

Consumerism versus Producerism:  
On the Global Threat of “Consumerism” and the Mission of Comparative Law

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“American consumerism threatens the globe.”  
--Hugo Chavez

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? These are hotly debated questions in the world today. Most of the debate focuses on America: Attacks on American-style “consumerism” are part of the standard fare of politics in many countries indeed. 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>1</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: The Figaro, for example, 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,” this article continued, is what American firms like MacDonald’s and Nike are selling to European youth.<sup>2</sup>

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<sup>1</sup> <http://www.thehindu.com/2006/01/28/stories/2006012802941400.htm>

<sup>2</sup> Sonia Devillers & Pierre-Olivier Julien, Leur anti-américanisme ne nuit pas au succès des marques de l’Oncle Sam; Ces jeunes qui aiment Nike mais pas l’Amérique, Le Figaro, August 1, 2002.

American consumerism has critics at home too—notably two prominent Harvard philosophers, Michael Sandel and the late John Rawls. 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 business and unions, leaving us dependent on the large enterprises that supply us with the consumer goods we crave.<sup>3</sup> As for Rawls: Not long before his death, he declared that consumerism posed a particular danger to the values and traditions of Europe:

Isn't there a conflict between a large free and open market comprising all of Europe and the individual nation-states, each with its separate political and social institutions, historical memories, and forms and traditions of social policy? Surely these are of great value to the citizens of these countries and give meaning to their life. The large open market including all of Europe is the aim of the large banks and the capitalist business class whose main goal is simply larger profit. The idea of economic growth, onwards and upwards, with no specific end in sight, fits this class perfectly. If they speak about distribution, it is [al]most always in terms of trickle down. The long-term result of this — which we already have in the United States — is a civil society awash in a meaningless consumerism of some kind.<sup>4</sup>

“Cultural rootlessness.” “Meaningless consumerism.” “Decay of the republican institutions of self-government.” Large markets that are cut off from the national

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<sup>3</sup> Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Harvard U. Pr., 1996), 221-249.

<sup>4</sup> John Rawls and Philippe van Parijs, *Three Letters on The Law of Peoples and The European Union*, p.9. Available at <http://www.uclouvain.be/cps/ucl/doc/etes/documents/RawlsVanParijs1.Rev.phil.Econ.pdf>.

“institutions, memories, forms and traditions” that “give meaning to life.” Such, to hear the critics tell it, will be the dreary “long-term result” of a globalization driven by the consumerist American market model.

Not everybody is a critic of American consumerism, however. There are other voices too, especially in America. 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>5</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. “[T]he 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>6</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, practically the first thing we find is the confident declaration that countries that fail to adopt the American approach will inevitably fail to prosper.<sup>7</sup>

Whether they are for it or against it, though, most of these observers agree that American law is somehow more “consumerist” than the law of other countries. They also agree that the rise and spread of consumerist law portends profound legal and social

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<sup>5</sup> Lizabeth Cohen, A Consumers’ Republic: The Politics of Mass Consumption in Postwar America (New York, 2003), 18-51.

<sup>6</sup> Robert Bork, The Antitrust Paradox: A Policy at War with Itself (New York, 1978), 51.

<sup>7</sup> Lawrence A. Sullivan and Warren S. Grimes, The Law of Antitrust: An Integrated Handbook, 2d ed. (2006), 2-3: “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.”

changes. Most of them further agree that the drama of globalization has something to do with the creeping spread of American “consumerism” to the rest of the world—a process that is the subject of a delightful and revealing recent history of twentieth-century Europe, Victoria de Grazia’s Irresistible Empire.<sup>8</sup> The question of global consumerism—what I would like to call the “Wal-Mart Question”—is indeed a topic of burning importance for all thoughtful observers of the contemporary world. It is becoming a question for domestic American politics too, as Democrats in the 2006 campaign make a point of denouncing Wal-Mart.<sup>9</sup>

So what do comparative lawyers have to say about the burning global Wal-Mart question? The sad answer is: Essentially nothing. One would expect modern comparative law to be deeply caught up in this controversy. After all, at the heart of the debates over consumerism lie claims about comparative law: the claim that some legal systems are more “consumerist” than others; the claim that “consumerism” represents a force for deep social change, whether for good or evil; and the claim that a “consumerist” legal order will tend to spread to societies throughout the globe. These are significant propositions about the law of the industrialized world, and one would expect comparative lawyers to address them in their scholarship and teaching. After all, every other course in law school speaks to the great issues of the day. A comparative law course that has nothing to say about the Wal-Mart Question is like a corporations course that has nothing to say about stock options, or a criminal law course that has nothing to say about determinate sentencing. How can comparative lawyers fail to develop an analytic approach to an issue of such public importance?

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<sup>8</sup> De Grazia, *Irresistible Empire: America’s Advance Through Twentieth-Century Europe* (Harvard, 2005).

<sup>9</sup> See Adam Nagourney and Michael Barbaro, *Eye on Election, Democrats run as Wal-Mart Foe*, *New York Times*, Thursday, August 17, 2006, p. A1.

Yet the discipline has failed. Part of my purpose in this Essay is to deplore this collective failure, and to plead with comparative lawyers to give suitable attention to great global issues like “consumerism.” I think that comparative law ought to focus on big public policy questions just as much as every other discipline housed in law schools. I think that our basic textbooks ought to encourage students to think in intelligent and informed ways about these kinds of global conflicts. I think that our teaching ought to prepare them for an international legal practice that includes the representation of enterprises like Wal-Mart—or, for that matter, the representation of opponents of Wal-Mart. Something has gone wrong in a discipline that cannot offer that kind of scholarship and teaching, and my first Section will make an effort to explain why.

Of course, there would be little use in declaring that comparative law should talk about consumerism if there were nothing intelligent to say about the subject. The bulk of this Essay is accordingly devoted to some basic analytic thinking about the comparative law of consumerism. There is more to the question of consumerism than left-wing (or right-wing) hand-wringing about the supposed psychic emptiness of modern life. There are sober and useful ways of defining “consumerist” law, and sober and useful ways of explaining why people in Europe might regard consumerist law as a threat to their traditions. At the same time, there are sensible reasons for thinking that the rhetoric condemning consumerism is overblown: The threat is not as dire as people like Rawls, Sandel and Chavez claim. The pro-consumerist arguments of figures like Cohen and Bork can also be discussed in provocative and valuable ways.

In order to address the problem of consumerism in an intelligent way, we must begin by explaining what “consumerism” is, and what the alternative is. Like other

authors (among them Sandel), I will offer an analysis that contrasts “consumerism” with “producerism.” This is an analytic contrast with a long history. The idea of consumerism emerged in early twentieth century economic theory, among American authors like Walter Weyl.<sup>10</sup> These authors already contrasted “consumerist” legal orders with “producerist” legal orders. Political figures as important as Franklin Roosevelt also spoke of the beauties of American “consumerism”: America was already the home of an avowed consumerism by the 1920s and 1930s.<sup>11</sup> During the same era, advocacy of a “producerist” legal order was widespread in Europe, especially among Fascist and Nazi theorists.<sup>12</sup> I believe this early twentieth-century opposition between consumerism and producerism remains the most useful analytic starting point for comparative law even today.

Indeed, although the conflict between producerism and consumerism grew up in the early twentieth century, it is still alive in the early twenty-first, I will argue. There are still broadly producerist legal orders in many parts of the world, including northern continental Europe. These orders are strongly associated with certain distinctive types of law—peculiar forms of competition law, retail law, protectionist legislation and more. Producerist law is also closely associated with particular values and institutions—notably craft values of production, structures of internal guild governance, and concepts of the dignity of labor. Not least, producerist law is associated with a style of politics framed in the language of class conflict: In particular, producerist cultures tend to conceive of rights as rights based on economic class, and especially as workers’ rights. One result is

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<sup>10</sup> Walter Weyl, *The New Democracy : An Essay on Certain Political and Economic Tendencies in the United States* (repr. New Brunswick, 2005) (orig. 1912).

<sup>11</sup> See below, Section II.

<sup>12</sup> Discussion and references in James Q. Whitman, *Of Corporatism, Fascism and the First New Deal*, 39 *Am. J. Comparative Law* 747, 754-763 (1991); and the discussion below, Section II.

that countries like France and Italy can be crippled by strikes and demonstrations on behalf of workers more frequently than the U.S. All these aspects of producerist legal ordering are still to be found in continental Europe, all of them seem threatened by American-style consumerist law. All of them deserve a prominent place in thoughtful teaching and scholarship about the modern world.

As I trace the contrasts between contemporary American and continental European law, I will pay particular attention to the question of why consumer law seems so menacing to so many observers. “Consumerist” law seems menacing, I will observe, to the extent it gives priority to one kind of consumer interest: the *economic* interest of consumers, defined primarily as an interest in low prices for goods. The alternative to such consumerist law is not the national tradition of this or that country, as Rawls (it seems) would have it. The alternative, as early twentieth-century commentators rightly asserted, is a legal order that gives priority in some way to the interests of producers, generally at the cost of raising the prices for goods and services.

