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## Consumerism Versus Producerism: A Study in Comparative Law

**ABSTRACT.** The spread of American-style “consumerism” is a burning global issue today. The most visible symbols of American consumerism, large enterprises like Wal-Mart and McDonald’s, attract vitriolic attacks in many parts of the world. Political conflict in Europe (and elsewhere) turns largely on the question of whether legal systems everywhere must inevitably follow the American model. Despite the global importance of the consumerism debates, though, comparative lawyers have found little to say. In an effort to develop an analytic comparative law approach to the problem of global consumerism, this Article proposes to revive an analytic distinction that was common in the 1930s: the distinction between “consumerism” and “producerism.” A producerist legal order tends to revolve around rights and interests on the supply side of the market: it focuses on the interest of some class of producers or distributors (such as workers, small shopkeepers, or the competitors in a given industry). A consumerist legal order, by contrast, tends to focus on rights and interests on the demand side of the market—in particular, on the consumer economic interest, understood primarily as an interest in competitive prices. Producerist legal orders can take forms quite different from consumerist ones, both when it comes to economic regulation in the law of antitrust and retail and when it comes to fundamental conceptions of the nature of rights. The distinction between consumerism and producerism involves some real complexities, and it must be used with care. Nevertheless, this Article argues, it is of fundamental importance for classifying and analyzing legal systems, and in particular for understanding basic and persistent differences between continental Europe and the United States.

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*I believe we are on the threshold of a fundamental change in our popular economic thought, that in the future we are going to think less about the producer and more about the consumer.*

—Franklin Delano Roosevelt, 1932<sup>1</sup>

*American consumerism threatens the globe.*

—Hugo Chavez, 2006<sup>2</sup>

## INTRODUCTION

Is there such a thing as “consumerist” law? Does the spread of “consumerist” law pose some kind of danger to the health of human societies? There are politicians and intellectuals all over the world who say so. Many of them blame America in particular for exporting a poisonous brew of consumer-oriented law, empty materialism, and heedless waste of resources. Leaders of the hard left wing, like Hugo Chavez of Venezuela, are particularly vocal: Chavez has declared that American consumerism, marching hand in hand with American militaristic imperialism, threatens the globe.<sup>3</sup> But the hard left is not alone on this issue. There are also mainstream figures, especially in Europe, who express anguish about the corrosive spread of American consumerism in a globalizing world. Even the conservative European press sometimes rumbles about the American consumerist threat: for example, *Le Figaro*, a French newspaper that generally promotes a relatively benign view of the United States, ran an article in 2002 declaring that “American enterprises have disseminated veritable commercial traps for the young generation. . . . Cultural rootlessness is what American firms like McDonald’s and Nike are selling to European youth.”<sup>4</sup> American consumerism has many critics at home too—notably two prominent Harvard philosophers, Michael Sandel<sup>5</sup> and the late

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1. LAWRENCE B. GLICKMAN, *A LIVING WAGE: AMERICAN WORKERS AND THE MAKING OF CONSUMER SOCIETY* 156 (1997).
  2. Associated Press, *Consumerism Threatens Globe: Chavez*, HINDU (Chennai), Jan. 28, 2006, at 18, available at <http://www.thehindu.com/2006/01/28/stories/2006012802941400.htm>.
  3. *Id.*
  4. Sonia Devillers & Pierre-Olivier Julien, *Ces jeunes qui aiment Nike mais pas l'Amérique* [*These Young People who Like Nike, but Not America*], FIGARO (Fr.), Aug. 1, 2002, *Économie*, at VIII.
  5. Sandel has campaigned vigorously against the culture of consumerism that he associates with chain stores like Wal-Mart. Consumerist law, for Sandel, is the enemy of republican self-government: when the law reduces us all to consumers, Sandel argues, it robs us of our connection to self-governing producer institutions like small businesses and unions, leaving us dependent on the large enterprises that supply us with the consumer goods we crave.

John Rawls, who decried the spread of an American style of “civil society awash in a meaningless consumerism” shortly before his death.<sup>6</sup>

Not everybody is a critic of American consumerism, however. For example, another Harvard professor, historian Lizabeth Cohen, gives consumerism credit for opening up political possibilities for American women and racial minorities: “Citizen consumers,” writes Cohen in her 2003 book *A Consumer’s Republic*, are people who are ready to make vigorous demands for rights.<sup>7</sup> Ralph Nader has, of course, made a major American political career saying something similar. And then there are legal scholars, like the eminent conservative Robert Bork, who insist on the supreme importance of consumer welfare in sensible economic legislation. “The only legitimate goal of American antitrust law,” as Bork famously put it in his book *The Antitrust Paradox*, “is the maximization of consumer welfare.”<sup>8</sup> Bork undoubtedly speaks for the large majority of *bien pensant* legal scholars in America today. Indeed, if we open a standard American antitrust textbook, we find the confident assumption that countries that fail to adopt the American approach will fail to prosper.<sup>9</sup> On the European side of the Atlantic too, there are proponents of the American way of doing things: “[T]he political discovery of the consumer,” as one of them recently wrote in the *Wall Street Journal*, “is the best economic news of recent history.”<sup>10</sup>

Whether they are for it or against it, most of these observers agree that the drama of globalization has something to do with the creeping spread of American “consumerism” to the rest of the world—and most of them write on the topic with some passion. Let us call it the “Wal-Mart Question,” since so many critics worldwide regard Wal-Mart as the vector of American consumerist influence.

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MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 221-49 (1996).

6. John Rawls & Philippe Van Parijs, *Three Letters on The Law of Peoples and the European Union*, 7 REVUE DE PHILOSOPHIE ÉCONOMIQUE [REVIEW OF ECONOMIC PHILOSOPHY] 7 (2003) (Fr.), available at <http://www.uclouvain.be/cps/ucl/doc/etes/documents/RawlsVanParijs1.Rev.phil.Econ.pdf>.
7. LIZABETH COHEN, A CONSUMERS’ REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA 18-51 (2003).
8. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 51 (1978).
9. LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 2-3 (2d ed. 2006) (“In a world in which the most competitively fit enterprise survives and thrives, a nation with vigorously enforced competition laws may have a comparative advantage over other nations. That nation’s enterprises, honed by competition in the home market, may be better equipped to compete in global markets.”).
10. Ann Mettler, Editorial, *Meet the European Consumer*, WALL ST. J. EUR., Jan. 29, 2007, at 15.

So how should legal scholars approach these often ferocious debates over the Wal-Mart Question? Surely we ought to have something to say. To be sure, it is hard to take figures like Hugo Chavez seriously; some of what one hears about consumerism amounts to little more than ranting. Nevertheless, it seems obvious that there is an issue here that deserves careful analysis. In particular, shouldn't specialists in comparative law be weighing in? After all, at the heart of the debates over consumerism lie claims about comparative law: that some legal systems are more "consumerist" than others; that American law in particular is a variety of "consumerist" law; that the spread (or as comparativists might put it, the "transplant"<sup>11</sup>) of consumerist law represents a force for deep cultural and social change and that a "consumerist" legal order will tend to transplant itself to societies throughout the globe.

Yet the sad truth is that comparative lawyers have contributed essentially nothing on the subject of global consumerism. Instead of wading into this debate, most comparativists continue to busy themselves with other topics—most especially topics involving the well-worn contrast between the common law and civil law traditions. My hope, in this Article, is to do something to change this state of affairs.

I will focus on two problems. The first is the problem of defining "consumerist" law—a problem that turns out to be both vexing and fertile. As I will argue, "consumerist" law is best thought of as opposed to "producerist" law, odd and unfamiliar though the latter term may sound. If we classify modern legal systems according to whether they look more consumerist or more producerist, we can gain significant insight into the dynamic of leading controversies in the world. My second focus is on the question of whether consumerist law is inevitably transplanting itself, bringing what the American press calls the "consumerist ethos"<sup>12</sup> with it. On that score, I will voice some skepticism, contending that continental European law is in fact resisting American-style consumerism with some success. The Atlantic world is divided, I will argue, between a more strongly consumerist America and a more strongly producerist Europe.

Before turning to these two problems, though, I will begin with a bit of methodology—with a brief reflection on why comparativists have found so little to say about consumerism. Like a number of other thoughtful contemporary comparativists, I think the field needs to broaden its orientation. Traditionally minded comparative lawyers write in ways that reflect the

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11. The classic statement is ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (1974).

12. Tom Hundley, *Germany: Now Open Sundays? Country's Culture of Shopping Slowly Changing*, CHI. TRIB., Jan. 28, 2007, at 13.

concerns and interests of the legal profession, while neglecting the sorts of issues that preoccupy social scientists and political leaders. Thus, they focus on topics like the different jurisprudential approaches and procedures of the common law and civil law traditions, while finding little to say about the role of the law in different socioeconomic systems. The result is that comparative law scholarship often seems out of tune with the dominant issues of the modern world. Accordingly, our first step in attacking the consumerism problem should be to shake free from our comfortable habit of addressing ourselves to the community of lawyers. Instead, we should write for a wider audience of readers concerned about contemporary differences in social and economic orientation.

In particular, when it comes to the great Wal-Mart Question, we should develop an analytic contrast between “consumerism” and “producerism.” The idea that there is a conflict between consumerist and producerist orientations may sound strange to lawyers, but it has been around for a long time. Early twentieth-century political theorists like Walter Weyl believed that there was a conflict between politics oriented toward producer interests and politics oriented toward consumer interests.<sup>13</sup> Contemporary social and political commentators say the same thing; for example, Benjamin Barber writes in his new book *Con\$umed* that market society has witnessed the “dominion of consumers over producers.”<sup>14</sup>

The basic idea behind what these authors say is simple enough. They argue that there has been a deep shift in the politics of industrial societies over the last two centuries. As Barber puts it, “productivist capitalism” has slowly given way to “consumerist capitalism.”<sup>15</sup> What does this mean? It means that in the early phases of the development of industrial society, politics focused on the rights of actors on the supply side of the market—on the rights of producers (as well as distributors). Thus, traditional socialist politics emphasized the rights of one class of producers, the workers. But traditional industrial politics was not limited to socialism, and the traditional orientation toward producer rights was not limited to workers: there were also less socialistic varieties of traditional politics, focusing on the rights of other classes of producers and distributors—for example, the rights of competitors in a given industry to be protected against “unfair competition,” or the rights of small retailers to be protected against big discount stores. Traditional industrial politics had many variants, on both the left and the right. But whether left-wing or right-wing, it

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13. See *infra* Part II.

14. BENJAMIN R. BARBER, *CON\$UMED: HOW MARKETS CORRUPT CHILDREN, INFANTILIZE ADULTS, AND SWALLOW CITIZENS WHOLE* 177 (2007).

15. *Id.* at 9.

was very broadly a politics of the supply side. It was a politics of rights and protections for producers and distributors—what we can call, for the sake of brevity, a politics of producer interests.

By contrast, the twentieth century has witnessed “the political discovery of the consumer,”<sup>16</sup> especially in America. In the 1932 words of Franklin Roosevelt, we now “think less about the producer and more about the consumer.”<sup>17</sup> This means that in contemporary America, politics focuses more on consumer rights than it used to—on rights and interests on the demand side of the market. Thus, instead of emphasizing producer protections like workers’ rights, or the right of competitors to be safe from “unfair competition,” modern American policymakers tend to emphasize the right of consumers to buy goods and services at competitive prices, or the right of consumers to warranties of quality and safety. Modern American policy thinking has thus shifted its tenor from producerism to consumerism—from supply-side-oriented politics to demand-side-oriented politics, from producer rights and protections to consumer rights and protections. Defenders of the rise of consumerism see many advantages in this historic shift from the politics of the supply side to the politics of the demand side. In particular, many of them believe that the consumerist orientation helps put an end to a style of politics addicted to inefficient producer protections. By contrast, cultural critics like Barber and Sandel find the shift to consumerism morally and politically troubling.

As this Article argues, this contrast between producerism and consumerism is of considerable value for understanding the comparative law of the economy today. The best way to analyze many of the dominant legal conflicts in today’s world is indeed through the lens of conflict between law oriented toward producer interests and law oriented toward consumer interests, between law oriented toward rights on the supply side and law oriented toward rights on the demand side. Certainly classifying legal orders in that way can be more revealing than talking about the common law and civil law families.

Nevertheless, as I will insist, classifying legal orders into consumerist and producerist categories is not a straightforward task. On the contrary, the problem requires some careful work in comparative law, to which this Article is devoted. We cannot talk intelligently about consumerism and producerism unless we acknowledge a number of ambiguities and complexities.

First of all, much depends on ambiguities in the conception of the consumer interest: as I shall argue, there is more than one variety of

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16. Mettler, *supra* note 10.

17. GLICKMAN, *supra* note 1, at 156.

“consumerism.” In particular, it is essential that we distinguish between the consumer *economic* interest, an interest in low prices, shopping convenience, and the like, and the consumer *protection* interest, an interest in legal guarantees of the safety and quality of goods and services. What the enemies of consumerism really fear is law favoring the first of these interests, the economic interest: they reject law that aims to lower consumer prices no matter what the cost to producers and distributors. In particular, they reject law that allows enterprises like Wal-Mart to offer low prices at the cost of protections for workers and small-square-footage stores. Law favoring the consumer *protection* interest, by contrast, poses fewer dangers to historic producer protections. As we shall see, a country can introduce a great deal of paternalistic consumer protection legislation while still leaving many historic producer protections in place. This means that there is no simple opposition between consumerism and producerism. Only *economic* consumerism represents a true menace to the producerist outlook, and the right question to ask is whether economic consumerism is inevitably transplanting itself.

If we must be careful in defining the consumer interest, moreover, the same is no less true when it comes to the producer side. Indeed, I will lay much emphasis on the fact that there is no single producer interest. Producerist law does not favor “the” producer interest, but *some* producer interest. When we speak of producerism, we are not speaking of any particular legal program, but of law that tends to focus on rights, interests, and most especially conflicts on the supply side. Indeed, as we shall see, the producerist worldview generally supposes that the problems of the law are very much problems of conflict between different classes of producers.

My topic, let me emphasize, is differences in worldviews. The differences between consumerism and producerism that I will trace are differences in the politics of the law, differences in the values embraced by different legal cultures. They have to do with whether the law *perceives* activities on the supply side or on the demand side as most deserving of protection. This Article is thus not a study of the actual economic impact of the law—of who gains or loses from any particular piece of legislation. The actual impact of a given piece of legislation may lag far behind its ambitions, as every worldly person knows. This Article is intended only to describe the ambitions, not to assess the impact—to describe how different societies settle on different economic identities as the ones of the greatest value, not whether those societies succeed or fail in the pursuit of their economic policies.

And as I shall insist throughout, the core problems raised by consumerism and producerism are indeed problems about identity. They are problems that turn, as it were, on a kind of economic identity politics. The enemies of consumerism sometimes talk as though there were some class conflict between

“the” consumers and “the” producers. Yet of course consumers and producers are not two different classes of persons. All productive members of society in a modern economy have both of these identities: we are all both “consumers” and “producers.” When a worker works, he is a producer; when he shops, he is a consumer. Correspondingly, the choice between emphasizing consumer rights and emphasizing producer rights is *not* a choice between favoring “the” economic class of consumers and favoring “the” economic class of producers. It is a choice about which of these two identities we will regard as deserving protection by law. It is a value choice about whether we think that the citizen’s interests in his guise as “consumer” are more fundamental than his interests in his guise as “producer,” or vice versa.

I will take my examples from the United States, on the one hand, and, on the other, from the leading continental economies of Germany and France. Germany and France, I will argue, remain far more oriented toward producer and distributor interests (for both of which I will use the shorthand “producer interests”) than the United States, even in this high age of consumerism. European policymakers often claim that Europe has made “the political discovery of the consumer,” but this statement is only true if we qualify it carefully. Continental law is indeed putting a growing emphasis on the consumer *protection* interest, developing many paternalistic guarantees of the safety and quality of goods and services. But the consumer *economic* interest is making slower headway. The result, as I will try to show, is that contemporary continental law can leave many producer protections on the books. This reflects a fundamental fact about continental cultures: countries like France and Germany remain both far more paternalistic and far more producerist in their deep cultural orientation than America.

Indeed, producerism is very much alive in the legal cultures of continental Europe. Despite all the global pressures to embrace economic consumerism, when continental Europeans gaze upon the modern marketplace, they remain much more likely than Americans to perceive rights and interests on the supply side, rather than on the demand side. Thus when it comes to basic labor law, they remain much more ready than Americans to think of workers’ rights as fundamental. When it comes to competition law, they remain more likely than Americans to focus on the rights of competitors to market-share, rather than on the rights of consumers to benefit from competitive prices. When it comes to the law of retail, they remain more likely to find ways to protect small shopkeepers against large retail outfits. I will offer numerous other examples too. In particular, I will argue that old guild and artisanal traditions are far more vigorous in Europe than they are in the United States. Indeed, the strength of their artisanal traditions has much to do with the successes of continental economies, which are specializing in high-end, luxury, and

precision goods. The net result is a continental Europe where artisanal traditions remain strong, where small shopkeepers benefit from important legal protections, and where workers' rights are far more important than gender or race rights. Europe, I will conclude, is not turning into the United States.

One caveat is in order: the Euro-American differences that I will trace are relative, not absolute. I will not claim that American law is purely devoted to economic consumerism, nor that continental European law is purely producerist. Instead, I will claim that American law is *more* consumerist and Europe is *more* producerist. But though the differences are merely relative, they are there, they are persistent, and they testify to a deep transatlantic divide in basic perceptions of the risks and dangers of modern economic life. Moreover, the supposed pressures of global economic competition are not compelling Europeans to embrace economic consumerism. Things are certainly changing, but the continental Europe that I will portray is not dying: Germany and France have not made the supposedly inevitable transition from law of the supply side to law of the demand side.

Part I of this Article begins with methodology, deploring the failure of comparative law to address issues like consumerism. Part II describes the emergence of the conflict between producerism and consumerism in the political and economic thought of the early twentieth century. Part III sketches out a basic contrast between two different approaches to law, economic consumerism and producerism. Part III also lays weight on the fundamental importance of distinguishing between the consumer economic interest and the consumer protection interest. Parts IV and V explore a variety of areas of American, French, and German law—especially the law of retail shopping. They focus on different aspects of retail law: Part IV discusses the law of pricing, while Part V focuses on other matters, like the law of store hours and square footage. Both Parts IV and V draw examples from an important recent business failure: Wal-Mart's withdrawal from the German market in the summer of 2006. Part VI turns to differing concepts of basic rights, and Part VII rapidly reviews the utility of the opposition consumerism/producerism for a variety of additional areas of the law. The Article concludes with some claims about the aims of comparative law and some tentative predictions about the future of continental Europe. In particular, the Article suggests that the law of comparative advantage implies that Europe and America are likely to remain different for the foreseeable future.

## I. BEYOND THE CIVIL LAW/COMMON LAW DICHOTOMY: COMPARATIVE LAW AS SOCIAL SCIENCE

Why do comparativists have so little to say about consumerism, while the rest of the global intelligentsia finds the subject so, well, consuming? The basic answer is that our specialist literature has long been written by legal professionals, for legal professionals. Our literature has traditionally been exceedingly lawyerly—which means that it often leaves disappointingly little room for analysis of the kinds of policy problems that capture the attention of most politicians and intellectuals on the global stage.

