INTRODUCTION TO THE SYMPOSIUM ON CONVERGENCE AND DIVERGENCE IN PRIVATE LAW

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INTRODUCTION

This Introduction summarizes the twelve articles presented in the "Symposium on Convergence and Divergence in Private Law," which are now being published subsequently in the *Southern California Law Review* in 2019. One group of articles proposes theories (roughly consistent with one another) to explain convergence of torts, contract, property, unjust enrichment, among other fields, across jurisdictions, within and beyond the United States. These articles offer theories to explain why the divergence of private law systems continues to persist today. Many articles in this issue draw their inspiration from a wide range of substantive areas, including patent law, civil procedure, property, torts, and contract from the United States, the United Kingdom, continental Europe, and China. Indeed, two contributions to the symposium amass information about the evolution of property doctrines from more than one hundred countries in order to demonstrate their points. The following two Parts of this Introduction weave the themes of the twelve articles together in more detail.

I. CONVERGENCE/DIVERGENCE THEORY

Arguably the two greatest challenges to any viable social system are, first, to control the use of violence and, second, to encourage cooperation among different actors. The first preserves both human and natural resources

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from destruction. The latter allows for their more efficient deployment via either exchange or corporation. Understanding these two basic challenges helps frame the enduring questions that arise in comparative law. The first asks simply: are legal systems more alike to each other than they are different, or is the opposite true? Second, are the similarities that we see across different legal systems a result of the simple fact that later legal systems, looking self-consciously for models, borrow legal rules, practices, and institutions from other systems that have proved their mettle, or is the process one of independent discovery of basic rules through a combination of adjudication and legislation? And a third, related question goes as follows: where there are differences that do emerge and persist across legal systems, are these on fundamental questions of social organization, or are they typically on matters of procedure and detail?

In this collection of articles, several big-picture contributions jointly lay out a clearer theory of convergence and divergence in private law. Richard Epstein's essay starts with the Roman and natural law framework and argues that the laws of physics and biology necessarily induce convergence in private law on the fundamental matters of substance, even if they allow for, indeed encourage, differences on matters of procedure, instructively called adjectival law in some of the earlier treatments of the subject. The ubiquity of institutions of marriage, the acquisition and transfer of property, the dominant role of torts (to deal with force), and contracts (to foster cooperation and exchange), Epstein argues, demonstrate his point. The differences on matters of form and procedure do not undermine this picture, but only show why and how a stable set of general norms have to be adapted to concrete circumstances.[1]

Saul Levmore, likewise, advances a similar general theory but focuses his attention more narrowly on tort law, which is the main tool available in all systems of private law to control the use of force. Levmore predicts that convergence takes place in the "upstream"—on basic social norms—while divergence happens in the "downstream"—on the proper mixture of remedies, most notably damages and injunctions. In Epstein's theory, "low-level" divergence occurs and does not refute the theory. Downstream and low-level operate as parallel descriptors for the same theoretical account. Unlike Epstein, Levmore does not develop a natural law theory based heavily on physics and biology. Rather, in his conception, the driving forces of

1. *See generally* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995) (arguing that a complex society can be governed effectively by six core principles); Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 713 (1989) (arguing that utilitarian principles track natural law theories).

convergence in his theory are efficiency and commonly held moral intuition. A clearly efficient solution that conforms with moral intuition is likely to be observed everywhere those intuitions hold. By contrast, when multiple solutions appear to be efficient, or when an efficient mechanism is un- or even counter-intuitive morally, divergence may emerge on substantive as well as procedural issues.[2] One illustration is the constant tension between strict liability and negligence as the basic organizing conception for tort damages. The absence of a dominant solution on this, as on other problems, precludes complete convergence. The overall effects of the differences are hard to pin down in light of the complex trade-offs that each liability rule offers, which explains why separate legal system often solve these problems in their own way—or indeed why a single legal system finds it difficult to get convergence on the dispute rules.

The theoretical framework in Yun-chien Chang and Henry Smith's article maps onto the Epstein-Levmore theory, especially Levmore's. Chang and Smith argue that the structure of property law has to converge to an exclusion-based architecture for such key resources as land, animals, and chattels due to high transaction costs.[3] Nonetheless "styles"[4] of property law may diverge, especially when the property doctrines are interconnected in the system of property and the starting points across jurisdictions are different. Structures are upstream, while styles of delineating property are downstream. Chang and Smith predict that "isolated"[5] doctrines (in the downstream) facing efficiency pressure will tend to converge. Nonetheless, overall, given that the whole upstream property structure will converge, at least relatively speaking, the downstream property style will appear to be divergent. Chang and Smith's article uses data on dozens of property doctrines from 119 jurisdictions to support their theoretical predictions. The "as expected" finding also lends support to the Epstein-Levmore theory.

