

PRIVATE SUPPLIERS OF LAW: DIVERSITY FOR LAWMAKERS

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INTRODUCTION

The notion of diversity that is presented here might be perceived as unorthodox by ordinary constitutional standards—even by the deliberately relaxed standards that have been chosen as guidelines for the contributions to this Symposium. This short Essay takes a different slant from most on the notion of diversity. The “[e]thnic, socioeconomic, and gender heterogeneity within a group” greatly preoccupies the constitutional debate.¹ This Essay, however, aims at looking exclusively at one socioeconomic aspect of diversity. It proposes to examine a few instances of diversity in the supply of law as opposed to its fruition. A few words of explanation are in order.

It would be in vain to attempt to enumerate the areas in which diversity has caused the law to be rethought. A cherished tenet of the current constitutional debate, diversity is viewed as a “compelling governmental interest”² in modern society and an ever-present feature of any theory of legal traditions.³ The notion appears to epitomize all that is good about being different. Diversity, thus perceived, ordinarily applies to the receiver of a rule, whose “quality of being different” acquires prominence in the face of one-and-the-same legislative system or one-and-the-same judiciary. However, the looser take on the matter that has been encouraged in this forum makes it excusable to discuss the overarching theme from a broader angle. Taking a look at rule-givers, this short Essay will argue that diversity in the supply of law—in other words, diversity for lawmakers—is likely to prove as worthy of attention as diversity applied to the recipients of a given rule. The consequences of that outlook on the structure of a legal system’s sources of law are substantial.

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1. BLACK’S LAW DICTIONARY 512 (8th ed. 2004). Another part of the definition for diversity is “the combination within a population of people with different backgrounds.” *Id.*

2. *Gutter v. Bollinger* 539 U.S. 306, 326, 328 (2003); *Gratz v. Bollinger* 539 U.S. 244, 268 (2003). For a general discussion on the topic, see PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 919, 973–78 (4th ed. 2000).

3. See H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 318–19, 331–38 (2000) (stating that sound analysis of a specific, legal tradition of the world requires one to look at “the existence of other recognizable legal traditions” and describing the importance of the multivalence of complex legal traditions in sustaining their survival).

I. DIVERSITY FOR LAWMAKERS: THE REINVENTION OF THE WHEEL?

It is difficult to talk of diversity in the supply of law without falling prey to an elusive recitation of the almost obvious truth that there exists a hierarchy, or at least a plurality, of sources of law. That lawmaking is not the exclusive business of what is formally known as “the legislature” is no novelty. Any American law school’s introductory course in legal methodology and legal sources will reveal just that.⁴ In reality, however, the hierarchy of sources of law hardly can be said to have been studied once and for all. It is little wonder that it might constantly require fresh attention, for the type and provenance of the law to which we subject ourselves is likely to be an indicator of social and institutional change.⁵ While it is accepted that the idea of society and its institutions calls for constant revisitation, the variations in the concept of law that might accompany those changes are surprisingly often overlooked.

The idea of the existence of a pluralism of legal orders has been the subject of important work.⁶ In 1946 the Italian jurist Santi Romano wrote:

It must be denied, in no uncertain terms, that the State system has become the only possible system within the legal order: in fact, it must be denied that such a concentration of power is at all possible. And indeed, if we could indulge in prophecy, it would probably appear that, in the near future, the exact opposite would be the case. The so-called crisis of the modern State entails the very tendency of a great number of social groups to build their own independent legal circle.⁷

4. See, e.g., PETER L. STRAUSS, *LEGAL METHODS: UNDERSTANDING AND USING CASES AND STATUTES 2–5* (2005) (introducing law students to the various sources of law and noting the prevalence of the common law in first-year studies). Likewise, manuals on both private and constitutional law destined for first-year students in European law schools traditionally devote an initial chapter to the topic of sources of law. E.g., FRANCESCO GAZZONI, *MANUALE DI DIRITTO PRIVATO* ch. 1 (11th ed. 2004).

5. On the idea of legal order as indistinguishable from the social structure from which it derives, see SANTI ROMANO, *FRAMMENTI DI UN DIZIONARIO GIURIDICO* 68 (1947). For an analysis of the weaknesses of this idea, chiefly due to its vagueness, see Anna di Robilant, *Genealogies of Soft Law*, 54 *AM. J. COMP. L.* (forthcoming 2006) (manuscript at 32–35, on file with author).

6. See SANTI ROMANO, *L’ORDINAMENTO GIURIDICO: STUDI SUL CONCETTO, LE FONTI E I CARATTERI DEL DIRITTO* (Enrico Spoerri ed., 1918) (dealing, especially in Part II, with the plurality of legal orders and the relationships among them); SANTI ROMANO, *L’ORDINAMENTO GIURIDICO* 106–113 (2d ed. 1946). For a historical critique of the evolution of the idea of legal pluralism, see Robilant, *supra* note 5.