In analyzing the conflict between consumerism and producerism, I will insist on one cardinal point: We must not imagine that the conflict is one between two classes of persons, consumers and producers. Commentators sometimes speak as though “consumers” and “producers” were two different classes of real existing persons, with two different, conflicting, sets of interests.<sup>13</sup> Yet of course that is nonsense. *All* productive members of society in a modern economy have *both* of these identities: They are all both “consumers” and “producers.” When a worker works, he is a producer; when he shops, he is a consumer. The choice between consumerist law and producerist law is

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<sup>13</sup> For an example from the Ralph Nader stable, see Consumer Power: North American Style, in *New Internationalist* 147 (May, 1985), 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.”

thus *not* a choice between favoring “the” class of consumers and favoring “the” class of producers. It is a choice about which of these two identities we will regard as requiring protection by law. It is a value choice about whether we will treat the citizen’s interests in his guise as “consumer” as more deserving of legal protection than his interests in his guise as “producer,” or vice versa. The consumerism/producerism conflict is thus not just a conflict about economic organization. It is also, strange though it may sound, a conflict about identity politics. In its own way, the conflict over consumerism resembles conflicts over sexual identity, religious identity and so on: It is a conflict over what forms of individual life should be given privileged status by the law.

In discussing this conflict, I will focus, like Rawls and the Figaro, on the contrast between contemporary America and continental Europe—especially France and Germany. In particular, I will make regular reference to 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. I will not argue that American is unambiguously and uniformly consumerist, or that continental Europe is unambiguously and uniformly producerist. The tension is a tension between two Weberian ideal types, and ideal types are never perfectly instantiated anywhere. The right way to describe the contrast is to say that the law of the contemporary United States more closely approximates the ideal type of a consumerist legal order, while law in western continental Europe more closely approximates the producerist model. To state the point differently, comparative law is always about relative differences, not absolute ones. The differences, though, are there.

Finally, in the Conclusion, I will turn to the question of whether American “consumerism” is inevitably spreading through the globe, and to western Europe in



particular. On that score, I will express some doubt. Societies are not transformed easily, and I think there are good reasons to believe that continental European law will remain different from American law for the foreseeable future—as Wal-Mart’s failure to penetrate Germany starkly suggests. In part this has to do with entrenched European cultural patterns: Producerist attitudes are deeply rooted in Europe. In part it has to do with an ambiguity in the concept of “consumer” law: As we shall see, while European systems are indeed becoming more “consumerist” in a sense, they are mostly doing so through consumer *safety* legislation, rather than through law favoring the consumer economic interest. Europeans are embracing a style of consumer safety regulation that leaves far more room for producer protections than does American law. Moreover, future European-style “consumerism” is likely to involve a much heavier measure of top-down bureaucratic protectionist intervention in the market than we will ever see in America. For these reasons, Europe is unlikely to witness a wholly Americanized future.

Not least, I will argue, Europe is unlikely to succumb completely to Americanization for reasons having to do with basic micro-economics, and in particular with the economics of comparative advantage. 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 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>14</sup> The growth of global trade thus does not by any means imply that all countries should develop uniform economies. On the contrary, the theory of comparative

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<sup>14</sup> David Ricardo, *The Principles of Political Economy and Taxation* (London/Toronto; Dent, 1923), 81-87.

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 sustainable, and indeed inescapable, even in a world of intense global economic competition. In particular, Europe arguably enjoys a continuing comparative advantage in producerist forms of socio-economic organization. Western Europe has craft traditions of long standing and deep social legitimacy. These traditions are a kind of natural resource, upon which European economies can draw. Because of its comparative strength in craft traditions, Europe can be expected to specialize, in particular, in the production of high-end, artisanal goods. 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-quality luxury goods, much as parts of Europe have become specialized in high-end tourism. (This is a development we can already see in the highly successful economies of Germany and France, respectively the number one and number four export nations of the world.) This may not seem a wholly desirable future to European policy-makers. But that is not a concern for comparative law. What matters is that it is a future in which the legal structures of the European economy are likely to remain distinctive.

## I

“Consumerism” is hardly a standard topic for comparative lawyers. Their interests lie elsewhere. Thus we possess plenty of books and articles comparing the

doctrinal approaches of different legal traditions to such problems as the rules of the formation of contract; and plenty on the various permutations of adversarial and inquisitorial procedural approaches. We have innumerable publications on the venerable distinction between common law and civil law. One aspect of “consumer” law gets plenty of attention: consumer protection legislation. Every month new articles appear summarizing the paragraphs of the latest consumer protection legislation in this or that country. These articles, it must however be said, are not, by and large, an analytically scintillating body of literature. There is some writing on economic issues by comparatists like Ugo Mattei, who has published a book called “Comparative Law and Economics.”<sup>15</sup> There are some fine economically informed studies by Katarina Pistor and her co-authors.<sup>16</sup> There is lots to read, in short. But none of it seems to tell us much about how to address global consumerism in a thoughtful way.

This is a real failure, and (as I want to begin this essay by observing) it is the consequence of a deeper failure in comparative law. Modern comparative law, despite the best efforts of a few scholars, has failed to become a policy science. Comparatists rarely worry about the kinds of policy problems that are the concern of the core policy sciences—economics, political science and sociology. They simply do not think of themselves as contributing to the social scientific project of explaining how different socio-economic orders function. Yet their contribution is badly needed: If we wish to understand how different socio-economic 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 “neo-

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<sup>15</sup> Mattei, *Comparative Law and Economics* (U. Mich. Press, 1997).

<sup>16</sup> E.g. Katarina Pistor, Dan Berkowitz and Jean-François Richard, *The Transplant Effect*, 51 *Am. J. Comp.Law* 163 (2003).

corporatist' economy. What shape does the law take in such an economy?<sup>17</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>18</sup> And so on. One would expect to find answers to these kinds of questions in any thoughtful basic textbook on comparative law. One would expect a good comparative law textbook to look something like a good basic textbook on micro-economics or sociology, featuring chapters with nuts-and-bolts accounts of the place of law in comparative politics, the place of law in comparative economics, and the place of law in comparative sociology.

The disappointing truth, though, is that comparative law leaves us almost entirely in the lurch. There are certainly some exceptions. I would not want to miss the opportunity to praise Robert Kagan's Adversarial Legalism, for example,<sup>19</sup> or Mary Ann Glendon's work on comparative family law and abortion.<sup>20</sup> Scholars like Mattei and Pistor too address themselves to large policy issues,<sup>21</sup> and so do some American law and economics scholars, among whom Mark Roe stands out.<sup>22</sup> But the overwhelming mass of work in the field is not written with comparative policy problems in mind.

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<sup>17</sup> The importance of this question is highlighted by political scientist John W. Cioffi, in A Review Essay on Comparative Corporate Governance: The State of the Art and Emerging Research, 48 Am. J. Comp. L. 501, 506 (2000).

<sup>18</sup> This is a theme of Robert Kagan's Adversarial Legalism: The American Way of Law (Harvard U. Press, 2001).

<sup>19</sup> *Id.*

<sup>20</sup> Esp. Mary Ann Glendon, The Transformation of Family Law: State, Law and Family in the United States and Western Europe (U. Chicago Press, 1989).

<sup>21</sup> Pistor et al., Transplant Effect, above note. For a recent example from Mattei's large output, see A Theory of Imperial Law. A Study on U.S. Hegemony and the Latin Resistance, 10 Indiana J. Global Legal Studies 383 (2002); and for his useful effort to arrive at a system of classification independent of traditional categories, Three Patterns of Law. Taxonomy and Change in The World's Legal Systems, 43 Am.J. Comp. Law 5 (1997). The latter article is unpersuasive to me, since it understates the difference in degree of professionalization between European and American traditions.

<sup>22</sup> See e.g. Roe, Some Differences in Germany, Japan and the United States, 102 Yale L. J. 1927 (1993); Mark Roe, Modern Politics and Ownership Separation, in Gordon and Roe, eds., Convergence and Persistence in Corporate Governance (Cambridge U. Press, 2004).

Comparative law remains rooted in traditions that speak primarily to the interests and views of practicing lawyers.

In particular, almost all of our specialist literature focuses on one of two problems of interest to legal professionals: problems of the sources of law, and problems of procedure. Questions of the sources of law predominate: Most comparatists assume that legal systems should be classified into “families” according to their principal juristic sources. Thus they classify legal systems according to whether they are 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 Quran.)<sup>23</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 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 policy analysts. Source-based classification offers little help in explaining how law works in corporatist versus non-corporatist orders, or in a parliamentary versus a non-parliamentary system.

The same is true of classification based on differences in procedure. The work of specialists on procedure is often profound indeed: There is no finer comparatist than

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<sup>23</sup> To be sure, the leading treatments bring great sophistication to their discussion of these familiar categories. Both René David, *Les Grands Systèmes de Droit Contemporains*, 8<sup>th</sup> ed. (1982), and Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, 3d ed. (1996), for example, are full of valuable insights. 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 critique, see Mattei, *Three Patterns of Law*, above note; 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).

Mirjan Damaska, for example.<sup>24</sup> Yet this work too is of limited value in addressing the basic problems of classification raised by social science. Proceduralists and source-oriented comparatists alike simply don't try to answer the kinds of questions that strike non-lawyers as most important. This situation has some authentically bizarre consequences: For example, when the sages of the Harvard Economics Department decided that they need to learn something about comparative law (I have in mind the much-cited 1998 article "Law and Finance," by La Porta, Schleifer, Vishny and Lopez-Silanes) they ended up seizing upon the wholly irrelevant civil law/common law distinction.<sup>25</sup> That distinction sheds no light on the problems that interested them, as their critics have argued.<sup>26</sup> Yet Schleifer and his co-authors cannot really be blamed for seizing on it: When they walked the hundred yards to Harvard Law School, they found a comparative law literature that insisted that the common law/civil law divide was what mattered.

