

Table of Contents

General Editors' Foreword	V
Acknowledgements	IX
Table of Cases	XVII
Table of Constitutional, Treaty and Legislative Provisions	XXIV
List of Abbreviations	XXXII

Chapter One: Introduction – Models of Inquiry

I. The Search for a Rational Division of Powers	1
A. Quantitative Criteria	2
B. Formal Criteria	3
C. The Relevance of Constitutional Text and Context to the Choice of Criteria	4
II. Economic Considerations Underlying the Division of Powers in the Field of Corporate and Enterprise Law	7
A. The Public Choice Approach	8
B. The Productivity of Integration Approach	10
C. The Nature of the State and the Unification of Law	12
III. The Political Frame of Reference	15
A. The European Political Frame of Reference	15
B. The American Political Frame of Reference	20
IV. Conclusion	21

Chapter Two: The American Experience

I. Introduction	25
II. The Factual Setting for the State Regulation of Trans-State and Trans-national Company Activities: An Introduction and Census	26
III. The American Constitutional Framework of Corporation Law	28
A. Introduction	28
B. Division of Powers	29
1. The Texts	30
2. The General History	31
3. The Question of Diversify of Citizenship	32
a. Introduction and History	33
b. Debatable Aspects of Corporate Citizenship	34
C. The Search for a Substantive Rationale of Federal Supremacy	36
1. The Tension Between the Privileges and Immunities Clause and the Commerce Clause	36

a.	The Rejection of Privileges and Immunities Protection for Corporations	36
b.	The Interim Role of the Fifth and Fourteenth Amendments	38
2.	The Commerce Clause	40
	a. Introduction	40
	b. The Preemptive Effects of the Commerce Clause	41
3.	Institutional and Economic Values Shaping the Concept of a National Market	43
	a. The Commerce Clause As Institutional Rather Than Personal Protection	44
	b. The Economic Philosophy Supporting the Commerce Clause	46
	c. Excursus: The State as Proprietor	54
	d. Excursus: The “Fundamental Attributes” of States’ Rights and the Commerce Clause	56
	e. Conclusion	61
IV.	Division of Powers and Traditional Corporation Law	62
A.	The Conflict of Laws	62
	1. Law of the State of Incorporation or Law of the <i>Siège Social?</i>	62
	2. The Domestic Mobility of American Capital and Its Legal Consequences	70
B.	The Twentieth Century Struggle Against Traditional Conflicts Doctrine	75
	1. The Origin and Definition of the Concept of “Internal Affairs”	77
	2. From Choice-of-Forum to Choice-of-Law Rules	82
	3. The Beginning of Tension Between Host State and Home State Law	83
	4. The Development of Statutory and Partial Choice-of-Law Rules	88
C.	The Constitutional Debate: Conflicts of Obedience and the Role of the Full Faith and Credit Clause	90
	1. Conflict Characterization of Substantive Corporation Law: Introduction	91
	2. Conflict Characterization: The Peripheral Problems	92
	3. Conflict Characterization: Substantive Disputes	97
	4. Conflict Characterization: The Classic Case of Cumulative Voting	98
D.	The Constitutional Issue	103
	1. The Precedents and Their Significance	103
	2. The Relationship Between Substantive Reach and Procedural Reach	107
	3. Multiplicity of State Claims	110
V.	Voluntary and Substantive Uniformity Among State Corporation Laws: “Harmonization from Below”	111
A.	Introduction and Early History	111
	1. Individual State Experimentation	112
	2. Uniformity by Design	116
B.	Major Components of the Majoritarian and Managerialist Enabling Act	119
	1. Corporate Finance and Capacity Issues	119
	2. Managerialist and Majoritarian Issues	123

3. Fiduciary Duty: Loyalty	124
4. Fiduciary Duty: Prudence	126
5. Reasons for Substantive Convergence: The Threat from the Center	128
C. The Center and the Periphery: State Blue Sky and Related Securities Regulation	130
1. Traditional Regulation	130
2. Takeover Regulation: Introduction and Context	132
3. Takeover Regulation: The Arrival of Federal Controls	135
4. The Issue Joined: The Constitutional Attack Under the Commerce Clause	137
5. Prospects for the Future	148
VI. The Corporation Within the Polity: Protection or Apotheosis?	155
A. The Impact of <i>Bellotti</i>	155
B. Free Speech and Corporate Management	160
VII. Conclusion	164

Chapter Three: European Attempts to Harmonize Company and Capital Market Law

I. National Regulation of Transnational Corporations: Facts and Developments	167
A. The Nature of Transnational Corporate Activity	167
1. Roots of Transnational Corporate Activity	167
2. European Corporate Census	169
B. The Development of Different National Company and Capital Market Laws	174
1. Development of National Company Laws	174
a. Formation and Financing of the Corporation	176
b. Organs and Internal Organization of the Corporation	176
i. Control of Management	177
ii. Shareholders' General Assembly	181
iii. Board of Directors	182
c. Corporate Disclosure Requirements	184
d. Choice of the Company's Legal Form	185
e. Limitations on Groups of Companies and Business Combination	187
2. The Emergence of an Independent Capital Market Law	189
a. Capital Market Law	189
b. Banking Systems and Other Framework Conditions	192
II. Aims, Bases and Expectations of Harmonization of Company and Capital Market Laws in Europe	193
A. Aims	193
1. The Constitutional Level: A Short Survey of the Treaty Provisions	194
2. Basic Assumptions of the EEC Treaty Relating to Company and Capital Market Law as Functions of Integration	196

