

**FEDERALISM IN THE EUROPEAN UNION AND THE
UNITED STATES: SUBSIDIARITY, PRIVATE LAW, AND THE
CONFLICT OF LAWS**

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ABSTRACT

The United States has long been a source of influence and inspiration to the developing federal system in the European Union. As E.U. federalism matures, increasingly both systems may have the opportunity to profit from each other's experience in federal regulatory theory and practice. This article analyzes aspects of the federal ordering in each system, comparing both historical approaches and current developments. It focuses on three legal topics, and the relationship between them: (1) the federal regulation of matters of private law; (2) rules of the conflict of laws, which play a critical role in regulating cross-border litigation in an era of global communications, travel and trade; and (3) "subsidiarity," which is a key constitutional principle in the European Union, and arguably also plays an implicit and under-analyzed role in U.S. federalism. The central contention of this Article is that the treatment of each of these areas of law is related — that they should be understood collectively as part of the range of competing regulatory strategies and techniques of each federal

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system. It is not suggested that “solutions” from one system can be simply transplanted to the other, but rather that the experiences of each federal order demonstrate the interconnectedness of regulation in these three subject areas, offering important insights from which each system might benefit.

TABLE OF CONTENTS

1.	INTRODUCTION.....	371
2.	DEFINING AND DISTINGUISHING SUBSIDIARITY	374
	2.1. <i>Subsidiarity in Constitutional Settlement and Practice</i>	378
	2.1.1. <i>Constitutional Settlement</i>	378
	2.1.2. <i>Constitutional Practice</i>	381
	2.1.3. <i>The Interaction of Constitutional Settlement</i> <i>and Practice</i>	384
	2.2. <i>Proportionality and Constitutional Interpretation</i>	384
3.	SUBSIDIARITY, PRIVATE LAW, AND THE CONFLICT OF LAWS IN THE EUROPEAN UNION	387
	3.1. <i>Private Law and the Emergence of Subsidiarity</i>	388
	3.1.1. <i>Toward European Private Law?</i>	388
	3.1.2. <i>The Emergence of Subsidiarity</i>	392
	3.1.3. <i>Subsidiarity and European Private Law</i>	397
	3.2. <i>Subsidiarity and the Conflict of Laws</i>	400
	3.3. <i>The Horizontal Effect of Subsidiarity on Choice of</i> <i>Law</i>	406
4.	SUBSIDIARITY, PRIVATE LAW, AND THE CONFLICT OF LAWS IN THE UNITED STATES.....	408
	4.1. <i>Private Law and the Emergence of Subsidiarity</i>	408
	4.1.1. <i>Swift v. Tyson</i>	409
	4.1.2. <i>Erie Railroad Co. v. Tompkins</i>	413
	4.1.3. <i>Clearfield Trust Co. v. United States</i>	421
	4.1.4. <i>Subsidiarity as a Principle of U.S.</i> <i>Federalism?</i>	431
	4.2. <i>Subsidiarity and the Conflict of Laws</i>	436
	4.3. <i>Too Little Subsidiarity, Too Late?</i>	449
5.	CONCLUSIONS	452

1. INTRODUCTION

It has long been recognized that the maturing federal system of the European Union¹ has much to learn from what is commonly considered the oldest enduring federal system in the world—the United States. As the European Union develops its own regulatory theories and practices, increasingly both systems may have the opportunity to profit from each other's experience. The fields of federal private law² and conflict of laws,³ which have been areas of intensive and controversial regulatory and academic activity in the history of the development of E.U. and U.S. law, are particularly apposite subjects for comparative study. The central contention of this Article is that the treatment of these two areas of law is related, and that this can be highlighted through analysis of a third, the principle of "subsidiarity," which has a key constitutional role in the European Union, and a largely latent but potentially important role in the United States. This Article thus explores the interrelation of subsidiarity, federal private law, and the conflict of laws, comparing approaches and developments in E.U. and U.S. federalism.⁴

¹ For ease of reference, the institutions of European governance, present and past, will be referred to generally as the European Union, which is the term used for the reformed structure established in the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 17, 2007, 2007 O.J. (C 306) 1 (entered into force Dec. 1, 2009) [hereinafter Lisbon Treaty (2009)].

² The distinction between public and private law, while long recognized as problematic in theory, still plays an important (if increasingly challenged) role in delimiting the sphere of operation of the conflict of laws. See, e.g., William S. Dodge, *The Public-Private Distinction in the Conflict of Laws*, 18 DUKE J. COMP. & INT'L L. 371, 372-94 (2008) (concluding that "[t]here is no good reason to maintain the public-private distinction in the conflict of laws"). This Article does not adopt a definition of "private law," but its focus is on developments in contract law and tort, where conflict of laws rules clearly apply.

³ The term "conflict of laws" is sometimes (particularly in the United States) used narrowly to focus on choice of law rules, and sometimes (particularly in the European Union, where it is used interchangeably with "private international law") considered to encompass rules on jurisdiction, choice of law, and the recognition and enforcement of foreign judgments. The focus in this Article is on questions of choice of law, although, particularly in the European Union, related developments in other areas of the conflict of laws (broadly conceived) will also be noted.

⁴ In the European Union, references to 'federalism' are often associated with centralizing movements toward greater concentration of power in E.U. institutions. By contrast, in the United States, references to 'federalism' are usually associated with decentralizing movements, which emphasize state rather than federal powers. In this Article, references to 'federalism' are intended to be

Any private dispute with an interstate or international cross-border element⁵ raises potential conflict of laws issues, particularly concerning questions of jurisdiction and the determination of the applicable law. In an era of globalization, it is thus a subject of intense and growing practical importance. It has, however, too often and too easily been dismissed as a dry and technical aspect of civil procedure, whose days of academic interest are long past. Nothing could be further from the truth. In the United States, there are clear signs of a reawakening of theoretical interest in conflict of laws through new interdisciplinary approaches.⁶ In the European Union the subject is in the midst of a full-blooded revolution, very different from but every bit as radical as the U.S. “conflict of laws revolution” of the mid-twentieth century.⁷ As will be examined further, the U.S. revolution overthrew not only traditional conflict of laws techniques, but also (at least partially) a long established “federal” perspective on choice of law when dealing with disputes internal to the United States. By contrast, without a substantial change in traditional techniques, the conflict of laws in the European Union is losing its old identity as a technical part of “local” private or procedural law, and emerging

neutral on these questions—the term ‘federal’ is used merely to indicate a polycentric legal system with a vertical and horizontal division of powers between central and subsidiary authorities.

⁵ In order to focus on federalism issues rather than questions of international law, this Article deals almost exclusively with intra-federal disputes—those with connections to more than one Member State of the European Union, or more than one state of the United States, but without international connecting factors.

⁶ See generally KAREN KNOP ET AL., *Foreword: Transdisciplinary Conflict of Laws*, 71 LAW & CONTEMP. PROBS. 1 (2008) (discussing various interdisciplinary approaches to analyzing private international law and the ways in which these approaches can revive and enrich conflict of laws scholarship). See also Ralf Michaels, *After the Revolution—Decline and Return of U.S. Conflict of Laws*, 11 Y.B. PRIVATE INT’L L. 11, 13–15 (2009) (noting that the most interesting developments in conflict of laws are arising not from the traditional areas of contracts and torts, but from the intense debate over same-sex marriage, and arguing that an interdisciplinary approach to this subject will help lend clarity and depth to the discussion).

⁷ See Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 TUL. L. REV. 1607 (2008) (arguing that the “federalization” and “constitutionalization” of E.U. choice of law rules has led to “a methodological pluralization” and a choice of law revolution in the European Union). But see Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons*, 82 TUL. L. REV. 1741 (2008) (arguing that the changes in interpreting private international law in Europe constitute not a revolution, as occurred in the United States, but rather a quiet and steady evolution).

as a new foundational subject of European transnational or “federal” public law, helping to define the relationship between the legal orders of the Member States.

These developments in the European Union and their contrast with the status of conflict of laws in the United States have begun to invite much deserved comparative attention.⁸ This Article advances the analysis through greater consideration of a wider context, incorporating an examination of aspects of the structure and organization of both the E.U. and U.S. federal systems. In exploring the origins of and justifications for these divergent approaches to the conflict of laws, this Article thus argues that they reflect broader themes and principles of federalism, which are also reflected in, and related to, the histories of private law regulation in each system.

The federal treatment of private law in the European Union and the United States has undergone its own series of evolutions and revolutions. In the United States, three key stages are explored in this Article—the broad evolution of general federal common law under *Swift v. Tyson*, its revolutionary rejection under *Erie Railroad Co. v. Tompkins*, and the subsequent fragmentary development of modern federal common law under *Clearfield Trust Co. v. United States*. In the European Union, a comparable evolutionary and fragmented development of European private law is identified and

⁸ See generally George A. Bermann, *Rome I: A Comparative View*, in *ROME I REGULATION: THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS IN EUROPE* 349, 350–56 (Franco Ferrari & Stefan Leible eds., 2009) (arguing that the set of rules presented in the Rome I Regulation are satisfactory for Europe, and comparing this success with the continued controversy over conflict of laws in the United States); Milena Sterio, *The Globalization Era and the Conflict of Laws: What Europe Could Learn from the United States and Vice Versa*, 13 *CARDOZO J. INT’L & COMP. L.* 161 (2005) (positing that two American conflict of laws concepts—Brilmayer’s “political rights theory” and Guzman’s “economic law approach”—could potentially be utilized in both the United States and Europe, and may further the pursuit of universal choice of law solutions); Symposium, *The New European Choice-of-Law Revolution: Lessons for the United States?*, 82 *TUL. L. REV.* 1607 (2008) (including contributions by Ralf Michaels, Patrick J. Borchers, Jan von Hein, Dennis Solomon, Symeon C. Symeonides, Larry Cata Backer, Jens Dammann, Onnig H. Dombalagian, Katharina Boele-Woelki, Horatia Muir Watt, Linda J. Silberman, Richard Fentiman, William A. Reppy Jr., Jurgen Basedow, and Erin Ann O’Hara & Larry E. Ribstein (jointly)) (examining the E.U. and U.S. conflict of laws experiences); Holger Spamann, *Choice of Law in a Federal System and an Internal Market* (N.Y.U. Law School Jean Monnet Ctr. for Int’l & Reg’l Econ. Law & Justice, Working Paper No. 8/01, 2001), <http://centers.law.nyu.edu/jeanmonnet/papers/01/012601.html> (comparing the constitutional requirements for choice of law in the United States and the European Union).

examined, as well as, more recently, a contested movement toward the revolutionary adoption of general private law at the European level through a proposed “European civil code.”

This Article argues that “subsidiarity,” a key legal principle in the constitutional distribution of power in the European Union and (it is argued) also implicitly in the United States, is the key to unlocking the explanation for these at times shared and at other times contrasting approaches, and the relationship between the federal treatment of private law and the conflict of laws in each system. Whether conflict of laws rules should be the subject of centralized or subsidiary state regulation has long been and continues to be a matter of contention in the United States. By contrast, the European Union has decisively reconceptualized the conflict of laws as a federal public law technique for promoting subsidiarity by ordering the diverse private law systems of the E.U. Member States—a role that a federalized conflict of laws might equally play in the United States.

The concept of subsidiarity, which is introduced in Section 2, thus provides the lens through which this Article analyzes the relationship between private law and the conflict of laws. Sections 3 and 4 look at the approaches of the European Union and United States (respectively) toward federal private law and choice of law, comparing and contrasting their different perspectives and their relationship, present and historical, with ideas of subsidiarity in each federal order. The analysis of the distinct traditions of private law and the conflict of laws in the European Union and United States reveals both commonalities and contrasts, which provides important insights into the theory, policy choices, and regulatory techniques of each federal system.

2. DEFINING AND DISTINGUISHING SUBSIDIARITY

Before examining its role in the fields of E.U. and U.S. private law and the conflict of laws, it is necessary to clarify the meaning of the term “subsidiarity,” particularly in the context of a federal system. Although its roots may arguably be traced deeper to Aquinas and Aristotle, it is often said that the idea of subsidiarity has its origins in late nineteenth century Catholic social thought.⁹

⁹ See ANTONIO ESTELLA, *THE EU PRINCIPLE OF SUBSIDIARITY AND ITS CRITIQUE* 76–79 (2002) (emphasizing that the multi-faceted nature of “subsidiarity” is largely due to the various perspectives on which it was based, including the social doctrines of the Catholic Church); Nicholas Aroney, *Subsidiarity, Federalism and the*

One of its most prominent articulations was in a papal encyclical from 1931, which, as part of a broader critique of both unrestrained capitalism and totalitarian communism, stated that “it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do.”¹⁰ The adoption of the principle of subsidiarity as part of the reconstruction of a German federal Constitution¹¹ after the Second World War thus reflects in part the

Best Constitution: Thomas Aquinas on City, Province and Empire, 26 LAW & PHILOSOPHY 161, 163 (2007) (noting that an inquiry into Thomas Aquinas’ understanding of community and political systems can help illuminate the concept of subsidiarity as a “Catholic social teaching . . . within the context of a wider social theory”); N.W. Barber, *The Limited Modesty of Subsidiarity*, 11 EUR. L.J. 308, 309–10 (2005) (acknowledging the possibility of a historical connection between the Catholic and European conceptions of subsidiarity, but arguing that there are major differences between them); Andrew Beale & Roger Geary, *Subsidiarity Comes of Age?*, 144 NEW L.J. 12 (1994) (arguing that St. Thomas Aquinas’ fusion of Catholic teaching with Aristotle’s notion of subsidiarity “automatically legitimised the state as part of God’s design”); Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT’L L. 38, 41 (2003) (stating that Catholic social theorists in the late nineteenth century developed the principle of subsidiarity as a “middle way between the perceived excesses of both laissez-faire liberal capitalist society and Marxian socialist alternatives”); Christoph Henkel, *The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity*, 20 BERKELEY J. INT’L L. 359, 363–64 (2002) (noting that the concept of subsidiarity is “rooted in the Catholic doctrine of social philosophy and the Catholic teachings on social reconstruction” under which, as first articulated by Pope Leo XIII, “[i]t is not right . . . for either the citizen or the family to be absorbed by the State”); Paul D. Marquardt, *Subsidiarity and Sovereignty in the European Union*, 18 FORDHAM INT’L L.J. 616, 618 (1994) (tracing the roots of “subsidiarity” to Catholic social theory and its first explicit description by Pope Pius XI); Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 103–107 (2001) (contending that the modern American conception of “subsidiarity” and its automatic association with conservative viewpoints sharply contrasts with its origins in Catholic social theory and detracts from its influence on concepts of American federalism).

¹⁰ Pius XI, *Quadragesimo Anno: Encyclical Letter on Reconstruction of the Social Order*, para. 79 (May 15, 1931), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html.

¹¹ See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, [GG] [Basic Law for the Federal Republic of Germany] [Federal Law Gazette Part III, 100-1] [as last amended by the Act of July 29, 2009], art. 23, available at http://www.bundestag.de/htdocs_e/documents/legal/index.html (“With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed . . . to the principle of subsidiarity”); see also *id.*, art. 72(2).

fact that it also offered a direct critique of the fascist unitary conception of the state.

The endurance of subsidiarity as an idea is matched by – and is perhaps a product of – its versatility. In recent years it has been increasingly invoked to deal with a range of multi-layered governance problems, particularly in support of arguments for devolution toward greater local government. A role for subsidiarity has also been proposed with respect to the international legal system as a whole; it has been argued that “[s]ubsidiarity is in the process of replacing the unhelpful concept of ‘sovereignty’ as the core idea that serves to demarcate the respective spheres of the national and international.”¹² Subsidiarity remains most famous in modern usage as a legal principle of European Union law. In that context, the Treaty on European Union provides that:

[u]nder the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.¹³

¹² Mattias Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 256, 264 (Sujit Choudhry ed., 2006); see also ALEX MILLS, THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW 103–06 (2009) (discussing how subsidiarity is a helpful way to approach the question of the distribution of lawmaking authority between individual states and multi-state bodies); Carozza, *supra* note 9, at 40 (stating that “subsidiarity can be understood to be a conceptual alternative to the comparatively empty and unhelpful idea of state sovereignty”); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT’L L. 907 (2004). See generally THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY (Tomer Broude & Yuval Shany eds., 2008) (providing an excellent overview of the of the principle of subsidiarity); JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 74 (2006) (discussing the allocation of power under principles of subsidiarity).

¹³ Treaty on European Union, art. 5(3), Mar. 30, 2010, 2010 O.J. (C 83) 13, 18 [hereinafter Treaty on European Union]. All references in this Article are to this Consolidated version of the Treaty on European Union, and to the Consolidated version of the Treaty on the Functioning of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 47, formerly the “Treaty Establishing the European Community,” both of which incorporate the changes made by the Lisbon Treaty (2009). The

The justifications offered for this principle typically draw on ideas of autonomy, accountability, organizational effectiveness, and local diversity in preferences and identity, which, it is argued, are generally better served by rules made by a subsidiary authority.¹⁴ It is sometimes expressed as the idea that decisions should be “taken . . . as closely as possible to the citizen,”¹⁵ and more specifically, to those people who will be affected by a decision, suggesting that it also has links with ideas of democratic participation.

In a federal system, subsidiarity means that regulation should be carried out by the states, unless there is a justification for action to be taken at the federal level.¹⁶ Defined in this way, a key feature of the concept is that it reflects an attempt to balance centrifugal and centripetal forces in a federal order—it may be offered both as a presumption against federal law, but also as a justification for centralized regulation. It thus “demarcates a conceptual territory in which unity and plurality interact, pull at one another, and seek reconciliation.”¹⁷ A foundational problem in any federal system is the question of the distribution of the authority to regulate, which may thus be redescribed as the question of what theory of subsidiarity should be adopted.

Treaty on European Union and the Treaty on the Functioning of the European Union will be referred to collectively as the “E.U. Treaties.”

¹⁴ See, e.g., George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 340 (1994) (discussing the benefits of subsidiarity, such as the resulting increases in self-determination and the participatory power of individuals and local communities); Kumm, *Democratic Constitutionalism Encounters International Law*, *supra* note 12, at 265 (arguing that the principle of subsidiarity offers “sensitivity towards locally variant preferences, possibilities for meaningful participation and accountability, and the protection and enhancement of local identities”).

¹⁵ Treaty on European Union, *supra* note 13, art. 1.

¹⁶ Subsidiarity may also support arguments for devolution within subsidiary authorities, on the basis that “there are few functions for which a mid-sized actor is most efficient” (or democratically effective). Marquardt, *supra* note 9, at 637; see also Yishai Blank, *Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance*, 37 FORDHAM URB. L.J. 509, 510 (2010) (contending that “subsidiarity is better fit for the task of articulating multilevel governance, even if only as a tool for loosening the grip of federalism over our political and legal theory”). There is some recognition of this in the reference to regulation “at regional and local level” in the definition of subsidiarity in the Treaty on European Union, as amended by the Lisbon Treaty (2009). See Treaty on European Union, *supra* note 13, art. 5(3) and *infra* note 67.

¹⁷ Carozza, *supra* note 9, at 52.

2.1. *Subsidiarity in Constitutional Settlement and Practice*

In both the European Union and the United States, two methods of allocating regulatory authority (i.e., two ways in which ideas of subsidiarity can be given effect) may be distinguished: an exclusive allocation of powers as a matter of constitutional settlement, and a more dynamic allocation of shared or non-exclusive powers as a matter of constitutional practice.

