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Private Law Beyond the State? Europeanization, Globalization, Privatization

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Ralf Michaels and Nils Jansen

**Private Law Beyond the State?
Europeanization, Globalization, Privatization***

Although the changing relation between private law and the state has become the subject of many debates, these debates are often unsatisfactory. Concepts like 'law', 'private law', and 'globalization' have unclear and shifting meanings; discussions are confined to specific questions and do not connect with similar discussions taking place elsewhere. In order to initiate the necessary broader approach, this article brings together the pertinent themes and aspects from various debates. It proposes a conceptual clarification of key notions in the debate—"private law," "state," "Europeanization," "globalization," and "privatization"—that should be of use beyond the immediate purposes of the rest of the article. And it suggests how one should analyze and categorize both the problems the modern developments create and the solutions that these problems might call for. It does not attempt to analyze which solution is the best one. But in unveiling common structures, both within and between the various debates, the article should help significantly in providing the further discussion of these solutions with a more rational framework.

I. THEME	2
II. CONCEPTS	4
A. PRIVATE LAW	5
B. STATE	12
C. THE RISE OF THE STATE AND THE DECLINE OF PRIVATE LAW?.....	15
III. DEVELOPMENTS	19
A. EUROPEANIZATION	19
B. GLOBALIZATION	23
C. PRIVATIZATION.....	27
D. THE DECLINE OF THE STATE AND THE RISE OF PRIVATE LAW?.....	30

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IV. ISSUES	32
A. VALIDITY	32
B. METHOD	35
C. LEGITIMACY	38
D. AUTONOMY.....	40
V. BEYOND THE STATE?.....	41
A. REVOLUTION.....	41
B. RESISTANCE.....	43
C. REGRESSION.....	44
D. REPRODUCTION.....	45
E. RENOVATION	46
VI. CONCLUSION.....	48

I. Theme

Europeanization, globalization, and private governance mean different things to different people, but one thing seems clear: they change the role of the state in the world. Legal scholars have analyzed at length the impact these developments have on the law. Most of these studies focus on public, especially constitutional, law; they ask how democracy and proper governance structures can be recreated or replaced outside the state. The impact on private law, by contrast, has received comparably less attention, with two exceptions: the (somewhat unspecific) claim that globalization transcends the distinction between public law and private law in a new way,¹ and the (public-law inspired) question to what extent private arrangements can compete with or substitute for the state.²

The reason for this relative neglect of private law in comparison to public law may lie in two irreconcilable assumptions. The first assumption, frequent among students of globalization, is that private law is not different from public law (“all law is public law”), so private law is automatically included in any analysis of law under globalization. The second assumption, frequent among private-law scholars, is that private law is already independent from the state, so any change in the role of the state has no impact on private law. Both assumptions are plausible, but they are mutually exclusive: Private law can be bound to the state like public law or be separate, but not both.³ More importantly, both assumptions have different implications for private law: If private law is public law, then a

¹ For a more thoughtful analysis making this point, see Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184 (1996).

² In this specific sense, “private law is a central subject in globalization discourse.” Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 38 N.Y.U. J. INT’L L.& POL. forthcoming (2006). For discussion, see *infra*, part III.3.

³ These are two endpoints of a continuum: private law can be more or less independent.

changed role of the state implies a change for private law; if private law is independent of the state, no such change ensues. This suggests that it matters which of the assumptions (if any) is correct, and that the impact of globalization, Europeanization, and private governance on private law deserves special attention. To what extent is the state the blind spot in our thinking about private law? Is private law beyond the state still “law”; is private law within the state still “private”? To what extent does private law presuppose the state; to what extent is it irreconcilable with the state? To what extent can private law in the “postnational constellation” learn from its experience before and within the state?

This article, together with a companion piece,⁴ addresses these questions by looking at American and German concepts and views, in particular. This is no easy task. Core concepts are unclear; several debates exist with no clear connection to each other; normative and analytical perspectives are confused. In this situation, these two articles cannot provide definite answers to the various questions involved. Their more modest, but all the more important, aim is to survey and organize the separate discussions and unveil internal connections between them, so the questions raised can be addressed in a more comprehensive and productive manner. Whereas the other article provides a historical and comparative analysis of the issues involved, this article will collect, analyze, and structure the different debates in legal theory and comparative law concerning the effects Europeanization and globalization and privatization have on private law.

The article is organized as follows. Part II shows traditional views of the relation between private law and the state. It demonstrates how traditional definitions of, and relations between, the central concepts “private law” and “state” differ, both within and between U.S. and German legal discourse; it also discusses the thesis of the simultaneous rise of the state and decline of private law. Part III describes the developments that have called the traditional views into question, grouped under three headings: Europeanization, globalization, and privatization; it also discusses the counter-thesis of a simultaneous decline of the state and rise of private law. Part IV describes four issues that arise because of these developments that would have seemed less problematic under the traditional views: the validity, method, legitimacy, and autonomy of private law. Part V describes various responses to these issues and groups them into types of answers according to the respective role of the state. Although the point of this article is not how one should

⁴ Nils Jansen & Ralf Michaels, *Private Law and the State: Comparative Perceptions and Historical Observations*, 71/2 RABELSZ (forthcoming 2007).

respond, some important insights that should shape future debates do emerge; these are distilled in Part VI.

This is a survey article, an effort to map a number of debates and viewpoints; it is not a position paper. Many views are presented because they are relevant or prominent in debates, not because we share them; we take no position on their value. The extensive footnotes in this article serve not only as references for statements in the text, but also as entry points into different aspects of the academic debate. Nonetheless, the article makes three contributions. First, this article brings together the various themes and aspects connected with the topic of private law and the state under the influence of Europeanization, globalization, and privatization. Although individual aspects have often been discussed in different places, this is the first attempt to combine them in one framework. Second, we suggest that most of the writing on this topic can best be understood in terms of the issues which the article distinguishes and describes. Too many discussions suffer from participants inadvertently using different or unclear concepts. While it is not necessary (or even desirable) to confine debate to only one meaning, awareness of the different meanings is necessary to avoid misunderstandings. To this end, the article proposes a conceptual clarification of key notions in the debate—“private law” and “state,” as well as “Europeanization,” “globalization,” and “privatization”—that should be of use beyond the immediate purposes of the rest of the article. Third, this article suggests how one should categorize both the problems the modern developments create and the solutions that these problems might call for. It does not attempt to analyze which solution is the best one. But in unveiling common structures both within and between the various debates, it should help significantly in rationalizing the further discussion of these solutions.

II. Concepts

Even within the Western legal tradition,⁵ the relationship between private law and the state is not uniform. Not only has it changed over time, but it is also viewed differently among different countries. A comparison between U.S. and German approaches, especially, reveals enlightening similarities and differences, since both the state and the

⁵ Both the state and private law are originally Western concepts that were exported elsewhere; a discussion focusing on societies beyond Europe and North America would raise numerous additional issues beyond the scope of this article.

idea of private law have been differently defined and have played different roles in German and American legal discourses.

A. Private Law

Comparatists have found that the concept of private law, and its distinction from public law, play a far greater role in Europe than in the United States, and they have sought historical and institutional reasons for this.⁶ However, they have widely avoided a logically prior issue: what is meant by private law in the U.S. and in Germany, respectively.⁷ When we speak of private law, we often assume, implicitly, the existence of a universal core meaning for the term, one typically focused on contracts and contract law. Yet beyond such a core meaning, it is not even clear whether private law always means the same thing within one legal tradition, let alone among different traditions.

Traditionally, private law rests on the law of obligations (both contractual and non-contractual), the law of property (including succession law), and the law of persons (including family law). It includes those areas of commercial law that extend the law of contracts (e.g., the law of unfair competition), the law of property (e.g., intellectual property) and the law of persons (e.g., corporate law). It excludes those areas that are not based on such extensions and are therefore seen as (merely) regulatory public law (e.g., antitrust law). This traditional definition holds, generally, for most purposes in American and German law.⁸ However, once scholars on both sides of the Atlantic Ocean went further and formulated criteria to define private law, usually in opposition to public law, they found important differences.⁹ These criteria are important in two ways. First, they define

⁶ The most comprehensive comparison is John Henry Merryman, *The Public-Law/Private-Law Distinction in European and American Law*, 17 J. PUB. L. 3 (1968). See also JOHN MERRYMAN, *THE CIVIL LAW TRADITION* 91-99 (2d ed. 1985); Roscoe Pound, *Public Law and Private Law*, 24 CORNELL L.Q. 469 (1939); Martin Shapiro, *From Public Law to Public Policy, or the "Public" in "Public Policy,"* 5 POLITICAL SCIENCE 410 (1972); RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 272-76, 539-60 (6th ed. 1998); MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 106-124 (2d ed. 1999). For comparison of French and English law, see J.W.F. ALLISON, *A CONTINENTAL DISTINCTION IN THE COMMON LAW* (1996) and the critical review by Nils Jansen, 5 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT (ZEUP) 971 (1997); THE PUBLIC LAW / PRIVATE LAW DIVIDE: UNE ENTENTE ASSEZ CORDIALE? (Jean-Bernard Auby & Mark Freeland eds., 2006). The distinction is defended as useful for the (English) common law by Geoffrey Samuel, *Public and Private Law: A Private Lawyer's Response*, 46 MOD. L. REV. 558 (1983).

⁷ E.g. Merryman, *The Public-Law/Private-Law Distinction*, *supra* note 6, at 4. For an exception, see Duncan Kennedy, *Thoughts on Coherence, Social Values and National Traditions in Private Law*, in *THE POLITICS OF A EUROPEAN CIVIL CODE* 9, 10 (Martijn W. Hesselink ed., 2006).

⁸ See the contents of MATHIAS REIMANN, *EINFÜHRUNG IN DAS US-AMERIKANISCHE PRIVATRECHT* (2d ed. 2004); PETER HAY, *US-AMERIKANISCHES RECHT* chap. 5 (2d ed. 2002).

⁹ For an overview of the three most important approaches in German law (interest, subject, and

the object of private law debate—what counts or does not count as private law. Second, and perhaps more importantly, they define what makes private law specific—what its inner rationalities are. In fact, a comparative survey reveals no less than seven different concepts, and shows their respective roles are different in Germany and the U.S.¹⁰

1. *Private Interests*. In the 3d century AD, Ulpian defined private law as the law that concerns private, as opposed to public, interests.¹¹ In Germany, this is still one of the most frequently articulated distinctions between private and public law. In the U.S., Ulpian's definition is rarely found as such,¹² but a similar criterion appears whenever private law is defined as that part of the law that protects and enforces private rights. The practical use of the distinction is limited, since it is widely accepted that all laws serve both private and public interests.¹³

2. *Corrective Justice*. A second definition gives the first more analytical bite: Private law is the body of those rules aimed at corrective justice, as opposed to rules of public law aimed at distributive justice.¹⁴ This may explain how tort law can be viewed as public law in the United States (where its function is seen more in the distribution of risks than in the

subordination theory), see Ehlers, in Friedrich SCHOCH, EBERHARD SCHMIDT-ABMANN & RAINER PIETZNER, VERWALTUNGSGERICHTSORDNUNG, Art. 14, nos. 220-38 (14th ed. 2005); for different approaches in U.S. law, see Randy A. Barnett, *Foreword: Four Senses of the Public-Private Law Distinction*, 9 HARV. J. L. & PUB. POL'Y 267, 267-72 (1986). Seventeen distinctions are listed in JAKOB HOLLIGER, DAS KRITERIUM DES GEGENSATZES ZWISCHEN DEM ÖFFENTLICHEN UND DEM PRIVATRECHT, DARGESTELLT IM PRINZIP UND IN EINIGEN ANWENDUNGEN (1904).

¹⁰ For the purpose of this article, we neglect the U.S. concept of “private laws” as laws for the benefit of specific individuals, as opposed to “public laws” applicable to all individuals. The term and its definition can be found in BLACKSTONE, I COMMENTARIES 85 (1st ed. 1765); its origins go back to the earliest times of statutory law. For much of the 19th century, this was the nearly exclusive meaning of the term in judicial opinions.

¹¹ Dig. 1.1.1. (Ulpian); Inst. 1.1.4 (Ulpian); for an early use in an English language treatise, see JOHN ERSKINE, AN INSTITUTE OF THE LAW OF SCOTLAND I.9 (1773); for the history of the idea in Germany, see Michael Stolleis, *Öffentliches Recht und Privatrecht im Prozeß der Entstehung des modernen Staates*, in ÖFFENTLICHES RECHT UND PRIVATRECHT ALS WECHSELSEITIGE AUFFANGORDNUNGEN 41, 45-59 (Wolfgang Hoffmann-Riem & Eberhard Schmidt-Abmann eds., 1996). Ulpian was a late classical lawyer and one of the most influential officials in the Roman Empire; for a biography and evaluation, see TONY HONORÉ, ULPIAN: PIONEER OF HUMAN RIGHTS (2002); see *id.* 98 on public and private law.

¹² But see, for a use of the distinction based on Ulpian, Frederick Pollock, *Divisions in the Law*, 8 HARV. L. REV. 187, 192-93 (1894); see also Ludwik Ehrlich, *Comparative Public Law and the Fundaments of its Study*, 21 COLUM. L. REV. 623, 631-32 (1921).

¹³ This point is not new; Azo made it as early as ca. 1210 in his *Summa Codicis*, Inst. I.I, no. 12, in opposition to the strict distinction of private and public law proposed by Placentinus.

¹⁴ GUSTAV RADBRUCH, RECHTSPHILOSOPHIE 123 (5th ed. 1956) [*Legal Philosophy*, in THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN 43, 153 (1950)]; EARNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995) 74 *et seq.*; see also Stephan Meder, *Der Begriff des Privatrechts als Kriterium rechtsgeschichtlicher Forschung*. Zur Bedeutung des Kompensationsmodells für die Neuere Privatrechtsgeschichte, 19 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 249–63 (1997).

compensation of harm)¹⁵ and as private law in Germany (where the emphasis is on compensation). At the same time, the example suggests why this definition of private law is problematical, at least as an a priori definition without further elaboration.¹⁶ Most areas of the law are hard to place—tort law is only one example,¹⁷ even contract law is ambiguous.¹⁸ Institutions frequently serve both distributive and corrective justice, and it may be artificial if not outright impossible to somehow separate the one from the other. Indeed, some think private law always fulfills both corrective and distributive purposes.¹⁹

3. *Relations between Private Parties.* According to a third distinction, private law concerns relations between private parties, whereas public law concerns relations that include the state in its role of sovereign (rather than that of a market participant). Although this distinction exists in both legal systems, it seems to have a stronger hold in Germany.²⁰ Only the German legal system seems to conclude that all relations to the state acting as sovereign are part of public law. For example, contracts between governmental agencies and individuals are, in Germany, undoubtedly part of public law, even if some private law provisions apply to them by analogy.²¹ By contrast, in the U.S., the rise of the “contracting state” signals transcendence of the public law/private law distinction: when the state regulates by contract, it makes use of private law.²²

¹⁵ Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1, 257 (1959-1960); but see the responses by Michael I. Krauss, *Tort Law and Private Ordering*, 35 ST. LOUIS U.L.J. 623 (1991); John C.P. Goldberg, *Tort Law for Federalists (and the Rest of Us): Private Law in Disguise*, 28 HARV. J. L. & PUB. POL’Y 3 (2004).

¹⁶ See Jansen & Michaels, *supra* note 4, at II.6. Arguably, private law is structured by principles of corrective justice that may be complemented by considerations of distributive justice. This corresponds with how individuals typically assess tort claims; see Gregory Mitchell & Philip E. Tetlock, *An Empirical Inquiry into the Relation of Corrective Justice to Distributive Justice*, 3 J. EMPIRICAL LEGAL STUD. 421 (2006).

¹⁷ NILS JANSEN, DIE STRUKTUR DES HAFTUNGSRECHTS. GESCHICHTE, THEORIE UND DOGMATIK AUSSERVERTRAGLICHER ANSPRÜCHE AUF SCHADENSERSATZ 89-136 (2003).

¹⁸ Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980); CLAUS-WILHELM CANARIS, DIE BEDEUTUNG DER IUSTITIA DISTRIBUTIVE IM DEUTSCHEN VERTRAGSRECHT 78-122 (1997).

¹⁹ *Supra* notes 17 and 18; Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 MICH. L. REV. 138, 147-50 (1999); JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW. PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 8-14 (2006).

²⁰ For an (unsuccessful) attempt to import it into U.S. law, see Ernst Freund, *Private Claims against the State*, 8 POL. SC. Q. 625, 640-51 (1893).

²¹ See Ralf Michaels, *Systemfragen des Schuldrechts*, in 2 HISTORISCH-KRITISCHER KOMMENTAR ZUM BGB no. 63-65 (Reinhard Zimmermann et al. eds., 2007); in more detail, PEER ZUMBANSEN, ORDNUNGSMUSTER IM MODERNEN WOHLFAHRTSSTAAT 192-99 (2000).

²² Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543-675 (2000); Janet McLean, *Government to State: Globalization, Regulation, and Governments as Legal Persons*, 10 IND. J. GLOBAL STUDIES 173, 183-92 (2003).

4. *Horizontality*. A fourth distinction generalizes the third: private law is characterized by horizontal relations of equality; public law is characterized by a vertical relation of subordination and dominance. Whether the state acts through private or through public law depends on whether the partner on the other side is treated as a coequal or as a subject. More importantly perhaps, this theory makes it possible to characterize relations between private parties as public law if they are characterized by subordination and dominance, as in, for example, employment contracts. As a consequence, public law restraints on government action can be applied to powerful private actors—corporations in particular—as well. The theory is usually modified to exclude this possibility, but the integration of public law considerations into imbalanced private relationships is still discussed.