These problems are exacerbated by another failing of comparative law: Specialists in the field focus overwhelmingly on the classic private law subjects found in the texts of the ancient Roman jurists or the basic first-year courses in an American law

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<sup>24</sup> Esp. Damaska, *Faces of the Justice and State Authority* (Yale U. Press, 1986); Damaska, *Evidence Law Adrift* (Yale U. Press, 1997).

<sup>25</sup> Rafael Laporta, Florencio Lopez-Silanes, Robert Vishny and Andrei Schleifer, *Law and Finance*, 106 *J. Polit. Econ.* 1113 (1998). For other work along these lines, see Edward Glaeser and Andrei Schleifer, *Legal Origins*, 2002 *Q. J. Econ.* 1193; Paul Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 *J. Legal Stud.* 503 (2001).

<sup>26</sup> See Pistor et al., *Transplant Effect*, above note at 167 and often ("the way a country received its formal law is a much more important determinant of the current effectiveness of its legal institutions than the particular family it adopted.") In general, where the literature cited in the previous note makes important observations, those observations involve some factor other than the particular legal family in question. Thus 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, above note, at 504-505. This is a claim well worth discussing, but it is a claim about political economy whose force 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 may arguably have had some real importance for commercial development, notably the common law's suspiciousness toward just price regulation. That is a topic for a different paper, though.

school. Contracts, in particular, commands a bizarrely disproportionate share of our attention.<sup>27</sup> Meanwhile the post-private-law topics that are critically important in modern economies are neglected.

Such is the core failure of comparative law: We have never developed a modern social science perspective, focusing on the policy problems of modern economies. (Or rather, to state the point more precisely, we have lost the social science perspective that was dominant in the work of Montesquieu, and that remained dominant in the field until the mid-nineteenth century.<sup>28</sup>) It is this failure that stands in the way of our making useful contributions to the “consumerism” debate. Doing so would require us to answer unfamiliar sorts of socio-economic questions—questions about how a legal system might be oriented toward consumers, and what the alternatives to such a legal system might be. Those questions are, I think, not all that difficult to answer. But the answers have nothing to do with the civil law/common law divide, and nothing to do with questions of procedure. They have nothing to do with the practicing lawyer’s view of how a legal system works, and little to do with classic private law. Instead, they are answers that grow out of some basic social scientific thinking about the relations between law, on the one hand, and modern economic and social institutions on the other.

Addressing the consumerism debate is thus more than an attempt to intervene in an important public policy debate. It is an effort to prod comparative lawyers to think more about public policy problems, and to think more like social scientists.

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<sup>27</sup> Notably these days in the work of the so-called Lando Commission. See [http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/](http://frontpage.cbs.dk/law/commission_on_european_contract_law/).

<sup>28</sup> For a taste of the liveliness of early nineteenth-century comparative law, it is worth browsing in the work of a once-famous, now-forgotten scholar, Charles Comte. As its title suggests, his multi-volume *Traité de législation, ou Exposition des lois générales suivant lesquelles les peuples prospèrent, dépérissent, ou restent stationnaires* (Paris: Chamerot, 1835), was concerned with the sorts of problems of comparative social organization that more recent comparative law has generally forgotten. Like his predecessors Montesquieu or John Millar, Comte had real learning and deep analytic insight.

## II

So let us begin by stating carefully the social scientific questions posed to comparative law by the anti-consumerist polemics of figures like Sandel, Rawls and Chavez. Is it true that there is such a thing as a “consumerist” legal order? Is it true that “consumerist” legal orders are spreading throughout the world? Is it true that as they spread, they have a corrosive effect on meaningful human life?

We are badly in need of a comparative law analysis that can address such questions. In the effort to build such an analysis, I want to begin, in this Section, by turning back the clock to the early twentieth century. As authors like Sandel and Cohen have recognized, the fundamental conflict over consumerism had already begun to take shape before the 1940s, and by starting in the early decades of the twentieth century we can gain indispensable perspective on the problems of our own contemporary law.

When “consumerism” began to emerge in the early twentieth century, it faced a great ideological competitor in “producerism.” Producerist ideas began appearing in the nineteenth century, particular among Catholic social thinkers.<sup>29</sup> During the first decades of the twentieth century, producerist ideas were common indeed—particularly in interwar Europe, whose political and intellectual life was marked by many efforts to organize society into producer groups, which were to constitute the basic organizing units of a new corporatist order.<sup>30</sup> At the core of this corporatist producerism lay the idealization of

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<sup>29</sup> See James Whitman, *Early German Corporatism in America*, in *Continental Ideas in Anglo-American Law*, ca. 1800-1920 (M. Reimann, ed., 1993), 229-252.

<sup>30</sup> For a rapid survey, see Carl Landauer, *Corporate State Ideologies: Historical Roots and Philosophical Origins* (Berkeley: Institute of International Studies, 1983), 59-92. For more in-depth treatments, see H. Heffter, *Die deutsche Selbstverwaltung im 19. Jahrhundert. Geschichte der Ideen und Institutionen* (1950); M. Elbow, *French Corporatist Theory, 1789-1948: A Chapter in the History of Ideas* (1953); R. Bowen, *German Theories of the Corporative State, with Special Reference to the Period 1870-1919* (1947).



guild organization as the best form for structuring a healthy society: The ideal type of economic identity, producerists believed, was that of the artisan craftsman, integrated into a guild structure that guaranteed him a life of dignity and satisfying productivity. Early twentieth-century theorists recognized that the old guild order was gone. Nevertheless they believed that the virtues of the guild order could be revived even in a world of vast industrial enterprises. The most famous of European producerist 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>31</sup> But fascists were not alone in advocating producerist policies.

These interwar European producerist movements were too complex to be described in detail here, but it is important to mention some of their key beliefs. First, these movements defined the category of “producers” very broadly. Here producerists were eager to put distance between themselves and Marxists: Where Marxists thought of workers as the class whose interests mattered, producerists insisted that the workers were only a sub-class 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 shopowners alike counted. One leading aim of producerist movements, especially on the political right, was to minimize conflict between these various classes of producers.<sup>32</sup> To this end, producerists promoted various legal measures. They tried to eliminate labor strife. (This was of course particularly true of the fascist regimes, which

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<sup>31</sup> See the discussion in Whitman, *Of Corporatism, Fascism and the First New Deal*, 754-755, with citations to further literature.

<sup>32</sup> *Id.*, 756-761.

used repressive means to the end.)<sup>33</sup> They also tried to tame competition between industrial competitors. Thus they generally regarded cartels as beneficial phenomena: Cartels, it was argued, could limit “destructive” competition within industries.<sup>34</sup> (This too was a characteristic of fascist economics.)<sup>35</sup> The introduction of a modern producerist 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 producerist movements reflected their idealization of craft production. In particular, they often proclaimed a hostility to large chain stores and discount prices: Large-scale retailers, producerists held, threatened to drive traditional craft production out of business. We can the flavor of this aspect of the producerist 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. Feuchtwanger’s fictitious Oppermann family owned a 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 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

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<sup>33</sup> E.g. Tim Mason, *Social policy in the Third Reich: The Working Class and the National Community*, trans. Jim Broadwin (Oxford, 1993).

<sup>34</sup> The European treatment of cartels has a complex intellectual history that I leave to the side here. See David Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford, 1998), at e.g. 51-62, 132-148 and often.

<sup>35</sup> E.g. Avraham Barkai, *Nazi Economics: Ideology, Theory and Policy* (trans. Ruth Hadass-Vashitz, 1990), 188-189.

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>36</sup>

Indeed, the Nazis agitated violently against large department stores, proposing to seize them all and turn them over to small craft organizations.<sup>37</sup> Nazis were not the only ones to talk in such terms. Anti-chain store agitation, often with a dollop of anti-Semitism, was widespread in Europe.<sup>38</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>39</sup> Europeans on both the right and the left in the 1930s were thus already making the claim that we still hear from Rawls (though of course Rawls shared none of the anti-Semitism of the Nazis): the claim that “cut-price methods” pose some kind of a danger to national well-being.

The United States too had producerist movements during the same period. In particular it had the National Recovery Administration, the corporatist New Deal scheme

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<sup>36</sup>Lion Feuchtwanger, *The Oppermanns*, trans. anon (New York, 1934), 18.

<sup>37</sup> This was Point 16 of the Nazi Party Program. See the fuller discussion of Heinrich Uhlig, *Die Warenhäuser im Dritten Reich* (Cologne and Opladen; Westdeutscher Verlag, 1956), 88 and passim.

<sup>38</sup> See de Grazia, *Irresistible Empire*, above note, 130-183, and 144 for anti-Semitism.