2.1.1. *Constitutional Settlement*

The first method concerns the allocation of powers by either the E.U. Treaties or the U.S. Constitution. Under any federal constitution, exclusive competence (legal power) over a particular field might be allocated either to the federal level or to the states. An allocation to federal or state levels might be done specifically, by a grant of a particular exclusive constitutional power,¹⁸ or generally, as part of an allocation of residual powers which are not specifically dealt with in the Constitution. Thus, where the Tenth Amendment of the U.S. Constitution provides that “[t]he powers not delegated to the United States by the Constitution, nor

¹⁸ The exclusive powers of E.U. institutions have been a matter of dispute. See, e.g., Opinion 1/75, Re: Understanding on a Local Cost Standard, 1975 E.C.R. 1355 (holding that the Community power in question was exclusive, because to conclude otherwise would “distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest.”); Alan Dashwood, *The Relationship Between the Member States and the European Union/European Community*, 41 COMMON MKT. L. REV. 355, 369–73 (2004) (arguing that a limited exclusive power vested in the Union is one of the key characteristics defining the relationship between Member States and the Union); see also Theodor Schilling, *A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle*, 14 Y.B. EUR. L. 203 (1994) (arguing that subsidiarity should affect the determination of exclusive E.U. powers). The Lisbon Treaty (2009) has attempted to clarify this issue in its reforms to the E.U. Treaties. See Treaty on the Functioning of the European Union, *supra* note 13, arts. 2–4 (granting exclusive competence to the Union in specific areas and providing that a Member State may “legislate and adopt legally binding acts” in those areas “only if so empowered by the Union or for the implementation of Union acts”). The allocation of powers in Article I, Section 8 of the Constitution of the United States is generally non-exclusive except where made exclusive through the operation of Article I, Section 10, which prohibits the exercise of certain powers by U.S. states, or where such exclusivity is necessarily implied by the nature of the power. See, e.g., *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819) (“Whenever the terms in which a power is granted to congress, or the nature of the power, require that it should be exercised exclusively by congress, the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act on it.”).

prohibited by it to the States, are reserved to the States respectively, or to the people,”¹⁹ it is, possibly among other things,²⁰ allocating exclusive competence to the States in respect of those powers not granted to the federal government by the Constitution. It is implicitly making a determination, or perhaps reaffirming an existing understanding,²¹ that, in respect of those powers, federal regulation is unnecessary. The legal consequence of this determination is that the federal government cannot use its other powers to achieve regulation indirectly in areas that fall outside its competence; it reinforces the limited nature of federal authority.²² Similarly, the European Union’s principle of ‘conferral’ provides that “the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein,” and

¹⁹ U.S. CONST. amend. X.

²⁰ See DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* (2007); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1440 (1987) (arguing that the original purpose of the Tenth Amendment was not to allocate power between governments, but to make clear that “the People retained all powers not expressly or impliedly delegated by enumeration—powers they could either give to other government agents in individual states, or withhold from all governments.”); Seth M. Rokosky, Comment, *Denied and Disparaged: Applying the “Federalist” Ninth Amendment*, 159 *U. PA. L. REV.* 275 (2010) (discussing the debate over whether the Ninth Amendment is meant to protect individual liberties or state powers, and applying the argument for protecting state powers to the Tenth Amendment); see also KURT T. LASH, *THE LOST HISTORY OF THE NINTH AMENDMENT* (2009) (advancing the argument summarized by Rokosky that the Ninth Amendment is a protection of state powers); Randy E. Barnett, *The Ninth Amendment: It Means What it Says*, 85 *TEX. L. REV.* 1 (2006) (concluding that the Ninth Amendment protects individual liberties—the other half of the debate summarized by Rokosky).

²¹ See, e.g., *United States v. Darby*, 312 U.S. 100, 124 (1941) (“There is nothing in the history of [the Tenth Amendment’s] adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment”); see also *United States v. Sprague*, 282 U.S. 716, 733 (1931) (“The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the states or to the people.”).

²² See generally *Reno v. Condon*, 528 U.S. 141 (2000) (holding that the Driver’s Privacy Protection Act—regulating state disclosure of personal information—did not violate the Tenth Amendment). See also *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that “Congress cannot circumvent th[e] prohibition [announced in *New York v. United States*] by conscripting the State’s officers directly”); *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that, under the Tenth Amendment, “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program”).

"[c]ompetences not conferred upon the Union in the Treaties remain with the Member States."²³

Whether it is specific or general, a grant of power in the foundational document of the federal system itself determines the appropriateness of regulation at the relevant level. An exclusive allocation of competence to the federal level implicitly involves a determination that uniform regulation at that level is strongly necessary and justified. An exclusive allocation to the states implicitly involves a determination that regulation at the federal level is not necessary and cannot be justified. In each case, the Treaty or Constitution reflects and embodies a determination that might be characterized as the result of a subsidiarity analysis. In this context, the subsidiarity analysis is conducted as part of the negotiation (and judicial interpretation) of the terms of the Constitution; it is "hard-wired" as part of the constitutional settlement of the federal system. Thus, for example, the Supreme Court stated in *Gregory v. Ashcroft*²⁴ that giving effect to the Tenth Amendment:

[A]ssures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government

²³ Treaty on European Union, *supra* note 13, art. 5(2). This clause is somewhat in tension with Article 352(1) of the Treaty on the Functioning of the European Union, which provides that "[i]f action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures." *Id.*; see also Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1996 E.C.R. I-1759, I-1761 (noting that "the competence of the Community to enter into international commitments may not only flow from express provisions of the Treaty but also be implied from those provisions"); Case 8/73, Hauptzollamt Bremerhaven v. Massey-Ferguson GmbH 1973 E.C.R. 897, 901 (discussing the applicability of Article 235 and stating that it does not create a discretionary power but authorizes power to fill in gaps in a treaty); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2443-44 (1991) (pointing to Article 235 of the EEC Treaty—the predecessor to Article 352—as the key to the ECJ's expansion of the implied powers doctrine).

²⁴ *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (holding that the federal Age Discrimination in Employment Act does not preempt state law requiring mandatory retirement of appointed state judges at age 70).

more responsive by putting the States in competition for a mobile citizenry.²⁵

These are criteria readily recognizable as justifications for subsidiarity—a principle that is, in this context, implicitly embodied within the constitutional division of powers.

2.1.2. *Constitutional Practice*

The second way in which subsidiarity may be operative concerns powers that are not exclusively assigned either to the federal or state level, but shared. The supremacy of federal over state law when there is any inconsistency between them is clearly established in both the European Union²⁶ and United States;²⁷ thus, there is no question of a dispute over the priority between actually

²⁵ *Id.* at 458.

²⁶ See, e.g., Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 1978 E.C.R. 629 (requiring national courts to “set aside any provision of national law which may conflict with [Community law], whether prior or subsequent to the Community rule”); see also Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125 (“[T]he validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of its constitutional structure.”); Case 6/64, *Flaminio Costa v. E.N.E.L.*, 1964 E.C.R. 585 (“[T]he EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.”); Treaty on the Functioning of the European Union, *supra* note 13, art. 2(2), at 50 (“Member states shall exercise their competence to the extent that the Union has not exercised its competences.”). *But see* Treaty on the Functioning of the European Union, arts. 4(3) & 4(4) (providing that, in the areas of research, technological development, space, development cooperation, and humanitarian aid, exercise of Union competence “shall not result in Member States being prevented from exercising theirs.”).

²⁷ This is provided for by the Supremacy Clause, which states:

[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI. The meaning of the Supremacy Clause has been defined—and clarified—by the Supreme Court. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406, 411–12 (1819) (noting that federal law is supreme and clarifying that, in addition to its enumerated powers, Congress may pass any laws which it deems “necessary and proper”); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 149 (1819) (“[T]he mere grant of a power to congress, does not vest it exclusively in that body” if congress chooses not to act, but “the laws of the United States, which shall be made, shall be the supreme law of the land . . .”) (emphasis added).

inconsistent federal and state laws. There is, however, wide scope for disagreement over putative federal laws—the question of whether federal regulation should be adopted. For such shared powers, the subsidiarity question is “unresolved,” or left open, as a matter of constitutional settlement. Whether through a legal rule or political negotiation (or a combination of the two) in these areas, which fall between powers allocated exclusively to the states or to the federal government, the level of regulation must be “justified.” In the legal and political space of these “shared powers,” the principle of subsidiarity can play a different role, as a central and dynamic aspect of the negotiations between the different levels of federal governance—part of the constitutional practice of such “justifications.” Subsidiarity arguments are thus implicitly at the heart of discussions over whether federal uniformity is really necessary to displace different state approaches in a particular field, or over which level of government is best placed to ensure implementation of policy objectives.

The focus in this Article is on subsidiarity as a legal rather than political doctrine. The extent to which a federal system chooses to “legalize” the debate over subsidiarity questions affects not only the vocabulary of the debate (to what extent it is a legal question or a question of policy), but also the power of the actors (whether evaluating the requirements of subsidiarity is a judicial or parliamentary function) and their approach (to what extent it is a technical question drawing on principle and precedent and to what extent it is an open contest of values).

Critics of subsidiarity in the European Union have sometimes suggested that it is an empty concept, that it offers no guidance for particular decisions and thus can act as a justification for action (or inaction) at any level.²⁸ This misses the point of a dynamic and in many ways intensely practical principle which in this context is designed to shape the framework and process of allocation of shared regulatory competence in a very fact-specific way, rather

²⁸ See, e.g., ESTELLA, *supra* note 9, at 6 (suggesting that “subsidiarity is, from a functional perspective, devoid of clear legal content”); Virginia Harrison, *Subsidiarity in Article 3b of the EC Treaty – Gobbledegook or Justiciable Principle?*, 45 INT’L & COMP. L.Q. 431 (1996) (suggesting that while it may be difficult to clearly define subsidiarity, it is still justiciable); John Peterson, *Subsidiarity: A Definition to Suit Any Vision?*, 47 PARLIAMENTARY AFF. 116 (1994) (“Subsidiarity is a complex idea which can be (and has been) abused and molded to suit virtually any prohibited agenda.”); Marquardt, *supra* note 9, at 628–29 (discussing arguments that subsidiarity can be used to justify any given position).

than (as the E.U. Treaties themselves do) “hard-wire” specific pre-determined decisions on lawmaking power.²⁹ Thus, according to the E.U. Protocol on the Application of the Principles of Subsidiarity and Proportionality (as adopted in 1997):

The principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty . . . [but rather, in] areas for which the Community does not have exclusive competence . . . [it] provides a guide as to how those powers are to be exercised at the Community level. Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified.³⁰

While subsidiarity is importantly adopted here as a legal principle, the political dimension of a subsidiarity analysis, even where conducted by the courts, is also ever present in the judgment as to whether regulatory action is really “necessary” or “justified” — “one’s judgment about whether a measure comports with the principle of subsidiarity is a profoundly political one, in the sense that it depends intimately on one’s assessment of the measure’s merits.”³¹ The scope for political contestation is also expanded by the counter-factual nature of a subsidiarity inquiry. The question of whether the objectives of a regulation could be achieved through measures adopted at a lower level may be assisted by practical experience,³² but will rarely be determined by it. Subsidiarity has

²⁹ See, e.g., Kumm, *Democratic Constitutionalism Encounters International Law*, *supra* note 12, at 265 (arguing that the usefulness of subsidiarity “does not lie in providing a definitive answer in any specific context. But it structures inquiries in a way that is likely to be sensitive to the relevant empirical and normative concerns”); Akos G. Toth, *Is Subsidiarity Justiciable?*, 19 EUR. L. REV. 268 (1994) (discussing the ways in which subsidiarity is justiciable and the limits on judicial determinations with respect to subsidiarity).

³⁰ Protocol on the Application of the Principles of Subsidiarity and Proportionality, para. 3, Nov. 10, 1997, 1997 O.J. (C 340) 105. The current version of this protocol, substantially amended by the Lisbon Treaty (2009), is attached as protocol no. 2 to the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *supra* note 13, at 206.

³¹ Bermann, *supra* note 14, at 335.

³² See *infra* text accompanying notes 77 and 186.

thus fairly been described as “fully an exercise in speculation as well as judgment.”³³

2.1.3. *The Interaction of Constitutional Settlement and Practice*

The doctrine of subsidiarity may therefore be operative in a federal system in two ways: first, as part of a fixed constitutional arrangement allocating exclusive competence in respect of certain powers to federal or state levels—a matter of constitutional settlement; and second, as part of a dynamic allocation of competence over shared powers—a matter of constitutional practice, which is (or may be) both legal and political in character. These roles of subsidiarity are complementary and may also be connected. The more that a constitution “hard-wires” a subsidiarity determination by allocating powers exclusively to federal or state levels, the less scope and need there is for subsidiarity to operate as a matter of constitutional practice. Conversely, the more that subsidiarity is taken into consideration as a legal and political principle as a matter of constitutional practice, the less concern there is likely to be with the fact that the constitution leaves a subsidiarity determination “unsettled,” by sharing competence between federal and state levels. Subsidiarity as a doctrine of legal theory and practice may thus be central to the design of federal constitutions, particularly in a system (like the European Union) where questions of constitutional settlement arise periodically for renegotiation.

2.2. *Proportionality and Constitutional Interpretation*

In any allocation of powers in a federal system, to either the federal or state level, exclusively or shared, a further issue arises. This is the question of the interpretation of the scope of the power, or the degree to which the allocation of power justifies regulation of areas indirectly affecting or affected by the field. An allocation of power may be (to varying degrees) strictly defined or left with indeterminate boundaries which are then subject to legal and political contestation. This contestation overlaps significantly with ideas of subsidiarity, particularly as they are implicated in the constitutional settlement of a federal system.

For example, in the United States, the limits of powers allocated to the federal Congress under Article I, Section 8 of the

³³ Bermann, *supra* note 14, at 335.

Constitution,³⁴ are affected by Clause 18 of that section, which provides (after delimiting the range of powers of Congress) that “[t]he Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”³⁵

This test of whether regulation is “necessary and proper for carrying into Execution” one of the range of allocated powers requires a determination (in practice, by both political actors and the courts) of how closely related the measure is to the power. This is not, however, a test of whether it is “necessary and proper” that the regulation take place at the federal level—a subsidiarity analysis. Rather, it is a test of whether the regulation is “necessary and proper” to achieve the objectives of the allocation of power under the Constitution—an allocation which already implicitly contains a ‘hard-wired’ determination that the power is justified according to a subsidiarity analysis. This form of analysis is therefore much more akin to the role of the principle of proportionality in the European Union, which imposes the requirement that “the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties,”³⁶ counter-balanced by the grant of any powers

³⁴ For a discussion of Article I, Section 8, see *supra* note 18.

³⁵ U.S. CONST. art. I, § 8, cl. 18. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819) (holding that the clause “purport[s] to enlarge, not to diminish the powers vested in the Government. It purports to be an additional power, not a restriction on those already granted.”).

³⁶ Treaty on European Union, *supra* note 13, art. 5(4). See Bermann, *supra* note 14, at 386–90 (noting that the concept of proportionality is commonly understood to include the requirement not only that the action in question be reasonably related to the objective, but also that it be the least burdensome alternative adequate to achieve the desired end while not carrying a cost greater than its benefit); see also *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (holding that a federal regulation had to show “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end” to be authorized under the Fourteenth Amendment); George A. Bermann, *Subsidiarity and the European Community*, 17 HASTINGS INT’L & COMP. L. REV. 97, 110–12 (1993) (pointing out that the decision whether to regulate at the federal or state level may be affected by concerns other than the vertical balance of power—a typical subsidiarity concern—such as the relationship between the regulation and the objective, the cost-benefit balance, and the burden posed by the regulation—typical proportionality concerns); Henkel, *supra* note 9, at 374–78 (comparing the concepts of subsidiarity and proportionality and noting that while they “manifest

“necessary . . . to attain one of the objectives set out in the Treaties.”³⁷ The broader process of reasoning inherent in such an analysis is one that is widely adopted at both national and international levels, when courts face problems of reconciling apparently conflicting norms or values.³⁸

In the context of a federal system, the approach which is taken to the question of what is a “necessary and proper” regulation obviously affects the balance of regulatory powers between federal and state levels (i.e. the issue of subsidiarity as constitutional settlement). However, this does not overtly require the court to determine whether the specific federal legislation in question is justified in order to achieve objectives which could not be satisfactorily achieved by regulation at the state level (i.e. the issue of subsidiarity as constitutional practice). If different judges take different views on the scope of federal powers under the Constitution of a federal system, the basis for these different views will not be articulated as an evaluation of whether specific federal measures are necessary (i.e. whether federal or state authorities are more suited to achieve the particular policy objectives of the measure), but of whether they are within the express or implied scope of the constitutionally allocated (and thus inherently justified) powers. Although this is formally presented as a question of interpretation, it will, however, also clearly involve questions of political judgment as to the appropriate allocation of powers between federal and state levels.

Where subsidiarity as constitutional settlement (including proportionality) and subsidiarity as constitutional practice do not match up, this is likely to be a source of constitutional conflict in one of two ways. Regulatory action may be “necessarily” connected to a shared power (satisfying proportionality), but nevertheless “unnecessary” in light of the alternative courses of action (not satisfying subsidiarity)—this would likely lead to protestations by states that federal power is being improperly exercised. Equally, federal regulation may achieve some objective

distinct differences, their independent spheres of application buttress one another”).

³⁷ Treaty on European Union, *supra* note 13, art. 352(1); *see also* sources cited *supra* note 23.

³⁸ *See, e.g.,* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008) (tracing the global development and adoption of proportionality analysis and its allowance for judicial review of conflicting legislative actions).

that cannot be otherwise achieved (satisfying subsidiarity), but that objective may not come sufficiently within the scope of any federal power (not satisfying proportionality)—this is likely to lead to protestations by federal authorities that they lack the powers necessary to perform their functions.³⁹ In either case, this is likely to put pressure on the constitutional settlement—leading to proposals for constitutional reform.

Drawing a clear technical or functional distinction between constitutional doctrines with a political dimension, like subsidiarity and proportionality, is inevitably difficult. Subsidiarity as a principle of constitutional settlement helps determine the allocation of powers between federal and state levels. Proportionality is one aspect of defining that allocation of powers—determining how closely connected regulatory acts need to be with a power to be validly supported by it. Where it is determined that a regulatory act would fall within shared federal and state competence, the secondary issue of subsidiarity as a matter of constitutional practice arises, which is the question of whether a federal law is really necessary to achieve the objectives of the regulation.

3. SUBSIDIARITY, PRIVATE LAW, AND THE CONFLICT OF LAWS IN THE EUROPEAN UNION

As the European Union has grown out of independent states, its development as a legal system has naturally involved the emergence and expansion of “federal” European law. This impetus toward centralization is reflected in the constitutional exhortation to create “an ever closer union among the peoples of Europe.”⁴⁰ It is well known that much of the progress toward centralization of regulation has been driven by the European Court of Justice, which has, particularly through the doctrines of “supremacy”⁴¹ and “direct effect”⁴² of E.U. law, pushed the

³⁹ In the European Union, a problematic device allowing for the flexible expansion of powers in these circumstances is provided by Article 352 of the Treaty on the Functioning of the European Union. See sources cited *supra* note 23.

⁴⁰ Treaty on European Union, *supra* note 13, pmb. and art. 1. This statement was originally adopted in the Preamble of the Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

⁴¹ See sources cited *supra* note 26 (discussing the recognition of the supremacy of federal law in the European Union).