5. *Private Ordering*. A fifth tradition equates private law with private ordering. Since private ordering concerns the distribution of goods, services, and capital through contracts, contracts and property are the core elements of private law in both the U.S. and Germany. But private ordering can encompass other areas of the law as well, and this is where the definition plays out differently in these two legal systems. In Germany, it is used to define private law in a general sense as areas of the law that are typically open to private ordering. The U.S. definition, by contrast, looks at individual rules and relations. This makes for a subtle but important difference: In the U.S. legal system, the core of private law is the *contract*. In consequence, all matters become private law once they can be regulated through party autonomy.²³ In this reading, mandatory norms of contract law are not private law,²⁴ whereas consensual agreements between citizens and public entities are; family law is private law to the extent it rests on private agreements.²⁵ By contrast, the core of German private law is not the contract²⁶ but the *law of contract*. In consequence, private

²³ For an isolated adoption of such a view in Switzerland, see WALTHER BURCKHARDT, DIE ORGANISATION DER RECHTSGEMEINSCHAFT. UNTERSUCHUNGEN ÜBER DIE EIGENART DES PRIVATRECHTS, DES STAATSRECHTS UND DES VÖLKERRECHTS 16-20, 27 (1927); see also Helmut Coing & Heinrich Honsell, *Einleitung zum Bürgerlichen Gesetzbuch*, in J. VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, no. 113 (2004).

²⁴ This definition existed already in Roman law; see D. 2.14.38 (Papinian), "*Ius publicum quod privatorum pactis mutari non potest*" [public law is that which cannot be changed through agreements by the parties]; see Max Kaser, '*Ius publicum*' und '*ius privatum*', 103 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE—ROMANISTISCHE ABTEILUNG 1, 75-88 (1986).

²⁵ See, e.g., Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction* 36 HARV. C.R.-C.L. L. REV. 79 (2003) (suggesting an analogy between private ordering in the family and in the market). See also Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443; *Roundtable: Opportunities for and Limitations of Private Ordering in Family Law*, 73 IND. L.J. 535 (1998).

²⁶ The contract itself is not viewed as a source of law; see already FRIEDRICH CARL VON SAVIGNY, I

law encompasses all other areas of the law that are closely related to contract law—the law of non-contractual obligations, property law, and—though for somewhat different reasons—family law²⁷ and the law of successions. Whether the norms in these areas are mandatory or not is irrelevant to their classification as private law. On the other hand, contracts with the government are public law.

6. *Privately Made Law.* A related sixth distinction exists between privately made law—norms created by private parties—and publicly made law—norms created by the state. In U.S. literature, such privately made norms are now repeatedly referred to and discussed as law.²⁸ By contrast, German scholars predominantly confine the notion of privately made law to law made on the basis of powers delegated by the state.²⁹

7. *Jurisdiction of General Courts.* A seventh distinction is not jurisprudential but jurisdictional: In Germany, private law matters are dealt with in ordinary courts, whereas public law matters go to special courts.³⁰ Whether an issue belongs to private law or public law is thus a matter of subject-matter jurisdiction; in turn, the definition of private law can draw on whether the general courts assert jurisdiction.³¹ In the U.S., by contrast, suits in general courts against the government have been an important part of the common law for a long time (although so-called administrative law judges, quasi-judicial agencies established outside the judicial branch, hear many disputes between government agencies and those affected by decisions of these agencies.)³² Thus, the question of jurisdiction creates a difference between Germany and the U.S., but its impact is not absolute, especially regarding the procedural treatment of private and public law. On the one hand,

SYSTEM DES RÖMISCHEN RECHTS 12 (1840); *more generally, see* GESETZ UND VERTRAG II. 12. SYMPOSIUM DER KOMMISSION "DIE FUNKTION DES GESETZES IN GESCHICHTE UND GEGENWART" (Okko Behrends & Christian Starck eds., 2005).

²⁷ The classification of family law was long unclear; *see* Wolfram Müller-Freienfels, *Zur Diskussion um die systematische Einordnung des Familienrechts*, 37 RABELSZ 609 (1973), 74 (1974) 533; Müller-Freienfels, *The Emergence of Droit de Famille and Familienrecht in Continental Europe and the Introduction of Family Law in England*, 28 J. FAM. HIST. 31 (2003).

²⁸ For debate of whether these norms are "law," *see* David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 403-20 (2003).

²⁹ *E.g.* FERDINAND KIRCHHOF, PRIVATE RECHTSSETZUNG (1987); STEFFEN AUGSBERG, RECHTSSETZUNG ZWISCHEN STAAT UND GESELLSCHAFT. MÖGLICHKEITEN DIFFERENZIIERTER STEUERUNG DES KAPITALMARKTES (2003); GREGOR BACHMANN, PRIVATE ORDNUNG. GRUNDLAGEN ZIVILER REGELSETZUNG (forthcoming).

³⁰ For the history, *see* Jansen & Michaels, *supra* note 4, at II.6. (text accompanying notes 252 *et seq.*)

³¹ There are exceptions. For example, although the general courts have jurisdiction over government liability, pursuant to Basic Law, Article 34 (2), such claims are nonetheless considered part of public law.

³² HAY, *supra* note 8, at p. 44, no. 92 (2d ed. 2002); Ralf Michaels, *Gerichtsverfassung und Verfahrensstrukturen in föderalen Gemeinwesen*, 66 RABELSZ 357, 363 (2002).

the German principle of a unitary legal order (*Einheit der Rechtsordnung*)³³ requires like treatment of public and private law when appropriate, so significant parts of Germany's procedural law are similar for general and for administrative courts. On the other hand, public law can trigger special sets of procedure even though no special public law courts exist.³⁴

It should be clear that these concepts, although they overlap (and it would be interesting to analyze in what ways they are interconnected), must be held apart if debates are to be fruitful. Even more important for the purpose of this article may be the finding that, although all these differentiations appear both in U.S. and in German legal discourse, they appear in very different ways. This suggests not only that Americans and Europeans often mean different things when they use a term like *private law*; it suggests a different understanding in Germany and in the U.S. of law in general and the place of private law within it. Grossly simplified, in Germany, the core of the law is private law and the rest is contingent politics;³⁵ in the U.S., the core of the law is public (regulatory) law and the rest is contingent private ordering.³⁶ As a consequence, the difference between private and public law is largely defined from the side of private law in Germany,³⁷ and in American

³³ VIELFALT DES RECHTS—EINHEIT DER RECHTSORDNUNG? (Karsten Schmidt ed., 1994); MANFRED BALDUS, DIE EINHEIT DER RECHTSORDNUNG (1995); DAGMAR FELIX, DIE EINHEIT DER RECHTSORDNUNG (1998); see also KLAUS F. RÖHL, ALLGEMEINE RECHTSLEHRE 464-69 (1994). But see Wolfgang Hoffmann-Riem, *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen. Systematisierung und Entwicklungsperspektiven*, in ÖFFENTLICHES RECHT UND PRIVATRECHT, *supra* note 11, at 261, 272 ("Nicht 'Einheit' sondern Ganzheitlichkeit der Rechtsordnung"—not a 'unitary' but a holistic legal order).

³⁴ L. Harold Levinson, *The Public Law/Private Law Distinction in the Courts*, 57 GEO. WASH. L. REV. 1579 (1989). Levinson defines public law for his purpose as "any litigation to which a government or a governmental official is a party"; *id.* at 1580. For example, whether the courts must, in patent law, defer to legal determinations by administrative agencies (the so-called *Chevron* doctrine) is said to draw on whether patent law is a matter of administrative law or general private law: Orin S. Kerr, *Rethinking Patent Law in the Administrative State*, 42 WM. & MARY L. REV. 127 (2000).

³⁵ This statement has several dimensions. The first dimension concerns the idea that private law is law, while public law is impure law or even pure politics; see HANS Kelsen, REINE RECHTSLEHRE 284-85 (2d ed. 1960) [PURE THEORY OF LAW 281 (2d ed., Max Knight trans., 1967)]; NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 468-69 (1993) [LAW AS A SOCIAL SYSTEM 406 (2004)]. The second dimension concerns the primacy of private law doctrine, which is adapted for public law; see WALTER WILHELM, ZUR JURISTISCHEN METHODENLEHRE IM 19. JAHRHUNDERT. ZUR HERKUNFT DER METHODE PAUL LABANDS AUS DER PRIVATRECHTSWISSENSCHAFT (2d ed. 2003); Michaels, *supra* note 21, at nos. 63-65. The third dimension concerns the primacy of private law as legal category versus public law as exception. Cf. Dieter Grimm, *Bürgerlichkeit im Recht*, in GRIMM, RECHT UND STAAT IN DER BÜRGERLICHEN GESELLSCHAFT 11, 14-15, 27 (1987); Walter Leisner, *Unterscheidung zwischen privatem und öffentlichem Recht*, 61 JURISTENZEITUNG 869, 875 (2006).

³⁶ See also Caruso, *supra* note 2, at I.3.

³⁷ With the exception of subject matter jurisdiction (the sixth distinction *supra*), which is discussed

common law from the side of public law. Public law in Germany appears as that part of the law that the state makes (other than the mere restatement of private law in the form of codification). By contrast, private law in the U.S. refers not to a separate body of *law* but rather to a private *sphere* that the state either willfully grants or in which it must not interfere under some constitutional or natural-law principles.

Although such a general statement is too broad to apply to every instance, some examples³⁸ may illustrate the thesis. For example, when Robert Ellickson describes the informal relations and agreements between neighbors as “order without law,”³⁹ much of this is, from a German perspective, law without enforcement—that the neighbors do not resort to courts or written agreements does not mean that their relations are not governed by (private) law. Similarly, when Stuart Macaulay describes a number of informal agreements and enforcement measures between business people as “non-contractual relations in business,”⁴⁰ a German lawyer would view many of these relations as contracts. It appears that U.S. discourse, in focusing on the enforcement of law, has a more limited concept of law (especially of private law) than her German colleague to whom enforcement is not a necessary element of private law.

The main reason is that law and its enforcement are separated in a much stricter form in Germany than in the common law. This means that German jurists can focus on the law regardless of its enforcement, making it a true private law detached from the state. By contrast, in the common law tradition, the partial conflation of law and enforcement, of rights and remedies, adds at least one necessary element of “public” law into “private” law: its enforcement.

A second explanation for the difference concerns the respective role of judges and academics in U.S. and in German private law traditions. German legal science developed in times of frequent changes of the political landscape; in such a setting, public law was ever-changing, while private law was a continuum apt for academic studies.⁴¹ By contrast, the

in administrative law more than in private law.

³⁸ One may object that both examples concern outside perspectives on the law, from economics and sociology, respectively. We would respond that both examples are core texts within American legal discourse; that they take an interdisciplinary approach merely reflects the more interdisciplinary character of U.S. legal studies.

³⁹ ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

⁴⁰ Stuart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIOLOGICAL REV. 55 (1963). Macaulay's definition of contract requires two elements: "(a) Rational planning of the transaction with provision for as many future contingencies as can be foreseen, and (b) the existence or use of actual or potential legal sanctions to induce performance of the exchange or to compensate for non-performance"; see *id.* at 56.

⁴¹ “*Öffentliches Recht vergeht, Privatrecht besteht*“ (Gustav Boehmer) [Public Law elapses, Private

common law developed largely in the hand of judges, who were long more interested in matters of pleading and procedure than with a coherent underlying substantive private law. This can also explain why private law plays a lesser role in the United States in general.

B. State

There is a third plausible reason why private law has different roles and meanings in the U.S. and in Germany: the state has a different role and meaning as well.⁴² With the caveat accompanying all generalizations, when Germans speak of “the state,” they refer to the comprehensive whole, the collective entity that transcends the particulars.⁴³ Debates over the law largely take place within the state framework. By contrast, Americans speak of government rather than of the state; the idea of the all-encompassing state is far less frequent in American debates.⁴⁴ The distinction is significant: unlike the state, government is undoubtedly separate from society, and it is also separate from the law. Government may restrict the freedom within society (in a Hobbesian construction) or enable it (in a Lockean construction), but society could exist without it. By contrast, the idea that a society requires a state is more plausible, and indeed more common, in Germany. Similarly, the government is not only separate from the law but indeed is bound by it, not unlike private citizens. In the U.S., this means that the government (and its members) can be sued in the same way (and before the same courts) as private individuals; where they are protected by sovereign immunity, this protection is based on their functions, not their nature. By contrast, whether “the state” is bound by the law is a more difficult question—if the state is all-encompassing, then by definition it encompasses the law as well.⁴⁵

Neither the distinction nor its significance should be overrated. First, the meaning of state and government is ambivalent in both discourses: Germans will often refer to government as state, Americans will often use state in the broader meaning that it has in German discourse. Second, the distinction is not relevant everywhere: when Germans advocate a weak state and Americans a weak government, they mean the same thing.

Law remains.] The more frequent version of the quote is “*Verfassungsrecht vergeht, Verwaltungsrecht besteht*” [Constitutional law changes, administrative law remains]: OTTO MAYER, 1 DEUTSCHES VERWALTUNGSRECHT vi (3d ed. 1924).

⁴² State refers to the political institution in general, not to the states within the United States in particular—in this sense, the United States are a state, too.

⁴³ Cf. ERNST-WOLFGANG BÖCKENFÖRDE, *GESCHICHTE DER RECHTS- UND STAATSPHILOSOPHIE* 4-6 (2002).

⁴⁴ *But see* Symposium, *Changing Images of the State*, 107 HARV. L. REV. 1179 (1994).

⁴⁵ The state can be sued in Germany, too, as a legal person. The idea of “the state” discussed here goes beyond this legal personality.

Nonetheless, the distinction is real and has implications on the view of the law's relation to the state. In German discourse, even where state and law are not synonymous (as they were for Kelsen)⁴⁶ they are very close.⁴⁷ Ideals of law are discussed under the idea of *Rechtsstaat*; even terminologically, the idea of a legal order is bound to the state.⁴⁸ By contrast, when American authors call the relation between state and law a perennial theme,⁴⁹ they usually refer to European debates. Here, two practical questions are more important: whether the government is bound by the law, and whether individuals can appeal to institutions (courts) for protection of their rights. U.S. discourse has two equivalents to the German *Rechtsstaat* reflecting roughly these two issues: the rule of law (a concept terminologically focused on the government—the ruler—rather than on the state)⁵⁰ and due process (a concept focused on protection of the individual against any kind of power). *Rechtsstaat* is typically confined to “state under the rule of law”; by contrast, translations of “rule of law” into German (*Rechtsstaatsprinzip*, *Rechtsstaatlichkeit*) are always linked to the state.

What does this mean for the relation between the state and the private sphere? With all caveats, in Germany, the state was long viewed not as separate from society but rather as its fulfillment. The widespread view that German liberalism of the nineteenth century established a separation of state and society⁵¹ can be misleading: It conceals the nineteenth-

⁴⁶ Kelsen, *Reine Rechtslehre*, *supra* note 35, at 319-20 [PURE THEORY OF LAW 318-19]. In the U.S., by contrast, synonymy exists between law and rule of law; *cf.* Herman Finer, *The Theory and Practice of Modern Government* 922 (rev. ed. 1949): “The law and the rule (of law) cover the same ground.”

⁴⁷ *See also* Jansen & Michaels, *supra* note 4.

⁴⁸ H. Patrick Glenn, *Legal Traditions of the World* 145 (2d ed. 2004). For the history of *Rechtsstaat*, see Ernst W. Böckenförde, *Entstehung und Wandel des Rechtsstaatsbegriffs*, in Ernst W. Böckenförde, *Recht, Staat, Freiheit* 143-169 (1991) [*The Origin and Development of the Concept of the Rechtsstaat*, in Ernst W. Böckenförde, *State, Society and Liberty* 47-70 (1991)]; Michel Rosenfeld, *The Rule of Law and the Concept of Constitutional Democracy*, 74 S. Cal. L. Rev. 1307, 1318-29 (2001).

⁴⁹ Edgar Bodenheimer, *Jurisprudence* 52 (1962); *see also* John Chipman Gray, *The Nature and Sources of the Law* 65-83 (2d ed. 1972); Roscoe Pound, *Law and the State. Jurisprudence and Politics*, 57 Harv. L. Rev. 1193 (1944).

⁵⁰ For comparative analyses, see Friedrich A. Hayek, *The Constitution of Liberty* 162-204 (1972); Rosenfeld, *supra* note 48; Michael Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 Int'l J. Const. L. 633, 638-52; Rainer Grote, *Rule of Law, Rechtsstaat and Etat de Droit*, in *Constitutionalism, Universalism and Democracy. A Comparative Analysis* 269-306 (Christian Starck ed., 1999). Gerald L. Neuman, *The U.S. Constitutional Conception of the Rule of Law and the Rechtsstaatsprinzip of the Grundgesetz*, in *Das Grundgesetz im Prozess europäischer und globaler Verfassungsentwicklung* (Ulrich Battis et al. eds., 2000) focuses, despite its title, almost entirely on U.S. law.

