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A LIFE IN THE CRAFT OF COMPARATIVE LAW

*John C. Reitz**

THOUGHTS FROM A BRIDGE: A RETROSPECTIVE ON NEW EUROPE AND AMERICAN FEDERALISM. By *Eric Stein*. Ann Arbor: University of Michigan Press. 2000. Pp. xvii, 497. \$69.50.

It is obvious to specialists in the law of the European Union (“E.U.”) — a relatively small but steadily growing group in the United States — that a “retrospective” collection of Eric Stein’s¹ writings would be of great interest. From his 1955 article in the *Columbia Law Review*, the first article about the Court of Justice of the European Coal and Steel Community to appear in English (p. 473), he has been one of the dominant U.S. scholars of what was initially called “European Community” (“E.C.”) law after the three original European Communities² and more recently has been rechristened “European Union” law after the creation of the E.U. around and on top of³ the original Communities in the Treaty of Maastricht in 1992.⁴ But this book, which won the 2001 University of Michigan Press Book Award, deserves a much wider readership. It is a fine collection of the craft of comparative law, covering much more than E.U. law, and it also has a very personal aspect that makes it a rich memento of the author and many of the people with whom he has worked.

It may be foolhardy to write a review of a book that comes with a “built-in” review, so to speak, and one that says with great acumen most of the really important things that should be said about Stein’s work. Joseph Weiler, another distinguished E.U. scholar and former

* Professor and Associate Dean for International and Comparative Law Programs, University of Iowa College of Law. B.A. 1970, Harvard; J.D. 1975, University of Michigan. — Ed. I would like to thank Alexander Somek for his helpful comments.

1. Hessel E. Yntema Professor Emeritus of Law at the University of Michigan Law School.

2. The European Coal and Steel Community, the European Economic Community (“EEC”), and the European Atomic Energy Community (“Euratom”).

3. The architecture of Europe is complicated. The three original Communities have been preserved, but their principal organs have been merged by the Merger Treaty of 1965, and the Treaty of Maastricht of 1992 rechristened the EEC the European Community (“E.C.”) and formed all three Communities into the first of three “Pillars” of the E.U., which is sometimes referred to as the “roof.” You do not need to understand this in the least to follow the rest of my Review.

4. Stein has published “some sixty” pieces on European integration. P. 9.

colleague of Stein's, has written a Foreword (p. ix) with his customary exuberance and insight that neatly exposes the deepest values of Stein's work with an inimitable and compelling style.⁵ Yet, while warmly commending Weiler's Foreword to the reader, I will venture another review, but from a slightly different angle. After a brief overview of the book and its special personal elements, I will focus on some specific aspects of Stein's comparative law craftsmanship and conclude by discussing two of the general issues about divided-powers systems that are raised by the materials in the book.

I. OVERVIEW OF THE BOOK AND ITS PERSONAL ELEMENTS

The collection is "retrospective" not only in the sense of a selection of some of Stein's finest work over a career spanning more than half a century, but also in the sense that Stein has annotated each piece with a short introduction putting the piece in context both within his own career and the other pieces in the volume, as well as sketching out some of the major legal developments since the original date of publication that would have to be taken into account in updating to the publication of this volume (2000).⁶ The method of updating and commenting on the original text through introductory notes gives the book a touch of the Talmud or Gothofredus' Digest and postmodernism at the same time. It should be noted, however, that the book is not meant to be a summing up of Stein's career. There are important aspects that are not touched upon by the materials in the book. For example, in addition to a heavy focus on E.U. law, Stein had a substantial career as a public international lawyer for the U.S. government before coming to Michigan to teach, and thereafter he continued to be involved in international law, teaching and writing especially about arms control.

The book is divided into a short "Introduction," three major sections, and a short "Coda." The Introduction sounds the main theme in its title, "Five Variations on a Theme: Divided-Power Systems." Part 1, entitled "Constitutionalizing, Harmonizing," is focused on the E.C./E.U. and contains a classic piece on E.U. law which makes a fine introduction to E.U. law and hence ought to be considered for inclusion in teaching materials. The article, "Lawyers, Judges, and the Making of a Transnational Constitution," is his 1981 study of the role of the European Court of Justice in advancing European integration (p. 15). It focuses on the seminal cases in which the Court enunciated

5. For another short, perceptive review, see Richard B. Bilder & George A. Bermann, *Book Review*, 94 AM. J. INT'L L. 826 (2000).

6. Although Stein expressly disclaims any thoroughgoing effort to update, p. 11, he also added footnotes in some places or expanded original footnotes to provide information about subsequent legal developments.

the key integrating doctrines (supremacy of Community law and direct effects, as well as the scope of the treaty-making power) that have solidified the powers of the then-E.C. government. The other essay in Part 1 is a 1971 study of the making of the First Coordination Directive, the first exercise of Community power to coordinate member state law, in this case on the subject of corporation (in the E.C. called “company”) law (p. 50).