⁴² See, e.g., Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1 (holding that Article 12 of the Treaty Establishing the

transformation of the European Union from a regional organization to a quasi-federal system. The focus of this section is on the less widely appreciated development of federal private law and the conflict of laws as part of this evolving order.

3.1. *Private Law and the Emergence of Subsidiarity*

3.1.1. *Toward European Private Law?*

The primary focus of early European integration was on questions of public law, particularly economic regulation, and this was and remains reflected in the absence of any general European competence over questions of private law. This lack of competence reflects an implicit 'hard-wired' subsidiarity determination—the Member States have determined that, at least in general, centralized private law regulation is unnecessary for the purposes of the federal union. In the field of private law, the 'progress' toward European harmonization has therefore been limited, incremental, and somewhat fragmented, partly through the development of law by the European Court of Justice,⁴³ but primarily through Regulations and Directives based on particular powers.⁴⁴ The scope of these rules is limited by the powers

European Community produces direct effects and creates individual rights that must be recognized and protected by national courts).

⁴³ See generally Walter van Gerven, *European Court of Justice Case Law as a Means of Unification of Private Law?*, 20 *FORDHAM INT'L L.J.* 680-81 (1997) (arguing that ECJ case law tends to harmonize, rather than unify, national private laws); Koen Lenaerts & Kathleen Gutman, "Federal Common Law" in the European Union: A Comparative Perspective from the United States, 54 *AM. J. COMP. L.* 1 (2006) (contrasting the rise of "federal common law" in the ECJ with its decline in U.S. jurisprudence).

⁴⁴ See generally CHRISTIAN TWIGG-FLESNER, *THE EUROPEANISATION OF CONTRACT LAW* (2008) (summarizing the history of European contract law and the notable predominance of Directives in its development); Jürgen Basedow, *EUROPEAN PRIVATE LAW: SOURCES*; Jürgen Basedow, *Federal Choice of Law in Europe and the United States—A Comparative Account of Interstate Conflicts*, 82 *TUL. L. REV.* 2119, 2124 (2008) (noting that although the number of legislative acts regulating contracts, corporations, intellectual property, and other legal issues has increased over the past fifteen years, European private law legislation continues to be fragmentary); Walter van Gerven, *Harmonization of Private Law: Do we Need it?*, 41 *COMMON MKT. L. REV.* 505, 507-14 (2004); Reiner Schulze, *European Private Law and Existing EC Law*, 13 *EUR. REV. PRIVATE L.* 3 (2005) (examining the possible effects of the European Commission's Action Plan to replace current Regulations and Directives with Europe-wide contract laws); Reinhard Zimmermann, *The Present State of European Private Law*, 57 *AM. J. COMP. L.* 479 (2009) (evaluating the state of

granted under the E.U. Treaties. For example, a range of Directives affecting private law has been issued under the treaty provision granting European institutions competence over consumer protection,⁴⁵ which complements the more general competence to “adopt . . . measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.”⁴⁶

The harmonization of private law has been further limited by the fact that, although E.U. treaty provisions themselves and Regulations made under them are capable of having both vertical

European private law and the development of principles and Directives in contract law).

⁴⁵ See Treaty on the Functioning of the European Union, *supra* note 13, art. 169 (authorizing certain measures “to promote the interests of consumers and to ensure a high level of consumer protection”). A proposal to simplify this range of Directives is under consideration. *Proposal for a Directive of the European Parliament and of the Council on Consumer Rights*, COM (2008) 614 final (Oct. 8, 2008) (proposing to replace the fragmented Consumer Acquis with a single Directive on consumer protection); see also Albertina Albors-Llorens, *Consumer Law, Competition Law and the Europeanization of Private Law*, in THE INSTITUTIONAL FRAMEWORK OF EUROPEAN PRIVATE LAW 245, 266–70 (Fabrizio Cafaggi ed., 2006) (arguing that the consumer interest in competition law and the adoption of consumer protection Directives to promote market integration jointly influence European private law); Martijn W. Hesselink, *European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?*, 15 EUR. REV. PRIVATE L. 323, 347 (2007) (arguing that “European contract law does not address us as persons who should be treated with justice nor as citizens who have fundamental rights, but, most of the time, as consumers”); Simon Whittaker, *A Framework of Principle for European Contract Law?*, 125 LAW Q. REV. 616 (2009) (tracing the development of the “Common Frame of Reference” and its effectiveness in identifying common principles for European contract and consumer law); Zimmermann, *supra* note 44, at 486–90 (discussing the E.U.’s 2008 Proposal for a Directive on Consumers). See also *infra* text accompanying note 80 (highlighting proposals for a European contract law).

⁴⁶ Treaty on the Functioning of the European Union, *supra* note 13, art. 114. See Case C-436/03, *Parliament v. Council*, 2006 E.C.R. I-3733 (holding that the Community is empowered to adopt measures which contribute to the elimination of obstacles to the economic freedoms guaranteed by the Treaty); Case C-491/01, *The Queen v. Sec’y of State for Health ex parte British Am. Tobacco (Investments) Ltd.*, 2002 E.C.R. I-11453 (holding that the Community had the power to adopt a Directive regarding the manufacture, presentation, and sale of cigarettes because the aim of the Directive was to prevent “the emergence of future obstacles to trade resulting from multifarious development of national laws”); Case C-380/03, *Germany v. Parliament and Council*, 2006 E.C.R. I-11573 (upholding the validity of a Directive which prohibits press and radio advertisements for tobacco products on the basis that the Directive reduces disparities in national laws on advertising of tobacco products which would otherwise impede the free movement of goods and the freedom to provide services).

and horizontal "direct effect"⁴⁷ (which can give rise to private law remedies),⁴⁸ in many cases the E.U. Treaties only authorize the adoption of a Directive, a weaker regulatory instrument. A Directive is binding on state public authorities (vertical direct effect),⁴⁹ but, unless it has been implemented by national law, not on private parties. It thus has only indirect horizontal effect on private law, through, for example, influencing the development and interpretation of national law.⁵⁰ These limitations have been addressed to some extent through doctrines of "incidental effect,"⁵¹

⁴⁷ Treaty on the Functioning of the European Union, *supra* note 13, art. 288. See also Case 43/75, *Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena*, 1976 E.C.R. 455 (noting that Article 119 of the Treaty establishing the European Economic Community regarding equal pay has direct effect); Case 6/64, *Costa v. ENEL (Ente Nazionale Energia Elettrica)*, 1964 E.C.R. 585 (noting that a legal duty not to act can produce a direct effect); Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1 (holding that Article 12 of the Treaty establishing the European Economic Community, which prohibits discrimination on the basis of nationality, has direct effect).

⁴⁸ See, e.g., Case C-453/99, *Courage Ltd. v. Crehan*, 2001 E.C.R. I-6297 (finding a party to a contract liable to restrict or distort competition may rely on breach of Art. 81 EC to obtain relief); Case C-253/00, *Muñoz & Superior Fruiticola v. Frumar Ltd.*, 2002 E.C.R. I-7289 (finding Community provisions on quality standards applicable to fruits or vegetables capable of enforcement through civil proceedings); Gerrit Betlem, *Torts, A European Ius Commune and the Private Enforcement of Community Law*, 64 CAMBRIDGE L.J. 126 (2005) (discussing the role of civil actions in enforcing Community law); Assimakis P. Komninou, *New Prospects for Private Enforcement of EC Competition Law: Courage v. Crehan and the Community Right to Damages*, 39 COMMON MKT. L. REV. 447, 449 (2002) (arguing that *Courage v. Crehan* established "a Community-law based right in damages").

⁴⁹ See, e.g., Case 152/84, *Marshall v. Southampton & Sw. Hampshire Area Health Auth.*, 1986 E.C.R. 723 (holding that a Directive prohibiting sex discrimination in the workplace does not impose obligations directly on private employers, but does obligate Member States acting as employers).

⁵⁰ See, e.g., Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentación SA*, 1990 E.C.R. 4135 (holding that "in applying national law, whether the provisions in question were adopted before or after the Directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the Directive"); Joined Cases C-397/01 to C-403/01, *Pfeiffer v. Deutsches Rotes Kreuz, Kreisverband Waldshut eV*, 2004 E.C.R. I-8835 (applying the principle that national courts must interpret national rules consistently with the objectives of a Community Directive); Case 14/83, *Von Colson v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891 (holding that Member States "are required to adopt measures which are sufficiently effective to achieve the objectives of the Directive and to ensure that those measures may in fact be relied on before national courts by the persons concerned.").

⁵¹ See, e.g., Case C-194/94, *CIA Sec. Int'l SA v. Signalson SA*, 1996 E.C.R. I-2201 (holding that breach of the procedural obligation to notify a technical regulation to the Commission, as set out in a Directive, results in the unenforceability of the technical regulation in private proceedings before national

and of state liability for the breach of, or the failure to implement, E.U. law.⁵² Community values, such as those set out in the European Convention on Human Rights, may also have an indirect role in developing private law rules in the different Member States. The Treaty on European Union establishes that “[f]undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”⁵³ Both the ECJ and also the courts of the Member States are

courts); Case C-159/00, *Sapod Audic v. Eco-Emballages SA*, 2002 E.C.R. I-5031 (holding that a “substantial procedural defect such as to render the technical regulations in question inapplicable” may be relied on between private parties); Case C-443/98, *Unilever Italia SpA v. Cent. Food SpA*, 2000 E.C.R. I-7535 (holding that although an individual may not rely on or be obligated by a Community Directive, individuals may rely on the inapplicability of a national technical standard when it is not in compliance with the Directive).

⁵² See, e.g., *Joined Cases C-48/93 & C-46/93, Brasserie du Pêcheur SA v. Germany and The Queen v. Sec’y of State for Transp. ex parte Factortame Ltd.*, 1996 E.C.R. I-1029 (applying the principle of state liability for loss and damage caused to individuals as a result of breaches of Community law to a breach of Community law attributable to the legislature); *Joined Cases C-6/90 & 9/90, Francovich v. Italian Republic*, 1991 E.C.R. I-5357 (holding that “the principle whereby a State must be liable for loss or damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.”). The development of state liability principles has sometimes been characterized as a form of European private law, creating a private right to damages somewhat analogous to tort law. Similar claims have been made with respect to the law developed to govern non-contractual liability of the European Community for “damage caused by its institutions or by its servants in the performance of their duties.” Treaty on the Functioning of the European Union, *supra* note 13, art. 340. See also Case C-224/01, *Köbler v. Austria*, 2003 E.C.R. I-10239 (adding that Member States are also liable under the Francovich principle for breaches of Community law occasioned by judicial decisions); Case C-352/98, *Laboratoires Pharmaceutiques Bergaderm SA v. Comm’n*, 2000 E.C.R. I-5291 (re-affirming that the Community or Member States may only be held liable for damages when the rule of Community law that is infringed was intended to confer rights on individuals, when the breach is sufficiently serious (in particular whether the relevant institution “manifestly and gravely disregarded limits on its discretion”), and there is a direct causal link between the breach of the obligation and the loss or damage caused to the individual); *Lenaerts & Gutman, supra* note 43, at 78–96 (describing the development of Member State liability); see generally *van Gerven, supra* note 43 (arguing that the development of Member State liability has led to an increasingly uniform system of tort rules among Member States). These areas are, however, perhaps better described as quasi-administrative in character because they necessarily involve disputes between public and private parties, and are not the focus of attention in this Article.

⁵³ See Treaty on European Union, *supra* note 13, art. 6(3).

required to develop their law in light of these principles. This is illustrated, for example, by the evolution of the private law doctrine of breach of confidence in the U.K. to reflect (and protect) the right to privacy under Article 8 of the European Convention of Human Rights, as interpreted by the European Court of Human Rights.⁵⁴ While U.K. courts have recognized that ECHR rights do not have a direct horizontal effect under the Human Rights Act 1998, they have nevertheless accepted that the courts themselves, as a public authority, must not “act in a way which is incompatible with a Convention right” in exercising their powers to develop the common law.⁵⁵

Despite these developments, the limitations on the powers of European institutions in dealing with private law remain significant. The piecemeal progress in this field has frustrated some, leading to continuing (and controversial) proposals for a European Civil Code.⁵⁶

3.1.2. *The Emergence of Subsidiarity*

In 1992, the Treaty of Maastricht significantly expanded the powers of European institutions, a development which also followed on from a period of increasing intensity of European

⁵⁴ See, e.g., *Douglas v. Hello! Ltd.* (No. 3) [2007] UKHL 21, ¶118 (“English law has adapted the action for breach of confidence to provide a remedy for the unauthorized disclosure of personal information . . . [developed] by the analogy of the right to privacy conferred by article 8 of the European Convention on Human Rights . . .”); see also *Campbell v. MGN Ltd.* [2004] UKHL 22 (considering the influence of the European Convention on Human Rights in the development of the tort of breach of confidence under the common law).

⁵⁵ Human Rights Act, 1998, c. 42, § 6 (U.K.).

⁵⁶ See, e.g., Zimmermann, *supra* note 44, at 479 (describing the variety of sources of European private law, and determining that these measures are not yet coherent enough to create a European Civil Code); HUGH COLLINS, *THE EUROPEAN CIVIL CODE: THE WAY FORWARD* (2008) (arguing for a Civil Code to provide more cooperative European governance); Albors-Llorens, *supra* note 45, at 266 (discussing the interactions between consumer law and competition law, and suggesting that the two will aid in the development of European private law). See generally *TOWARDS A EUROPEAN CIVIL CODE* (Arthur S. Hartkamp et al. eds., 3d ed. 2004) (presenting various arguments regarding the feasibility and desirability of a European civil code); MARTIJN W. HESSELINK, *THE NEW EUROPEAN PRIVATE LAW: ESSAYS ON THE FUTURE OF PRIVATE LAW IN EUROPE* (Kluwer Law International ed. 2002); Christian von Bar, *From Principles to Codification: Prospects for European Private Law*, 8 COLUM. J. EUR. L. 379 (2002) (outlining the past and present debate over the creation of a European Civil Code); Christoph U. Schmid, *Legitimacy Conditions for a European Civil Code*, 8 MAASTRICHT J. EUR. & COMP. L. 277 (2001) (recommending a civil code unifying European transactional law).

regulatory activity. It is no coincidence that this development was accompanied by the adoption of the principle of subsidiarity—an attempt to provide reassurance and security that Member State “sovereignty” would not be unduly affected by these expanded powers. The enlargement in E.U. powers in the Treaty of Maastricht was a challenge to the European Union’s constitutional settlement—a potential rewriting of the implied ‘hard-wired’ subsidiarity in its allocation of competences. The introduction of subsidiarity as a legal and political principle into the constitutional practice of the European Union is therefore best understood as a counter to this potential unbalancing of the federal system—not as a purely opposing decentralizing principle, but as a methodology for ensuring balance.⁵⁷ Subsidiarity assisted in the difficult political negotiations for the expansion of European competence; it was “a glue to help keep support for the Maastricht Treaty from coming unstuck.”⁵⁸ It achieved this by allowing a legal codification of the idea that E.U. federalism should not, after all, be “an ever closer union,” but should be an attempt to strive for some sort of rational negotiated balance between different levels of regulation. This movement has also been supported by the increased influence of U.S. theories of regulatory competition in the European Union, bringing the idea that efficiency may in some circumstances be enhanced rather than impeded by diversity.⁵⁹

⁵⁷ See, e.g., Denis J. Edwards, *Fearing Federalism’s Failure: Subsidiarity in the European Union*, 44 AM. J. COMP. L. 537, 543 (1996) (discussing the connection between federalism and subsidiarity, and whether the principle can counterbalance consolidation of power); Bermann, *supra* note 14, at 346 (highlighting “the connection between subsidiarity and the expansion of the Community’s powers”); Bermann, *supra* note 36, at 386–90 (outlining the emergence of the subsidiarity doctrine in the European context and discussing its use as a mechanism for the balancing of power); ESTELLA, *supra* note 9 (viewing subsidiarity as a reaction by states to the growing centralized power of the European community); Henkel, *supra* note 9 (describing the subsidiarity principle as a functional one to ensure balance of powers within the European Union).

⁵⁸ Deborah Z. Cass, *The Word to Save Maastricht? The Principle of Subsidiarity and the Division of Powers in the European Community*, 29 COMMON MKT. L. REV. 1107 (1992) (describing the substantial role the principle of subsidiarity played in the acceptance of various European political instruments and institutions); Peterson, *supra* note 28, at 121; see also Marquardt, *supra* note 9, at 625 (“Subsidiarity provided useful cover to national politicians factoring Euro-skeptical criticism of Maastricht at home.”); Schilling, *supra* note 18, at 207 (asserting that the principle of subsidiarity assisted in the success of the Maastricht Conference and in quelling fears regarding the Treaty on European Union).

⁵⁹ See *infra* text accompanying note 137. See generally REGULATORY COMPETITION AND ECONOMIC INTEGRATION: COMPARATIVE PERSPECTIVES (Daniel C.

The further conviction that subsidiarity promotes democratic legitimacy also has a particularly strong normative pull in the European Union, where doubts persist over the democratic credentials of federal institutions.⁶⁰

Since its adoption in the Treaty of Maastricht,⁶¹ the principle of subsidiarity has played an important legal and political role in mediating competing claims for progressive federalization and for continued diversity and decentralization of regulation.⁶² In this context, subsidiarity essentially means that any regulation at the E.U. level, outside those areas given to its exclusive competence, must be justified on the grounds that its objectives cannot be sufficiently achieved by the Member States. This leaves open the question of what role there should be for the courts in evaluating such “justifications” – should they merely check (as a procedural matter) whether the issue has been rationally considered and a justification offered, or should they (as a substantive matter) engage in review of the persuasiveness of the argument for E.U. rules. As a legal doctrine, subsidiarity particularly invites the European Court of Justice to shift its focus of attention away from the Member States, where (as noted above) it has been the engine of developments in ensuring the effectiveness of E.U. law. Instead, it is asked to develop the character of an independent “constitutional” court by looking more critically ‘inward’ at the internal validity of E.U. legislation,⁶³ and perhaps even at the

Esty & Damien Gérardin eds., 2001); Wolfgang Kerber, *Interjurisdictional Competition within the European Union*, 23 *FORDHAM INT’L L.J.* S217 (2000) (analyzing the present and potential role of jurisdictional competition within Europe); Anthony Ogus, *Competition Between National Legal Systems: A Contribution of Economic Analysis to Comparative Law*, 48 *INT’L & COMP. L.Q.* 405 (1999) (analyzing the effects of regulatory competition on legal development).

⁶⁰ See *supra* note 14 and accompanying text.

⁶¹ As previously noted, subsidiarity is now defined in the Treaty on European Union, art. 5(3). See *supra* note 13.

⁶² See generally NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE, AND NATION IN THE EUROPEAN COMMONWEALTH* 137 (1999) (describing the long European debate over the role of sovereignty, particularly the competing places of subsidiarity and democracy); Reimer von Borries & Malte Hauschild, *Implementing the Subsidiarity Principle*, 5 *COLUM. J. EUR. L.* 369 (1999) (discussing the meaning of subsidiarity and providing examples of the principle applied in German administration); Edwards, *supra* note 57, at 543 (looking at Europe’s movement towards federalism and its connection to subsidiarity); Schilling, *supra* note 18, at 207 (stressing the important role subsidiarity has played in the debate over European centralization of power).