Another contribution that uses large-scale comparative data to support theoretical predictions is authored by Giuseppe Dari-Mattiacci and Carmine

2. *See* Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43 *passim* (1987).

3. For how and to what extent common resources like water are also exclusion-based, but with a heavier use of governance, see Henry E. Smith, *Governing Water: The Semicommons of Fluid Property Rights*, 50 ARIZ. L. REV. 445, 466–75 (2008).

4. Style is a characteristic manner of delineating legal relationships at the surface level. *See* Yun-chien Chang & Henry E. Smith, *An Economic Analysis of Civil Versus Common Law Property*, 88 NOTRE DAME L. REV. 1, 1–2 (2012).

5. Isolated doctrines are not intertwined with other doctrines in the same legal system. Changing them will create little ripple effect in the system. *See* Yun-chien Chang & Henry E. Smith, *Convergence and Divergence in Systems of Property Law: Theoretical and Empirical Analyses*, 92 S. CAL. L. REV. 785, 788 (2019).

Guerriero. Their empirical analysis uses a unique data set to address the perennial triangle that involves the good-faith purchaser against the original owner with respect to the disposition of stolen and embezzled goods in 126 countries. Holding the thief or embezzler liable is an easy question on which there is uniform convergence. But with the thief or embezzler out of the picture, does the law protect the original owner or the good faith purchaser, and why?

We now get into one of those gray zones identified by both Epstein and Levmore. The take-away finding of Dari-Mattiacci and Guerriero is that there is first-order ("downstream") divergence across countries and second-order ("upstream") convergence. More specifically, most countries provide more protection to good-faith buyers of embezzled goods than to those of stolen goods, and most countries afford more protection to those parties involved in commercial transactions than to those engaged in non-commercial transactions. This global phenomenon results from trade-off of two concerns. The first is the ex ante incentives (inducing parties to protect their own interests) and the second looks to the ex post values (assigning entitlements based on allocative efficiency). Moreover, Dari-Mattiacci and Guerriero's empirical analysis suggests that certain key cultural attributes dictate a pattern of divergence across countries found by Levmore over three decades ago. Multimodal efficient solutions, plus distinct moral and cultural intuitions, appear to be the recipe for divergence.

Moving to the realm of contract law, Marcus Cole argues that market and jurisdictional competition lead to the adoption of "the law of one law"; that is, uniformity in the rules of different legal systems whose key players have to interact with each other. A prime example for Cole is China's decision to emulate the Vienna Convention for the International Sale of Goods in its 1999 Contract Law.[6] We might add that France, Germany, Japan, among others, all recently amended the contract part of their civil codes (but not the property part!), presumably to move closer toward one another. As Cole reminds us, the process of convergence is long. Notwithstanding the pressures toward convergence, we may find divergent bodies of contract law persistent even as the gap between national contract laws continues shrinking—slowly. The higher volume of multinational transactions drives all parties towards a system of convergence. In one prominent recent development, the emergence of blockchain technology enables the development of self-executory "smart contracts," and the

6. For the evolution of China's private law, see generally PRIVATE LAW IN CHINA AND TAIWAN: LEGAL AND ECONOMIC ANALYSES (Yun-chien Chang et al. eds., 2017) (documenting the evolution of contract law, tort law, property law, and corporate law in China in the past several decades).

abundant boilerplate contracts and other resources on the Internet empower even an ordinary consumer to propose a contractual term to her favor. Thus, the basic theory here predicts this nice conundrum: on the one hand, contract law is fast converging; on the other hand, the increased pace of contractual transactions requires standardized terms that the parties customize to govern their own set of business arrangements.

A final piece to the theoretical mix is offered by Robert Cooter and Ariel Porat's article that examines eight rules of torts and restitution side by side. They show that the right rules regarding disgorgement in restitution and compensation for harm in tort are symmetrical in their economic reasoning. Yet the legal treatment of these rules is divergent in virtually all legal systems. That is, when, say, one rule of compensation is adopted in strict liability, its symmetrical rule (here, strict liability for disgorgement of benefit in unjust enrichment law) is not necessarily adopted. Cooter and Porat argue that more convergence in the legal treatment is more efficient. To explain the lack of convergence, one may again refer to Levmore's theory. The efficiency case for adopting either a rule of negligence or strict liability in torts is widely accepted in law and economics.[7] In contrast, the choice of efficient restitution rules is still debated—scholarly opinions have not converged.[8] In addition, the moral intuition for compensating harm is stronger and clearer than that for returning unrequested benefit. The good news is that the higher the stakes, the risk of higher error costs leads to a stronger movement toward convergence.