<sup>39</sup> Pierre Arlet, *La Consommation* (Sarlat, 1939), 149, quoted, translated and discussed in Victoria de Grazia, *Changing Consumption Regimes in Europe*, in S. Strasser, C. McGovern and M. Judt, eds., *Getting and Spending: European and American Consumer Societies in the Twentieth Century* (Cambridge U. Pre, 1998), 78.

that was struck down in *Schechter Poultry*.<sup>40</sup> During the same period, the United States saw the anti-chain-store agitation that led to the Robinson-Patman Act of 1936.<sup>41</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, his history of American shoemakers, Commons traced the transition from an older form of guild-like producer organization to modern forms of production. In the older, producerist world, as it existed from the seventeenth through the early nineteenth centuries, 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>42</sup>

Nevertheless, despite the Robinson-Patman Act, and despite the views of people like Commons, American producerism was never as strident or political dominant as European.<sup>43</sup> Quite the contrary: As American historians have argued, American political

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<sup>40</sup> *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, *Of Corporatism, Fascism and the First New Deal*.

<sup>41</sup> See now Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 *Iowa L. Rev.* 1011 (2005).

<sup>42</sup> John R. Commons, *American Showmakers, 1648-1895: A Sketch of Industrial Evolution*, 24 *Q. J. Econ.* 39 (1909).

<sup>43</sup> Even the Robinson-Patman Act itself focused, in a characteristically American way, on price *discrimination*. See 15 U.S.C. 13-13b, 21a (2000). There is nothing comparable in European law.

life had already begun to take a “consumerist turn” by the late nineteenth century.<sup>44</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>45</sup> By 1929 it seemed obvious to Time Magazine that American had found the solution to the “capital-labor war”: It had created a society in which workers had an “equal opportunity to consume.”<sup>46</sup> In 1932 no less a personage than Franklin Delano Roosevelt could declare, “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.”<sup>47</sup> Early twentieth century America was the home of an increasingly self-conscious consumerism. It was already the America that Hugo Chavez and John Rawls can be heard deploring three generations later.

The history of these early American consumerist efforts has been the subject of studies by both Sandel and Cohen, both of them seeking the roots of modern American political life. Thus Sandel, in his investigation of American political values, turns back to progressive-era institutional economists like Walter Weyl. Like their European contemporaries, these economists believed the economy was marked by fundamental conflict between producers and consumers. Again like their European contemporaries,

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Moreover, even the most aggressively corporatist of American public figures still spoke in consumerist terms. See the discussion of Donald Richberg in Whitman, *Of Corporatism, Fascism and the First New Deal*, above note, 768. For the early rise of a culture of consumer sovereignty in the United States, see also de Grazia, *Irresistible Empire*, above note, at 103.

<sup>44</sup> Lawrence Glickman, *A Living Wage: American Workers and the Making of Consumer Society* (Cornell Press, 1997), xiii.

<sup>45</sup> Lippman, *Drift and Mastery* (New York: Mitchell Kennerley, 1914), 54-55. Quoted and discussed in Sandel, *Democracy's Discontent*, 222.

<sup>46</sup> Quoted and discussed in Lizabeth Cohen, *Making a New Deal: Industrial Workers in Chicago, 1919-1939* (Cambridge Press, 1990), 101.

<sup>47</sup> Quoted and discussed in Glickman, *Living Wage*, 156.

they defined the category of “producers” very broadly, to include workers, capitalists, and retailers. These progressive era economists also recognized, like their European contemporaries, that these various producer groups had conflicting interests. Nevertheless, they thought that all producers shared one sinister tendency: the tendency to exploit consumers by selling shoddy goods at inflated prices. The aim of a “consumerist” law, as advocated by Weyl and others, was to protect consumers against this sort of producer exploitation, by guaranteeing quality goods at low prices.

Beginning in the early twentieth century, figures like Weyl embarked on a great “consumerist” campaign, whose history is, in Sandel’s view, of fundamental importance in the making of America’s distinctive legal and political culture.<sup>48</sup> It was a campaign that had a powerful impact on certain areas of law. Antitrust is Sandel’s first example of that impact: 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. 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 went so far as expressly

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<sup>48</sup> See the discussion of Sandel, *Democracy’s Discontent*, 223-227.

to bless cartels—something they rarely did.<sup>49</sup> It does mean, though, that they had their eye largely on the interest of competitors.<sup>50</sup> 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 low 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>51</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>52</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 Americans. But to Sandel the shift toward consumerism is really the tale of a kind of political tragedy: 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

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<sup>49</sup> The great exception is the National Recovery Administration, discussed above text at note. For the basic outlines, see Sullivan & Grimes, *Law of Antitrust*, above note, at 7.

<sup>50</sup> I will not enter into the debate over Robert Bork's claims, now generally rejected, that early American antitrust already took consumer welfare as the primary goal. See *id.*, at 6.

<sup>51</sup> Sandel, *Democracy's Discontent*, 231-249, summarizing familiar history of antitrust.

<sup>52</sup> *Id.*, 227-231, and now Schragger, *Anti-Chain Store Movement*, above note.

producers are. In the producerist era, as he sees it, individuals belonged to self-governing producer associations, like mom-and-pop stores and unions. In the consumerist era that went by the boards.<sup>53</sup>

Cohen tells a similar story, a story that pits consumers against producers. But she draws quite a different moral from it.<sup>54</sup> Cohen is one of a number of historians who argue that “consumer” identity displaced “producer” identity in America, especially during the 1930s and 1940s. Most notably, these historians have claimed, the American labor movement was deeply transformed as “workers” came to think of themselves as “consumers.”<sup>55</sup> 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’s else’s. The decline of citizen producer identity thus opened the way for a new kind of fruitful rights politics.<sup>56</sup> The rise of consumerism was in that sense fundamental to the making of modern America.

### III

These debates over producerism may seem to belong to a long-ago past. Fascist economics is long since dead. One might suppose that the pressures of globalization have brought full-blast consumerism to contemporary continental Europe. Indeed, de

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<sup>53</sup> Sandel, *Democracy’s Discontent*, 201-203 and often.

<sup>54</sup> For her rejection of Sandel, see Cohen, *Consumer’s Republic*, 409.

<sup>55</sup> See the literature discussed in Glickman, *Living Wage*, 155-156. Glickman himself pushes the transformation back to the later nineteenth century. *Id.*, 156.

<sup>56</sup> Cohen, *Consumer’s Republic*, 22, 31-53.



Grazia's 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 model.<sup>57</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>58</sup> For their part, European lawyers declare that the old aggressive producerism of the 1930s is dead. European law simply no longer endorses the old attitudes. Americans moved forcefully after World War II to replace the old German competition law with new law based on American antitrust<sup>59</sup>; and today, after decades of lethargy, Europeans are making energetic attacks on cartels.<sup>60</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. So hasn't consumerism won in Europe since 1945?

The answer is no, or at least a qualified no. This is something that is well understood by political scientists. They have long argued that countries like Germany and France are still “neo-corporatist” polities, in which industry and labor groups make basic policy in alliance with the state.<sup>61</sup> Maybe consumerism has rendered “the interest

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<sup>57</sup> As one of her Chapter titles runs, her book is the history of the “The Consumer-Citizen: How Europeans Traded Rights for Goods.” De Grazia, *Irresistible Empire*, 336-375.

<sup>58</sup> *Id.*, 376-415.

<sup>59</sup> See Lisa Murdach-Brand, *Antitrust auf Deutsch. Der Einfluß der amerikanischen Aliierten auf das Gesetz gegen Wettbewerbsbeschränkungen (GWB) nach 1945* (Tübingen: Mohr, 2004).

<sup>60</sup> Christopher Harding and Julian Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (Oxford, 2003), 117-142.

<sup>61</sup> The seminal article is Philippe Schmitter, *Still the Century of Corporatism?* In *The new Corporatism: Social-Political Structures in the Iberian World* 85 (F. Pike & T. Stritch, eds., 1974). For recent literature on this theme, see Sven Jochen and Nico A. Siegel, eds., *Konzertierung, Verhandlungsdemokratie und Reformpolitik im Wohlfahrtsstaat. Das Modell Deutschland im Vergleich* (Opladen: Leske + Budrich, 2003); Howard Wiarda, *Corporatism and Comparative Politics: The Other Great “Ism,”* (Armonk: Sharpe, 1997), 74-75. For France, see *id.*, 75-76, and Steven L. Kaplan & Philippe Menard, eds., *La France, Malade du Corporatisme?* (Paris: Belin, 2004), and on the European level Hugh Compton and Justin Greenwood, *Social Partnership in the European Union*, in Hugh Compton and Justin Greenwood, eds., *Social Partnership in the European Union* (Palgrave, 2001), 154-169. Also more generally on Europe: Andrew Cox and Noel O'Sullivan, eds., *the Corporate State: Corporatism and the State Tradition in Western Europe* (Aldershot: Elgar, 1988).

. of labor [and] capital”<sup>62</sup> irrelevant in the United States, but the same thing has not yet happened in Europe. Nobody thinks that European countries are still fascist, but thoughtful observers continue to see lines of filiation between the economics of the ‘30s and the economics of today. Nor are political scientists the only ones who observe that Europe remains distinctive. Specialists in competition law recognize that Europeans, and especially Germans, moved to reassert their own traditions after the American occupation ended,<sup>63</sup> and as we shall see, German competition remains quite different from ours. Even de Grazia acknowledges that American values have not triumphed yet: She recognizes that Europeans do not yet think of themselves “first and foremost” as consumers.<sup>64</sup> The failure of Wal-Mart in Germany is only the most recent sign of a critical truth: Europe has not become America. On the contrary, as I will argue in the balance of this Essay, the old producerism is still very much alive in French and German law, even in the face of many dramatic changes, and despite the insistence of European lawyers that their law has learned to favor consumers. Indeed, the clash between American consumerism and European producerism lies at the root of major transatlantic business and legal conflicts today.