⁶³ See, e.g., Trevor C. Hartley, *Constitutional and Institutional Aspects of the Maastricht Agreement*, 42 *INT’L & COMP. L.Q.* 213, 217 (1993) (noting that “the

fundamental doctrines of E.U. law developed by the ECJ itself,⁶⁴ in order to preserve a federal balance that makes room for diverse Member States.⁶⁵

European Courts initially appeared reluctant to rely on subsidiarity as a justiciable basis for judicial review, and it is unclear whether this hesitancy is being overcome.⁶⁶

effectiveness of subsidiarity will depend, to a considerable extent, on the attitude and policy of the European Court," but observing that "[u]ntil now, the Court's policy has always been to expand Community power and to restrict that of the member States"); Florian Sander, *Subsidiarity Infringements Before the European Court of Justice: Futile Interference with Politics or a Substantial Step Towards EU Federalism?*, 12 COLUM. J. EUR. L. 517 (2006) (addressing the potential importance of judicial review of subsidiarity); W. Gary Vause, *The Subsidiarity Principle in European Union Law – American Federalism Compared*, 27 CASE W. RES. J. INT'L L. 61, 80 (1995) (comparing subsidiarity to federalism).

⁶⁴ See, e.g., Edward T. Swaine, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, 41 HARV. INT'L L.J. 1, 9 (2000) (arguing that the ECJ should reconsider the *Francovich* principle in light of subsidiarity). See generally Gráinne de Búrca, *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor*, 36 J. COMMON MKT. STUD. 217 (1998) (exploring the tension between the Court's institutional role and the requirements of subsidiarity). See also Bermann, *supra* note 14, at 400 (arguing that "the Court may have difficulty pressing subsidiarity on the political branches, either as a procedural or a substantive requirement, unless it shows a willingness to examine its own jurisprudence from a subsidiarity point of view").

⁶⁵ See, e.g., Nathan Horst, Note, *Creating an Ever Closer Union: The European Court of Justice and the Threat to Cultural Diversity*, 47 COLUM. J. TRANSNAT'L L. 165 (2008) (arguing that subsidiarity may play a role in reducing the threat posed by the ECJ to Member State cultural diversity).

⁶⁶ See, e.g., Case T-253/02, *Ayadi v. Council*, 2006 E.C.R. II-2139 (suggesting that a common foreign and security policy cannot violate the principle of subsidiarity); Case C-491/01, *The Queen v. Sec'y of State for Health ex. parte British Am. Tobacco (Investments) Ltd.*, 2002 E.C.R. I-11550 (rejecting the claimant's argument that a Directive regulating the manufacture, presentation and sale of tobacco products is invalid on subsidiarity grounds); Case C-377/98, *Netherlands v. Parliament*, 2001 E.C.R. I-7079 (finding sufficient compliance with the principle of subsidiarity within the challenged Directive); Case C-233/94, *Germany v. Parliament*, 1997 E.C.R. I-2405 (holding that an express reference to the principle of subsidiarity was not necessary to comply with the obligation to give reasons, and that Parliament and the Council did not fail to state the reasons on which the Directive was based because they "did explain why they considered that their action was in conformity with the principle of subsidiarity"); Henkel, *supra* note 9, at 373 (noting that "the statements of the European Council with regard to procedures and practices in the application of subsidiarity fall short of providing specific meaning"); Harrison, *supra* note 28, at 439 (acknowledging subsidiarity as justiciable but stating that the Court still faces the challenge of balancing Member State power with community power); Edwards, *supra* note 57, at 551 (noting that "[a]lthough some commentators have concluded that Article 3b is not justiciable, it is not clear either in theory or from the jurisprudence of the ECJ why it should not be").

Encouragement is offered in the new E.U. Protocol on the Application of the Principles of Subsidiarity and Proportionality, as amended by the Lisbon Treaty in 2009, which confirms expressly that “[t]he Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act”.⁶⁷ In practice, subsidiarity has been interpreted in a way that tends to emphasize its procedural rather than substantive implications,⁶⁸ perhaps reflecting concerns over the appropriateness of the ECJ exercising powers with a strong political dimension. The new E.U. Protocol on the Application of the Principles of Subsidiarity and Proportionality thus focuses on a somewhat formalistic conception of subsidiarity, emphasizing its role in parliamentary procedure (involving both the European Union and Member States).⁶⁹ Nevertheless, subsidiarity has also had a substantive role in the emergence of a broader political and legal policy in support of balancing European unification with preserving diversity in Member State legal orders.⁷⁰ While subsidiarity may support retaining national regulation, it offers a new vocabulary to replace the nationalist language of ‘sovereignty’ that has traditionally characterized debates about the allocation of regulatory authority within the European Union, seeking to reposition those debates within the framework of the European Union and redefine them according to legal doctrine.

⁶⁷ Protocol on the Application of the Principles of Subsidiarity and Proportionality, *supra* note 30, art. 8. The Protocol includes the further innovation that “the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted.” *Id.* See generally Robert Schütze, *Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?*, 68 CAMBRIDGE L.J. 525, 531 (2009) (arguing that the ECJ has tended to leave substantive subsidiarity analysis in the hands of the Community legislator).

⁶⁸ See generally von Borries & Hauschild, *supra* note 62, at 370 (expounding on the meaning of subsidiarity as a principle of constitutional law and discussing its European implementation); Bermann, *supra* note 14.

⁶⁹ Protocol on the Application of the Principles of Subsidiarity and Proportionality, *supra* note 30; see Schütze, *supra* note 67, at 527 (arguing that the Amsterdam Protocol created “process federalism” in institutions and that it treated subsidiarity as a “political question”); Philipp Küver, *The Treaty of Lisbon, the National Parliaments and the Principle of Subsidiarity*, 15 MAASTRICHT J. EUR. & COMP. L. 77 (2008).

⁷⁰ Subsidiarity concerns are also reflected in the accommodation of ‘differentiated integration’ in the E.U. Treaties, whereby some Member States may proceed with further integration than others, as in the European Monetary Union and adoption of the Euro currency.

The constitutional exhortation in the Treaty on European Union toward further centralization is thus now qualified with a contradictory objective of “localism” — a paradoxical aspiration for “an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen”⁷¹ This paradox embodies the tension between centralizing and decentralizing forces inherent in any federal balance of power. The constitutional rebalancing of the European Union in favor of federalized powers (involving subsidiarity conceived as a matter of constitutional settlement) has been countered by the introduction of subsidiarity as a matter of legal and political constitutional practice.

3.1.3. *Subsidiarity and European Private Law*

It is difficult to determine the precise impact of the emergence of the principle of subsidiarity on the development of Europeanized private law. While the long-term objective of achieving harmonized European private law continues to have support within E.U. institutions⁷² and among academic research groups,⁷³ the project has also faced significant opposition, drawing on two types of arguments. The first questions whether harmonization exceeds the scope of existing European powers—

⁷¹ Treaty on European Union, *supra* note 13, pmb. This sentiment is similarly emphasized in art. 1, which provides that “[t]his Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.” *Id.*

⁷² Communication from the Commission to the European Parliament and the Council: An Area of Freedom, Security and Justice Serving the Citizen, COM (2009) 262 final (June 10, 2009) sec. 3.4.2.

⁷³ See generally JOINT NETWORK ON EUROPEAN PRIVATE LAW, <http://www.copecpl.org> (last visited Nov. 16, 2010) (identifying and compiling principles of European private law); STUDY GROUP ON A EUROPEAN CIVIL CODE, <http://www.sgecc.net> (last visited Nov. 16, 2010) (a network of academics conducting comparative private law research in E.U. Member States); THE COMMON CORE OF EUROPEAN PRIVATE LAW PROJECT, <http://www.common-core.org> (last visited Nov. 16, 2010) (a group dedicated to identifying core principles of European private law among the different E.U. Member State legal systems); COMMISSION ON EUROPEAN CONTRACT LAW, http://frontpage.cbs.dk/law/commission_on_european_contract_law/index.html (last visited Nov. 16, 2010) (endeavoring to identify and codify common “Principles of European Contract Law”); EUROPEAN GROUP ON TORT LAW, <http://www.egt.org> (last visited Nov. 16, 2010) (a network of scholars discussing fundamental issues of tort law liability in Europe, which has drafted a collection of “Principles of European Tort Law”).

this might be characterized as the question of whether harmonization violates subsidiarity as reflected in the constitutional settlement. The second asks a more policy-oriented question about whether, even if constitutional, the development of European private law might contravene values such as national culture or autonomy—the question of whether harmonization might violate subsidiarity as a matter of constitutional practice.⁷⁴

The continued prominence of Directives as the form of private law regulatory instrument itself reflects concerns of subsidiarity—a determination that European rules should “leave to the national authorities the choice of form and methods” of implementation, leading to a “hybridization” of European principles or objectives with diverse national implementations.⁷⁵ The impact of subsidiarity, and the doubts over the possible legal and political basis for wider European legislation in the field of private law, may also be felt in the preference in much of the literature for “bottom up” harmonization, through identifying and encouraging a congruence of private law across the Member States, rather than the “top down” imposition of centralized rules. However necessary harmonized regulation may be, if it can be achieved through horizontal coordination, the adoption of E.U. law would obviously fail to satisfy the requirement that “the objectives of the proposed action cannot be sufficiently achieved by the Member States.”⁷⁶ The possibility of horizontal harmonization presents a counter-factual which will be problematic for advocates of federal rules in the face of subsidiarity requirements—it is difficult to

⁷⁴ See, e.g., Pierre Legrand, *A Diabolical Idea*, in TOWARDS A EUROPEAN CIVIL CODE, *supra* note 56, at 245 (arguing that a European Civil Code ought not to be adopted); Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44 (1997) (arguing against European legal integration through a civil code); Jan Smits, *Diversity of Contract Law and the European Internal Market*, in THE NEED FOR A EUROPEAN CONTRACT LAW: EMPIRICAL AND LEGAL PERSPECTIVES 155 (Jan Smits ed., 2005); Stephen Weatherill, *Reflections on the EC's Competence to Develop a 'European Contract Law'*, 13 EUR. REV. PRIVATE L. 405, 406 (2005) (supporting the Commission's hesitance to assert constitutional competence to develop a European contract law); Stephen Weatherill, *Why Object to the Harmonization of Private Law by the EC?*, 12 EUR. REV. PRIVATE L. 633 (2004) (discussing constitutional, cultural, and economic objections to the harmonization of European private law).

⁷⁵ Treaty on the Functioning of the European Union, *supra* note 13, art. 288. See generally Angus Johnston & Hannes Unberath, *European Private Law by Directives: Approach and Challenges*, in THE CAMBRIDGE COMPANION TO EUROPEAN UNION PRIVATE LAW (Christian Twigg-Flesner ed., 2010).

⁷⁶ Treaty on the Functioning of the European Union, *supra* note 13, art. 5(3).

justify federal rules in the absence of a genuine failed attempt at state-level coordination.⁷⁷ The rejection of “a soulless and authoritarian uniform solution” has led to the “rise of comparative law from a new and allegedly impractical branch of legal methodology at the beginning of the last century, to a catalyst for the development of European private law at the outset of this century”⁷⁸ Inspiration is thus often sought from similar U.S. experiences with uniform law projects, particularly the Uniform Commercial Code, which are discussed below.⁷⁹

In the European Union, a great deal of recent attention and effort has focused on movements toward developing a European contract law.⁸⁰ A ‘Draft Common Frame of Reference’ document, prepared with the support of the European Commission and submitted to European institutions in 2008, is under continuing

⁷⁷ See *supra* text accompanying notes 31–32.

⁷⁸ Ivan Sammut, *Tying the Knot in European Private Law*, 17 EUR. REV. PRIVATE L. 813, 814 (2009).

⁷⁹ See *infra* Part 4.1.3; Sammut, *supra* note 78, at 837 (suggesting that Europe is moving slowly toward American-style uniform statutes); Richard Hyland, *The American Experience: Restatements, the UCC, Uniform Laws, and Transnational Coordination*, in TOWARDS A EUROPEAN CIVIL CODE, *supra* note 56, at 59 (surveying American developments in harmonizing diverse fields of law and suggesting that codifying European law is possible); Mathias Reimann, *Towards a European Civil Code: Why Continental Jurists Should Consult Their Transatlantic Colleagues*, 73 TUL. L. REV. 1337, 1345 (1998) (suggesting that European jurists crafting a civil code should consult their North American counterparts, especially those in Louisiana and Quebec, who have experience in codifying private law in mixed civil and common law jurisdictions).

⁸⁰ See, e.g., *Communication from the Commission to the European Parliament and the Council, European Contract Law and the Revision of the Acquis: The Way Forward*, COM (2004) 651; European Parliament Resolution on European Contract Law and the Revision of the Acquis: The Way Forward, EUR. PARL. DOC. P6_TA (2006) 0109. See also STEFAN VOGENAUER & STEPHEN WEATHERILL, *THE HARMONISATION OF EUROPEAN CONTRACT LAW: IMPLICATIONS FOR EUROPEAN PRIVATE LAWS, BUSINESS AND LEGAL PRACTICE* 136 (2006) (discussing whether the harmonization of European contract law is necessary or at least desirable); Martijn W. Hesselink, *The European Commission’s Action Plan: Towards a More Coherent European Contract Law?*, 12 EUR. REV. PRIVATE L. 397 (2004) (arguing that a European Code of Contracts could be favorable regardless of its practical impact on market functionality or coherence in law); Dirk Staudenmayer, *The Way Forward in European Contract Law*, 13 EUR. REV. PRIVATE L. 95 (2005); TWIGG-FLESNER, *supra* note 44, at 179 (examining developments in the Europeanization of contract law); Whittaker, *supra* note 45, at 618 (discussing the purposes behind the initiative to create a “Common Frame of Reference”); Zimmermann, *supra* note 44, at 480–82 (discussing the present state of European private law and its origins); Smits, *supra* note 74.

consideration.⁸¹ In part, this is simply “an exercise in applied comparative law, designed to nourish a dynamic process of coordinated learning in Europe.”⁸² A further part of the strategy which appears to be favored is to establish an (at least partly) optional European contract law, as an alternative system to that of the Member States, which private parties might choose to govern their contracts. Such a measure is anticipated under Recital 14 of the *Rome I Regulation* (2008) on choice of law in contract, which provides that “[s]hould the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.”⁸³ A fruitful comparison here might be with the pre-1938 coexistence of federal and state common law in the United States operating in regulatory competition⁸⁴—the theory that a rival federal law might provide a model for the improvement of state private law.

Setting aside such aspirations, at present the development of European private law remains fragmented, occurring only where it is indirectly permitted by other legal developments authorized under the E.U. Treaties, or as an indirect effect of community values, as examined above. The expansion in ‘federal’ powers under the E.U. Treaties has thus had a limited effect on questions of private law. While there is a range of legal and political considerations behind this, ideas of subsidiarity have certainly played a role in ensuring that the treaty allocation of (non-exclusive) powers to European institutions remains subject to contestation as a matter of constitutional practice.

3.2. Subsidiarity and the Conflict of Laws

In the early years of the European Union, there was some significant progress made in the establishment of Europeanized rules of conflict of laws, in particular through the *Brussels*

⁸¹ The draft document is published as PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) (Christian von Bar & Eric Clive eds., 2009).

⁸² Weatherill, *Reflections on the EC's Competence to Develop a 'European Contract Law'*, *supra* note 74, at 409.

⁸³ Regulation of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), 2008 O.J. (L 177) 6.

⁸⁴ See *infra* text accompanying note 143.

Convention (1968)⁸⁵—which introduced common rules on jurisdiction and the enforcement of judgments in civil and commercial matters—and the *Rome Convention* (1980)⁸⁶—which dealt with choice of law in contract. It is notable that these developments were in the form of separate treaties between European Member States, and not European legal instruments. This reflected concerns as to the regulatory competence of the European Union in the field of the conflict of laws, in the absence of an express treaty provision covering the field—questions of whether the constitutional settlement supported or justified centralized conflict of laws regulation. This in turn reflects the lack of centrality of the conflict of laws in early thinking about the European Union,⁸⁷ except where it arose incidentally in the fragmented development of topics of substantive private law.⁸⁸

The conclusion of these separate treaties by the Member States may, however, be understood as a form of *ad hoc* amendment of the constitutional settlement—centralizing (‘federalizing’) regulation in the affected subject matter without the need for express treaty amendment. It thus involves a reconsideration of the subsidiarity question of whether such federalized rules of conflict of laws are necessary. This reconsideration, and the new centrality of E.U. conflict of laws, was formally reflected in the new regulatory powers covering the conflict of laws in the Treaty Establishing the European Community (now the Treaty on the Functioning of the European Union), introduced in 1997 by the Treaty of Amsterdam. As amended and renumbered by the Lisbon Treaty (2009), Article 81(2) now provides (in part) that:

⁸⁵ Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1998 O.J. (C 27) 1 (consolidated version).

⁸⁶ Convention on the Law Applicable to Contractual Obligations (consolidated version), Jan. 26, 1998, 1998 O.J. (C 27) 36.

⁸⁷ *But see* DOMINIK LASOK & PETER STONE, CONFLICT OF LAWS IN THE EUROPEAN COMMUNITY 25–81 (1987) (discussing the treaty provisions that affect the conflict of laws); IAN F. FLETCHER, CONFLICT OF LAWS AND EUROPEAN COMMUNITY LAW 400 (1982) (analyzing the characteristics of the European Community legal structure and its implications for conflict of laws); Ulrich Drobnig, *Conflict of Laws and the European Economic Community*, 15 AM. J. COMP. L. 204, 205 (1967) (discussing the role conflict of laws might have in the development of a new economic-political entity in Europe).

⁸⁸ *See generally* Aude Fiorini, *The Evolution of European Private International Law*, 57 INT’L & COMP. L.Q. 969, 970 (2008) (tracing the historical development of European conflict of laws); Basedow, *supra* note 44, at 2141 (examining the impact of European legislation on choice of law in interstate conflicts).

the European Parliament and the Council . . . shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;

. . .

(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction.

Drawing on this authorization, there has been a dramatic increase in recent years in the development of European conflict of laws instruments, covering jurisdiction and the recognition and enforcement of foreign judgments (including the *Brussels I Regulation* (2001)⁸⁹ and *Brussels II bis Regulation* (2005)⁹⁰), as well as the determination of the applicable law in both contract (under the *Rome I Regulation* (2008)⁹¹) and tort (under the *Rome II Regulation* (2007)⁹²).

The exercise of these powers is effecting a revolutionary transformation of the conflict of laws. These changes are not just developments in the sources of conflict of laws, but an increasingly widely recognized fundamental shift in its purpose and character, from a subject of national private law to a subject of European public constitutional law.⁹³

⁸⁹ Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, EC/44/2001, L/12/2 (Dec. 22, 2000).

⁹⁰ Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, Nov. 27, 2003, 2003 O.J. (L 338) 1.

⁹¹ Council Regulation on the law applicable to contractual obligations, EC/593/2008, L/177/6 (June 17, 2008).

⁹² Council Regulation on the law applicable to non-contractual obligations, EC/864/2007, L/199/40 (July 11, 2007).

