Articles

The Desirability of 'Weak' Form Legal Harmonization: Perspectives from Statutory Interpretation and Legal Coherence

*By Mark Humphery-Jenner **

A. Introduction

Harmonized regulatory frameworks have become increasingly important. This is especially so following the global financial crisis, where there have been calls for a harmonized international response to securities regulation.[1] Examples in the EU include MIFID and the Takeover Directive. MIFID regulates securities traders and stock exchanges. It contains rules that indicate the obligations on exchanges and traders vis-à-vis matters such as achieving the "best execution" of trades. The Takeover Directive regulates mergers and acquisitions, their regulations include regulations on anti-takeover provisions, compulsory acquisitions, and the method of paying for acquisitions. These impose a 'weak' form of harmonization: member states can opt out of some provisions, many provisions are vague (and require definition by domestic regulators) and member states retain the right to legislate around the harmonized framework.[2] These directives have not received universal support.

These forms of "weak" harmonization have received some criticism. The ability to "opt-out" of particular provisions has led to suggestions that a weak form of harmonization might lead to "regulatory arbitrage" or a "Delaware effect" (in which member states

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[1] *See especially* Donald Langevoort, *Global Securities Regulation after the Financial Crisis*, 13(3) J. OF INT'L ECON. L. 799-815 (2009); Mark Humphery-Jenner, *Securities Fraud Compensation: A Legislative Scheme Drawing on China, the US, and the UK,* 38(2) LEG. ISS. OF ECON. INT. 143-162 (2011); Elaine Fahey, *Does the Emperor Have Financial Crisis Clothes? Reflections on the Legal Basis of the European Banking Authority,* 74(4) MOD. L. REV. 581-595 (2011).

[2] *See especially* the discussion in Joseph McCahery & Erik Vermeulen, *Does the European Company Prevent the 'Delaware Effect'?*, 11(6) EUR. L. J. 785 (2005); Joseph McCahery & Erik Vermeulen, *Does the Takeover Bids Directive Need Revision?,* Tilburg L. and Econ. Center (TILEC)(2010); Joseph McCahery & Luc Renneboog, *The Economics of the Proposed European Takeover Directive,* Centre for European Policy Studies (2003).

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compete to pass the most lax and most accommodating laws).[3] Further, the imposition of vague provisions leads to allegations that the regulation scheme is uncertain and arbitrary. A "weak" regime compares with a "strict" harmonization regime, which limits the ability of member states to opt out of particular provisions, strictly defines technical terms (so that member states do not define them), and in the extreme, would have a centralized regulatory regime. However, this does not address the issue of whether "strong" harmonization is any more desirable. Thus, the purpose of this paper is to compare the abilities of a "weak" regime and a "strict" regime to meet necessary conditions for principled harmonization.

I focus on the necessary conditions for principled harmonization. An international directive is principled only if both (a) its general form is principled, and (b) its specific provisions are principled. The specific provisions are the particular regulations that the framework imposes. For example, they could include the specific definition of "best execution" (in MIFID) or the board neutrality rule (in the Takeover Directive). The general form is the type of harmonization it mandates, whether it allows member states to opt out, and whether it leaves states with residual legislation power. A general form is principled only if (1) it promotes appropriate degrees of legal coherence, and (2) its provisions can evolve over time to meet changes in the commercial environment.

I focus on whether weak-form harmonization meets the necessary conditions of (1) promoting legal coherence, and (2) enabling flexibility. For concreteness, I define a "weak" form of regulatory scheme as one in which the member states agree to a harmonized scheme, but (a) the scheme allows member states to opt out of some provisions, (b) some provisions of the scheme are 'vague' and require interpretation by domestic regulators, and (c) member-states retain the power to regulate around the framework.[4]

I find that weak-form harmonization is more able to promote legal coherence and legal flexibility. Specifically, enabling countries to opt out of ill-fitting provisions, and allowing them to define vague rules, means that domestic courts and legislators can adapt legislation to changing commercial circumstances. This allows the law to respond to emerging challenges. This is especially important in finance, where flexibility is important for enabling countries to adapt to new financial instruments.

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[3] For a summary of the arguments *see* Joseph McCahery & Elaine Vermeulen, *Does the European Company Prevent the 'Delaware Effect'?*, *supra* note 2.

[4] The contrary position is one where the imposition of a central regulatory framework completely deposes any power that the member-states might have. This is the case under The Australian Constitution 1901, where federal legislation under s 51 of the constitution displaces state legislation. *See*

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These findings have significant legal implications. The key implication is that it lends some support for the current EU framework, which imposes a weak form of regulatory harmonization. Further, the findings help to guide the optimal structure of other regional frameworks, and of federal arrangements that attempt to harmonize disparate state laws. I note that I only analyze whether weak-form harmonization meets the necessary conditions for weak harmonization to be principled. These are not sufficient conditions. For example, a weak regulatory framework can still fail if its provisions are inappropriate, as is arguably the case with some frameworks such as the Takeover Directive.[5]

The findings also contribute to the literature on "Better Regulation" in the EU. The EU is pursuing a "Better Regulation" program, whereby it aims to improve the legislative decision-making in the EU legislature.[6] One aspect of this involves improving the type of international regulations that the EU parliament imposes. By providing some justification for the use of a "weak" form of coherence, I indicate ways in which the EU parliament could enhance legislation.

The balance of this article proceeds as follows. Section 2 discusses why a "one-size-fits-all" approach to regulation might be inappropriate. This section then begs the question of how to promote harmonization while accounting for different regimes. Section 3 and Section 4 then discuss how a "weak" form of harmonization might address the need for flexible harmonization. Section 3 analyses whether this weak regulatory harmonization will promote principled international coherence. It addresses the issue of whether weak-form harmonization will still promote sufficient legal coherence. Section 4 examines whether the weakly harmonized framework will allow flexible law that can adapt to changes in commercial circumstances. This addresses the issue of whether the weak form of harmonization can maintain sufficient flexibility. Section 5 concludes that weak regulatory harmonization is justifiable.

[5] For example, the provisions of the Takeover Directive arguably facilitate managerial entrenchment and value destruction. *See* Mark Humphery-Jenner, *The Impact of the EU Takeover Directive on Takeover Performance and Asset Growth*, 18(2) J. OF CORP. FIN. (2012).

[6] Wim Voermans & Ymre Schuurmans, *Better Regulation by Appeal* 17(3) EUR. PUB. L. 507 (2011); Gijs van Dijck & Rob van Gestel, *Better Regulation through Experimental Legislation*, 17 EUR. PUB. L. 539 (2011); Alberto Alemanno, *The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission's Walls or the Way Forward?*, 15(3) EUR. L. J. 383 (2009).

B. Why a "One Size Fits All" Approach is Inappropriate: the Need for Geographic Flexibility and Temporal Flexibility

The first issue is to address why a "one size fits all" approach might be inappropriate. I argue differences in legal regimes make a one-size-fits-all approach inappropriate. These differences can change over time as legal and economic conditions change. This suggests that both geographic flexibility and temporal flexibility are necessary.

First, different regulatory institutions render different laws appropriate. Empirical and game theoretic literature suggests that the strength of a country's regulatory institutions dictates the effectiveness of its laws.[7] For example, Bhattacharya and Daouk argue that having no laws can be better than having strong laws that are not enforced.[8] They argue that if there is no law, then everyone "deviates". However, if there is a strong law that is not enforced, then law-abiding people will comply, and deviants will deviate more severely in order to take advantage of law-abiding people. In the context of harmonization, this means that different member states must apply laws that fit with their regulatory institutions. For example, it may be inappropriate to apply stringent "board neutrality rules" (during takeovers) within a country that lacks the regulatory institutions to police those rules.