II. CONVERGENCE/DIVERGENCE IN COMPARATIVE CONTEXT

The second set of articles in this issue deal with more particularized institutions. Using English law as his benchmark, Adam Mossoff gives an account of the incorporation and transformation of traditional English patent law into the United States, with its very different constitutional tradition both on matters of federalism and individual rights. In England, at least historically, patents were commercial monopoly privileges conferred to creators—what Mossoff terms "regulatory entitlements." Often times they were given to allow private parties to have local monopolies on importation

7. *See generally* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (2004) (providing an overview of the law and economics approach to the law).

8. *See, e.g.*, Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65 *passim* (1985); Ariel Porat, *Private Production of Public Goods: Liability for Unrequested Benefits*, 108 MICH. L. REV. 189 *passim* (2009); Ariel Porat, *Economics of Remedies*, *in* 2 THE OXFORD HANDBOOK OF LAW AND ECONOMICS: PRIVATE AND COMMERCIAL LAW 308, 308–09 (Francesco Parisi ed., 2017). On the other hand, for a defense of this asymmetry, see generally Richard A. Epstein, *Positive and Negative Externalities in Real Estate Development*, 102 MINN. L. REV. 1493 (2018).

as political grant from the Crown, always anxious to find new sources of tax revenue. These grants were not awarded for a new advance in science or the practical arts. At the critical constitutional juncture, the U.S. patent system in the late eighteenth century was structured on a consciously different model, namely as one of private property rights, given in exchange for the creation of new technologies that might never be made if the inventor did not enjoy for limited periods the right to exclude others from selling the patented technology, without necessarily allowing the patentee to sell the good if other obstacles (for example, FDA approval), block the transaction.

This U.S. private property (which has both its defenders and opponents at home)[9] model has attracted followers—including China—thus causing convergence toward the U.S. model in non-common law countries. Recently, however, Mossoff observes that the United States has been shifting back toward the regulatory entitlement model, which subjects patents to much greater control by treating them as public rights subject to the control of the state.[10] Given Mossoff's causal account of the private property model leading to growing innovation, efficiency pressure should help keep the United States from drifting away from the century-old desirable equilibrium, at least if the anti-patent forces do not come to dominate the federal court system. This rising tension between politics and economics is worth tackling for theorists of convergence and divergence in the future.

Shyamkrishna Balganesh also uses a comparative approach to study the operation of copyright and contract law in the United Kingdom and the United States to show their polar opposition in statutory interpretation. Balganesh observes that interpreting private law statutes is primarily a public law enterprise in the United States,[11] in contrast with the deeply-rooted

9. For a comprehensive review of the basic choices, see OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW (Rochelle Dreyfuss & Justine Pila eds., 2018). The two general essays are Rochelle C. Dreyfuss & Justine Pila, *Intellectual Property Law: An Anatomical Overview*, *in* OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW, *supra*, at 3, and Richard A. Epstein, *The Basic Structure of Intellectual Property Law*, *in* OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW, *supra*, at 25.

10. *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018). For criticism from the property rights perspective, see generally Richard A. Epstein, *The Supreme Court Tackles Patent Reform: Post-Decision Article: Inter Partes Review Under the AIA Undermines the Structural Protections Offered by Article III Courts*, 19 FEDERALIST SOC'Y REV. 132 (2018).

11. Statutory easement is a related example. While all civil law countries contain provisions in their civil codes regarding access to landlocked land, they treat their national solutions as creating a statutory (not voluntary) right-of-way between two private parties. In contrast, in the United Sates, state statutes conceptualize the statutory easement as private condemnation, which shows the heavy influence of public-law thinking. *See* JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 4:14 (2012); Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 546 (2009); Yun-chien Chang, *Hybrid Rule: Hidden Entitlement Protection Rule in Access to Landlocked Land Doctrine*, 91 TULANE L. REV. 217, 230–33 (2016).

private law tradition that holds in the United Kingdom. Put differently, interpreting private law statutes in the United Kingdom starts with treating the interaction between private parties as the focal point of the analysis, so that, ultimately, internal coherence within the private law system takes center stage. By contrast, interpreting private law statutes is far more explicitly policy-based in the United States, where constitutional law and norms, not found in the United Kingdom, supply external values that often lead to undermining the coherence of the private law system in order to make sure that private actions are blessed only when they are understood by courts to be designed solely to advance the public good. Note this contrast. Mossoff regards the evolution of U.K. patent law as a bad paradigm that is slowly seeping into U.S. law. In contrast, Balganesh thinks that U.K. copyright law offers a better model that the United States has shown no sign of adopting.