⁹³ See sources cited, *supra* note 8; Jürgen Basedow, *The Communitarization of the Conflict of Laws under the Treaty of Amsterdam*, 37 COMMON MKT. L. REV. 687, 691 (2000) (discussing the impact of the treaty of Amsterdam on the conflict of laws in the European Community); Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline*, 14 DUKE J. COMP. & INT'L L. 149, 166 (2004) (arguing that European law demands a reconceptualization of private international law); Horatia Muir Watt, *Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy*, 9 COLUM. J. EUR. L. 383, 402

The principle of subsidiarity is involved in this allocation of power in two ways. First, there is the question of subsidiarity in the regulation of the conflict of laws—which level of government should have power over conflicts issues. Here, the E.U. Treaties have now determined that federal regulation is within E.U. powers, and thus (as a matter of constitutional settlement) potentially justified. This is, however, clearly territory in which competence is shared with the Member States, and thus challenges may still be made to the European regulation of the conflict of laws on the basis of subsidiarity arguments. Lawyers in the United Kingdom, in particular, faced with the unfamiliar approaches adopted in these European rules (which emphasize public law certainty and predictability rather than private law flexibility and discretion), have questioned the necessity for European regulation—essentially (although not always expressly) challenging the compatibility of the exercise of these powers with the principle of subsidiarity.⁹⁴ To some extent, these concerns are recognized in the requirement in Article 81 of the Treaty on the

(2003) (analyzing the role of conflict of laws as a market regulatory technique); Horatia Muir Watt, *Integration and Diversity: The Conflict of Laws as a Regulatory Tool*, in *THE INSTITUTIONAL FRAMEWORK OF EUROPEAN PRIVATE LAW*, 107–48 (Fabrizio Cafaggi ed., 2006) (exploring the conflict of laws as a European regulatory technique); Horatia Muir Watt, *European Integration, Legal Diversity and the Conflict of Laws*, 9 *EDINBURGH L. REV.* 6, 16 (2005) (arguing that the conflict of laws could provide a more effective tool of multi-level governance if permitted to incorporate a regulatory function); Fiorini, *supra* note 88, at 969 (arguing that the Treaty of Amsterdam has “radically reformed the position and status of private international law”).

⁹⁴ See, e.g., Andrew Dickinson, *European Private International Law: Embracing New Horizons or Mourning the Past?*, 1 *J. PRIVATE INT’L L.* 197 (2005) (critically examining the scope of E.U. competence in conflict of laws); Richard Fentiman, *Choice of Law in Europe: Uniformity and Integration*, 82 *TUL. L. REV.* 2021, 2043 (2008) (arguing that “it might be wondered why [the Brussels Convention] was relevant in a case involving the allocation of jurisdiction between a member state and a nonmember state” given its internal market objectives); Trevor C. Hartley, *The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws*, 54 *INT’L & COMP. L.Q.* 813, 828 (2005) (suggesting that the “crass insistence that common law rules must be abolished even where no Community interest is at stake is the feature . . . that will cause most difficulty for lawyers in England”); C.J.S. Knight, *Owusu and Turner: The Shark in the Water?*, 66 *CAMBRIDGE L.J.* 288 (2007) (discussing the common law impact of the ECJ’s decisions in *Owusu v. Jackson* and *Turner v. Grovit*); Adrian Briggs, Note, *The Death of Harrods: Forum Non Conveniens and the European Court*, 121 *LAW Q. REV.* 535, 538 (2005) (criticizing the ECJ’s ruling in *Owusu v. Jackson*). For similar controversy in France concerning European regulation of private international law, see *La Semaine Juridique - Édition Générale (JCP G)*, Dec. 13, 2006, act. 586, and Jan. 10, 2007, act. 18.

Functioning of the European Union, that regulation be adopted “particularly when necessary for the proper functioning of the internal market.”⁹⁵ This is, however, a much weaker constraint than that offered prior to the Lisbon Treaty (2009), where the predecessor to Article 81 provided that regulation be taken only “in so far as necessary for the proper functioning of the internal market.”⁹⁶

Arguments against the necessity of E.U. conflicts rules have, however, had very limited success. The use of Regulations to establish European standards for conflict of laws is itself significant—the certainty they achieve is preferred to the use of Directives (favored, by contrast, in the context of private law⁹⁷) that leave the details of implementation to the Member States and are thus automatically more sympathetic to considerations of subsidiarity. This broadly defined internal competence has also been extended to cover external relations—the power to enter into treaties governing the conflict of laws—in a move which itself offers a further justification for federalized regulation as it arguably enhances the possibility for the European Union to participate in international efforts to harmonize conflict of laws.⁹⁸

The second way in which subsidiarity is involved in this allocation of power is in its effect on the allocation of regulatory competence concerning private law, which, as explored above, remains largely outside E.U. powers. The harmonization of conflicts rules attempts to impose a public ordering on the relations between the diverse private law systems of the European

⁹⁵ Treaty on the Functioning of the European Union, *supra* note 13, art. 81(2).

⁹⁶ Treaty Establishing the European Community, art. 65, Dec. 29, 2006, 2006 O.J. (C 321) 68 (consolidated version).

⁹⁷ See *supra* note 75 and accompanying text.

⁹⁸ See Treaty on the Functioning of the European Union, *supra* note 13, art. 3(2) (establishing “exclusive competence for the conclusion of an international agreement when its conclusion . . . may affect common rules or alter their scope”); Opinion 1/03 on the Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Feb. 7, 2006) E.C.R. I-1145 (recognizing an implied exclusive external competence for the European Union); see also Fiorini, *supra* note 88, at 981–82 (discussing the external competence of the Community with respect to private international law); Andrea Schulz, *The Accession of the European Community to the Hague Conference on Private International Law*, 56 INT’L & COMP. L.Q. 939, 939–42 (2007) (discussing the developments that led to the European Community’s request for accession and the legal and political issues that had to be resolved). This may be contrasted with the situation in the United States. See *infra* note 290 and accompanying text.

Member States. In so doing, it decreases the necessity for European harmonization of substantive law—it provides a mechanism which supports and affirms the coexistence of diverse national rules of private law, and thus acts in support of the principle of subsidiarity. As the European Commission has expressly acknowledged:

[t]he technique of harmonising conflict-of-laws rules fully respects the subsidiarity and proportionality principles since it enhances certainty in the law without demanding harmonisation of the substantive rules of domestic law.⁹⁹

It may thus be argued that the need for federal conflict of laws rules, to satisfy subsidiarity requirements, is at least partly justified by the fact that it supports the ordered coexistence of diverse state private law, which satisfies a second level of subsidiarity requirements. Subsidiarity at the same time both asks and answers the question of why federal rules on the conflict of laws are necessary.

A recent illustration is the proposal, discussed above, to create a new (at least partly) optional European contract law, allowing the parties to choose this as the legal system governing their contracts.¹⁰⁰ Allowing such a choice would require the partial Europeanization of choice of law rules in contract, to adapt the rules on party autonomy. However, this centralization of conflict of laws (which has of course already been achieved through the *Rome Convention* (1980) and now the *Rome I Regulation* (2008)) supports the possibility of decentralized private law—the proposal for European contract law to be optional rather than adopted as a matter of European law.

This change in European regulatory strategy, a shift of focus from centralized harmonization to the coordination of diversity, is also reflected in other developments. The principle of ‘mutual recognition’ developed by the ECJ¹⁰¹ and reflected in the adoption of a ‘country of origin rule’ in various contexts,¹⁰² for example, may

⁹⁹ Commission for the European Communities, Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (“ROME II”), at 7, COM (2003) 427 Final (July 22, 2003).

¹⁰⁰ See *supra* text accompanying note 83.

¹⁰¹ See, e.g., Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649.

¹⁰² See, e.g., Council Directive 2000/31, 2000 O.J. (L 178) 1 (EC); Case C-212/97, *Centros Ltd. v. Erhvervs-og selskabsstyrelsen*, 1999 E.C.R. I-1459, 1483

not reflect traditional conflicts methodology, but functions to similar effect as a method to regulate the coexistence of different Member State legal orders.¹⁰³

New conflict of laws rules and techniques are thus emerging as part of a new “federalist” European law, which orders the coexistence of the private law systems of the different Member States within the internal market. A striking feature of this development is its similarity to the role historically played by the conflict of laws in the United States, which is examined below.¹⁰⁴

3.3. *The Horizontal Effect of Subsidiarity on Choice of Law*

When analyzing the influence of the doctrine of subsidiarity on E.U. law, the focus of attention is naturally on its vertical effect, as considered above—its impact on the balance between central and subsidiary (state) legal orders. It is less appreciated that subsidiarity may also be viewed as having a horizontal effect, on the distribution of regulatory authority between the Member States.¹⁰⁵ This is because subsidiarity requires that regulation take

(holding that a company that has been formed in accordance with the law of one Member State can register a branch in any other Member State); Case C-208/00, *Überseering BV v. Nordic Constr. Co. Baumanagement GmbH*, 2002 E.C.R. I-9919, 9941 (holding that the principle of freedom of establishment requires Member States to recognize companies incorporated in other Member States); Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, 2003 E.C.R. I-10155, 10233 (holding that national laws which restrict freedom of establishment must be proportionate and necessary to protect a public interest objective).

¹⁰³ See Basedow, *supra* note 44, at 2130 (discussing a “second layer of legal principles that address transborder situations”); Geert De Baere, *‘Is this a conflict rule which I see before me?’ Looking for a Hidden Conflict Rule in the Principle of Origin as Implemented in Primary European Community Law and in the ‘Directive on Electronic Commerce’*, 11 MAASTRICHT J. EUR. & COMP. L. 287, 289 (2004) (examining whether the country of origin principle contains a hidden conflict rule); Ralf Michaels, *EU Law as Private International Law? Reconceptualising the Country-of-Origin Principle as Vested-Rights Theory*, 2 J. PRIVATE INT’L L. 195, 198 (2006) (arguing that the country-of-origin principle in E.U. law is best understood by comparing it to the vested rights theory in private international law); Michael Hellner, *The Country of Origin Principle in the E-commerce Directive – A Conflict with Conflict of Laws?*, 12 EUR. REV. PRIVATE. L. 193, 194 (2004) (analyzing the application of the country of origin principle with respect to e-commerce); MILLS, *supra* note 12, at 200; Muir Watt, *Integration and Diversity: The Conflict of Laws as a Regulatory Tool*, *supra* note 93 at 107–48 (comparing conflict of laws rules with other European regulatory techniques).

¹⁰⁴ See *infra* Part 4.2.

¹⁰⁵ See, e.g., Barber, *supra* note 9, at 312 (arguing that subsidiarity “does not just embody a preference for smaller units over large ones: it allocates powers to

place as close as possible to those affected by it – this does not only mean at the lowest level possible, but in the most appropriate location.

Viewed in this light, subsidiarity may potentially have an impact not only on the *existence* of E.U. choice of law rules, as analyzed above, but also on their *content*. Subsidiarity appears to require that choice of law rules select the applicable law based on the values which underpin subsidiarity itself – that the people who are likely to be affected by a regulation should have the opportunity to participate in the process under which that regulation is made. Put this way, subsidiarity appears to require something akin to an ‘interest analysis’ in designing choice of law rules – the law chosen must be the law of the place which is most affected by the issue.¹⁰⁶

While ordinarily it would be expected that choice of law rules would meet this criterion, it remains a reminder that such rules should be evaluated not merely on their efficiency, but on the appropriateness of their allocation of regulatory authority. This may be important in framing a critique of choice of law rules. For example, this could be a basis for questioning the appropriateness of the law of the place of habitual residence¹⁰⁷ of the characteristic performer as the basic choice of law rule in contract under Article 4 of both the *Rome Convention* (1980) and *Rome I Regulation* (2008). The Giuliano-Lagarde Report,¹⁰⁸ prepared by the drafters of the *Rome Convention* (1980), obliquely acknowledges the principle underlying this argument, when it makes the much criticized claim that the characteristic performer rule “essentially links the contract to the social and economic environment of which it will form a part.”¹⁰⁹ It is at least open to argument that the place where the

the states containing the people who will be affected by the power”); MILLS, *supra* note 12, at 106.

¹⁰⁶ See MILLS, *supra* note 12, at 259; *infra* note 269–70 and accompanying text.

¹⁰⁷ This is subject to exceptions under Article 4(2) of the *Rome Convention* (1980), and is specially defined in Article 19 of the *Rome I Regulation* (2008).

¹⁰⁸ Council Report on the Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (C 282) 1.

¹⁰⁹ *Id.* at 20. For examples of criticism, see C.G.J. Morse, *The EEC Convention on the Law Applicable to Contractual Obligations*, 2 Y.B. EUR. L. 107, 131 (1982) (questioning the suitability of the characteristic performer test); Hans Ulrich Jessurun D’Oliveira, “Characteristic Obligation’ in the Draft EEC Obligation Convention, 25 AM. J. COMP. L. 303, 326 (1977) (emphasizing that determining characteristic performance does not conclusively select the law most connected with the contract); Lawrence Collins, *Contractual Obligations – The EEC Preliminary*

contract is to be performed has a greater interest in determining whether and how that performance is carried out, although some accommodation of that law may be made under the exceptions in Article 4(5) of the *Rome Convention* (1980) and Articles 4(3) and 9(3) of the *Rome I Regulation* (2008). Regardless of these specific doctrinal questions, the general point remains that subsidiarity should be recognized as having not only a vertical dimension, affecting the distribution of powers between federal and state levels, and thus the 'federalization' of the conflict of laws, but also a horizontal dimension, affecting the distribution of powers between states, and thus the content of conflicts rules.

4. SUBSIDIARITY, PRIVATE LAW, AND THE CONFLICT OF LAWS IN THE UNITED STATES

As in the European Union, the early development of law in the United States, particularly by the federal courts, enthusiastically reflected the constitutional imperative to create "a more perfect Union"¹¹⁰ out of formerly independent states. This imperative is evidently in tension with the delicate federal-state relationship set out overall in the Constitution, a "model that balanced centripetal and centrifugal political forces—a harmonious Newtonian solar system in which individual states were preserved as distinct spheres, each with its own mass and pull, maintained in their proper orbit by the gravitational force of a common central body."¹¹¹ Nevertheless, the initial momentum of federalization was necessarily toward the centre, and one aspect of this was the development of new rules of private law for federal courts.

4.1. *Private Law and the Emergence of Subsidiarity*

The U.S. Constitution, like the E.U. Treaties, does not grant federal authorities a general power to make rules of private law. Federal statutes based on other specific powers have had some impact on U.S. private law, like the incremental and fragmented development of E.U. private law. In the United States this has been

Draft Convention on Private International Law, 25 INT'L & COMP. L.Q. 35, 45 (1976) (suggesting that the characteristic performer test "do[es] not necessarily lead to the appropriate governing law").

¹¹⁰ U.S. CONST. pmb1.

¹¹¹ Amar, *supra* note 20, at 1449.

based primarily on the Commerce Clause,¹¹² which has (at times) been interpreted to authorize a wide scope of federal regulation, as will be explored further below.¹¹³ But for present purposes the most significant engine for the development of federal private law in the United States has not been Congress but rather the federal courts, and it is this judge-made law which is the central focus of this section.

4.1.1. *Swift v. Tyson*

For almost a century after the Supreme Court decision in *Swift v. Tyson*,¹¹⁴ federal courts exercising diversity jurisdiction (that is, jurisdiction over a dispute involving parties from more than one state¹¹⁵) applied and developed ‘federal common law’ in the absence of binding state or federal statutory authority. Justice Story, also the leading U.S. conflicts lawyer of the early nineteenth century, delivered the judgment for the Court, finding that:

[T]he true interpretation and effect [of contracts and other instruments of a commercial nature] are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. . . . The law respecting negotiable instruments may be truly declared . . . to be in a great measure, not the law of a single country only, but of the commercial world.¹¹⁶

¹¹² U.S. CONST. art. I, § 8, cl. 3 (vesting Congress with the power “[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

¹¹³ See, e.g., *infra* Part 4.1.4.

¹¹⁴ *Swift v. Tyson*, 41 U.S. 1 (1842). See generally TONY A. FREYER, HARMONY AND DISSONANCE: THE SWIFT AND ERIE CASES IN AMERICAN FEDERALISM (1981) (discussing the balance of state and national relations in the context of the *Swift* and *Erie* cases); William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 25 (1963) (claiming that *Swift v. Tyson* discharged the federal responsibility implicit in the U.S. Constitution’s full faith and credit clause); Walter Wheeler Cook, *The Federal Courts and the Conflict of Laws*, 36 ILL. L. REV. 493, 516 (1942) (arguing that the doctrine of *Swift v. Tyson* was unconstitutional because of Justice Story’s erroneous construction of existing statutes); Arthur Taylor Von Mehren, *Conflict of Laws in a Federal System: Some Perspectives*, 18 INT’L & COMP. L.Q. 681, 683 (1969) (noting that before 1938, federal courts would apply a judicially developed substantive rule in diversity cases).

¹¹⁵ U.S. CONST. art. III, § 2; see 28 U.S.C. § 1332(a)(3) (2010) (granting U.S. district courts jurisdiction over conflicts arising between citizens of different states).

¹¹⁶ *Swift*, 41 U.S. at 19.

The true significance of this judgment is a matter of debate—it has been argued that, in its contemporary context, the decision in *Swift v. Tyson* was “merely a garden-variety exposition of the prevailing view of the law applicable in diversity cases, not the fountainhead of an unprecedented and bizarre doctrine for which the opinion is often taken.”¹¹⁷ What is clear is that the approach it adopted was initially international as well as constitutional in character and inspiration, arguing for the development of a federal common commercial law (or “federal law merchant”¹¹⁸) drawing on well established general principles of international commerce (sometimes referred to as the *lex mercatoria*), which were also accepted as part of U.S. law.¹¹⁹ The Court derived the right to

¹¹⁷ Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 114 (1993); see also Bradford R. Clark, *Erie’s Constitutional Source*, 95 CALIF. L. REV. 1289, 1292-93 (2007) (“Taken in historical context, the *Swift* Court arguably did no more than what New York law instructed it to do—i.e., to exercise independent judgment to ascertain the applicable rule of customary commercial law.”); Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1317 (1985) (“Federal courts long before *Swift* honored established interpretations of local common law, just as they followed settled constructions of state statutes. *Swift* did no more than recite the accepted understanding of this procedure . . .”) (footnote omitted); Alfred B. Teton, *The Story of Swift v. Tyson*, 35 ILL. L. REV. 519 (1941) (discussing the political and legal developments that led to *Swift*).

¹¹⁸ See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (finding that the federal law merchant “stands as a convenient source of reference for fashioning federal rules applicable to . . . federal questions”); *R.R. Co. v. Nat’l Bank*, 102 U.S. 14, 55 (1880) (noting that codes, laws, and ordinances of other states are evidence of the general law merchant); *Oates v. National Bank*, 100 U.S. 239, 246 (1879) (determining that “the courts of the United States . . . are not bound by the decisions of state courts upon questions of general commercial law”).