7. SANTI ROMANO, *L’ORDINAMENTO GIURIDICO* 112–13 (2d ed. 1946).

Thus, the idea of the private supply of law was fervently thought about in Italy, despite the very recent adoption of a new civil code in 1942. However, the old idea of hapless renunciation by the state of its regulatory role occasionally has been revisited in a more optimistic light. In a Canadian context, Richard Janda has warned against the pathologies inherent in the pluralism of legal orders.⁸ He proclaims the “[r]eturn of the [s]tate” after years in which the assumption of the state’s failure or inability to perform almost any task, whether the allocation of resources or basic regulatory functions, seemed dominant.⁹ Janda has advocated the centrality of the state regulatory function, far from *dépassé* at a time when there exists, he claims, a relationship of dependency of the market upon the state.¹⁰

On an altogether different front, diversity in the supply of law has been explored through the study of the relationship between learning and lawmaking—that is, through the study of the complementary roles of jurists and judges as scholars and lawmakers.¹¹ The function of jurists as carriers of diversity in the supply of law tends to receive benevolent and respectful comments by onlookers. Law proposed in an academic context is not feared as a competitor of state sources, for it is not perceived as intimidating in the first place. Academics, as harmless observers of the law, do not appear to have the supply of law declaredly on their agenda.

8. Richard Janda, *Cosmopolitan Citizenship and Pathologies of Pluralism* (2004) (unpublished draft) (on file with author); Richard Janda, *Toward Cosmopolitan Law* (2005) (unpublished draft) (on file with author).

9. Richard Janda, *The Return of the State* (2005) (unpublished draft) (on file with author); cf. FRED FOLDVARY, *PUBLIC GOODS AND PRIVATE COMMUNITIES: THE MARKET PROVISION OF SOCIAL SERVICES* 25–43 (1994) (explaining that territorial collective goods should be paid for through the collection of rents instead of allowing free riders to exist as is currently the case with some territorial collective goods).

10. Janda, *supra* note 9. Despite the deleterious effects of numerous waves of privatization and deregulation in Canada’s previously coherent mixed economy of the 1970s, it nevertheless seemed that [t]he state was to cede its place [to the market] unless a difficult burden of proof could be met that the market would fail to provide goods and services efficiently. Those functions of the state that were preserved after cost-cutting and downsizing were now to be run on market models using market incentives. . . . Outsourcing and public-private partnership gave rise to the impression that the state was just one corporate entity among others—perhaps a larger nexus of contracts than corporations in the private sector, but a nexus of contracts nonetheless.

Id.

11. See generally J. H. BAKER, *THE LAW’S TWO BODIES* (2001) (discussing sources of law outside of the formal, commonly considered categories); ALEXANDRA BRAUN, *LA DOTTRINA E I GIUDICI NELL’ESPERIENZA INGLESE: STORIA DI UN RAPPORTO CONTROVERSO* chs. 6–7 (forthcoming 2006) (dealing with the recourse by judges to jurists’ work); Alexandra Braun, *Professors and Judges in Italy: It Takes Two to Tango*, 26 OXFORD J. LEGAL STUD. 665 (2006) (exploring the relationship between judges and academics and how this leads to the development of law).

However, an unusually ambitious category of competitors has taken to shaping the production of legal rules in extensive areas of both domestic and transnational private law. They are, just to name a few, merchants, financial institutions, and interstate organizations.¹² The extent to which they create law cannot be ignored. It is not helpful to try to downplay this role by assuming that private organizations will at most influence the content of the contractual agreements into which they enter during the course of their business. The statement that a contract is a source of obligations, and therefore a species of law, is ancient.¹³ That a contract has legal strength between the parties to it is almost a matter of conventional wisdom. Much less attention, however, is devoted to the case where the production of legal rules reaches beyond the parties to the agreement and affects unwilling or unaware subjects. Talking about this external manifestation of contractual strength in the reassuring language of “soft law” alters neither the terms of the problem nor the scale of the phenomenon. For, if soft law is obeyed, it has a good claim to be law.

In the subsections which follow, this Essay looks at instances of how the private supply of law has challenged the relevance of state regulation. In turn, this Essay considers the advantages of the choice of opting out of the public legal systems, the idea of regulation by networks, the function of transnational enterprises for the supply of law, and the issue of compliance. In so doing, the purpose will be to build some background against which the private supply of law may be studied as a new legal source.

II. SCENARIOS OF DIVERSITY IN THE SUPPLY OF LAW

A. *The Opt-Out Choice of the Cotton Industry*

Among the sectors which have “entirely opted out of the public legal system, replacing it with one of the oldest and most complex systems of private commercial law” is the cotton industry.¹⁴ Lisa Bernstein has shown

12. For an overview of the role of law in the global political economy, see generally A. CLAIRE CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY* (2003).

13. It was remarked to me in the course of the forum that the idea was at least as old as Kelsen. That is certainly correct. *E.g.*, HANS KELSEN, *ALLGEMEINE THEORIE DER NORMEN* (Kurt Ringhofer & Robert Walter eds., 1979); HANS KELSEN, *REINE RECHTSLEHRE: EINLEITUNG IN DIE RECHTSWISSENSCHAFTLICHE PROBLEMATIK* (1934). In reality, the statement is found in classical Roman law: G. INST. 3.89 (F. de Zulueta trans.); J. INST. 3.13.1–2.

14. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1724 (2001).

how merchant-to-mill transactions and merchant-to-merchant transactions are governed by sets of rules produced within the associations that handle the cotton trade.¹⁵ These are clubs in themselves.¹⁶ The success of the system has been said to lie in the fact that the content of the rules is understood by all market participants.¹⁷ Also, the arbitration tribunals resolve disputes expeditiously.¹⁸ As a result transaction costs, error costs inherent in the use of the legal system, and collection costs are low.¹⁹ Despite easy access to monetary sanctions, cotton transactors do not often resort to them, for “reputation-based nonlegal sanctions (like negative gossip, which may lead to refusal to deal) [are] important force[s] in the industry. They work in tandem with the monetary sanctions available in arbitration to provide desirable breach-or-perform incentives”²⁰

It has therefore been suggested that “one of the more important ways that cotton industry institutions create value is by providing a social and institutional transactional framework that effectively constrains opportunism and promotes commercial cooperation in its shadow.”²¹

At the outset of the enterprise, the mechanisms ruling the cotton industry were remarkably flexible. The business resembled “an old boy network,” or a “gossip network,” where honoring one’s word was paramount, for failure to do so meant a loss of business.²² Nowadays, while precontractual negotiation is more common, the expectation of cooperation within the industry is undiminished.²³ Thus, new cotton merchants are encouraged to become acquainted with and abide by the main sets of trading rules. At the same time they are encouraged by their associations to “come to informal understandings on subjects not dealt with explicitly by the rules.”²⁴ The contractual activity itself is a two-tiered regulatory structure made of a combination of written contracts and variations to these.²⁵ Variations, known as “relationship-preserving norms,” are achieved through extralegal understandings that reduce the likelihood of

15. *Id.* at 1724–25.

16. Examples of these trade associations are the American Cotton Shippers Association and the American Textile Manufacturers Institute. *Id.* at 1726. Most of the U.S. cotton trade is handled by the ninety members of the Memphis Cotton Exchange. *Id.*

17. *See id.* at 1725 (mentioning how the content of the rules are “understood by most market participants”).

18. *Id.*

19. *Id.*

20. *Id.* at 1745.

21. *Id.* at 1762.

22. *Id.* at 1765 (quoting a merchant in the industry).

23. *Id.*

24. *Id.* at 1772–73.

25. *Id.* at 1780.

relationship breakdown.²⁶

In short, “social norms of honor, particularly when reinforced through group activity and a basic human desire to think of one’s self as trustworthy, are more powerful motivators of transactional behavior than economic models of behavior typically assume.”²⁷ Since private commercial legal systems offer transactors benefits that can only be reproduced through the public legal system at great cost, it is no surprise that a particular industry might decide to opt out of the latter.

B. Regulation by Networks

Another example of diversity as applied to suppliers of law is the idea of regulation by networks. The thought has long been advanced that there are “networks of contracts” that prompt regulation “from within.”²⁸ This is especially true in a corporate context.²⁹

The traditional “contractarian paradigm” (contract is law as between the parties to it) assumes that the value of a corporate contract term is unrelated to the number of firms who adopt the term.³⁰ This assumption was questioned by Michael Klausner in the mid-1990s. He has proven that interdependence among corporate contracts may require us to reconsider the way we think about corporate law.³¹ “[T]he benefit that one party’s use of a product confers on the value of that product has been termed a ‘network externality.’ . . . [I]f network externalities are significant, corporate law may perform a coordinating function similar to that of technical standards in such fields as telecommunications [and] computing . . .”³² Thus, the objective of corporate law is not only to reduce the cost of drafting contracts, but also to operate as a system of standards that “promote[s]

26. *Id.*

27. *Id.* at 1787 (footnote omitted) (citing Robert Cooter & Melvin A. Eisenberg, *Fairness, Character, and Efficiency in Firms*, 149 U. PA. L. REV. 1717, 1732–33 (2001)).

28. Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 757, 759 (1995).

29. *Id.* at 759.

30. *See id.* (finding that the “contract terms” tend to “maximize the firm’s value”).

31. *Id.*

32. *Id.* at 763–64 (citing Joseph Farrell & Garth Saloner, *Installed Base and Compatibility: Innovation, Product Preannouncements, and Predation*, 76 AM. ECON. REV. 940, 942 (1986); Joseph Farrell & Garth Saloner, *Standardization, Compatibility, and Innovation*, 16 RAND J. ECON. 70, 70 (1985); Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 424–25 (1985); Michael L. Katz & Carl Shapiro, *Product Compatibility Choice in a Market with Technological Progress*, 38 OXFORD ECON. PAPERS 146, 146 (SUPPLEMENT) (1986); Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, J. ECON. PERSP., Spring 1994, at 93, 93; Michael L. Katz & Carl Shapiro, *Technology Adoption in the Presence of Network Externalities*, 94 J. POL. ECON. 822, 823 (1986)).