The second part of the book, which contains the most explicitly comparative pieces about the E.U. and is appropriately entitled “European Integration and the American Federal Experience,” begins with his classic 1977 essay on “Uses, Misuses — and Nonuses of Comparative Law” (p. 89), a general essay on the subject, which nicely states the promise of comparative studies and gives a still largely accurate assessment of the relative non-use of comparative law in the United States. Part Two also contains another classic piece worthy of consideration as an introduction to E.C./E.U. law, the magisterial comparison of the E.C. with the U.S. federal system, specially focusing on free movement of goods and persons (p. 112), which he coauthored with his Michigan colleague Terrance Sandalow for the 1982 book they jointly edited entitled *Courts and Free Markets — Perspectives from the United States and Europe*. The introductory note Stein wrote for that piece includes a page-length quotation from the introduction European Court of Justice (“ECJ”) Judge Pierre Pescatore wrote for the 1982 book (pp. 113-14). Other selections in this part include a 1976 comparative study of standing under E.C. and U.S. federal law which Stein co-authored with Michigan colleague Joseph Vining (p. 161); a 1986 comparison of the foreign affairs powers under U.S. and E.C. law (p. 191), on which he collaborated with Columbia professor Louis Henkin; a guest editorial he published in the *Common Market Law Review* in 1992 entitled “Foreign Policy at Maastricht: ‘*Non in Com-motione Dominus*’” (p. 304); a study of the forces for uniformity within the U.S. federal system (p. 309), also published in 1986; and a previously unpublished statement on *Democracy without “a People,”* which he presented at conferences in 1998 and 1999.

The selections in the third part (entitled “Europe’s Burden of History”) are not about E.U. law. They include his 1989 essay (p. 347) on the German criminal laws that have been interpreted to proscribe public statements propagating the so-called “Auschwitz lie,” the claim that the Holocaust never happened; a collection of never-before published correspondence Stein received in reply to earlier published versions of that essay (p. 410); and selections from his 1997 book on the breakup of Czechoslovakia (p. 417). The “Coda” contains some short remarks entitled “Reminiscences of the Embryonic EEC,” which he gave at a dinner in Villa Montaldo, Florence, in 1989 in celebration of his seventy-fifth birthday (p. 471) and some stylish remarks his wife

Virginia Stein gave, apparently at the same occasion, entitled "A Million Footnotes" (pp. 476-77).

The book thus consists of major studies Stein has already published, either alone or with others, one going back as far as 1971, supplemented by a number of statements from personal friends and colleagues of long standing, some relevant documentation (the correspondence on the "Auschwitz lie" issue), an editorial he wrote, an unpublished conference statement, an after-dinner speech, and some autobiographical writing. The autobiographical information comes chiefly in the introduction and coda and in the introductory notes he wrote for each essay, which often discuss how he came to undertake the particular study and how he saw it relating to his previous or subsequent work. The excerpt from the Preface to his book on the break-up of Czechoslovakia also describes his connection to that country (he was born, raised, and received his first law degree there), how he left in the wake of the German occupation in 1939, how he returned years later and was able to attend the fiftieth reunion of his high school (gymnasium) class only to witness the way that communism had wasted the lives of many of his classmates, how he left determined never to return, and how he nevertheless came to return to provide assistance in the preparation of a new constitution after the collapse of communism (pp. 418-19).

The intrusion of such a personal note may seem especially surprising once you know Stein's writing style, of which Joseph Weiler quite accurately says in his Foreword that it "provides powerfully probative evidence for the qualities of temperance, suppression of the personal and the subjective in favor of a disciplined, rational discourse" (p. xiii). For that very reason, I am grateful for the more personal tone of the book. Something of the warm smile and engaged look of concern with which he greets students and former students shines through the pages, though in truth the book still provides only glimpses. The book is also a celebration of the rich human ties he has had in his professional life. The number of colleagues who have collaborated with him, either as coauthor, commentator on a draft, supplier of information or perspective which is documented in a footnote, or in some more organizational way is truly impressive, and his introductory notes tend to document the human connections in some detail. There is no doubt that Stein's ability to work with others is a very important ability which has contributed to the strength of his scholarship.

II. COMPARATIVE LAW CRAFTSMANSHIP

I had the privilege in the mid-1970s to be a student in Eric Stein's class on what was then called, according to my still extant class notes, "Common Market Law." To this day, I remember being struck at the

end of the course by the realization that, despite my expectation that the course would be about the law of another system, I found that I had also had a really good comparative law course, and as always should be true of comparative study, I came away from that course with a much better understanding of our own system, especially the aspect of federalism. Readers of this book will, I think, have a similar experience because Stein is a master comparatist. There are at least four virtues in his craft which are worth reflecting on.