The concern over different regulatory environments can be significant even in relatively well-developed regions such as the EU. ***Table 1*** contains World Bank governance variables for EU countries in 2010.[9] I report the percentile rank for each country (where the rank is based on a full set of 214 countries). The figures indicate significant differences in various aspects of governance across the EU. Different countries in the EU are differently able to implement and regulate different laws. ***II. Figure 1*** displays the figures for the

[7] Utpal Bhattacharya & Hazem Daouk, *The World Price of Insider Trading,* 57(1) J. OF FIN. 75 (2002); Utpal Bhattacharya & Hazem Daouk, *When no law is better than a good law,* 13(4) REV. OF FIN. 577 (2009); Utpal Bhattacharya, Hazem Daouk & Michael Welker, *The World Price of Earnings Opacity*, 78(3) ACC. REV. 641(2003).

[8] Bhattacharya & Daouk, *supra* note 7.

[9] For uses of this data (based on prior years' statistics), *see* Daniel Kaufmann & Aart Kraay, *Governance Indicators: Where Are We, Where Should We Be Going?,* 23(1) WORLD BANK RESEARCH OBSERVER 1 (2008); David Dollar & Aart Kraay, *Institutions, trade and growth,* 50 (1) J. OF MON. ECON. 133 (2003); Sheng-Hung Chen & Chien-Chang Liao, *Are foreign banks more profitable than domestic banks? Home- and host-country effects of banking market structure, governance, and supervision*, 35(4) J. OF BANK. AND FIN. 819 (2011); Jens Forssbaeck, *Ownership structure, market discipline, and banks risk-taking incentives under deposit insurance,* 35(10) J. OF BANK AND FIN. 2666 (2011).

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"Corruption" measure for countries in the EU. A higher percentile rank indicates a better ability to remove corruption. The figures also illustrate that there is significant variation in the regulatory quality of EU countries and, thus, that a regional policy that assumes a homogeneous degree of regulation might be inappropriate. Therefore, in general, a one-size-fits-all approach to regulatory harmonization might not be appropriate.

I. Table 1: World Bank Governance Data for EU Nations in 2010

This table contains the values of World Bank Governance variables for EU nations in 2010. The World Bank data is available from: http://info.worldbank.org/governance/wgi/index.asp.

Country	Country Code	Accountability	Political Stability	Government Effectiveness	Regulatory Quality	Rule of Law	Corruption
Austria	AUT	95.7	88.7	97.6	93.3	96.7	92.3
Belgium	BEL	94.8	73.1	93.3	86.1	88.6	90.4
Bulgaria	BGR	62.6	57.5	56.5	71.8	53.1	52.2
Cyprus	CYP	82.9	58.5	90.4	90.0	86.3	82.8
Czech Republic	CZE	78.7	82.1	80.9	85.2	80.1	65.6
Denmark	DNK	98.6	84.4	99.0	100.0	98.6	100.0
Estonia	EST	85.3	67.9	85.2	91.9	83.9	78.9
Finland	FIN	97.2	94.3	99.5	99.0	100.0	98.1
France	FRA	89.1	70.8	89.5	87.1	90.5	89.0
Germany	DEU	92.9	74.1	91.9	93.8	92.4	93.3
Greece	GRC	73.5	40.1	68.4	73.7	66.8	55.5
Hungary	HUN	74.9	71.2	71.8	81.8	73.0	66.5
Ireland	IRL	92.4	83.0	87.6	94.7	94.3	92.8
Italy	ITA	75.8	62.3	67.9	77.0	62.6	57.4
Latvia	LVA	71.6	62.7	72.2	80.4	73.9	63.2
Lithuania	LTU	74.4	68.9	74.2	79.9	72.0	66.0
Luxembourg	LUX	97.6	95.3	93.8	95.7	97.6	95.2
Malta	MLT	86.7	90.1	82.8	90.9	90.0	79.4
Netherlands	NLD	96.2	79.7	94.3	98.1	97.2	97.6
Poland	POL	81.0	83.5	72.7	79.4	69.2	70.3
Portugal	PRT	84.8	69.8	81.8	75.6	83.4	81.3
Romania	ROM	61.1	54.7	50.2	74.2	56.4	53.6
Slovakia	SVK	73.0	85.8	77.0	81.3	66.4	64.6
Slovenia	SVN	78.2	75.5	81.3	74.6	82.5	75.6
Spain	ESP	85.8	39.2	79.4	84.2	86.7	80.9
Sweden	SWE	99.1	88.2	98.6	96.7	99.5	99.0

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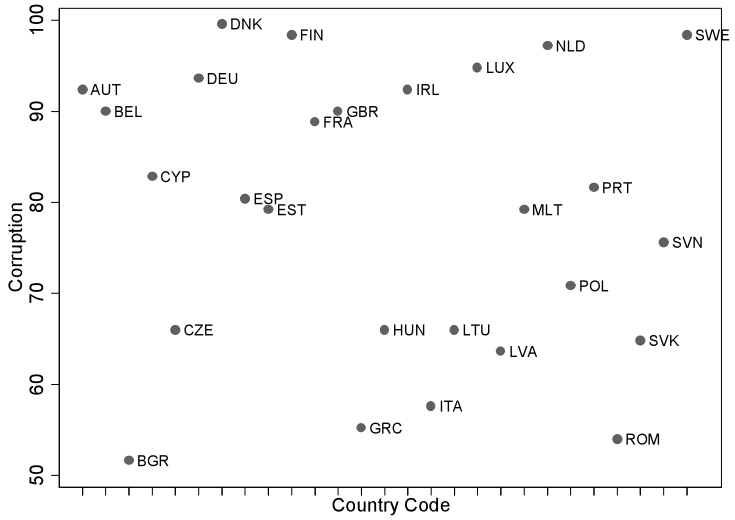
United Kingdom	GBR	91.9	58.0	92.3	97.1	94.8	90.0

II. Figure 1: Corruption World Percentile Ranks

This figure graphs the world percentile ranks in terms of "Corruption" in 2010 for the countries in the EU. The figures are from the World Bank Governance Indicators. A higher percentile rank indicates better governance (i.e. a better ability to detect and punish corruption).



Second, different countries have different demographics, different needs, and different commercial institutions, and, thus, need different laws. De Haas et al.[10] empirically show that legal strength, such as the strength of laws governing creditor protection, influences the types of loans that banks make (suggesting wide differences in bank loan portfolios across countries). Klomp and de Haan argue that different types of banking institutions require different types of regulation.[11] Bruno and Claessens argue that a legal regime's impact can vary depending upon the underlying quality and governance of firms within

[10] Ralph de Haas, Daniel Ferreira & Anita Taci, *What determines the composition of banks' loan portfolios? Evidence from transition countries,* 34(2) J. OF BANK. AND FIN. 388 (2010).

[11] Jeroen Klomp & Jakob de Haan, *Banking risk and regulation: Does one size fit all?,* (Forthcoming) J. OF BANKING AND FINANCE (2012).

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that regime.[12] Specifically, they show that stronger sovereign governance is more effective in markets where companies have weak corporate governance, and good governance companies in strict legal environments trade at a discount compared with good governance companies in "flexible" (or weaker) legal environments. Additionally, different cultural environments can induce different commercial practices. For example, Turkey, a potential future EU member, features a higher rate of Islamic banking than do other countries.[13] This could impose difficulties for a mandatory or strict multinational banking regulation that fails to account for these unique characteristics. Overall, this suggests that it is important for countries to be able to tailor their legal regimes to the nature of companies that operate within those regimes.