Here we must begin with some preliminary work of definition and analysis, before we can understand how the old conflicts are still playing themselves out in legal collisions between America and western continental Europe. 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,”

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<sup>62</sup> Lippman, above, text at note.

<sup>63</sup> See esp. on Germany Gerber, *Law and Competition in Twentieth Century Europe*, 232-265 (rise of German ordoliberalism); 266-333 (development of post-war German competition law).

<sup>64</sup> De Grazia, *Irresistible Empire*, 375.

by contrast, is a more complex category, as Sandel, and the older institutional economists, argue. A “producer” is any actor who provides some factor in the production and distribution of goods and services. This means that it is a very broad term indeed: “Producer” includes both workers and capitalists, both management and labor, both industry and retail. It includes everyone who lends any kind of hand in the production and distribution process.

So what is the contrast between consumerist and producerist law? It will not do simply to call it a contrast between, on the one hand, law that dedicated primarily to protecting consumer interests, and, on the other, law dedicated primarily to protecting producer interests. First of all, 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 “protecting the interest of consumers,” we may be speaking of consumer *safety* legislation: of legislation on such matters as products liability, the purity of food and drugs, non-deceptive advertising and the like. On the other hand, when we speak of “protecting the interest of consumers,” we may be speaking of consumer *economic* interests: 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.

Walter Weyl, and after him Ralph Nader and many other consumer advocates, have treated these two interests as identical: They have argued that consumer safety and

low prices can go hand in hand. But this is manifestly false, and false in ways that matter for comparative law. The consumer economic interest and the consumer safety interest are quite different, and in many ways directly at odds. The spirit of consumer safety legislation is obviously paternalistic: Consumer safety 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 safety 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 safety legislation operates against consumer interests. After all, consumer safety legislation eliminates one class of goods—goods that are relatively unsafe, but also relatively cheap—that would otherwise have been available for consumers to choose.

These two forms of consumer protection are also most naturally at home in different institutional settings. Consumer safety 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.

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: We could imagine, as it were, the Weberian ideal type of a polity that favored the consumer economic interest,

and opposed to it the ideal type of a polity that favored the consumer safety interest. (As I will suggest, such is 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.” The phrase “producer interests” too is significantly ambiguous. “Producer” is a term that refers to every actor providing some factor in the production and delivery of goods and services—both workers and capitalists, both management and labor, and retailers as well: everyone who is involved in the production and distribution process. Correspondingly, it is almost never possible to speak of any single, monolithic, “producer” interest. “Producer” is a broad, diffuse and conflict-ridden category, and any given piece of legislation may favor one group over “producers” over another. For example, sometimes legislation favoring “producer” interests may favor the interests of organized labor over the interests of investors, or of non-organized 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).

Despite the fact that producer interests are so varied and conflict-ridden, producer-oriented law is quite different from consumer-oriented law. *Any* law favoring *any* producer interest can be thought of as law disfavoring the economic interest of consumers. In particular, law favoring producer interests, whatever those interests may be, tends to raise prices. Thus legislation limiting layoffs creates market rigidities that inevitably raise prices. It can accordingly be thought of as legislation that works against consumer economic interests—though it is an open question whether it works against the consumer safety interest. The same is true of both legislation favoring small shopkeepers over large retail stores, and of law favorable to the formation of cartels. These are all forms of law that 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 not favoring consumer economic interests.

The dichotomy between consumerist and producerist legal systems is thus not the dichotomy between two fixed sets of policies. There is no such thing as “the” menu of legislative enactments that favor consumers. Nor is there any such thing as “the” menu of legislative enactments that favor producers. The dichotomy lies elsewhere: It is the dichotomy between two different choices about what should count as the basic legally protected identity of citizens in a modern economic order.

For indeed, “consumer” and “producer” are *identities*. They are two kinds of constructed legal-economic identities, neither of which corresponds to any class of real existing persons: Everyone has both identities. The choice between consumerism and producerism is 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. Democratic politicians charge that Wal-Mart exploits its workers. Wal-Mart counters that it saves consumers “billions of dollars by squeezing costs.”<sup>65</sup> The conflict here is not between the interests of two clearly defined classes of persons. It is the conflict between two incommensurable visions of what counts as justice in a modern economy. It is conflict in the imagination: It asks whether, when we imagine the modern economy in the abstract, we feel instinctively that it “the worker” who matters most, or “the consumer.”<sup>66</sup> It is a conflict over, in Roosevelt’s words, “popular economic *thought*.”<sup>67</sup>

#### IV

And, as comparative lawyers ought to recognize, that conflict in the imagination can have far-reaching consequences for the day-to-day functioning of different legal systems. Indeed, as we try to understand the comparative law of modern western economies, the producer/consumer distinction should be one of our primary points of

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<sup>65</sup> New York Times, Eye on Elections, Democrats Run Against Wal-Mart, August 17, 2006, above note, p. A23.

<sup>66</sup> 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, *Irresistible Empire*, 342.

<sup>67</sup> Quoted and discussed in Glickman, *Living Wage*, 156.

reference: Legal systems can differ dramatically, depending on whether they take “consumer” or “producer” as the most highly valued identity in a modern economy. This is not only a matter of workers’ rights. It is much more broadly a matter of producer protections, touching on every aspect of economic legislation. Moreover, it affects not only economics, but also the broader culture of rights.

To illustrate the lasting strength of European producerism, I begin by taking the examples used by Sandel and Cohen. First, like Sandel, I look at competition law, and especially at one corner of competition of law: the law of retail. Second, like Cohen, I turn to the contrast between rights politics in an ideal consumerist order and rights politics in an ideal producerist order.

Let us start with what Americans call “antitrust” and Europeans call “competition law.” As Sandel says, 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. 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 pricing. Exactly how this end is to be achieved is of course a matter of great contentiousness. But the basic commitment to protecting consumer economic interest is now almost universally shared in the United States, both in government and among scholars. Indeed, for most American observers, the primacy of the consumer interest has come to seem so self-evident that it hardly requires any effort at justification.

Other industrialized countries, by contrast, remain much more fixed in the producerist approach that American law has abandoned, putting a heavier focus on the



interests of the competitors in a given industry. This results in important clashes in international business. Indeed, it has resulted in some titanic business conflicts, especially where the law of the United States and the European Union are both applicable. Aditi Bagchi summarizes the clash as current American commentators see it. From the American point of view, it seems as though European care about competitors, not consumers:

While US regulators are interested in the expected effect of a merger on prices, “the European Commission [has] normally disapproved a merger or imposed regulatory conditions if the merger significantly enhanced the market share of a dominant firm, created joint dominance, or seriously distorted 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>68</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 advantageous prices. Not so in Europe. Bigness is a danger, in European eyes, even if it benefits consumers: Permitting big competitors to prosper may harm smaller ones. The difference is one with real impact on the operations of big multinational firms like Microsoft. Microsoft can mount arguments based on consumer economic welfare in the United States. Those arguments simply will not wash in Europe.

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<sup>68</sup> Bagchi, *The Political Economy of Merger Regulation*, 53 *Am.J.Comp.L.* 1, 4-5 (2005) (citations omitted).

In Europe, Microsoft “faces a tribunal largely unsympathetic to the principal American antitrust objective, which is strictly consumer welfare-centered and pro-competition, rather than pro-competitor.”<sup>69</sup>

To be sure, the issue is not entirely simple: The old producerist approach toward competition law no longer dominates exclusively in European statutes. European Union law does take consumer interests into account.<sup>70</sup> The same is true of the domestic German and French systems that are my focus in this essay: These systems, which once avowedly protected only competitors, now purport to protect both competitors *and* consumers.<sup>71</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. But it is critically important that when the law of these countries speaks of the interest of “consumers,” it typically conceives of that interest differently from the way American law does. American law aims primarily to guarantee that consumers will benefit from competitive prices. European law, by contrast, frequently aims to guarantee, in a much more paternalistic way, that consumers will not be misled. By taking this approach, European law does offer a certain form of protection to consumers, but it does so in a way that leaves protections for competitors in place, and in the end leaves the producerist character of European regulation largely intact.

To understand how the European approach differs from the American, it is useful to delve more deeply into the law of price regulation. European law frowns on various

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<sup>69</sup> Amanda Cohen, *Surveying the Microsoft Antitrust Universe*, 19 *Berkeley Tech. L.J.* 333, 354 (2004).

<sup>70</sup> E.g. Ulrich Loewenheim, Karl Meesen & Alexander Risenkampff, 1 *Kartellrecht* 6 (§ 17) (2005) (consumers are beneficiaries of cartel regulation); Barry Rodger and Angus MacCulloch, *Competition Law and Policy in the EC and UK*, 3d ed. 153 (2004) (consumers must receive pass-on of benefits from restrictions on competition)

<sup>71</sup> Germany: § 1 UWG (2004): “Dieses Gesetz dient dem Schutz der Mitbewerber, der Verbraucherinnen und der Verbraucher . . .” For the previous history, see Hefermehl/Köhler/Bornkamm, *Wettbewerbsrecht*, 24. ed. (Munich:Beck, 2006), 39-40 (Einl. UWG rdn. 2.17), 545-55 (§ 5 UWG, rdn. 1.10).

forms of discounted pricing. Here I begin with the first of my examples from Wal-Mart's recent failure to penetrate the German market. As the Wall Street Journal notes, 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>72</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 US firms—depends on the use of loss leaders, 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 non-discounted goods. Some firms depend heavily on this practice. For example, large appliance retailers like Circuit City can sell appliances at or below cost, because they can make money by inducing consumers to buy warranties.<sup>73</sup>

Yet such practices are forbidden in Europe. Law forbidding loss leaders is not unknown in the US: Most American states also have laws, dating to the Depression, that prohibit below-cost sales. But in the US these laws are rarely enforced.<sup>74</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>75</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 decision of Keck—a decision that marked a kind of

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<sup>72</sup> WSJ, July 29, 2006, p. A1: With Profits Elusive, Wal-Mart to Exit Germany.