First, Stein's work is never simplistic. Comparative work has been chided for the tendency to reduce law to a narrow positivist version by being satisfied with simple comparisons of a statutory scheme from one country with that of another. It is an understandable tendency because positive law is the easiest to identify and limiting one's attention to that level of law keeps the comparative task quite manageable. In any event, good legal analysis has to start with the written texts of law. But what good lawyer is satisfied to describe only the positive law? The whole interest of law — its whole soul — lies in the possibilities that are created by what positive law does not say, by its gaps. Stein's consummate legal professionalism shows, for example, in the way he examines the U.S. law that would be relevant to deciding whether to uphold laws like the German laws that criminalize the propagation of the "Auschwitz lie" (pp. 382-86). He discusses the main U.S. Supreme Court decisions up to the time of original publication of the essay (1989). He describes the controversy involving *Skokie*, Illinois, where a neo-Nazi party applied for a permit to march in that heavily-Jewish town and the permit was denied on the basis of town ordinances suppressing hate speech. The Illinois state and lower federal courts struck down the ordinances as violations of the First Amendment and the U.S. Supreme Court refused review. Stein is certainly on solid ground to conclude that U.S. law is not likely to uphold the German-style laws. But as he says, "[i]n reality, neither the language of the free speech clause of the First Amendment nor its history, nor for that matter — prior case law, unequivocally foreclose considerations of any claim to regulate extremist speech that defames religious or racial groups and advocates a violent regime" (p. 385). In that spirit of openness, he examines the academic discourse after the *Skokie* case, especially the arguments by Lee Bollinger who, reacting to the considerable controversy within the U.S. over that case, attempted to provide a new and better justification for such a policy of strong tolerance. In his search to understand U.S. law on the point, Stein has thus tried to take into account the expressions of all important authorities in the legal community, especially the scholars, whose voices are an important part of the on-going debate about what the law is.

In Professor Rudolf Sacco's terms, Stein's work takes into account all the "legal formants."⁷ So too, in discussing the German laws in question, Stein not only examines statutory texts and court decisions, but also scholarly writing and the public debates, which in the case of passage of a new statute on the matter were carried out largely between the political parties, and he subjects the logic of the case decisions to his own searching critique (pp. 349-80). Similarly, his treatment of the famous *van Gend* case at the European Court of Justice examines the different ways the argument could have gone and thus supports his claim that the Court was making law there (pp. 18-24). This quality of Stein's craft makes his work retain its significance long after the law it treats has become outdated, just as we study and teach old cases, even if they have been overruled, to learn how great lawyers of the past have conducted their craft of lawyering.

Second, Stein makes extensive use of models or theoretical constructs. Stein does this so much that I can give only a few examples here. A consistent theme of his writing has been to examine the degree to which the E.C./E.U. is a type of federal system. Thus he was among the first scholars to treat the E.C., not as an institution of international law, but as an emerging domestic legal order in which the ECJ makes constitutional decisions — in other words, to hold the E.C. treaty up to the model of a national constitution (pp. 4-5) and thus the ECJ up to the model of a supreme or constitutional court. In considering the "Uses, Misuses — and Nonuses of Comparative Law" (p. 89), Stein devotes over half of the piece to a consideration of competing theories of legal borrowing by Otto Kahn-Freund and Alan Watson and then tests those theories by applying them to the efforts within Europe at transplanting company law.

Stein's closing study on the dissolution of Czechoslovakia makes perhaps the most extensive use of models and theories, especially from political science. As a possible basis for understanding ethnic conflict, Stein cites, for example, the work of American sociologist/lawyer Donald L. Horowitz (p. 421), who suggested that ethnic conflict may result from "cultural differences" or "ignorance or realistic divergence of interests" (pp. 421, 423). Stein uses that dichotomy throughout his analysis of the breakup to show that both cultural differences and ignorance (and resultant resentment) played their respective roles. In discussing the progress of transformation in Czech and Slovak lands from Communism to free market democracy, Stein cites a number of the leading writers on the issue of whether the transition to democracy together with constitution drafting should precede the transition to the

7. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. COMP. L. 1 (1991); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343 (1991); see especially Sacco (Installment I), *supra*, at 22.

market, come after it, or take place at the same time. Stein makes a plausible case that in fact in most if not all of the post-Soviet countries of Eastern and Central Europe, constitution-making has been pursued through legislation and court decision even if no new constitution was formally adopted (p. 438), so that one should not point to this region of the world as evidence that political reform should be postponed until after economic reform. In discussing the role of civil society in these transformations, Stein notes Robert Putnam's work concerning the hypothesis that good government and political-economic progress depend on the formation of many small-scale associations, and Stein concludes from data about the extent of civil societies in both the Czech Republic and the Slovak Republic that "the data appear to support Putnam's correlation between a civil society of vibrant private groupings and good government" (p. 440).