Third, the impact of legal histories might discourage a one-size-fits-all approach. Different legal regimes have different legal histories. These legal histories create "path dependence", whereby the country's legal family continues to influence the nature of its law. For example, countries from different legal "families" (e.g., Common Law, French, German, Scandinavian) have different degrees of investor protection.[14] Subsequently, Berkowitz et al.[15] argue that a country's historical legal "family" should influence the way that it structures contemporary law. They argue that this is because (1) the contemporary law must "make sense" within the country's legal context (i.e. fit within the country's institutional environment); and, (2) regulators and courts must be able to administer, interpret, and ally the law, which they can do only if they are sufficiently familiar with the nature of the law. Subsequently, empirical evidence suggests that legal developments are less effective if they are transplanted from a different legal environment.[16] This suggests

[12] Valentina Bruno & Stijn Claessens, *Corporate governance and regulation: Can there be too much of a good thing?*, 19(4) J. OF FIN. INTER. 461 (2010).

[13] *See* Steven Onega & Ilkay Sendeniz-Yuncu, *Which firms engage small, foreign, or state banks? And who goes Islamic? Evidence from Turkey*, 35(12) J. OF BANK. AND FIN. 3213 (2011). This problem is not unique to Europe. For example, the United States exhibits similar problems where differences in state-level demographics have induced differences in factors such as involuntary bank account closures. *See* Dennis Campbell, Asis Martinez-Jerez & Peter Tufano, *Bouncing out of the banking system: An empirical analysis of involuntary bank account closures* Journal of Banking and Finance(2012), Federal Reserve Bank of Chicago, PROCEEDINGS 462 (2008).

[14] Rafael La Porta, Florencio Lopez de-Silanes *et. al.*, *Law and finance,* 106 J. OF POL. ECON. 1113 (1998); Rafael La Porta Florencio Lopez de-Silanes *et. al.*, *Legal Determinants of External Finance*, 52(3) J. OF FIN. 1131 (1997); Holger Spamann, *The 'Antidirector Rights Index' Revisited*, 23(2) REV. OF FIN. STUD. 467 (2010).

[15] Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic development, legality, and the transplant effect*, 47(1) EUR. ECON. REV. 165 (2003).

[16] *Id.*, Table 5.

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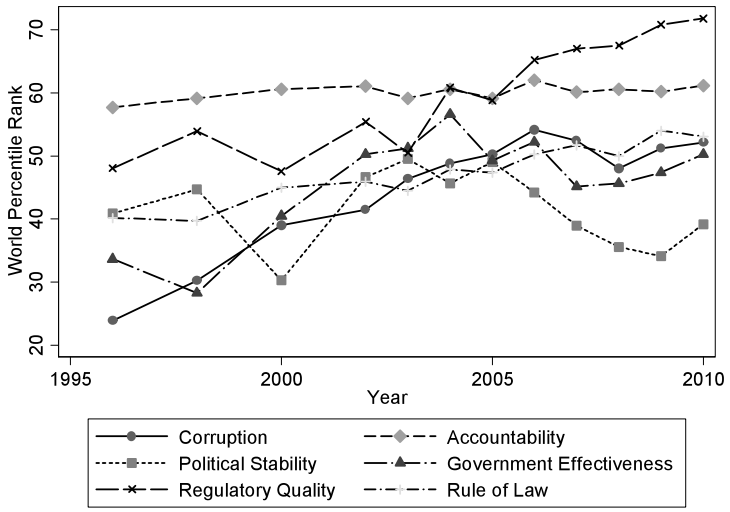
that a one-size-fits-all approach to harmonization is appropriate only if all member states' legal systems are from the same "legal family". In many cases, such as the EU, this is not the case, so a one-size-fits-all approach might not be appropriate.

It is also important for laws to be flexible over time. The need for temporal flexibility arises due to changes in legal and economic conditions. With respect to legal conditions, the strength of regulatory institutions can change over time. For example, in the EU, The World Bank reports significant variance over time in the lower standards of EU countries.
III. Figure 2 reports the world percentile rank of the worst governed country in the EU in each year. The statistics show a general level of improvement in the EU over time; however, they also show a significant level of time variation in country-level governance. This suggests that a framework that is locked into the regulatory environment a point in time risks becoming outdated. Thus, an inflexible regulatory framework might become inappropriate.

III. Figure 2: Governance over Time

This figure reports the minimum world percentile rank for the members of the EU over time. For example, of the set of EU countries, the country with the minimum corruption score in 1996 was Latvia with a world percentile rank of 24.



This section establishes that a one-size-fits-all approach to regulation might not be appropriate. The issue is then to analyze whether a weak form of harmonization, which

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would implicitly account for different forms of legal regime, would still promote sufficient legal coherence and would be sufficiently flexible to adapt to different legal circumstances.

C. Weak Form Harmonization and Coherence

The next issue is to determine whether a weak form of harmonization would promote principled legal coherence. A harmonized regulatory framework requires countries to adhere to an international framework. However, a weak regulatory framework also allows countries to define the domestic operation of this framework and opt out of provisions, and leaves member states with a residual legislative power to legislate around the provisions and in a manner that is not incompatible with the regulatory framework. That is, the weak regulatory framework imposes a weak form of legal coherence. [17]

The first key issue is whether this form of "legal coherence" is justifiable. Arguably, all law should be coherent.[18] Zapatero extends this, and argues that coherence in international law "should be the master value in any project of institutional coordination".[19] However, a coherent legal system (in this context) can have several different meanings and support for coherence is not universal.

Strong-coherence and weak-coherence[20] are two types of legal coherence. Weak-coherence envisages national laws as autonomous entities that are justified so long as they do not contradict the international framework. Strong-coherence envisages national laws as interrelated parts of a coherent whole that must not contradict the general framework, and must interrelate to one another. The main difference is that weak-coherence allows

[17] For a discussion of 'coherence' theories within legal frameworks, *see* Leonor Moral Soriano, *A Modest Notion of Coherence in Legal Reasoning A Model for the European Court of Justice,* 16(3) RATIO JURIS 296 (2003).

[18] *See e.g*. Zenon Bankowski & Neil MacCormick, *Statutory Interpretation in the United Kingdom*, *in* INTERPRETING STATUTES: A COMPARATIVE STUDY 365-373 (Neil MacCormick and Robert Summers (eds.), 1991); Phillipa Weeks, *Employment Law - A Test of Coherence Between Statute and Common Law*, *in* INTERPRETING STATUTES (Suzanne Corcoran and Stephen Bottomley (eds.), 2005); Douglas Brodie, *Legal Coherence and the Employment Revolution*, 117 L. QUART. REV. 604 (2001).

[19] Pablo Zapatero, *Searching for Coherence in Global Economic Policymaking*, 24 PENN. STATE INT'L L. REV. 595 (2006).

[20] *See* 'strict coherence' in Stefano Bertea, *The Arguments from Coherence: Analysis and Evaluation*, 25(3) OXFORD J. OF LEG. STUD. 369–391 373(2005); *see also* Robert Alexy & Aleksander Peczenik, *The Concept of Coherence and Its Significance for Discursive Rationality*, 3 RATIO JURIS 130 (1990); Jaap Hage, *Law and Coherence* 17 RATIO JURIS 87, 89 (2004).

domestic laws to be autonomous whereas strong-coherence requires domestic laws to form part of a larger interconnected whole.