⁵¹ For debates of this relation, see, e.g., *Staat und Gesellschaft* (Ernst-Wolfgang Böckenförde ed., 1976); Hans Heinrich Rupp, *Die Trennung von Staat und Gesellschaft*, in *I Handbuch des Staatsrechts* § 28 (Josef Isensee & Paul Kirchhoff eds., 1987).

century notion of co-originality rather than separation of state and society; the state was viewed, then and now, as a creation of society, rather than an antinomy to it.⁵² More precisely, the so-called separation between state and society signifies in fact a separation between the political sphere and the private spheres of market and family.⁵³ This means that the general idea of the state can remain constant even if within the state the relation between political and private spheres shifts. The change from the nineteenth-century liberal state to the twentieth-century welfare state concerned not the relationship between society and state, but that between the political and the private spheres within the state. Both the liberal state and the welfare state are compatible with the idea, prominent in German thought, that the state is the general representative of collective concerns. The difference is that the liberal state grants a large sphere of autonomy while the welfare state interferes more in this sphere for the greater good, but in both cases the private sphere and its extent are defined by, and exist within, the state.

The situation is different in the United States, where the state is contingent on society. The main achievement of the American Revolution was to get rid of a state (England), and a prime idea behind the foundation of individual states and (to a lesser extent) the Union was to protect the private sphere and private rights. This history may explain the restricted view and function of the state; it may also provide one explanation why ideals of anarchy and a society without government and even without state are more common than in Germany (though of course they still represent a minority view.)⁵⁴ In a sense, the American view of government is almost the flip-side of the German view of the state: Whereas the German view places particular interests in the members of society and

⁵² See, for example, Erich Angermann, *Das Auseinandertreten von "Staat" und "Gesellschaft" im Denken des 18. Jahrhunderts*, in STAAT UND GESELLSCHAFT, *supra* note 51, at 108 (originally in 10/2 ZEITSCHRIFT FÜR POLITIK 89 (1963)). Angermann defines the state as a bureaucratic institution (*id.* at 112) and society as all non-state group structures (at 113). Under these definitions, state and society are necessarily co-original: society can only exist if there is a sphere outside the state, and the state under this definition requires a separate society.

⁵³ Niklas Luhmann, *Die Unterscheidung von Staat und Gesellschaft*, in Luhmann, 4 SOZIOLOGISCHE AUFKLÄRUNG 69-76 (3d ed. 2005); ZUMBANSEN, *supra* note 21, at 20-23; *see also* Dieter Grimm, *Der Staat in der kontinentaleuropäischen Tradition*, in GRIMM, *supra* note 35, at 53, 59-60; Stolleis, *supra* note 11, at 45.

⁵⁴ *E.g.* ALBERT JAY NOCK, OUR ENEMY, THE STATE (1935); BRUCE L. BENSON, THE ENTERPRISE OF LAW: JUSTICE WITHOUT THE STATE (1990); FOR AND AGAINST THE STATE. NEW PHILOSOPHICAL READINGS (John T. Sanders & Jan Narveson eds., 1996); *see also* MICHAEL TAYLOR, COMMUNITY, ANARCHY & LIBERTY 53-59 (1982). Anarchy goes beyond libertarianism, which sees a minimal role for the state; *cf. e.g.* RICHARD NOZICK, ANARCHY, STATE AND UTOPIA 133-37 (1974). It may be more than a terminological coincidence that these mostly American authors want to abolish or restrict the state altogether, whereas a former judge at the German Constitutional Court merely wants to hand it back to society: PAUL KIRCHHOFF, DAS GESETZ DER HYDRA. GEBT DEN BÜRGERN IHREN STAAT ZURÜCK! (2006).

collective interests in the state, Americans frequently view government as run by special (particular) interests, while general interests are protected only within a society free from the state.

These theses may be overly broad, but they provide a glimpse of how differently Germans and Americans tend to see the relationship between the state and private law, a difference that mirrors and reinforces the differences between the relation in each nation of public and private law. In Germany, the validity of private law is undoubtedly linked to the state, but this in itself has no implications for whether public or collective concerns play out in private law.⁵⁵ The state both guarantees freedom and autonomy and protects against the effects of this freedom, especially on weaker parties; private law performs both of these tasks simultaneously. In the United States, by contrast, private law is traditionally viewed as that part of the law that is separate from the state—the common law that has developed largely outside the state, in the courts and in society. As a consequence, the state is viewed as a danger to this freedom, at least when it goes beyond its (allegedly unpolitical) role of enforcing private law.

C. The Rise of the State and the Decline of Private Law?

The rise of the welfare state in the twentieth century challenged the substantive autonomy of private law from the state both in the U.S. and in Germany. However, since both private law and state mean different things in the two systems, this challenge has played out differently.

In the United States, few would still defend the autonomy of private law; it is commonplace that the public/private distinction is an illusion. Early in the twentieth century, the legal realists dismissed the traditional view of contract and property as private rights that the state must accept and enforce as it finds them, and reinterpreted these rights as public powers vested in rightsholders to engage the state's help in enforcing their interests.⁵⁶ This reinterpretation influenced both the political left and the political right.⁵⁷ Critical legal studies (CLS) scholars made the debunking of the public/private divide a

⁵⁵ See, in more detail, Jansen & Michaels, *supra* note 4, at I.1.

⁵⁶ Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); both also in MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER*, 41, 69 (1982); see also BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* (1998).

⁵⁷ See now Symposium, *Contemporary Political Theory and Private Law*, 92 VA. L. REV. 1279 (2006).

centerpiece of much of their thinking and a cornerstone in their argument, if not for a strong state, then at least for a treatment of (apolitical) “private” law as (political) public law.⁵⁸ Conservative law-and-economics scholars looked at supposedly private law through public eyes, namely through the eyes of overall welfare maximization.⁵⁹ And they were also critical of the state’s role in administering private law, though their criticism went against the regulatory and redistributive state, not against the state that provides and enforces private law.

In this well-known story on the decline of the public/private distinction, four important elements illuminate the peculiar relationship between private law and the state that underlies much of the debate and that is relevant to the themes of this article. First, if the underlying concept of private law is that of private ordering, then what is at stake is not the autonomy but the very existence (or possibility) of private law so defined. A private law instilled with public considerations, so termed, would be a self-contradiction; this conceptual peculiarity may explain much of the harshness in the debate. Second, the public/private distinction is not really transcended (in the sense that each side of the dichotomy is overcome) but rather resolved on the side of public law: all private law is, “really,” public law because it implies public interests and distributive considerations.⁶⁰ Third, because these interests and considerations are located in the state, all private law is state law;⁶¹ the focus lies on its role for the regulatory state and on the role of adjudication as effective lawmaking. It follows, fourth, that all the different attacks on the public/private divide come with a certain critique of the role of the state with regard to the law, be it a critique of its laissez-faire ideology, the superstructure it provides, or its undue interference

⁵⁸ Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 102-09 (1987).

⁵⁹ RICHARD POSNER, THE ECONOMICS OF JUSTICE 69-76 (1983). See also FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 80-81 (1944/1972).

⁶⁰ For realists, see MORRIS R. COHEN, LAW AND THE SOCIAL ORDER, *supra* note 56, at 46 (“property as sovereign power,”) 104 (“...the law of contract may be viewed as a subsidiary branch of public law;”) for Critical Legal Studies, see Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1427-28 (1982); for law and economics, see Gerhard Wagner, *Prävention und Verhaltenssteuerung durch Privatrecht—Anmaßung oder legitime Aufgabe?*, 206 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS (ACP) 352, 422-23 (2006). But see Freeman, *supra* note 22, at 564-65 (“Critical legal scholars, building on legal realism, successfully exposed the incoherence of the public/private divide, revealing that a purely private realm exists only as a legal construct. The flip side of that argument—that a purely public sphere is also illusory—proves equally true, and has gone relatively unnoticed in administrative law.”)

⁶¹ See, e.g., ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 281-84 (1975); Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L. REFORM 835, 836 (1985) (“As long as a state exists and enforces any laws at all, it makes political choices. The state cannot be neutral or remain uninvolved, nor would anyone want the state to do so.”) What happens if the condition in the beginning of this sentence is not met?

with the free interplay of markets. The left and the right seem to agree not only on private law being on the political right and public law being on the political left,⁶² but also on the crucial role of the state in this debate. The critique of private law's autonomy presumes a certain role for the state; the critique of the state's role in private law presumes a certain idea of private law.

In Germany, the public/private divide and its decline have played out differently. Remarkably, the realists' insight that all private law is public law, because the state necessarily intervenes in private relations with its decision to enforce or to abstain from enforcement, had been formulated earlier in Germany⁶³ but with little effect.⁶⁴ The insight had less subversive potential than in the U.S., because the realists' credo that "all private law is really public law" translates, in the German context, into the idea that all private law is really state law—law made and enforced by the state. This is hardly more than a truism for the prevailing German view of the relation between state and law.

In Germany, the debate deals less with the distinction of public and private *spheres* and its impact on law than with the distinction between private and public *law*. One relevant debate deals with the role of governmental policies and social values in private law. After early calls for adding "a drop of socialist oil" to the assumed liberal structure of the Civil Code⁶⁵ remained at first unheeded, the Third Reich and the German Democratic Republic attempted to put these calls into practice by abolishing the distinction between private and public law,⁶⁶ with little success. Postwar West Germany took a different path—instead of abolishing the distinction, it enriched traditional private law with substantive values (most notably in consumer and labor law). Ironically, this strengthened rather than weakened the autonomy of private from public law—once these values are developed

⁶² See, e.g., Duncan Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 SETON HALL L. REV. 1 (1983). But see, for an attempt to establish a leftist "new" private law, Symposium, *The New Private Law*, 73 DENV. U. L. REV. 993-1279 (1996).

⁶³ JULIUS BINDER, RECHTSNORM UND RECHTSPFLICHT 27-28, 38-45 (1912); GEORG JELLINEK, ALLGEMEINE STAATSLHRE 83 (3d ed, 1914); HANS KELSEN, REINE RECHTSLEHRE, *supra* note 35, at 285-287 [PURE THEORY OF LAW 283-84].

⁶⁴ Jansen & Michaels, *supra* note 4, at I.1.

⁶⁵ The quote is from OTTO V. GIERKE, DIE SOZIALE AUFGABE DES PRIVATRECHTS 10 (1943) (1889); on the general debate at the time (including similar calls by, e.g., Anton Menger), see TILMAN REPGEN, DIE SOZIALE AUFGABE DES PRIVATRECHTS. EINE GRUNDFRAGE IN WISSENSCHAFT UND KODIFIKATION AM ENDE DES 19. JAHRHUNDERTS (2001), reviewed by Viktor Winkler in 1 ANNUAL OF GERMAN AND EUROPEAN LAW 540-46 (2003).

⁶⁶ MICHAEL STOLLEIS, 3 GESCHICHTE DES ÖFFENTLICHENS RECHTS IN DEUTSCHLAND: STAAT- UND VERWALTUNGSRECHTSWISSENSCHAFT IN REPUBLIK UND DIKTATUR 338-41 [A HISTORY OF PUBLIC LAW IN GERMANY 1914-1945, at 358-362 (2004)]; ZUR RECHTLICHEN VERANTWORTLICHKEIT, (W. Weichert ed., 1987) but see also John Quigley, *Socialist Law and Civil Law Tradition*, 37 AM. J. COMP. L. 781, 787 (1989) ("Lenin's dictum that all law is public law should not evoke shock.")

within private law, outside interference from public law becomes unnecessary. At the same time, this means that private and public law are now able to serve as functional equivalents and mutual residual regimes.⁶⁷ The legislature may choose a private law or a public law regime to deal with the same problem: accidents, for example, may be dealt with through tort law (arguably private law) or through insurance schemes (arguably public law), but this functional equivalence is not similarity.⁶⁸

A second development concerns the intrusion of Constitutional basic rights into private law. The idea of “indirect third-party effects” of the Constitution⁶⁹ gave Constitutional judges a flexible instrument to instill Constitutional restraints into private law, notably the protection of the weaker party and non-discrimination in contract law. Although some private lawyers violently oppose these influences out of concern for the autonomy of private law,⁷⁰ others have welcomed it as a means to fulfill the promises of private law—private autonomy, liberty—in a fuller sense than a libertarian private law could by itself. Indeed, one may doubt whether basic rights are still specifically public law or whether they are rather fundamental principles that transcend the public/private distinction and permeate the whole legal order.⁷¹

This creates two differences between Germany and the United States and one common development. The first difference concerns autonomy from public law: In the U.S., private law (understood as private ordering) lost its autonomy by turning into public law; in Germany, private law (understood as contract, tort, and property law) maintained its autonomy by incorporating public concerns. The second difference concerns the relationship to the state. Whereas critique of private law in the U.S. entails critique of the

⁶⁷ ÖFFENTLICHES RECHT UND PRIVATRECHT ALS WECHELSEITIGE AUFFANGSORDNUNGEN (Wolfgang Hoffmann-Riem & Eberhard Schmidt-Aßmann eds., 1997).

⁶⁸ Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 371 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

⁶⁹ For comparative analyses, see Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT'L J. CONST. L. 79 (2003); Stephen W. Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, 102 MICH. L. REV. 387 (2003); Mattias Kumm & Víctor Ferreres Comella, *What is so Special about Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Horizontal Effect*, in THE CONSTITUTION IN PRIVATE RELATIONS. EXPANDING CONSTITUTIONALISM 241-86 (András Sajó & Renáta Uitz eds. 2005); see also Gregor Thüsing, *Die „Drittwirkung der Grundrechte“ im Verfassungsrecht der Vereinigten Staaten*, 99 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSSWISSENSCHAFT 72 (2000).

⁷⁰ See, e.g., Uwe Diederichsen, *Das Bundesverfassungsgericht als oberstes Zivilgericht—ein Lehrstück für die juristischen Methodenlehre*, 198 ACP 171, 243-56 (1998); see also Jan Smits, *Private Law and Fundamental Rights: a Skeptical View*, in CONSTITUTIONALISATION OF PRIVATE LAW 9-22 (Tom Barkhuysen & Siewert Lindenbergh eds., 2006).

⁷¹ This view has long existed in the German discussion; see, THORSTEN HOLLSTEIN, *DIE VERFASSUNG ALS “ALLGEMEINER TEIL* (2006) (on Hans Carl Nipperdey).

state that produces and enforces this law, critique of private law in Germany takes the state for granted and takes place within it.⁷² The common development often goes overlooked: Nineteenth-century private law was thought to be autonomous from the state: it was conceivable as a transnational body of law; and indeed, foreign law was frequently used in private-law adjudication.⁷³ By contrast, when private law turned into public law or state law, it became domestic law. Now, the framework for debate and reasoning was the state, and foreign law was relegated into comparative law, a separate discipline without immediate normative relevance.

III. Developments

The traditional views of private law pointed out in Part II are diverse, but they share certain traits: they all depend on the idea that private law is part of a coherent legal system owing its validity and legitimacy to the fact that it is conceived as a coherent whole and enacted or enabled by the state. This Part describes how recent developments call the traditional view into question. To the extent that the European Union shapes private law, private law is not the product of a state, at least in the traditional sense.⁷⁴ Where private law is created within the plurality of legal orders shaped by globalization, it is not the product of one state. When private actors or agencies make and enforce their own law, this law is not the product of any state.

A. Europeanization

Europeanization of private law has three different meanings that sometimes overlap but must be held apart for analysis, since the role of private law and the state is different in each of them.

1. *European Communities*. One meaning concerns the growing importance of the European Communities,⁷⁵ which have recently, after originally dealing with other areas,

⁷² See already Christian Joerges, *Introduction*, in *CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE* 1, 5 (Christian Joerges & David M. Trubek eds., 1989).

⁷³ MICHAEL H. HOEFLICH, *ROMAN & CIVIL LAW & THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE* (1997);

⁷⁴ Europeanization could best be compared to federalization of private law in the United States. However, apart from the Uniform Commercial Code, the trend has gone towards defederalization of private law, most importantly through the rejection of a broad notion of federal common law; see Jansen & Michaels, *supra* note 4, at II.5.

⁷⁵ See Maarten Vink & Paolo Graziano, *Challenges of a New Research Agenda*, in *EUROPEANIZATION: NEW RESEARCH AGENDAS* 1, 1-26 (Paolo Graziano & Maarten Vink eds., 2006).

focused on private law. The view the European Community takes of private law is clearly instrumental—European private law must serve the common market.⁷⁶ This has different consequences. First, differences between member-state private laws are said to require supranational harmonization of conflict of laws rules.⁷⁷ Second, private-law norms of member states can violate EC law if they interfere with the free movement of goods, services, labor, and capital. This is so not only for mandatory norms⁷⁸ but even, as has been argued, for non-mandatory, truly "private," norms.⁷⁹ Third, because private law is considered relevant for the functioning of a common market, the EC has begun to harmonize substantial parts of market-oriented private law through directives.⁸⁰ Some even argue that differences between the member-state private-law norms require general unification of private law, through either a real codification⁸¹ or a legislative instrument *sui generis*: a common frame of reference.⁸² Defendants of state private law invoke the cultural heritage represented in the member states' own private laws or argue that unification is unnecessary in practice.⁸³ Sometimes, U.S. federalism is invoked as a model of non-unified private law, although the situations are not fully comparable, since

⁷⁶ See LEONE NIGLIA, *THE TRANSFORMATION OF CONTRACT IN EUROPE* (2003); Jansen & Michaels, *supra* note 4, at I.3 *et seq.*

⁷⁷ Jürgen Basedow, *Spécificité et coordination du droit international privé communautaire*, in 2002-2004 TRAVAUX DU COMITÉ FRANÇAIS DE DROIT INTERNATIONAL PRIVÉ 275 (2005); on the enhanced role of individual interests over state interests, see Ralf Michaels, *EU Law as Private International Law? Reconceptualizing the Country-of-Origin Principle as Vested-Rights Doctrine*, 2 J. PRIV. INT'L L. 195, 238-42 (2006).