<sup>73</sup> This strategy may be collapsing in the current market. See Minding the Store: Analyzing Customers, Best Buy Decides Not All Are Welcome --- Retailer Aims to Outsmart Dogged Bargain-Hunters, And Coddle Big Spenders, Wall Street Journal, Nov. 8, 2004, p. A1.

<sup>74</sup> See Francis Dougherty, Validity, Construction and Application of State Statutory Provision Prohibiting Sales of Commodities Below Cost—Modern Cases, 41 A.L.R. 4<sup>th</sup> 612 (1985); Schragg, the Anti-Chain Store Movement, 1066-1067.

<sup>75</sup> E.g. L. Sullivan and W. Grimes, The Law of Antitrust: An Integrated Handbook, 2d ed. (West, 2006), 168-169.

European declaration of independence from American economic approaches to retail.<sup>76</sup> Law limiting below-cost pricing is an important bar to the use of American retailing practices. Wal-Mart and its business counsel should have understood this, and comparative lawyers (and their students) ought to understand it too: Europeans are much more ready than Americans to let the government monkey 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.

Nor is below-cost pricing the only such issue. Europeans, unlike Americans, engage in all sorts of direct price regulation.<sup>77</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 store-wide “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>78</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

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<sup>76</sup> C-267/91 Keck and Mithouard.

<sup>77</sup> For example, the current German pricing ordinance, which went into effect in 2004, includes a four-page appendix of mathematical formulae. PAngV, Anhang.

<sup>78</sup> 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*, 3d ed. (Paris: Litec, 2002), 254, § 458. 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 Anon., *Guide juridique et pratique du consommateur* (Héricy: Éditions du Puits Fleuri, 83-87).

sale in France, the authorities will check to make sure that you actually go out of business! Germany is no longer quite like France: As of 2004, German law no longer directly regulates sales seasons. Nevertheless, Germany continues to police other sorts of sales vigilantly.<sup>79</sup> Retail practices are relatively free in the United States. In Europe, by contrast, they are hedged in by a forest of regulations.

European policy-makers 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 only a few months ago), they do so by fiddling with the regulations, not by deregulating.<sup>80</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. Such indeed 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>81</sup> Such indeed has been the historic stated purpose of

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<sup>79</sup> Hefermehl/Köhler/Bornkamm, Wettbewerbsrecht, 743-744. § 5 UWG Rdn. 6.7-6.12.

<sup>80</sup> In August of 2005, France amended the Loi Galland of 1996, in order to lower prices so as to stimulate consumer demand. They did so, though, by forbidding distributors to pass on to 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 30% of the cost of goods was attributable to the *marge arrière*. The new law limited that to 20%. The French government did not choose to amend another law limiting large retail practices, the Loi Raffarin of 1996.

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.

<sup>81</sup> Code de Commerce Art. L. 420-5: “Sont prohibées les offres de prix ou pratiques de prix de vente aux consommateurs abusivement bas par rapport aux coûts . . . dès lors que ces offres ou pratiques ont pour objet ou peuvent avoir pour effet d’éliminer d’un marché ou d’empêcher d’accéder à un marché une entreprise ou l’un de ses produits.”

European competition law since the early twentieth century. In this sense, the legal limitations that prevented Wal-Mart from using loss leaders are no different from the legal limitations that have ham-strung Microsoft.

Nevertheless, contemporary European lawyers insist that their law no longer favors only competitors. Like American law, they insist, it protects consumers too.<sup>82</sup> So how could anyone argue that law prohibiting low 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 it. Instead, the answer is that European lawyers tend to define the consumer interest, not as an *economic* interest, but as a kind of consumer *safety* 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>83</sup>

“Lowering the price,” the same text ominously notes, “has a very strong tendency to incite the consumer.”<sup>84</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.

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<sup>82</sup> § 3 UWG.

<sup>83</sup> Ferrier, *Droit de la distribution*, above note, 248 (§ 450).

<sup>84</sup> *Id.*, 249 (§451): “La diminution du prix est un facteur très incitatif pour le consommateur.”

The new German statute offers a variant on the same argument—though in terms that may well strike American as even more bizarre: Being German, the German statute couches its argument in the grand language of the human dignity. “Unfair” competitive practices, the law explains, include:

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>85</sup>

This paragraph will 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>86</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 nothing less than a display of “contempt” for his “humanity”! Similar things are said in a related area of

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<sup>85</sup> § 4 UWG:

Unlauter im Sinne von § 3 handelt insbesondere, wer:

I. Wettbewerbshandlungen vornimmt, die geeignet sind, die Entscheidungsfreiheit der Verbraucher oder sonstiger Marktteilnehmer durch Ausübung von Druck, in menschenverachtender Weise oder durch sonstigen unangemessenen und unsachlichen Einfluss zu beeinträchtigen.

<sup>86</sup> Cf. Josef Drexler, *Die wirtschaftliche Selbstbestimmung des Verbrauchers* (Tübingen: Mohr, 1992). I discuss this concept, and the contrast with American ideas, more fully in Whitman, *The Two Western Cultures of Privacy*, 113 *Yale L. J.* 1151 (2004).

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>87</sup>

Indeed, all of this is pretty astonishing, not to say comical, from the point of view of an American. Can anyone really believe that aggressive marketing could constitute a species of inhumane and degrading treatment?<sup>88</sup> How can you not 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 foreign systems, no matter how outlandish they may seem at first blush. Approached thoughtfully, and seen in context, German and French pricing law is not entirely silly, and it deserves some thoughtful attention from comparatists. For starters, the use of loss leaders in America *is* sometimes arguably abusive, in ways that deserve to be the subject of good classroom discussion.<sup>89</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 socio-political. 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

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<sup>87</sup>Notably with regard to comparative advertising. This is a body of law that has been in considerable flux. In the past, European law generally forbade comparative advertising. This is no longer true, but the law remains quite involved. For France, see Régis Fabre, M.-P. Bonnet-Desplan, O. Ortega & N. Sermet, *Droit de al Publicité et de la Promotion des Ventes* (Paris: Dalloz, 2002), 148-151; for Germany, Hefermehl/Köhler/Bornkamm, 800-803 (§ 6 UWG rdn. 1-5);

<sup>88</sup> It is particularly astonishing to see the language of “human dignity” in this context. Germans often to 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 Whitman, *From Fascist ‘Honour’ to European ‘Dignity’* in C. Joerges and N. Ghaleigh, eds., *The Darker Legacy of European Law: Perceptions of Europe and Perspectives on a European Order in Legal Scholarship during the Era of Fascism and National Socialism* (Cambridge: Hart, 2003), 243-266.

<sup>89</sup> For example, the sale of warranties in consumer electronics retailing, described above note, arguably preys on consumer irrationality in assessing risk, as well as on the absence of a developed secondary market for warranties.



exist, and is indeed impossible under the norms of European privacy law.<sup>90</sup> Consumers use credit cards much less.<sup>91</sup> They cannot exploit home re-financing the way Americans do.<sup>92</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.

As for the socio-political 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 very little role in Europe, where people tolerate much intrusive state intervention.<sup>93</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 law 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.

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<sup>90</sup> See James Q. Whitman, *Two Western Cultures of Privacy*, 113 *Yale L.J.* 1151, 1190-1192. My argument there has been challenged by Jerry Kang, and Benedikt Buchner, *Privacy in Atlantis*, 18 *Harv. J. Law & Tec* 229, 258-259 (2004). Kang and Buchner misrepresent my claims. I certainly did not claim, as they assert, that there is no German credit reporting. Quite the contrary. I described in detail, but focused on the differences in the practices and goals of German regulation.

<sup>91</sup> E.g. Marcus Walker, *Behind Slow Growth in Europe: Citizens' Tight Grip on Wallets*, *Wall Street Journal*, December 10, 2004, p. A1 (Europeans have 0.27 credit cards per capita, while Americans have 2.23 per capita).

<sup>92</sup> Steven Pearlstein, *In Europe, One Size Fits None*, *Washington Post*, Dec. 7, 2005, p. D1 (no mortgage refinancing in Europe).

<sup>93</sup> Whitman, *The Two Western Cultures of Privacy*, above note.

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 this, is not whether the Europeans are right or wrong. What matters, for purposes of comparative law, is that they are different. Europeans perceive dangers in consumer sovereignty where Americans do not. They *are* resisting American-style consumerism. This is part of why Wal-Mart failed in Germany and it is part of what we should be teaching in comparative law class: 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 and 2006.

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 ways 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 *safety*, rather than an interest in *low prices*, European law can continue to protect a class of producers, as it has done for generations.