Strong- and weak-coherence have different practical ramifications. Weak-coherence says a country can pass a national law if the regulatory framework has not taken away the power to do so. This means that the national laws can be completely independent, and are allowable if they do not contradict the framework. Such weak-coherence has significant,[21] but not universal,[22] support. Strong-coherence says that the elements of law form an integrated whole. This concept has some support,[23] but the support is not universal.[24] For practical purposes, this means that a country can pass a national law only if the international framework gives it the power to do so. In other words, national laws are justified only if they can trace their authority to the framework. The central difference is as follows: weak-coherence says that member states can regulate unless the harmonized framework removes the power, whereas strong-coherence says that member states cannot regulate unless the harmonized framework has given them the power.

I argue that weak coherence is preferable for three key reasons: (1) the practical reality of the international legislative process; (2) the desirability of allowing countries to quickly fill

[21] *See e.g.* G. R. Mailman & Assoc Pty. Ltd. v. Wormald (Aust) Pty. Ltd. (1991) 24 NSWLR 80, 99, *per* Meagher J.A.; Berthea, *supra* note 20; Veronica Rodriguez-Blanco, '*Genuine' Disagreements: A Realist Reinterpretation of Dworkin'; Rodriguez-Blanco, 'A Revision of the Constitutive and Epistemic Coherence Theories in Law*' 14(2) RATIO JURIS 212 (2001); *see also* the survey in Jaap Hage, *Law and Coherence,* 17(1) RATIO JURIS 87-105 (2004).

[22] *See e.g.* JOSEPH RAZ, *The Relevance of Coherence*, *in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 261 (Joseph Raz (ed.), 1994); Eveline Feteris, *A Survey of 25 Years of Research on Legal Argumentation,* 11 ARGUMENTATION 355(1997).

[23] *See* support for a 'principled taxonomy' in, PETER BIRKS, UNJUST ENRICHMENT (2nd ed., 2005); ANDREW BURROWS, REMEDIES FOR TORTS AND BREACH OF CONTRACT (2004); Andrew Burrows, *Remedial Coherence and Punitive Damages in Equity*, *in* EQUITY IN COMMERCIAL LAW (Simone Degeling and James Edelman (eds.), 2005); Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 UNIV. OF WEST. AUS. L. REV. 1 (1996); Peter Birks, *Equity, Conscience and Unjust Enrichment*, 23 MEL. UNIV. L. REV. 1 (1999); Peter Birks, *The Law of Restitution at the End of an Epoch*, 28 UNIV. OF WEST. AUS. L. REV. 13 (1999); Peter Birks, *Rights, Wrongs and Remedies,* 20 OXFORD J. OF LEG. STUD. 1 (2000); Peter Birks, *Three Kinds of Objection to Discretionary Remedialism*, 29 UNIV. OF WEST. AUS. L. REV. 1 (2000); Andrew Burrows, *We Do This At Common Law But That in Equity*, 22 OXFORD J. OF LEG. STUD. 1 (2002); Geoffrey Samuel, *English Private Law: Old and New Thinking in the Taxonomy Debates*, 24 OXFORD J. OF LEG. STUD. 335 (2004); *see also* Anthony Duggan, *Is Equity Efficient?* 113 L. QUART. REV. 601 (1997).

[24] Felton v. Mulligan (1971) 124 CLR 367, 392, *per* Windeyer J; O'Rourke v. Hoeven (1974) 1 NSWLR 80, 99, *per* Meagher J,; Pilmer v. Duke Group Ltd (in liq) (2001) 207 CLR 165, 201-202; Peter Cane, *Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law*, 25 OXFORD J. OF LEG. STUD. 393, 412 (2005).

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gaps in legislation; and (3) the need to allow countries to adapt legislation to their own national circumstances.

The first argument is practical. Laws in general,[25] and the laws of myriad international countries in specific,[26] are chaotic and do not practically form a coherent whole. Rodriguez-Blanco asserts that this misses the point of (international) legal coherence: namely, that coherence exists precisely to remove this chaos.[27] However, while removing chaos may be desirable, it is not practicable. The legislative process is usually an exercise in complex compromises.[28] This applies especially in international law. Thus, McCahery and Vermeulen analyze the EU Takeover Directive, and note that it is often impossible to reach an international agreement on an international framework, and, thus, compromises are necessary.[29] This suggests that it is sometimes practically necessary to adopt an ad hoc legal approach in which the international regulator leaves some contentious issues to member states/domestic authorities.

Second, weak-coherence allows countries to quickly address new developments and emerging gaps in the international framework. A practical example helps to illustrate the

[25] Hage, *supra* note 21.

[26] Joseph Camilleri, *Fragmentation and Integration: The Future of World Politics*, *in* CONFLICT RESOLUTION THROUGH NON-VIOLENCE 45 (K. D. Gangrade and Rameshwar Misra (eds.), 1990; Jost Delbrück, *A More Effective International Law or a New "World Law?" Some Aspects of the Changing Development of International Law in a Changing International System*, 68 IND. L. J. (1993); Earl Fry, *Sovereignty and Federalism: U.S. and Canadian Perspectives: Challenges to Sovereignty and Governance* 20 CAN.-U.S. L. J. 303 (1994); Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORD. L. J. 27 (2005); Joost Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 MICH. J. OF INT'L L. 903 (2004); Pemmaraju Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or Its Fragmentation*, 25 MICH. J. OF INT'L L. 929 (2004); Michael Reisman, *International Law after the Cold War*, 84 AMER. J. OF INT'L L. 859, 864 (1990); Randa Salama, *Fragmentation of International Law: Procedural Issues Arising in Law of the Sea Disputes*, 19 AUS. AND NEW ZEAL. MAR. L. J. 24 (2005); Karl Zemanek, *The Legal Foundations of the International System: General Course on Public International Law*, 266 *RECUEIL DES COURS:* COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 62 (1997); *see also*, Project Blue Sky Inc v. Australian Broadcasting Authority (1998) CLR 335 (1998) 194 CLR 335, [60], *per* Brennan C.J.

[27] Veronica Rodriguez-Blanco, *A Revision of the Constitutive and Epistemic Coherence Theories in Law*, 14(2) RATIO JURIS 212-232(2001).

[28] Thomas Giligan, William Marshall & Barry Weingast, *Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887,* 32 J. OF L. AND ECON. 35-62 (1989); *see also* Orrin Hatch, *Legislative History: Tool of Construction Or Destruction*, HARV. J. OF L. AND PUBL. POL. 43-50 (1988).

[29] *See* Joseph McCahery & Elaine Vermeulen, *supra* note 2.

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difference between weak-coherence and strong-coherence. Suppose there is a new type of complex derivative security (CDS) and that no provisions in the existing framework cover CDSs. If weak-coherence applies, then any country can legislate on CDS instruments. If strong-coherence applies, then countries cannot legislate on CDSs because the framework has not directly vested them with power to do so. Thus, if strong-coherence applies, then there may be gaps in the law. If weak-coherence applies, then countries can address momentary gaps in the law that may exist until the international framework addresses them.

Third, weak-coherence allows countries to adapt law to their domestic circumstances. Wellens and Hafner indicate that a unified securities law prevents countries developing laws that are suitable to their domestic context.[30] However, the EU's current approach can side step this issue by allowing countries to adapt the law to their circumstances. Examples from the EU Takeover Directive and from MIFID are illustrative.

The EU Takeover Directive provides an example. Two examples are informative. (1) Countries can define rules differently: different countries can define the percentage of voting rights that constitutes "control" for the purposes of an acquisition (Article 5(3)). This allows countries to adapt the rules based on the level of ownership dispersion in that country. (2) Countries can exempt particular companies from particular rules (Article 12). This allows countries to adapt rules to particularly systemically important or nationally important institutions that might require special protection.