Stein's pervasive use of models and theory makes his work interdisciplinary and lends it analytic muscle. An old criticism of comparative law holds that it is primarily descriptive, not analytic. I have already pointed out how analytic Stein's comparative work is with regard to the way he explores the possibilities of legal doctrine, but much comparative writing is not about doctrine. Stein shows that descriptions of governmental structures or of legal reform can also be made highly analytic by basing the description on theoretical models. As Stein recognizes (p. 112), models also facilitate comparison by providing a *tertium comparationis* or abstract statement of the subject of comparison so that exactly what is being compared to what is clear. They can also introduce a comparative element into a description of the law of a single country. Another complaint about comparative law is that so much of it is not comparative at all but rather a mere description of foreign law. That is not necessarily bad in and of itself — the foreign law may be very interesting — but such writing does fail to get the analytic advantages of the comparative method. When Stein writes a piece focused, for example, solely on the law of the former Czechoslovakia, his use of theoretical models like Putnam's theory of civil society, which Putnam developed in a study of Italy and has applied to the United States, implicitly introduces a comparative element and gives his description, with respect to the subject of the model, much if not all of the analytic power that an expressly comparative treatment would.

Third, Stein's work gains great clarity by being concrete. It thus makes clear the relationship between law and life. Despite his powerful use of models and theories for analysis, the treatment is not aridly abstract. Stein avoids that vice through the use of concrete examples and good use of data about the social reality on which law acts. For example, the essay comparing the law of standing in the United States and the E.U. deals with that notoriously abstract topic by introducing

the facts of three actual cases to illustrate the differences between U.S. and E.U. law (pp. 163-64).

His study of the forces contributing to uniformity within the U.S. federal system focuses on family law to illustrate its themes. In describing how the U.S. federal system has handled both divorce and non-payment of child support, Stein uses statistics to give the reader some idea of the extent of the problems (pp. 320, 322). He uses the harmonization of company law to test the different theories about transplanting law (p. 98). Stein studied the making of the first E.C. harmonization of company law as a way of illustrating and understanding the workings (and dysfunctions) of the original E.C. law-making process (p. 50). As he says in his introductory note to that study, "Searching behind the façade of technical argumentation, I discerned a colorful world of public and private groups pressing a variety of political, economic, professional, and class interests, fiercely protecting institutional 'turfs' and indigenous legal traditions, as well as private individuals with their own ambitions" (p. 51). It is this searching for the connection between law and the life on which it purports to operate that makes Stein's work so interesting to read.

Fourth, Stein's treatment of foreign law is grounded in fundamental respect for the Other. Weiler has already described this quality of Stein's work with great eloquence in his Foreword (pp. xiv-xv). It seems to me to be an absolute prerequisite for serious comparative study. Unless you are willing to accord the Other full respect, how can you take seriously the Other's legal system when it differs from your own in some fundamental respects? When you do accord the Other's legal system respect, you can criticize it just as if it were your system because you are taking it seriously. This quality permits Stein, for example, to write a study of the German laws criminalizing the "Auschwitz lie" which enables U.S. lawyers to understand the sense of these laws in the context of German history and the rest of German law even though they are so at odds with our own strong commitment to free speech. He even helps the U.S. lawyer see how the laws can be criticized from within the German legal tradition so that we as outsiders can appreciate the robustness of the German legal discourse. Of course, in this respect Stein is perhaps ideally qualified to be a comparatist. Born and raised in Czechoslovakia, educated as a lawyer both there and again at Michigan, and having worked his entire professional career as a lawyer in the United States, he personally has been a bridge between Europe and the United States. He is, as Weiler says, "utterly at home in America, utterly at home in Europe" (p. xiv). There is no question about his insider-status as a U.S. lawyer. When he departs from his usual even-handed stance by making his opinion clear that U.S. law has gone too far toward protecting free speech at

the expense of protecting community,⁸ the mere expression of his opinion lends it a particular force, but it is a criticism from within U.S. law. Yet, he has also enabled us to appreciate how we are different from a very foreign legal system and — in the space opened up within our own system by the possibility of critique arising from within our own system — how we are also to an important extent similar, as well. As all good comparative writing should do, he has taken us with him across a bridge.

