

1995

European Community Law from a U.S. Perspective

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EUROPEAN COMMUNITY LAW FROM A U.S. PERSPECTIVE

GEORGE A. BERMANN*

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I. INTRODUCTION

Although less than forty years have passed since the founding of the European Economic Community (now the European Community),¹ the lifetime of the Community is well marked temporally. The term of each Commission² furnishes a convenient time-line for measuring the Community's progress in legal integration. Since the 1970s, each year has been punctuated by two or more "summit" meetings of heads of state or government.³ These summits not only are key markings in their own right, but also furnish an occasion for additional monitoring of the Community's state of health. Throughout the 1970s and into the 1980s,

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1. Article G(1) of the TREATY ON EUROPEAN UNION, Feb. 7, 1992 [hereinafter MAASTRICHT TREATY] replaces the term "European Economic Community" with the term "European Community" throughout the TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957 [hereinafter EC TREATY]. The European Community now represents one of the pillars of the European Union; the latter is described in Article A of the MAASTRICHT TREATY as "founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty." *Id.* art. A.

2. Art. 158 of the EC TREATY, *supra* note 1, as amended by the MAASTRICHT TREATY, *supra* note 1, art. 11, provides that the Commission shall have a five-year term. The term of the present Commission began in January 1995.

3. Art. 2 of the SINGLE EUROPEAN ACT, effective July 1, 1987, provides that the European Council "shall bring together the Heads of State or of Government of the Member States and the President of the Commission of the European Communities," and "shall meet at least twice a year."

the Community submitted to periodic “self-examinations” through specially commissioned studies and reports on the Community’s well-being.⁴ In more recent years, intergovernmental conferences (IGCs), convened for the express purpose of negotiating amendments to the constitutive treaties, have provided additional fora for deliberately and comprehensively assessing the state of the Community and its direction.⁵ While the Community continues to fulfill its geographical “manifest destiny” through successive enlargements within the European continent, it provokes a considerable amount of interest in the effect that each particular “widening” has on the Community’s overall “deepening.”⁶

The Community has thus acquired a strong habit of taking its own measurements, and even its own temperature. Of course, the Community is a good candidate for such treatment since it is, after all, an enterprise and, like most enterprises, has its more or less well-defined criteria of success and failure. Unlike other polities, it seems never to have had the luxury of just surviving—that is to say, of merely meeting its population’s basic needs and avoiding internal and external threats to security. It has always had, and continues to have, a positive program to accomplish. Moreover, the Community has continually had to justify itself nearly every step along the way, since its very mission implies a challenge to the political and legal autonomy of some nations with a well-developed sense of sovereignty. Finally, the Community has been subject from the start to intense scrutiny by the well-established academic communities—legal, economic, and political—within each of the Member States.

My aim is neither to recount the results of the European Community’s self-examinations over the last forty years, nor make a parallel inquiry into the United States. These forty years have brought changes not only in the Community and the United States, viewed

4. For a brief discussion, see GEORGE A. BERMAN, ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 13-14 (1992).

5. The two most recent rounds of amendments to the EC TREATY, *supra* note 2, embodied in the SINGLE EUROPEAN ACT, *supra* note 3, and the MAASTRICHT TREATY, *supra* note 1, were negotiated at intergovernmental conferences [hereinafter IGCs], convened in 1985 and 1990, respectively. IGCs for these purposes were originally provided for by the EC TREATY, *supra* note 1, art. 236, and are now provided for by the MAASTRICHT TREATY, *supra* note 1, art. N. The MAASTRICHT TREATY, *supra* note 1, art. N, also specifically provides for the convening of an IGC during 1996 for purposes of further amendments to the constitutive treaties.

6. See generally John Redmond, *The Future Enlargement of the European Community*, 9 ST. LOUIS U. PUB. L. REV. 149 (1990).

separately, but also in the common understanding of the Community within the United States, and vice versa. This Article addresses the question of changing U.S. perspectives on EC law, with particular focus given to nontransactional developments. It is curious (though, for the reasons I suggested above, perhaps not surprising) that we know a great deal about the European Community's changing legal and political self-assessments over time, but rather little about how the U.S. legal conception of the Community has itself changed during that period. In other words, we probably understand the reception of European law in the European legal community better than we understand its reception in our own.