MIFID is also relevant. The best execution provisions in Article 21 provide countries with flexibility. Here, trading firms must "take all reasonable steps…to obtain the best possible result for their clients". MIFID does not define what constitutes "reasonable steps" or the "best possible result".[31] Further, while Article 21 lists factors firms must consider when determining the "best possible result" it does not indicate how firms should weigh these factors. This allows different countries to define what constitutes "reasonable steps" based on the practical realities of the trading infrastructure in that country, and the extent to which traders can access international financial markets.

[30] *See e.g.* Gerhard Hafner, *Pros and Cons Ensuing From Fragmentation of International Law*, 25 MICH. J. OF INT' L LAW 949 (2004); Karel Wellens, *Fragmentation of International Law and Establishing an Accountability Regime for International Organization: The Role of the Judiciary in Closing the Gap*, 25 MICH. J. OF INT'L L. 1159 (2004).

[31] A 'reasonableness' standard is common in law. However, the definition depends on the context in which it appears. Given that MIFID is unique in its cross-border regulation of financial markets, there is no comparable Common Law or Statute Law from which one could obtain the definition of 'reasonableness' in this context.

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Overall, these arguments suggest that a weak-coherence international framework is desirable. This weak-coherence is politically expedient and allows member states/domestic legislators to fill emerging gaps in the regulatory framework and to adapt laws to their national/domestic circumstances.

D. Weak Forms of Harmonization and Flexibility

A harmonized regulatory scheme is appropriate only if it can adapt to different locations and time periods. This is particularly important in fields like banking, where different countries feature different types of banking institutions and where different forms of banking regulation are important for different types of banks.[32] A legal framework can adapt to different legal environments only if the existing approach to statutory and treaty interpretation permits words in an international scheme to adapt to different contexts. It can do this only if (a) courts may evolve the denotation of the words in the scheme, and (b) principles of stare decisis do not prevent courts from adapting the scheme to present circumstances. This article finds that established doctrines of interpretation allow a weak-form regulatory scheme to evolve over time.

I. Can the weak harmonized framework adapt to different times and geographies?

A harmonized regulatory framework must be able to adapt over time and to different geographies. A regulatory scheme can remain relevant only if the court allows the meaning of its words to dynamically change over time. A weak harmonized scheme can do this because it uses "fuzzy" words (words that are capable of a range of meanings[33]), which allow courts to adapt a weak harmonized regime to different situations. There are four key reasons.

First, the use of vague language implicitly indicates that the "legislator" (i.e. the European Commission or European Parliament) cannot foresee all future circumstances and intends that the framework to remain flexible and adaptable. Courts will attribute this intention to the legislature on grounds that by leaving the statutory words vague, the legislature

[32] *See*, for example, findings that different types of regulation and supervision have different effects on high-risk banks and low-risk banks: Klomp & de Haan, *supra* note 11.

[33] RANDAL GRAHAM, STATUTORY INTERPRETATION: THEORY AND PRACTICE (2001); Reed Dickerson, *The Diseases of Legislative Language*, 1 HARV. J. ON LEGIS. 5, 10 (1964); Randal Graham, *Good Intentions*, 12 SUP. CT. L. REV. 147 (2000); Randal Graham, *A Unified Theory of Statutory Interpretation*, 23 STATUTE L. REV. 91, 118 (2002); Randal Graham, *Right Theory, Wrong Reasons: Dynamic Interpretation, the Charter and "Fundamental Laws."* 34 SUP. CT. L. REV. 1 (2006).

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merely intended to implement a broad policy purpose (rather than a specific goal).[34] Given that the purpose of any harmonized framework is to create an effective regulatory scheme, and a scheme is effective only if it is suitable to both the current context, and the current geographical region, courts and administrators should allow a weakly harmonized scheme to adapt it to the current context.[35]

Second, the use of "fuzzy" or "vague" words indicates that the legislature intends to delegate interpretation to the bodies that administer and apply the scheme. This could be for several reasons: (a) the consequences of the scheme depend upon the context in which it applies;[36] (b) domestic courts and administrators are more capable of adapting the scheme to the domestic environment than is an international legislature;[37] and (c) courts and administrators already have some expertise applying treaties and legislation.[38]

Third, the use of vague words may imply that the legislature could not agree on specific terms (as opposed to broad policy purposes), and, thus, intended to delegate interpretation to the courts to adapt the legislation as circumstances require.[39] Thus, the

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[34] Justice Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 59 (1988); Ernest Brunken, *Interpretation of the Written Law*, 25 YALE L. J. 129 (1915); FRANCIS BENNION, STATUTORY INTERPRETATION 375 (3rd ed., 1997); Lord Peter Millett, *Construing Statutes*, 20STATUTE L. REV. 107, 108 (1990); Keith Mason, *The intent of legislators: How judges discern it and what they do if they find it*, 27 AUS. BAR REV. 253 (2006); Henry Hart & Albert Sacks, *A suggested Restatement on the Use of Legislative History*, *in* THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1253-54 (William Eskridge & Philip Frickey (eds., 1994); Justice James Spigelman, *The poet's rich resource: Issues in statutory interpretation*, 21 AUS. BAR REV. 224, 225 (2001); Justice James Spigelman, *Principle of legality and the clear statement principle*, 79 AUS. BAR REV. 769 (2005).

[35] Gerald MacCallum, *Legislative Intent*, 75 YALE L. J. 754, 781 (1966); ELMER DRIEDGER, THE COMPOSITION OF LEGISLATION 161 (1957); Randall Graham, *A Unified Theory of Statutory Interpretation*, *supra* note 33, at 123; FRANCIS BENNION, STATUTE LAW (1980). *See also* Francis Bennion, *Jaguars and Donkeys: Distinguishing Judgment and Discretion*, 31 U. WEST L. A. L. REV. 1 (2000, agreeing with outcome, disagreeing that it is due to legislative intent).

[36] Fitzpatrick v. Sterling Housing Association Ltd (1999) 4 All ER 705.

[37] Frederick de Sloovere, *Preliminary Questions in Statutory Interpretation*, 9 N. Y. U. L. Q. REV. 407, 415 (1932); Randal Graham*, A Unified Theory of Statutory Interpretation*, *supra* note 33, at 123. *See* for example, BENNION, STATUTE LAW, *supra* note 35, at 120; Vigolo v. Bostin (2005) 221 CLR 191; R v. Burstow (1997) 4 All ER 225, 233, *per* Steyn L.J. , 240 *per* Hope L.J.

[38] Vigolo v. Bostin; Dickerson, *supra* note 33, at 11; Randall Graham*, A Unified Theory of Statutory Interpretation*, *supra* note 33, at 123.

[39] Stephen Bottomley, *A Framework for Understanding the Interpretation of Corporate Law in Australia*, *in* INTERPRETING STATUTES 159-160 (Suzanne Corcoran & Stephen Bottomley (eds.), 2005); Phillip Frickey, *Structuring purposive statutory interpretation: An American perspective*,80 AUS. L. J. 849 (2006); William Eskridge, *Dynamic*

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issues are: (a) how likely is it that a weak regulatory framework would reflect a compromise; and (b) does this indicate that courts and administrators should allow the meaning of the framework to evolve over time to meet new developments?

The use of vague language implies that the legislature intended to implement a compromise (and to delegate interpretation) for two reasons. (1) Legislatures often use vague language for political convenience.[40] This is because treaties come into force only if they have international consensus.[41] Treaties, like statutes, are more likely to achieve consensus if they contain broad flexible policies than specific details.[42] Therefore, the legislature may use vague language in order to implement a compromise. (2) Delegates from member states may act for their own national interest.[43] Different states can have different (and possibly conflicting) goals. Thus, the use of vague words can symbolize a compromise of national interests.