⁷⁸ OLIVER REMIEN, *ZWINGENDES VERTRAGSRECHT UND GRUNDFREIHEITEN DES EG-VERTRAGES* (2003); TORSTEN KÖRBER, *GRUNDFREIHEITEN UND PRIVATRECHT* (2004).

⁷⁹ APOSTOLOS TASSIKAS, *DISPOSITIVES RECHT UND RECHTSWAHLFREIHEIT ALS AUSNAHMEBEREICHE DER EG-GRUNDFREIHEITEN* (2004), criticizing the countervailing view in Case C-339/89, *Alsthom Atlantique v. Compagnie de construction Sulzer SA*, 1991 E.C.R. I-107, no. 15.

⁸⁰ Peter-Christian Müller-Graff, *EC Directives as a Means of Private Law Unification*, in *TOWARDS A EUROPEAN CIVIL CODE* 77 (A.S. Hartkamp et al. eds., 3d ed. 2004) with a list of private law directives at 90-100; see also Angus Johnston and Hannes Unberath, *Law at, to or from the Centre? The European Court of Justice and the Harmonization of Private Law in the European Union*, in *THE INSTITUTIONAL FRAMEWORK OF EUROPEAN PRIVATE LAW* 149 (Fabrizio Cafaggi ed., 2006).

⁸¹ For a skeptical overview, see Nils Jansen, *European Civil Code*, in *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* 247-58 (Jan Smits ed., 2006) with bibliography.

⁸² Nils Jansen, *Traditionsbegründung im europäischen Privatrecht. Zum Projekt eines Gemeinsamen Referenzrahmens*, 61 JURISTENZEITUNG 536 (2006).

⁸³ *THE NEED FOR A EUROPEAN CONTRACT LAW: EMPIRICAL AND LEGAL PERSPECTIVES* (Jan Smits ed., 2005) (questioning such a need from various perspectives); but see Stefan Vogenauer & Stephen Weatherill, *The European Community's Competence to Pursue the Harmonisation of Contract Law—an Empirical Contribution to the Debate*, in *THE HARMONISATION OF EUROPEAN CONTRACT LAW: IMPLICATIONS FOR EUROPEAN PRIVATE LAWS, BUSINESS AND LEGAL PRACTICE* 105 (Stefan Vogenauer & Stephen Weatherill eds., 2006) (presenting data on the desire by business for a unified contract law).

similarities of legal cultures and styles between the U.S. states are greater than between EU member states.⁸⁴

The impact on private law and the state is ambivalent. On the one hand, this institutionalized Europeanization reduces the importance of the member states and their private law because they must yield sovereignty to the European Union. On the other hand, the European Union itself in many ways resembles a state, functionally and structurally, whether it is called a state or not.⁸⁵ In this sense, institutionalized European private law partly replicates state private law on a higher level. The result is a system of shared sovereignties and overlapping private law systems, regardless of whether the European level is superior, subordinated, or equal to the state level.

2. *Transnational Legal Science*. A second meaning of Europeanization of private law goes beyond the EU and refers to European identity building; it concerns the revival of a pan-European legal science and exchange between judges.⁸⁶ There are several variants of such an academic “European” private law:⁸⁷ a reinvigorated *ius commune* as basis of, or model for, an academic transnational private law,⁸⁸ restatements,⁸⁹ networks,⁹⁰ pan-

⁸⁴ Ralf Michaels, *American Law (United States)*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW, *supra* note 81, at 66, 70; *see also* Mathias Reimann, *Amerikanisches Privatrecht und europäische Rechtseinheit--Können die U.S.A. als Vorbild dienen?*, in AMERIKANISCHE RECHTSKULTUR UND EUROPÄISCHES PRIVATRECHT 132 (Reinhard Zimmermann ed., 1995) [*American Private Law and European Legal Unification—Can the United States be a Model?*, 3 MAASTRICHT J. EUR. & COMP. L. 217 (1996)]; Richard Hyland, *The American Experience: Restatements, the UCC, Uniform Laws, and Transnational Coordination*, in TOWARDS A EUROPEAN CIVIL CODE 59 (A. Hartkamp et al. eds., 3d ed. 2004).

⁸⁵ Christian Joerges, *Die Wissenschaft vom Privatrecht und der Nationalstaat*, in RECHTSWISSENSCHAFT IN DER BONNER REPUBLIK 311, 358-9 (Dieter Simon ed., 1994); Jürgen Habermas, *Der europäische Nationalstaat—Zu Vergangenheit und Zukunft von Souveränität und Staatsbürgerschaft*, in JÜRGEN HABERMAS, DIE EINBEZIEHUNG DES ANDEREN 128 (1996) [*The European Nation-State: On the Past and Future of Sovereignty and Citizenship*, in JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER 105 (1998)]; Rainer Wahl, *Erklären staatsrechtliche Leitbegriffe die Europäische Union?*, 60 JURISTENZEITUNG 916 (2005); *see also* Cris Shore, *Government Without Statehood? Anthropological Perspectives on Governance and Sovereignty in the European Union*, 12 EUR. L. REV. 709 (2006).

⁸⁶ NILS JANSEN, BINNENMARKT, PRIVATRECHT UND EUROPÄISCHE IDENTITÄT 19-22 (2004) with further references. *See also* Isabelle Petit, *Dispelling a Myth? The Fathers of Europe and the Construction of a Euro-Identity*, 12 EUR. L. J. 661 (2006).

⁸⁷ For overviews, *see* Wolfgang Wurmnest, *Common Core, Kodifikationsentwürfe, Acquis-Grundsätze—Ansätze von internationalen Wissenschaftlergruppen zur Privatrechtsvereinheitlichung*, 11 ZEUP 714-44 (2003); Reinhard Zimmermann, *Comparative Law and the Europeanization of Private Law*, in OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 68, at 539.

⁸⁸ Reinhard Zimmermann, *Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science*, 112 L.Q. Rev. 576 (1996); REINHARD ZIMMERMANN, ROMAN LAW, CONTEMPORARY LAW, EUROPEAN LAW: THE CIVILIAN TRADITION TODAY (2001); Reinhard Zimmermann, *Europa und das römische Recht*, 202 ACP 243 (2002); Nils Jansen, *Dogmatik, Erkenntnis und Theorie im europäischen Privatrecht*, 13 ZEUP 750 (2005).

European casebooks,⁹¹ and research on a common core.⁹² In addition, courts seem more willing than before to look to the courts of other European states for guidance in private-law cases.⁹³ A widely shared hope is to keep private law relatively free from instrumental concerns and allow it to maintain its own logic and rationality. Unsurprisingly, EC directives are mostly frowned upon and European codification is widely opposed; if at all, it should be performed by academics with as little political influence as possible.⁹⁴

3. *Regulatory Competition*. Finally, a third meaning of Europeanization of private law refers not to unification but to greater interdependence resulting in regulatory competition.⁹⁵ Proponents hope for a pluralist private law that is autonomous not only from the state but also from judicial and academic interventions, a private law created by, and developing under, the forces of the market. The hypothesis is that states cannot maintain regulatory laws that are inefficient (as is often assumed in the area of private law, where many favor market autonomy over centralized state power), since this would put their corporations at a competitive disadvantage vis-à-vis foreign participants and may encourage these corporations to relocate. This competitive effect is intensified by party

⁸⁹ Principles of European Contract Law (Parts I & II rev'd 1998; Part III 2002); "Restatement of European Insurance Contract Law," www.restatement.info; EUROPEAN GROUP ON TORT LAW, PRINCIPLES OF EUROPEAN TORT LAW. TEXT AND COMMENTARY (2005); STUDY GROUP ON A EUROPEAN CIVIL CODE/CHRISTIAN VON BAR, PRINCIPLES OF EUROPEAN LAW. BENEVOLENT INTERVENTION IN ANOTHER'S AFFAIRS (PEL Ben. Int.) (2006).

⁹⁰ Joint Network on European Private Law (CoPECL), <http://www.copecl.org/>; COMMON PRINCIPLES OF EUROPEAN PRIVATE LAW. STUDIES OF A RESEARCH NETWORK (Reiner Schulze & Gianmaria Ajani eds., 2003).

⁹¹ E.g. Hein Kötz, 1 EUROPÄISCHES VERTRAGSRECHT (1996) [1 EUROPEAN CONTRACT LAW (1997)]; FILIPPO RANIERI, EUROPÄISCHES OBLIGATIONENRECHT (2d ed. 2003); Ius Commune Casebook Project, <http://www.law.kuleuven.ac.be/casebook/>; for review articles, see Christoph Schmidt, *Anfänge einer transnationalen Privatrechtswissenschaft in Europa*, 40 ZEITSCHRIFT FÜR RECHTSVERGLEICHUNG 213-22 (1999) [*The Emergence of a Transnational Legal Science in Europe*, 19 OX. J. LEGAL STUD. 673-689 (1999)]; Nils Jansen, *Auf dem Weg zu einem europäischen Haftungsrecht*, 9 ZEUP 30 (2001).

⁹² Common Core of European Private Law, <http://www.jus.unitn.it/dsg/common-core/books.html>.

⁹³ E.g. Bundesgerichtshof, January 12, 2005, XII ZR 227/03, 162 BGHZ 1, 7-8; Walter Odersky, *Harmonisierende Auslegung und europäische Rechtskultur*, 2 ZEUP 1 (1994); Hein Kötz, *Der Bundesgerichtshof und die Rechtsvergleichung*, in II 50 JAHRE BUNDESGERICHTSHOF. FESTGABE AUS DER WISSENSCHAFT 825 (Claus-Wilhelm Canaris et al., eds., 2000); ILKA KLÖCKNER, GRENZÜBERSCHREITENDE BINDUNG AN ZIVILGERICHTLICHE PRÄJUDIZIEN. MÖGLICHKEITEN UND GRENZEN IM EUROPÄISCHEN RECHTSRAUM UND BEI STAATSVETRAGLICH ANGELEGTER RECHTSVEREINHEITLICHUNG (2006); Jansen & Michaels, *supra* note 4, at I.3 (also for English cases)

⁹⁴ Roy Goode, *The Harmonization of Dispositive Contract and Commercial Law—Should the European Community be Involved?* in DENATIONALISIERUNG DES PRIVATRECHTS? 18, 28, 31 (Eva-Maria Kieninger ed. 2005).

⁹⁵ Gerhard Wagner, *The Virtues of Diversity in European Private Law*, in THE NEED FOR A EUROPEAN CONTRACT LAW, *supra* note 83, at 3; Jan Smits, *European Private Law: A Plea for a Spontaneous Legal Order*, in DEIRDRE M. CURTIN ET AL., EUROPEAN INTEGRATION AND LAW 55, 75-78 (2006); for criticism, see EVA-MARIA KIENINGER, WETTBEWERB DER PRIVATRECHTSORDNUNGEN IM EUROPÄISCHEN BINNENMARKT (2002).

autonomy in choice of law, which gives parties the ability to choose the private law applicable to them and thereby opt out of unfavorable private-law rules. (However, internationally mandatory norms, often the most relevant norms, remain applicable despite a choice by the parties; here, regulatory competition requires parties to relocate physically).

These three concepts of Europeanized private law imply very different relations between private law and the state. Proponents of academic Europeanization defend a private law that is largely independent of instrumental considerations, a private law with its own logic and rationality. By contrast, the view the European Community takes of private law is not only instrumental—European private law must serve the common market—but also bound to the state-like regulatory functions of the EU. Regulatory competition presupposes an instrumental private law as well, but with the important difference that the goals are set not by states or the Community but by the inner rationality of the market for legal rules. Not surprisingly, the tensions between these views of Europeanized private law are becoming more and more visible.⁹⁶

B. Globalization

Attempting to define globalization in the abstract would be less fruitful than identifying where globalization discourse addresses changes in the role of the state that are relevant for private law. Many of these developments—supranational regulation, international unification, regulatory competition—bear some similarity to those under Europeanization. However, since an organization comparable to the EU is lacking on the global plane, any concept of global private law will likely be plural and therefore significantly different from private law within the state.

1. *World State*. Many authors think that globalization leads to a decline of the state,⁹⁷ but this is far from certain. A world state, the closest analogy to the European Union would be a world state, underlies two interpretations of globalization in political science. A neo-Kantian interpretation sees a world government without a world state,⁹⁸ made up of

⁹⁶ Cf. Reinhard Zimmermann, *Civil Law and Civil Code. The “Europeanization” of Private Law Within the European Communities and the Re-Emergence of a European Legal Science*, 1 COL. J. EUR. L. 63, 73-82 (1994/95); JANSEN, *supra* note 86, at 6 and *passim*.

⁹⁷ MARTIN VAN CREVELD, *THE RISE AND DECLINE OF THE STATE* 336-414 (1999); *but see* Achim Hurrelmann et al., *Is there a Legitimation Crisis of the Nation State?*, in *TRANSFORMATIONS OF THE STATE?* 119 (Stephan Leibfried & Michael Zürn eds., 2005) (reporting on deeply rooted public support for the nation state).

⁹⁸ OTFRIED HÖFFE, *DEMOKRATIE IM ZEITALTER DER GLOBALISIERUNG* (2d ed. 2002); *WELTREPUBLIK. DEMOKRATIE UND GLOBALISIERUNG* (Stefan Gosepath & Jean-Christophe Merle eds., 2002); for critique, see Klaus Günther, *Alles richtig! Otfried Höffes Entwurf einer subsidiären*

different supranational branches (the WTO as world legislator, the International Court of Justice as world court, etc.)⁹⁹ or of networks between the different branches of national governments—a network of legislators, one of judges, etc.¹⁰⁰ This would place the production and adjudication of private law in a framework that is familiar from historical experience with the nation states.¹⁰¹ A neo-Marxist interpretation holds that the western state will globalize into a global state or empire¹⁰² that would resemble the liberal state opposed by Marx, with a clear delimitation of the public and the private spheres.¹⁰³

Such political theories may or may not be convincing: what is undeniable is that global organizations are in fact exerting pressure on state private laws. The World Bank, for example, requires developing countries to adopt functioning private-law regimes, frequently modelled after American law, in return for loans. In addition, it has begun to rank legal systems of all states according to their efficiency—with devastating results for some civil-law countries.¹⁰⁴ That French scholars now protest against the methods involved and invoke the cultural and social values of their national private law¹⁰⁵ highlights the tension between global regulation and regulatory competition on the one hand and state control over private law on the other.

und föderalen Weltrepublik auf der Basis des Allgemeinmenschlichen, 19 RECHTSHISTORISCHES JOURNAL 232ff (2000); Andreas Fischer-Lescano, *Book Review*, 89 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 287 (2003).

⁹⁹ Donald B. King, *Does an Unknown World Government Exist? Impact of Commercial and Consumer Law*, 22 PENN. ST. INT'L L. REV. 73 (2003); King, *The Unknown World Government: Some Very Recent Commercial Law Developments and Gaps*, 23 PENN. ST. INT'L L. REV. 535 (2005); see also Hans Smit, *The Universalization of Private Law*, in DE TOUS HORIZONS. MELANGES XAVIER BLANC-JOUVAN 335, 347-49 (2005); MIREILLE DELMAS-MARTY, TROIS DEFIS POUR LE DROIT MONDIAL 152 *et seq.* (1998).

¹⁰⁰ ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 262-64 (2004).

¹⁰¹ It is thus the private law side of the call for a global constitution: Jürgen Habermas, *Eine politische Verfassung für die pluralistische Weltgesellschaft?*, in JÜRGEN HABERMAS, NATURALISMUS UND RELIGION 324-65 (2005) [*A Political Constitution for the Pluralist World Society?* <http://ptw.uchicago.edu/Habermas01.pdf>].

¹⁰² MICHAEL HARDT & ANTONIO NEGRI, EMPIRE (2000), *esp.* at 300-03 (on privatization of public property); MARTIN SHAW, THEORY OF THE GLOBAL STATE (2000); William I. Robinson, *Social Theory and Globalization: The Rise of a Transnational State*, 30 THEORY & SOCIETY 157 (2001); see also PARADIGM LOST: STATE THEORY RECONSIDERED (Stanley Aronowitz & Peter Bratsis eds., 2002).

¹⁰³ For application to law, see Susan Marks, *Empire's Law*, 10 IND. J. GLOB. STUD. 449 (2003); Antonio Negri, *Postmodern Global Governance and The Critical Legal Project*, 16 LAW & CRITIQUE 27-46 (2005).

¹⁰⁴ See <http://www.doingbusiness.org>.

¹⁰⁵ ASSOCIATION HENRI CAPITANT, LES DROITS DE TRADITION CIVILISTE EN QUESTION. A PROPOS DES RAPPORTS *DOING BUSINESS* DE LA BANQUE MONDIALE (2006) http://www.henricapitant.org/IMG/pdf/Les_droits_de_tradition_civiliste_en_question.pdf; BENEDICTE FAUVARQUE-COSSON & SARA PATRIS-GODECHOT, LE CODE CIVIL FACE A SON DESTIN 152-61 (2006).

2. *Treaties*. Absent a world state, the main tool for unifying private law is the treaty.¹⁰⁶ So far, the dream of global private law unification has never been realized.¹⁰⁷ Even the most important international text on private law, the UN Convention on the International Sale of Goods (CISG), although it treats an intensely international field and is based on extensive preparatory studies in comparative law, has gained relatively marginal importance in legal practice and theory.¹⁰⁸ Undeterred by such developments, the then-Secretary of UNCITRAL proposed work towards a Global Commercial Code.¹⁰⁹ Whether such a global, relatively uniform private law can be created without strong global regulatory institutions remains to be seen.