The altered reception of EC law in the United States is actually a question to which I have recently paid considerable attention. It is not, of course, very surprising that one who is devoted to understanding American conceptions of EC law would find the changing American perspective on EC law to be of interest. However, during my recent stay at the Legal Service of the European Commission, I found myself continually testing the prevailing U.S. conceptions of EC law. Whichever meeting I attended or whatever conversation I had, the dominant U.S. perspectives on EC law were always poignant.

In these remarks, I envisage the notion of the American reception of European Community law in the most common "telecommunications" sense of the term. I seek to discuss not so much the "picture" or "image" of EC law received in the United States as the "wavelengths" on which that picture or image is received. I simply ask whether the *nature* of the interest in the European Community within the American legal community has changed significantly over the last forty years and, if so, how and why?

The aspect of EC law that seemed to hold the greatest interest for Americans throughout the 1960s, 1970s, and into the 1980s, was very largely a transactional one. By the European Community's transactional aspect, I mean the impact of EC law on the shape and conduct of discrete legal transactions. Those transactions include, first and foremost, the private business dealings of U.S. enterprises with European enterprises or otherwise those affecting the European market. Transactions also include the processes by which private law claims arising out of such business dealings are resolved legally. Even the handling of state-to-state international trade disputes relative to those dealings may be considered a

transactional event. It is no exaggeration to suggest that American scholars of EC law were highly absorbed in the early years in the transactional impact of that law in all these senses. Their attention was drawn, significantly enough, to the competition law of the Common Market,⁷ to the Brussels Convention on Jurisdiction and the Enforcement of Foreign Judgments,⁸ and to direct bilateral trade relations between the United States and the European Community,⁹ to name only a few of the more salient subjects of interest.

Of course, matters were never quite that simple. Competition law, transnational litigation, and international trade were at no time the only EC law areas of interest to the U.S. academic community. Eric Stein, the most eminent U.S. scholar of EC law in those years, consistently displayed a broader appreciation of Community law than the listing of those fields would suggest.¹⁰ The transactional perspective on EC law has not been left behind since. United States and world economists alike would be rightly dismayed at any suggestion that the 1990s represent a *post*-transactional world. However, if the needs for counseling in international transactions may have defined the traditional

7. The principles of competition law of the European Community are set out in the EC TREATY, *supra* note 1, arts. 85 and 86, and in secondary legislation. See generally David J. Gerber, *The Transformation of European Community Competition Law*, 35 HARV. INT'L L.J. 97 (1994); John Temple Lang, *European Community Competition Law and Member State Action*, 10 N.W. J. INT'L L. & BUS. 114 (1989); Pierre Pescatore, *Public and Private Aspects of European Community Competition Law*, 10 FORDHAM INT'L L.J. 373 (1987); Peter D. Sutherland, *The Competition Policy of the European Community*, 30 ST. LOUIS U. L.J. 149 (1985).

8. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Sept. 27, 1968, as amended), 1978 O.J. (L 304) 77, as contemplated by the EC TREATY, *supra* note 1, art. 220. See generally Richard G. Fentiman, *Jurisdiction, Discretion and the Brussels Convention*, 26 CORNELL INT'L L.J. 59 (1993); Christian Kohler, *Practical Experience of the Brussels Jurisdiction and Judgments Convention in the Six Original Contracting States*, 34 INT'L & COMP. L.Q. 563 (1985); Robert Rowland, *The Recognition of Judgments in the European Community*, 14 MICH. J. INT'L L. 559 (1993).

9. For a brief discussion, see BERMANN, *supra* note 4, at 952-61. See also Mark L. Jones, *The GATT-MTN System and the European Community as International Frameworks for the Regulation of Economic Activity*, 8 MD. J. INT'L L. & TRADE 53 (1984); Randy E. Miller & Jessica A. Wasserman, *Trade Relations between the European Community and the United States: An Overview of Current Issues and Trade Policy Institutions*, 15 B.C. INT'L & COMP. L. REV. 393 (1992).