The compromise allows courts to adapt the scheme's words. This is based on public good theory, which states that treaty-makers are rational. Rational people act to promote the

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Statutory Interpretation, U. PA. L. REV. 1479 (1987); WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994); William Eskridge & Philip Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

[40] Suzanne Corcoran, *Theories of Statutory Interpretation*, *in* INTERPRETING STATUTES 159-160 (Suzanne Corcoran & Stephen Bottomley eds., 2005); Millett, *supra* note 34, at 109; Spigelman, *The poet's rich resource: Issues in statutory interpretation*, *supra* note 34, at 225; Spigelman, *Principle of legality and the clear statement principle*, *supra* note 34; Graham, *A Unified Theory of Statutory Interpretation*, *supra* note 33; Minister for Employment and Workplace Relations v. Gribbles Radiology Pty Ltd (2005) 214 ALR 24, [21] *per* Gleeson, Hayne, Callinan and Heydon J.J.

[41] Jonathan Charney, *Universal International Law*, 87 AM. J. OF INT'L L. 529 (1993); Lisa Churma, *International Law-Making in a Community Context: Not a True Reflection of a Community Interest*, 2 INT'L LEGAL THEORY 40 (1996); Michael Gadbaw, *Intellectual Property and International Trade: Merger or Marriage of Convenience*, 22 VANDERBILT J. TRANSNAT'L L. 223 (1989); Shaun Vorster & Philip Nel, *Tracing power relations in the global knowledge structure: Two case studies*, 22 POLITIKON 52 (1995).

[42] On the legislative process, *see* Quentin Johnstone, *Evaluation of the Rules of Statutory Interpretation*, 3 U. KANSAS L. R. 1, 15 (1955); HARRY EVANS, ODGERS' AUSTRALIAN SENATE PRACTICE 2 (11th ed., 2001); IAN HARRIS, BERNARD WRIGHT & PETER E FOWLER, AUSTRALIAN HOUSE OF REPRESENTATIVES PRACTICE (5th ed. 2005); AUSTRALIAN DEPARTMENT OF THE PRIME MINISTER AND CABINET, CABINET HANDBOOK (5th ed. 2004).

[43] AUSTRALIAN DEPARTMENT OF THE PRIME MINISTER AND CABINET, LEGISLATION HANDBOOK (1999); Jonathan Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORN. L. REV. 43 (1988).

public good.[44] The current social context defines the public good. Thus, interpretations must reflect the present social-context. Arguably, to assume that treaty-makers always act in the public good is overly optimistic[45] because they may mediate between interest groups or act self-interestedly. However, the process of bargaining between interest groups can promote a common good that mediates between diffuse members of society.[46] Further, public good theory is democratically sound since it reflects delegates' publicly enunciated policies,[47] which ordinarily propound the public good.[48] Therefore, courts should interpret treaties to uphold the public good.[49] Thus, the interpretation of treaties should change over time to facilitate modern social interactions.

Fourth, treaty-makers are aware of the rules of treaty/statutory interpretation and know that this involves adapting interpretations to match the current social context. A treaty-maker's context influences his/her actions and the intended meaning of his/her actions.[50]

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[44] Reformulation of the argument in HARRIS, WRIGHT AND FOWLER, *supra* note 43, purporting to follow the argument in Peter Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction and Legislative Histories*, 38 U. KAN. L. REV. 815 (1990).

[45] Hart & Sacks, *supra* note 34. See also Eskridge and Frickey, *supra* note 34, at 334-335.

[46] William Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 567 (1988); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1532 (1992).

[47] Argument based upon ROBERT SHILLER, IRRATIONAL EXUBERANCE (2000); William Eskridge, *Politics without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988); Jonathan Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

[48] Glen Staszewski, *Avoiding Absurdity*, 81 IND. L. J. 1001 (2006); Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L. J. 1539 (1988).

[49] William Eskridge & Philip Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era,* 48 U. PITT. L. REV. 691, 694-701 (1987); Justice Murray Gleeson, *Judicial Legitimacy*, 20 AUS. B. REV. 4, 6 (2000); Justice Michael McHugh, *The strengths of the weakest arm*, 25 AUS. BAR REV. 181 (2004); Marbury v. Madison, 5 US (1 Cranch) 137, 169.

[50] In *Re*: Ericson, 815 F 2d 1090, 1094 (7th Cir, 1987); Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, *supra* note 34, at 341-342; Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 199 (1983); Cass Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247, 1247 (1990); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 33 (1958); MICHAEL ZANDER, THE LAWMAKING PROCESS 57 (1980); Theophanous v. Herald & Weekly Times Ltd (1994) 182 CLR 104, 196; Shell Oil Co v. Iowa Department of Revenue, 109 S Ct 278, 281.

Therefore, a treaty-maker's context influences the treaty and its intended meaning. This context includes established interpretative practices. [51] These include the interpretative approach of adapting legislation to its present context.[52] Thus, treaty-makers implicitly intend adaption to the present context.[53]

Overall, treaty-makers intend that courts evolve treaties over time in order to reflect contemporary society. Therefore, the ISC intends courts to adapt the ISS to the present context. Thus, the ISS can adapt to different places and time periods.

II. Will an evolving interpretation uphold statutory stare decisis?

Doctrines of statutory stare decisis hold that courts can change their interpretation of a statute, such as an international framework, only if their previous interpretation was clearly wrong.[54] This becomes a live issue because adapting the framework over time may require courts to replace or amend prior interpretations of the framework. Thus, it is

[51] NLRB v. Federbush Co, 121 F 2d 954, 957 (2nd Cir); Stanley Fish, *Change*, 86 S. A. Q. 423, 423 (1987); Justice James Spigelman (Opening address), *Principle of legality and the clear statement principle*, New South Wales Bar Association Conference (2005); Schanck, *supra* note 44, at 835; JOHN BELL AND SIR GEORGE ENGLE, CROSS ON STATUTORY INTERPRETATION 165-166 (3rd ed., 1995),

[52] *See* for example, Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104, 196; Stevens v. Kabushiki Kaisha Sony Computer Entertainment (2005) 224 CLR 193 *per* McHugh J; Minister for Employment and Workplace Relations v. Gribbles Radiology Pty Ltd, [21] *per* Gleeson, Hayne, Callinan and Heydon JJ.

[53] George Hudson Ltd v Australian Timber Workers' Union (1923) 32 CLR 413.

[54] National Westminster Bank Plc v. Spectrum Plus Ltd (2005) AC 680, 64, *per* Hope L.J.; Babaniaris v. Lutony Fashions Pty Ltd (1987) 163 CLR 1, 13-14, *per* Mason J.; Takapana Investments Pty Ltd v. Teco Information Systems Co Ltd (1988) 82 FCR 25, 32, *per* Goldberg J.; Esso Australia Resources Ltd v. FCT (1997) 150 ALR 117, 121; Towney v. Minister for Land and Water Conservation for New South Wales (1997) 147 ALR 402; Nettlefold Advertising Pty Ltd v. Nettlefold Signs Pty Ltd (1998) 90 FCR 453, 470; Telstra Corp Ltd v. Treloar (2000) 102 FCR 595, 603, *per* Branson and Finkelstein J.J.; Algama v. Minister for Immigration and Multicultural Affairs (2001) 115 FCR 253, 263-264, *per* Whitlam and Katz J.J.; Repatriation Commission v Gorton (2001) 110 FCR 321, 327-341, *per* Heerey J., 333 *per* Emmett J, 334-345 per Allsop J; Federal Commissioner of Taxation v. Energy Resources of Australia Ltd (2003) 204 ALR 487, 492-493, *per* Ryan and Finkelstein J.J.; NATB v. Minister for Immigration and Multicultural and Indigenous Affairs (2003) 133 FCR 506, 519; Jones v. Daniel (2004) 212 ALR 588, 594, *per* Moore J; Minister for Immigration and Multicultural and Indigenous Affairs v. Hicks (2004) 138 FCR 475, 477 per Hill J; SOK v Minister for Immigration and Indigenous Affairs (2005) 85 ALD 323, 329, *per* Branson J, 331, *per* Marshall J; Vigolo v. Bostin, [25], *per* Gleeson C.J.; William Eskridge, *Overriding Supreme court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 397 (1991); Edward Levi, *An Introduction to Legal Reasoning*, 15 U. CHIC. L. REV. 501, 540 (1948); Burnet v Coronado Oil & Gas Co 285 US 393, 405-407; Erie RR Co v. Tompkins, 304 US 64, 77-78; Apex Hosiery Co v. Leader, 310 US 469, 488-489; Cleveland v. United States, 329 US 14, 18.