3. *Regulatory Competition*. While these developments could lead to uniformity, global competition between private law regimes would require a plurality of private laws. Such competition differs from that in Europe on a crucial point: an overarching regulatory institution like the European Communities is lacking in the global sphere; regulatory competition is unregulated.¹¹⁰ This means that states that are strong enough can apply their laws extraterritorially and thereby hamper the possibilities for private parties to opt out of their laws, whether through party autonomy or through physical relocation. We see this in the conduct of the U.S. and the EU, both of which are unwilling externally to submit

¹⁰⁶ Jürgen Basedow, *Vie Universelle, Droit National? À Propos de la Mondialisation du Droit*, in DE TOUS HORIZONS, *supra* note 99, at 232-36.

¹⁰⁷ RENÉ DAVID, THE INTERNATIONAL UNIFICATION OF PRIVATE LAW (II/5 INT'L ENCYCL. COMP. L.) 123-79 (1971).

¹⁰⁸ This is true especially for the U.S.: Mathias Reimann, *The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care*, 71/1 RABELSZ ____ (2007); for a recent overview, see THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS, AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION (I CILE Studies, 2005). In Europe, there is more case law and academic writing, but many lawyers still excluded the CISG regularly from international contracts.

¹⁰⁹ Gerold Herrmann, *The Role of Uncitral*, in FOUNDATIONS AND PERSPECTIVES OF INTERNATIONAL TRADE LAW 28, 35 (Ian Fletcher et al. eds., 2001); Gerold Herrmann, *The Future of Trade Law Unification*, 2001 INTERNATIONALES HANDELSRECHT (IHR) 6, 12; see also Michael Joachim Bonell, *Do We Need a Global Commercial Code?*, 106 DICK. L. REV. 87 (2001) = 5 UNIF. L. REV. 469 (2000); Ole Lando, *The CISG and the UNIDROIT Principles in a Global Commercial Code*, in MÉLANGES FONTAINE 451 (2003); Ole Lando, *A Global Commercial Code*, 50 RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW) 161 (2004); Ole Lando, *A Vision of a Future World Contract Law. Impact of European and Unidroit Contract Principles*, 2004 UCC L.J. Vol. 2, p. 3 (2004); Ole Lando, *CISG and its Followers: A Proposal to Adopt some International Principles of Contract Law*, 53 AM. J. COMP. L. 379 (2005). The idea was first proposed by UNIDROIT: Progressive codification of the law of international trade, Note by the Secretariat of the International Institute for the Unification of Private Law (UNIDROIT), 1968-1970 UNCITRAL Y.B. 285, U.N. Doc. A/CN.9/SER.A/1970; see also Clive M. Schmitthoff, *The Codification of the Law of International Trade*, 1985 J. BUS. L. 34.

¹¹⁰ Although the World Trade Organization is sometimes equated to the European Communities, its impact is far smaller; this is true in particular with regard to private law. See also Josef Drexler, *WTO und Privatrecht*, in VEREINHEITLICHUNG UND DIVERSITÄT DES ZIVILRECHTS IN TRANSNATIONALEN WIRTSCHAFTSRÄUMEN 333-64 (Claus Ott & Hans-Bernd Schäfer eds., 2002).

themselves to the regulatory competition they require internally from their respective member states.¹¹¹ Similarly, the effect of party autonomy is more dramatic than in the European Communities. On a global level, party autonomy turns the hierarchical relationship between the state and the individual upside down. In the traditional view, the individual is subordinated to the state, even in the realm of private law. By contrast, party autonomy subordinates the state and its private law to private parties and their choices. Parties are not confined to using the autonomy granted to them by the legal order; rather, they have the autonomy to choose the very legal order that grants this autonomy. All of this means that global private law will likely remain pluralistic and non-hierarchical, an important difference to a hierarchical state-based private law.

4. *Americanization*. Competition between private laws does not necessarily occur on a level playing field, for better or worse. If students of globalization often speak of “the state”, this is too general.¹¹² Arguably, globalization strengthens big powerful states like the United States (and the EU), while weakening midsize states.¹¹³ In accordance with this view, some view globalization as an increased Americanization of the law in the world, including private law.¹¹⁴ Some private-law projects in Europe can be viewed as a reaction; they aim, implicitly or explicitly, at protecting European private law with its social aspects against such Americanization,¹¹⁵ while at the same time promoting European (and German) private law as a model for other states. If globalization weakens the power of mid-size states, then both the strengthening of the European Union and the Europeanization of private law can be viewed as reactions to globalization.¹¹⁶ The tension

¹¹¹ For the EU, see Case C-381/98, *Ingmar v. Eaton Leonard*, 2000 E.C.R. I-9305 (mandatory application of EU law on commercial agency contracts); Ralf Michaels & Hans-Georg Kamann, *Grundlagen eines allgemeinen gemeinschaftlichen Richtlinienkollisionsrechts—“Amerikanisierung” des Gemeinschafts-IPR?*, 12 EUROPÄISCHES WIRTSCHAFTS- UND STEUERRECHT 301, 311 (2001); STÉPHANIE FRANCO, *L’APPLICABILITÉ SPATIALE DU DROIT DÉRIVÉ COMMUNAUTAIRE AU REGARD DES MÉTHODES DU DROIT INTERNATIONAL PRIVÉ* (2005); Basedow, *supra* note 106, at 229-32.

¹¹² Ralf Michaels, *Welche Globalisierung für das Recht? Welches Recht für die Globalisierung?*, 69 RABELSZ 525, 532 (2005).

¹¹³ Globalization can strengthen also small states, since it enables them to derive disproportionate revenues from lucrative transnational business like banking or registration of offshore corporations.

¹¹⁴ Michaels, *supra* note 84, at 73-74 with further references; Duncan Kennedy, *Three Globalizations of Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT. A CRITICAL APPRAISAL* 19, 63-71 (David Trubek & Alvaro Santos eds., 2006). *But see* Mathias Reimann, *Droit positif et culture juridique. L’américanisation du droit par réception*, in 45 *Archives de Philosophie du Droit – L’Américanisation du Droit* 61 (2002).

¹¹⁵ Ugo Mattei, *Hard Code Now* (2002), <http://www.bepress.com/gj/frontiers/vol2/iss1/art1/>; Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law: A Manifesto*, 10 EUR. L.J. 653 (2004).

¹¹⁶ Sjeff van Erp, *Editorial—European Private Law and Legal Globalisation*, 6.2 ELECTRONIC J.

between U.S. and German private law is then also tension over the role of specific states in private law, not just of the state in the abstract.

C. Privatization

All these developments concern the shift of state power to other states or global institutions. Yet, perhaps the most important development of globalization is the shift away from states altogether towards the private sphere. In a globalized world, in addition to states an increasing number of non-state institutions—NGOs, multinational corporations, and individuals—are relevant international or transnational actors.¹¹⁷ In various ways and degrees, these have all become not only subjects and objects of international law, but also creators and shapers of law. Since these organizations are private, the resulting law is a kind of privatized private law that is independent from the state to the extent that the state does not interfere and is not required for its enforcement.

1. *Transnational Legal Science*. One consequence could be the emergence of a transnational legal science with a global academic debate and a worldwide community of courts. While some such developments can be observed in the human rights sector,¹¹⁸ similar developments in private law are made more difficult by the relative lack of common intellectual and cultural roots worldwide; even communication between German and U.S. law is sometimes riddled with misunderstandings.¹¹⁹ Nonetheless, one such development is occurring in the area of commercial law, in the form of academic restatements or private codifications of private law. Modelled after both European national codifications and the American Restatements, several different and sometimes competing private codifications exist on the global level.¹²⁰ Whereas European private codifications offer themselves, at least in part, as models for a possible future European codification and thus for incorporation into the political system, worldwide models remain permanently outside the structure of states. They serve either as mere academic constructions or as

COMP. L. (2002), <http://www.ejcl.org/62/editor62.html>.

¹¹⁷ There are also hybrid institutions between state and private actors; for the banking sector, see Janet K. Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125 (2005); Michael S. Barr & G. P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15 (2006).

¹¹⁸ See Jansen & Michaels, *supra* note 4, at I.3.

¹¹⁹ On an earlier US-German project, see Christian Joerges, *On the Context of German-American Debates on Sociological Jurisprudence and Critique of Law: A Transatlantic Record of Misunderstandings and Missed Opportunities*, 1993 EUR. YB. SOC. OF LAW 403-418.

¹²⁰ UNIDROIT Principles of International Commercial Contracts 2004, <http://www.unidroit.org/english/principles/contracts/main.htm>; see also *supra* notes 89, 109.

potentially applicable law for international contracts, most importantly (up until now) in arbitration.¹²¹ Formally similar to “official” codifications but lacking a legislator’s authority, they present a challenge to traditional concepts of private law: their character as “law” is disputed; their functions oscillate between potential and actual description and prescription.¹²²

2. *Privately Created Orders.* More controversial is the idea of privately created legal orders.¹²³ Although various kinds of such orders are often presented indiscriminately, closer analysis identifies these orders as reflections of different themes of globalization. The primacy of economy and markets, a favorite globalization topic, is reflected in the idea of a new *lex mercatoria* (law merchant), a transnational body of substantive rules created not by states but by the needs and practices of commerce and applied and developed by international arbitration.¹²⁴ A second globalization theme, technological advances and the rise of the Internet, corresponds to the conceptualization of private law created within the Internet community.¹²⁵ A third group of private laws substitutes community trust created by close religious or ethnic ties for the state’s enforcement scheme¹²⁶ and thereby

¹²¹ MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW 273-300 (3d ed. 2005); *but see supra* note 109.

¹²² Ralf Michaels, *Privatautonomie und Privatkodifikation. Zu Anwendbarkeit und Geltung allgemeiner Vertragsrechtsprinzipien*, 62 RABELSZ 580, 584-91 (1998); *see also* Claus-Wilhelm Canaris, *Die Stellung der "UNIDROIT Principles" und der "Principles of European Contract Law" im System der Rechtsquellen*, in EUROPÄISCHE VERTRAGSRECHTSVEREINHEITLICHUNG UND DEUTSCHES RECHT 5 (Jürgen Basedow ed., 2000).

¹²³ *Cf. supra* text accompanying notes 28-29.

¹²⁴ Peer Zumbansen, *Lex mercatoria: Zum Geltungsanspruch transnationalen Rechts*, 67 RABELSZ 637-82 (2003) [*Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 EUR. L.J. 400-32 (2002)]; CLAIRE CUTLER, PRIVATE POWER AND PUBLIC AUTHORITY. TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY (2003); RULES AND NETWORKS. THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS 159 (Richard P. Appelbaum, William L.F. Felstiner & Volkmar Gessner eds., 2001); Symposium, *The Empirical and Theoretical Underpinnings of the Law Merchant*, 5 CHI. J. INT’L L. 1 (2004); Ralf Michaels, *The True New Lex Mercatoria*, IND. J. GLOBAL STUD. (forthcoming). *See also* Julian D.M. Lew, *Achieving the Dream: Autonomous Arbitration*, 22 ARB. INT’L. 179-203 (2006).

¹²⁵ Gillian Hadfield, *Delivering Legality on the Internet: Developing Principles for the Private Provision of Commercial Law*, 6 AM. L. & ECON. REV. 154 (2004).

¹²⁶ Often, old normative orders outside the state receive new attention. One example is Shariah (understood as a modern transnational law); another is the Chinese institution of Guanxi (personalized networks of influence). *See* JANET T. LANDA, TRUST, ETHNICITY, AND IDENTITY (1994); RULES AND NETWORKS. THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS, *supra* note 124, at 325-402. Another example concerns the norms and dispute regulations established by orthodox Jews in the international diamond trade; *see* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 11 J. LEGAL STUD. 115 (1992); Barak Richman, *How Communities Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 LAW & SOC. INQUIRY 383-420 (2006).

exemplifies a move in globalization from territoriality to community affiliation.¹²⁷ A fourth group, finally, contains private legal orders that are specific to certain functional sectors of world society; they reflect the move towards global functional systems:¹²⁸ a transnational sport law (*lex sportiva*),¹²⁹ a transnational construction law (*lex constructionis*),¹³⁰ etc.

Both the existence and the legal character of all these orders are disputed. Much of the debate is inconclusive: it confounds conceptual analysis with questions of validity and legitimacy, and throws together issues of general acceptance, legal validity, intrinsic quality, and of definition. Obviously, privately created private law can only be called “law” if the concept of law is not confined to state-created orders; whether such a definition is useful depends on the context.¹³¹

More important is the actual relation of these private orders to the state, especially the question whether they provide the applicable norms in a choice-of-law analysis.¹³² Traditionally, states have been unanimous in rejecting the applicability of non-state private laws in choice of law;¹³³ demands to the contrary¹³⁴ have so far remained unheeded. This

¹²⁷ Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002).

¹²⁸ MATHIAS ALBERT, ZUR POLITIK DER WELTGESELLSCHAFT. IDENTITÄT UND RECHT IM KONTEXT INTERNATIONALER VERGESELLSCHAFTUNG (2002); see also Ralf Michaels, *US-Gerichte als Weltgerichte—Die Avantgarde der Globalisierung*, 31 DAJV-NEWSLETTER 46, 49-50 (2006).

¹²⁹ Mark van Hoecke, *Des ordres juridiques en conflit: sport et droit*, 35 REVUE INTERDISCIPLINAIRE D'ÉTUDES JURIDIQUES (R.I.E.J.) 62 (1995); Gérald Simon, *Existe-t-il un ordre juridique du sport?*, 33 DROITS 97-106 (2001); Jens Adolphsen, *Eine lex sportiva für den internationalen Sport?* in 2002 JAHRBUCH JUNGER ZIVILRECHTSWISSENSCHAFTLER 281 (2003); Thomas Schultz, *La lex sportiva se manifeste aux jeux olympiques de Turin: Suprematie du droit non étatique et boucles étranges* (2006), <http://ssrn.com/abstract=896673>; FRANÇOIS OST & MICHEL VAN DE KERCHOVE, *DE LA PYRAMIDE AU RÉSEAU? POUR UNE THÉORIE DIALECTIQUE DU DROIT* 202-20 (2002).

¹³⁰ ANDREAS FISCHER-LESCANO & GUNTHER TEUBNER, *REGIME-KOLLISIONEN. ZUR FRAGMENTIERUNG DES GLOBALEN RECHTS* 101-110 (2006).

¹³¹ Most opinions are more absolute. Legal pluralists insist that restricting the notion of “law” to state law is unacceptable; e.g. BRIAN TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* 192 (2001). Opponents insist that definitions must include the state if they are to have any explanatory power; see Simon Roberts, *After Government? On Representing Law Without the State*, 68 MOD. L. REV. 1, 13-17 (2005). For a thorough analysis, pointing out that the answer depends on the purpose for which law is to be determined, see Franz von Benda-Beckmann, *Who's Afraid of Legal Pluralism?*, 47 J. LEGAL PLURALISM 37, 39-42 (2002); see also Ralf Michaels, *The Re-State-ment of Non-State Law: The State, Choice of Law and the Challenge from Legal Pluralism*, 51 WAYNE L. REV. 1209, 1224-27, 1258-59 (2005). A yet unresearched question is whether there is a parallel between state-based conceptions of law and an emphasis on public law on the one hand, and between non-state-based conceptions of law and an emphasis on private law on the other hand.

¹³² Michaels, *supra* note 131.

¹³³ For *lex sportiva*, see OLG Frankfurt/M., 18 April 2001, 2001 SPORT UND RECHT (SPURT) 159; for Shari'ah, see *Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd.* (2004) EWCA Civ.; see also Michaels, *supra* note 131, at 1228-31.

¹³⁴ E.g. Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819 (2005); GABRIELE SCHERER, *DAS INTERNATIONALE PRIVATRECHT ALS GLOBALES SYSTEM* (Diss. HU Berlin 2005), available at <http://edoc.hu-berlin.de/docviews/abstract.php?lang=ger&id=26355>.

attitude may be changing at least for quasi-official private codifications: The current proposal for a European regulation on choice of law in contracts would allow parties to choose private codifications like the UNIDROIT Principles over state law as the law applicable to their contracts.¹³⁵ This would be a triumph for privately made, non-state law, which will achieve an equal footing with state-made private law. However, it would also be a victory (not yet realized by all) for state-made private law as the model for what can be accepted as law: privatized private law will only be recognized when it appears as a code, sufficiently similar, in form and substance, to state law.

D. The Decline of the State and the Rise of Private Law?

What broader effects do these developments have for private law? Harold Koh convincingly argues that what he calls transnational legal process “breaks down two traditional dichotomies that have historically dominated the study of international [and, one could add, private] law: between domestic and international, public and private.”¹³⁶ However, whereas Koh follows the legal realists’ example¹³⁷ and breaks the dichotomy for the benefit of a broadened concept of *public* law, it may be more plausible to turn the realist project on its head and break the dichotomy on the other side: In the domestic sphere, all law may really be public; in the global sphere, all law is, arguably, really private.¹³⁸ The legal realists had to assume, tacitly, that the state is strong enough to regulate all ostensible private law as public law. To view the abstention from intervening in the private sphere as a form of regulation, as Robert Hale did,¹³⁹ makes sense only when this abstention is the result of a political (public) decision, not of inability. Yet inability is exactly what globalists now argue characterizes the state: States are so weak, compared to other, non-state actors on the world scene, that they yield much of their sovereign power to

¹³⁵ Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final, p. 5 and Article 3(2) (advocating choice of non-state law for contracts in the European Union). For US law on this question, see Symeon C. Symeonides, *Contracts Subject to Non-State Norms*, 54 AM. J. COMP. L. (SUPPL.) 209, 215-231 (2006); see also Friedrich K. Juenger, *Contract Choice of Law in the Americas*, 45 AM. J. COMP. L. 195, 204-05 (1997).