¹¹⁹ See, e.g., ALAN WATSON, *JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS* 38-39 (1992) (discussing how Justice Story adopted but misapplied Ulrich Huber’s understanding of the doctrine of “comity of nations”); Anthony J. Bellia, *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 889 (2005) (suggesting that until the mid-19th century, the law of nations “governed matters that courts today categorize as commercial law”); Anthony J. Bellia & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 46 (2009) (explaining that federal courts applied certain aspects of the law of nations “because that was the applicable rule of decision or . . . because such law was understood to supply the operational detail of the Constitution’s allocation of foreign relations powers”); Borchers, *supra* note 117, at 111 (“American lawyers near the time the federal courts were created also believed in a general law, applicable to transstate and transnational cases”); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1279 (1996) (characterizing the law of nations as “an identifiable body of rules and customs” which had a strong influence on state law); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 822 (1989)

develop the law in this way from its narrow interpretation of section 34 of the Judiciary Act of 1789 (known as the Rules of Decision Act), which provided that “the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.”¹²⁰ To modern sensibilities, the conclusion of the Court that “laws of the several states” did not (except with respect to matters of local concern, like immovable property)¹²¹ include state common law (thereby leaving scope for the development of federal common law) may seem strange. There was, however, a broader philosophical context to this which explains the Court’s approach to the statute—its interpretation reflected a belief in the existence and application of a non-state ‘natural law,’ later critically described as “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.”¹²² Although this theory and together with it the international dimension of this analysis was rejected over the course of the nineteenth century, the power of the federal courts to develop general common law persisted, thereby establishing a federalized set of substantive legal principles of private law for application in diversity cases.¹²³

(arguing that “it was commonly recognized that there was a body of general law that ‘existed by common practice and consent among a number of sovereigns’” (footnote omitted), which “encompassed commercial disputes between individuals, private disputes in admiralty, criminal offenses, and a host of issues that arose under what we now term public international law”); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 281 (1992) (“There was a domain of the general common law, and a domain of local law, with choice-of-law rules for choosing between general and local law, and other choice-of-law rules for choosing among the local law of different jurisdictions”); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 173 (2004) (indicating that international law may have influenced the development of the service of process requirement).

¹²⁰ Now found, slightly amended, in 28 U.S.C. § 1652 (2010).

¹²¹ This distinction between ‘general’ and ‘local’ matters in *Swift v. Tyson* may itself implicitly recognize a primitive principle of subsidiarity, in acknowledging that some subject matters are more appropriately left to local regulation.

¹²² *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting); see also MILLS, *supra* note 12, at 47, 127.

¹²³ See, e.g., *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 349 (1910) (“[W]here the law has not thus been settled it is the right and duty of the Federal court to exercise its own judgment, as it always does in cases depending on doctrines of

The legacy of this 'natural law'-inspired federal common law was thus that private law in this period was adjudged to be at least within the shared competence of federal and state authorities. The Constitution was understood to have determined that federalized regulation of private law in diversity cases was at least *possibly* necessary as a matter of constitutional settlement. The federal courts had decided to exercise this competence to develop federal law; the courts made a determination (as a matter of constitutional practice) that federal regulation was *actually* necessary and not precluded by the Rules of Decision Act. Equally, states had their own common law, and state legislatures had the opportunity to pass statutes to regulate areas of private law and thus (ordinarily) override federal common law (but not, of course, any applicable federal statutes).¹²⁴ An added complexity, however, was that federal common law was only applicable in federal courts exercising diversity jurisdiction, and in those circumstances federal and state courts could potentially have overlapping jurisdiction. This meant that in some cases a claimant would have (or would be able to engineer) a choice of venue, and thus would be able to 'forum shop' between federal courts applying federal common law and state courts applying state law.¹²⁵ To some extent this result was considered desirable—the competition from federal courts was thought likely to improve state courts and state law. Concerns

commercial law and general jurisprudence."); *W. Union Tel. Co. v. Call Publ'g Co.*, 181 U.S. 92, 102 (1901) ("[T]he principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by Congressional enactment"); *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 370 (1893) (determining that the case was not a question of local law, but "rather one of general law, to be determined by a reference to all the authorities, and a consideration of . . . principles . . .").

¹²⁴ Federal courts did usually, but not invariably, apply state statutes as interpreted by state courts. See generally *Kirby v. Lake Shore & Michigan S. R.R. Co.*, 120 U.S. 130 (1887) (holding that a New York state statute would not affect the applicability of a similar and relevant federal statute); *Burgess v. Seligman*, 107 U.S. 20 (1883) (declaring that the Court was not obliged to follow precedent set by the Supreme Court of Missouri in a similar case); *Watson v. Tarpley*, 59 U.S. 517 (1855) (finding that a state statute preventing the filing of a suit for a specified amount of time would not hinder the ability of federal courts to hear the claim).

¹²⁵ See, e.g., *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928) (holding that federal courts with diversity jurisdiction are not required to apply state common law) *rev'd* by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); Marian O. Boner, *Erie v. Tompkins: A Study in Judicial Precedent*, 40 TEX. L. REV. 509, 510-11 (1962) (analyzing how *Swift v. Tyson* was not contained by the limits set by Justice Story and the ways in which this led to forum shopping).

about this behavior increased, however, as state courts and legislatures developed their own increasingly particular “local” rules of private law, which might be thwarted through recourse to federal courts.¹²⁶

4.1.2. *Erie Railroad Co. v. Tompkins*

For this reason, the existence of general federal common law and its constitutional underpinnings were dramatically rejected by the U.S. Supreme Court in *Erie Railroad Co. v. Tompkins*.¹²⁷ *Erie* instead held that federal courts exercising diversity jurisdiction would have to apply state common law, apparently assuming that this referred to the law of the state in which the court sits.¹²⁸ Justice Brandeis, delivering the opinion of the Court, famously held that:

There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or “general,” be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.¹²⁹

Once again this decision was partly based on the Rules of Decision Act,¹³⁰ drawing on new historical evidence of the original

¹²⁶ See, e.g., Clark, *supra* note 119, at 1293 (discussing the development of localized commercial doctrines which federal judges continued to disregard in favor of their own generalized commercial law).

¹²⁷ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). There was some indication of a trend in this direction, through increased deference to state law and its interpretation by state judges. See, e.g., *Willing v. Binstock*, 302 U.S. 272 (1937) (giving deference to Pennsylvania’s law regarding partnership notes because nothing in the National Banking Act or in any federal statute conflicted with Pennsylvania’s rule); *Marine Nat’l Exch. Bank of Milwaukee v. Kalt-Zimmers Mfg. Co.*, 293 U.S. 357 (1934) (deferring to a Wisconsin statute after the Court distinguished the matter from other cases involving the application of a local decision). See generally FREYER, *supra* note 114.

¹²⁸ See generally *infra* Part 4.2.

¹²⁹ *Erie*, 304 U.S. at 78.

¹³⁰ See generally WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES AND USING NEW EVIDENCE* 78–79 (Wythe Holt & L.H. LaRue eds., 1990) (questioning whether the Senate intended for Section 34 to be construed to perform “the functions that . . . the Supreme Court majority in *Erie* . . . have attributed to it); Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1424 (1989) (offering a “chronology of the origin of the federal courts within a socioeconomic context”); Henry J. Friendly, *In Praise of Erie – and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 388 (1964); Teton, *supra* note 117,

intention of the drafters of the 1789 Judiciary Act to conclude that Congress intended to require federal courts to apply state common law.¹³¹ Whether this reinterpretation has discovered the “true” meaning of the statute remains, perhaps inevitably, a matter of contention.¹³² This continuing uncertainty only underlines the point that to characterize the decision technically in this way would be to miss its important theoretical and constitutional dimensions—the Court itself observed that “[i]f only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.”¹³³ The reinterpretation was based on a more fundamental move from Story’s “natural law”—inspired idea of common law¹³⁴ to a positivist conception of law as the commands of a sovereign.¹³⁵

Although perhaps motivated primarily by these changes in the conception of law, the *Erie* decision was also concerned with the proper constitutional balance between federal and state sources of legal authority. This was not a case purely about judicial activism, but about *federal* judicial activism and its impact on the vertical balance of powers within the U.S. federal system. In finding that the constitution did not support the judicial development of general federalized private law, the Court was giving effect to an

at 536 (examining the Supreme Court’s construction of Section 34 and the ways in which this may have influenced the holding of *Swift v. Tyson*).

¹³¹ The Court relied expressly on Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923) (presenting a new perspective on the history of the Federal Judiciary Act of 1789 in the context of new material evidence).

¹³² See generally Borchers, *supra* note 117; Clark, *supra* note 117 (questioning the post-*Erie* doctrine requiring federal courts to apply state substantive law).

¹³³ *Erie*, 304 U.S. at 77.

¹³⁴ *Swift v. Tyson*, 41 U.S. 1, 18 (1842) (holding that the decisions of judges are “at most, only evidence of what the laws are, and are not, of themselves, laws”).

¹³⁵ See *Guar. Trust Co. v. York*, 326 U.S. 99, 101–03 (1945) (noting that before *Erie*, “Law was conceived as a ‘brooding omnipresence’ of Reason, of which decisions were merely evidence, and not themselves the controlling formulations”); *Erie*, 304 U.S. at 78 (stating that “law in the sense in which courts speak of it today does not exist without some definite authority behind it”) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)); Borchers, *supra* note 117, at 116 (noting that the positivist conception of law “defined law as a command of a sovereign”). But see Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673 (1998) (challenging the conventional wisdom about the influence of legal positivism on *Erie*).

aspect of the principle of subsidiarity as a matter of constitutional settlement—its negative conception as a limitation on federal competence.

Although not expressly part of the reasoning in *Erie*, a further part of the explanation for the decision arguably comes from the idea of ‘regulatory competition’ which has also recently influenced the debate on the federal distribution of competence in the European Union.¹³⁶ This is the theory that a diversity of state laws contains the additional benefit that each state may act as a separate site for legal experimentation, with other states free to adopt the outcome which is best or most appropriate for their residents.¹³⁷ It is perhaps significant that Justice Brandeis, who delivered the judgment in *Erie*, had previously written a dissenting judgment in *New State Ice Co. v. Liebmann*,¹³⁸ dealing with the interpretation of constitutional Due Process,¹³⁹ which included the statement that “it is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁴⁰ This idea of regulatory competition thus emphasizes the benefits of decentralization, providing a

¹³⁶ See *supra* note 59 and accompanying text.

¹³⁷ See generally ERIN A. O’HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* (2009) (examining the nature and effects of competition between legal systems); George A. Bermann, *Regulatory Federalism: European Union and United States*, 263 RECUEIL DES COURS 9 (1997) (comparing the approaches to federal regulation in the European Union and United States in an effort to further understand the problems each faces); Horatia Muir Watt, *Experiences from Europe: Legal Diversity and the Internal Market*, 39 TEX. INT’L L.J. 429, 431 (2004) (examining “the rival claims of interjurisdictional competition as an alternative to central regulation”); Giesela Rühl, *Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency*, in CONFLICT OF LAWS IN A GLOBALIZED WORLD 153 (Eckart Gottschalk et al. eds., 2007) (analyzing the development of party autonomy in conflict of laws from an economic perspective); Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT’L L. 743, 788 (1999) (arguing that regulators should allow “national legal systems to compete among themselves as to the terms they will offer commercial actors, and business people to choose among the competitors”).

¹³⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

¹³⁹ See U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law”); U.S. CONST. amend. XIV, § 1 (“nor shall any state deprive any person of life, liberty, or property, without due process of law”).

¹⁴⁰ *Liebmann*, 285 U.S. at 311; *accord* *FERC v. Mississippi*, 456 U.S. 742, 788 (1982) (further arguing that “state innovation is no judicial myth”).

presumptive 'centrifugal' argument against federalized forms of regulation which must be overcome as part of any subsidiarity analysis.¹⁴¹ It may be contrasted with the idea of regulatory competition which operated (to little success¹⁴²) under *Swift v. Tyson*, and which has recently been revived in the European Union¹⁴³—the theory that federal law (and, in the United States, federal courts) could and should operate in competition with the states, as this will lead (by example) to the improvement and harmonization of state justice.¹⁴⁴

It is striking that the decision in *Erie* came only a few months after standardized U.S. Federal Rules of Civil Procedure had been adopted by the Supreme Court and sent to Congress for approval—as authorized under the Rules Enabling Act of 1934—and less than six months before those rules were approved.¹⁴⁵ Under the Process Act of 1789¹⁴⁶ and subsequent acts, federal courts were generally obliged to follow the procedural rules of the

¹⁴¹ See, e.g., Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 397 (1997) (arguing that innovation beneficial to the entire populace may result from parallel state and sub-state governments serving as laboratories for experimentation).

¹⁴² But see *infra* text accompanying note 235.

¹⁴³ See *supra* text accompanying notes 83–84 (discussing the proposed role of European contract law as an alternative system to that of the Member States, which private parties might choose to govern their contracts).

¹⁴⁴ The negative perception of state courts may have been influenced by the fact that *Swift v. Tyson* was decided in the midst of the famous 'Caroline affair', in which the arrest and trial of an English citizen in New York caused a major diplomatic incident between the United States and England, much criticism of the New York courts, and an exchange of letters which is still relied on as a precedent in the international law rules relating to the use of force by a state in self-defense. See *The People v. McLeod*, 1 Hill 377, 25 Wend. 483, 3 Hill 635 (N.Y., 1841); Teton, *supra* note 117, at 533–35 (discussing the Caroline incident and the resulting criticism of the New York Court for its alleged misapplication and misunderstanding of the law). Similarly, modern federal common law is generally considered to be justified in areas in which U.S. foreign relations are implicated. See *infra* note 179.

¹⁴⁵ Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2010)). See also *Orders Re Rules of Procedure*, 302 U.S. 783 (1937) (adopting the Rules of Procedure on Dec. 20, 1937, and requesting that the Attorney General report the Rules to Congress at the start of the next general session); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (examining the history and context of the Rules Enabling Act); John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 718 (1974) (arguing that in determining the application of federal law, the Rules Enabling Act should be dispositive).

¹⁴⁶ Process Act of 1789, 1 Stat. 93, 1789. For a discussion of the history of the Process Act, see Borchers, *supra* note 117, at 107.

state in which they were sitting. As state procedural law was modernized in different states at different times, this resulted in federal courts following varied procedures in different common law cases. Although the Conformity Act of 1872 introduced a more flexible obligation to “conform, as near as may be”¹⁴⁷ to state procedures, the requirement to follow state procedural law essentially continued until federal procedural rules were finally adopted in 1938.

That year thus saw two apparently diametrically opposed developments in federal courts: first, the federalization of uniform rules of procedure, in response to difficulties caused by following diverse state procedural rules (including inconsistency between different federal courts); and, second, the decentralization of substantive rules, in response to difficulties caused by the adoption of federal common law (inconsistency between federal and state courts).¹⁴⁸ These apparently conflicting trends are readily explained as an illustration of a subsidiarity-style ‘balancing’ of centrifugal and centripetal forces—as federal procedural power expanded (potentially increasing the danger of federal court forum shopping), federal substantive power contracted (counteracting this by aiming to eliminate state and federal court differences in substantive applicable law). Between these two opposing movements, the boundary between substance and procedure was and remains inevitably a point of friction. Cases in the years immediately after the decision in *Erie* largely took an expansive approach to what constitutes a ‘substantive’ rule, and therefore falls under state law,¹⁴⁹ although the procedural limits of *Erie* have

¹⁴⁷ Conformity Act of 1872, 17 Stat. 196, 197, § 5 (1872).

¹⁴⁸ See, e.g., Mary Kay Kane, *The Golden Wedding Year: Erie Railroad Company v. Tompkins and the Federal Rules*, 63 NOTRE DAME L. REV. 671, 671 (1988) (recognizing the significance of 1938 as the year in which the Supreme Court both “return[ed] to the states the power to create common law” and “promulgate[d] the first set of federal civil rules”). Kane notes, however, that Justice Brandeis, who delivered the opinion of the Court in *Erie*, did not approve of the adoption of federal procedural rules. *Id.* at 673. See also *Orders Re Rules of Procedure*, *supra* note 145, at 783 (noting Justice Brandeis’s disapproval).

¹⁴⁹ See, e.g., *Guar. Trust Co. v. York*, 326 U.S. 99 (1945) (establishing that state rules, not federal rules, should govern when the rules are “outcome determinative.”); *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208 (1939) (determining state law regarding burden of proof in property dispute to be substantive and thus controlling). *But cf.* *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (holding that Rules 35 and 37, authorizing a federal court to order a party to undergo a physical or mental examination, are procedural not substantive, and therefore valid).

been the subject of continuing clarification, modification and rebalancing.¹⁵⁰

The principle in *Erie* was quickly understood to apply not only to diversity cases, but also to incidental issues of private law which arise when a federal court has taken jurisdiction under other grounds—for example, mandating application of state property law to determine proprietary issues which may arise when considering questions of federal law, such as bankruptcy.¹⁵¹

¹⁵⁰ See, e.g., *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010) (holding that where New York state law on class actions conflicted with the federal rule, Rule 23 governed and would allow suit despite state law position to the contrary); *Gasperini v. Ctr for Humanities, Inc.*, 518 U.S. 415 (1996) (allowing federal court to apply a lower state standard of review of jury's verdict rather than the federal standard, so long as such application is consistent with the Seventh Amendment); *Hanna v. Plumer*, 380 U.S. 460 (1965) (applying federal rules of service of process in federal court, irrespective of whether the cause of action arose under state or federal law); *Byrd v. Blue Ridge Rural Elect. Coop.*, 356 U.S. 525 (1958) (holding that the federally-guaranteed right to a jury trial cannot be denied in federal court by virtue of a contrary state rule); *Angel v. Bullington*, 330 U.S. 183 (1947) (applying res judicata to bar suit in federal court of alleged state court violation of federal Constitution, where such alleged violation was litigated in the state court system); see also Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693 (1988) (examining federal limitations law); Donald L. Doernberg, *The Unseen Track of Erie Railroad: Why History and Jurisprudence Suggest a More Straightforward Form of Erie Analysis*, 109 W. VA. L. REV. 611 (2007) (discussing the history and application of the *Erie* doctrine as a governmental-interest analysis approach to a conflict of laws problem); Ely, *supra* note 145 (discussing the balance between substance and procedure under *Erie*); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 510 (1954) (discussing the frustrating effect of overlapping and conflicting systems of law and arguing the need for a harmonious federal/state system); Alfred Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427 (Part I) and 541 (Part II) (1958) (analyzing the various problems that arise from application of the *Erie* doctrine); Kane, *supra* note 148 (discussing the Supreme Court's position that it could prescribe procedural rules so long as it did not venture "into the prohibited bounds of substance left to state control"); Allen E. Smith, *Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443 (1962) (discussing the extent to which the *Byrd* decision has altered the *Erie* framework).

¹⁵¹ See, e.g., *Travelers Cas. & Sur. Co. v. Pacific Gas & Electric Co.*, 549 U.S. 443, 443 (2007) (holding that contractual, and thus state law-governed, assessments of attorney fees may be applied in federal court, even in the course of litigating issues "peculiar to federal bankruptcy law"); *Butner v. United States*, 440 U.S. 48 (1979) (determining that state law may control property rights in bankruptcy proceedings); see also Note, *Interaction of National and State-Created Interests in Non-Diversity Fields*, 47 COLUM. L. REV. 629 (1947) (discussing the implications of federal law built upon state-created interests); Laura E. Little, *Empowerment through Restraint: Reverse Preemption or Hybrid Lawmaking?*, 59 CASE W. RES. L. REV. ____ (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1331588; *infra* note 244.

Despite this, it has been argued that another way of understanding the changes introduced in *Erie* is as a reinterpretation of the diversity jurisdiction function of the federal courts. It is generally accepted that at least part of the reason for vesting federal courts with diversity jurisdiction was fear of bias in state courts against out of state litigants.¹⁵² In the early days of the U.S. federal system, federal courts were thus intended to serve the function of providing a neutral forum and (following *Swift v. Tyson*) neutral applicable law. They were a check on state judiciaries, by offering an alternative law-making power in competition with state courts. The idea that diversity jurisdiction would protect litigants from state law is, however, at first glance somewhat difficult to reconcile with the disputed Rules of Decision Act. Although it was a matter of disagreement whether this Act required federal courts to apply state *common* law, it has always been clear that it requires federal courts to apply state *statutes*.¹⁵³ What is unclear is why state common law would be viewed as more problematic than state statutes if there really were concerns about the fairness of state substantive law.