optimal contracting by facilitating the formation of contractual networks among homogeneous firms while also promoting diversity in contracts among heterogeneous firms, and . . . avoid[s] locked-in obsolescence.”³³

The possibility that network externalities are significant (that is, the rather tautological proposition that certain rules may be increasingly popular simply because more and more people use them, rather than owing to their inherent quality) implies that the products generated in that market may be suboptimal.³⁴ Delaware law’s “dominance” in governing corporate affairs, Klausner claims, “may have resulted in too much uniformity in state laws.”³⁵ On this view, diversity needs to be promoted further within the network, perhaps by creating subnetworks corresponding to different practices of corporate law.³⁶

C. Transnational Norm Entrepreneurs

In the conduct of transnational affairs, bottom-up examples of lawmaking have long challenged existing assumptions as to the success rate of traditional top-down lawmaking by state entities.

A recent article by Janet Koven Levit has celebrated “the transnational norm-entrepreneur, as opposed to the state, as the driving force of international legal processes.”³⁷ An expert of experimental scholarship, the author has conducted a detailed evaluation of the role of bankers, insurers, and technocrats as central players in the production of law relating to key commercial tools, such as letters of credit and export-credit insurance policies.³⁸ Both instruments address the problem of how to extend credit to a buyer who might be thousands of miles away without stifling the seller’s ability to engage in further trade transactions.³⁹

Three examples will highlight the regulatory context. First, with regard to letters of credit, for example, “the Uniform Customs and Practice for Documentary Credits (UCP) provides a set of transnational rules that [all] commercial banks . . . follow in their letter-of-credit practices.”⁴⁰ The author has shown that “[t]hese rules are not the work of policymakers; they

33. *Id.* at 851.

34. *Id.* at 852.

35. *Id.*

36. *See id.* at 851 (stipulating that “[l]egislatures should supply menus of optional terms in addition to default rules”).

37. Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT’L L. 125, 181 (2005) (emphasis omitted).

38. *Id.* at 129–32.

39. *Id.* at 132–33.

40. *Id.* at 128.

are the creation of private bankers who congregate under the auspices of the Commission on Banking Technique and Practice (Banking Commission) of the International Chamber of Commerce (ICC) to draft” and interpret the rules.⁴¹ Secondly, in the field of credit insurance, the International Union of Credit and Investment Insurers (Berne Union), a nongovernmental institution, regulates the way in which members, all private insurers, may conduct their business.⁴² These rules of behavior have been codified and are followed by international lawmaking institutions.⁴³ Thirdly, when dealing with export credit, the “Gentlemen’s Agreement” wording clothes the content of the Arrangement on Officially Supported Export Credits, which governs official export-credit agencies’ financing of national exports.⁴⁴ The Arrangement is the work of the practitioners who make up the Participants Group, and the rules are the result of their practical experience.⁴⁵ They are declaredly supplied within a private (although “international,” in a nontechnical sense) circle, for use by the members of that club.⁴⁶

A 1998 study by Tamar Frankel had shown that decentralized lawmaking was largely employed in cross-border securitization, on the principle that “[p]rivate sector actors have incentives to both innovate and standardize the law.”⁴⁷ She predicted that it would be “unlikely” for “cross-border securitization [to] be enacted and enforced by a central international lawmaker any time soon.”⁴⁸ Instead, the combined action of a plurality of mechanisms would likely yield uniformity, including “the International Monetary Fund, the World Bank, cooperating governments and regulators, regional markets . . . bodies developing principles and models of law, and private agreements feeding customary laws that, like precedents, gain coercive momentum as they are replicated over time.”⁴⁹ “Cross-border securitization,” Frankel concluded, was “indeed without law in the

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Tamar Frankel, *Cross-Border Securitization: Without Law, but Not Lawless*, 8 DUKE J. COMP. & INT’L L. 255, 280 (1998).

48. *Id.* at 281.

49. *Id.* at 281–82 (citing Caroline Bradley, 1992: *The Case of Financial Services*, 12 J. INT’L L. BUS. 124, 125–26 (1991); Charles A. Samuelson, Note, *The Fall of Barings: Lessons for Legal Oversight of Derivatives Transactions in the United States*, 29 CORNELL INT’L L.J. 767, 768 (1996); Rochael M. Soper, Note, *Promoting Confidence and Stability in Financial Markets: Capitalizing on the Downfall of Barings*, 7 DUKE J. COMP. & INT’L L. 651, 670 (1997); Maria A. Volarich, Note, *Easing the Regulation of a Pan-European Securities Market: Applying the Recommendation of the Rudman Report to EASDAQ*, 19 FORDHAM INT’L L.J. 2230, 2280 (1996)).

traditional sense, but . . . not lawless.”⁵⁰

In conclusion, customary international lawmaking, the transnational legal process, transgovernmental network theory, and private lawmaking all appear to be manifestations of the private supply of law. In the old-fashioned and more familiar language of the hierarchy of sources of law, custom was also one such manifestation, but it was reassuringly perceived as residual and merely influential by comparison to state legislation. The new species of custom is impatiently appropriating the features of a proper legal order. It does not fill gaps. It emanates from—and promptly satisfies the operational needs of—a diverse social order that has long been in place and will not await state intervention to be endowed with rules. The receivers of this privately produced law are at the same time its givers. No regulation process could be met by a higher degree of receptiveness.