III. SOME ISSUES RELATING TO DIVIDED POWER SYSTEMS

In view of the title of Stein's introductory essay to the book, *Five Variations on a Theme: Divided-Power Systems*, it may surprise the reader that the book offers no extended theoretical investigation of divided-power systems. In view of Stein's affinity for theoretic models, it may seem surprising that the book contains no discussion of federal versus confederal systems or how they compare to unitary states with autonomous regions or significant devolution of power to local authorities. Stein has a clear interest in theory, but the focus of his work is on careful studies about concrete aspects of the subject. Perhaps he felt that it was not yet time for grand theory or comprehensive treatment. The last several decades of the twentieth century have been a time of extraordinary activity and creativity in this field. Not only have new international organizations been created, most notably the World Trade Organization ("WTO"), but there has also been an extraordinary wave of constitution drafting around the world, especially in the wake of the collapse of communism in Eastern and Central Europe and Eurasia. We now have many more divided-power systems to study.

As a way of demonstrating the richness of Stein's studies and engaging in scholarly dialogue with him,⁹ I would like to comment on two important issues that appear in his work but that would be important to understand better in order to develop a more comprehensive theory of divided-power systems.

A. *The Integrating Force of the Economy*

One conventional understanding of the growth of the E.C., now E.U., is that the substantial political unity that has been achieved has been made possible, or at least greatly strengthened, by the substantial

8. Stein's opinion is still somewhat indirectly expressed. Stein closes the essay with this pointed question: "What is one to think of a law that pleads inability to distinguish between neo-Nazis parading through Skokie and civil-rights advocates marching through white-racist neighborhoods in the South?" P. 388.

9. Stein remains a very productive scholar despite his "retirement" in 1983. Roughly half of the selections included in *Thoughts from a Bridge* were first published after 1983.

economic integration that has been achieved in Europe. The story to date is quite wondrous. Who would have thought in the 50s, 60s, or even the 70s and 80s that by the beginning of the twenty-first century a substantial part of the E.U. would have achieved a currency union and the dismantling of virtually all E.U.-internal border controls on the continent of Europe. Surely substantial economic benefits from a common market in Europe, with freedom of movement for goods, labor, establishment, and capital, have contributed to the political acceptability of the substantial political integration that has followed in the wake of market integration.

The articles included in *Thoughts from a Bridge* tend to focus more on legal and political integration than on economic integration, but I suspect that Stein would agree with the conventional understanding because in the excerpts from his book on the dissolution of Czechoslovakia, he asks explicitly why the economic forces were not sufficient to hold the union of Czechs and Slovaks together (pp. 426-28). As in the E.U., but on a smaller scale, the larger domestic market should have been attractive to businesses large enough to exploit it because, as a general rule, the larger the market available to them under one set of rules, the lower their costs.

So why in the case of Czechoslovakia did the pressures for dissolution override the economic pressure in favor of integration? Stein canvasses a number of answers. First, the economic benefits of the larger state are only attractive to domestic business if there are business entities capable of taking advantage of the larger market. There apparently were none in either the Slovak or the Czech Republic at the time of dissolution.¹⁰ Second, there were countervailing economic pressures. The Slovak economy included many more large Soviet-style factories, especially ones involved in weapons production. The Slovak economy therefore suffered disproportionately from the loss of eastern markets for these large industrial enterprises and the central government's decision early in the transition period to terminate weapons production. Moreover, because of their size, they were particularly difficult to restructure, and the central government's attempts at radical restructuring had much more serious social impact in Slovakia than in the rest of the country. From the Slovak side, economic factors appeared to argue for dissolution, not union (p. 427). From the Czech side, there were also important economic/political pressures against union. Prime Minister Klaus was concerned that the economic transformation in the Czech Republic would be impaired by special policies being demanded to deal with the problems of the huge former defense

10. P. 427 n.13 (citing Ellen Comisso, *Federalism and Nationalism in Post-Socialist Eastern Europe* (1992) (unpublished paper for a symposium on "Federalism for the New Europe," Benjamin Cardozo School of Law, New York (Sept. 10-12, 1992))).

industries in Slovakia, and Czechs in general were tired of the feeling that they were “subsidizing” the Slovaks (p. 428).

Stein also points to the influence of numerous other factors pushing the two states apart, for example, the awkwardness of a union of two polities in which there was an understandable claim for equal treatment by each entity, yet one had twice the population of the other (pp. 424-25); two key players, Czech Republic Prime Minister Vaclav Klaus and his Slovak counterpart Vladimir Meciar, both of whom pushed for dissolution (pp. 425-26); the media, which failed to calm the nationalistic rhetoric on either side (pp. 428-29); the lack of international pressure to stay together (pp. 429-30). But what Stein labels as the “primary cause” (pp. 423-24) was ethnic conflict. Despite having closely similar languages and living standards, the Slovaks had been under what they felt to be oppressive Hungarian rule at the end of the Hapsburg monarchy and emerged at the time of the first Czechoslovak Republic in 1918 “some half a century behind the Czechs” (p. 424). Since then, Slovaks have felt ignored or looked down upon by the Czechs and treated as second-class citizens. Although this enmity did not result in violence, there was real heat in the Slovak rejection of union with the Czechs, and Stein appears to regard this factor as the most important one in the break-up.