Indeed, as anybody who has browsed the comparative law bookshelf knows, the bulk of our literature focuses on technical problems of limited interest to nonlawyers. Moreover, even when it offers larger generalizations, our literature tends to rely on two lawyerly frameworks: we tend to classify legal systems according to the sources they use and according to their procedures. Classification by sources of law predominates: comparativists generally assume that legal systems should be classified into source-based “families,” such as civil law systems (i.e., ones whose sources have roots in Roman law) or common law systems (i.e., ones whose sources have roots in the judicial precedents of the English courts) or “religious” systems (i.e., ones whose sources have roots in a text like the Qur’an).<sup>18</sup> This seems perfectly natural to lawyers, who always begin any legal analysis by asking “what are the sources of the law?”—or, to put it a little more concretely, “where should I go to look up the answer?”

But if practicing attorneys need to spend time thinking about the sources of law, the same is much less true of people interested in matters like the spread of consumerism. They do not need to know what kinds of authorities are cited in different legal systems. They need to understand the role of law in the larger world of economic and political debate. Source-based classification does little to help them. Much the same complaint can be mounted against classification

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18. To be sure, the leading treatments bring great sophistication to their discussion of these familiar categories. For a number of valuable insights, see, for example, RENÉ DAVID, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* [MAJOR CONTEMPORARY LEGAL SYSTEMS] (8th ed. 1982); and KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* (Tony Weir trans., 3d ed. 1998). Nevertheless, it is striking that these authors continue to classify legal systems in the traditional source-oriented way, even while offering analytic observations that have nothing to do with that style of classification. For a critique, see Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 *AM. J. COMP. L.* 5 (1997); and Mark Van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 *INT'L & COMP. L.Q.* 495 (1998).

based on differences in procedure. The work of specialists on procedure is often profound indeed: there is no finer comparativist than Mirjan Damaška, for example.<sup>19</sup> Yet this work too is generally of limited value in addressing the basic problems of classification raised by social science. Proceduralists and source-oriented comparativists alike simply do not try to answer the kinds of questions that strike nonlawyers as most important.

This situation has some strange consequences: for example, when Andrei Shleifer and other leading economists decided to focus on the importance of the law for development, they seized, in a much-cited article, on the civil law-common law distinction. What mattered, they thought, was whether a given country belonged to the one legal “family” or the other.<sup>20</sup> Yet as their critics have argued (in my view rightly), the civil law-common law distinction sheds little light on the problems that concerned them.<sup>21</sup> Why did these economists not focus on the socioeconomic functions of the law? Why did they think the divide between the common law and civil law “families” was so important? The answer is that when they sat down to do their research, they found a comparative law literature that insisted that the common law-civil law divide was what mattered. They can hardly be blamed for believing what they read.

Our comparative law literature, these economists failed to grasp, is mostly written for lawyers, not for social scientists. Unfortunately, the classifications comparativists have traditionally employed provide few answers to the kinds of policy questions posed by the core policy sciences—not only economics, but

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19. See, e.g., MIRJAN R. DAMAŠKA, *EVIDENCE LAW ADRIFT* (1997); MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986) [hereinafter DAMAŠKA, *FACES OF JUSTICE*].
  20. See Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998). For other work along these lines, see Edward Glaeser & Andrei Shleifer, *Legal Origins*, 117 Q.J. ECON. 1193 (2002); and Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503 (2001).
  21. See, e.g., Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 167 (2003) (“[T]he way in which a country received its formal law is a much more important determinant of the current effectiveness of its legal institutions than the particular legal family that it adopted.”). In general, when the literature cited above, see *supra* note 20, makes important observations, those observations involve some factor other than the particular legal family in question. Mahoney, for example, points to the “association” of the common law with limited government. He mounts an interesting historical argument about the differing influence of “landed aristocrats and merchants” in England and France. Mahoney, *supra* note 20, at 504-05. This is a claim well worth discussing, but it is a claim about political economy, the force of which is blunted if we focus on the common law family as such. Oddly, the authors who work in this vein pay no attention to aspects of the common law tradition that arguably may have had some real importance for commercial development, notably the common law’s suspiciousness toward just-price regulation.

political science and sociology as well. Yet classifications that can address such policy questions are badly needed: if we wish to understand how different socioeconomic orders differ, we must assess the differing sorts of roles played by law. Indeed, we need answers to some quite basic questions. For example, political scientists commonly assert that postwar Germany has a “neocorporatist” economy. What shape, as John W. Cioffi asks, does the law take in such an economy?<sup>22</sup> Is it different from the shape that law takes in, say, the United States? Does the law take a different shape in parliamentary systems from the shape it takes in presidential systems?<sup>23</sup> And so on. One might hope to find answers to these kinds of questions in any thoughtful basic textbook on comparative law, but one would hope in vain.

Like other reflective contemporary comparativists, therefore, I will abandon the familiar common law-civil law framework in exploring the topic of this Article, in the effort to speak to a different set of policy issues. Taking a page from the work of fine scholars like Robert Kagan,<sup>24</sup> Mary Ann Glendon,<sup>25</sup> Ugo Mattei,<sup>26</sup> Mark Roe,<sup>27</sup> John Reitz,<sup>28</sup> David Gerber,<sup>29</sup> and Katharina Pistor,<sup>30</sup> I aim to write comparative law focused on the policy problems of modern societies, rather than on the parochial traditional viewpoint of lawyers. We

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22. The importance of this question is highlighted in John W. Cioffi, *State of the Art: A Review Essay on Comparative Corporate Governance: The State of the Art and Emerging Research*, 48 AM. J. COMP. L. 501, 506 (2000) (book review).
  23. This is a theme in ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).
  24. *See id.*
  25. *E.g.*, MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987); MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989).
  26. For a recent example from Mattei’s large output, see Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383 (2003). For his useful effort to arrive at a system of classification independent of traditional categories, see Mattei, *supra* note 18. The latter article is unpersuasive to me, since it understates the difference in degree of professionalization between European and American traditions.
  27. *E.g.*, Mark J. Roe, *Modern Politics and Ownership Separation*, in *CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE* 252 (Jeffrey N. Gordon & Mark J. Roe eds., 2004) [hereinafter Roe, *Modern Politics*]; Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan, and the United States*, 102 YALE L.J. 1927 (1993).
  28. *E.g.*, John Reitz, *Political Economy and Contract Law*, in *NEW FEATURES IN CONTRACT LAW* 247 (Reiner Schulze ed., 2007).
  29. *E.g.*, DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* (1998).
  30. *E.g.*, Berkowitz et al., *supra* note 21.

need to return to the tradition of Montesquieu, the great social scientist who pioneered the study of comparative law, and whose approach remained dominant until the field was captured by lawyers with more limited vistas in the mid-nineteenth century.<sup>31</sup>

Here, however, it is important to add a methodological proviso. It is not my aim to identify the “correct” essential classification of any given system. In particular, I will not claim that the correct way to characterize American law is as a purely consumerist legal order. Good comparative law should never claim to offer any single correct classification. Classification in comparative law is not like Linnean classification in biology. It does not identify essential differences between legal systems comparable to the essential differences between animal species. Instead, classification in comparative law is necessarily ad hoc: it serves to explain how different legal orders can be classified in a variety of ways for the purpose of answering a variety of questions. Legal systems must always be viewed through a prism of multiple classifications. It is important to emphasize this methodological point, because it is a point that is so easy to miss. Thus Shleifer and his coauthors, after reading the comparative law literature, drew the conclusion that the distinction between common law and civil law was something like the distinction between reptiles and mammals—a classificatory distinction of such fundamental importance that it would dictate the behavior of legal systems in almost every respect and every environment. Yet of course it is nothing of the sort: it is a classification that is useful for some purposes, but not others.

Accordingly, the object of this Article is simply to identify one of many classificatory schemes that we can use for the analysis of modern law—the classificatory scheme “consumerism versus producerism.” I shall not argue that American law is in every respect an essentially consumerist system; nor that the French and German systems are in every respect essentially producerist ones.

Instead, I will measure these different legal orders against contrasting *ideal types* of consumerism and producerism. The Weberian theory of ideal types<sup>32</sup>

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31. For a taste of the liveliness of early-nineteenth-century comparative law, it is worth browsing the work of a once famous, now forgotten scholar, Charles Comte. As its title suggests, CHARLES COMTE, TRAITÉ DE LÉGISLATION, OU EXPOSITION DES LOIS GÉNÉRALES SUIVANT LESQUELLES LES PEUPLES PROSPÈRENT, DÉPÉRISSENT, OU RESTENT STATIONNAIRES [A TREATISE ON LEGISLATION, OR EXPOSITION OF THE GENERAL LAWS IN ACCORDANCE WITH WHICH NATIONS PROGRESS, DECLINE, OR REMAIN STABLE] (Paris, Félix Locquin 2d. ed. 1835) was concerned with the sorts of problems of comparative social organization that more recent comparative law has generally forgotten. Like his predecessors Montesquieu and John Millar, Comte had real learning and deep analytic insight.

32. 1 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETATIVE SOCIOLOGY 20-21 & n.5, 57-58 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968).

has been adopted by some of the finest comparativists, notably Mirjan Damaška<sup>33</sup> and Robert Kagan.<sup>34</sup> It offers a means of analyzing legal orders without claiming to describe them perfectly in every detail. Weberian ideal types never correspond perfectly to any real existing order. The right way to speak about ideal types is to say that existing legal orders more or less *approximate* them, and that is the language that I will use. In particular, despite the claims of anti-American critics, it is not the case that the United States presents a perfectly realized consumerist order. Nevertheless, I will argue that in many legal areas and economic sectors, the United States does *approximate* the ideal type of a consumerist legal order more than do the legal orders of Germany and France. Unless we recognize that fact, we will be poorly equipped to analyze some of the most important issues in global law today.

## II. CONSUMERISM VERSUS PRODUCERISM: A BRIEF HISTORY OF A DISTINCTION

With those methodological preliminaries, we can turn to the problem of consumerism and producerism, and in particular with the revealing early history of the conflict between these two orientations in the early twentieth century.

What do we mean by “producerism”? To understand this term, which is admittedly not part of our accustomed comparative law jargon, we must remember what economic regulation and social philosophy looked like in the pre-twentieth-century world. From the sixteenth through nineteenth centuries, economic regulation was heavily concerned with the rights and privileges of various actors involved in the production and distribution of goods. Thus in the early modern period there was a great deal of law intended to regulate and protect guilds, and a great deal of law intended to guarantee the monopoly rights of the vendors of various kinds of goods.<sup>35</sup> To be sure, premodern

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33. See, e.g., DAMAŠKA, *FACES OF JUSTICE*, *supra* note 19, at 9.

34. KAGAN, *supra* note 23, at 11.

35. I hope the reader will accept this large proposition, which could easily be the subject of a book in itself, without full-scale discussion. The most important example in the common law literature may be *The Case of Monopolies*, (1603) 77 Eng. Rep. 1260 (K.B.). American authors sometimes like to treat this famous case as a ratification of the primacy of a consumer interest in competitive prices, but careful historians have shown that it involved the competing claims of a guild and the grantee of a royal monopoly. See Jacob I. Corré, *The Argument, Decision, and Reports of Darcy v. Allen*, 45 EMORY L.J. 1261 (1996); D. Seaborne Davies, *Further Light on The Case of Monopolies*, 48 LAW Q. REV. 394 (1932); Barbara Malament, *The “Economic Liberalism” of Sir Edward Coke*, 76 YALE L.J. 1321, 1343-44 (1967). For the broader history, especially with regard to guilds, see, for example, ANTONY BLACK,

contract law worried about some of the same consumer rights we worry about today, at least a bit.<sup>36</sup> Nevertheless, premodern law regarded the problems of the economy largely as problems of the supply side—problems in sorting out rights among those involved in producing and distributing goods and services. Most especially, it regarded the problems of the economy as problems in determining how market share should be distributed among competitors. The nineteenth century brought new kinds of economic law—most notably, law about the rights of collective labor as well as the rights of industrial competitors. The great problem of the nineteenth century was, of course, conflict between labor and capital.<sup>37</sup> But that conflict, too, was a supply-side conflict.

The process of production was not just the focus of economic regulation during these centuries, moreover; it was the focus of social philosophy as well. To take only the most famous examples, John Locke, Karl Marx, and Emile Durkheim all thought that the dynamic of the social order had to do with shifting patterns of production.<sup>38</sup> A famous passage from the writings of the young Marx is typical of the worldview focused on production:

[A]s soon as the distribution of labour comes into being, each man has a particular, exclusive sphere of activity, which is forced upon him and from which he cannot escape. He is a hunter, a fisherman, a shepherd, or a critical critic, and must remain so if he does not want to lose his means of livelihood; while in communist society, where nobody has one exclusive sphere of activity but each can become accomplished in any branch he wishes, society regulates the general production and thus makes it possible for me to do one thing today and another tomorrow, to hunt in the morning, fish in the afternoon, rear cattle in the evening,

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GUILDS AND CIVIL SOCIETY IN EUROPEAN POLITICAL THOUGHT FROM THE TWELFTH CENTURY TO THE PRESENT (1984).

36. For limited concern with implied warranties in particular, see S.F.C. MILSOM, *STUDIES IN THE HISTORY OF THE COMMON LAW* 126-32 (1985); Friedrich Kessler, *The Protection of the Consumer Under Modern Sales Law: A Comparative Study* (pt. 1), 74 *YALE L.J.* 262, 262-72 (1964).
37. Within a literature too vast to cite, see, for example, WILLIAM H. SEWELL, JR., *WORK AND REVOLUTION IN FRANCE: THE LANGUAGE OF LABOR FROM THE OLD REGIME TO 1848* (1980).
38. EMILE DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* (W.D. Halls trans., MacMillan 1984) (1893); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (C.B. Macpherson ed., Hackett 1980) (1690) (discussing the labor theory of property); KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* (Ben Fowkes trans., Penguin Books 1976) (1867).

criticize after dinner, just as I have a mind, without ever becoming hunter, fisherman, shepherd or critic.<sup>39</sup>

From this point of view what mattered, in both law and human life, was the organization of production. To be fully human was to *make* things, and the primary problems of economic regulation were problems in sorting out the conflicting rights of participants in the processes of production and distribution.

There were different schools of thought in this pre-twentieth-century, preconsumerist world. Later nineteenth-century left-wing thinkers, especially those under the influence of Marx, tended to emphasize workers' interests and rights. Others took different views. Thus, the late nineteenth century saw the rise of what is sometimes called "organized capitalism" – the rise of a program that focused on the rights and interests of capital. In particular, there were many advocates of the idea that manufacturers should defend their interests, and sort out their conflicts, through industry associations and cartels.<sup>40</sup> The later nineteenth century also saw the rise of the modern "corporatist" tradition, notably among Catholic social thinkers.<sup>41</sup> Here the idea was that society should be organized into producer groups, which were to constitute the basic units of a new corporatist order.<sup>42</sup> At the core of this corporatist producerism lay idealization of guild organization as the best form for structuring a healthy society: the best sort of economic identity, corporatists believed, was that of the artisan craftsman, integrated into a guild structure that guaranteed him a life of dignity and satisfying productivity. The most famous of European corporatist

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39. Karl Marx, *The German Ideology* (1845), reprinted in *THE MARX-ENGELS READER* 146, 160 (Robert C. Tucker ed., 2d. ed. 1972).
40. RUDOLF HILFERDING, *FINANCE CAPITAL: A STUDY OF THE LATEST PHASE OF CAPITALIST DEVELOPMENT* 367-68 (Tom Bottomore ed., Morris Watnick & Sam Gordon trans., Routledge & Kegan Paul 1981) (1910); *ORGANISierter KAPITALISMUS: VORAUSSETZUNGEN UND ANFÄNGE* [ORGANIZED CAPITALISM: CONDITIONS AND ORIGINS] (Heinrich August Winkler ed., 1974).
41. See James Q. Whitman, *Early German Corporatism in America: Limits of the "Social" in the Land of Economics*, in *THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820-1920*, at 229 (Mathias Reimann ed., 1993).
42. For a rapid survey, see CARL LANDAUER, *CORPORATE STATE IDEOLOGIES: HISTORICAL ROOTS AND PHILOSOPHICAL ORIGINS* 59-92 (1983). For more in-depth treatments, see RALPH H. BOWEN, *GERMAN THEORIES OF THE CORPORATIVE STATE, WITH SPECIAL REFERENCE TO THE PERIOD 1870-1919* (1947); MATTHEW H. ELBOW, *FRENCH CORPORATIVE THEORY, 1789-1948: A CHAPTER IN THE HISTORY OF IDEAS* (1953); and HEINRICH HEFFTER, *DIE DEUTSCHE SELBSTVERWALTUNG IM 19. JAHRHUNDERT: GESCHICHTE DER IDEEN UND INSTITUTIONEN* [GERMAN SELF-GOVERNMENT IN THE NINETEENTH CENTURY: A HISTORY OF IDEAS AND INSTITUTIONS] (1950).

programs were promoted by the Italian Fascists and the Nazis, whose economic program of “corporatism” was based on the proposition that guild-like “producer” identity should play a fundamental role in the social and political structure of society.<sup>43</sup> But fascists were not alone in advocating corporatist policies.

These corporatist movements are of special interest for this Article, since it is often argued that continental Europe is still characterized by “neocorporatism.”<sup>44</sup> In particular, it is important to summarize some key corporatist beliefs. First, corporatists defined the category of “producers” very broadly. Here they were generally eager to put distance between themselves and the Marxist theory of class conflict. Marxists thought of workers as the producer class whose interests mattered, and believed that more or less violent conflict between labor and capital was inevitable. Right-wing corporatists, by contrast, insisted that the workers were only a subclass of the larger community of “producers.” All persons engaged in the process of modern production and distribution fell under the rubric “producer”: workers, capitalists, and shop owners alike counted. This meant that producer conflicts could be settled relatively peaceably, through corporatist representative institutions.<sup>45</sup> Corporatists promoted various legal measures to this end. They tried to eliminate labor strife. (This was of course particularly true of the fascist regimes, which used repressive means against labor.<sup>46</sup>) They also tried to tame competition between industrial competitors. Thus they generally regarded cartels as beneficial phenomena: cartels, it was argued, could limit

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43. See James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AM. J. COMP. L. 747, 753-55 (1991).

44. The seminal article is Philippe C. Schmitter, *Still the Century of Corporatism?*, in *THE NEW CORPORATISM: SOCIAL-POLITICAL STRUCTURES IN THE IBERIAN WORLD* 85 (Frederick B. Pike & Thomas Stritch eds., 1974). For recent literature on this theme, see KONZERTIERUNG, VERHANDLUNGSDEMOKRATIE UND REFORMPOLITIK IM WOHLFAHRTSSTAAT [CONCERTED ACTION, NEGOTIATED DEMOCRACY, AND REFORM POLITICS IN THE WELFARE STATE] (Sven Jochem & Nico A. Siegel eds., 2003); HOWARD J. WIARDA, CORPORATISM AND COMPARATIVE POLITICS 74-75 (1997). For France, see *id.* at 75-76; and LA FRANCE, MALADE DU CORPORATISME? [FRANCE: AILING FROM CORPORATISM?] (Steven L. Kaplan & Philippe Minard eds., 2004). On the European level, see Hugh Compston & Justin Greenwood, *Social Partnership in the European Union*, in *SOCIAL PARTNERSHIP IN THE EUROPEAN UNION* 154 (Hugh Compston & Justin Greenwood eds., 2001). More generally on Europe, see *THE CORPORATE STATE: CORPORATISM AND THE STATE TRADITION IN WESTERN EUROPE* (Andrew Cox & Noel O’Sullivan eds., 1988).