necessary to examine whether allowing the interpretation of the framework over time supports statutory stare decisis. I argue that a weak regulatory scheme is consistent with statutory stare decisis because it upholds key values that are central to stare decisis: efficiency, legislative foresight, public confidence, and legal equality.

Efficiency: The weak regulatory scheme upholds the stare decisis value of efficiency. Judicial efficiency is a key justification for statutory stare decisis.[55] Efficiency is reached/attained(???) if courts conserve resources. Courts conserve resources if they do not re-consider rules in every dispute, and, thus, ordinarily reach efficiency if courts follow precedent. [56] However, the scheme requires that courts interpret the scheme's words differently in different countries and at different time periods. Arguably, if courts must re-interpret the ISS in different countries and time periods, then aggregate litigation costs increase.[57] However, the better view is that weak regulatory scheme flexibility promotes efficiency in three ways.

First, a weak regulatory scheme uses fuzzy language, which allows courts to mold it to the domestic environment and, thus, minimize the social and commercial costs of ill-fitting rules.[58] Second, the fuzzy language minimizes the time and cost of achieving consensus on

[55] LORD HARRY WOOLF, ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1995); Queensland v. J L Holdings Pty Ltd (1997) 189 CLR 146; Bright v. Femcare Ltd (2002) 195 ALR 574, 605-606, *per* Finkelstein J.; Justice James Spigelman, *Just, Quick and Cheap: A New Standard for Civil Procedure*, 38 L. SOC'Y J. 24 (2000); Richard Ackland, *Lawyers in Limbo as bar Raised*, SYDNEY MORNING HERALD 17 (Sydney) 10 March 2000; Justice James Spigelman, Case Management in New South Wales (Speech delivered at the Annual Judges Conference, 22 August 2006).

[56] Telstra Corp Ltd v. Treloar, *supra* note 54, at 602, *per* Branson and Finkelstein JJ.; Paul Dame, *Note: Stare Decisis, Chevron, and Skidmore: Do Administrative Agencies Have the Power to Overrule Courts?*, 44 WM. & MARY L. REV. 405, 405 (2002); Eskridge, *supra* note 54, 401; Ronald Heiner, *Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules*, 15 J. LEGAL STUD. 227 (1986); Thomas Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N. C. L. REV. 643 (2000); Henry Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 744-746 (1988); Richard Pierce, *Reconciling Chevron and Stare Decisis*, 85 GEO. L. J. 2225 (1997); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 599 (1987); Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 410 (1924); Morange v. State Marine Lines Inc, 398 US 375, 403, *per* Harlan J.

[57] Lee, *supra* note 56, at 650-652; Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 63 (2001).

[58] See on the problem of ill-fitting legal-transplants, Pierre Legrand, *What "Legal Transplants"?*, *in* ADAPTING LEGAL CULTURES 55-57 (David Nelson & Johannes Feest eds., 2001); Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003); Otto Kahn Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974); Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L. J. 1 (2004); Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97 (2002);

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the framework's words.[59] Third, the fuzzy language relieves the legislature of updating the scheme over time to reflect the development of new securities. This promotes efficiency since (a) amendments are costly and time-consuming,[60] and (b) politico-legislative inertia means that the legislature is likely to amend the scheme only if both the old provisions are palpably inappropriate[61] and the legislature notices that they are inappropriate. However, since a high-level regional legislature cannot practically monitor all securities developments[62] and quasi-legislative bodies are reticent to amend laws, the scheme may remain outdated for a long period,[63] which is socially inefficient.[64] Thus, allowing courts to adapt the meaning of the scheme over time is efficient.

Hideki Kanda and Curtis J Milhaupt, *Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, Working Paper No 219, Columbia Law and Economics, (2003). *See also:* Lake Macquarie Shire Council v. Aberdare County Council (1970) 123 CLR 327, 331. *per* Barwick C.J.; Street v. Queensland Bar Association (1989) 168 CLR 461, 537, *per* Dawson J.; McGinty v Western Australia (1996) 186 CLR 140; Singh v. Commonwealth (2004) 209 ALR 355, *per* McHugh J; Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 FED. L. REV. 1 (1997). Follows discussion on obtaining the correct interpretation in: Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B. U. L. REV. 383 (2004); Lawrence Marshall, *"Let Congress Do It": The Case for An Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 199 (1989); Thereses Maynard, *The Uniform Limited Offering Exemption: How "Uniform" is "Uniform"? - An Evaluation and Critique of the ULOE*, 36 EMORY L. J. 357, 400 (1987). Implicit in: William N Eskridge, *Book Review: No Frills Textualism: Judging Under Uncertainty*, 119 HARV. L. REV. 2041, (2006); Michael Healy, *Communis Opinio and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 WM. & MARY L. REV. 539, 622 (2001); Stephen Ross and Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L. J. 195 (1998).

[59] On the legislative process see: Johnstone, *supra* note 42, at 15; Evans, *supra* note 42, at 2; Harris, Wright and Fowler, *supra* note 42; Department of the Prime Minister and Cabinet, *supra* note 42.

[60] Thomas Christiansen, Gerda Falkner & Knud Erik Jorgensen, *Theorizing EU treaty reform: beyond diplomacy and bargaining*, 9 J. EURO. PUB. POL. 12 (2002); Gerda Falkner, *EU treaty reform as a three-level process*, 9 J. EURO. PUB. POL. 1 (2009); Vincy Fon and Francesco Parisi, *The Formation of International Treaties*, 3 REV. L. & ECON. 37 (2007); Morten F Greve and Knud Erik Jorgensen, *Treaty reform as constitutional politics – a longitudinal view*, 9 J. EURO. PUB. POL. (2002). See also on the cost of legislating, Eskridge, *supra* note 39, at 1525; Eskridge, *supra* note 58; Marshall, *supra* note 58, at 197-200; Ross and Tranen, *supra* note 58; Amanda Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1409-1410 (2005).

[61] Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002); Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2087 (2002).

[62] EMILE DURKHEIM, THE DIVISION OF LABOUR IN SOCIETY (1893).

[63] Eskridge, *supra* note 39, at 1525;

[64] Tyler, *supra* note 60, at 1408-1409.

Encouraging legislative foresight: A weak legislative framework (and allowing words to evolve over time) promotes the goal of encouraging foresight in law- or treaty making. International bodies can "legislate" with foresight only if they can predict the commercial implications of the scheme.[65] Arguably, consequences of the scheme's vague language depend upon domestic/administrative discretion and, thus, the scheme's implications are unpredictable.[66] However, the better view is that the scheme's consequences are predictable because member states must promulgate regulations to enforce it. These regulations interpret the scheme. Established doctrines of treaty-interpretation determine the domestic interpretation of the scheme. These doctrines are known. Therefore, the process of domestic interpretation is predictable, and, thus, the vague language in a weak regulatory scheme can encourage legislative foresight.