D. Diversity in Compliance

It would be wrong, however, to assume that the identity between rule-givers and rule-receivers observed above with regard to some transnational norm entrepreneurs proves true of all instances of supply of law. To name but one case, transnational networks have prompted some rethinking of the idea of compliance. The very existence of different levels of compliance with a norm suggest that not all members of the rule-giving club might be equally obliging receivers.

Recent work by Charles Whitehead has shown that, differently from enacted law, compliance is ensured by mechanisms of reputation and exclusion.⁵¹ Not unlike in the cotton industry, adhering to network standards may encourage praise; whereas, deviation may carry with it embarrassment or shame.⁵² Network norms have a potentially cohesive effect on network members.⁵³ They can create a diverse group of members that uses law differently and separately from the rest of the community at

50. *Id.* at 282. Similarly, on the formation of rules for wholesale financial services, Joseph H. Sommer remarks that, on the one hand, “international financial law is increasingly well served by its international institutions” (e.g., the infrastructure supplied by the World Bank and the IMF), and that, on the other hand, “[t]he private sector is unusually active in law formation—both clearinghouses with their rules, and trade associations with their master agreements.” Joseph H. Sommer, *International Securities Holding and Transfer Law*, 18 ARIZ. J. INT’L & COMP. L. 685, 687 (2001).

51. Charles K. Whitehead, *What’s Your Sign?—International Norms, Signals, and Compliance*, 27 MICH. J. INT’L L. 695, 705 (2006) (citing ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 136–37, 196–200 (2004); Amitai Aviram, *Regulation by Networks*, 2003 BYU L. REV. 1179, 1225 (2003)).

52. *Id.* at 708 (citing Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 355–75 (1997)).

53. *Id.* at 709–10.

large and within which operate peculiar prestige/shame mechanisms.

One well-known example of global financial regulation is the Basel Accord of 1998 on minimal capital requirements for banks.⁵⁴ The recent Asian market crash signified that Japanese banks might have been struggling to keep up with the Basel Accord and its requirement of eight percent of risk-weighted assets.⁵⁵ For fear of being misjudged on the scene of international cooperation, Japan continued to be part of the agreement.⁵⁶ Enforcement was not a consequence of internationally threatened sanctions; it was a consequence of the fear of disapproval by the network.⁵⁷

The globalization of business regulation makes good use of diversity in the supply of law by creating its own separate legal network. Within these nonlegal—or nontraditionally legal—networks, lower levels of compliance might be tolerated than those that would accompany enacted law, thereby creating a diverse subgroup within a diverse group.

This phenomenon probably transcends the idea of soft law. Financial regulatory cooperation enjoys widespread adherence simply because it is widely adopted. This situation in which the utility of a product (such as a legal device) increases as other consumers obtain the product, has been called a “network effect.”⁵⁸ A network effect boosts the existing incentives to standardize. Thus, the fact that the law is not binding does not make that law less obeyed. Most of the time, the common culture that exists amongst network members ensures obedience with the diverse source of law.⁵⁹

54. BASEL COMMITTEE ON BANKING SUPERVISION, INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS (2004), available at <http://digbig.com/4qwmh>. See generally Daniel E. Ho, *Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?*, 5 J. INT'L ECON. L. 647, 648–49 (2002) (discussing the statistical effects of the Basel Accord in over one hundred countries).

55. Whitehead, *supra* note 51, at 732–33.

56. *Id.*

57. *Id.*

58. David Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, 5 CHI. J. INT'L L. 547, 592 (2005).

59. Amitai Aviram has argued that “[n]etwork effects do not only assist in enforcing norms.” Aviram, *supra* note 51, at 1238. Network effects also

induce a special type of norm violation, called degradation. Degradation is a predatory act that weakens the network, . . . thereby giving larger firms an advantage over smaller competitors. . . . Private regulators, including networks, are also hindered in their ability to punish degrading parties because their enforcement mechanisms tend to be least effective in conditions that are most conducive to degradation. Thus, parties often turn to the public legal system to remedy degradation.

Id.

The question whether financial standards as “soft law alone will be sufficient in the long run to ensure the systemic stability of the international financial markets,”⁶⁰ however, remains open. While some scholars have called for hard law in the future of the global financial system, others have warned against reaching formal agreements in areas where past experience of compliance is, all things considered, encouraging.⁶¹ It has been suggested that the two approaches might well function optimally when taken as complementary.⁶² For standards “on which an international consensus has been established on an informal basis could be made the object of an international treaty This would by no means prevent the informal consensus building process from continuing in parallel,” especially through the mechanisms of “peer pressure” and “market discipline.”⁶³

III. PRIVATELY SUPPLIED LAW AND SOFT LAW

The inquiry about private sources of law seems tangential to the investigation of the nature of “soft law.” That is because many approaches to the latter inquiry tend to focus on the receiver of a rule, thus missing the more stimulating chance to look at the structural changes that soft law causes to occur within the system of the sources of law.