45. Whitman, *supra* note 43, at 756-61.

46. *E.g.*, TIMOTHY W. MASON, *SOCIAL POLICY IN THE THIRD REICH: THE WORKING CLASS AND THE “NATIONAL COMMUNITY”* (Jane Caplan ed., John Broadwin trans., Berg Publishers 1993) (1977).

“destructive” competition within industries.<sup>47</sup> (This too was a characteristic of fascist economics.<sup>48</sup>) The introduction of a modern corporatist guild order, producerists argued, would lead to a world of harmonious cooperation between all the various producer groups of a modern economy.

Other aims of these corporatist movements reflected their idealization of craft production. In particular, they often proclaimed hostility to large chain stores and discount prices: large-scale retailers, they held, threatened to drive traditional craft production out of business. We can get a flavor of this aspect of the corporatist program by reading a wickedly perceptive author of the 1930s, the novelist Lion Feuchtwanger. Feuchtwanger’s 1933 novel *The Oppermanns* chronicled the fate of a Berlin Jewish family with Hitler’s seizure of power in that terrible year.<sup>49</sup> Feuchtwanger’s fictitious Oppermann family owned a large discount furniture store, and as Feuchtwanger explained, that meant that they stood on the side of what we now call the “consumers.” Their “Aryan” business rival Heinrich Wels described how the newly triumphant Nazi movement viewed the problems of retail:

“Oppermann customers buy good goods cheaply,” was a household phrase. . . . One might sleep more comfortably in Wels beds, and the Wels tables might be more durably constructed, but people preferred to invest less money, even if what they bought was a bit less substantial. . . . However during recent years, things had taken a turn for the better. A movement was making headway which spread the idea that hand-made articles were better suited to the character of the German people than standardized products of factories run on international lines. This movement called itself National-Socialism. It freely expressed what Heinrich Wels had long secretly felt, namely that the Jewish firms with their cut-price methods were responsible for Germany’s decline.<sup>50</sup>

Indeed, the Nazis agitated violently against large department stores, proposing to seize them all and turn them over to small craft organizations.<sup>51</sup>

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47. The European treatment of cartels has a complex intellectual history that I leave to the side here. See GERBER, *supra* note 29, at 51-62, 132-48.

48. E.g., AVRAHAM BARKAI, NAZI ECONOMICS: IDEOLOGY, THEORY, AND POLICY 188-89 (Ruth Hadass-Vashitz trans., 1990).

49. LION FEUCHTWANGER, *THE OPPERMANNS* (Viking Press 1934) (1933).

50. *Id.* at 18.

51. This was Point Sixteen of the Nazi Party Program. For a fuller discussion, see HEINRICH UHLIG, *DIE WARENHÄUSER IM DRITTEN REICH* [DEPARTMENT STORES IN THE THIRD REICH] 88 & *passim* (1956).

Nazis were not the only ones to talk in such terms. Anti-chain store agitation, often with a nasty dose of anti-Semitism, was widespread in Europe.<sup>52</sup> A 1939 French critic of American-style consumerism, for example, pleaded with his compatriots to insist on “quality” artisanal products, rather than accepting the “standardized, ersatz product line.”<sup>53</sup> Europeans on both the right and the left in the 1930s were thus already making a claim that we still hear today: that “cut-price methods” pose some kind of a danger to national well-being.

Two points about these various producerist movements deserve emphasis. First, although they divided into mutually hostile left-wing and right-wing movements, movements on both the right and the left shared a belief in the primacy of producer identity. This deserves some emphasis, since when Americans look upon producerism they often perceive only the left-wing side: they tend to think they are seeing socialism. Socialism is, however, only one way to put the political accent on the supply side. Second, none of these movements, whether left-wing or right-wing, imagined that there was one single producer interest. On the contrary, all of them presupposed that the world of producer politics was a world of *conflicting* producer interests. All of them thought of the politics of producerism as a politics of class conflict. When we speak of producerist movements, we are thus not speaking of movements favoring “the” producer interest. There is no such thing. Instead, producerist movements are movements that focus on the supply side—movements that perceive the basic problems of law and politics to be the problems of reconciling the conflicting interests of different producer groups.

Producerist ideas—some left-wing, some right-wing—were thus dominant in the early-twentieth-century European politics of class conflict. America, by contrast, early on became the home of consumerist programs—programs focusing on rights on the demand side of the market. To be sure, the United States too had producerist movements during the early twentieth century. In particular, it had the National Recovery Administration (NRA), the corporatist New Deal scheme that was struck down in *Schechter Poultry*.<sup>54</sup> During the same period, the United States saw the anti-chain-store agitation that led to the

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52. See VICTORIA DE GRAZIA, *IRRESISTIBLE EMPIRE: AMERICA'S ADVANCE THROUGH TWENTIETH-CENTURY EUROPE* 135-37 (2005).

53. PIERRE ARLET, *LA CONSOMMATION: L'ÉDUCATION DU CONSOMMATEUR* [CONSUMPTION: EDUCATION OF THE CONSUMER] 143 (1939), *quoted in* Victoria de Grazia, *Changing Consumption Regimes in Europe, 1930-1970: Comparative Perspectives on the Distribution Problem*, in *GETTING AND SPENDING: EUROPEAN AND AMERICAN CONSUMER SOCIETIES IN THE TWENTIETH CENTURY* 59, 78 (Susan Strasser et al. eds., 1998).

54. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The corporatist character of the NRA, and its sources in Italian corporativism in particular, are discussed in Whitman, *supra* note 43.

Robinson-Patman Act of 1936.<sup>55</sup> Moreover, American thinkers laid some of the classic foundations of the producerist outlook. John R. Commons, the great institutionalist economist, is an important example. In a famous 1909 article chronicling the history of American shoemakers, Commons traced the transition from an older form of guild-like producer organization to modern forms of production.<sup>56</sup> In the older, producerist world as it existed from the seventeenth century through the early nineteenth century, shoemakers were organized into artisan guilds that were devoted to the maintenance of high standards of quality, which were energetically policed within the guild. Any shoemaker who tried to sell shoddy goods—goods that did not meet guild standards—could be barred from the market, since the guilds maintained effective monopoly control. Of course, this system brought higher prices for consumers: shoddy goods can be produced more cheaply. Nevertheless, it maintained high standards of artisanal quality. The transition to modern forms of factory production was a transition away from artisanal quality, and toward low prices. As factories succeeded in churning out cheaper goods at lower prices, the old guilds were slowly destroyed.<sup>57</sup>

Nevertheless, despite the Robinson-Patman Act, and despite the views of people like Commons, American producerism was never as strident or politically dominant as the European variety.<sup>58</sup> Quite the contrary: a case can be made that consumer identity had come to seem increasingly important in the Anglo-American world from the eighteenth century onward.<sup>59</sup> American historians have argued that American political life had already begun to take a

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55. 15 U.S.C. § 13 (2000); see Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011, 1060-64 (2005).

56. John R. Commons, *American Shoemakers, 1648-1895: A Sketch of Industrial Evolution*, 24 QJ. ECON. 39 (1909).

57. *Id.* at 73-75. One also finds American authors who echoed the dark anti-Semitism of many European anticonsumerists. See, e.g., LEON SAMSON, *THE AMERICAN MIND: A STUDY IN SOCIO-ANALYSIS* 38-39, 182-83 (1932) (claiming that the American, like the Jew, is “an alien to art,” and that American consumerism prevents Americans from seeing the truth of class conflict).

58. Even the Robinson-Patman Act itself focused, in a characteristically American way, on price discrimination. See 15 U.S.C. §§ 13-13a (2000). There is nothing comparable in European law. Moreover, even the most aggressively corporatist of American public figures still spoke in consumerist terms. See the discussion of Donald Richberg in Whitman, *supra* note 43, at 768. For the early rise of a culture of consumer sovereignty in the United States, also see DE GRAZIA, *supra* note 52, at 103.

59. See, e.g., NEIL MCKENDRICK, JOHN BREWER & J.H. PLUMB, *THE BIRTH OF A CONSUMER SOCIETY: THE COMMERCIALIZATION OF EIGHTEENTH-CENTURY ENGLAND* (1982).

“consumerist turn” by the late nineteenth century.<sup>60</sup> By the early twentieth century, figures like Walter Lippman were identifying consumerism as the great characteristically American movement, “destined to be stronger than the interest either of labor or of capital.”<sup>61</sup> Consumerism, for Lippman, was thus a radical political program. To him, it seemed possible to end the scourge of class conflict by recharacterizing every member of American society as a member of a single class, the class of consumers. This was a common idea among early-twentieth-century American thinkers. It is worth quoting Walter Weyl, whose *New Democracy* appeared in 1912:

In America to-day the unifying economic force, about which a majority . . . is forming, is the common interest of the citizen as a consumer of wealth . . . . The producer (who is only the consumer in another role) is highly differentiated. He is banker, lawyer, soldier, tailor, farmer, shoeblick, messenger boy. He is capitalist, workman, money lender, money borrower, urban worker, rural worker. The consumer, on the other hand, is undifferentiated. All men, women, and children who buy shoes (except only the shoe manufacturer) are interested in cheap good shoes.<sup>62</sup>

To think of Americans as “consumers” was thus to think of them as members of a kind of universal class, with a single common interest—an interest in buying things that were both “cheap” and “good.” The key to creating justice and social peace in democratic America lay in making consumers understand that they all shared this common interest. Rising prices, Weyl thought, were encouraging just that sort of attitude. Producer protections, in the form of tolerated monopolies, were causing prices to rise. This was gradually causing a shift in the forms of American politics:

Despite . . . overwhelming superiority in numbers, the consumer, finding it difficult to organize, has often been worsted in industrial battles. . . . As prices . . . rise, however . . . a new insistence is laid upon the rights of the consumer, and political unity is based upon him. . . . Men who voted as producers are now voting as consumers.<sup>63</sup>

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60. GLICKMAN, *supra* note 1, at xiii.

61. WALTER LIPPMAN, DRIFT AND MASTERY 54-55 (1914), *quoted in* SANDEL, *supra* note 5, at 222.

62. WALTER E. WEYL, THE NEW DEMOCRACY: AN ESSAY ON CERTAIN POLITICAL AND ECONOMIC TENDENCIES IN THE UNITED STATES 250 (Harper & Row 1964) (1912).

63. *Id.* at 250-51.

Democratic politics, focused on the imperative of bringing prices down, could thus unite Americans in a single national interest, putting an end to the particularisms of the producer orientation.

American consumerism thus started largely as a political program, as a way of changing people's attitudes as voters, and for a long time it remained that way. Thus, in 1929 it seemed obvious to *True Story Magazine* that America had found the solution to the "capital-labor war": it had created a society in which workers had an "equal opportunity to consume."<sup>64</sup> In 1932, no less a personage than Franklin Delano Roosevelt could declare, even in the face of the destitution of the Great Depression, "I believe we are at the threshold of a fundamental change in our popular economic thought, that in the future we are going to think less about the producer and more about the consumer."<sup>65</sup> By shifting political energies from the supply side of the marketplace to the demand side, these American figures hoped to achieve social peace.

The history of early American consumerism has been the subject of a great deal of scholarship, including widely read studies by both Sandel and Cohen. Both authors see the rise of American consumerism as a key theme in the making of modern American political life, and we can take their books as exemplary of current scholarly thinking, with Sandel taking the anticonsumerist stand, and Cohen the proconsumerist stand. Sandel, in his investigation of American political values, argues that the rise of consumerism has been fundamentally important to the making of America's distinctive legal and political culture.<sup>66</sup> He focuses on the impact of consumerism on a number of areas of law. Antitrust is Sandel's first example: the consumerist campaign slowly eroded the producerist outlook in the analysis of antitrust problems. From the producerist point of view, the primary goal of antitrust law was to protect a certain class of producers—namely, the competitors in a given industry. Producerist competition law thus aimed to prevent "cutthroat" competition, unfair competition designed to drive weaker firms out of business. In particular, it condemned the price-cutting practices that allowed certain big firms to drive out their smaller competitors.<sup>67</sup> It is this attitude that led European producerists to take a benign view of cartels.

As Sandel observes, the producerist approach to antitrust dominated in America in the early twentieth century. This does not mean that Americans

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64. See LIZABETH COHEN, *MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919-1939*, at 101 (1990) (quoting 2 *TRUE STORY MAGAZINE*, *THE AMERICAN ECONOMIC EVOLUTION* 32-34, 67 (1930)).

65. See GLICKMAN, *supra* note 1, at 156 (quoting Franklin Delano Roosevelt).

66. See SANDEL, *supra* note 5, at 221-27.

67. See *id.* at 211-212 (discussing the vision of Brandeis).

went so far as expressly to bless cartels—something they rarely did.<sup>68</sup> It does mean, though, that they had their eye largely on the interest of competitors, rather than consumers.<sup>69</sup> They perceived the legal problems as lying on the supply side. But early American antitrust producerism was slowly displaced over the course of the century by a consumerist approach, which abandoned the idea that antitrust law should protect a class of producers (the competitors), instead holding that it should protect consumers. The aim of such consumer protection was to guarantee that consumers should receive the lowest possible prices. The consumerist approach did not condemn bigness as such, and it certainly did not condemn price-cutting practices out of hand. Instead, it judged all markets by their capacity to deliver competitive prices. There were inklings of this consumerist approach in the early twentieth century, but it was in the 1940s (under the influence of Thurman Arnold) and especially since the 1970s (under the influence of Robert Bork) that it has triumphed.<sup>70</sup> Sandel sees a similar transition from producerism to consumerism in the law of retail, which moved from a condemnation of chain stores in the 1920s and especially the 1930s, to the acceptance of large retailers like Wal-Mart, capable of providing consumers with low prices.<sup>71</sup> These movements succeeded in making American law consumerist.

This transition to a world of low prices may sound like a triumph indeed to most contemporary Americans. But Sandel wants us to think of the shift toward consumerism as the tale of a kind of political tragedy. To Sandel, like the young Marx and many other pre-twentieth-century thinkers, it seems clear that a healthy political and moral life is best founded on the primacy of producer identity, rather than consumer identity. As consumerism took hold, the law gradually reduced American citizens to mere consumers, no longer in control of their own destinies in the way that producers are. In the producerist era, as Sandel sees it, individuals belonged to self-governing producer associations, like mom-and-pop stores and unions. In the consumerist era, these forms of producer self-government went by the boards.<sup>72</sup> Sandel's attack on the cultural and political consequences of the rise of consumerism is only one of many. In particular we can point to the writings of figures like John Kenneth Galbraith and Benjamin Barber, both of whom single out the

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68. The great exception is the National Recovery Administration. See generally SULLIVAN & GRIMES, *supra* note 9, at 7 (discussing U.S. cartel law).

69. I will not enter into the debate over Robert Bork's claims, now generally rejected, that early American antitrust law already took consumer welfare as the primary goal. See *id.* at 6.

70. SANDEL, *supra* note 5, at 231-49 (summarizing the familiar history of antitrust).

71. *Id.* at 227-31; see also Schragger, *supra* note 55.

72. SANDEL, *supra* note 5, at 201-03.

advertising industry as the culprit in the creation of a society of credulous and disempowered consumers.<sup>73</sup>

Cohen tells a historical story similar to that of Sandel, a story that pits consumers against producers. But she draws a quite different moral from it.<sup>74</sup> Cohen is one of a number of historians who have seized on the rise of consumerism in the effort to explain the decline of class conflict politics in America. These historians have claimed, most importantly, that the American labor movement was deeply transformed as “workers” came to think of themselves as “consumers.”<sup>75</sup> For historians like Cohen, the tale of twentieth-century American history is the tale of the substitution of consumer identity for producer identity, just as it is for Sandel. But Cohen does not paint this history in Sandel’s dark colors. Rather than bemoaning the loss of “citizen producer” identity, she sees some gains in the shift to consumerism. As citizens ceased thinking of themselves primarily as “workers,” they began to seek rights in their guise as “women” or “African Americans.” African Americans, for example, could claim rights as consumers, since, in the proverbial phrase, their dollar was as good as anybody else’s. The decline of producer identity, and the concomitant decline of class conflict politics, thus opened the way for a new and fruitful kind of rights politics.<sup>76</sup> The rise of consumerism was, in that sense, fundamental to the making of modern America.

### III. REFINING THE DISTINCTION

At first glance, these battles over consumerism and producerism may seem to belong to a war that ended long ago—a war that ended in victory for consumerism on both sides of the Atlantic. Indeed, Victoria de Grazia’s elegant and entertaining recent book *Irresistible Empire* is a history of exactly that—of a France, Germany, and Italy that have mostly abandoned their old traditions in face of the “irresistible” American consumerist model.<sup>77</sup> She has amply demonstrated that Europe has changed since the early twentieth century, becoming the continent of supermarkets that we all know today.<sup>78</sup>

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73. BARBER, *supra* note 14; JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* (3d ed. 1976).

74. For her rejection of Sandel, see COHEN, *supra* note 7, at 409.

75. See the literature discussed in GLICKMAN, *supra* note 1, at 155–56. Glickman himself pushes the transformation back to the later nineteenth century. *Id.* at 156.

76. COHEN, *supra* note 7, at 22, 31–53.

77. As one of her chapter titles runs, her book is the history of “The Consumer-Citizen: How Europeans Traded Rights for Goods.” DE GRAZIA, *supra* note 52, at 336–75.

78. *Id.* at 376–415.

And indeed, to judge by the public pronouncements of leading European figures, producerism in Europe might seem to be a thing of the past. Today, European policymakers often proclaim their commitment to consumerist legal programs. The main European Union Web site, for example, declares that the European Union aims to foster competition, because competition “cuts prices, raises quality and expands customer choice.”<sup>79</sup> Over the last few years in particular, Brussels has been making aggressive efforts to shift European law in consumerist directions.<sup>80</sup> In countries like Germany, the old producerist approach has been under attack for two generations: Americans moved forcefully after World War II to replace the old German competition law with new law based on American antitrust;<sup>81</sup> and today, after decades of lethargy, Europeans are making energetic attacks on cartels.<sup>82</sup> Contemporary European law, in both France and Germany, states firmly that the protection of consumers must be a primary goal, though not the only one.<sup>83</sup>

Moreover, developments in both the economy and the broader everyday culture seem to conspire to foster consumerism in continental Europe. Global competition, it might seem, demands that European countries eliminate the sort of inefficient producer protections associated with the producerist orientation. Indeed, both the system of global trade agreements and the policies of the European Union are dedicated to breaking down the sorts of producer protections that create obstacles to trade. Meanwhile the ever-rising flood of consumer goods must inevitably tempt ordinary Europeans to think of themselves primarily as consumers. Indeed, so have European cultural critics complained for decades. So hasn't consumerism triumphed in Europe? Is there really still any point in talking about consumerism versus producerism?

There is indeed. Consumerism versus producerism remains a vital analytic opposition – indispensable in particular for understanding continental Europe. Political scientists continue to see continental Europe as a world of “neocorporatism,” a world in which policies are made through negotiation

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79. Europa: Activities of the European Union – Competition, [http://europa.eu/pol/comp/index\\_en.htm](http://europa.eu/pol/comp/index_en.htm) (last visited Nov. 9, 2007).

80. For current activities of the European Commission and the European Union, see Europa, [http://europa.eu/press\\_room/index\\_en.htm](http://europa.eu/press_room/index_en.htm) (last visited Nov. 9, 2007).