¹³⁶ Koh, *supra* note 1, at 184; similarly BOAVENTURA DE SOUSA SANTOS, TOWARDS A NEW LEGAL COMMON SENSE 83-84 (2d ed. 2002).

¹³⁷ *Supra* note 60.

¹³⁸ See Thomas Wilhelmsson, *Welfare State Expectations, Privatisation and Private Law*, in FROM DISSONANCE TO SENSE: WELFARE STATE EXPECTATIONS, PRIVATISATION AND PRIVATE LAW 3, 23-25 (Thomas Wilhelmsson & Samuli Hurri eds., 1999). On the debate about an autonomous *public* international law, see Benedict Kingsbury, *The Problem of the Public in Public International Law*, NOMOS (forthcoming).

¹³⁹ *Supra* note 56.

the forces of the market—regulatory competition, public-private partnerships, privatization, etc.¹⁴⁰ All domestic law may become public law, but all international law becomes transnational private law.¹⁴¹ It is especially the relative independence from government traditionally enjoyed by private law that makes it a likely candidate for the supranational situation without a government.

Such a rebirth of autonomous private law is reminiscent of the autonomous private law of nineteenth-century liberalism, but it differs in a crucial way. Then, the autonomy was possible because a strong state was willing and able to grant this autonomy.¹⁴² Now, the monolithic state that could grant this autonomy has given way to a multitude of public and private actors, and the new autonomy of private law takes place not in the presence and under the protection of a state but rather in, and due to, its absence. This makes the idea that private law can remain essentially unchanged both implausible and unattractive. That private law could remain essentially free of “public” values has always been an illusion, but it had at least a grain of plausibility when the provision of such values and control could be externalized to the state and to public law. Such externalization has now become more difficult. In the European Communities, the task of providing “social values” can be assigned from the member states to the EC level, or vice versa, from the EC to the member states.¹⁴³ On a global level, since there is no state to provide essentially “public” values, it is unclear where the public values to enrich and legitimize private law should originate.¹⁴⁴

¹⁴⁰ Mark Freedland, *Government by Contract Re-examined: Some Functional Issues*, in LAW AND ADMINISTRATION IN EUROPE: ESSAYS IN HONOUR OF CAROL HARLOW 123 (Paul Craig & Richard Rawlings eds., 2003).

¹⁴¹ The literature on this question is expansive. For two critical analyses, see Klaus Günther, *(Zivil-)Recht. Kann das Zivilrecht im Zuge der Globalisierung das öffentliche Recht ersetzen?*, in RECHTSVERFASSUNGSRECHT. RECHT-FERTIGUNG ZWISCHEN PRIVATRECHTSDOGMATIK UND GESELLSCHAFTSTHEORIE 295 (Christian Joerges & Gunther Teubner eds., 2002); Christoph Möllers, *Transnational Governance without a Public Law?* in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 329 (Christian Joerges et al. eds., 2004).

¹⁴² This in turn represented an inheritance of earlier times when private law had been largely beyond the reach of public domination; Jansen & Michaels, *supra* note 4. See also Michaels, *supra* note 131, at 1236-37.

¹⁴³ See, from the vast literature, Study Group on Social Justice, *supra* note 116; Fernanda Nicola, *Another View on European Integration: Distributive Stakes in the Harmonization of European Law*, in PROGRESSIVE LAWYERING, GLOBALIZATION AND MARKETS: RETHINKING IDEOLOGY AND STRATEGY (Clare Dalton & Dan Danielsen eds., forthcoming); Rasmus Goksor, *Jurisprudence on Protection of Weaker Parties in European Contracts Law: A Swedish and Nordic Perspective* CHL-KENT J. OF INT’L & COMP. L. (forthcoming); see also Ugo Mattei & Fernanda Nicola, *A “Social Dimension” in European Private Law? The Call for Setting a Progressive Agenda*, NEW ENG. L. REV. (forthcoming).

¹⁴⁴ John Wightman, *Private Law and Public Interests*, in FROM DISSONANCE TO SENSE, *supra* note 138, at 253, 257-66; Jody Freeman, *Extending Public Law Norms through Privatization*, 116 HARV. L. REV. 1285, 1314-52 (2003); Laura Dickinson, *Public Law Values in a Privatized World*, 31 YALE

This does not mean that globalized private law cannot contain any values beyond those of the market. Rather, the new private law must develop the necessary values within itself, as genuine private law values. Along these lines, proposals have been made to constitutionalize global private law—not in the traditional sense of constraints from an external (state) constitution, but rather, in accordance with the idea of a constitution beyond the state,¹⁴⁵ in the sense that private law must itself turn into a constitutional order.¹⁴⁶ Whether globalized private law can develop the necessary values within its own rationality is perhaps the most pressing question.

IV. Issues

It should have become clear that private law requires rethinking, especially with regard to its connection to the state. That being so, much of our traditional conception of private law is called into question: its validity as an enactment of the state or a national tradition, its method as a coherent and hierarchical structure, its legitimacy through democratic enactment or as an embodiment of private rights protected by the state, its autonomy as a distinct branch of law. These issues—validity, method, legitimacy and autonomy of globalized law—are frequently debated with regard to globalization, but typically with a focus on public law. This section highlights the special role of private law with regard to these issues and proposes structures for addressing these issues.

A. Validity

The first question is central especially to German legal thinking: what counts as valid private law. Three concepts must be distinguished:¹⁴⁷ Juridical validity requires issuance in the duly prescribed way by a duly authorized organ; sociological validity requires that law is effectively obeyed and enforced; ethical validity requires that law is

J. INT'L L. 384 (2006); *see also* ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 17-18 (1996) (advocating a public-law structure in private relationships).

¹⁴⁵ Gunther Teubner, *Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND ÖFFENTLICHES RECHT UND VÖLKERRECHT 1 (2003) [*Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?*], in CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE 3 (Christian Joerges et al. eds., 2004)]; *see also* ANDREAS FISCHER-LESCANO, GLOBALVERFASSUNG (2003).

¹⁴⁶ Christian Joerges, *European Challenges to Private Law: on False Dichotomies, True Conflicts and the Need for a Constitutional Perspective*, 18 LEGAL STUD. 146 (1998).

¹⁴⁷ ROBERT ALEXY, BEGRIFF UND GELTUNG DES RECHTS 139-43 (4th ed. 2002) [THE ARGUMENT FROM INJUSTICE. A REPLY TO LEGAL POSITIVISM 85-88 ((Stanley L. Paulson & Bonnie Litschewski-Paulson trans., 2004)]; *see also* OST & VAN DE KERCHOVE, *supra* note 129, at 324-41.

morally justified. Juridical validity of law, including private law, has traditionally been based on the state's authority: Even if the state does not create the substance of private law, it is law only because the state accepts it as such.¹⁴⁸ This poses obvious problems when private law moves beyond the state.¹⁴⁹

1. *Sociological Validity.* One answer is to substitute sociological or ethical for juridical validity. Legal pluralists suggest that we recognize privately made norms as law because of their sociological effectiveness. This suggestion is not entirely new—historically, non-state normative orders have long posed a challenge to the state.¹⁵⁰ Nor does it necessarily lead to radically different outcomes—states have always effectively recognized non-state normative orders even though they denied them the character of “law,” notably through incorporation, deference, and delegation.¹⁵¹ What makes this answer radical is the suggestion to give up the traditional concept of juridical validity and replace it with sociological validity. This has always been perceived as risky, as is evidenced by the historical desire in centuries past to find for the law's validity a juridical criterion of authority beyond effectiveness and correctness, however fictional.¹⁵² One reason is that social effectiveness is difficult to determine empirically. In addition, to consider a norm legally binding because it is practically effective requires a problematical is/ought crossover.

2. *Ethical Validity.* Other authors propose a quasi-natural concept of private law beyond the state, based on practical reasoning and moral principles,¹⁵³ and thereby suggest effectively substituting ethical for juridical validity. Such an idea of reasoning underlies not only some proposals for a new *ius commune*; arguably, a similar idea is implicit in proposals for a global private law based on economic efficiency or global utility maximization as objective goals. Although economics and natural law have vastly different values, both agree that law should be shaped by objective values extrinsic to the lawmaker's description. If private law is autonomous from political considerations, then dispensing with juridical validity may be less problematical than for public law, where a disentanglement of validity from the political process appears more unattractive. Whether private law is, or should be, autonomous in this sense is a different and prior question.

¹⁴⁸ Jansen & Michaels, *supra* note 4, at I.1.

¹⁴⁹ Michaels, *supra* note 122, at 612-22.

¹⁵⁰ See, e.g., Jansen & Michaels, *supra* note 4, at II.2 (*lex mercatoria*).

¹⁵¹ Michaels, *supra* note 131, at 1231-37.

¹⁵² Jansen & Michaels, *supra* note 4.

¹⁵³ PETER JÄGGI, PRIVATRECHT UND STAAT. GESAMMELTE AUFSÄTZE 3-84 (1976); James Gordley, *The Moral Foundations of Private Law*, 47 AM. J. JURIS. 1 (2002)

3. *Rethinking Juridical Validity.* Another answer is not to replace juridical validity but to rethink it. If juridical validity is defined through issuance in the duly prescribed way by a duly authorized organ, then it is not necessarily tied to the state—supranational or non-state organs may be duly authorized as well. However, the criterion of a duly authorized organ raises an immediate follow-up question, both within and outside the state: according to what standard is the organ duly authorized? And how does this standard in turn achieve validity? Obviously, juridical validity leads into infinite chains of justification. There are three ways to break such chains: They can be continued into infinity; they can be broken at some point where a foundation is simply assumed as an axiom; or they can become circular.¹⁵⁴

Can the chain of justification for private law be continued into infinity? While infinite reasoning is logically impossible, a fiction of infinity is frequently found. The common law, at least in its English version, adopts a variant when its validity is based on tradition since time immemorial.¹⁵⁵ Similarly, when the justification for a new *ius commune* is sought in the long European intellectual tradition, this is based on the fiction of an infinite chain of justification.

More frequent are attempts to break the chain of justification at one point which is used as an axiom. For state private law, this axiom lies typically in the state—in either a Kelsenian *Grundnorm* or a Hartian rule of recognition. However, there is no good reason why the only *Grundnorm* or rule of recognition should exist within the state—especially for private law, which is already relatively independent from the state. For Europe, some have already argued for an interplay of two *Grundnorms*—one of the European Communities, the other of the member states.¹⁵⁶ Moreover, once we establish the *Grundnorm* as a mere analytical tool, there is no intrinsic reason why it should be confined to traditional states.¹⁵⁷ The same is true for Hartian rules of recognition. If legal pluralists

¹⁵⁴ This is the famous Münchhausen trilemma: HANS ALBERT, TRAKTAT ÜBER KRITISCHE VERNUNFT 15-17 (5th ed. 1991) [TREATISE ON CRITICAL REASON 18-21 (1985)].

¹⁵⁵ Under English common law, customs could be recognized as law if they had existed since "time immemorial." Although this appears to represent an infinite chain of justification, in fact the chain was broken more or less arbitrarily for the year 1189 by the English Statute of Westminster in 1275.

¹⁵⁶ For the possibility of multiple *Grundnorms* or rules of recognition, see NEIL MCCORMICK, QUESTIONING SOVEREIGNTY—LAW, STATE AND PRACTICAL REASON (1999); N.W. Barber, *Legal Pluralism and the European Union*, 12 EUR. L.J. 306 (2006); see also Andreas Fischer-Lescano, *Monismus, Dualismus? Pluralismus. Selbstbestimmung des Weltrechts bei Hans Kelsen und Niklas Luhmann*, in VÖLKERRECHTSPOLITIK. HANS KELSENS STAATSVÉRSTÄNDNIS (Hauke Brunkhorst ed., forthcoming); Theodor Schilling, *On the Value of a Pluralistic Concept of Legal Orders for the Understanding of the Relation Between the Legal Orders of the European Union and its Member States*, 83 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 568-81 (1997).

¹⁵⁷ See Alexander Somek, *Staatenloses Recht: Kelsens Konzeption und ihre Grenzen*, 91 ARCHIV

are correct in stating that people owe allegiance to numerous different normative orders, this suggests the existence of various rules recognition that can validate both state and non-state laws.¹⁵⁸ The result is a situation with multiple overlapping private law orders, arguably not an inadequate conceptualization of global private law.

Finally, circular chains of justification are gaining new attraction for globalization. Autopoietic theory holds that law, in particular private law, is able to create and maintain itself through a self-recurring, autopoietic process.¹⁵⁹ This process gains special force for non-state law. Since autopoietic theory makes it possible to conceive of various legal orders that establish themselves outside the state, it has, not surprisingly, welcomed globalization discourse (albeit typically under the heading of world society).¹⁶⁰ The law is no longer conceived as a hierarchical structure; rather, different legal systems interact in a network.¹⁶¹ At the same time, this theory, based in sociology, may be open to the same criticism as the criterion of social effectiveness—an is/ought crossover.

B. Method

If private law is plural, this poses challenges for our methods, many of which have been developed in the context of state private law. A debate has begun on whether these methods are still appropriate for private law beyond the state, especially in the European context,¹⁶² but much remains to be done.

FÜR RECHTS- UND SOZIALPHILOSOPHIE 61 (2005) [*Stateless Law. Kelsen's Conception and its Limits*, 26 OX. J. LEGAL STUD. 753 (2006)]; for connections between Kelsen and autopoietic theory, see François Ewald, *The Law of Law*, in AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 36, 39-41 (Gunther Teubner ed., 1988).

¹⁵⁸ But see Massimo La Torre, *Legal Pluralism as Evolutionary Achievement of Community Law*, 12 RATIO JURIS 182 (1999) (arguing that legal pluralism in the EU requires a single rule of recognition).

¹⁵⁹ Gunther Teubner, Richard Nobles, David Schiff, *The Autonomy of Law: An Introduction to Legal Autopoiesis*, in INTRODUCTION TO JURISPRUDENCE AND LEGAL THEORY. COMMENTARY AND MATERIALS, chap. 19 (Richard Nobles & David Schiff eds., 2003).

¹⁶⁰ Gunther Teubner, *Globale Bukowina: Zur Emergenz eines transnationalen Rechtspluralismus*, 15 RECHTSHISTORISCHES JOURNAL 255 (1996) [*Global Bukowina: Legal Pluralism in the World-Society*, in GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1996)]; Gunther Teubner, *Breaking Frames: Economic Globalisation and the Emergence of lex mercatoria*, 45 AM. J. COMP. L. 149 (1997); Gunther Teubner, *Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors?*, in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION 71-87 (Karl-Heinz Ladeur ed., 2004); Graf-Peter Calliess, *Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law*, 23 ZEITSCHRIFT FÜR RECHTSZOLOGIE 185 (2002); Marc Amstutz & Vaios Karavas, *Rechtsmutation. Zu Genese und Evolution des Rechts im transnationalen Raum*, 8 RECHTSGESCHICHTE 14-32 (2006).

¹⁶¹ OST & VAN DE KERCHOVE, *supra* note 129; see also Gunther Teubner, *The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy*, 31 L. & SOC. 763 (1997).

¹⁶² Reiner Schulze, *Ein Jahrhundert BGB—deutsche Rechtseinheit und europäisches Privatrecht*, 75

1. *Beyond Domestic Law*. A first challenge to traditional methods goes against their domestic character—not only in Germany, where the highest methodological criterion is typically the legislature's real or hypothetical will, but also in the U.S., where the common law is viewed as the expression of a sovereign's will rather than a pie in the transnational sky. This domestic focus must obviously be adapted for binding supranational law. Especially in Europe, this presents challenges regarding the relationship and manifold conflicts between EU and national private law.¹⁶³ However, even beyond such supranational law, scholars argue that the interdependence among states and their legal systems makes the use of comparative law mandatory¹⁶⁴—not only for harmonized law in the European Union, but in general. This use can rest on an (implicit) assumption that a pan-European, or even global, private law exists;¹⁶⁵ but even a pluralist conception of global private law requires exchange.