Could economics have trumped ethnic conflict? It is hard to know since according to Stein’s account, neither side perceived a strong economic advantage in staying together. Still, the reasons for ethnic discord also seem mild by world standards, which usually involve long and bloody histories of violence. The reasons for ethnic conflict were certainly mild by comparison with the reasons for enmity between, for example, France and Germany at the start of the E.C. in the wake of World War II. Another factor Stein offers to explain the break-up of Czechoslovakia is the timing with which the ethnic grievances could be aired, and this may have been the crucial factor. In Western Europe, before the ties of the E.C. began to be developed and strengthened much beyond that of a simple customs union, there was opportunity for free discussion about enmities, ancient and recent. In Eastern Europe, by contrast, the Soviet yoke had suppressed all expression of ethnic discord after the war, and the Slovaks and Czechs could not air their mutual grievances until the collapse of communism after 1989. The sudden opportunity to air them seems to have stoked the flames of discord the way a fire that has been deprived of oxygen will flare up when suddenly given more air. One wonders whether the results might have been different if international pressure, for example, had forced events in Czechoslovakia to slow down.

One also wonders about the relationship between union at the regional or world level and break-up of small countries like

Czechoslovakia. Stein says, “the increasingly liberalized international economy has reduced the allure of the larger domestic market”¹¹ It also appears that at least some Czechs and Slovaks supporting dissolution did so because they hope to see both the Czech and Slovak Republics becoming members of the E.U. (p. 430). Is this evidence of the real success of the idea of European Union — that it begins to make nationhood seem irrelevant? But if this logic operated to hasten the dissolution of a nation-state, could the same logic operate against the E.U.? Is it possible that if the WTO has reasonable success in expanding free trade to services and maybe even beyond to labor and capital, that its very success might begin to convince individual nations that they need not be part of the E.U.? Or are all these unions vulnerable to dissolution if they are based solely on economics and not on some ethnic or cultural affinity?

B. *Europe and America as Models for Each Other: The Significance of Differences in Political Economy*

Comparison always raises at least implicitly the normative question whether one country’s law should be taken as a model for another’s. Eschewing simplistic notions, Stein has never suggested that the U.S. version of federalism should simply be copied by the E.U. Nevertheless, Stein’s work comparing the degree of integration in the E.U. to the U.S. federal system raises the question to what extent U.S. law might serve in any degree as a model for Europe. In like manner, his verdict that American law is too extreme in its protection of free speech,¹² raises the question to what extent Europe should serve as a model for the United States.

Stein recognizes, of course, important differences between Europe and the United States that might show why the law comes to different answers on both sides of the Atlantic. With respect to free speech issues, he mentions the very different histories, including a much longer tradition of democracy and constitutional government and a greater sense of national security in the United States than in Germany, the significance of the civil rights movement in the United States, the greater diversity that the U.S. society has traditionally had as compared with European societies and the “melting pot” theory with which America has traditionally greeted immigration (pp. 386-88). These are no doubt important for understanding the greater willingness in the United States to protect speech that stirs up racial or ethnic hatred. But I think that he puts his finger directly on the nub of the matter when he raises the question whether courts or legislatures

11. P. 427 (citing Comisso, *supra* note 10).

12. See *supra* note 8.

should play the larger role in deciding these kinds of issues. That question, Stein says, “goes beyond the institutional concerns to the problem of fundamental values” because it implicates the debate between liberals and communitarians (p. 388). “[F]orbid[ding] localities to interfere with the public advocacy of group hatred affirms individual liberty, but denies the political community the opportunity to express through law the central commitment and ideals that unite its members.”¹³

Political economy, which is itself a product of the historical and social factors, is thus an important dimension of the issue. The lack of willingness to permit communities to regulate hate speech reflects not only the very high value the American polity places on freedom of speech, but also the great skepticism with which it tends to regard government regulation of any kind. The German interpretation of their criminal laws to prohibit the “Auschwitz lie” reflects a polity that is much more accepting of government regulation of all kinds.