81. See LISA MURACH-BRAND, *ANTITRUST AUF DEUTSCH: DER EINFLUSS DER AMERIKANISCHEN ALIIERTEN AUF DAS GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN (GWB) NACH 1945* [ANTITRUST AUF DEUTSCH: THE INFLUENCE OF THE AMERICAN ALLIES ON THE LAW AGAINST RESTRAINTS ON COMPETITION AFTER 1945] (2004).

82. CHRISTOPHER HARDING & JULIAN JOSHUA, *REGULATING CARTELS IN EUROPE: A STUDY OF LEGAL CONTROL OF CORPORATE DELINQUENCY* 117-142 (2003).

83. See *infra* Parts IV & V.

between the state and producer associations; and its law has not lost its producerist coloration. Despite all of the pressure for change, continental Europe is managing to remain significantly more producerist than the United States, as I aim to show. But even to the extent the Continent is changing, we cannot understand what is at stake unless we bear the consumerism-producerism opposition in mind. The politics of consumerism are only fully intelligible if we understand the converse politics of producerism.

To understand the lasting vitality of the consumerism/producerism opposition, though, we must use both terms with extreme care, beginning with some preliminary work of comparative law definition and analysis.

Let us start by defining “consumer” and “producer.” “Consumer” is a straightforward term: a “consumer” is any member of society who is engaged in consumption of goods or services. “Producer,” by contrast, is a more complex category. Figures like Weyl lumped together all economic actors who were not consumers under the general rubric “producer.” They defined a “producer” as any actor who provided some factor in the production and distribution of goods and services.<sup>84</sup> By this definition, the rubric is very broad indeed: “producer” includes both workers and capitalists, both management and labor, both industry and retail. It includes all actors on the supply side of the market.

So does it make sense to work with a contrast between the exceedingly broad category of “producers” and the category of “consumers”? It does, but we must do so with care. It will not do simply to call it a contrast between, on the one hand, law dedicated primarily to protecting consumer interests, and on the other hand, law dedicated primarily to protecting producer interests, as so many commentators have done since the early twentieth century.<sup>85</sup> Appealing as the simple opposition of consumerism and producerism may sound, it is not adequate unless we add some caveats. First, both concepts, “consumer interests” and “producer interests,” carry significant ambiguities. Second, “consumers” and “producers” are not two different real existing classes of persons.

Let us begin with the ambiguities of “consumer interests.” On the one hand, when we speak of “the interest of consumers,” we may be speaking of consumer *economic* interests, i.e., of the interest of consumers in purchasing goods and services at the lowest possible price, in having access to the widest variety of goods and services, in having easy access to credit, in being able to shop at maximally convenient hours and locations, and the like. On the other

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84. See WEYL, *supra* note 62.

85. See *supra* Part II.

hand, when we speak of “protecting the interest of consumers,” we may be speaking of consumer *protection and safety* legislation, that is, legislation on such matters as products liability, the purity of food and drugs, nondeceptive advertising, and the like. (I will use the shorthand “consumer protection law” to describe this second type of consumer-oriented legislation.)

Walter Weyl, and later many other consumer advocates such as Ralph Nader, have treated these two interests as identical: they have argued that consumer protection and low prices can always go hand in hand. As Weyl declared, consumers have an interest in shoes that are both “cheap” and “good.”<sup>86</sup> The European Union speaks in the same tones, when it praises competition as a force that both “cuts prices” and “raises quality.”<sup>87</sup> But the problem is manifestly much harder than that, and harder in ways that matter for comparative law. The consumer economic interest and the consumer protection interest are quite different, and in many respects directly at odds. The spirit of consumer protection legislation is obviously paternalistic: consumer protection legislation limits consumer choice. The spirit of law protecting the consumer economic interest, by contrast, aims to maximize consumer choice: it idealizes the consumer as sovereign. Indeed, the consumer protection interest and the consumer economic interest may be entirely inconsistent with each other. If we define the consumer interest as an economic interest in having the widest available range of goods at the lowest possible prices, then consumer protection legislation operates against consumer economic interests. After all, consumer protection legislation eliminates one class of goods—goods that are relatively unsafe or relatively low-quality, but also relatively cheap—that would otherwise have been available for consumers to choose.

These two forms of consumer-oriented law are also most naturally at home in different institutional settings. Consumer protection legislation is the natural province of bureaucracy, and indeed tends to be produced through paternalistic bureaucratic regulation everywhere. By contrast, the consumer economic interest has an obvious affinity with relatively free, unregulated markets. To state it in the simplest terms: the core value behind the protection of consumer economic interest is consumer sovereignty, maximally immune from bureaucratic interference. The two also have natural affinities with different kinds of economic policy. Law favoring the consumer economic interest will seem appealing to policymakers who aim to stimulate consumer spending, while law oriented toward consumer protection will not.

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86. WEYL, *supra* note 62.

87. Europa: Activities of the European Union—Competition, *supra* note 79.

These two contrasting conceptions of the consumer interest are different enough that one can imagine two different polities, both equally committed to “the consumer,” but each having law diametrically opposed to the law of the other. (As I will suggest, such is, in part—though only in part—the contrast between continental Western Europe and the United States.) To say that a given legal system favors the “consumer interest” is thus to leave fundamental questions unresolved.

The same is true of saying that a given legal system favors “producer interests.” “Producer” is a term that refers to every actor providing some factor in the production and delivery of goods and services. Correspondingly, it is almost never possible to speak of any single, monolithic, “producer” interest, as the thinkers of the early twentieth century well understood. “Producer” is a broad, diffuse, and conflict-ridden category, and any given piece of legislation may favor one group of “producers” over another. For example, sometimes legislation favoring “producer” interests may favor the interests of organized labor over the interests of investors, or of nonorganized labor. The most obvious example of this is legislation making it difficult to lay off workers, which favors a *particular* producer interest (the interest of existing employees, who provide labor to the enterprise) at the expense of other producer interests (the interest of equity holders, who provide capital to the enterprise; and the interest of those aspiring workers who cannot find employment). The same is true of legislation that, for example, empowers small shopkeepers to block the establishment of large retail stores. Such legislation manifestly favors one producer interest (small shopkeepers) over another (large retail chains). Or again, we may take the example of competition law. Competition law may favor the interests of existing market participants against the interests of aspiring new entrants into the market. It may also favor the status quo in the distribution of market share against the ambitions of one player to dominate. Such law is not law favoring “the” producer interest in general, but law favoring one set of producers (existing competitors) over another (aspiring entrants and aspiring dominant players). To say that law is oriented to producers is thus not to say that it favors “the” producer interest. Instead, it is to say that it is law that assumes a politics of conflict between producer groups—or, in the familiar language of Marxism, class conflict.

Despite the fact that producer interests are so varied and conflict-ridden, producer-oriented law is quite different from law favoring the consumer *economic* interest. *Any* law favoring *any* producer interest may seem to threaten the economic interest of consumers. In particular, law favoring producer interests, whatever those interests may be, threatens to raise prices. Thus legislation limiting layoffs may create market rigidities that raise prices. It can accordingly be perceived as legislation that works against consumer economic

interests. The same is true of both legislation favoring small shopkeepers over large retail stores, and of law favorable to cartel formation. These are all forms of law that may well operate to the economic prejudice of consumers, keeping prices higher, limiting opportunities to shop, and so on. Legal systems that favor producer interest may be quite diverse, but they are all alike in their refusal to treat such threats to the consumer economic interest as the most important threats facing the law.

Conversely, the spread of economic consumerism tends to threaten traditions of class conflict politics. Such indeed was exactly the program of figures like Lippman and Weyl, who believed that focusing on the interests of the consumer would put an end to the politics of the interests of labor and capital. Anybody who is committed to the politics of class conflict can thus be expected to regard economic consumerism as a menace.

There is thus a clear and recurring conflict between the producer orientation and the consumer economic interest. To the extent that the consumer economic interest dominates the thinking of policymakers, the law of producer interests, and more broadly the politics of class conflict, are in danger. The same, however, is not true of the consumer *protection* interest. On the contrary, producer-oriented law and consumer protection legislation may often go hand in glove. Legislation intended to guarantee the quality and safety of consumer goods can easily have the effect, intended or unintended, of protecting existing producer interests. This has to do largely with the dynamic of competition. High quality and safety standards may tend to protect the position of existing competitors in a given industry. If there are such consumer protection standards in place, new entrants cannot break in by offering relatively low-quality goods. Moreover, as we shall see, high quality standards are often associated with entrenched artisanal traditions that may benefit from producer-protectionist policies.

What all this means is that we must be very careful in describing the conflicts over consumerism and producerism in the world today. The truly bitter current world conflicts over consumerism and producerism revolve around the consumer *economic* interest, the consumer interest in competitive prices and shopping convenience. What troubles critics of consumerism worldwide is first and foremost the danger that a politics of low prices will endanger historic producer protections.

For example, the spread of big box stores like Wal-Mart raises precisely the question of whether lower prices and greater convenience for consumers justify diminished rights for three groups of producers: workers, suppliers, and small shopowners. Wal-Mart, so its critics charge, is able to offer economic benefits

to consumers by diminishing worker salaries and job protections, squeezing its suppliers, and driving out competitors whose shops have less square footage.<sup>88</sup> The conflict surrounding Wal-Mart is thus best understood as a conflict between a focus on the consumer economic interest on the one hand, and a focus on various producer economic and social interests on the other: Wal-Mart flourishes by emphasizing consumer rights rather than producer rights, promising to offer low prices for consumers by attacking social and economic interests on the supply side. Similar things can be said about many other areas of law as well—for example, antitrust (is it law that guarantees competitive prices for consumers, or law that guarantees market share for competitors?) or the law of the World Trade Organization (should world trade guarantee low consumer prices worldwide, or should it protect producers in individual countries?).

Law favoring the consumer *protection* interest, by contrast, does not raise the same kinds of issues. To be sure, in some sense consumer protection law is “consumerist,” since it proclaims the primacy of consumer identity. But a country that opts to favor consumers through consumer *protection* law can be a country that leaves many producer protections in place. As I shall argue, that is exactly the pattern often found in France and Germany.

Hanging over all this is one additional fundamental difficulty that deserves constant reiteration: “consumers” and “producers” are not two different classes of persons, but two kinds of constructed legal-economic identities. Political leaders like Ralph Nader often speak as though “consumers” and “producers” were two different classes of real existing persons, with two different, conflicting, sets of interests.<sup>89</sup> So do European advocates of a proconsumer revolution.<sup>90</sup> Yet of course that is nonsense. Everyone has both identities. The choice between consumerism and producerism is not a choice about whether “the” consumers or “the” producers will ultimately win out, but a value choice about which of these two possible economic identities deserves priority in a modern market order.

Such indeed is the shape that debate over Wal-Mart takes today, for example, as we can see both in America and abroad. In America, Democratic

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88. For these widely leveled charges, see, for example, George S. McGovern, *The End of ‘More,’* L.A. TIMES, May 22, 2006, at B11; and Andrew Ratner, *United States of Wal-Mart: What Is the True Cost of Those Low Prices?*, PITTSBURGH POST-GAZETTE, Mar. 12, 2006, at H-6.

89. For an example from the Ralph Nader stable, see Peter MacFarland, *Consumer Power: North American Style*, NEW INTERNATIONALIST, May 1985, at 26, 26, available at <http://www.newint.org/issue147/north.htm> (“The new wave will have consumers banding together to take the price-setting initiative away from the producers.”).

90. Mettler, *supra* note 10.

politicians charge that Wal-Mart exploits its workers.<sup>91</sup> In India, the arrival of Wal-Mart is protested by small shopkeepers who fear for their livelihoods.<sup>92</sup> Wal-Mart counters such charges by asserting that it saves *consumers* “billions of dollars by squeezing costs.”<sup>93</sup> The conflict here is not between the interests of two clearly defined classes of persons. After all, the American workers of a given small-town Wal-Mart are also its shoppers, and the same will be true of future Indian shopkeepers. If they do not themselves shop at Wal-Mart, other members of their community will. In fact, it is difficult indeed to say where the long-term economic interests of the community lie, to the extent we conceive of the community as a community of consumers.

But the real debate is not about some clear economic choice for the community. The real debate is about how we should imagine that community—whether we should conceive of it as a community of consumers, or as a community of producers. The real conflict is one between two incommensurable visions of what counts as justice in a modern economy. It is conflict in the imagination, asking whether, when we imagine the modern economy in the abstract, we feel instinctively that it is “the worker” or “the shopkeeper” who matters most, or “the consumer.”<sup>94</sup> It is a conflict over whether we think it is the vocation of the law to intervene to protect rights on the supply side, or on the demand side. It is a conflict over, in President Roosevelt’s words, “popular economic *thought*.”<sup>95</sup>

#### IV. ATLANTIC CONFLICTS: ANTITRUST AND RETAIL PRICING

How is this conflict in “popular economic thought” playing out on the two sides of the Atlantic? Can we see patterns in the law that reflect the great political conflicts over consumerism and producerism? Here, as in other work, I will focus on the comparison between the United States and two northern continental European countries, France and Germany. Economic consumerism can be found in all three countries: to some extent, both France and Germany have been moving closer to the ideal type of a legal order oriented toward the consumer economic interest. To some extent, conversely, American law has

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91. Adam Nagourney & Michael Barbaro, *Eye on Election, Democrats Run as Wal-Mart Foe*, N.Y. TIMES, Aug. 17, 2006, at A1.

92. *Wal-Mart’s Welcome to India Includes Demonstrations*, N.Y. TIMES, Feb. 23, 2007, at C3.

93. Nagourney & Barbaro, *supra* note 91.

94. The same is true in Europe, where, as de Grazia observes, the conflict is one between “the European vision of the social citizen and the American notion of the sovereign consumer.” DE GRAZIA, *supra* note 52, at 342.

95. See GLICKMAN, *supra* note 1, at 156 (emphasis added).

embraced consumer protection. It is not the case that America is the home of a pure form of economic consumerism, or that France and Germany have refused every form of economic consumerism. In some sectors in particular—notably agriculture—deeply entrenched producerist attitudes exist on both sides of the Atlantic.

Nevertheless, reviewing a variety of areas of the law reveals that significant relative differences between American consumerist style and a continental producerist style persist. Continental Europe has by no means abandoned the politics of class conflict — quite the contrary. Moreover, in areas critical to everyday life, continental law continues to resist economic consumerism. Despite efforts to foster economic consumerism in Europe, the differences in legal values remain stubbornly present, and we will not grasp the nature of important social and political conflicts at work today unless we recognize them.

Let us start with what Americans call “antitrust” and Europeans call “competition law.” Over the course of the twentieth century, and especially over the last thirty years, American antitrust law has moved strongly in the direction of protecting the economic interests of consumers through fostering competition. According to standard American antitrust analysis, markets ought to be structured in such a way as to maximize benefits to consumers, and in particular to guarantee the kind of competition that yields the lowest possible prices. Exactly how this end is to be achieved is of course a matter of great contention, and American law is open to the argument that there may be forms of competition that benefit consumers without necessarily guaranteeing that all goods will always be sold at the lowest possible price.<sup>96</sup> But the basic commitment to protecting consumer economic interest is now almost universally shared in the United States, both in government and among scholars. Competition is the watchword, and antitrust law is thought of as protecting consumers, not competitors. The primacy of consumer economic interest has come to seem so self-evident that it hardly requires any effort at justification.<sup>97</sup>

Now, antitrust is an area of the law where we would most expect to see convergence between the approaches of the United States and Europe, at least to the extent that big deals and big firms are involved. Competition crosses borders and consolidation takes place on a global scale. There are deals and business practices that must be approved by authorities in both the United States and Europe, and there is considerable communication between

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96. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2715 (2007) (noting that resale price maintenance may give consumers more options).

97. *E.g.*, IRVING SCHER, *ANTITRUST ADVISER* 1-2, 1-3 (4th ed. 2005) (claiming that the purpose of antitrust law is to protect “consumers of goods and services”).

specialists on either side of the Atlantic.<sup>98</sup> If there is one area of the law in which we would expect to see pressure toward the creation of a single standard, this is it.

And the pressure is certainly there. Nevertheless, sharp cultural limits remain. Europe has long differed from the United States. As Americans see it, the European tradition has sought to protect competitors rather than consumers—as Americans would say, “We protect competition, you protect competitors.”<sup>99</sup> Aditi Bagchi summarizes the clash as Americans commentators have historically perceived it. From the American point of view:

While US regulators are interested in the expected effect of a merger on prices, “the European Commission [has] normally disapprove[d] a merger or impose[d] regulatory conditions if the merger significantly enhance[d] the market share of a dominant firm, create[d] joint dominance, or seriously distort[ed] the playing field for competitors.” While the United States looks for corporate behavior that might undermine consumer welfare, the European Union has been “sensitive to a wider range of single-firm conduct, especially when the ‘dominant’ firm’s rivals are significantly smaller.”<sup>100</sup>

This contrast in approach involves the most fundamental questions of antitrust. From the prevailing point of view of American law, there is nothing wrong with bigness as such. The right question is whether the dominance exercised by a given firm or firms provides consumers with competitive prices. Not so in Europe. Europeans have been more willing to regard bigness as a danger, even if it benefits consumers: permitting big competitors to prosper may harm smaller ones.

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98. For a survey of the two regulatory schemes, see Douglas H. Ginsburg, *Comparing Antitrust Enforcement in the United States and Europe*, 1 J. COMPETITION L. & ECON. 427 (2005). For recent examples of firms facing regulatory authorities on both sides of the Atlantic, see, for example, Grant Robertson & Eric Reguly, *Thomson-Reuters Merger a Balancing Act*, GLOBE & MAIL (Can.), May 16, 2007, at B3; and Paul Wilson, *Deal Would Vault Hexion to Top 5*, COLUMBUS DISPATCH, July 13, 2007, at 8C. For contact between specialists, see, for example, Neelie Kroes, Member of the European Comm’n in Charge of Competition Policy, Speech at the Fordham Corporate Law Institute: Preliminary Thoughts on Policy Review of Article 82, at 2 (Sept. 23, 2005) (on file with the author).

99. Eleanor M. Fox, “*We Protect Competition, You Protect Competitors*,” 26 WORLD COMPETITION L. & ECON. REV. 149, 149 (2003).

100. Aditi Bagchi, *The Political Economy of Merger Regulation*, 53 AM. J. COMP. L. 1, 4-5 (2005) (quoting Eleanor Fox, *Global Markets, National Law, and the Regulation of Business: A View from the Top*, 75 ST. JOHN’S L. REV. 383, 395 (2001); Michael Jacobs, *Mergers and Acquisitions in a Global Economy: Perspectives from Law, Politics, and Business*, 13 DEPAUL BUS. L.J. 1, 7 (2000)) (alterations in original) (citations omitted).

But are things changing? In recent years Europeans have certainly been responding to a real drive in favor of adopting something like the American approach. In particular, E.U. Competition Commissioner Neelie Kroes, an aggressive advocate of change, has declared that enforcement agencies should hesitate to intervene in markets “*unless* there is clear evidence that they are not functioning well.”<sup>101</sup> And indeed, current E.U. law has been making a real effort to take consumer economic interests into account.<sup>102</sup> As a result, bureaucrats in Brussels have made some highly publicized moves intended to lower consumer prices, actively imposing heavy fines on certain cartels.<sup>103</sup> In particular, they have been trying to bring competition to the energy industry in order to lower prices—though it remains unclear whether these efforts will really succeed in breaking down national protections for the benefit of consumers.<sup>104</sup> There have also been shifts in the domestic German and French systems that are the focus in this Article: these systems, which once avowedly protected only competitors, now purport to protect both competitors and consumers.<sup>105</sup> All of this must make some difference.<sup>106</sup> The idea that law should be about consumers has been spreading into countries like France and Germany since the dark days of the 1930s.