2. *Coherence*. Another issue concerns the question of coherence of legal systems, dear to German private law in the nineteenth and twentieth centuries,¹⁶⁶ but far less

DEUTSCHE RICHTERZEITUNG 369 (1997) [*A Century of the Bürgerliches Gesetzbuch: German Legal Uniformity and European Private Law*, 5 COL. J. EUR. L. 461 (1999)]; Jürgen Basedow, *Anforderungen an eine europäische Zivilrechtsdogmatik*, in RECHTSGESCHICHTE UND PRIVATRECHTSDOGMATIK 79-100 (Reinhard Zimmermann, Rolf Knütel & Jens Peter Meincke eds., 1999); THOMAS M.J. MÖLLERS, DIE ROLLE DES RECHTS IM RAHMEN DER EUROPÄISCHEN INTEGRATION. ZUR NOTWENDIGKEIT EINER EUROPÄISCHEN GESETZGEBUNGS- UND METHODENLEHRE (1999) [THE ROLE OF LAW IN EUROPEAN INTEGRATION. IN SEARCH OF A EUROPEAN IDENTITY (2003) (a short version can be found in 48 AM. J. COMP. L. 679 (2000))]; Ernst A. Kramer, *Konvergenz und Internationalisierung der juristischen Methode*, in DIE ZUKUNFT DES RECHTS 71 (Christian J. Meier-Schatz ed., ZSR-Beiheft 28, 1999); Arndt Teichmann, *Die „Europäisierung des Zivilrechts“ und ihre Auswirkungen auf die Hermeneutik*, in FESTGABE ZIVILRECHTSLEHRER 1934/1935, 629-648 (Walther Hadding ed., 1999); Klaus-Peter Berger, *Auf dem Weg zu einem europäischen Gemeinrecht der Methode*, 9 ZEUP 4 (2001); UNTERSCHIEDLICHE RECHTSKULTUREN—KONVERGENZ DES RECHTSDENKENS (Heinz-Dieter Assmann et al. eds., 2001); Axel Flessner, *Juristische Methode und europäisches Privatrecht*, 57 JURISTENZEITUNG 14 (2002); Flessner, *Europäisches Privatrecht und bewegliches System*, 125 JURISTISCHE BLÄTTER 205 (2003); Stefan Vogenauer, *Eine gemeineuropäische Methodenlehre des Rechts—Plädoyer und Programm*, 13 ZEUP 234-263 (2005); Ernst A. Kramer, *Nationale Privatrechtskodifikationen, internationale Privatrechtsvereinheitlichung und Privatrechtsvergleichung zu Beginn des neuen Jahrhunderts*, 124 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT I.421 (2005); Jansen, *supra* note 88; EUROPÄISCHE METHODENLEHRE. GRUNDFRAGEN DER METHODEN DES EUROPÄISCHEN PRIVATRECHTS (Karl Riesenhuber ed., 2006).

¹⁶³ E.g. Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Discipline*, 14 DUKE J. OF COMP. & INT'L L. 149 (2004); Marc Amstutz, *Zwischenwelten: Zur Emergenz einer interlegalen Rechtsmethodik im europäischen Privatrecht*, in RECHTSVERFASSUNGSRECHT, *supra* note 141, at 213 [*In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning*, 11 Eur. L.J. 766 (2005)].

¹⁶⁴ See *supra* note 93.

¹⁶⁵ Jansen & Michaels, *supra* note 4, at I.3, also for English cases.

¹⁶⁶ Michaels, *supra* note 21, with references.

important in the United States.¹⁶⁷ Some consider systematic private law irreconcilable with the ethical pluralism of our postmodern time.¹⁶⁸ Yet, the opposite view seems at least equally plausible: only a systematic and coherent law can mediate between the otherwise irreconcilable and incommensurable ethical positions of our pluralist society.¹⁶⁹ National societies were hardly more coherent in the nineteenth century, the age of codification and systematic legal thought, than today's global society. One difference was that states were able to bring coherence through their highest courts; this was true for England since the late twelfth century and for Germany in the nineteenth.¹⁷⁰ However, the absence of central courts beyond the state does not rule out the creation of coherence altogether.¹⁷¹ One possibility is codification, in form of treaties or an official global commercial code,¹⁷² or, following the model of Restatements in the U.S., in form of unofficial restatements that try to create the same degree of coherence.¹⁷³ A second possibility is the “global community of courts”—a dialogue between different courts that see themselves as world courts.¹⁷⁴

A third possibility is the development of a transnational legal science that supplements comparative law with doctrinal analysis in order to formulate adequate transnational legal concepts and rules. A new transnational legal science would first identify and adequately describe common normative structures even where legal systems disagree on specific rules and decide concrete cases divergently. It could then, in a second step, reconstruct the divergent doctrinal approaches as different answers to common legal

¹⁶⁷ Reimann, *supra* note 8, at 20-21.

¹⁶⁸ Thomas Wilhelmsson, *The Ethical Pluralism of Late Modern Europe and Codification of European Contract Law*, in *THE NEED FOR A EUROPEAN CONTRACT LAW*, *supra* note 83, at 121, 136, 141; *but see also* William N.R. Lucy, *The Crises of Private Law*, in *FROM DISSONANCE TO SENSE*, *supra* note 138, at 177, 180-195 (such an argument is “seriously under-developed”).

¹⁶⁹ Erhard Denninger, *Recht und rechtliche Verfahren als Klammer in einer multikulturellen Gesellschaft*, in *SUMMA. DIETER SIMON ZUM 70. GEBURTSTAG 117* (Rainer Maria Kiesow et al. eds., 2005); *see also* ROBERT CHR. VAN OOYEN, *DER STAAT DER MODERNE. HANS KELSENS PLURALISMUSTHEORIE* (2003).

¹⁷⁰ R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 19-28, 88-93 (2d ed. 1988); Elmar Wadle, *Hüter der Rechtseinheit: Aufgabe und Last des Reichsgerichts im Lichte der kaiserlichen Verordnung vom 28. September 1879*, in *VERFAHRENSRECHT AM AUSGANG DES 20. JAHRHUNDERTS. FESTSCHRIFT FÜR GERHARD LÜKE ZUM 70. GEBURTSTAG* 897 (1997); *see also* Heinz Mohnhaupt, *Rechtseinheit durch Rechtsprechung? Zu Theorie und Praxis gerichtlicher Regelbildung im 19. Jahrhundert in Deutschland*, in *19 RÄTTSHISTORISKA STUDIER* 117 (1993).

¹⁷¹ *See* Ralf Michaels, *Three Paradigms of Legal Unification: National, International, Transnational*, 96 *ASIL PROC.* 333 (2002).

¹⁷² *Supra* note 109.

¹⁷³ *Supra* notes 89, 120.

¹⁷⁴ SLAUGHTER, *supra* note 100, at 29, 231-35 (2004); Michaels, *supra* note 128, at 53.

problems. These problems, together with these divergent approaches, would become the basis of transnational legal knowledge, and possibly of a transnational legal doctrine.¹⁷⁵

3. *Pluralism*. To the extent that coherence and uniformity cannot be brought about, private law method will have to deal with plurality and the lack of a hierarchical system. Here, U.S. law, which has long dealt with plurality of lawmakers and judiciaries, may provide useful experience that German law, with its traditional emphasis on coherence, is lacking. Additional experience can come from conflict of laws, which has long dealt with plurality of legal systems—provided it can be developed to deal adequately with the challenges of globalization.¹⁷⁶ Indeed, some methodologies of European and global private law explicitly endorse conflict of laws methods.¹⁷⁷

C. Legitimacy

Legitimacy is not the same as validity. Legitimacy implies there is a reason for respecting a body of law other than the authority by which it was created, be it the authority of tradition or that of enactment. One reason for regarding private law as legitimate is that it protects private rights against usurpation by the state. A different reason is that it represents the judgment of a democratic state of the proper scope of private rights and the requirements of the common good. New developments have weakened one of these reasons and strengthened the other.

1. *Substantive Legitimacy*. As long as the legitimacy of the state with its monopoly of creation and administration of law were unquestioned, all private law authorized by the state was automatically legitimate (with exceptions for fully ineffective or repulsive law).¹⁷⁸ Whether state private law remains legitimate beyond the state is more doubtful. First, state law is typically aimed at domestic situations; arguably, this makes it inappropriate for transnational situations and transactions. Second, if regulatory competition has reduced the states' legislative discretion, states can no longer provide

¹⁷⁵ See Jansen, *supra* note 88.

¹⁷⁶ See THE RETURN OF THE PRIVATE. PRIVATE INTERNATIONAL LAW MEETS GLOBAL GOVERNANCE (Karen Knop, Ralf Michaels & Annelise Riles eds., forthcoming); see also Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819 (2005); Michaels, *supra* note 131.

¹⁷⁷ *Supra* note 163; Horatia Muir Watt, *Integration and Diversity: the Conflict of Laws as a Regulatory Tool*, in THE INSTITUTIONAL FRAMEWORK OF EUROPEAN PRIVATE LAW, *supra* note 80, at 107; Gunther Teubner, *De Collisione Discursuum: Communicative Rationalities in Law, Morality, and Politics*, 17 CARDOZO L. REV. 901 (1996).

¹⁷⁸ ALEXY, BEGRIFF UND GELTUNG DES RECHTS, *supra* note 147, at 201 [THE ARGUMENT FROM INJUSTICE 89-94].

certain norms deemed desirable, for example norms aimed at the protection of weaker parties. This loss of discretion weakens the legitimacy of state private law.

Is private law beyond the state more legitimate? Supranational and transnational private law can take nondomestic concerns into account; this is one reason why many consider treaties like the CISG and private legal orders like *lex mercatoria* intrinsically superior to domestic private law. Also, since supranational law can provide a framework for regulatory competition between state laws, it can guarantee the protection of the weaker parties. EU law, for example, guarantees a certain degree of mandatory consumer protection throughout Europe and thereby isolates it from the effects of competition.

2. *Democratic Legitimacy.* A general criticism voiced against law outside the state is that such law lacks democratic legitimacy. To some extent, the democratic idea that everybody who is affected by a rule should have a say, at least indirectly, in its creation, can be transferred to the transnational sphere.¹⁷⁹ The binding force of transnational contracts between the parties, for example, can be legitimized even without a state; the same is true for the application of *lex mercatoria* to the community of merchants, provided *lex mercatoria* is truly a creation of the community of merchants.¹⁸⁰ However, large areas of law are not rooted in close communities; without a democratic mechanism, it is difficult to ensure that all parties affected by certain norms have a chance to be heard in their creation. Here, disputes over the legitimacy of norms must be resolved by other means—market solutions or ethical discourse.¹⁸¹

These are important challenges, but arguably, the lack of democratic legitimation presents fewer problems for private law. At least from a historical perspective, the legitimacy of private law was never fully linked to democracy. Even within the state, the substance of most private law is determined by experts rather than by popular will.¹⁸²

¹⁷⁹ Peer Zumbansen, *Quod Omnes Tangit: Globalization, Welfare Regimes and Entitlements*, in THE WELFARE STATE IN AN ERA OF GLOBALIZATION 135-73 (Georg Nolte & Eyal Benvenisti eds., 2003); Karl-Heinz Ladeur, *Globalization and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation State?* in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION, *supra* note 160, at 89-118.

¹⁸⁰ Teubner, *supra* note 160.

¹⁸¹ For such an attempt, based on Habermas's discourse theory, see Klaus Günther, *Legal Pluralism and the Universal Code of Legality: Globalisation as a Problem of Legal Theory* 13-17 (2003), <http://www.law.nyu.edu/clppt/program2003/readings/gunther.pdf>; see also Jens Steffek, *Sources of Legitimacy Beyond the State: A View from International Relations*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM, *supra* note 141, at 81.

¹⁸² Graf-Peter Calliess, *Weitgehende Übereinstimmung und laufendes Programm. Zur Legitimation von Privatrecht im Zeitalter der Globalisierung*, in RECHTSANGLEICHUNG. GRUNDLAGEN, METHODEN UND INHALTE, at III.1 (Karl Riesenhuber ed., forthcoming).

Moreover, private law has always retained some autonomy from state control.¹⁸³ The common law developed largely outside the government's control, and even codifications have always consisted, to a large degree, of mere restatements of legal developments and ideas developed outside the structures of the state. The codification grants these developments and ideas legislative authority, but it does not prevent subsequent development of the law, which, again, is largely at the hands of courts and scholars. In this historical view, that the new private law lacks democratic legitimacy may seem shocking but is nothing novel. Even in the democratic state, much private law has always drawn at least part of its legitimacy from substantive considerations developed by jurists and judges outside democratically legitimized lawmaking. Remembering this should help address the legitimacy of globalized and privatized private law.

D. Autonomy

A final issue concerns the autonomy of private law—from public law and values, from the state and from politics, and from non-legal disciplines and rationalities.¹⁸⁴ Moving beyond the state has ambivalent results for all three aspects.

On the one hand, there are clear indications that “classical” private law has lost its traditional autonomy. Its autonomy from public law has long been lost in the United States;¹⁸⁵ in Germany today, this autonomy is based largely on contingent sociological factors, such as the organization of the judiciary and academia, rather than on intrinsic differences of legal values.¹⁸⁶ Europeanization and globalization may restrict the states' impact on private law, but similar activities are now moving up to transnational bodies, be they the European Union or the World Bank, so autonomy from the political sphere is still not achieved. Finally, doctrine is increasingly relying interdisciplinarily on other sciences, especially on the economic analysis of law;¹⁸⁷ thus, private law scholarship may lose its autonomy vis-à-vis other academic disciplines.¹⁸⁸

¹⁸³ See, in more detail, Jansen/Michaels, *supra* note 4.

¹⁸⁴ Gunther Teubner, *Nach der Privatisierung: Diskurskonflikte Im Privatrecht*, 19 ZEITSCHRIFT FÜR RECHTSOSOZIOLOGIE 8 (1998) [*After Privatization? The Many Autonomies of Private Law*, 51 CURR. LEG. PROBS. 393 (1998)].

¹⁸⁵ *Supra* part II.B.

¹⁸⁶ Jansen/Michaels *supra* note 4, II.6., at n. 252 *et seq.*

¹⁸⁷ This is true even for Germany; see Roland Kirstein, *Law and Economics in Germany*, in 1 ENCYCLOPEDIA OF LAW AND ECONOMICS, 160-227 (Boudewijn Bouckaert & Gerrit de Geest eds., 2000); Wagner, *supra* note 60; *but see* Christian Kirchner, *The Difficult Reception of Law and Economics in Germany*, 11 INT'L REV. L. & ECON. 277 (1991). At the same time, law and economics starts to spur more disillusionment in the U.S.; see Anita Bernstein, *Whatever Happened*

On the other hand, counter-developments may result in an increase of the law's autonomy. For example, if it is true that *lex mercatoria* and international arbitration serve only individual, private interests,¹⁸⁹ then this form of private dispute resolution leads to a strict autonomy against all third-party interests and against the public sphere.¹⁹⁰ In addition, the emergence of international principles of private law and of transnational legal discourse favors a new autonomy of private law against the state. Once legal knowledge and doctrinal arguments become transnational, they transcend their origin in state laws and become independent not just from individual states but from the state in general. Finally, increasing interdisciplinarity of legal doctrine creates a new kind of autonomy: If economic reasoning now occupies the position that traditional legal doctrine had to give up,¹⁹¹ it also inherits the autonomy previously maintained by doctrinal private law. Legal arguments based on economic analysis make it difficult for the government to interfere with private law, since it is constrained, both in its lawmaking and in the interpretation of its acts, by considerations of economic efficiency.

V. Beyond the State?

If private law is no longer regarded as autonomous, valid, legitimate, and doctrinally coherent for the same reasons as in the past, we must ask what form it will take in the future. Although the questions and answers collected up until now are diverse, the answers to the various questions can be grouped along the different roles the state plays in them.

A. Revolution

A first possibility is the end of private law, at least as deriving its validity, method, legitimacy, and autonomy from the state. Private transactions might be structured by entirely different means. This first possibility, here called revolution, adopts the (early)

to *Law and Economics*, 64 MD. L. REV. 303 (2005).

¹⁸⁸ Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987); Brian H. Bix, *Law as an Autonomous Discipline*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 975 (Peter Cane & Mark Tushnet eds., 2003).

¹⁸⁹ Hans-Joachim Mertens, *Lex Mercatoria: A Self-applying System Beyond National Law?*, in GLOBAL LAW WITHOUT A STATE, *supra* note 160, at 32, 38-39.

¹⁹⁰ This corresponds to ideas behind the classical will theory of contract law, similarly developed for a private law autonomous from the state and collective interests. JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 109-10 (1991); Reinhard Zimmermann, "Heard melodies are sweet, but those unheard are sweeter ...," 193 ACP (1993) 121, 129 *et seq.*; see also JANSEN, *supra* note 86, at 25-26 with further references; CHARLES FRIED, CONTRACT AS PROMISE. A THEORY OF CONTRACTUAL OBLIGATIONS (1981); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94 (2000).

¹⁹¹ See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 4 (2004).

views of globalization as decline of the state and rejects concepts of private law insofar as they are based on the state. If Europeanization and globalization lead to a new paradigm of law, then private law can and should be rethought from the ground up. One prognosis in this camp is that law will cease altogether and that private transactions will be structured entirely by non-legal means.¹⁹² The idea of private law, especially, must yield to instrumental concerns.¹⁹³ Another prognosis is that we should stretch our understanding of what constitutes private law beyond traditional boundaries. One example can be found in the idea, prominent for some time in the 1990s, that an entity like the internet not only requires new law but in fact itself constitutes its own legal order, since it regulates and structures private conduct in the same way as private law.¹⁹⁴ In this view, the internet is viewed as autonomous and independent from the state, indeed as “sovereign”—the state cannot, nor should it, regulate it; the internet regulates itself. Instead of doctrine, the internet uses technological architecture for its creation and maintenance, but this architecture is analogous to legal doctrine:¹⁹⁵ access rights are property rights, computers can enter into contracts as agents,¹⁹⁶ and so on. Legitimacy and validity of this autonomous internet lie in an anarchical (i.e., non-state) ideal of self-determination and self-regulation, and in its opportunities for the creation of transnational communities. The virtual worlds of the internet create their own law.¹⁹⁷

Some may see great creative potential in such debates; others may dismiss them as plainly absurd. Regardless of these evaluations, it is worth remembering that revolutionary fervor often turns into restoration and that predictions that the law is coming to an end have been made again and again in history and so far failed to come true; this makes current predictions for an end of law less likely.¹⁹⁸ Perhaps all that comes to an end is a certain way of thinking about the law. Similarly, ideas about an autonomous internet as its own

¹⁹² Debra Lyn Bassett & Rex Perschbacher, *The End of Law*, 84 B.U.L. REV. 1 (2004); see also the final sentence of LUHMANN, *supra* note 35.