A probable explanation is that the development of discriminatory state statutes was intended to be restricted by the ‘privileges and immunities’ clause in the Constitution, which provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”¹⁵⁴ While there was some uncertainty as to the effect of this clause on state law-making powers, the Supreme Court finally clarified in

¹⁵² See Borchers, *supra* note 117, at 79 (recognizing a “consensus . . . that diversity [jurisdiction] has existed and exists to provide a neutral forum for out-of-staters against perceived local bias by state courts”); Hill, *supra* note 150, at 451–52 (“[I]t is the generally accepted view that the basic purpose of vesting in the federal courts jurisdiction to try controversies over questions of state law between citizens of different states was to permit the nonresident litigant to avoid possible bias in the local courts . . .”). *But see* Amar, *supra* note 20, at 1494 (arguing that the federalism envisioned by the Framers requires “each government checking the lawlessness of the other”); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928) (describing the roots of diversity jurisdiction—including arguments for and against it raised while drafting the Constitution—and casting doubt on the argument that states will be hostile to out-of-state citizens); Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97 (1990) (providing an overview of historical arguments both for and against diversity jurisdiction, and arguing that Congress should abolish diversity jurisdiction—with limited exceptions—to alleviate federal caseload).

¹⁵³ *Swift v. Tyson*, 41 U.S. 1, 18 (1842).

¹⁵⁴ U.S. CONST. art. IV, § 2.

1869 that the clause “inhibits discriminating legislation against [citizens of any State] by other States.”¹⁵⁵ The Fourteenth Amendment to the U.S. Constitution, adopted in 1868 (also in the aftermath of the civil war), aimed to ensure even greater protection against state regulatory excess; establishing substantive federal constitutional rights in addition to the existing obligations of non-discriminatory treatment. It provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹⁵⁶

By the twentieth century, the jurisdictional overlap between federal and state courts thus seemed less like an essential check on possible state bias, and more like an anachronistic fracturing of regulation, facilitating forum shopping. As concerns about state courts and law have faded, so too has the need for federal courts to adopt federal common law as a neutral alternative to state law. This has led to long-standing criticisms of the need for diversity jurisdiction to exist at all, particularly given the expanding demands on federal courts in exercising ‘federal question’

¹⁵⁵ Paul v. Virginia, 75 U.S. 168, 180 (1869), *rev'd on other grounds* United States v. Se. Underwriters Ass'n, 322 U.S. 533 (1944).

¹⁵⁶ U.S. CONST. amend. XIV, § 1. The effect of the prohibition on abridging “privileges or immunities” in this context is somewhat contested. On the prevailing interpretation, it refers to privileges and immunities arising out of U.S. federal citizenship, rather than those arising out of state citizenship (which are covered by the “privileges and immunities” restriction in Article IV § 2), although on this reading it is potentially redundant (such privileges and immunities automatically override inconsistent state law because of the Due Process clause and/or Supremacy Clause). See *Slaughter-House Cases*, 83 U.S. 36 (1872) (holding that the Privileges and Immunities Clause pertains to federal, not state, citizenship rights). However, there are alternative interpretations of the meaning of “privileges or immunities.” See William Winslow Crosskey, *Charles Fairman, “Legislative History” and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954) (arguing that the clause should refer to rights arising out of state citizenship and defending the perspective on incorporation held by Justice Black; who would have incorporated the entire Bill of Rights); Charles Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954) (arguing against Justice Black’s stance); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1388 (1992) (distinguishing between equality-based protections and substantive protections to argue that the Privileges and Immunities Clause is an equality-based protection that imposes on any given state the requirement “that the law, whatever it is, be the same for all citizens”).

jurisdiction.¹⁵⁷ Even under *Erie*, of course, interstate litigants retain the possible benefit of federal courts as a neutral forum, as well as federal procedural rules, which may still address lingering concerns about bias in the application (rather than the form) of state rules. Nevertheless, the post-*Erie* objective of achieving identity of decision with local state law is a far cry from the initial perceived purpose of diversity jurisdiction—neutrality and independence from state law.

4.1.3. *Clearfield Trust Co. v. United States*

As is well known, federal common law has not been entirely abolished under these developments. The recognition by the Supreme Court of special rules of federal common law began with an opinion delivered by Justice Brandeis the same day he delivered *Erie*,¹⁵⁸ and may have already been implicit in *Erie*'s determination that "[t]here is no federal general common law."¹⁵⁹ In *Clearfield Trust Co. v. United States*,¹⁶⁰ the Supreme Court resurrected an element of federal common law jurisprudence (relating to government-issued commercial paper), and considered the criteria to be used in determining when federal courts could develop federal common law in the future. Justice Douglas held, for the Court, that "the rule of *Erie R. Co. v. Tompkins* ... does not apply to this action," and that "[t]he rights and duties of the United States on commercial paper which it issues are governed by federal rather

¹⁵⁷ See, e.g., Kramer, *supra* note 152 (arguing for the abolition of diversity jurisdiction).

¹⁵⁸ See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (applying federal common law in relation to water rights).

¹⁵⁹ *Erie*, 304 U.S. at 78 (emphasis added).

¹⁶⁰ *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); see also Friendly, *supra* note 130, at 409 (discussing the spread of the *Clearfield* doctrine into other areas of litigation, including general contract law involving the validity of a liquidated damages clause); Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1642 (2008) ("[I]t becomes clear that some form of *Clearfield* must govern all instances of preemptive federal common-law making."); Clearfield: *Clouded Field of Federal Common Law*, 53 COLUM. L. REV. 991, 1007 (1953) ("*Clearfield* may best be explained as a judicial attempt to avoid the expansion of the Rules of Decision Act occasioned by the *Erie* decision."). Various courts have addressed the scope of *Clearfield*. See *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (looking to federal common law and finding no basis therein for the contribution claim alleged); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592 (1973) (finding that "[h]ere, the choice of law task is a federal task for federal courts, as defined by *Clearfield*"); *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301 (1947) (applying federal common law in the antitrust context).

than local law.”¹⁶¹ Further, he concluded, “[i]n absence of an applicable Act of Congress, it is for the federal courts to fashion the governing rule of law according to their own standards.”¹⁶² The policy behind this qualification of *Erie*, and thus behind the re-emergence of federal common law, was expressed in the following terms:

The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain. And while the federal law merchant developed for about a century under the regime of *Swift v. Tyson*, 16 Pet. 1, represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions.¹⁶³

This reasoning is instantly recognizable as a subsidiarity analysis, adopted as a guiding principle for judicial lawmaking, and operating as a matter of both constitutional settlement and practice. The reasoning of the Supreme Court essentially followed a two-stage test.¹⁶⁴ The first stage asks whether federal (judicial) regulatory action is authorized under the Constitution—this is the question of whether federal action is permitted as a matter of constitutional settlement. The second stage asks whether the adoption of a federal common law rule is ‘necessary’ to achieve objectives that could not be met by regulation according to the laws of different states—this is the question of whether federal action is justified as a matter of constitutional practice. In *Clearfield Trust*, the Court concluded that “the desirability of a uniform rule”

¹⁶¹ *Clearfield*, 318 U.S. at 366.

¹⁶² *Id.* at 367.

¹⁶³ *Id.*

¹⁶⁴ See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 886, 950 (1986) (arguing “that no meaningful limits on judicial power to make federal common law have been articulated”); Lenaerts & Gutman, *supra* note 43, at 37 (providing further discussion of the two-prong test for determining whether an issue is governed by federal common law).

vindicated the adoption of federal rather than state law, which could be found in otherwise obsolescent federal common law jurisprudence.¹⁶⁵

Despite *Erie*, the Supreme Court has thus, in at least a category of circumstances, reserved to itself the power to make ongoing evaluations of the need for federal regulation of private law questions, drawing on the principle of subsidiarity. Part of the explanation for this apparent inconsistency is a subtle shift in context, and thus in the role of the principle of subsidiarity. Subsidiarity operates in *Erie* purely as a matter of constitutional settlement: there can be no general federal common law because no constitutional power has authorized it. In *Clearfield Trust*, however, it affects legal constitutional practice: in an area properly within federal competence, it is for the courts to determine whether federal common law is justifiable.

What ‘properly within federal competence’ means may, of course, be susceptible to different interpretations, although it must certainly be accepted that “[b]ecause post-*Erie* federal common law is made, not discovered, federal courts must possess some federal-common-law-making authority before undertaking to craft it.”¹⁶⁶ Thus, some have argued that the Constitution permits a wide scope of federal common law, while others, by contrast, require specific constitutional or even legislative authorizations, suggesting that what is called ‘federal common law’ is really only (or mostly) legitimate if it is a matter of interpretation of federal statutes, rather than federal judicial lawmaking.¹⁶⁷ Certainly, concerns about the separation of powers and the limits of the judicial function must play some role here, and the Supreme Court has on occasion preferred not to act on the basis that the relevant policy is “a proper subject for congressional action, not for any

¹⁶⁵ *Clearfield*, 318 U.S. at 367.

¹⁶⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 741 (2004) (Scalia, J., concurring).

¹⁶⁷ Compare Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 851 (1989) (suggesting that federal common law should not be rejected due only to concerns over the limited power delegated to federal courts), with Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761, 803 (1989) (“Nothing in American democratic theory . . . justifies the unrepresentative judiciary’s usurpation of the legislature’s basic policymaking function . . .”), and Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 344 (1992) (noting that federal courts are not “general common-law courts” and that “there is a sense of unease about the decisions adopting federal common law, verging on guilt”).

creative power of ours.”¹⁶⁸ When federal common law is ‘created,’ the reinterpretation of the federal judicial function discussed above suggests that it no longer serves the purpose (attributed to the old general common law) of providing an alternative (neutral) law to state law.¹⁶⁹ It is thus now understood to be subject to the Supremacy Clause¹⁷⁰ and hence also binding on state courts, thereby overcoming the concerns of forum shopping between federal and state courts that motivated *Erie*, and effectively harmonizing aspects of private law regulation within the federal system.¹⁷¹ Again, this may be understood as a process of federal rebalancing—as the scope of federal power has contracted (there is no general federal common law), its effectiveness has expanded (modern federal common law is binding on state courts).

Clearfield Trust is an excellent illustration of the fact that subsidiarity has a positive as well as a negative dimension—it can be used not merely as a presumption against federalized regulation, but as a way to articulate a justification in favor of it. This is the “centripetal” aspect of subsidiarity, operating in support of federalized rules, countering the “centrifugal” pressures toward states’ rights acknowledged in *Erie*. The revision to the

¹⁶⁸ *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 314 (1947); *see also* *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (holding that Congress had “occupied the field through the establishment of a comprehensive regulatory program,” displacing federal common law).

¹⁶⁹ *But see* Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 588 (2006) (“[P]otential bias in creating state law is a necessary condition for creating federal common law.”).

¹⁷⁰ *See supra* note 27 (discussing clarifications of the clause).

¹⁷¹ *See, e.g.,* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964) (“[T]here are enclaves of federal judge-made law which bind the States.”); Clark, *supra* note 117, at 1268 (noting that under the Supremacy Clause, federal common law is binding in both state and federal forums); Field, *supra* note 164, at 897 (“[F]ederal common law rule, once made, has precisely the same force and effect as any other federal rule. It is binding on state court judges through the supremacy clause.”); Friendly, *supra* note 130, at 405 (“*Erie* led to the emergence of a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding in every forum”); Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1074 (1967) (observing that federal judge-made law is binding upon the states under the Supremacy Clause). Applying federal common law is of course not a purely mechanical process; it has thus also been argued that “[i]t is not the case . . . that state courts merely follow federal common law that the Supreme Court has made; rather, state courts regularly participate in the development of federal common law themselves—in other words, they make federal common law too.” Bellia, *State Courts and the Making of Federal Common Law*, *supra* note 119, at 828 (discussing what justifies the creation of federal common law by state courts).

constitutional balance in *Erie* is, on this view, counter-balanced by *Clearfield Trust's* introduction of subsidiarity in private law as a matter of constitutional practice, to replace *Erie's* apparent determination that private law is ruled out as a matter of constitutional settlement. As Judge Friendly of the federal court suggested, "the Hegelian dialectic has been here at work—with *Swift v. Tyson* the thesis, *Erie* the antithesis, and the new federal common law the synthesis."¹⁷² The status of private law in federal courts moves from (pre-*Erie*) federal common law, to (*Erie*) apparently exclusively state law, to (*Clearfield Trust*) a matter of (contentiously) shared federal and state competence, with the boundary to be determined by application of subsidiarity principles. Rightly interpreted by *Clearfield Trust*, the decision in *Erie* turns out not to be a centrifugal principle of "states' rights," but the adoption of a principle and a decisional process of subsidiarity, aspiring toward the harmonious and balanced Newtonian solar system envisaged by the Constitution.¹⁷³ It provides simply that, as stated by Judge Dobie of the federal court in a lecture of 1941, "[u]nto each Caesar, State or federal, is thus rendered that which properly belongs to that particular Caesar, supreme in its distinctive field."¹⁷⁴

Drawing on the subsidiarity principle adopted in *Clearfield Trust*, the Supreme Court has developed rules of federal common law in a range of areas in which federal competence exists, and the issues are "so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings,"¹⁷⁵ which "relate to programs and actions which by their nature are and must be uniform in character throughout the Nation,"¹⁷⁶ or where "uniquely federal interests" are at stake.¹⁷⁷ This analysis has not only been applied in

¹⁷² Friendly, *supra* note 130, at 421 (arguing that since *Erie* the U.S. Supreme Court "has been forging a new centripetal tool incalculably useful to our federal system").

¹⁷³ See Amar, *supra* note 20, at 1449 (comparing the relationship between state and federal law laid out in the Constitution to a "harmonious Newtonian solar system," in which states are distinct spheres of law controlled by the "gravitational force of a common central body").

¹⁷⁴ Friendly, *supra* note 130, at 407-08 (citation omitted).

¹⁷⁵ *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 307 (1947).

¹⁷⁶ *United States v. Yazell*, 382 U.S. 341, 354 (1966).

¹⁷⁷ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964); see also *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001) (noting that

diversity cases, but also where *Erie* has been extended to other grounds of federal jurisdiction. Thus, for example, the Supreme Court has held that state law should ordinarily determine property rights in bankruptcy proceedings, “[u]nless some federal interest requires a different result.”¹⁷⁸ In some cases the exclusivity of federal interest is expressly determined by the Constitution, as a matter of constitutional settlement, such as the federal interest in regulating the foreign relations of the United States, which includes a limited but contested role for the courts.¹⁷⁹ In this

federal interest in certain areas, such as claim preclusion, may warrant the creation of rules contrary to state law); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (“[A] few areas, involving ‘uniquely federal interests,’ . . . are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed . . . by the courts”) (citation omitted); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 400 (1971) (Harlan, J., concurring) (arguing that “federal courts . . . have the power to award damages for violation of ‘constitutionally protected interests’”); *D’Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447, 457 (1942) (arguing that the Federal Reserve Act created a federal interest in protecting the FDIC and is subject to federal law). See generally George D. Brown, *Federal Common Law and the Role of the Federal Courts in Private Law Adjudication—A (New) Erie Problem?*, 12 PACE L. REV. 229, 231–32 (1992) (noting that federal common law’s application to “uniquely federal interests” should be separate from Federal judges’ statutory or constitutional interpretation) (citation omitted); Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 758 (1986) (discussing how state law governs in federal cases, unless the state’s law is inconsistent with federal interests); Field, *supra* note 164, at 885–86 (describing a two-prong test, which includes asking whether it is proper to apply federal power to the issue at hand and whether it is appropriate to favor federal law in light of the competing state’s interest, to determine if federal common law is necessary); Friendly, *supra* note 130, at 405 (discussing *Erie*’s role in allowing for a binding, uniform federal decisional law in areas of national concern); Hill, *supra* note 171, at 1035–46 (discussing the role of federal interest in cases regarding federal law to which the United States is not a party); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 301 (1992) (arguing that federalism requires federal common law to be limited to filling in federal interest gaps left by Congressional statutes); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 18 (1985) (analyzing the role of federalism in granting the judiciary branch certain “implied powers” in areas of federal interest); Tidmarsh & Murray, *supra* note 169, at 630–32 (advancing the role federal interests and federal common law play in providing neutral solutions to cases in which the United States is a party and in disputes between two or more states); Young, *supra* note 160, at 1661 (discussing doctrinal problems with the idea that “federal interest” can be entirely separated from state interests so as to warrant federal common law).

¹⁷⁸ *Butner v. United States*, 440 U.S. 48, 55 (1979).

¹⁷⁹ See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) (reaffirming that “the domestic law of the United States recognizes the law of nations” and

context, the fractured post-*Erie* judicial development of federal rules of private law in the United States in subjects of particular federal interest and competence mirrors the fragmented development of European private law, as an incidental effect of the constitutional authorization of federal regulation in particular subject matters.¹⁸⁰ In other cases, such as the apparent application of 'general contract law' to federal government contracts,¹⁸¹ the

characterizing customary international law as "federal common law" for purposes of the Alien Tort Statute); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 396 (2003) (holding that state law is preempted by national policies when it conflicts with foreign relations policies); *Zschernig v. Miller*, 389 U.S. 429, 441 (1968) (arguing that even in the absence of a specific treaty or statute preempting a state's law, only federal policies may directly impact foreign relations); *Banco Nacional de Cuba*, 376 U.S. at 425 ("[A]n issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."); *Bellia & Clark*, *supra* note 119, at 8 (arguing that the Constitution was framed, in part, in order to grant the federal courts and federal government exclusive jurisdiction over foreign relations); Curtis A. Bradley et al., *Sosa*, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 902 (2007) (stating that, contrary to many scholar's views, *Sosa* did not automatically make all of customary international law a part of federal common law and that judges should look for legislative guidance before exercising their authority); William S. Dodge, *Bridging Erie: Customary International Law in the U.S. Legal System after Sosa v. Alvarez-Machain*, 12 TULSA J. COMP. & INT'L L. 87, 88 (2004) (arguing that *Sosa* has a narrow effect on the role of customary international law in the United States and courts must continue to review similar cases issue by issue); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1636 (1997) (arguing that the federal common law of foreign relations is unjustified); Hill, *supra* note 171, at 1042 (noting that "an area of federal judicial competence by force of a preemption effected by the Constitution is one involving questions of international law"); Philip C. Jessup, Editorial Comment, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939) ("[A]ny attempt to extend the doctrine of the Tompkins case to international law should be repudiated by the Supreme Court Any question of applying international law in our courts involves the foreign relations of the United States and can thus be brought within a federal power."); Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1827 (1998) (arguing that the incorporation of international law into federal common law is constitutional, in response to Curtis Bradley's and Jack Goldsmith's critique of the federalization of customary international law without explicit authority from other political branches).

¹⁸⁰ See *supra* Part 3.1.

¹⁸¹ See, e.g., *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947) ("It is customary, where Congress has not adopted a different standard, to apply to the construction of government contracts the principles of general contract law."); *United States v. County of Allegheny*, 322 U.S. 174, 183 (1944) ("The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the

justification for federal common law appears to be based on a determination by the courts themselves, as a matter of constitutional practice. It has also been argued that some federal common law has been derived from the 'structure' of the federal system.¹⁸²

These justifications for centralization are, however, balanced by the Supreme Court's acceptance of the other, centrifugal aspect of subsidiarity. Thus, it has held that "a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards."¹⁸³ Similarly, the Court has determined that state interests "should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied,"¹⁸⁴ and thus that a particular policy objective should not be addressed by federal common law if "there has been no showing that state law is not adequate to achieve it."¹⁸⁵

The emergence of other mechanisms for coordinating state law in areas of national concern, such as the various projects under the auspices of the Uniform Law Commission¹⁸⁶ and the American

parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State.").