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101. Kroes, *supra* note 98.

102. *E.g.*, ULRICH LOEWENHEIM, KARL M. MEESSEN & ALEXANDER RIESENKAMPFF, 1 KARTELLRECHT [CARTEL LAW] 6 (2005) (arguing that consumers are beneficiaries of cartel regulation); BARRY J. RODGER & ANGUS MACCULLOCH, COMPETITION LAW AND POLICY IN THE EC AND UK 153 (3d ed. 2004) (arguing that consumers must receive pass-on of benefits from restrictions on competition).

103. For current activities of the European Commission, see, for example, Press Release, European Commission, Competition: Commission Fines Members of Lifts and Escalators Cartels over €990 Million (Feb. 21, 2007), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/209>. For the broader European Union, see Europa: Activities of the European Union—Competition, *supra* note 79.

104. See Keith Johnson, *Electric Attraction: For Europe's Utilities, a Frenzied Power Grab: As Deregulation Nears, Bids Top \$100 Billion; Will Consumers Benefit?*, WALL ST. J., Apr. 11, 2007, at A1.

105. For Germany, see Gesetz gegen den unlauteren Wettbewerb [Statute Against Unfair Competition], July 3, 2004, BGBl. I at 1414, § 1 (F.R.G.) (“Dieses Gesetz dient dem Schutz der Mitbewerber, der Verbraucherinnen und der Verbraucher . . . .” (This law serves to protect competitors and consumers)). For the previous history, see HELMUT KÖHLER & JOACHIM BORNKAMM, WETTBEWERBSRECHT [COMPETITION LAW] 39-40, 545-55 (24th ed. 2006).

106. The *Economist*, for example, thinks it can detect a “subtle but discernible shift in competition policy” toward favoring lower consumer prices in the retail sector, at least in Britain. *Competition Policy in the EU: Big Chains Enjoy a Buyer's Market*, ECONOMIST, Feb. 15, 2007, at 78.

But for all that, Europe remains Europe, even in this area of the law where global pressures are so intense. The most recent evidence came in June 2007, when Nicolas Sarkozy, the French President often perceived as an unreconstructed pro-American, nevertheless set out to diminish American influence on European competition policy. Sarkozy, conscious of domestic French political pressures, succeeded in eliminating the endorsement of “free and undistorted competition” from the draft organic treaty of the European Union.<sup>107</sup> Instead, he proclaimed nothing less than “the end of competition as an ideology and dogma” in Europe.<sup>108</sup> If Nicolas Sarkozy will not advocate “free and undistorted competition” in the French political world, nobody will. As Eleanor Fox, a close observer of international competition law, has declared, “there are values, beliefs, larger pictures and contexts” in play.<sup>109</sup> Consequently, despite European efforts to shift in an American direction, it remains the case that “U.S. law privileges single-firm action” while “E.U. law privileges contestability of monopolized markets.”<sup>110</sup> Values and beliefs do not fade away easily, even under intense global pressure.

As a result, important differences remain in the international business climate for big firms.<sup>111</sup> These are differences that can have real impact on the operations of big multinationals, which must operate in both American and European legal environments, for example, on Microsoft’s efforts to introduce its new Vista operating system. The Vista system poses a potential threat to Microsoft’s competitors. Consequently, at least for a while, Vista faced much tougher going obtaining regulatory approval in Europe than in the United States. As the European Commissioner put it with regard to Microsoft, European law is meant to operate to “the benefit of *all companies* and European consumers.”<sup>112</sup> If consumers get attention, so do “all companies,” and as a result, from the European point of view, the key question about Vista was whether it was designed to exclude rivals and solidify Microsoft’s market share.

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107. Honor Mahony, *Sarkozy Claims ‘Competition’ Victory at Summit*, EUOBSERVER.COM, June 25, 2007, available at [http://www.ezilon.com/information/article\\_18148.shtml](http://www.ezilon.com/information/article_18148.shtml).

108. *Id.*

109. Eleanor M. Fox, *Monopolization, Abuse of Dominance, and the Indeterminacy of Economics: The U.S./E.U. Divide*, 2006 UTAH L. REV. 725, 740.

110. *Id.*

111. For the continuing truth of this observation, see Stephanie Kirchgaessner, *Intellectual Property Line Highlights an Atlantic Rift*, FIN. TIMES (London), Nov. 3, 2006, at 24. Cf. Amanda Cohen, *Surveying the Microsoft Antitrust Universe*, 19 BERKELEY TECH. L.J. 333, 354 (2004).

112. Neelie Kroes, European Comm’r for Competition Policy, Introductory Remarks at Press Conference on Imposing Penalty Payments on Microsoft (July 12, 2006) (emphasis added), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/452>.

Holding that such was indeed the case, the European Commission imposed massive fines for Microsoft's abuse of its dominant position in 2004 and 2006.<sup>113</sup> By contrast, complaints by Microsoft's rivals to the U.S. Justice Department were unavailing for months.<sup>114</sup> Eventually, pressure from state competition officers compelled the Justice Department to act against Microsoft.<sup>115</sup> Nevertheless, the politics remain tellingly different: even Microsoft's victorious rivals in the United States had to find ways to argue that they were acting in "consumers' interests."<sup>116</sup> While the future is unclear, it is surely the case that Microsoft must act in a world in which there will be two different regimes for years to come. In this dual world, its decisions must be justified in the United States in terms of "consumers' interest" and the benefits of competition, while those same decisions must be justified in Europe, at least in part, in terms of the interests of "all companies." Europe may have moved somewhat in the direction of U.S. law, but at a minimum it remains *more* oriented toward the producer interest of competitors. Producerism hangs on.

If global pressures have not forced convergence when it comes to giant transnational firms and huge transnational deals, the same is even truer of the everyday world of retail. Indeed, for my purposes, it is particularly valuable to focus on the law of retail. After all, the law of retail shows the most direct impact of differing values and beliefs on the lives of consumers, and demonstrates through many telling signs that the consumer economic interest matters less from the French and German point of view than it does from the American. As discussed above, the consumer *economic* interest is, first and foremost, an interest in low prices. Accordingly, it is a matter of some significance that continental European law frowns on various forms of discounted pricing that are considered acceptable in America. Both the French and Germans are simply less willing than Americans to allow retail prices to be set competitively, and their unwillingness contributes to the making of an everyday consumer culture that does much less to ratify the primacy of consumer economic identity than is the case in the United States.

To illustrate the difference, I begin with my first of several examples from a major recent American business failure in Europe: Wal-Mart's July 2006 decision to abandon its German operations, at a loss of some \$1 billion. As the

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113. *See id.*

114. Kevin J. Delaney & Robert A. Guth, *Microsoft Rivals Gripe to U.S. About Its New Vista Software*, WALL ST. J., Feb. 10, 2006, at B4.

115. Stephen Labaton, *Microsoft Will Alter Vista System*, N.Y. TIMES, June 20, 2007, at C1.

116. Ellen Nakashima, *Extended Monitoring Sought for Microsoft; Google Asks Court To Lengthen '02 Antitrust Decree*, WASH. POST, June 26, 2007, at D1 (quoting David C. Drummond, Senior Vice President and Chief Legal Officer, Google) (emphasis added).

*Wall Street Journal* observed, Wal-Mart's debacle in Germany had to do in part with Germany's "laws against selling goods at below cost, which made it difficult to lure shoppers with so-called loss leaders."<sup>117</sup> Indeed, what Wal-Mart discovered, in its German misadventure, was a difference of great interest for comparative law, and of arguably momentous significance for international retailing. Wal-Mart's business model—like that of numerous other U.S. firms—depends on the use of loss leaders, i.e., goods priced under cost. Many American firms use loss leaders in order to draw consumers into their establishments, in the hope that they will buy more profitable goods. Some firms depend heavily on this practice. For example, large appliance retailers such as Circuit City can sell appliances at or below cost, because they can make money by inducing consumers to buy warranties.<sup>118</sup>

Yet such practices are generally forbidden in Europe. Laws forbidding loss leaders are not unknown in the United States: most American states also have laws, dating to the Depression, that prohibit below-cost sales.<sup>119</sup> But in the United States these laws are rarely enforced.<sup>120</sup> And while American antitrust law treats below-cost pricing as suspicious *if* there is other evidence of illegal behavior, it does not ban below-cost pricing outright.<sup>121</sup> In Europe, by contrast, this sort of ban is a central part of competition law, declared permissible by the European Court of Justice in the famous 1993 *Keck* decision, which marked a kind of European declaration of independence from American economic approaches to retail.<sup>122</sup> Laws limiting below-cost pricing are an important bar to the use of American retailing practices. Wal-Mart and its business counsel should have understood this, and comparative lawyers ought to understand it too: continental Europeans are much readier than Americans to let the government meddle with retail practices, even at the cost of raising prices for consumers. One consequence is to create an important barrier to entry for large American retailers like Wal-Mart. This does not mean that Europe does not have big box stores. There are many of them. What it means is something

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117. Ann Zimmerman & Emily Nelson, *With Profits Elusive, Wal-Mart To Exit Germany*, WALL ST. J., July 29, 2006, at A1.

118. This strategy may be collapsing in the current market. See Gary McWilliams, *Minding the Store: Analyzing Customers, Best Buy Decides Not All Are Welcome*, WALL ST. J., Nov. 8, 2004, at A1.

119. See Schragger, *supra* note 55, at 1066-68; Francis M. Dougherty, Annotation, *Validity, Construction, and Application of State Statutory Provision Prohibiting Sales of Commodities Below Cost—Modern Cases*, 41 A.L.R.4th 612 (1985).

120. See Dougherty, *supra* note 119; Schragger, *supra* note 55, at 1066-68.

121. E.g., SULLIVAN & GRIMES, *supra* note 9, at 168-69.

122. Case C-267/91, *Criminal Proceedings Against Keck and Mithouard*, 1993 E.C.R. I-6097.

subtler: European big box stores cannot engage in the kind of pricing practices that are the stuff of America's consumerist retailing sector.

Nor is below-cost pricing the only such issue. Europeans, unlike Americans, engage in other sorts of direct retail price regulation too.<sup>123</sup> To be sure, most prices are set competitively in Europe, just as they were in the 1930s. Nevertheless, in certain key areas Europeans are willing to regulate prices in ways that reveal deep differences between their attitudes and those of Americans. For example, Europeans have extensive law regulating when merchants can put goods on sale. Thus in France, merchants may ordinarily hold storewide "sales" ("*ventes*") only during legally regulated "sales seasons," and even then only with regard to certain goods: as any regular visitor to Paris, that world capital of shopping, knows, cheap prices on high-end goods come in January and July, when the law allows "*les soldes*."<sup>124</sup> Other sorts of sales—especially specious "going-out-of-business" sales of the kind that are common in the United States—are vigorously combated in France. If you announce a going-out-of-business sale in France, the authorities will check to make sure that you actually go out of business.<sup>125</sup> French newspapers even run articles lionizing the heroic officials who investigate fraudulent "sales."<sup>126</sup> Germany is no longer quite like France: as of 2004, German law no longer directly regulates sales seasons.<sup>127</sup> This is part of Germany's new effort to bring

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123. For example, the current German pricing ordinance, which went into effect in 2004, includes a four-page appendix of mathematical formulae. *Verordnung zur Regelung der Preisangaben* [Ordinance on the Regulation of Pricing], Mar. 14, 1985, BGBl. I at 582, § 6 (F.R.G.).

124. The dates for the sales seasons, tourists may wish to know, are set by *Département*, and may vary by a week or so in different parts of France. For the general law with further references, see DIDIER FERRIER, *DROIT DE LA DISTRIBUTION* [LAW OF DISTRIBUTION] § 458, at 254 (Litec 3d ed. 2002). Apart from *les soldes*, merchants may only put particular items already present in the shop on "promotion"—and even then subject to considerable regulation. Low-end goods are often offered on "promotion"—though here too there is quite a bit of regulation. For a guide aimed at the lay consumer, see AMICALE DES CADRES SUPÉRIEURS DES SERVICES EXTÉRIEURS ET DES LABORATOIRES DE LA DIRECTION DE LA CONCURRENCE, DE LA CONSOMMATION ET DE LA RÉPRESSION DES FRAUDES [ASSOCIATION OF SENIOR EXECUTIVES FOR EXTERNAL SERVICES AND FOR INVESTIGATIVE OFFICES CHARGED WITH THE MANAGEMENT OF COMPETITION, CONSUMER AFFAIRS, AND COMBATING FRAUD], *GUIDE JURIDIQUE ET PRATIQUE DU CONSOMMATEUR* [A LEGAL AND PRACTICAL GUIDE FOR THE CONSUMER] 83-87 (Emile Guchet ed., 2005).

125. See generally C. COM. arts. L310-1, L310-5 (Fr.) (limiting liquidation sales to a two-month period and subjecting violators to a fine).

126. Leroy, *Ils font la chasse aux fraudeurs* [They Hunt Down Defrauders], *PARIS-NORMANDIE*, Jan. 19, 2007.

127. For the previous history, see KÖHLER & BORNKAMM, *supra* note 105, at 39-40, 545-55 (discussing older laws regulating sales seasons).

consumerism to its law. Nevertheless, we should not be deceived into thinking that Germany has gone wholly American: German authorities continue to police other sorts of sales vigilantly.<sup>128</sup> Retail practices are relatively free in the United States. In Europe, by contrast, they are hedged in by a forest of regulations.

European policymakers understand perfectly well that these regulations result in higher prices for consumers. Yet even when Europeans amend their law of retail in order to lower prices and stimulate consumption (as the French did in the summer of 2005), they do so by fiddling with the regulations, not by deregulating.<sup>129</sup> Why is there such price regulation in Europe? Europeans give two answers. The first answer is the obvious one, and the one that surely suggests itself to both Microsoft and Wal-Mart: forbidding “excessively” low prices serves the interest of the existing competitors in a given retail sector. It is a producerist practice. If big operations like Wal-Mart cannot sell below cost, they will find it harder to drive their competitors out of business. Preventing such practices is the stated purpose of the current French law, which forbids prices that are “abusively low compared to cost” if they “intentionally or effectively prevent an enterprise or one of its products from coming to market.”<sup>130</sup> Such indeed has been the stated purpose of European competition law since the early twentieth century.<sup>131</sup> In this sense, the legal limitations that prevented Wal-Mart from using loss leaders are no different from the legal limitations that have hamstrung Microsoft.

Nevertheless, contemporary European lawyers insist that their law no longer favors only competitors. Like American law, they insist, it protects

128. KÖHLER & BORNKAMM, *supra* note 105, at 743-44.

129. In August 2005, France amended the *Loi Galland* of 1996, in order to lower prices so as to stimulate consumer demand. Law No. 96-588 of July 1, 1996, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 3, 1996, p. 9983, *modified by* Law No. 2005-882 of Aug. 2, 2005, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 3, 2005, p. 2 sur 114. They did so, though, by forbidding distributors to pass onto consumers the full cost of the “*marge arrière*,” a fee paid by the distributors of high-end goods to induce retailers to display their goods prominently. Studies showed that as much as thirty percent of the cost of goods was attributable to the *marge arrière*. The new law limited that to twenty percent. The French government did not choose to amend another law limiting large retail practices, Law No. 96-603 of July 5, 1996, Journal Officiel de la République Française [J.O.] [Official Gazette of France], July 6, 1996, p. 10,199. This episode raises an important issue that I do not pursue here, but that was arguably of importance in Wal-Mart’s German failure; in practice, European retailing treats high-end and low-end goods quite differently.

130. C. COM. art. L420-5 (Fr.).

131. *See supra* Part II.

consumers too.<sup>132</sup> So how could anyone argue that law prohibiting lowering prices favors consumers? Americans might suppose that Europeans had done an economic analysis showing that consumers would suffer in the long run economically from below-cost pricing, even if they benefited in the short term. But that is not the case. Instead, the answer is that European lawyers tend to define the consumer interest not as an economic interest but as a kind of consumer protection interest—an interest in being protected against “misleading” practices. A current French handbook explains reasoning that most Americans may find bizarre: “Enticing sales tactics [*la promotion*] consist in inciting the purchase of a product or the hire of a service. Such tactics are often harmful to the consumer, because, by offering an advantage, they create pressure to make an inopportune purchase.”<sup>133</sup> “Lowering the price,” the same text ominously notes, “has a very strong tendency to incite the consumer.”<sup>134</sup> Consumers, by this reasoning, cannot be trusted to decide for themselves when a purchase is “opportune,” and so they must be protected against being “incited” through being offered an “advantage.” Low prices in particular threaten to “harm” consumers, by disordering their senses and turning them into foolish shoppers.

The new German statute offers a variant on the same argument—though in terms that may well strike Americans as even more bizarre. The German statute couches its argument, in part, in the grand language of human dignity. “Unfair” competitive practices, the law explains, include, among other things: “actions that have a tendency to harm the decision-making freedom of consumers or other market participants by exerting pressure in a way that displays contempt for their humanity [*in menschenverachtender Weise*] or through other inappropriate or irrelevant influence.”<sup>135</sup>

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132. Gesetz gegen den unlauteren Wettbewerb [Statute Against Unfair Competition], July 3, 2004, BGBl. I at 1414, § 3 (F.R.G.).

133. FERRIER, *supra* note 124, at 248 (translation by author) (“La promotion consiste à inciter à l’achat d’un produit ou à la demande d’une prestation de service. Elle préjudicie souvent au consommateur en le poussant par l’offre d’un avantage à réaliser des achats inopportuns . . .”) (citations omitted).

134. *Id.* at 249 (translation by author) (“La diminution du prix est un facteur très incitatif pour le consommateur.”).

135. Gesetz gegen den unlauteren Wettbewerb [Statute Against Unfair Competition], July 3, 2004, BGBl. I at 1414, § 4 (F.R.G.) (translation by author) (“Unlauter im Sinne von § 3 handelt insbesondere, wer[:] 1. Wettbewerbshandlungen vornimmt, die geeignet sind, die Entscheidungsfreiheit der Verbraucher oder sonstiger Marktteilnehmer durch Ausübung von Druck, in menschenverachtender Weise oder durch sonstigen unangemessenen unsachlichen Einfluss zu beeinträchtigen . . .”).

This paragraph may seem weird indeed to anyone who has never wandered in the forest of the contemporary German codes, with their strange conception of human dignity. Although it speaks of “freedom,” the paragraph does not mean “freedom” in the sense in which Americans ordinarily use the word. This is not the freedom of the fully sovereign consumer, who is deemed the best judge of his own interests. It is the supervised freedom that goes by the German name “*Selbstbestimmung*”: it is “self-determination” under the watchful eye of a caring, supportive government.<sup>136</sup> The German consumer who enjoys this form of freedom must be paternalistically protected against his own tendency to make bad decisions—including the bad decision to buy something at a low price. Indeed, to offer the German consumer a low price may represent, at the limit, nothing less than a display of “contempt” for his “humanity”! Similar things are said in a related area of European law, though one that is undergoing real change: the law of retail advertising, which is extensively regulated in ways that are likely to surprise Americans.<sup>137</sup>

Indeed, all of this is pretty astonishing, not to say comical, from the point of view of an American—probably even to those Americans who favor “libertarian paternalism.”<sup>138</sup> Can anyone really believe that aggressive marketing could constitute a species of inhumane and degrading treatment?<sup>139</sup> Americans may be tempted to laugh out loud when a French lawyer ponderously declares that “lowering the price has a tendency to incite the consumer.” Nevertheless, my purpose is not to make fun of German or French law. The task of comparative law is to arrive at a sympathetic understanding of

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136. Cf. JOSEF DREXL, DIE WIRTSCHAFTLICHE SELBSTBESTIMMUNG DES VERBRAUCHERS [ECONOMIC SELF-DETERMINATION FOR THE CONSUMER] (1998). I discuss this concept, and the contrast with American ideas, more fully in James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004).