## V

Europeans care comparatively more about producer interests (and consumer safety), where Americans care comparatively more about consumer economic interests

(and consumer sovereignty). We discover further aspects of this contrast as we dig more deeply into the law of retail shopping.

Let us indeed look more closely at the law of shopping, that most profoundly meaningful activity in modern consumer life. 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: 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, there are virtually no limits on the hours stores may keep. The American economy has also produced the Mecca of shopping convenience, the mall.

The contrast with western continental Europe is marked, though it is certainly diminishing somewhat. Indeed, the retail law of European countries has long shown what, to American eyes, can seem a bizarre disregard for the interests of consumers. One familiar example is German store-closing laws—the laws of the *Ladenschlußgesetz*. (Comparable laws exist in France, though I will not discuss them.) The *Ladenschlußgesetz*, currently under assault but still quite alive in German law, limits the opening hours of most German retail establishments. Until fairly recently, German stores were obliged to close at 6:30 in the evening, as well as on Saturday afternoons and Sundays. (Frustrated American expats all 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 law has been loosened up somewhat: As of June, 2003, after many years of political battling, ordinary stores are permitted to remain open until 8 PM.<sup>94</sup> But American ease of shopping has by no means come to Germany.

The *Ladenschlußgesetz* 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 member would be available to shop during the workday). Nevertheless, 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 home with the children, and families need to be together in the

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<sup>94</sup> § 3 LadSchlG.

evenings and weekends.”<sup>95</sup> Allowing stores to stay open late, it has generally been argued, facilitates the efforts of employers to exploit their *workers*, and no matter how much benefit consumers might gain from a reform, the protection of the workers has been viewed as primary.

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). 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 claim that was, let us note, highly economically dubious<sup>96</sup>—has dominated German political discussion, to the near total exclusion of any discussion of consumer interest. Even as the law has slowly loosened up in Germany (as in France), the basic producerist terms of the debate have not changed<sup>97</sup>: Indeed, the current version of the German statute demonstratively includes a long section on worker protection.<sup>98</sup> As we shall see in the next Section, this is entirely typical of a continental European world that continues to lay all the political emphasis on workers’ rights.

The politics of store-hours legislation, in short, is producerist politics in Europe, in a way that would never be the case in the United States. A similar example, also drawn from the law of retail merchandising, comes from law protecting small

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<sup>95</sup> Guy Raz, Closed on Sunday? Shopkeepers rebel, *Christian Science Monitor*, August 12, 1999.

<sup>96</sup> 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 from those seeking entry-level jobs.

<sup>97</sup> It is worth noting that store-closing laws in both Germany and France have been gradually loosening up 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.

<sup>98</sup> § 17 LadSchlG.

shopkeepers. The protection of small shopkeepers against big retailers was a recurrent theme of early twentieth-century economic life. As we have seen, 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 introduced measures intended to protect their small competitors, the United States included.<sup>99</sup> Things have changed in recent decades: In all of these countries the anti-chain-store legislation has been mostly repealed or abandoned.<sup>100</sup> Indeed, this may seem an unambiguous global triumph of the contemporary American style of consumerism.

Yet if we look close, we see that the triumph is by no means total. 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>101</sup> The Times is quite right. There are certainly large discount outfits in Europe, like Aldi; and large supermarkets like Monoprix. Yet at the same time there are many small shops in Europe that seem to be surviving perfectly well, holding on their clienteles even in the face of big store competition. Take the example of France. Any visitor to a French city knows that there

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<sup>99</sup> De Grazia, *Irresistible Empire*, 130-183; and for Japan, Frank Upham, *Privatized Regulation: Japanese Regulatory Style in Comparative and International Perspective*, 20 *Fordham International Law Journal* 396 (1997).

<sup>100</sup> Though not entirely in France. See below.

<sup>101</sup> Mark Landler and Michael Barbaro, *No, not always: Wal-Mart Discovers that its Formula doesn't fit every culture*, *New York Times*, August 2, 2006, p. C4.

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 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 is not false. Cultural traditions do indeed play a major part, as I will suggest in a moment. 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 that fact that it has abandoned most (though not all!<sup>102</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 from large-square-footage stores.<sup>103</sup> To be sure, as with the law of competition, modern French law insists that its goal is to further the interest of

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<sup>102</sup> The Loi Raffarin of 1996, 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."

<sup>103</sup> Avis 2 mai 1996: D. affaires 1996, p. 939, obs. L. and J. Vogel. Other goods are covered too. For a recent decision on electronics, see Décision n° 04-D-33 (July 19, 2004), available at [http://www.minefi.gouv.fr/DGCCRF/boccrf/04\\_10/a0100002.htm](http://www.minefi.gouv.fr/DGCCRF/boccrf/04_10/a0100002.htm).

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>104</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>105</sup>—with the result 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>106</sup> This is of course a barrier to industrial production, and so to lower prices.

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<sup>104</sup> Id.

<sup>105</sup> Discussion in Georg Kojda, *Freigabe von Arzneimittel für die Selbstmedikation*, available at <http://www.uni-duesseldorf.de/kojda-pharmalehrbuch/apotheckenmagazin/Fortbildungsartikel/2002-01-02.pdf>, p. 8.

<sup>106</sup> Code de la Consommation, Art. L. 121-80.



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 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>107</sup> All this may look, to the American eye, obviously 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 own when to dose himself with ibuprofen, and whether or not 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 (especially in the classroom), we must make the effort to understand foreign law sympathetically.

We can begin by raising normative questions about the American system. Does the

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<sup>107</sup> This done through what is called a "contrat de distribution sélective" between the distributor and the retail establishments. See *Recueil Dalloz* 1990 (Jurisprudence) 66-70 (arrêt de la Chambre commerciale de la Cour de cassation, 25 April, 1989).

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. This is meat for classroom 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 socio-economic 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. Family ownership of enterprise dominates in Europe.<sup>108</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 unsurprising that small-shop form of producer identity should matter so much.

Family ownership of enterprise does not exhaust the social importance of the French small shop, moreover. 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>109</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

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<sup>108</sup> E.g. Mark Roe, *Modern Politics and Ownership Separation*, in Gordon and Roe, eds., *Convergence and Persistence in Corporate Governance* (2004), 252; Harold James, *Family Capitalism: Wendels, Haniels and Falcks and the Continental European Model* (Harvard, 2006).

<sup>109</sup> Discussion above, Section II.

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 to the American liberal professions, though. By contrast, the same pattern of behavior is much more widely dispersed over the labor force in continental Europe.

Thus even low-status workers like French waiters receive professional training. In Paris they may even attend one of several training institutions.<sup>110</sup> Good French waiters take a 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 expect themselves to be able to offer expert advice. The many small clothing shops in Paris can offer excellent fashion counseling. Pharmacists represent a striking example of the difference in attitude. It remains the case that French pharmacists, who receive extensive training, are treated as

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<sup>110</sup> For an example, see <http://lyc-drouant.scola.ac-paris.fr/1histo.php>.

professionals capable of dispensing a wide range of advice. For example, they are trained to identify poisonous mushrooms.<sup>111</sup> In both France and Germany, professional licensing exams are also 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>112</sup>) Internal governance of these professions is also highly developed. In France, for example, all these professions have their own quasi-legal codes, their *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 high 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 maintaining higher prices. It was this tradition that Feuchtwanger's Heinrich Wels claimed to represent against “Jewish cut-price methods.”

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. Here it is important to make an observation about comparative consumer protection law as law of information. The French law encouraging deference to the expertise of pharmacists and bakers can be conceived as a form of consumer protection:

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<sup>111</sup> For this worthwhile piece of information about French pharmacies, see <http://www.univers-nature.com/dossiers/champignons.html>: “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).”

<sup>112</sup> For a general introduction to the requirements, see <http://www.salonweb.de/salonweb-friseur-infos.htm>. Thankfully, a preparatory book on “Chemistry for Hairdressers” is available to aspiring Friseurmeister: Günter Staps, *Chemie für den Friseur* (Books on Demand, 2002).

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 safety legislation often involves information. Yet Europeans often think of information differently from Americans. American law tends to involve overwhelmingly the *disclosure* of information. Europeans also have a great deal of law mandating disclosure. But at the same time, they 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 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, like their 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>113</sup> and wines.<sup>114</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>115</sup> To the extent legislation is necessary to keep artisanal values alive, the French approach does

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<sup>113</sup> For the ensemble of regulations, see <http://www.legifrance.gouv.fr/WAspad/FicheTheSarde?cod=5194&cat=0&lib=FROMAGE>.

<sup>114</sup> For the ensemble of regulations, see <http://www.legifrance.gouv.fr/WAspad/FicheTheSarde?cod=9897&cat=0&lib=VIN>.

<sup>115</sup> Conseil de la Concurrence, above note.

expand the range of consumer choice to include goods like decent baguettes that simply cannot be produced in America at any price.

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—notably from Pierre Raffarin, who was Minister of Small and Medium-Sized Enterprises in the mid-1990s. 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 *déontologie*.

## VI

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 Lizabeth Cohen's argument for comparative law.

Cohen and other 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 had centered on the conflict between labor unions and capital, and it had encouraged ordinary people to think of rights primarily as the rights of organized labor. The rise of consumerism from the 1930s onward 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 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>116</sup> As Cohen argues in her latest book, this led them slowly to embrace a new style of rights politics—of rights politics focusing, for example, on the claims of women and African-Americans.