Some twenty years ago, inquiries into soft law were comprehensibly worried about pinning down the features that made nonstate law different from state command.⁶⁴ Thus, scholars seemed preoccupied with establishing how many of the formal elements of a legal communication were missing from soft law compared to its traditional state cousin. Everyone seemed to agree that a state law command included a request to do or forbear, an appearance of authority vested in its source, and a control mechanism to make that command effective; all distinguishing it from the “you ought’s” and “you should’s” of nonstate law.⁶⁵ But scholars could not agree as to which of these dimensions was defective.⁶⁶ In the background

60. Mario Giovanoli, *Reflections on International Financial Standards as ‘Soft Law’*, in *ESSAYS IN INTERNATIONAL FINANCIAL & ECONOMIC LAW 27* (London Inst. of Int’l Banking, Fin. & Dev. Law, Essays in International Financial and Economic Law No. 37, Joseph J. Norton et al. eds., 2002).

61. For the debate, see *id.* at 27–30.

62. *Id.* at 30.

63. *Id.*

64. *E.g.*, Gunther F. Handl et al., *A Hard Look at Soft Law*, 82 *AM. SOC’Y INT’L L. PROC.* 371, 372, 380, 382 (1990) (tackling soft law manifestations such as UN General Assembly resolutions, the resolutions and recommendations of international bodies, and the soft law procedures of human rights treaties).

65. *Id.* at 373.

66. *Id.* at 373–74.

was the intuition that soft law played a role in the makeup of international legality and the perception that it was “not only a new word for an old (customary) process.”⁶⁷

However, asking about the defining features of soft law—although perhaps interesting from a purely definitional perspective—almost inevitably misses the point, for it invites an answer based on the enforcement of the norm. Enforcement, as we have seen, is not particularly problematic, for compliance is often spontaneously practiced within the network. Obedience is guaranteed by the desirability of belonging to the club and the unwillingness to being frowned upon by others. If soft law is obeyed, it is law. The interesting profile to soft law must therefore lie elsewhere. It is plausible that it might lie in the supply, rather than receipt, of law: in those features that cause soft law to enter the hierarchy of the sources of law.

Soft law has formed the subject matter of a number of recent studies.⁶⁸ The European Union, with its attention to the principles of subsidiarity and proportionality, has proven the ideal testing field for soft law.⁶⁹ Some work has dealt with the importance of flexibility in EU governance, especially since the White Paper on European Governance was adopted in 2001.⁷⁰ The debate has since centered whether the “Community top-down ‘command-and-control method’” is still suitable for the production of law.

67. *Id.* at 389.

68. *E.g.*, Ulrika Mörth, *Introduction to SOFT LAW IN GOVERNANCE AND REGULATION* 7–8 (Ulrika Mörth ed., 2004) (furthering the debate on systems of soft law governance that are nonbinding). The study has looked at a number of questions such as whether soft law is a threat rather than a welcome opportunity for democracy, with regard to both accountability and deliberation, and the nature of the relationship between certain forms of rules and the organization in which they exist. Goran Ahrne & Nils Brunsson, *Soft Regulation from an Organizational Perspective*, in *SOFT LAW IN GOVERNANCE AND REGULATION*, *supra*, at 171–190; Henrik Frykman & Ulrika Mörth, *Soft Law and Three Notions of Democracy: The Case of the EU*, in *SOFT LAW IN GOVERNANCE AND REGULATION*, *supra*, at 155–171; Mörth, *supra*, at 7–8. Another study investigates changes in the regulatory style in the EU social policy. GERDA FALKNER ET AL., *COMPLYING WITH EUROPE: EU HARMONISATION AND SOFT LAW IN THE MEMBER STATES* 1–2 (2005). The combined principles of minimum harmonization and social dialogue between the collective parties of labor and industry have created new options for the adoption of European directives alongside the traditional one consisting in the adoption of a Commission proposal by the Council in tandem with the European Parliament. *Id.* at 2.

69. For discussion of the EU developments presented immediately below, see Linda Senden, *Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?* 9.1 ELECTRONIC J. COMP. L. at 2–4 (2005), <http://digbig.com/4qmjw>. For the state of the debate in the mid-1990s, see generally Francis Snyder, *Soft Law and Institutional Practice in the European Community*, in *THE CONSTRUCTION OF EUROPE: ESSAYS IN HONOUR OF EMILE NOEL* 197 (Stephen Martin ed., 1994).

70. *European Governance: A White Paper*, at 3, COM (2001) 428 final (July 25, 2001).