10. See, e.g., COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE (Terence Sandalow & Eric Stein, eds. 1982); Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981); Eric Stein, *Uniformity and Diversity in a Divided-Power System: The United States' Experience*, 61 WASH. L. REV. 1081 (1986).

interest of American jurists in EC law, it would be difficult to maintain that view today.

What features are now competing with European Community law's transactional aspects for the attention of the American audience? In other words, in what respects has EC law come to assume a *nontransactional* significance for us? I suggest that recently Community law has: (1) fostered a remarkable renewal of interest in the problems of American federalism, (2) provided an unparalleled frame of reference for evaluating U.S. law reform proposals more generally, and (3) introduced unprecedented opportunities for U.S. public authorities to engage in bilateral regulatory cooperation with overseas counterparts. My purpose in this Article is to trace briefly each of these nontransactional developments in the U.S.-EC legal relationship.

II. FEDERALISM: EUROPEAN AND AMERICAN

Questions of federalism, though never absent from the American constitutional scene, have enjoyed a special prominence in the United States in very recent times, and seem unlikely to lose that prominence in the near future. Even before the rise of the so-called "new Republican majority" in Congress,¹¹ the U.S. Supreme Court had evidenced its intention to take federalism more seriously than it had become accustomed to taking it in recent decades. No decision better exemplifies the Court's current concern with federalism than its ruling in the case of *New York v. United States*.¹² In that case, the Court suggested that principles of federalism captured in the Tenth Amendment to the United States Constitution, and even more basic notions of representative democracy, prohibit Congress from enacting legislation that compels the states to enact legislation over their objection, or from otherwise "commandeering" state resources.¹³ The Court's ruling followed, and partly relied upon, a body of academic writing and public advocacy in favor of curbing Congress' and the federal agencies' right to dictate state and local government policy.¹⁴ The Court's more recent ruling in the

11. See Helen Dewar & Kenneth J. Cooper, *GOP Senators Want to Cut 100 Programs*, WASH. POST, Jan. 4, 1995, at A1; David E. Rosenbaum, *G.O.P. Facing Some Obstacles After Fast Start*, N.Y. TIMES, Feb. 13, 1995, at A1.

12. 505 U.S. 144 (1992).

13. *Id.* at 176.

14. For academic writings, see, e.g., Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483 (1991); Michael W. McConnell, *Federalism: Evaluating the*

constitutional challenge to the Federal Gun-Free School Zone Act as in excess of the limits of federal prescriptive jurisdiction under the Interstate Commerce Clause¹⁵ further limits Congress' power to legislate in areas or in ways traditionally reserved to the states.¹⁶

Various legislative and constitutional initiatives in the current U.S. Congress show that Congress is not waiting for the courts to tell it how far it may go in shaping the agendas of state and local governments. Whether it is the constitutional requirement of a balanced federal budget, or legislative limits on the issuance to the States of unfunded federal mandates, or a more general requirement of strict cost-benefit analyses in support of federal regulations, each of these initiatives aims at lowering the federal government's involvement in the shaping of public policy with a commensurate empowering of the states and their localities.¹⁷

I am not suggesting, of course, that the revival of U.S. judicial or political interest in federalism issues is in any substantial sense traceable to EC influence. Still, the European Community presents the U.S. judiciary and U.S. political institutions with their first real opportunity to examine the operations of federalism in an overseas setting that is both of comparable scale and complexity to the United States and shares with it the same basic political, economic, and cultural values. We know that at least some of our Supreme Court Justices are aware of, and quite interested in, the contemporary European federal experience.¹⁸ However imperfect the U.S.-EC comparison, it is significant for those now thinking seriously about federalism in the United States that the European

Founders' Design, 54 U. CHI. L. REV. 1484 (1987); Deborah Jones Merritt, *The Guaranty Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988). As to public advocacy, see, e.g., U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, FEDERAL REGULATION OF STATE AND LOCAL GOVERNMENTS: THE MIXED RECORD OF THE 1980'S (1993) (MIXED RECORD); U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT AND REFORM (1984) (REGULATORY FEDERALISM).