137. This is particularly true with regard to the law of comparative advertising, which has been in considerable flux. In the past, European law generally forbade comparative advertising. This is no longer true, but the law remains quite complex. For France, see RÉGIS FABRE ET AL., DROIT DE LA PUBLICITÉ ET DE LA PROMOTION DES VENTES [LAW OF ADVERTISING AND OF THE PROMOTION OF SALES] 148-51 (2d ed. 2002). For Germany, see KÖHLER & BORNKAMM, *supra* note 105, at 800-03 (discussing Gesetz gegen den unlauteren Wettbewerb [Statute Against Unfair Competition], July 3, 2004, BGBl. I at 1413, § 6, rdn. 1-5 (F.R.G.)).

138. See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003).

139. It is particularly astonishing to see the language of “human dignity” in this context. Germans often claim that their law of “human dignity” grows out of a reaction against the horrors of Auschwitz. But in practice, the everyday German law of human dignity can have remarkably little to do with that terrifying experience. See James Q. Whitman, *On Nazi ‘Honour’ and the New European ‘Dignity,’* in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 243-66 (Christian Joerges & Navraj Singh Ghaleigh eds., 2003).

foreign systems, no matter how outlandish they may seem at first blush. Approached thoughtfully, and seen in context, German and French pricing law is by no means entirely silly, and it deserves some respectful attention from comparativists. For starters, the use of loss leaders in America *is* sometimes arguably abusive, in ways that deserve to be the subject of good discussion.<sup>140</sup> Consumers are *not* always clearly the best judges of their own interest.

More importantly, the European law of retail has to be judged in its larger social context. That context is in part economic, and in part sociopolitical. To begin with the economic, we must remember that consumer credit is much less freely available in Europe than it is in the United States. Credit reporting of the American kind does not exist and is indeed impossible under the norms of European privacy law.<sup>141</sup> Consumers use credit cards much less.<sup>142</sup> They cannot exploit home refinancing the way Americans do.<sup>143</sup> Unlike his American counterpart, the ordinary European consumer is not his own loan officer. Because Americans have easy access to credit, they are able to stretch in order to take advantage of a cheap opportunity. It is harder for European consumers to behave that way. Purchases are more difficult for Europeans to finance—which means they may indeed be more “inopportune” for a given European consumer than they would be for an American. European consumers operate in a world in which they are protected against the risks of easy consumer credit, which perhaps does imply that they must also be protected against temptations created by aggressive marketing. Indeed, aggressive marketing of cheap credit itself poses dangers, as the subprime lending crisis that hit America in the summer of 2007 suggests. After all, that crisis involved precisely borrowers who took out risky loans because they were tempted by low “teaser rates.”<sup>144</sup>

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140. For example, the sale of warranties in consumer electronics retailing, *see supra* note 118 and accompanying text, arguably preys on consumer irrationality in assessing risk, as well as on the absence of a developed secondary market for warranties.

141. Whitman, *supra* note 136, at 1190–92. My argument there has been challenged. *See* Jerry Kang & Benedikt Buchner, *Privacy in Atlantis*, 18 HARV. J.L. & TECH. 229, 258–59 (2004). Kang and Buchner misrepresent my claims. I certainly did not claim, as they imply, that there is no German credit reporting. Quite the contrary. I described it in detail, but focused on the differences in the practices and goals of German regulation.

142. *E.g.*, Marcus Walker, *Behind Slow Growth in Europe: Citizens' Tight Grip on Wallets*, WALL ST. J., Dec. 10, 2004, at A1 (noting that Western Europeans have 0.27 credit cards per capita, as compared with 2.23 for Americans).

143. Steven Pearlstein, *In Europe, One Size Fits None*, WASH. POST, Dec. 7, 2005, at D1 (noting that there is no mortgage refinancing in Europe).

144. *See, e.g.*, Gretchen Morgenson, *More Home Foreclosures Loom as Owners Face Mortgage Maze*, N.Y. TIMES, Aug. 6, 2007, at A1.

Failure to regulate prices, it seems, can result not only in woes for consumers, but even in a major economic meltdown.

As for the sociopolitical context, the European regulation of pricing belongs to a European culture that generally rejects the kind of individual sovereignty that dominates in America. As I have argued elsewhere, the American value of “liberty” plays a comparatively lesser role in Europe, a continent where people tolerate much more intrusive state intervention than in America.<sup>145</sup> This leads to far-reaching differences in the law of privacy, and it leads to differences in the law of retail as well. Just as European legal culture rejects the idea that the sovereign citizen ought to be able to keep firearms, it rejects the idea that the fully sovereign consumer ought to face the dangers of the market without agents of the state standing reassuringly by his side. Differences in the law of retail are thus only one aspect of a much grander contrast between these two great Western legal cultures.

In any case, what matters, in all of this, is not whether the Europeans are right or wrong. What matters, for purposes of comparative law, is that they are different. Europeans certainly do feel pressure to favor consumers. At the same time, though, they perceive dangers in consumer sovereignty where Americans do not. They *are* resisting American-style consumerism, in the face of all the pressures. This is part of why Wal-Mart failed in Germany, and it is part of what we should be teaching in comparative law classes: we should be initiating our students into the contrast between the American culture of maximal consumer sovereignty and the European culture of maximal consumer protection. Let me emphasize that there is nothing antiquarian in teaching such material. The contrast is very much alive: the European law that I have summarized is not law of the 1930s. It is law of 2004, 2005, 2006, and 2007.

Not least, we should recognize that Europeans have defined the consumer interest in ways that allow their law of competition to continue protecting competitors. The bottom line is that European law still finds methods to forbid deliberately low pricing, in ways that help some competitors stay in business. As long as one defines the consumer interest as an interest in being protected, rather than an interest in benefiting from low prices, European law can continue to protect a class of producers, as it has done for generations.

## **V. REGULATING RETAIL: HOURS, MERCHANDISE, SQUARE FOOTAGE**

As the law of retail pricing suggests, Europeans care comparatively more about producer interests (and consumer protection), while Americans care

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145. See Whitman, *supra* note 136.

comparatively more about consumer economic interests (and consumer sovereignty). These are differences we can only understand if we bear in mind our two ideal types of economic consumerism and producerism. We discover further aspects of this contrast as we dig more deeply into the law of retail shopping. Let us look at a couple of other aspects of the law of shopping, that most profoundly meaningful activity in modern consumer life. In particular, let us look at the regulation of store hours, merchandise, and square footage.

What is the consumer economic interest when it comes to shopping? We can define it, straightforwardly enough, as an interest in low prices, wide selection of goods, and shopping convenience. This interest is typically best served by stores offering a wide range of goods and open for maximally long hours. Consumers prefer large diversified retail establishments that open early and close late. Retail law that is unfavorable to consumer economic interests comes, correspondingly, in several forms. It may be law limiting store hours. It may be law limiting the range of merchandise that retailers may offer; for example, if the law permits retailers to offer only shoes or socks, but not both, the consumer who wishes to clothe his feet must make two shopping stops and not one. It may be law very simply limiting the size of shops by limiting their square footage. It may, of course, also be law limiting competition within a certain district, permitting only a limited number of shops to open.

Over the last generation or so, American law has become increasingly hostile to all of these forms of legislation. American large retailers are permitted to carry the widest range of goods. We can all now buy milk and cookies at large drugstore chains—though goods that smack of sin, like liquor, are still generally segregated into separate shops. Other protections against competition for small shops are nil. Apart from Sunday blue laws, themselves in sharp decline,<sup>146</sup> there are rarely limits on the hours stores may keep.<sup>147</sup> The American economy has also produced the mecca of shopping convenience, the mall.

The contrast with continental Western Europe is marked, though it is certainly diminishing. Indeed, the retail law of European countries has long shown what, to American eyes, can seem to be a bizarre disregard for the interests of consumers. One familiar example is German store-closing laws—

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146. See, e.g., Jonathan Gruber & Daniel M. Hungerman, *The Church vs. the Mall: What Happens When Religion Faces Increased Secular Competition?* 2-4 (Nat'l Bureau of Econ. Research, Working Paper No. 12,410, 2006), available at <http://www.usc.edu/schools/college/crcc/private/ierc/Hungerman.pdf>.

147. There are occasionally cases, to be sure, in which zoning authorities are concerned with limiting store hours, for example in order to avoid disruption in residential areas. See, e.g., *Gratton v. Pellegrino*, 348 A.2d 349, 351 (N.H. 1975). Nevertheless such concerns hardly match the role they play in continental Europe.

the laws of the *Ladenschlußgesetz*.<sup>148</sup> The *Ladenschlußgesetz* has historically limited the opening hours of most German retail establishments. Under a law passed in 1956, German stores were obliged to close at 6:30 in the evening, as well as on Saturday afternoons and Sundays.<sup>149</sup> Frustrated American expatriates know what it is like to rush to a German supermarket after a day at the office, only to encounter departing clerks who shout at them, triumphantly, “*Feierabend!*” (“Time to knock off work!”) The old *Ladenschlußgesetz* is no more. German efforts to import legal consumerism have involved a sustained assault on store hour limitations: as of June 2003, after many years of political battling, ordinary stores are permitted to remain open until 8:00 p.m.<sup>150</sup> Recent efforts have provided further encouragement to shopkeepers to keep longer hours—though it remains quite unclear how many of them will take advantage of it.<sup>151</sup>

But if the *Ladenschlußgesetz* is under assault, that does not mean it is of no comparative interest. In fact, it remains a classic example of the conflict between producerism and economic consumerism. It also remains, despite recent legislative reforms, an example of the depth of German political resistance to American-style consumerism. Limiting store hours has the obvious effect of limiting consumer choice (and the obvious collateral effect of limiting the opportunities of German women to enter the workforce, since it assumes that some family members will be available to shop during the workday). Nevertheless, it is striking that the German politics of the *Ladenschlußgesetz* have been overwhelmingly producerist. German debates over the *Ladenschlußgesetz* have long revolved around a purported producer interest: the interest of store employees in being immune from pressure to work longer hours. As one German explained to the *Christian Science Monitor*: “In Germany, the protection of workers has always been a priority. Parents need to be at

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148. Gesetz über den Ladenschluß [Act Concerning Store Closing Times], Nov. 28, 1956, BGBl. I at 875 (F.R.G.). Comparable laws, and comparable debates, exist in France, though I will not discuss them. See generally C. TRAV. art. L221. The debate in France has been quite heated at times. See, e.g., Les documents de travail du Sénat [The Report of the French Senate], Les horaires d’ouverture des commerces de détail [Opening Hours of Retail Establishments] (Oct. 2003), available at <http://www.senat.fr/lc/lc126/lc126.pdf>.

149. Gesetz über den Ladenschluß [Act Concerning Store Closing Times], Nov. 28, 1956, BGBl. I at 875 (F.R.G.).

150. The shifts began in 1996 and continued in 2003. The lengthened hours were first intended to benefit “innovative boutique enterprises” (“innovative Einzelhandelsunternehmen”) and were later extended. See DIRK NEUMANN, *Commentary to § 3, Ladenschlussgesetz, in LADENSCHLUSSGESETZ: MIT ALLEN WICHTIGEN VERORDNUNGEN AUS BUND UND LÄNDERN* [THE STORE CLOSING LAW: WITH IMPORTANT FEDERAL AND STATE REGULATIONS] 11 (4th ed. 2003).

151. Hundley, *supra* note 12.

home with the children, and families need to be together in the evenings and weekends.”<sup>152</sup> Allowing stores to stay open late, it has generally been argued, facilitates the efforts of employers to exploit their *workers*. No matter how much benefit consumers might gain from reform, the protection of the workers has been viewed as primary. In the conflict of the imagination, it has seemed to Germans that “the worker” is the modern economic actor threatened with potential injustice, not “the consumer.” The politics of store-closing law have been class conflict politics. When it comes to store hours, Germans have seen the vocation of the law to lie in intervening to protect interests on the supply side, rather than the demand side.

That does not mean that participants in the German debates did not understand that a consumer interest might be at stake (though, as Lizabeth Cohen might predict, they often seemed weirdly blind to the women’s interest that was also at stake<sup>153</sup>). It means simply that the consumer interest was of far lesser political weight. Only producer identities ultimately mattered for purposes of the political debate. The claim that employees might be threatened with exploitation—a highly dubious claim in any case<sup>154</sup>—long dominated German political discussion, to the near total exclusion of any endorsement of consumer economic interest.

Even as store-closing regulation has been loosened, that political attitude has not died<sup>155</sup>: quite the contrary, the current version of the German statute demonstratively includes a long section on worker protection.<sup>156</sup> It remains unclear how many German shops will really stay open late. What is clear is that Germans continue to see the issue as one in which favoring consumers can only come at the painful expense of workers. The pressure to change may yet put an end to the *Ladenschlußgesetz*, but it has not succeeded in putting an end to the political culture that puts the priority on workers’ rights. As we shall see in the next Part, this is entirely typical of a continental European world that continues to lay its fundamental political emphasis on workers’ rights. Even as the law

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152. Guy Raz, *Closed on Sunday? Shopkeepers Rebel*, CHRISTIAN SCI. MONITOR, Aug. 12, 1999, at 8.

153. Cf. COHEN, *supra* note 7, at 31-41 (noting that the American focus on women’s rights follows upon the rise of consumerism as an alternative to focus on workers’ rights).

154. The German debate ignores in particular the possibility that after-hours clerks will be hired not from the ranks of older workers with families but rather from the ranks of entry-level jobseekers.

155. It is worth noting that store-closing laws in both Germany and France have been gradually loosening with the rise of convenience stores operated by minorities from the Maghreb and Turkey. It is possible that Europeans feel less need to protect workers of Maghrebi or Turkish origin.

156. Gesetz über den Ladenschluß [Act Concerning Store Closing Times], Nov. 28, 1956, BGBl. I at 747-48 (F.R.G.).

has shifted in Germany, the structure of political debate has remained revealingly German.

The politics of store hours legislation, in short, demonstrates European producerist politics that contrasts starkly with how such politics play out in the United States. The same is true of other areas of law, some of them far more resistant to change than the law of store hours. For example, in both Germany and France we still find considerable law protecting small shopkeepers. The protection of small shopkeepers against big retailers was a recurrent theme of early-twentieth-century economic life. Anti-chain-store legislation was widespread everywhere in the first part of the twentieth century. As big retailers like Woolworth's and its imitators appeared, countries all over the industrialized world, including the United States, introduced measures intended to protect their small competitors.<sup>157</sup> Things have changed in recent decades, however. In all of these countries the anti-chain-store legislation has mostly been repealed or abandoned,<sup>158</sup> and there are big stores in Europe just as there are in the United States. Indeed, this appears to represent an unambiguous global triumph of contemporary American-style consumerism.

But on closer inspection, it becomes clear that the triumph is by no means absolute. Large retailers have not driven out their smaller competitors everywhere. Here again, we may start with an example from Wal-Mart's German Waterloo, as reported by the *New York Times*. Wal-Mart, says the *Times*, was unable to break down a small-shop culture in Germany: "They tried to sell packaged meats when Germans like to buy meat from the butcher.' . . . Wal-Mart's shoes-to-sausage product line does not suit the shopping habits of many non-American shoppers. They prefer daily outings to a variety of local stores that specialize in groceries, drugs or household goods."<sup>159</sup> The *Times* is quite right. There are certainly large discount outfits in Europe, like Aldi, and large supermarkets, like Monoprix. But at the same time there are many small shops in Europe that seem to be surviving perfectly well, holding onto their customers even in the face of big store competitors. Here I will focus on the example of France. Any visitor to a French city knows that there are still many small shops there. Small butchers, cheese-dealers, and bakers still dominate the experience of food shopping, for example. One still buys one's

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157. DE GRAZIA, *supra* note 52, at 130-83; see also Frank K. Upham, *Privatized Regulation: Japanese Regulatory Style in Comparative and International Perspective*, 20 *FORDHAM INT'L L.J.* 396 (1997) (describing Japanese regulations).

158. France is a noteworthy exception. See sources cited *infra* note 161.

159. Mark Landler & Michael Barbaro, *No, Not Always: Wal-Mart Discovers That Its Formula Doesn't Fit Every Culture*, *N.Y. TIMES*, Aug. 2, 2006, at C1 (quoting German union official Hans-Martin Poschmann).

medicines from small pharmacies. Decades after the supermarket arrived in Europe, the one-stop big store still has not killed the small specialized shop. Why is this so?

The *Times'* answer is about culture: "Wal-Mart Discovers That Its Formula Doesn't Fit Every Culture," the title of its piece reads. This statement is not false, as far as it goes. Cultural traditions do indeed play a major part. (In fact, protecting competitors is so deeply ingrained in French culture that even children's cartoon books offer their preadolescent readers jokes that turn on the technical legal term for "unfair competition."<sup>160</sup>) The fact that Europeans do not live suburban, automobile-based lives also plays a part, since they cannot embark on the kind of massive shopping expeditions that are normal in America. But the law plays a part too. Let us indeed look at how French law has engineered a structure that protects small competitors—despite its announced commitment to "consumer" welfare, and despite the fact that it has abandoned most (though not all!<sup>161</sup>) of its anti-chain store legislation.

In part, French law has achieved small-shop-friendly results through price regulation. French law defines a *zone de chalandise*, a marketing radius, in which no merchant may charge predatory prices. The *zone de chalandise* is familiar enough to anyone who has lived in Paris or any other French city: it is the walking radius within which shoppers may move as they make their purchases. The purpose of regulating prices within this radius, as the French Court of Competition (*Conseil de la Concurrence*) has explained, is specifically to guarantee that small butchers and bakers will not face ruinous competition

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160. See Titeuf: *L'Arbitre: Mamette la mamie qui forge des bonnes manières!* [*The Referee: Granny Mamette Teaches Good Manners!*], in TCHÔ! 100, LE NUMÉRO MÉGA SPÉCIAL 81 (2007) (cartoon frame showing Titeuf covered with glob lobbed at him by his baby sister, with dialogue line "*la concurrence déloyale règne!*" ("Unfair competition reigns!")). For the phrase "concurrence déloyale" ("unfair competition"), in competition law, see, for example, *Concurrence Déloyale*, <http://www.lexinter.net/JP/concurrencedeloyale.htm> (last visited Nov. 9, 2007). It is remarkable what you can learn about a foreign culture by living in it with a child—and remarkable how much easier it is to explain French comic books to your nine-year old if you know some French law.

161. The *Loi Raffarin* of 1996, Law No. 96-603 of July 5, 1996, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 6, 1996, p. 10,199, strikingly not repealed in 2006, requires that all stores of 300 square meters and larger obtain a special administrative authorization to open. Its stated purpose is to "defend" "*le petit commerce contre les grands distributeurs*" ("small businesses against large distributors"). See, for example, the discussion at *Et La Loi Raffarin?* [And the Law Raffarin?], [http://www.libres.org/francais/actualite/archives/actualite%E9\\_1004/raffarin\\_a6\\_4404.htm](http://www.libres.org/francais/actualite/archives/actualite%E9_1004/raffarin_a6_4404.htm) (last visited Nov. 9, 2007).

from large-square-footage stores.<sup>162</sup> To be sure, as with the law of competition, modern French law insists that its goal is to further the interest of consumers. As the Court declared, the purpose of the law is to guarantee that “the *consumer* will have the ability of choosing the mode of distribution that he prefers.”<sup>163</sup> This is a conception of the consumer interest that is worth taking seriously, as I will suggest in a moment. Nevertheless, there is no doubt that it is a conception that leaves protections for small competitors, like local bakers, intact.