Today EC law is no longer the “terra incognita der Gesetzgebungslehre” (the unknown land within legislative doctrine).⁷¹ The White Paper recommended that the top-down approach be complemented with alternative legislative instruments.⁷² It saw legislation as often being “only part of a broader solution combining formal rules with other non-binding tools such as recommendations, guidelines, or even self-regulation within a commonly agreed framework.”⁷³ The White Paper was followed by an Action Plan “Simplifying and improving the regulatory environment”⁷⁴ and by an Interinstitutional Agreement on Better Law-Making between European Parliament, the Council of the European Union, and the Commission of the European Communities in December 2003.⁷⁵ The issue of simplification was on the agenda of the European Convention that elaborated the text of the Treaty establishing a Constitution for Europe.⁷⁶ Within this framework, various patterns of coregulation and self-regulation involving private actors and public authorities have been experimented with. Self-regulation, in particular, contemplates a more prominent use of the soft law instrument of recommendation,⁷⁷ followed by the adoption of agreements. Steps in this direction have been criticized for being too mild. The European Convention, it has been alleged, has missed the chance to recommend a more transparent use of recommendations in the proposed constitution.⁷⁸

But the impression from the European story suggests that the question of where exactly the boundary between hard and soft law lies might be rather trivial. The more interesting question appears to be how soft law comes to operate as a source of law. In the EU context, for example, it has been suggested that where the regulatory function of recommendations ends, the gap should be filled by the conclusion of agreements. But the

71. Thomas Bruha & Harald Kindermann, *Rechtsetzung in der Europäischen Gemeinschaft*, 1 ZEITSCHRIFT FÜR GESETZGEBUNG 293 (1986).

72. *European Governance: A White Paper*, *supra* note 70, at 4, 20.

73. *Id.* at 20.

74. *Action Plan “Simplifying and Improving the Regulatory Environment”*, at 7, COM (2002) 278 final (May 6, 2002).

75. Interinstitutional Agreement between European Parliament Council and Commission, 2003 O.J. (C 321) 1.

76. Treaty Establishing a Constitution for Europe, Oct. 29, 2004, 2004 O.J. (C 310) 1, 3 (referring to the Union being “United in diversity”).

77. *See id.* art. I-33 (suggesting that European institutions shall use amongst other things “recommendations and opinions”); Consolidated Version of the Treaty Establishing a Constitution for Europe, Dec. 24, 2002, 2002 O.J. (C 325) 33, art. 249, available at <http://digbig.com/4qmjx> (directing the Council and the Commission to “make regulations and issue directives, take decisions, make recommendations or deliver opinions”).

78. Senden, *supra* note 69, § 5, at 27; *see* Treaty Establishing a Constitution for Europe, *supra* note 76, art. I-33 (declaring that recommendations and opinions are not binding).

importance of these agreements would be rather marginal if the contracts only had force as between the parties. As discussed above, that would amount to the reinvention of the wheel or, at most, to a learned, Kelsenian statement. In reality, the private supply of law acquires importance when the detailed content of the terms of a contractual arrangement is imposed onto subsequent contracting parties. In that case, the contract's legal strength will bind all participants to the network of contracts. It will then be appropriate to identify a new source of law.

IV. PRIVATELY SUPPLIED LAW IN DAILY LIFE: THE EXAMPLE OF TITLE INSURANCE

Lest it might be thought that regulation by networks is limited to transnational law, it is helpful to investigate a quintessentially domestic legal situation—that of a buyer purchasing land. In the United States, insurance companies propose countless variations on the scheme of title insurance. The purchaser of land can purchase insurance against the risk that his or her title to a particular parcel of real property will be found vitiated by competing claims. This may be the case where the plot of land or the house on it has gone through several ownership changes. There may be a weak link, such as an undiscovered lien at any point in that chain, which could emerge to weaken the buyer's title. Routinely, a title examination or search of all public records relating to the property (past deeds, wills, trusts, and judgments) will be carried out by the purchaser's property surveyor to ensure that title has passed correctly to each new owner. This title search should uncover other potential problems such as rights of way, view and power line easements, mineral rights, the existence of undisclosed heirs, and any pending legal actions. However, since any title examiner might miss a defect, insurance is usually a good idea.⁷⁹

In the case of title insurance, attractive websites celebrate what is, for all intents and purposes, the state's abdication of the once state-run regulation of title to real property.⁸⁰ At the very least what has taken place is an abdication of the function, once satisfactorily performed by the land registry, of evidencing title to land.

79. Often the grantor (seller) signs a general warranty deed that guarantees that the grantor holds clear title to the real estate and has a right to sell it. The guarantee is not limited to the time the grantor owned the property—it extends back to the property's origins.

80. *E.g.*, Investors Title Company, Investors Title Management Services, <http://digbig.com/4rbqm>.