We offer another interesting comparison to Balganesh's observation: the legal methodology of statutory interpretation in Germany ("*Rechtdogmatik*") starts with the systematic explanation of private law principles, which are then duly exported into public law. This progression arose arguably because the German Civil Code ("BGB") of 1900 already created what many jurists there believe to be a closed and internally coherent system. In that framework, public law values, or policies, enter private law only indirectly. When public law, such as the German Administrative Procedure Act of 1977, was later enacted and its jurisprudence developed, private law concepts such as unjust enrichment and contract were borrowed by the public law. The same pattern held in selecting the mode of statutory interpretation. Therefore, unlike the U.K. courts that interpret private law as private law and the U.S. courts that interpret private law as public law, the German courts interpret public law as private law.

Using survey data, Stefanie Jung's article looks deeper into the moral intuition account by Levmore. Jung distinguishes ideas of moral philosopher, moral beliefs, sense of justice, and general values. Jung's surveys administered in the United States and Germany show that lawyers, judges, professional negotiators, and law students in these two countries have similar moral beliefs and senses of justice regarding the proper limits on the use of deception in the course of contract negotiations. Yet the contract law regarding that same topic of deception does not converge. Jung posits that the divergence between American and German law can be explained by differences in moral philosophy. On the German side, the Kantian influence leads to high regard for noninstrumental values, which in turn leads to attaching a greater weight to the autonomy of the deceived person. In contrast, the American realist system tends to be more utilitarian and thus to

weigh commercial convenience more heavily than abstract notions of individual autonomy. A bold generalization of Jung's study would be that the constellation of ideas of moral philosopher, moral beliefs, sense of justice, and general values has to be aligned to facilitate convergence of private law as developed within legal systems.

Finally, in the context of nuisance law, Vanessa Casado Perez and Carlos Gomez Liguerre examine data from five European jurisdictions (France, Germany, Spain, the Netherlands, and Catalonia) to test a hypothesis of convergence, which they do not find. Under Chang and Smith's framework, that divergence may not be surprising. Nuisance rules are styles and governance (not exclusion) in nature, so convergence is not necessary. Nuisance rules are on the interconnected end of the style spectrum, and their initial conditions, such as the level of industrialization, differ. It does not help that, as Perez and Liguerre point out, the Roman law of nuisance—the common origin of the studied jurisdictions—is somewhat unclear, having evolved from the Latin notion of Nocumentem—or harm as a result of some actor—which operates as a fuzzy concept, as does the common usage of the term "nuisance" in ordinary English. Absent a clear definition, some divergence in the civil codes is to be expected on the outer reaches of the law, even though core cases like the emission of poisonous gases and stenches will be observed more widely, in part because on these matters at least, ordinary language across cultures tends to converge.

Like several other articles in this Symposium, China is featured in the analysis. More so than others, Aaron Simowitz's article puts China at the center stage. Looking closely at foreign money judgment enforcement, Simowitz demonstrates how the old, formal approach of reciprocal enforcement by bilateral treaties has been replaced by the new approach of de facto reciprocity. At least in the case of China, an intermediate Chinese court has recognized a money judgement by a U.S. court. Simowitz then puts this symbolic case in a broader context and discusses how the United States, European Union, and Mexico, among others, handle foreign money judgment enforcements.

Looking at local governments within the United States, Christopher Serkin uncovers divergence in regulatory goals in land use and calls the new trend "multimodal convergence." To be exact, in total, he identifies and categorizes fifteen different types of land-use mindsets. Serkin posits a fierce jurisdictional competition among local governments to attract high-valued property uses in a world where both voice and exit function as viable, overlapping options. In these settings, diversity (or, for that matter, divergence) is elevated to prima facie a phenomenon well worth celebrating.

Nonetheless, as Serkin cautiously points out, compliance costs for developers necessarily go up when divergence is the rule. At the same time, these developers often negotiate heavily with local governments in order to identify and respond to certain rent-seeking opportunities, which in turn can lead not only to sensible deals, but also to further inefficiencies in negotiation.

CONCLUSION

It should be evident that the Articles collected in this Symposium offer only a limited glimpse into what is a constant and evolving phenomenon. We are pleased that this collection of essays contains a wide set of analytical tools, which are then applied to a diverse set of subject matter areas. Our hope is that our readers can learn from the material that is collected here, and that they will be inspired to continue research along some of the many paths that have been created or refined in these essays.