The regulation of price within the “market radius” is not the only such French measure. Similar results are achieved through the regulation of goods. Visitors to French cities will know that shops tend to have more limited product lines than they do in the United States. There are no vast “drugstores” like Walgreen’s, selling both pharmaceuticals and sliced bread. Supermarkets do not sell medicines. Even the larger stores specialize. For example, there are fairly large *drogueries*, but they specialize in soaps, perfumes, and other hygienic goods. This relative absence of large all-purpose retailers can have a real impact on the consumer when it comes to some goods that Americans regard as basic. For example, it is impossible in continental Western Europe to buy ibuprofen except at a store staffed by a trained pharmacist<sup>164</sup> – with the result that the cost of ibuprofen is much higher than it is in the United States. A similar story can be told about bakeries and bread. French law specifies carefully that no seller can call himself a “baker” unless he directly supervises the kneading and other processes, bakes the bread at the site of sale, and strictly avoids freezing at any stage.<sup>165</sup> This is of course intended as a barrier to industrial production, and in turn to lower prices.

How does this system survive? Why hasn’t Walgreen’s conquered France? Why haven’t French consumers been forced to resign themselves to buying stale so-called baguettes at Stop and Shop? A large part of the answer, once again, is cultural, but a part of the answer is legal: the French system is

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162. Le Conseil de la concurrence, Avis n° 96-A-05 du 2 mai 1996, at 5 (May 2, 1996), <http://www.conseil-concurrence.fr/pdf/avis/96a05.pdf>.

163. *Id.* Perhaps we can see the Supreme Court of the United States accepting the same kind of reasoning in its recent decision of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2714-15 (2007). Here again, the differences that are traced in this Article are relative and not absolute.

164. Georg Kojda, *Freigabe von Arzneimitteln für die Selbstmedikation* [*Permissible Distribution of Medicinal Substances for Self-Medication*], APOTHEKEN MAGAZIN [APOTHECARY MAGAZINE], Jan.-Feb. 2002, at 8, available at <http://www.uni-duesseldorf.de/kojda-pharmalehrbuch/apotheke/magazin/Fortbildungsartikel/2002-01-02.pdf>.

165. C. COM. art. L121-80 (Fr.), available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=61&r=2130>.

perpetuated through the regulation of goods. The law may regulate goods just as it may regulate prices, and goods can be regulated in ways that affect the practice of retailing. Thus French law requires that numerous products be sold only by persons who hold a professional pharmacy degree. So does American law, of course. But Americans will be surprised by some of what France regulates. Ibuprofen may be an unsurprising example of such regulation. But French law also regulates some “hygienic products,” which must also be sold by clerks with a pharmaceutical degree, on the grounds that they touch the human skin. This means that distributors of cosmetics can demand that their products be sold only in pricier small shops.<sup>166</sup> To the American eye, all this may seem prejudicial to consumer interests. Why do you need a professional pharmacist in order to buy cosmetics (or for that matter a professional baker in order to buy bread)? Surely the sovereign consumer can decide on his or her own when to use ibuprofen or whether to experiment with a new shampoo. Surely the sovereign consumer can judge whether flash-frozen bread is as good as fresh-baked. Surely the French claim to be protecting consumers is simply humbug.

Well, not necessarily. Here again, in discussing the French approach, we must make the effort to understand foreign law sympathetically. We can begin by raising normative questions about the American system. Does the American system of consumer sovereignty *really* guarantee lower prices? Not always. For example, some American consumers end up paying ruinously high prices for medications—a situation that the French social welfare state prevents. There is a paradox here, at least to the extent that the American attitude toward consumer sovereignty is the product of a larger hostility to state intervention that works against the establishment of socialized medicine. This is meat for discussion: the American sovereign consumer model asks the individual to accept significantly more risk in life than his European counterpart.

More importantly, we should see the French protection of small shops in its larger socioeconomic context. Small shops have social value in France, and for more than one reason. First of all, they may be family owned. In Europe, much more frequently than in the United States, small shops may be literally mom-and-pop(-and-kids) operations.<sup>167</sup> In highly mobile America, members of the younger generation typically make their own way in the world rather than joining the family business. That pattern of mobility has never taken hold in Europe. The producer values of the small shop remain *family* values, and it is

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166. This is done through what is called a “*contrat de distribution sélective*” between the distributor and the retail establishments. See RECUEIL DALLOZ, JURISPRUDENCE 66-70 (1964).

167. E.g., HAROLD JAMES, FAMILY CAPITALISM: WENDELS, HANIELS, FALCKS, AND THE CONTINENTAL EUROPEAN MODEL (2006); Roe, *Modern Politics*, *supra* note 27, at 252.

unsurprising that the small-shop form of producer identity should matter so much.

Moreover, family ownership of enterprise does not exhaust the social importance of the French small shop. There are also artisanal values at stake, of the kind described by Commons in his work on shoemakers (and trumpeted twenty years later by the Nazis).<sup>168</sup> Producerism is associated with historic guild traditions. In their ideal form, these guild traditions include certain centrally important features. They emphasize craft knowledge—a body of specialized knowledge passed on from generation to generation through apprenticeship. As Commons argued, they also involve a pride in the production of goods at a high level of artisanal quality.

In both Germany and France, craft traditions, associated with historic guild structures, still run much deeper than they do in the United States. We can see this in the attitude toward professional knowledge and the embrace of a professional identity. Guilds are characterized by their control of a body of craft knowledge and by the primacy of guild identity in the self-understanding of guild members. Some of that sort of guild culture exists in the United States. Members of the American liberal professions, especially lawyers and doctors, are expected to master a body of professional knowledge and to identify themselves primarily with their profession. This pattern is more or less limited in America to the liberal professions, though.

By contrast, the same pattern of behavior is much more widely dispersed over the labor force in continental Europe. Even low-status workers like French waiters receive professional training. In Paris they may even attend one of several training institutions.<sup>169</sup> Good French waiters take pride in their command of professional knowledge, comparable in many ways to the pride taken by American lawyers. Being a waiter is a profession for many of its French practitioners — not a form of casual labor as in the United States. In this sense, a Paris waiter is a little like a New York lawyer, strange as that may sound. The same is frequently true of French salesclerks at better stores, who consider themselves as offering expert advice. The many small clothing shops in Paris can offer excellent fashion counseling. Perhaps we can even speculate that French waiters and salesclerks are more likely than their American counterparts to think of themselves in terms of their producer identity: if asked, they will identify themselves by saying “I am a waiter” or “I am a salesclerk.” Certainly we see this attitude in continental trials, in which

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168. See *supra* Part II.

169. For an example, see the Web site of Lycée des métiers de l'hôtellerie Jean Drouant [Jean Drouant High School of Hotel Services], <http://lyc-drouant.scola.ac-paris.fr/1histo.php> (last visited Nov. 9, 2007).

witnesses identify themselves by referring to their place within a professional guild tradition: "I am an apprentice pastry-chef."<sup>170</sup> One's place in society has to do with one's place in a profession defined by its body of knowledge. This is what Weber called *Standesehre*, the honorable sense of self that comes from membership in an "estate," a professional or social status group.<sup>171</sup>

Pharmacists represent a striking example of the continental style in the treatment of professional knowledge. It remains the case that French pharmacists, who receive extensive training, are treated as professionals capable of dispensing a wide range of advice. For example, as all French people know, they are trained to identify poisonous mushrooms.<sup>172</sup> But high standards of professional training are not limited to liberal professions like pharmacists. In both France and Germany, professional licensing exams are demanding even for relatively low-status professions. The sometimes maligned licensing exam for German master hairdressers is one example. (German master hairdressers are tested on their knowledge of chemistry.<sup>173</sup>) Internal governance of these professions is also highly developed. In France, for example, all these professions have their own quasilegal codes (*déontologies*) governed by a rich body of jurisprudence created by the *Conseil d'État*, the supreme court of administrative law. There is even a baker's *déontologie*.

If craft knowledge and professional identity matter in Europe, so does artisanal quality. Producer groups have long claimed social status by insisting that they stand for traditional craft standards of production—standards that depend on a high level of craft mastery and that give priority to maintaining high quality, even at the cost of charging higher prices. It was this tradition that Feuchtwanger's Heinrich Wels claimed to represent.

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170. DVD: *L'Affaire Delnatte* [The Delnatte Affair] (LA CINQ/VF Productions 1991) (on file with author).

171. 1 WEBER, *supra* note 32, at 141-42; 2 WEBER, *supra* note 32, at 932-33.

172. For this worthwhile piece of information about French pharmacies, see *La Classification et sa Morphologie* [Classification and Morphologie], <http://www.univers-nature.com/dossiers/champignons-1.html> (last visited Aug. 31, 2007) ("Au moindre doute, il est préférable, lors de la cueillette, de séparer les champignons douteux des autres et de les montrer à un professionnel (pharmacien ou mycologue professionnel).") ("In case of the slightest doubt it is preferable, at the time of collecting, to separate the doubtful mushrooms from the others and show them to a professional (pharmacist or professional mycologist).").

173. See *Handwerkskammer Münster: Friseurmeister stylen bis in die Spitzen* [Artisanal Chamber of Münster: Master Hairdressers Style to the Last Strand], [http://www.hwk-muenster.de:80/index.php?id=60&tx\\_ttnews%5Btt\\_news%5D=242&tx\\_ttnews%5BbackPid%5D=1&cHash=3cae673739](http://www.hwk-muenster.de:80/index.php?id=60&tx_ttnews%5Btt_news%5D=242&tx_ttnews%5BbackPid%5D=1&cHash=3cae673739) (last visited Nov. 9, 2007).

The French regulations that I have described enshrine such artisanal values. They aim to encourage deference to the professional expertise of both pharmacists and bakers. There is a deeper issue here, we should see, about comparative consumer protection law as a law of information. The French law encouraging deference to the expertise of pharmacists and bakers can be conceived of as a form of consumer protection: it is a means of guaranteeing that consumers will benefit from informed judgments about the goods they buy. It is law about the kind of information that will guide consumer purchases. In regulating information, France resembles the United States. In both countries, consumer legislation often involves information. Yet Europeans often think of information differently than Americans. American law tends to involve overwhelmingly the *disclosure* of information. Europeans also have a great deal of law mandating disclosure – more all the time, as Brussels tries to encourage consumerism. But at the same time, Europeans are more prepared than Americans to suppose that some sound information can only be dispensed by trained professionals. When it comes to items like ibuprofen, for example, they are less ready than Americans to leave the sovereign consumer alone with a cryptic page of dosage instructions.

Of course, the French regulations are not only about managing information. They also aim to encourage high standards of production. And in that regard, they enjoy some real success. Baguettes are (in the personal view of this author) inexpressibly better in France than in the United States—even than in Greenwich Village. Well-to-do shoppers from all over the world come to Paris to buy their cosmetics and clothing, from clerks who are proud of their professional savvy. France, like other European countries, produces a wide range of superb, regulated artisanal goods, such as cheeses<sup>174</sup> and wines.<sup>175</sup> In this regard, it is not pure humbug to declare that French protective legislation aims to guarantee the consumer “the ability of choosing the mode of distribution that he prefers.”<sup>176</sup> To the extent that legislation is necessary to keep artisanal values alive, the French approach does expand the range of consumer choice to include goods like decent baguettes that simply cannot be produced in America at any price. Most importantly, to the extent that legislation enshrines artisanal standards of quality, it serves as a bar to the entry of competitors who could provide cheap, but lower quality, goods.

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174. For the ensemble of regulations, see Dispositions Législatives et Réglementaires, <http://www.legifrance.gouv.fr/WAspad/RechercheSarde.jsp> (search “fromage” and click “fromage”) (last visited Nov. 9, 2007).

175. For the ensemble of regulations, see *id.* (search “vin” and click “vin”).

176. Le Conseil de la concurrence, Avis n° 96-A-05 du 2 mai 1996, at 5 (May 2, 1996), <http://www.conseil-concurrence.fr/pdf/avis/96a05.pdf>.

Nevertheless, it is not obvious that legislation is needed in order to keep artisanal values alive. It is perfectly possible that artisanal traditions would survive even without the intervention of the state. Indeed, as the *New York Times* rightly observes, there is a strong cultural tradition of artisanal values in Europe. In France too, the artisanal tradition is at least as much part of the general culture as it is the product of any specific legal regulation. Indeed, the small bakers of Paris are frequently mere outlets for city-wide producers; they are not the neighborhood bakers of the past. Nevertheless, even these contemporary bakers often (though not always) manage to maintain high standards of artisanal production. In part, this is because they are encouraged by government boosterism.<sup>177</sup> In part, though, the enduring artisanal character of French bakeries reflects the strength of deeply ingrained cultural understandings of how producers are supposed to act, at least when they act according to the ethical demands of their craft.

## VI. CONSUMERISM, PRODUCERISM, AND THE CULTURE OF RIGHTS

In short, the American/European clash between consumerism and producerism did not die after the 1930s. It is of continuing importance for our discussions of comparative antitrust and comparative retail law. What is more, it tells us something about how ordinary Europeans experience everyday life. The same is true of rights politics, as we can see when we reflect on the implications of the claims of historians like Lizabeth Cohen.

These American historians make a striking claim. As Americans came to regard “consumer” as their primary legal identity during the mid-twentieth century, they began to abandon the old form of politics. That old form of politics focused on the supply side of the market. It centered on the conflict between labor unions and capital, and it encouraged ordinary people to think of rights primarily as the rights of organized labor. The rise of consumerism from the 1930s onward slowly changed that. Rather than thinking that their rights accrued to them by virtue of their membership in the producerist labor movement, people began to conceive of their rights in different terms—as the sorts of rights that all individuals have, by virtue of their membership in the universal class of consumers.<sup>178</sup> As Cohen argues in her latest book, this led

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177. One notable figure is Jean-Pierre Raffarin, who was Minister of Small and Medium-Sized Enterprises in the mid-1990s. See, e.g., *Le gouvernement instaure une Journée nationale du pain* [The Government Institutes a National Day of Bread], LES ÉCHOS [THE ECHOS], Apr. 24, 1996, at 12.

178. See *supra* Part II.

them slowly to embrace a new style of rights politics—of rights politics focusing, for example, on the claims of women and African Americans.<sup>179</sup>

This is an argument of great importance in the interpretation of American history, and of great importance to comparative law as well. It is impossible to grasp the contrast between American and continental European legal orders unless we keep this argument in mind. Continental politics remains much more oriented toward a producerist concept of rights than American politics, and that has provocative implications for the shape of the law on either side of the Atlantic.

Let us then turn to the contrast between the attitude toward rights in consumerist and producerist orders. Here we must begin by thinking about the shape of politics in a producerist order. As we have seen, there is no such thing as “the” producer interest. Producer groups have inherently conflicting interests, whether the conflict is one between labor and capital or between small and large retail establishments. To describe continental Europe as relatively “producerist” is thus not to declare that Europeans embrace some particular legislative program. Instead, it is to declare that European politics is largely framed in terms of producer conflict—or, in the classic phrase, “class conflict.” It is to say that European legislators tend, more than Americans, to conceive of their task as the weighing and balancing of different producer interests. Such is indeed the case, as political scientists observe: economic legislation in continental Europe has long been the product of conflicts between such traditionally politically powerful producer groups as workers, craftsmen, small shopkeepers, and large enterprises.<sup>180</sup> As I suggested above, even “consumerist” reforms like the German liberalization of the *Ladenschlußgesetz* are seen against the background of a politics of *workers’* rights.<sup>181</sup>

In countries with traditions of this kind, the law of individual rights is marked by the same spirit of producerism that moves through competition law and retail law. The simplest examples come from labor and employment law. In Europe, the influence of the most historically powerful producer groups—organized labor and large-scale enterprise—is manifestly still alive, and the perceived conflict between those groups shapes labor law. One consequence is that labor rights law plays a far more central role in Europe than in the United States. Thus most continental countries have a great deal of law limiting the capacity of employers to lay off or dismiss workers. The recent riots in France

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179. COHEN, *supra* note 7, at 31-53.

180. See *supra* Part III.

181. See *supra* text accompanying notes 148-157.

show that the resistance to any change on this score can be fierce.<sup>182</sup> The same is shown, if less dramatically, by the current abject failure of the Merkel regime to alter German labor law.<sup>183</sup> Here again we can point to the example of Wal-Mart in Germany: “They didn’t understand that in Germany, companies and unions are closely connected,” as the *New York Times* quoted one union official.<sup>184</sup> This lies, of course, at the heart of the global Wal-Mart Question.

There is more to the distinctiveness of European labor law than hiring and firing, though. As Gabrielle Friedman and I have argued at length elsewhere, European law also puts a heavy emphasis on the *dignity* of labor—on the right of workers to feel respected in their workplace.<sup>185</sup> This too reflects long-standing producerist traditions. European social identity has traditionally been conferred by membership in producer classes—by Weberian *Standesehre*, status-group honor.<sup>186</sup> That conception remains powerfully present in European rights legislation.

The culture of rights legislation in the United States is quite different. It is sometimes claimed that the United States is peculiarly oriented to “rights talk.” That claim, made most forcefully by Mary Ann Glendon,<sup>187</sup> is false, in my view. The truth is not that Americans are more attached to “rights,” but that they have largely ceased to conceive of rights in traditional producerist terms—at least as compared with Europeans. Tending to abandon the old rights language of class conflict, they have shifted to conceiving of rights in a different key.

This expresses itself in sharp differences between American and continental European labor and employment law. Thus, though there is American employment legislation, it takes quite different forms from the forms found in Europe. American employment law puts comparatively little emphasis on protections against firing, and no emphasis whatsoever on the traditional idea of the dignity of labor.<sup>188</sup> Instead, it emphasizes affirmative action and equal

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182. See Craig S. Smith, *French Unrest Reflects Old Faith in Quasi-Socialist Ideals*, N.Y. TIMES, Apr. 9, 2006, at A10.

183. See Richard Bernstein, *Political Paralysis: Europe Stalls on Road to Economic Change*, N.Y. TIMES, Apr. 14, 2006, at A8.

184. Landler & Barbaro, *supra* note 159.

185. Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241 (2003).

186. 1 WEBER, *supra* note 32, at 141-42; 2 WEBER, *supra* note 32, at 932-33.

187. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

188. Let me emphasize that this claim is made in *comparative* perspective. Of course I do not mean to make the obviously false claim that there are no protections against firing in American law. I claim only that those protections play a far lesser role in American law than they do in German or French law.

access to the labor market. It is a law that aims to guarantee that citizens will not be disadvantaged in their choice of jobs in a very fluid and mobile market. Paradoxically, we might say, it treats jobseekers as consumers, choosing among possible positions on offer.