The expense incurred by the buyer for this service is considerable, especially in those areas where sellers do not pay for policy premiums as part of their obligation to deliver good title to the buyer. The costs are also considerably difficult to spot upon surfing the websites of title insurance companies. They are hidden behind rhetoric of “comprehensive training,” “business development guidance,” and “management and operations assistance to optimize customer and agent profitability.”⁸¹ The costs of the new law of property are only known to those who can afford to pay them, or to those who have been informed that it would be highly advisable to pay them. However, title insurance is often imposed by lenders as a prerequisite to granting a mortgage to a prospective buyer, and the cost of the insurance service increases with the amount of the loan.⁸²

The somewhat disconcerting aspect of this trade is that only buyers of the service will benefit from a first-class property title. Those who cannot afford it, by contrast, will enjoy a lower-class property title. Such economy-class property owners are left to hope that they will have concluded a reasonably good deal, still unaware of having been exposed to more bargaining-process risks than they might have first anticipated.⁸³

Arguably, a couple of objections prevent this practice from being seen as “law.” Insurance, one may argue, *may* be purchased to accompany any number of services, but it is rarely compulsory to proceed with the purchase. Thus, the common character of that which usually accompanies manifestations of law seems absent from the practice of insurance. But, as this Essay has shown above, compulsion is not strictly necessary.

81. *E.g.*, Investors Title Company, Investors Title Management Services, <http://digbig.com/4rbqm>.

82. In some states the charges for title-related services are paid to title insurance companies. More often, however, borrowers may pay attorneys or independent companies called abstractors or escrow companies. Borrowers are encouraged to leave it to one of the professionals with whom they deal (i.e., real estate agent, lender, or attorney) to select the carrier. Borrowers typically know little or nothing about title insurance, which is part of much larger transactions that they encounter very infrequently. Therefore, in most cases a borrower purchases policies from the title company recommended by the industry professional most closely involved with the borrower’s transaction. Borrowers are not encouraged to shop for insurance in those states where title insurance rates are not preestablished (Alabama, District of Columbia, Georgia, Hawaii, Illinois, Indiana, Massachusetts, Oklahoma, and West Virginia).

83. However, even where the buyer has purchased title insurance, he is granted limited protection. Title insurance normally protects against losses arising from events that occurred prior to the date of the policy. Coverage ends on the day the policy is issued. Thus, for example, the standard policy does not protect the insured from false claims that arise after the property is purchased. Finally, title insurance does not prevent loss of marketability due to a title claim. The interest of the owner and the insurer may clash in such cases. The owner usually wants settlement immediately; whereas, the insurer wants to minimize the cost of settlement, which may require time-consuming negotiations with the claimant.

Spontaneous obedience is normally the result of a *così fan tutti* (“it is the norm”) logic, the consequence of satisfying a desire for conformity, or the manifestation of the prestige that accompanies membership in the club.

CONCLUSION

This Essay has tried to suggest that privately produced law is present in many more instances amidst more traditional sources of law than it might appear at first sight. The nonchalance with which the emergence of the private supply of law has been endorsed is surprising. This is probably because, in the process of determining what constitutes law, excessive attention has been traditionally devoted to the recipients of a given rule, while scant attention has been paid to its suppliers.

Negotiation by private parties about the content of their legal relationship is the most expedient channel for the production of new law. The importance of this proposition is not limited to the simplistic remark that, as between the parties, the content of a contractual agreement has always had legal strength. This observation entirely misses the point. The novel significance of negotiation as a source of law lies in its reaching out to networks of contracting parties, where it establishes itself with the same intensity as a well-rooted custom. It is plausible to assume that the higher the degree of detail of the contractual terms imposed within the network, the higher the likelihood of a new source of law coming into existence.

From the standpoint of the receiver of a rule, there are good reasons why the private supply of law through negotiation should not be supinely endorsed. First, allocating the supply of law to private parties might decrease legal certainty, for only those who have access to the club of “users” will be able fully to appreciate the implications of availing themselves of it. Second, the claim that privately supplied law is only imposed onto those who choose to subject themselves to it is fictitious, for obedience-to-network etiquette is seen as highly desirable notwithstanding the absence of compulsion. Compliance and compulsion are not necessarily coterminous. Thus, the market pressure to comply with insurance requirements when purchasing real property might be viewed as one critical stage of the formation of a new source of law, for the practice of buying title insurance is both sufficiently widespread in the real estate market and is in such contractual terms that remind one of a command. When a certain contractual practice becomes consolidated, those terms—perhaps in an implied form—will define the content of that practice and probably increase required levels of obedience. Therefore, there is a difference between a suggested practice and one whose content is minutely regulated.

By contrast, the creation of a diverse law-abiding group might be welcome in other situations. Minimum capital requirements for banks are one successful example of transnational legal supply.

Finally, the choice of a label to attach to this innovative supply of rules—whether that of soft law or hard law—is less important than the realization that private supply of law deserves a place among the sources of law. The terminology of “hierarchy of sources” might no longer be in fashion, but room must be made for at least some awareness of the dominance of socioeconomic mechanisms—this Essay referred to them primarily as networks or clubs—in shaping new law.

The worry about the blurring of the boundary between law and nonlaw belongs to the first age of soft law, as do the “reservations about [soft law’s] potential for legal obfuscation.”⁸⁴ The modern preoccupation, meanwhile, should lie with a better understanding of the social synergies that necessitate the novel supply of law.

84. Handl et al., *supra* note 64, at 371.