15. *United States v. Lopez*, 115 S. Ct. 1624 (1995).

16. See generally MIXED RECORD, *supra* note 14; REGULATORY FEDERALISM, *supra* note 14.

17. See Kenneth J. Cooper & Helen Dewar, *We're Halfway Done: Tougher Tests for House Republican "Contract" Lie Ahead*, WASH. POST, Feb. 20, 1995, at A1; Michael K. Frisby, *Americans, Polled on GOP and "Contract," Like Big Picture but Have Trouble with Small Print*, WALL STREET J., Mar. 9, 1995, at A20.

18. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* 70-80 (1993); STEPHEN BREYER, *REGULATION AND ITS REFORM* 278-79, 345, 362 (1982); Antonin Scalia, *Subsidiarity à l'Américaine: C'est à Dire Preemption*, in MAASTRICHT, SUBSIDIARITY AND ITALIAN-EC RELATIONS 4 (The Mentor Group, The Forum for U.S.-EC Legal-Economic Affairs, Venice, 1992).

Community has been facing these problems very directly and deliberately for well over a decade. With the 1996 IGC on the horizon,¹⁹ and with several more of these conferences scheduled, the Europeans are unlikely to lose their focus on federalism anytime soon.

III. THE EUROPEAN COMMUNITY AS A LEGAL FRAME OF REFERENCE

The emergence of an EC frame of reference is scarcely limited to federalism issues; it extends to other institutional issues and fully to noninstitutional issues as well. U.S. policymakers have traditionally gone about their business with a marked indifference to the policies of other legal systems concerning the same or similar problems. They still exhibit such indifference more than they should. But the same broad comparability that makes the European Community instructive to us on federalism issues may also make it instructive on virtually any other aspect of governance, including the law. I suspect that the European Community may be in the process of becoming a generalized frame of reference for U.S. policymakers (though by no means the only), just as the United States has been for so long the measure (or, at least, a measure) for other countries. If this is the case, it would represent a significant change in U.S. legislative and regulatory attitude, and in my judgment a healthy one. Whatever one's opinion of this development, it could not realistically have occurred until the European Community had acquired its present profile as a large and complex regulatory environment having political, economic, and cultural characteristics clearly recognizable to us in the United States.

Although the emergence of a EC frame of reference may be new and important, it need not exclude the development of other more or less bilateral—or even multilateral—frames of reference. Moreover, within the U.S.-EC frame of reference, references properly run in two directions. I shall once more take federalism as my initial example, but the point is a decidedly more general one. Those who have been following European Court of Justice (ECJ) case law on Article 30, concerning the elimination of nontariff barriers to the free movement of goods,²⁰ know that that ECJ

19. See MAASTRICHT TREATY, *supra* note 1, art. N.

20. The EC TREATY, *supra* note 1, art. 30, forbids “[q]uantitative restrictions on imports and all measures having equivalent effect.” See generally Manfred A. Daus, *The System of the Free Movement of Goods in the European Community*, 33 AM. J. COMP. L. 209 (1985); David T.

has been in search of a new framework for dealing with these issues. More particularly, they have been in search of a principled basis on which to restrict an expansive and rather dogmatic jurisprudence on the subject. However, the ECJ's most notable recent effort in that direction, the judgment in the case of *Keck and Mithouard*,²¹ has itself been subject to severe criticism as illogical and even simplistic.²² I have found that at least some EC officials, in Brussels and Luxembourg alike, believe that U.S. Supreme Court decisions may be instructive in this regard. Though far from unproblematic, the prevailing Supreme Court case law on the "dormant" interstate commerce clause has taken the ECJ down quite different, and in some ways more promising, avenues of analysis. There appears to be at least some European interest in the idea, originating in the Supreme Court's "dormant" commerce clause case law, that the clause has no application at all in the absence of an actual and demonstrable burden on interstate commerce.²³

The EC frame of reference applies to institutional issues extending well beyond federalism as such. The IGC scheduled for 1996 will deal with the whole next generation of treaty amendments required for the European Community's continued functioning into the next century and, as noted,²⁴ this is unlikely to be the last such conference. The Commission has already determined, in preparation for the heavy institutional agenda facing that IGC, to assemble a committee of foreign experts to advise it on those issues and Americans are likely to be among them. The Commission's position seems to be that the experts' experiences in foreign countries may be useful to it. One example of such an issue is the establishment within the European Community of independent agencies that would function with greater or lesser independence from the Commission and be able to capture the benefits of

Keeling, *The Free Movement of Goods in EEC Law: Basic Principles and Recent Developments in the Case Law of the Court of Justice of the European Communities*, 26 INT'L LAW 467 (1992).