This is an argument of the first importance in the interpretation of American history, and I think it is an argument of the first importance for the comparative law of American and continental Europe as well. Indeed, it is ultimately impossible to grasp the contrast between American and western European legal orders unless we keep it in mind: European politics remains much more oriented toward a producerist concept of rights than does 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.

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<sup>116</sup> Discussion above Section II.

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 “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 have conceived 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>117</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 law on labor rights 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 show that the resistance to any change on this score can be fierce.<sup>118</sup> The same is shown, if less dramatically, by the current abject failure of the Merkel regime to

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<sup>117</sup> Literature cited above, Section III.

<sup>118</sup> E.g. Craig S. Smith, French Unrest Reflects Old Faith in Quasi-Socialist Ideals, *New York Times*, April 9, 2006.



alter German labor law.<sup>119</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>120</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 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>121</sup> This too reflects long-standing producerist traditions. European social identity has traditionally been conferred by membership in producer classes—by what Weber called *Standesehre*, status-group honor. 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, is false, in my view<sup>122</sup>: The truth is not that Americans are more attached to “rights,” but that they have ceased to conceive of rights in traditional producerist terms. Abandoning the old rights language of class conflict, they have shifted to conceiving of rights in a consumerist 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

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<sup>119</sup> E.g. Richard Bernstein, Political Paralysis: Europe Stalls on Road to Economic Change, New York Times, April 14, 2006.

<sup>120</sup> Landler and Barbaro, No, not always, New York Times, above note, p. C4.

<sup>121</sup> James Q. Whitman & Gabrielle S. Friedman, The European Transformation of Harassment Law: Discrimination Versus Dignity, *9 Colum. J. Eur. L.* 241 (2003).

<sup>122</sup> Mary Ann Glendon, *Rights Talk: the Impoverishment of Political Discourse* (New York; Free Press, 1991).

employment law puts comparatively little emphasis on protections against firing, and no emphasis whatsoever on the traditional idea of the dignity of labor.<sup>123</sup> Instead, it emphasizes affirmative action and equal 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 job-seekers 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” or whatever—in favor of the idea that we are defined by a *universal* identity, “consumer.” As particularistic forms of producer identity have declined in importance, though, 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: For example, 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. 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.

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<sup>123</sup> Let me emphasize that this is claim 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.

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, there. The core conception of rights, in countries like France or Germany, remains the conception of the rights of organized labor. In practice, this can leave little room for American approaches—little room for American gender politics, little room for American race politics, and so on.

## VII

A striking pattern emerges in all of this. The basic choice made by these differing legal systems over whether to give the 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 America is a consumerist legal order in a very deep sense—an order that has embraced a basic set of values associated with consumer sovereignty—where countries like France and Germany, despite decades of change, retain much more producerist in their basic orientation. America has made the transition that was advocated by Lippman and Weyl and FDR: It has substituted consumer identity for producer identity. That transition has not taken place in France and Germany. 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 identities count most. A fuller treatment would offer many more examples. In this Section, before moving to the Conclusion, I want to

touch on only a few—though in order to stay within the limits of the essay form, 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. They are steered into career training at a younger age than are Americans.<sup>124</sup> Moreover the class of female *Azubis* is, unsurprisingly, particularly prey to sexual harassment.

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. 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>125</sup> He paints, that is, the picture of a judiciary organized as a craft guild.

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<sup>124</sup> For an introduction for foreigners settling in Germany, see <http://www.derweg.org/deutschland/bildungswesen/sekundaerstufe2.html>.

<sup>125</sup> Mitchel Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford, 2004), at e.g. 307-311 and often.

On the American side, by contrast, we can see many signs of the 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 kind of form of dignitary consumer safety legislation. To Americans, though, banning the sale of consumer information represent 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>126</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 don't count in America. 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

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<sup>126</sup> Whitman, *Two Western Cultures of Privacy*, 1189-1195.

rarity.<sup>127</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. Now to the extent the individual buys equity, he is not technically a “consumer,” of course. He is 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 is no (European-style) socialism in America?”<sup>128</sup> but “why is there no (European-style) capitalism in America?”

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. Of course, such protectionist legislation also plays its part in American law: The differences that I describe are relative and not

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<sup>127</sup> For this observation, see e.g. Reinier Kraakman et al. *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford, 2004), 129.

<sup>128</sup> W. Sombart, *Warum gibt es in den Vereinigten Staaten Keinen Sozialismus* (Tübingen: Mohr, 1906).

absolute.<sup>129</sup> The philosophical importance of consumer and producer also calls for much more discussion than I will give it: If we want to talk seriously about the value of these two identities, we must spend much more time on the relative values of work and leisure in life. This Essay is no more than a sketch, though, and rather than explore the entire range of comparative problems raised by my topic, though, I would like to move on to a Conclusion.

## CONCLUSION

The conflict of consumerism versus producerism is a conflict in values, a conflict over which of two economic identities we will regard as primary. This conflict 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 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 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 students, and 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.

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<sup>129</sup> Protectionist agricultural policies in both European and the United States recently led to the collapse of the Doha Round. See Steven Weisman and Alexei Barrionuevo, *Failure of Global Trade Talks Is Traced to the Power of Farmers* *The New York Times* July 27, 2006

America and continental Europe do not just differ in economic organization. They differ in the judgment about which economic identities should be deemed by the law to play the most important role. This suggests something significant about the study of comparative law, as well as something about how we should respond to the jeremiad of John Rawls with which I began. The study of comparative law should be, in part, a study of how legal systems construe primary protected legal identities. “Consumer” versus “producer” is not the only example by any means. Some legal systems treat “individual” as the primary identity from which rights and obligations flow, where others take “family-member.” Similarly, some take “member of a religious community” as a primary identity, and some take “member of national and ethnic community.” One of the key choices made in any legal culture is which of many possible legal identities is deemed worthy of protection by the law, and comparative law ought to create its classifications partly in light of that fact.

The recognition that economic identities are what is at stake, in the consumerism/producerism debate, can help us in responding to Rawls, with his dark insistence that the consumerist market endangers “meaning in life,” and national “memories and traditions.” 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 Rawls’ polemic its surface plausibility.



That does not mean that Rawls is right, though—at least not as far as the law is concerned. It is true that American law often seems to identify “consumer” as the economic identity that matters. It is true that this lies at the heart of the strong American legal orientation toward market ordering. But the law is hardly the only cultural system making statements about what matters in life. Individuals in search of an identity have many other resources. Even if the law speaks disproportionately of individuals as “consumers,” entitled to the benefit of the lowest prices the market can provide, Americans still manage to pursue many other activities. They have families, they play chamber music, they hunt. They surrender to crazy romantic impulses. For that matter, they work in productive industry. They manage to get identity out of all these activities. It is just not the case that we will inevitably all sink into “meaningless consumerism” if the law favors American-style market ordering.

As for Rawls’ claim that consumerism threatens national traditions: That claim is inexact and misleading. Law that identifies “consumer” as the primary protected identity does pose a certain threat. But the threat that it poses is not a threat to national identity. It is a threat to *producer* identity. Producerist values are not national. On the contrary: The producerist orientation remains common to most leading industrial countries outside the United States. Correspondingly, sensible reflection about global consumerism ought to begin, not with Rawls’ unpleasant neo-nationalism, but with an appreciation for what producerist values are worldwide.

As for the future of Europe, painted in such dismal colors by Rawls: I think there is no need to take an utterly bleak view. It is not at all clear that Europe is fated to assimilate to American consumerism. This is for two reasons above all. First, even if

European law embraces the primacy of consumer identity (as it may 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 pursues the consumer economic interest in low prices. It is this above all that poses a danger to traditional producerist values.

But one can embrace the consumer without embracing consumer *economic* interest. Consumer legislation can also take the form of consumer *safety* 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 safety interest than is American law—most notably these days with regard to genetically modified foodstuffs. 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 far more hospitable to promotion of consumer economic interests, while European law will remain more hospitable to protection of consumer safety. (Let me emphasize, too, that these two interests are by no means identical.)

Finally, it is simply false to claim that continental European economies will inevitably come to resemble the American economy. The law of comparative advantage suggests that the opposite is true. As trade grows in intensity, different regions should be compelled to specialize in different products. Continental Europe in particular, with its artisanal traditions, should be expected to specialize in high-quality goods. We see this 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. We see it in regions like northern Italy, also specialized in luxury artisanal goods such as

high-end fabrics. The success of these products reflects of a kind of human capital resource in Europe. Because artisanal traditions are strong, they allow forms of production that are more difficult elsewhere. Of course, these economies also produce other goods, like cereals. The point is not that they are purely artisanal. The point is only that they have some degree of comparative advantage in the artisanal sector. (This culturally rooted tendency to favor artisanal markets helps explain, incidentally, the European resistance to genetically modified foods, produced through industrial methods that seem inconsistent with artisanal traditions.)

If continental countries specialize in artisanal goods to some extent, that does not imply that continental populations will only consume artisanal goods. It implies 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 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.

It 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 typical French people do: They found 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. 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 consumerism. There will be large retailers in France, just as there will be large retailers elsewhere. But economics tells us that the artisanal niche should survive, and even prosper; and cultural reflection tells us that it should continue to mean a great deal in the lives of French citizens. To that extent anti-consumerist gloom and doom is out of place.