3.	A Critique	197
a.	The Problem of Specificity Versus Discretion	198
b.	The Factual Assumptions and Their Legitimacy	199
c.	The Critique Applied: Company Law and Capital Market Law	200
i.	Protection of Shareholder/Creditor Interests	201
ii.	Protection of the Economy or Market	201
iii.	Protection of Other Interests	203
iv.	Conclusion	203
B.	Bases	203
1.	Article 54(3)(g)	204
2.	Articles 100-102	205
a.	The Necessary and Proper Clause	206
b.	The Demand for Clarity	207
c.	The Idea of Respect for National Law	208
d.	The Pursuit of Other Than Economic Goals	209
3.	Article 220	209
4.	Article 235	210
C.	Expectations in Community Law – Failure of National Laws	212
1.	Implementation	212
a.	Granting Subjective Legal Positions	213
b.	Procedural Disincentives	215
2.	Problems of Economic Theory	218
a.	Efficient Capital Markets	218
b.	Disclosure	219
c.	Other Framework Conditions	220
3.	Economic Concentration	221
a.	Company Law, Particularly on Groups of Companies	222
b.	Antitrust Law	224
III.	Methods and Tools for Integration of Company and Capital Market Law	226
A.	Indirect Methods and Tools	226
1.	Conflict of Laws	226
2.	Model Laws and Restatements	230
3.	The International Code Effort	231
B.	Legal Integration Through Community Company and Capital Market Law	232
1.	Harmonization Through Community Directives	232
a.	Regulation or Directive?	232
b.	Overly Specific Directives	233
c.	Harmonization by Options	234
d.	Direct Applicability as an Answer to Time-Lapses and National Balking?	236
e.	Possible Conflict with National Enabling Legislation	240
f.	Blocking Later National Legislation	241
g.	Ratification and Possible Cures	242
2.	Creation of a Substantive Community Law: The <i>Societas Europaea</i> and the European Economic Interest Grouping	243
a.	The <i>Societas Europaea</i>	244

b.	The European Economic Interest Grouping (EEIG)	246
3.	Self-Regulation in the Shadow of Community Law	246
IV.	Status, Difficulties and Prospects of Integration	250
A.	The State of Harmonization of Company and Capital Market Law:	
	A Preliminary Table of Contents	250
	1. Company Law	250
	a. Company Law Harmonization	250
	i. Directives Adopted	250
	ii. Proposed Directives	252
	iii. Prepared Directives	253
	b. European Community Company Law	253
	i. Regulations Adopted	253
	ii. Proposed Regulations	253
	c. Agreements Among Member States	254
	i. Not in Force	254
	ii. Draft Agreements	254
	2. Capital Market Law	254
	a. Free Movement of Capital	254
	i. Directives Adopted	254
	ii. Prepared Directives	255
	b. European Community Codes	255
	c. Capital Market Law Harmonization	255
	i. Directives Adopted	255
	ii. Proposed Directives	256
	iii. Prepared Directives	256
	3. Banking Law	257
	a. Freedom of Establishment and of Provision of Services ...	257
	i. Directives Adopted	257
	ii. Proposed Directives	257
	b. Banking Law Harmonization	257
	i. Directives Adopted	257
	ii. Proposed Directives	258
	iii. Prepared Directives	258
	iv. Recommendations Adopted	258
B.	Difficulties of Integration: The Example of Worker Participation on Company Boards (Codetermination)	259
1.	The History	259
2.	The Political Context	260
C.	Prospects for Integration	262
1.	Extent, Speed and Effectiveness of Integration	262
	a. Extent	263
	b. Speed	264
	c. Effectiveness	264
2.	The Role of Administrative Agencies	266
3.	The Role of the Courts	268

Chapter Four: The Legal Problems in Their Social Context	
I. Harmonization of Company Law – At Which Level	271
A. The Ongoing Process of Harmonization by European Community Directives	271
B. The Judicial Role in Harmonization	272
C. The States' Statutory Role in Harmonization	273
D. The Harmonization Process and the Public Choice Model	274
II. The Causes of Failure of Harmonization at the Member State or Community Level	274
A. The History of Accounting Law Harmonization	275
B. Accounting Law Harmonization and Economic Models	278
C. Securities Regulation and the Models	280
D. The Process of Harmonization and the Models	282
III. Harmonization of Law on the Basis of Priorities Derived from Non-Economic Values	283
A. Substantive Values and Value Disputes and Harmonization Efforts ..	284
B. Process Consensus and Harmonization Efforts	284
C. Methods and Tools of Harmonization in Politically Fragmented Areas	285
References	289
Index	329