21. Judgment of November 24, 1993 in Joined Cases C-267/91 and C-268/91 (not yet officially published).

22. See A. Mattera, *De l'arret "Dassonville" à l'arret "Keck": L'obscur Clarté d'une Jurisprudence Riche en Principes Novateurs et en Contradictions*, 1 REVUE DU MARCHE UNIQUE EUROPEEN 117 (1994); see also Note, 1 COLUM. J. EUR. L. 120, 128 (1994-95).

23. See *Barclays Bank PLC v. Franchise Tax Bd.*, 114 S. Ct. 2268 (1994); *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205 (1994); *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994); *Oregon Waste Systems, Inc. v. Department of Env. Quality*, 114 S. Ct. 1345 (1994); *Northwest Airlines, Inc. v. County of Kent*, 114 S. Ct. 855 (1994).

24. See MAASTRICHT TREATY *supra* note 1, art. N and accompanying text.

greater expertise and efficiency.²⁵ There is good reason to suppose that the 1996 IGC will find itself in a position to benefit from the American experience with independent regulatory agencies, and with the various instruments that the Executive Branch has devised over time to solve the problems of coherence and coordination that such fragmentation of power almost invariably raises.

Institutional questions, however, do not even begin to exhaust the field over which the United States and the European Community have become mutual frames of legal and policy reference. It was virtually inconceivable that the European Community would develop and adopt a directive on insider trading²⁶ without taking a long and careful look at U.S. law and practice in that sphere. Conversely, the recently revived initiative to enact uniform products liability legislation in the United States is unlikely to proceed in ignorance of the 1985 EC directive harmonizing the Member States' legislation on products liability.²⁷ Countless other examples exist. They all suggest that the United States and the European Community are actually in a position to carry out the largest and most ambitious exercise in law reform by the comparative method that the world has ever seen, if they choose to do so.

IV. INTERNATIONAL REGULATORY COOPERATION

From this conclusion, it is a relatively small step to envisage a veritable program of international regulatory cooperation between the United States and the European Community. By "international regulatory cooperation," I mean the process by which U.S. federal

25. See Claus-Dieter Ehlermann, *Case for a Cartel Body: Europa*, FIN. TIMES, Mar. 7, 1995, at 14; Simon Kuper, *Drug Agency Will Draw Companies*, FIN. TIMES, Jan. 25, 1995, at 8; Caroline Monnot, *Les Enjeux du Téléphone du Futur: Une Autorité Européenne?*, LE MONDE, July 14, 1994, at 16; Craig R. Whitney, *With European Union's Arrival, Fears on Economy Cast a Shadow*, N.Y. TIMES, Oct. 30, 1993, at 1, col. 1.

26. Council Directive 89/592/EEC of Nov. 13, 1989, coordinating regulations on insider trading, 1989 O.J. (L 334) 30. See generally Barbara Crutchfield George, Maria Kathleen Boss & Marty Haraldson, *The European Community Directive Regulating Insider Trading: Harmonizing Difficulties for the United States*, 22 ANGLO-AM. L. REV. 257 (1993); Thomas Lee Hazen, *Defining Illegal Insider Trading: Lessons from the European Community Directive on Insider Trading*, 55 LAW & CONTEMP. PROBS. 231 (1992).