The difference reveals a kind of “irony” of political economy: The individual-based, market-centered political economy of the United States is less capable of protecting the individuals in society from extremist hate-mongers than is a more state-centered political economy which is more willing to accept the use of state regulatory power for the benefit of society as a whole. Too much emphasis on individualism thus threatens to isolate the individual precisely because it challenges the power of the communities that groups create in order to protect themselves from other individuals or groups.

Within a given country people differ with respect to where the balance should be struck: more in favor of the individual and hence of the market, or more in favor of the community and hence of the state. But I also believe that countries tend to show surprising consistency with respect to whether a more state-centered or a more market-centered political economy generally prevails. Moreover, I have argued, these differences have profound consequences for their respective legal systems, including matters of public law such as the conceptions of the state, constitutional rights, and the judicial office, and standing and related topics concerning the participation of the public in the processes of administrative formulation of and enforcement of law.¹⁴ If I am right, differences in political economy need to be taken into account in any analysis of types of divided-power systems. Stein and his coauthor Sandalow recognize the influence of differences of political economy in the excerpt from their book *Courts and Markets — Perspectives from the United States and Europe*. In their list of factors that

13. P. 388 (quoting Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 683 (1988)).

14. John C. Reitz, *Political Economy as a Major Architectural Principle of Public Law*, 75 TUL. L. REV. 1121 (2001).

explain why they do not believe that the E.U. will model itself on U.S. federalism, political economy plays a prominent role. For example, they write that “the contemporary European welfare state systems postulate intensive government intervention in the economy. . . .” (p. 117). Speaking of the American Republic at the time of Chief Justice John Marshall, Stein and Sandalow say, “the new Republic, endowed with natural resources vastly superior to those of Western Europe, functioned in a *laissez-faire* market economy that offered substantially fewer opportunities for confrontations between state and central institutions than are generated by ‘welfare state’ economies” (p. 117).

What more can we say about the relationship between political economy and the form of divided-power systems? I have suggested that state-centered political economies should be more willing to concentrate state power, in order to facilitate state action — something which is necessary if the state is to be assigned significant responsibilities for providing for the general welfare — whereas the more market-centered political economies ought in general to be more receptive of forms that distribute power and particularly of forms of “checks and balances” in which more than one branch or level of government is required to agree before the government can take action on behalf of the state. The possibility that the checks and balances will prevent or slow down government action is less objectionable in a system that is fundamentally skeptical about government action and does not assign the government a leading role in securing the general welfare.¹⁵

But that idea could be implemented in many different ways. In a divided-powers system, powers can be distributed between the constituent parts and the central government (what we normally mean by “federalism”) or among the different branches of the central government (what we normally mean by “separation of powers”), or by various combinations of both. The fact that the United States and Germany are both federal systems suggests that there is no necessary correlation between political economy and forms of divided-power systems. But these two federal systems also show some intriguing differences. The way in which the U.S. federal system often permits federal, state, and even local jurisdictions to overlap and regulate aspects of the same activity or place justifies labeling it “competitive” federalism; German federalism is often called “cooperative” federalism from the way in which the federal and state governments have to work together.¹⁶ I am not clear that the U.S.-style “competitive” federalism necessarily results in greater distribution of power than the German version, but it seems at least to result in a different manner of distrib-

15. *Id.* at 1144-45.

16. *Id.* at 1147.

uting power. But even if federalism is not found exclusively in the more market-centered political economies, if my idea has any merit, one ought to find that the sum total of devices used to diffuse power are greater in a market-centered political economy and that there is a greater concentration of state power in state-centered political economies.

Where does the E.U. fall on the political economy spectrum? It is not at all clear to me. On the one hand, it might seem likely that a union of European states would reflect the dominant political economy on the continent of Europe, the relatively more state-centered political economy of the social welfare state. True, England is a bit of an anomaly, but my investigations into political economy suggest that England is much closer to the continental versions of political economy than the United States.¹⁷ In any event, virtually all the other members of the E.U. have fairly strong commitments to the social welfare state model. It would not be surprising if the product of their union also manifested a similar commitment to a relatively state-centered political economy. On the other hand, there are reasons to expect a political economy at the level of E.U. law that would be much closer to the strongly market-centered political economy of the United States. One might hypothesize that the development of the market-centered political economy in the United States was influenced in part by the relative lack of commonality that the various immigrant groups felt for each other. Individualism may have flourished in part because different immigrant groups felt that they had little in common with other groups. If there is any validity to that view of U.S. history, then it would seem even more likely that the E.U. would develop a similar kind of pluralist politics. Like the U.S., the E.U. is the product of a great mix of peoples, and they are even more divided than the population of the United States by language and history and still today by separately constituted states.