¹⁹³ BRIAN TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (2006).

¹⁹⁴ See the discussion in Michaels, *supra* note 131, at 1215-18; for similar ideas for markets, see Peter Dombrowski & Richard Mansbach, *From Sovereign States to Sovereign Markets?*, in GLOBAL SOCIETY IN TRANSITION 111 (Daniel N. Nelson & Laura Neack eds., 2002); Werner F. Ebke, *Märkte machen Recht—auch Gesellschafts- und Unternehmensrecht!*, in FESTSCHRIFT FÜR MARCUS LUTTER 17-30 (2000).

¹⁹⁵ LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 6 (1999) with further references.

¹⁹⁶ Gunther Teubner, *Rights of Non-humans? Electronic Agents and Animals as New Actors in Politics and Law*, 33 J. L. & SOC. 497, 506-09 and passim (2006) with further references to the American and German debates.

¹⁹⁷ Symposium: *State of Play*, 49 N.Y.L. SCH. L. REV. 1-352 (2004).

¹⁹⁸ See Steven Smith, *The (Always) Imminent Death of the Law*, 43 SAN DIEGO L. REV. (forthcoming).

normative order have become less plausible once it became clear that traditional law can, and does, regulate the internet. Even the virtual worlds of online games have their ultimate impact in the real world.

B. Resistance

A second possibility is that we may once more regard private law much as we did traditionally. This is the flip -side of revolution—resistance, the continuance of private law theory and practice under the state paradigm as before. Resistance is less ignorant than it is sometimes presented. Globalization is not unavoidable or predetermined; it may be overrated.¹⁹⁹ Especially its impact on the content of private law may be minimal—either because private law has always been detached from the state and is therefore already optimal for globalization, or because a state-based concept of private law can deal perfectly well with the challenges of globalization. The state already has norms for dealing with transnational private law in its rules on conflict of laws; the globalization of conflict of laws (or the use of conflict of laws for globalization) could be a way to keep substantive private law intact. After all, globalization is to no small degree shaped by the conduct of states, and states may well succeed in re-domesticating issues that are currently thought to escape regulation through individual states' private law.²⁰⁰ Furthermore, the jury is still out as to whether state private law is really less attractive than globalized private law, whether state courts are really less attractive than either arbitration²⁰¹ or potential supranational courts.²⁰² The state might well survive globalization and take its private law with it.

Resistance of traditional private law to globalization may be possible. What seems no longer possible, however, is to conceive of private law as state law as though this were a natural or necessary connection. One irreversible result of globalization and Europeanization discourse is that we can no longer equate law with state law without

¹⁹⁹ See Hannes Lacher, *Putting the State in its Place: the Critique of State-Centrism and its Limits*, 29 REV. OF INT'L STUDIES 521 (2003).

²⁰⁰ See Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283 (2004).

²⁰¹ For examples of parties preferring state courts over arbitration, see Eric A. Feldman, *The Tuna Court: Law and Norms in the World's Premier Fish Market*, 94 CAL. L. REV. 313 (2006); Theodore Eisenberg & Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies' Contracts*, Cornell Legal Studies Research Paper Series No. 05-023, at 16-18, 35-36, <http://ssrn.com/abstract=927423>. The classic study of the legitimacy of international arbitration and *lex mercatoria* is still YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE. INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996); see also CUTLER, *supra* note 124.

²⁰² Michaels, *supra* note 128.

justification. The forceful defense of national codifications in Germany²⁰³ and France²⁰⁴ against the possibility of a European codification is a sign that the need to justify state private law is being recognized.

C. Regression

A third possibility is to deal with the challenges of post-state private law by regressing to the model of pre-state private law.²⁰⁵ Private law was once independent from the state—if only because there was no state in the modern sense. Several different concepts of pre-state private law, explored at more length elsewhere,²⁰⁶ offer themselves as models for postnational private law. Roman law contains two: a doctrinal private law that exists essentially separately from the state,²⁰⁷ and *ius gentium* that exists separately even from the Roman society and represents a general private law of the world.²⁰⁸ Medieval European law seems another attractive candidate—the multiplicity of overlapping legal orders and claims to jurisdiction is a feature some find again in globalization,²⁰⁹ as is the lack of a clear distinction between private and public law.²¹⁰ The *ius commune*, the learned law of the European Continent that combined secular and canon law and transcended boundaries and local statutes, is used as a model for our contemporary private law in Europe.²¹¹ The *lex mercatoria*, the legal rules created in and by international trade, (allegedly) independently from state laws, have found proponents for a rebirth.²¹² Finally, the common law may offer itself as a model.²¹³

²⁰³ Barbara Dauner-Lieb, *Auf dem Weg zu einem europäischen Schuldrecht?*, 57 NEUE JURISTISCHE WOCHENSCHRIFT 1431 (2004).

²⁰⁴ PENSÉE JURIDIQUE FRANÇAISE ET HARMONISATION EUROPÉENNE DU DROIT (Bénédicte Fauvarque-Cosson & Denis Mazeaud eds., 2003).

²⁰⁵ Caruso, *supra* note 2, at III.1.

²⁰⁶ Jansen & Michaels, *supra* note 4.

²⁰⁷ Although the development of the law lay in the hands of an official, the praetor, his actual role for the development of private law was limited: Jansen & Michaels, *id.*

²⁰⁸ Harold J. Berman, *Is Conflict of Laws Becoming Passé?*, in BALANCING OF INTERESTS: LIBER AMICORUM PETER HAY ZUM 70. GEBURTSTAG 43-48 (Hans-Eric Rasmussen et al. eds., 2005).

²⁰⁹ H. Patrick Glenn, *North America as a Medieval Legal Construction* (2002), www.bepress.com/gj/advances/vol2/iss1/art1.

²¹⁰ Jansen & Michaels, *supra* note 4, at II.2.

²¹¹ *Supra* note 88.

²¹² Nikitas Hatzimihail, *The Many Lives (and Faces) of Lex Mercatoria*, in THE RETURN OF THE PRIVATE, *supra* note 176.

²¹³ See H. Patrick Glenn, *Transnational Common Law*, 29 FORDHAM INT'L L.J. 457 (2006) (discussing several different versions of transnational common laws, not all based on Anglo-American Law).

If these old ideas can be used for our times at all, they require modification. Some of the historical models are themselves doubtful. Whether a substantive *lex mercatoria* ever existed has become dubious;²¹⁴ the *ius commune* was a common academic language rather than a uniform set of rules applied uniformly before courts²¹⁵. In addition, some of the historical models were based on presumptions and presuppositions that are no longer valid. Natural law has become doubtful because we can agree neither on one transcendent norm-giver (let alone on the rules such a norm-giver would create), nor on principles of rationality that are both universal enough to apply to all humanity worldwide and specific enough to create more than just abstract and general principles. Similarly, the faith in the norm-generating force of tradition, underlying both the common law and the historical school in Germany, has been shattered by the ruptures of revolution and perversion of the law. Nevertheless, all these concerns notwithstanding, the detailed historical experience with old versions of non-state private law should be invaluable for a possible new version of non-state private law.

D. Reproduction

A fourth possibility is to reproduce on a supranational level the form of state-based private law with which we are already familiar.²¹⁶ One example is the return of codification. The proclaimed age of “decodification,” in which codes became less important and the emphasis of law moved to regulatory statutes, gave way to a recodification: Numerous countries are either codifying their private law for the first time, or even reforming their codifications. The European Union for some time seemed willing to codify private law; now it prefers a frame of reference whose only function would likely be to provide a doctrinal and conceptual background for European private law thinking. The World Bank proclaims the “rule of law” as a necessary requirement for economic success, and often this requires the implementation of legal rules. But codification is taking place outside of states and “official law” as well. The *lex mercatoria*, whose main quality was once said to be its flexibility and independence from doctrinal concepts, is now being codified—either as relatively static codifications of unclear normative force²¹⁷ or as

²¹⁴ Jansen & Michaels, *supra* note 4, at II.2.

²¹⁵ *Id.*, text accompanying note 154.

²¹⁶ PEER ZUMBANSEN, *ORDNUNGSMUSTER IM MODERNEN WOHLFAHRTSSTAAT. LERNERFAHRUNGEN ZWISCHEN STAAT, GESELLSCHAFT UND VERTRAG* (2000).

²¹⁷ Michaels, *supra* note 122.

“creeping codification.”²¹⁸ The Code, once thought quintessential to private law in the state, is translated into realms outside the state.

Reproduction can be unconscious when scholars apply their traditional understanding without asking to what extent it is based on the state. Yet, reproduction can also be a conscious attempt at translating this understanding to a new environment. Conscious reproduction is frequent in the realm of Europeanization. Since the European Union performs many of the same functions as the nation state on a higher level,²¹⁹ it is not surprising that much debate on European private law repeats debates of private law within the state. Sometimes such repetition comes explicitly, for example when the codification debate between Thibaut and Savigny is reinvoked²²⁰ (which itself was in no small part a debate over the role of the state in the creation of private law). More often, it comes only implicitly, when expectations directed at private law in the European Union mirror those we are used to from the state, without any consideration of the possibly different framework.

Reproducing state-based concepts of private law is not automatically inappropriate beyond the state; the experience from state-based private law is undoubtedly valuable. However, it must be kept in mind that certain background conditions existing within the state are lacking beyond the state, for example a centralized court system, a common legal heritage, and so on. As a consequence, reasoning that makes perfect sense within the state may lose its justification beyond the state. Naïve reproduction is likely to be inadequate.

E. Renovation

The four possibilities just mentioned are based in different ways on experience of the past. A fifth possibility is renovation: Although the past shapes the future in some way, history will take us in a direction that does not resemble the past and which we cannot envision entirely on the basis of our past experience. In this category of answers, the state

²¹⁸ KLAUS-PETER BERGER, FORMALISIERTE ODER "SCHLEICHENDE" KODIFIZIERUNG DES TRANSNATIONALEN WIRTSCHAFTSRECHTS—ZU METHODISCHEM UND PRAKTISCHEM GRUNDLAGEN DER LEX MERCATORIA (1996) [THE CREEPING CODIFICATION OF THE LEX MERCATORIA (1999)]; Charles N. Brower & Jeremy K. Sharpe, *The Creeping Codification of Transnational Commercial Law: An Arbitrator's Perspective*, 45 VA. J. INT'L L. 199 (2004).

²¹⁹ *Supra* note 85.

²²⁰ E.g. Ole Lando, *Why Codify the European Law of Contract?* 5 EUR. REV. PRIV. L. 525 (1997); see also Arnald J. Kanning, *The Emergence of a European Private Law: Lessons from 19th Century Germany*, OX. J. LEGAL STUD. (forthcoming); Ernst Steindorff, *Aufgaben künftiger europäischer Privatrechtsetzung angesichts deutscher Erfahrungen*, in Festschrift für Peter Ulmer 1393 (2003).

is just one stage in the development of the world;²²¹ codification is just a ripple in the stream of legal development.²²² The common law has always reacted gradually to changes in its environment (even if such change was not always immediately visible)²²³ Likewise, the civil law develops over time through judicial and scholarly interpretation—before the code, under the code, and, potentially, after the code.²²⁴ Our experience with the state makes a simple return to a pre-state situation implausible, but in turn our experience with a pre-state situation may save private law against a possible decline of the state. Within this category of responses, it should be possible to combine experiences from *ius commune* and from codification, from traditional common law and from the legislation of the New Deal, and to use them towards mastering the challenges from globalization and privatization.

Undoubtedly, there are problems with evolutionary models. One model is evolutionary determinism that makes a certain development look like a necessity, be it a trajectory via the European Union²²⁵ to some kind of world state²²⁶ and via European law towards world law,²²⁷ be it a trajectory through ever-growing privatization towards an ever-growing multitude of overlapping legal orders, or be it a steady decline of western law and law in general.²²⁸ Such evolutionary determinism has rightly been criticized for importing a teleological element into a predictive theory of law.²²⁹ Another model is critical rationalism, in which learning from the past and its mistakes helps us create law that comes ever closer to the ideal, although we can never know that ideal.²³⁰ Such a model can be criticized as overestimating the potential of reason, especially in the highly complex world and law of Europeanization and globalization. A third model of evolution comes

²²¹ VAN CREVELD, *supra* note 97, 415.

²²² Bernhard Windscheid, *Die geschichtliche Schule in der Rechtswissenschaft*, in WINDSCHEID, GESAMMELTE REDEN UND ABHANDLUNGEN 76 (Paul Oertmann ed., 1904); cf. Reinhard Zimmermann, *The German Civil Code and the Development of Private Law in Germany*, (2006) OX. U. COMP. L. FORUM 1, www.ouclf.iuscomp.org, text accompanying note 100.

²²³ S.F.C. MILSOM, *A NATURAL HISTORY OF THE COMMON LAW* (2001).

²²⁴ The best study on the evolution of (civil) law is MARC AMSTUTZ, *EVOLUTORISCHES WIRTSCHAFTSRECHT: VORSTUDIEN ZUM RECHT UND SEINER METHODE IN DEN DISKURSKOLLISSIONEN DER MARKTGESELLSCHAFT* (2002).

²²⁵ David Long & Lucian M. Ashworth, *Working for Peace: the Functional Approach, Functionalism and Beyond*, in *NEW PERSPECTIVES ON INTERNATIONAL FUNCTIONALISM 1* (David Long and Lucian M. Ashworth eds., 1999); Jürg Martin Gabriel, *Die Renaissance des Funktionalismus*, 55 *AUSSENWIRTSCHAFT* 121 (2000).

²²⁶ *Supra* part III.B.

²²⁷ For example, EU law is sometimes viewed as a model for WTO law; see, e.g., *THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE?* (Joseph H.H. Weiler ed., 2000).

²²⁸ *Supra* note 198 with references.

²²⁹ Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984).

²³⁰ KARL POPPER, *LOGIK DER FORSCHUNG* (1934); *THE LOGIC OF SCIENTIFIC DISCOVERY* (1959); HANS ALBERT, *supra* note 154.

from systems theory, which describes the evolution of law as neither predetermined nor intrinsically good, but rather as a contingent development, in which how the future takes place before the background of the past is unpredictable.²³¹ This model has been criticized as politically conservative and for leaving insufficient room for individual actions.²³²

Despite these methodological concerns, renovation is in many ways the most plausible development for private law. Part of this plausibility derives from its breadth and the variety of actual developments possible within it. But although its general core may sound banal, it is relevant and not obvious: The future of private law is unpredictable in its details. It likely will not look like its past nor like a negation of that past. Nonetheless, it will be shaped by that past, and knowledge of that past will be helpful to master its challenges.

VI. Conclusion

The primary aim of this article has been one of organization—to draw together and structure disparate and fragmented debates, and to raise questions that come to light from this organization. Nonetheless, some more general results have emerged.

First, the two assumptions listed in the introduction are both unhelpful; it has become clear that private law requires rethinking, since its roots in the state can no longer be assumed as self-evident. This is obvious for private law outside the state—supranational or nonnational, “privatized,” private law. However, such rethinking is necessary for the state’s private law, too. The state can no longer (if it ever could) be viewed as an all-encompassing entity; it stands in a complex relation with other institutional and social orders, supranational and non-national. This insight makes it hard to argue that private law must ultimately be legitimized and validated entirely by the state. At the same time, seeing how different state private law is from non-state private law makes it hard to argue that private law can be discussed without reference to the state.

Second, the challenges for private law are at least in part different from those for public law. On the one hand, some concerns, like the validity and legitimacy of non-state-law, are less pressing than in public law, because private law is not concerned only with issues of regulation and government. On the other hand, the fact that private law is so often discussed without explicit regard to the role of the state makes it difficult to discuss private law beyond the state. In contrast to public lawyers, who are used to arguing explicitly

²³¹ *Supra* note 224; see also the contributions to “Debatte” in Vols. 1 & 2 of RECHTSGESCHICHTE.

²³² ALLAN C. HUTCHINSON, *EVOLUTION AND THE COMMON LAW* (2005).

within the state and therefore know well which of the state's structures should be replicated or avoided beyond the state, private lawyers have yet to learn which state structures matter.

Third, private law beyond the state is bound to be less coherent and hierarchical, at least to some degree, than private law within the state. This raises new problems for those who seek clear and predictable answers. At the same time, it creates opportunities for those who advocate solutions based on a variety of sources: Once private law overcomes its necessary connection with the state, arguments from comparative law, ethics, even economics, present fewer intrinsic problems than within the legal positivism of state private law. Whether freeing private law from the state is an advantage or a disadvantage for private law will ultimately depend on whether satisfactory methods for dealing with the new pluralism can be developed; this is not yet the case.

Fourth, knowledge about the history of private law will be especially helpful for mastering future challenges, beyond the general usefulness of such knowledge. History not only helps in understanding the contemporary relation of private law and the state, which is contingent yet real. Furthermore, experiences with private law, both before the state and under the state, provide us with structures in which we can think fruitfully about private law today; they can also provide a background against which we can evaluate how we should think about private law beyond the state.

These insights are fairly general; they do not resolve more specific questions and problems of private law beyond the state. At the same time, we are convinced that these specific questions and problems cannot be addressed adequately without a clearer conception of what private law beyond the state might be about. This article is a plea for a more general, all-encompassing debate of the effects of Europeanization, globalization, and privatization on the law in general and private law in particular. It should start, not end such debates.