27. Council Directive 85/374/EEC of July 25, 1985, on the laws, regulations and administrative provisions of the Member States concerning liability for defective products, 1985 O.J. (L 210) 29. On current U.S. products liability initiatives at the federal level, see Stephen Labaton, *G.O.P. Preparing Bill to Overhaul Negligence Law*, N.Y. TIMES, Feb. 19, 1995, at 1.

agencies and the European Commission directorates-general conduct their respective regulatory activities through various forms of collaboration with the other.²⁸ In a growing number of fields—aviation, food and drug, and telecommunications, for example—departments or agencies of the U.S. government are in fact engaging in collaborative regulatory activities with their EC counterparts.²⁹ Such initiatives may be prompted by a variety of considerations. Regulators observe that they face similar problems and stand to benefit from sharing information, research and experience in addressing them. Moreover, by making their regulatory standards fairly common, national officials place themselves in a position to take mutual advantage of each other's enforcement activities and resources.³⁰ Finally, private industry ordinarily prefers to operate in a reasonably uniform regulatory environment of the sort that international regulatory cooperation may be capable of producing; it may find as a result that the overall cost of conducting multinational business is lowered.

On the other hand, intensive regulatory collaboration raises difficult political, legal, and administrative problems. Assuming that it goes beyond the mere exchange of views or of documentary material, collaboration can considerably complicate the usual regulatory process. It may introduce criteria that are foreign to the usual domestic administration. Collaboration may also complicate regulation procedurally, for example, by reducing the degree of transparency or the forms of public participation that are possible. When two or more nations collaborate in regulation, they may in any event find themselves operating more in the mode of negotiation than lawmaking. The more substantive question also arises of whether the participating nations should seek an accommodation between their standards, settle for something more in the nature of a lowest common denominator, or possibly pursue the highest possible standard of protection. Harmonization inevitably raises the

28. See George A. Bermann, *Regulatory Cooperation with Counterpart Agencies Abroad: The FAA Aircraft Certification Experience*, 24 LAW & POL'Y INT'L BUS. 669 (1993); ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 1991 ANN. REP. 63 et seq.

29. *Id.* On international regulatory cooperation generally, see ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, REGULATORY CO-OPERATION FOR AN INTERDEPENDENT WORLD (1994).

30. George A. Bermann, *Managing Regulatory Rapprochement: Institutional and Procedural Approaches*, in REGULATORY CO-OPERATION FOR AN INTERDEPENDENT WORLD, *supra* note 29, at 73.

issues of whether uniformity or merely convergence is required, and the extent to which local differences and local preferences can justifiably be suppressed in the interest of having common standards and procedures.³¹

In sum, international regulatory cooperation, though highly promising, is problematic in that it risks distorting both prevailing policies and procedures. To that extent, it necessarily raises questions of democratic legitimacy and democratic accountability. My aim here is not to explore either the promises or the pitfalls of international regulatory cooperation,³² but rather to underscore that the reciprocal involvement of the United States and the European Community in each other's regulatory processes has lent their legal relationship still another new and important nontransactional dimension.

V. CONCLUSION

My remarks thus far are meant to convey my enthusiasm over the unveiling of new horizons for the U.S.-EC legal relationship. That relationship seems poised to transcend the boundaries of transactional law, such as competition, trade and transnational litigation law, which have very largely defined U.S. interest in EC law and legal developments. But even if I have correctly identified and characterized the elements of change, I may be mistaken in applauding them. Let me raise, in a final series of remarks, what seem to me to be the most salient objections to my characterization and evaluation of the trends.

First, the very distinction between the transactional and the nontransactional may be called into question. At the very least, this distinction calls to mind a more conventional, and often discredited,

31. See John Braithwaite, *Prospects for Win-Win International Rapprochement of Regulation*, in REGULATORY CO-OPERATION FOR AN INTERDEPENDENT WORLD, *supra* note 29, at 201; Scott H. Jacobs, *Regulatory Co-operation for an Interdependent World: Issues for Government*, in REGULATORY CO-OPERATION FOR AN INTERDEPENDENT WORLD, *supra* note 29, at 15; Giandomenico Majone, *Comparing Strategies of Regulatory Rapprochement*, in REGULATORY CO-OPERATION FOR AN INTERDEPENDENT WORLD, *supra* note 29, at 155; James K. Martin & Alan Painter, *Seeking Mutual Gain: Strategies for Expanding Regulatory Co-operation*, in REGULATORY CO-OPERATION FOR AN INTERDEPENDENT WORLD, *supra* note 29, at 93; Jacques Pelkmans & Jeanne-Mey Sun, *Towards a European Community Regulatory Strategy: Lessons from "Learning-by-Doing,"* in REGULATORY CO-OPERATION FOR AN INTERDEPENDENT WORLD, *supra* note 29, at 179.

32. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra* note 29.

distinction between private and public law.³³ Arguably, what I have shown is merely that the public law side of the U.S.-EC legal relationship has grown in importance along with the public side of the law generally, to the relative detriment of traditional private law. In each of the scenarios that I described above, government regulators essentially occupy center stage, whether borrowing from the other side in the reshaping of their law or engaging in direct regulatory coordination in pursuit of a more common regulatory environment. Some might criticize my apparent preoccupation with these aspects of the modern regulatory state and my apparent neglect of the EC law subjects that bear most directly on private commercial behavior: corporate, tax, and contract law, as well as more specialized business law topics. This objection, however, suffers from the same flaw that has come to discredit the sharp distinction between public and private law. Even those legal regimes that we most closely associate with private economic activity, such as corporate, tax, and contract law, form part of the overall regulatory environment. Conversely, business is governed as fully by enactments of the regulatory state as by traditional private law sources.

Second, the comparative and collaborative activities that I have identified proceed on the premise that the United States and European Community are not profoundly different as legal environments. But in fact they do represent important differences. For example, the United States is a two-centuries old federation whose constituent units had had relatively little experience in self-government prior to forming a union. It is characterized by an exceedingly high level of mobility. It occupies a culturally and linguistically unified landscape. By contrast, the European Community has had to contend with Member States that have had long and successful experiences with political independence, that retain strong cultural and linguistic particularities, and whose populations are correspondingly less mobile. As the European Community expands

33. On this distinction, see Randy E. Barnett, *Foreward: Four Senses of the Public Law—Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267 (1986); Alan David Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237 (1987); Jonathan Hill, *Public Law and Private Law: More (French) Food for Thought*, 1985 PUB. L. 14 (1985); L. Harold Levinson, *The Public Law/Private Law Distinction in the Courts*, 57 GEO. WASH. L. REV. 1579 (1989); Alfred P. Rubin, *Private and Public History: Private and Public Law*, 82 ASIL PROCEEDINGS 30 (1990); Charles Sampford, *Law, Institutions and the Public/Private Divide*, 20 FED. L. REV. 185 (1992); Harry Woolf, *Public Law—Private Law: Why the Divide? A Personal View*, 1986 PUB. L. 220.

eastward, its relative heterogeneity in these and other respects may only become more pronounced.

Perhaps because of its well-defined territorial distinctions, the EC has thus far behaved in accordance with the view that geographical criteria count heaviest in determining the structure and organization of political power. Overall political trends in the United States, well illustrated in the outcome of the fall 1994 congressional elections, suggest that the salient political lines in the United States are not geographical but rather socio-economic ones. In the very long term, the European Community will probably develop political lines that are as fully socio-economic as they are territorial. Yet, until it does, policy comparisons with the United States will be dangerous.

Finally, even if the European Community provides an apt frame of reference for U.S. law, as well as a suitable partner in regulatory cooperation, the further question remains whether it is in itself a sufficient one. The twenty-first century will be one in which other regional groupings present themselves for consideration more forcefully than ever in these nontransactional respects. Those groupings will do so differently, depending on the issues at hand and the changes taking place within the groupings themselves. The United States is, at the same time, situating itself within an altered North American regional environment. This fact cannot help but affect the continued suitability of a EC legal frame of reference for the United States and challenge the European Community's currently privileged position in U.S. regulatory cooperation.

Because the European Community's preeminence in these respects will be subject to competition and other stresses in the period ahead is not, however, a reason to minimize the changes in the U.S. conception of EC law that I have described. It has been one thing to consult European law (or indeed any foreign law) for purposes of designing, executing, and "mopping up" after international transactions. It is quite another thing to enlist that law in the analytical and critical challenges facing the U.S. legal system more generally. The current U.S. perspective on EC law has already made that transition.