Public confidence in the courts: A justification for statutory stare decisis is that it promotes public-confidence in the courts by maintaining stable and consistent judicial decisions.[67] A weak regulatory scheme can promote public-confidence because it allows member states to update interpretations of the scheme if commercial conditions change. While long-term public confidence diminishes if interpretations merely follow populist opinions or change too frequently,[68] public confidence increases if the interpretation is both rational and reflects contemporary society.[69] Thus, a weak regulatory scheme that allows the meaning of its provisions to evolve over time promotes public confidence in the courts.

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[65] Pierce, *supra* note 56, at 2238; Schauer, *supra* note 56, at 572-575.

[66] See on the unpredictability of "vague" language, HADFIELD, WEIGHING THE VALUE OF VAGUENESS: AN ECONOMIC PERSPECTIVE ON PRECISION IN THE LAW 541-543 (1994); Kolender v. Lawson, 461 US 352 (1983).

[67] *Telstra Corp Ltd v. Treloar*, *supra* note 54, at 602, *per* Branson and Finkelstein J.J.; Justice Murray Gleeson, *The State of the Judicature*, 76 AUSTRAL. L. J. 24, 29-30 (2002); Susan Kenny, *Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium*, 25 MELB. U. L. REV. 209 (1999); Justice Michael Kirby, *Precedent law, practice and trends in Australia*, 28 AUSTRAL. BAR REV. 243, 243 (2007); McHugh, *supra* note 49; Pierce, *supra* note 56, at 2239; Justice James Spigelman, *Negligence: The Last Outpost of the Welfare State*, 76 AUSTRAL. L. J. 432 (2002).

[68] Kenny, *supra* note 67; McHugh, *supra* note 49, at 192.

[69] Follows the discussions in: Monaghan, *supra* note 56, at 749-753; Pierce, *supra* note 56, at 2241; Ronald Sackville, *Continuity and Judicial Creativity - Some Observations*, 20 UNIV. OF N. S. WALES L. J. 145, 149 (1997). *See e.g.* Theophanous v. Herald & Weekly Times Ltd, and the reaction in: Margo Kingston, *Government Reversal on Free Speech*, SYDNEY MORNING HERALD (Sydney), 2 October 1996, at 1. See also City of Akron v. Akron Centre for Reproductive Health Inc 463 US 416, 419-420; Webster v. Reproductive Health Services, 492 US 490, 518-519; Planned Parenthood v Casey, 202 US 833, 845-869.

Legal equality: A key stare decisis value is "legal equality". This involves giving similar treatment to similar cases (that arise at different times or in different places).[70] That is, it involves "temporal" equality and "geographic" equality. The weak regulatory scheme does promote temporal-equity. Temporal-equity involves applying the same rule irrespective of when a case arises.[71] Arguably, if commercial changes cause member states to update their interpretation of the scheme, then different rules apply at different time periods. However, the better view is that the scheme's connotation (basic meaning or 'essential nature') is constant, and courts only change the denotation (the application of the essential meaning in a particular instance). Thus, the same essential rule applies at all time periods.[72]

A weak regulatory scheme does promote geographic-equity. Geographic equity arises only if courts apply the same rule in all jurisdictions.[73] Arguably, a weak regulatory scheme can undermine this by allowing member states to opt out of different rules, and by giving member states discretion over how to interpret particular provisions. However, the better view is that a weak scheme promotes equality by allowing domestic courts/administrators to account for latent inequalities in the home market. That is, it allows member states to avoid provisions that might be unfair or inappropriate for the domestic circumstances. This promotes aggregate equality by ensuring that laws do not operate unfairly in different countries.

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[70] Thompson v. Byrne (1999) 161 ALR 632, 646 per McHugh J; Larry Alexander, *Constrained by Precedent,* 63 S. CAL. L. REV. 1, 9-13 (1989); Meir Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 COLUM. L. REV. 1, 31 (1985); Randall Graham, 'A Unified Theory of Statutory Interpretation', *supra* note 33; Jennifer McGruther, *Chevron vs. Stare Decisis*, 81 WASH. U. L. Q. 6, 612 (2003); Alfonso Miguel, *Equality before the Law and Precedent*, 10 RATIO JURIS 372 (1997); Pierce, *supra* note 56, at 2243; Justice Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989); Schauer, *supra* note 56, at 595-598; Pamela Stephens, *The new retroactivity doctrine: equality, reliance and stare decisis*, 48 SYRACUSE L. REV. 1515 (1998).

[71] Telstra Corp Ltd v .Treloar, *supra* note 54, at 602, *per* Branson and Finkelstein J.J.; Dame, *supra* note 56, at 405; Pierce, *supra* note 56; Morange v. State Marine Lines Inc, 403 , *per* Harlan J.

[72] *See* on constitutional law: Lake Macquarie Shire Council v. Aberdare County Council; Street v Queensland Bar Association; McGinty v Western Australia; Singh v Commonwealth.

[73] See on the importance of geographic equality: Leeth v. Commonwealth (1992) 174 CLR 455; McGruther, *supra* note 70. *See also*, Burrows, Remedial Coherence and Punitive Damages in Equity, *supra* note 23, at 390; Justice Peter Young, *Equity, Contract and Conscience*, *in* EQUITY IN COMMERCIAL LAW 512 (Simone Degeling & James Edelman eds., 2005); Aquaculture Corporation v. New Zealand Green Mussel Co. Ltd. (1990) 3 NSLR 299, *per* Cooke P; Burrows, *supra* note 23; Michael Tilbury, *Fallacy or Furphy? Fusion in a Judicature World*, 26 U. N. S. WALES L. J. 357, 358 (2003).

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Overall, a weak regulatory framework that uses "vague" or "fuzzy" words does promote the stare decisis values of efficiency, legislative-foresight, public confidence in the law, and equality.

E. Conclusion

International regulatory co-operation is important. It has become especially important due to the globalization of financial markets. One way to facilitate international co-operation is through a harmonized regulatory scheme. The EU has adopted some schemes such as MIFID (for the regulation of stock exchanges and trading) and the Takeover Directive (for the regulation of mergers and acquisitions). A defining feature of these schemes is they involve "weak" regulatory harmonization that uses broad/vague provisions, allows member states to opt out of the regulatory scheme, and does not limit the ability of member states to legislate on things that do not come within the scheme.

This paper analyzes whether a "weak" form of regulatory harmonization meets the necessary conditions of promoting legal coherence and enabling legal flexibility. I show that, compared with strict harmonization, a weak form of regulatory harmonization is beneficial, promoting principled legal coherence and flexible law that remains relevant in the current social context. These are only necessary conditions (not sufficient conditions) for weak form harmonization to be principled. However, the findings suggest that weak-form harmonization is more able to meet these conditions than is strict harmonization, and, thus, strict harmonization might not be more desirable than weak harmonization.

This analysis has implications for the EU, regional regulatory communities, and for federal systems. For the EU, the findings help to justify the current form of MIFID and the EU Takeover Directive. They help to address concerns that the provisions are too vague or discretionary.[74] They show that this vagueness may enable EU regulation to remain effective and current, and that stricter legal harmonization might not be beneficial. For other regional communities, the findings help to guide the form of any future regulatory schemes. For federal systems, the paper suggests the optimal form of federal regulation to harmonize myriad state-based schemes.

[74] Of course, this addresses only one concern with MiFID and the Takeover Directive. It does not address all concerns. For example, there are arguments that some of the specific provisions in MiFID and the Takeover Directive are inappropriate.

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