The rights orientation of the American consumerist order is, moreover, not restricted to economic regulation. The turn to consumerism in American law has involved a broad turn away from the politics of class conflict, and this has had a wide-ranging impact on the shape of rights thinking. Consumerism, as we have seen, is partly about identity politics: it involves a turn away from the idea that we are defined by a *particularistic* producer identity—our identity as “workers” or “industrialists” and so on—in favor of the idea that we are defined by a *universal* identity, “consumer.” As particularistic forms of producer identity have declined in importance, however, other particularistic identities have taken their place—identities like “gay” or “straight” or “Latino” or “Anglo.” Thus, the rise of consumerism has opened the door to new forms of identity politics different from the identity politics of class conflict. As Cohen argues, both the strength of the American women’s movement and the prominence of racial identity in the United States can be linked to the decline of a union-centered culture of class conflict.<sup>189</sup> Once we cease to think of workers’ rights as the paradigmatic conception of rights, the door is opened to the widest variety of alternative conceptions.

Conversely, European resistance to American innovations like affirmative action has something to do with the lasting strength and primary legitimacy of producer identities and class conflict. In countries like France or Germany, rights are still conceived of, at their core, as the rights of organized labor. This often leaves little room for American approaches—little room for American gender politics, little room for American race politics, and so on.

## VII. CONSUMERISM AND PRODUCERISM ACROSS THE LANDSCAPE OF THE LAW

A striking pattern emerges in all of this. The basic value choice made by these differing legal systems over whether to give priority to consumer or producer identity has consequences across the whole landscape of the law. It is not just that America has passed this or that piece of consumerist legislation. It is that, at least in many sectors, American law has a consistently deeper affinity with the ideal type of an order oriented toward the consumer economic interest; while countries like France and Germany, despite decades of change,

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189. COHEN, *supra* note 7, at 31-53.

remain much more producerist in their basic orientation. This does not mean that all American law perfectly corresponds to the ideal type of an order oriented toward the consumer economic interest. It certainly does not. There is producer protection in the United States, for example, for agricultural producers. There is consumer protection legislation, especially where unsettling health threats like carcinogens are concerned. There are many forces at work in the making of American law, just as there are many forces at work in the making of French and German law. Nevertheless, America resembles the ideal economic-consumerist order much more than France or Germany, and that is a fact of basic importance for comparative law. Compared to continental countries, America looks like a place that has gone much further toward the transition advocated by Lippman and Weyl and FDR: the substitution of consumer identity for producer identity.

Let me emphasize that the basic choice between producer identity and consumer identity does not involve some straightforward redistribution of resources from “the” class of producers to “the” class of consumers, or vice versa. We all belong to both classes, and any redistribution involves robbing some Peter to pay some Paul. The real question is about which identity counts most.

A fuller treatment would offer many more examples. In this Part, before moving to the conclusion, I want to touch on only a few—though I will not delve into these examples in any detail.

There is more to be said, for example, about the strength of European guild traditions. The structure of professional education is one important example of how European guild traditions have not perished. German job training, for example, is still conceived of in classic guild terms. Young German workers begin as apprentices (*Auszubildende* or *Azubis*). This tradition of apprenticeship matters immensely for the lives of young Germans, who are steered into career training at a younger age than are Americans.<sup>190</sup>

The guild-like pattern of craft self-government on the basis of a command of craft knowledge also arguably extends outside the narrow confines of the economy in continental Europe. The same institutional structures can also be seen in continental bureaucratic traditions. Bureaucrats too are a corps, with a *déontologie*, and European administrators too regard themselves as the vessels of a body of professional knowledge. Perhaps this helps account for the pattern elegantly explicated by Mitchel Lasser in his analysis of the French judiciary.

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190. For an introduction for foreigners settling in Germany, see Lothar von Seltmann, *Das deutsches Bildungswesen: Die Sekundarstufe II* [The German Educational System: The Secondary School], <http://www.derweg.org/deutschland/bildungswesen/sekundaerstufe2.html> (last visited Nov. 9, 2007).

Lasser paints the picture of a judiciary loyal to its own professional traditions of knowledge and internal craft discipline, strongly resisting American norms of public transparency in favor of internal deliberations.<sup>191</sup> He paints, that is, the picture of a judiciary organized as a craft guild.

On the American side, by contrast, we can see many signs of the relative primacy of a consumerist outlook. We see it, for example, in the tolerant attitude of American privacy law to the sale of consumer information, which I have explored elsewhere. Europeans are deeply troubled by the sale of consumer information by one marketer to another, and they have made energetic efforts to ban such practices. Such a ban is conceived by Europeans as essential to the maintenance of individual dignity—as a form of dignitary consumer safety legislation. To Americans, though, banning the sale of consumer information represents an interference with market mechanisms that can only have the effect of diminishing consumer choice. Why, say Americans, should consumers be “protected” from receiving offers of merchandise?<sup>192</sup> Whatever the merits of this dispute, it shows once again how much more Americans are oriented toward a concept of consumer economic interest that privileges any kind of law that expands consumer choice. The key identity for Americans is, as so often, the consumer sovereign.

In other important ways too, we can see American order as a consumerist order. American insolvency law takes no account of the interests of the competitors of the insolvent firm, and comparatively limited account of the interests of workers. These producer interests do not count in America. American class actions are widely perceived as procedures used to vindicate the interest of consumers—though the class action suit is an institution that can clearly be used either to vindicate a consumer economic interest or a consumer protection interest. Antidilution law offers another example. Strong antidilution measures favor the interests of existing competitors in an industry. It is thus perhaps no surprise that Europeans are more open to antidilution measures than Americans.<sup>193</sup>

Another familiar, though difficult, example suggests the comparative power of the producerist orientation in Europe. This is the case of the “*droit moral de l’auteur*,” the “moral rights” of the artist. Continental Europe is famously the home of a tradition that protects the noneconomic rights of the artist to control the use of artworks as expressions of the artist’s “personality.” The literature of this continental tradition has always been rich in celebrations

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191. MITCHEL DE S.-O.-L’E. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 307-11 (2004).

192. Whitman, *supra* note 136, at 1189-95.

193. My thanks to Rochelle Dreyfuss and Annette Kur for making this observation to me.

of the “creative” and “productive” character of the artist.<sup>194</sup> The contrast with American law is not as sharp as it once was: American statutes have adopted the European approach, at least in some measure.<sup>195</sup> Nevertheless, the American version of this continental law is “exceedingly narrow,” and in practice amounts to far less than what we find in Europe, in the view of one recent commentator.<sup>196</sup> This is not the place for a full exploration. What matters is that continental Europe, here as elsewhere, is the home of a tradition that focuses heavily on “productive” powers—not only those of workers in general, but those of artists in particular.

When it comes to the strength of American consumerism, perhaps the most striking example of all comes from the wide diffusion of equity holding in the United States. Equity holding remains very limited in Europe and Japan. Firms are often closely held, and outside equity holders are often large enterprises. The small individual equity holder remains a rarity.<sup>197</sup> Indeed, in most ways, the class of equity holders in Europe today would still be recognizable to a nineteenth-century observer as a “capitalist” class.

The phenomenon of the small individual equity holder is, of course, much more familiar in the United States, as it has been for a very long time. To the extent the individual buys equity, he is technically not a “consumer,” but rather an investor. He belongs to the capitalist class. Nevertheless, shares of equity are traded on a secondary market in the United States, and participants in the market for those shares clearly resemble consumers. They are entirely passive investors, who certainly think of themselves as purchasing a kind of good. Moreover, they demand investor protection law that clearly resembles consumer protection law. This may indeed represent the most dramatic of American departures from the classic producer-oriented systems of political economy. One of the great classic producer interests—the interest of capital—has been largely consumerized in America. In fact, we might say that America has seen not just a separation of ownership from control, but a remarkable dissolution of capital into the consumer market. To vary the famous question of Werner Sombart, we might even ask not just “why is there no (European-style) socialism in America?”<sup>198</sup> but, more challengingly, “why is there no (European-style) capitalism in America?”

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194. See my fuller discussion in Whitman, *supra* note 136, at 1184–85.

195. See Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 HARV. INT’L L.J. 353, 353–54 (2006).

196. *Id.* at 406; see also *id.* at 404–11.

197. See, e.g., REINIER KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 129 (2004).

198. WERNER SOMBART, *WARUM GIBT ES IN DEN VEREINIGTEN STAATEN KEINEN SOZIALISMUS? [WHY IS THERE NO SOCIALISM IN THE UNITED STATES?]* (1906).

There are other issues that a fuller discussion of consumerist/producerist dichotomy would require. For example, protectionist legislation, still so important in France, is a classic form of producerist law. More broadly, the place of protectionist politics in global trade is a topic of manifest importance that I do not investigate here. Moreover, such protectionist legislation also plays its part in American law; the differences that I describe are relative and not absolute.<sup>199</sup> It is also sometimes said that European regulation is more attached to the strong consumer-protection orientation of the precautionary principle—though here again, far more detail would be needed in any careful comparison.<sup>200</sup> Issues like the Value Added Tax (VAT), which taxes supply-side activities, also deserve attention beyond what my expertise can give.

Perhaps most importantly, the classification in this Article raises important philosophical and social scientific problems that I leave to the side. If we want to delve deeply into the value of these two identities, producer and consumer, we must spend much more time on the relative values of work and leisure in life. If we want to explain the relatively greater strength of the producer orientation in Europe, we must ask what social forces encourage it. I have not done that in this Article, which has focused only on the problem of classification. It is obvious that the differences I have traced have to do with deeper differences in culture and political economy, but I have not made any effort to explain how culture and political economy relate to each other. All these questions must await another day.

## CONCLUSION

Deeply important and fiercely contested issues turn on the clash between producer orientation and consumer orientation in the world today. It is a clash that affects a remarkably wide range of issues in comparative American and European law, touching not only on antitrust and retail, but on basic concepts of rights and forms of social organization. It is a conflict that impinges on the business prospects of major American enterprises like Microsoft and Wal-Mart. It is a conflict that colors major political events, like large-scale French rioting over labor law reforms. It is against the background of this conflict that

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199. Protectionist agricultural policies in both Europe and the United States recently led to the collapse of the Doha Round of free trade negotiations. See Steven R. Weisman & Alexei Barrionuevo, *Failure of Global Trade Talks Is Traced to the Power of Farmers*, N.Y. TIMES, July 27, 2006, at C1.

200. See, e.g., Thomas C. Fischer, Commentary, *An American Looks at the European Union*, 19 EMORY INT'L L. REV. 1489, 1506 (2005). James Salzman has expressed skepticism to me that the practical differences are all that great.

we can begin to understand why American rights programs like affirmative action seem to have so little traction in Europe. Comparative law must explore this conflict if it hopes to offer a cogent analysis of American and European differences. We are letting our fellow citizens down if we continue to talk only about the jurisprudential differences between the common law and the civil law, and not about these burning legal and public policy issues.

At its core, the clash is over the politics of the law, and in particular over basic conceptions of legal identity—over whether the law is more inclined to see the individual as having rights in the guise of “consumer” or “producer.” Indeed, the phenomenon of consumerism seems momentous and troubling precisely because basic choices about identity are at issue. To the extent that our sense of the meaning of life depends on our choice among possible identities, there is a connection between forms of law and styles of meaning in life. When we opt for a “consumerist” law, we *do* seem to be making a statement about what counts in life more broadly. This is part of what gives the polemics we hear so often their surface plausibility.

That does not mean, however, that continental Europe is fated to succumb to American economic consumerism. First, even if European law embraces the primacy of consumer identity (as it may well do), it will not necessarily embrace the American approach. As we have seen, there is a real ambiguity in the concept of consumer interest. American law seems threatening to the extent that it elevates the consumer economic interest, an interest in low prices and shopping convenience. It is this, above all, that poses a danger to traditional producerist values and to the traditional politics of class conflict. But one can embrace consumer identity without embracing consumer *economic* interest. Consumer legislation can also take the form of consumer *protection* legislation, and that is exactly the kind of legislation that we are receiving more and more of at the hands of European lawmakers. Indeed, there are critical issues on which European law seems more concerned with the consumer protection interest than is American law—most notably these days with regard to genetically modified foodstuffs.<sup>201</sup> Consumer identity may well be fated to prosper on both sides of the Atlantic over the next decades. But I predict that American law will remain relatively more hospitable to promotion of consumer economic interests, while European law will remain relatively more hospitable to protection of consumer safety.

This matters immensely, because the paternalistic protection of the consumer is far easier to reconcile with the historic European political focus on

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201. For the U.S./European conflict, see, for example, John Charles Kunich, *Mother Frankenstein, Doctor Nature, and the Environmental Law of Genetic Engineering*, 74 S. CAL. L. REV. 807, 814 (2001).

producer rights and interests than the protection of consumer economic sovereignty. Indeed, what Germany and France are creating is a world that manages to endorse the importance of consumer identity without discarding producerist traditions. Germany and France are finding a paternalistic path toward a producerist future.

But can they really succeed? Won't global economic pressures compel Europe to embrace economic consumerism no matter what? In the end, these are questions that can only be answered by someone with more expertise in economics than I possess. Nevertheless, I believe the traditions of continental Europe are not likely to perish. There are eminent economists who believe that European economies are not fated to undergo Americanization. Most recently, Barry Eichengreen has argued that European-style "coordinated capitalism" will survive and can succeed. Continental Europe, he argues, has distinctive "culture, preferences, attitudes and history," that result in "persistent differences in institutions."<sup>202</sup> This sounds right to me. Even if there are economic pressures, those pressures could be resisted. It may be costly for societies like those of Germany and France to resist favoring the consumer economic interest, but that does not mean it is necessarily ruinously costly. The price may be one their societies are willing to pay.

In any case, I think the extent of the pressures has been exaggerated, and their nature misapprehended. First of all, continental countries can change without abandoning their historic orientation toward producer rights and protections. For example, it is widely said that France must liberalize its labor laws if it is to prosper.<sup>203</sup> This may be true. But France can liberalize its laws on firing without ceasing to think that workers' rights are what matter. For example, it can embrace what is often called the "Danish Model" of the social welfare state.<sup>204</sup> Changing French employment law does not necessarily mean surrendering to American economic consumerism; there are alternatives.

Moreover, I would suggest that commentators on globalization have not always carefully thought through their economics. In particular, they have not considered the economics of comparative advantage. David Ricardo observed long ago that trade is governed by the law of comparative advantage. As countries engage in trade, they are compelled to specialize in the goods and services that they can produce most cheaply. This has important, and oddly neglected, implications for our globalization debates. Far from forcing

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202. BARRY EICHENGREEN, *THE EUROPEAN ECONOMY SINCE 1945: COORDINATED CAPITALISM AND BEYOND* 421 (2007).

203. *E.g.*, *France's Chance*, *ECONOMIST*, Apr. 14, 2007, at 11.

204. *E.g.*, Louis Uchitelle, *Job Security, Too, May Have a Happy Medium*, *N.Y. TIMES*, Feb. 25, 2007, § 3, at 5.

countries to become uniform, the pressures of comparative advantage should force them to diversify, specializing in the forms of production in which they enjoy a leg up.<sup>205</sup> The growth of global trade does not by any means imply that all countries should develop uniform economies. Rather, the theory of comparative advantage implies that they should diverge, as they specialize in the forms of production in which they can excel.

The Ricardian theory of comparative advantage suggests that some Western European differences are not only sustainable, but inescapable, even in a world of intense global economic competition. In particular, the arguments I have offered in this Article suggest that continental Europe enjoys a continuing comparative advantage in producerist forms of socioeconomic organization. Countries like France and Germany have craft traditions of longstanding and deep social legitimacy. These traditions are a kind of natural resource, upon which their economies can draw. Correspondingly, continental Europe, with its artisanal traditions, should be expected to specialize in high-quality goods. Exactly that has happened. We see it in French cheeses, wines, cosmetics, and fashion—all mainstays of the French economy. We also see it in successful high-end specialties of the German economy like BMWs.<sup>206</sup> We see it in regions like northern Italy, which also specializes in luxury artisanal goods such as high-end fabrics.

The success of these products reflects a kind of human capital resource in Europe. Because artisanal traditions are strong, they allow forms of production that are more difficult elsewhere. The result is that there can be “A Renaissance in Germany,” as the business section of the *New York Times* recently proclaimed, because “A Tradition of Quality and Strong Brands Leads Export Growth.”<sup>207</sup> Precision and high quality in production, the *Times* notes, are allowing Germany to specialize in “global niche products.”<sup>208</sup> Similar things can be said of other continental economies. Europe’s artisanal traditions give it a global niche. This sort of specialization is not necessarily directly threatened by globalization at all. On the contrary, the more integrated the world economy becomes, the more likely it is that Western Europe will become, perforce, a specialized producer of high-end and luxury goods, much as parts of Europe have become specialized in high-end tourism.

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205. DAVID RICARDO, *THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 81-87 (1911).

206. On the success of German luxury cars, but expressing some doubts about their future, see *The Big-Car Problem*, *ECONOMIST*, Feb. 24, 2007, at 81.

207. Mark Landler, *A Renaissance in Germany: A Tradition of Quality and Strong Brands Leads Export Growth*, *N.Y. TIMES*, Apr. 13, 2007, at C1.

208. *Id.*

To be sure, such artisanal specialization may not seem a wholly desirable future to European policymakers. As the *Economist* puts it, Europe may look to policymakers all too much like “a has-been, excelling in luxury goods, fine food, wines and fashion but weighed down by too many old industries and old ideas.”<sup>209</sup> What matters for comparative law is that it is a future in which the legal structures of the European economy are likely to remain distinctive, and in which distinctive artisanal legal traditions will continue to have an impact on the workings of distinctive economies. If continental countries specialize in artisanal goods to some extent, that does not imply that continental populations will only produce or consume artisanal goods, of course. What it implies is that *when* they consume artisanal goods, they are more likely to consume European products—and that when they consume low-end and subsistence goods, they are more likely to consume Chinese or perhaps American ones. The same is true of Americans: they too will buy European artisanal goods, while making their purchases of what the guild tradition condemned as “shoddy” goods at Wal-Mart. The proposition that continental economies are more artisanal thus does not mean that large retailers have no place in the continent. It means that *some* continental producers will be involved in the artisanal sector.

But that may also mean, importantly, that the artisanal economy can play a central ideological role for society at large, as it seems to do in France today. A successful artisanal sector can contribute to identity formation for all members of society. All French persons, even ones who are not directly engaged in artisanal production, can point with pride to French artisanal traditions, and build a sense of their own French identity founded on French artisanship. That is of course exactly what French people often do: they base their identity partly on their consumption of wine and cheese, and their mastery of traditional cuisine—just as Germans manage to take quite a bit of pride in their BMWs, even those who cannot personally afford such luxuries. Artisanal producer identity can continue to matter even in societies in which most people are merely consumers of artisanal products. This French cultural pattern suggests, once again, that the deep issues are about identity formation, and not just about economic activity.

At any rate, the future for continental Europe is not necessarily a future of soulless American economic consumerism. There will be large retailers in France, for example, just as there will be large retailers elsewhere. But the economics of comparative advantage tells us that the artisanal niche should survive, and even prosper; while cultural reflection tells us that it should

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209. *Who Are the Champions?*, *ECONOMIST*, Feb. 10, 2007, at 3.

continue to mean a great deal in the lives of French citizens. To that extent anticonsumerist gloom and doom is out of place. Such, at least, is my prediction.

Even readers who reject this prediction, though, should recognize the value of the classificatory opposition between consumerism and producerism that has been my topic. It is not a simple opposition. As I have tried to show, it must be worked through with real care. Nevertheless, it is an opposition that remains indispensable for our understanding of what it is at stake in our changing world. Comparativists must be prepared to talk intelligently about consumerism and its alternatives. If they are not, they will have no right to complain if the world regards their discipline as an academic curiosity, of no great relevance to the larger issues confronting the globe.