The issue may thus have some relation to the much-discussed issue of the E.U.'s "democratic deficit," which Stein addresses in his "Panel Statement on *Democracy without a People*" (p. 335). How can democracy be created at the E.U. level when there is no European people (*demos*), only the peoples of the member states? The assumption is that democracy can function well only if the people among whom it is instituted feel themselves to constitute a community. So too, we might ask, how could a state-centered political economy be formed at the E.U. level if there is no community of citizens who see themselves constituting a people? If there is no European *demos*, won't the E.U. inevitably tend away from the state-centered pole of political economy and toward the market-centered pole? Besides, a key purpose of the

17. *Id.* at 1130-31.

E.C. was to promote and facilitate free trade within the European Community, so a kind of neo-liberal, free-trade bias pervades the whole project of the E.U.

Surely one effect to date of E.U. law has been to invalidate a large mass of protective domestic legislation in the name of the principles of free movement. But at the same time, Member State regulation has to some extent been replaced by E.U. regulation. Some aspects of E.U. regulatory policy suggest that the E.U. approach has tended toward the more state-centered end of the political economy spectrum, like that of the individual European states. For example, it may at first blush appear surprising that the Commission has pursued such an interventionist competition policy, even promulgating standard-form contracts for patent licensing, but the interventionism results naturally from the block-exemption power that the Commission has in this area.¹⁸ With respect to the collection and transmission of personal data, the E.U.'s Directive 95/46/EC imposes significant protections for personal privacy while "the United States has . . . left the protection of privacy to markets rather than law."¹⁹

I do not know enough about current E.U. law to characterize its political economy with any assurance. More study is needed. Moreover, I think that Stein would counsel us to be wary of being overly rigid in our concepts. With regard to the concern that there is no "European people," he points out that the E.U. is also not a nation-state. It is something new "that calls for its own idiosyncratic solution" (p. 342). Stein seems to align himself with those who think that a European identity can form on top of²⁰ the discrete identities of citizens of the member states so that a meaningful form of democracy can be developed at the E.U. level (p. 343). So too, it is possible that the E.U. is developing a unique political economy that does not look like that of any of its member states and that is still quite different from that of the United States. But whatever form the E.U.'s political economy takes, it is an important feature of the Union which we must better understand, both in order to better understand the E.U. and in order to develop a more comprehensive understanding of divided-power systems.

18. Imelda Maher, *Competition Law and Intellectual Property Rights: Evolving Formalism*, in *THE EVOLUTION OF EU LAW* 598, 609-13, 622 (Paul Craig & Gráinne de Búrca eds., 1999).

19. Joel R. Reidenberg, *E-Commerce and Trans-Atlantic Privacy*, 38 *HOUS. L. REV.* 717, 730-31(2001).

20. Problems of E.U. architecture again! *See supra* note 3.

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In effect, I have been arguing in this last section to elaborate Stein's latest model for divided-power systems. In his "Panel Statement on *Democracy without "a People,"*" Stein proposed a model, based on the democratic liberal state, that had three required components: (a) "democracy," (b) "constitutionalism" (rule of law and protection of basic individual rights), and (c) "respect for civil society and market economy" (p. 336). I have in effect been suggesting that we need further study with regard to the part of (c) that concerns the market. At a minimum, it seems likely that the citizens of a divided-power system will have little allegiance to a divided-power system unless they can see themselves as able to gain significant benefits from the system's market economy, but within the various democratic liberal states, there is considerable variation in political economy. In the current period following the decisive collapse of communism, it is tempting to assert that at least the very far state-centered end of the spectrum, the command economy, is not acceptable, if for no other reason, then on the ground that it threatens to undermine all the other required components. However, I think it important for theorists of divided-power systems to hold an open mind on the issue. People are always going to seek some forms of communalism, and there are no clear dividing lines along the political economy spectrum. What does seem clear is that the choice of political economy is likely to be associated with certain choices about the structure of governmental institutions and law, so we need to understand the connections better. Stein's comparative study of divided-power systems has helped put us in position to take this next step.

These issues about divided-power systems are not just academic questions. Recent protests against the power of the WTO and concern about the transparency and participatory quality of its governing processes, as well as the dramatic reconstitution of the social, political and economic orders of countries emerging from communism show that we have a current, pressing need to understand these matters better. Moreover, the astonishing degree of integration in Europe achieved already in just half a century of the E.C./E.U., as well as the relatively recent creation of the WTO are major steps toward greater integration on a worldwide basis. Is it possible that there may soon be opportunities to restructure the whole world order? Stein tells us that over the years he has turned gladly to the E.C./E.U. as compensation for the frustrations of trying to deal with the broader problems of world order (p. 9). I believe, however, that if and when opportunities to restructure the general world order do open up, we will find that our ability to address the issues have been materially aided by the fine comparative work Stein has done, especially as represented in *Thoughts from a Bridge*.