¹⁸² See Clark, *supra* note 119, at 1271 (observing that a legitimate federal common law rule is one that is beyond the legislative capabilities of state law and relates to a constitutional issue).

¹⁸³ Kamen v. Kemper Fin. Servs., 500 U.S. 90, 98 (1991).

¹⁸⁴ United States v. Yazell, 382 U.S. 341, 352 (1966).

¹⁸⁵ Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 71 (1966); see also Atherton v. FDIC, 519 U.S. 213, 218 (1997) (noting that judges must first demonstrate a significant conflict between federal policy and a relevant state law before applying federal common law); O'Melveny & Myers v. FDIC, 512 U.S. 79, 89 (1994) ("We conclude that this is not one of those extraordinary cases in which the judicial creation of a federal rule of decision is warranted."); Tex. Indus. v. Radcliff Materials, 451 U.S. 630, 641 (1981) ("[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."); United States v. Kimbell Foods, Inc., 440 U.S. 715, 727-28 (1979) ("Controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules.").

¹⁸⁶ Formally the National Conference of Commissioners on Uniform State Laws. See THE NAT'L CONF. OF COMMISSIONERS ON UNIFORM ST. LAWS,

Law Institute,¹⁸⁷ thus also operates as a counter-weight to the need to develop federal common (or statutory) law. This is particularly evident in their joint publication of the Uniform Commercial Code, which was expressly adopted in preference to a proposed Federal Sales Act,¹⁸⁸ but is also present in a range of modern efforts toward cooperative solutions that cut across federal-state boundaries.¹⁸⁹ As in the European Union,¹⁹⁰ these forms of ‘bottom-up’ harmonization, where commonalities between states are identified and encouraged rather than imposed, may be viewed as naturally more consistent with subsidiarity than the ‘top-down’ adoption of binding federal rules. If this type of harmonization is not attempted it is difficult to demonstrate that “state law is not adequate to achieve”¹⁹¹ the objectives sought by federal regulation. Uniform law projects may thus be conceptualized as the practical testing ground of subsidiarity in the federal division of powers,

www.nccusl.org (last visited Nov. 23, 2010) (providing information about the Commission and electronic copies of non-partisan rules and procedures the Commission has drafted); Allison Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 LAW & CONTEMP. PROBS. 233, 237 (1965) (noting that states could voluntarily adopt the Commission's laws to obtain national uniformity).

¹⁸⁷ See THE AM. L. INST., <http://www.ali.org> (last visited Nov. 23, 2010) (describing the Institute's work to debate and draft uniform model laws, Restatements of Law, and principles of law across a number of areas).

¹⁸⁸ See, e.g., Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 799 (1958) (surveying the legislative history of the Uniform Commercial Code, which the National Conference of Commissioners on Uniform State Laws proposed to replace Congress's Federal Sales Act in 1940); Lenaerts & Gutman, *supra* note 43, at 66 (describing the American Law Institute's and the National Conference of Commissioners on Uniform State Laws' joint promulgation of the Uniform Commercial Code). *But see* William Tucker Dean, Jr., *Conflict of Laws under the Uniform Commercial Code: The Case for Federal Enactment*, 6 VAND. L. REV. 479, 479-80 (1953) (discussing how piecemeal enactment of the Uniform Commercial Code will result in greater conflict of laws between U.S. jurisdictions).

¹⁸⁹ See, e.g., A. Brooke Overby, *Our New Commercial Law Federalism*, 76 TEMP. L. REV. 297, 299-300 (2003) (examining new methods in commercial lawmaking which allow for partial federal control in areas of state law, instead of the traditional all-or-nothing rule of strict federal preemption).

¹⁹⁰ See *supra* text accompanying note 76 (noting the difficulty of creating vertical harmonization in the European Union without first allowing for the possibility of horizontal state cooperation).

¹⁹¹ *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 71 (1966).

addressing its speculative nature¹⁹² by determining experimentally whether problems can be solved without federal intervention.

It is striking that the invocation of the centrifugal dimension of subsidiarity in *Erie* itself marked a retreat from a perceived excessive centralization of regulation—a reaction to the growth in federal authority under Roosevelt’s New Deal.¹⁹³ This growth was based at least in part on a broad judicial interpretation of Article I of the Constitution, Section 8, Clause 18,¹⁹⁴ as well as a newly expansive approach to the Commerce Clause.¹⁹⁵ The development of the Uniform Commercial Code (first published in 1952) may be viewed as part of the same reaction—an attempt to forestall federal exercise of these newly expanded commerce powers. An instructive parallel may be drawn with the rise of subsidiarity in the European Union in the early 1990s, examined above, which came in conjunction with—and in an attempt to mitigate the effects of—expanding European Community powers.¹⁹⁶ It is perhaps also striking that the rebalancing counter-reaction in *Clearfield Trust* came during U.S. involvement in the Second World War—in which the national interest arguably justified greater centralization¹⁹⁷—and ironic that *Clearfield Trust* itself arose out of a fraudulently presented \$24.20 paycheck from the Works Progress Administration, the largest New Deal agency.¹⁹⁸

¹⁹² See *supra* text accompanying note 32 (noting the counterfactual nature of subsidiarity inquiries).

¹⁹³ See generally Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987) (discussing the impact and legacy of the New Deal).

¹⁹⁴ See *supra* Part 2.2.

¹⁹⁵ U.S. CONST. art. I, § 8, cl. 3. See also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (finding that the Commerce Clause allowed Congress to pass legislation that punished businesses in interstate commerce for refusing to negotiate with unions); *infra* note 206 and accompanying text (pertaining to subsidiarity-style reasoning in interpreting the scope of the Commerce Clause).

¹⁹⁶ See *supra* Part 3.1.1.

¹⁹⁷ Note also the contemporaneous expansive interpretations of the Commerce Clause. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (finding the Commerce Clause to encompass the power to regulate the growth of wheat for private use because reducing a potential consumer’s need to purchase wheat from the market affected interstate commerce); *United States v. Darby*, 312 U.S. 100 (1941) (upholding the constitutionality of legislation regulating employment conditions).

¹⁹⁸ *Clearfield Trust Co. v. United States*, 318 U.S. 363, 364 (1943).

4.1.4. *Subsidiarity as a Principle of U.S. Federalism?*

Subsidiarity has venerable origins in U.S. political thought, particularly in Abraham Lincoln's often quoted observation that "[t]he legitimate object of government, is to do for a community of people, whatever they need to have done, but can not do, *at all*, or can not, *so well do*, for themselves—in their separate, and individual capacities."¹⁹⁹ Nevertheless, it has typically been viewed as playing only a very limited role in the U.S. federal system, and then only as a political rather than a legal principle.²⁰⁰ The federal government is generally considered (by the courts, at least) as acting legitimately if it exercises any power granted to it under the Constitution, whether or not the objectives of its actions could equally be achieved by state regulation. Ideas of subsidiarity (as a matter of general federal balancing) do have influence when it comes to resolving what powers are actually granted to federal authorities—thus, the Supreme Court has committed itself to protect:

[A] system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.²⁰¹

But there is certainly no express constitutional provision, equivalent to the European principle of subsidiarity, which imposes legal restraint on the Federal government's exercise of powers shared with the states. Thus, as a legal principle,

¹⁹⁹ ABRAHAM LINCOLN, *To Do for the People What Needs to be Done*, in LINCOLN ON DEMOCRACY (Mario M. Cuomo & Harold Holzer eds. 1990); see, e.g., Vischer, *supra* note 9, at 126 (arguing that subsidiarity "is deeply ingrained in the structure of our federal system").

²⁰⁰ See Bermann, *supra* note 14, at 407-23 (discussing the extent to which Congress may or may not contemplate the need for federal rather than state legislation when it acts or, separately, the constitutionality of such action). See generally George A. Bermann, *Subsidiarity as a Principle of U.S. Constitutional Law*, 42 AM. J. COMP. L. SUPPLEMENT 555 (1994) (arguing that while subsidiarity does not find much judicial or constitutional support in the United States, legislative and executive actors ultimately promote the same principles subsidiarity seeks to serve).

²⁰¹ *Younger v. Harris*, 401 U.S. 37, 44 (1971). But cf. Friedman, *supra* note 141, at 318 (suggesting that there is "little real effort . . . to take account of when governmental power sensibly is exercised at one level or another").

subsidiarity in the United States is largely only present implicitly in the division of constitutional powers—in the allocation of some powers exclusively to the states, some exclusively to the federal government, and some shared between both, as a hard-wired matter of constitutional settlement.

Federal courts have, however, adopted reasoning which supports a subsidiarity-style analysis in other contexts, in addition to its role in the development of federal common law explored above. For example, in interpreting choice of court clauses which might affect diversity jurisdiction, federal courts have predominantly applied federal standards rather than state contract law, because of “the possibility of diverging state and federal law on an issue of great economic consequence, the risk of inconsistent decisions in diversity cases, and the strong federal interest in procedural matters in federal court.”²⁰² Subsidiarity considerations have also affected the Supreme Court’s determination of whether federal regulation is compatible with supplementary state regulation, or whether (following the Supremacy Clause) it preempts state law. Thus, one justification for preemption is that an “[a]ct of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.”²⁰³ As a counter-weight to this, the Supreme Court has also recognized (although perhaps not always consistently applied) a presumption against preemption,²⁰⁴ and thus a constitutional preference for the ‘hybridized’ coexistence of federal and state law rather than the

²⁰² *Wong v. Party Gaming Ltd.*, 589 F.3d 821, 827 (6th Cir. 2009) (noting, however, a split in other Circuit authorities on the point).

²⁰³ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also* *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (stating that absent pre-emptive language, Congressional intent to supersede state law may still be implicit where the federal interest is dominant); *Bermann*, *supra* note 14, at 424 (“Federal preemption is one way in which Congress shows its preference for federal over state regulation of a given matter”). *See generally* *Young*, *supra* note 160 (discussing *Clearfield Trust Co.* and the application of federal, rather than state, law in antitrust cases); Roderick M. Hills, *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007) (arguing that federal and state regulatory powers necessarily overlap, and that the states’ political processes protect national values).

²⁰⁴ *See generally* *Wyeth v. Levine*, 129 S. Ct. 1187; *accord* *Altria Grp. v. Good*, 129 S. Ct. 538 (2008); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

displacement of state law by federal – “a blend of legal rules with alternating strata of state and federal principles.”²⁰⁵

Perhaps the most important field in which subsidiarity-style reasoning may be readily (although again somewhat intermittently) identified is in the case law dealing with the interpretation of the scope of the Commerce Clause,²⁰⁶ which has (*inter alia*) been the source of much of the fragmented federal statutory rules dealing with private law²⁰⁷ – mirroring the fragmented post-*Erie* judicial development of federal private law. Although this is formally a matter of interpretation of the constitutional settlement, in practice the courts have at times openly engaged with the policy question of the appropriateness of the division of federal and state powers.²⁰⁸ In 1852, the Supreme Court held that the content of the Commerce Clause depended on the strength of the justification for uniform regulation, observing that:

[T]he power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some . . . imperatively demanding that diversity, which alone can meet the local necessities of navigation.²⁰⁹

The Court thus adopted a subsidiarity-style balancing test, determining the validity of a particular exercise of the Commerce

²⁰⁵ Little, *supra* note 151, at 28.

²⁰⁶ U.S. CONST. art. I, § 8, cl. 3; *see* Bermann, *supra* note 14, at 417 (concluding that the Supreme Court has declined to read the Commerce Clause as a basis for enforcing subsidiarity on Congress, opting instead to use the Tenth Amendment to avoid the federalism question posed by subsidiarity); Edwards, *supra* note 57, at 566–68 (discussing the effects of the Supreme Court’s interpretation of congressional power on integral state functions). *See generally* Vause, *supra* note 63 (reviewing American federalism and subsidiarity principles).

²⁰⁷ The Federal Trade Commission, for example, enforces a range of federal consumer protection statutes. *See generally* *Legal Resources – Statutes Relating to Consumer Protection Mission*, FED. TRADE COMM’N (Oct. 7, 2010), <http://www.ftc.gov/ogc/stat3.shtm> (listing such statutes); Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41–58 (2010) (establishing the Federal Trade Commission).

²⁰⁸ *See supra* Part 2.2.

²⁰⁹ *Cooley v. Board of Wardens*, 53 U.S. 299, 319 (1852).

Clause based on analysis of whether federal regulation was necessary to achieve the desired policy objectives.

Although this approach has not always played a major role in the Supreme Court's jurisprudence, the Court returned to it in *Fry v. United States*, finding that the relevant statute, "an emergency measure to counter severe inflation that threatened the national economy," must be held valid otherwise "the effectiveness of federal action would have been drastically impaired."²¹⁰ In *National League of Cities v. Usery*, the Court distinguished *Fry* on the basis that "[t]he enactment at issue there was occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall."²¹¹ The Court thus held, relying on the Tenth Amendment, that "integral operations in areas of traditional [state] governmental functions"²¹² should be shielded from federal regulation. Justice Blackmun, concurring, considered that the majority opinion "adopts a balancing approach, and does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."²¹³

The approach in these cases was, however, expressly overruled in *Garcia v. San Antonio Transit Authority*,²¹⁴ where the Court (with Justice Blackmun writing the majority opinion, in an acknowledged *volte-face*) held that "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."²¹⁵ A parallel may be drawn here with the E.U. debate about the substantive or procedural character

²¹⁰ *Fry v. United States*, 421 U.S. 542, 548 (1975).

²¹¹ *Nat'l League of Cities v. Usery*, 426 U.S. 833, 853 (1976).

²¹² *Id.* at 852.

²¹³ *Id.* at 856.

²¹⁴ *See Garcia v. San Antonio Transit Auth.*, 469 U.S. 528, 546 (1985) ("[W]ithin the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be.").

²¹⁵ *Id.* at 552; *see, e.g., Bermann, supra* note 14, at 407 ("[A] series of executive orders calls upon the federal agencies not only to minimize the regulatory burdens imposed on the private sector, but also to refrain from regulating at all if action at the state or local level would satisfactorily accomplish the federal government's objectives.").

of subsidiarity – whether it is or should be justiciable and thereby judicially enforced, or whether Member State interests are sufficiently protected as a matter of European legislative procedure.²¹⁶ The Supreme Court in *Garcia* preferred a procedural approach, emphasizing the protection of state interests through participation in Congress, because of concerns over whether the courts can or should evaluate the necessity or the appropriateness of the exercise of federal power. Rather than engage in a subsidiarity analysis to determine the scope of application of the Commerce Clause on a case-by-case basis, the Supreme Court has subsequently controlled its exercise simply by construing the clause (and the ‘necessary and proper’ clause) more narrowly,²¹⁷ although the most recent cases perhaps suggest a re-widening of federal authority.²¹⁸ This ongoing indeterminacy has led to critical calls for the express (re)adoption of subsidiarity as “a more effective and fluid balance of power between state and federal governments,”²¹⁹ providing a methodology for the explicit analysis of policy questions involving the federal distribution of power, rather than the present focus on the implicit determination of such questions through constitutional interpretation.

²¹⁶ See *supra* text accompanying note 69.

²¹⁷ See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act of 1990 because it exceeded congress’s power under the commerce clause); see also *United States v. Morrison*, 529 U.S. 598, 613 (2000) (“[T]hus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”). But see Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995) (arguing that the *Lopez* court’s decision “to invalidate an Act of Congress on the ground that it exceeded the commerce power must be recognized as an extraordinary event”).

²¹⁸ See, e.g., *United States v. Comstock*, 130 S.Ct. 1949 (2010) (holding that the Necessary and Proper Clause has an expansive effect on the scope of the enumerated powers, including the Commerce Clause); see also *Gonzales v. Raich*, 545 U.S. 1, 35 (2005) (“Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.”).

²¹⁹ Jared Bayer, Comment, *Re-Balancing State and Federal Power: Toward a Political Principle of Subsidiarity in the United States*, 53 AM. U. L. REV. 1421, 1425 (2003–2004); see also Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996) (discussing the role of subsidiarity within federalism, and how inter-jurisdictional deference allows for effective legislation).

4.2. *Subsidiarity and the Conflict of Laws*

In the early history of U.S. law, federal conflict of laws rules were developed as part of federal common law. Initially this was influenced by an internationalist perspective on conflict of laws (commonly known at the time, and still known in the European Union, as 'private international law'), which was considered as part of a broadly conceived international law.²²⁰ The development of federal conflict of laws was thus an aspect of the way that rules of federal common law drew on ideas of a universal (natural law inspired) '*lex mercatoria*'.²²¹ As the conflict of laws became reconceived as national law through the nineteenth century, and the justification for federal common law lost its international dimension, federal conflicts rules nevertheless continued to develop, coming increasingly under the influence of the constitutional obligations of Full Faith and Credit²²² and Due Process.²²³ In 1926, it was suggested that the "Supreme Court has quite definitely committed itself to a program of making itself, to some extent, a tribunal for bringing about uniformity in the field of

²²⁰ See, e.g., *Suydam v. Broadnax*, 39 U.S. 67, 67 (1840) (holding that one state cannot discharge a debt from a contract entered into in another state because of the general assumption that contracts are governed by the laws under which they are created); *Ogden v. Saunders*, 25 U.S. 213, 222 (1827) ("The constitution meant to preserve the inviolability of contracts, as secured by those eternal principles of equity and justice which run throughout every civilized code, which form a part of the law of nature and nations, and by which human society, in all countries and all ages, has been regulated and upheld"); MILLS, *supra* note 12, at 127.

²²¹ See *supra* note 119 (discussing federal courts' use of the *lex mercatoria*); MILLS, *supra* note 12, Ch. 2 (discussing natural law and positive approaches to conflict of laws); see also Bruce Wardhaugh, *From Natural Law to Legal Realism: Legal Philosophy, Legal Theory, and the Development of American Conflict of Laws since 1830*, 41 ME. L. REV. 307 (1989) ("[T]he revolution [in American conflict of laws] can be correlated with a change in the manner in which both law and legal reasoning have come to be viewed by members of the legal profession in the twentieth century.").

²²² U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."); see, e.g., *Bradford Elec. Light Co., Inc. v. Clapper*, 286 U.S. 145 (1932) (holding that the full faith and credit clause required a federal court sitting in New Hampshire to apply the Vermont workers' compensation statute in a suit brought by the administrator of a Vermont worker who was killed in New Hampshire).

²²³ *Supra* note 139.

conflicts,"²²⁴ on the basis that "the full faith and credit clause . . . impose[s] on a state court the duty, in framing its local rule, to follow the statute of another state where, in the opinion of the Supreme Court, the demands of justice require that such a course be adopted."²²⁵ The conflict of laws was understood to be concerned with "the powers of independent and 'sovereign' states and the limitations which result from their uniting in the Federal Compact,"²²⁶ acting "to coordinate the administration of justice among the several independent legal systems which exist in our Federation,"²²⁷ a description that can readily be applied to the modern E.U. conception of the conflict of laws, explored above.²²⁸

In 1931, the title of one law review article quite reasonably asked: "Has the Conflict of Laws Become a Branch of Constitutional Law?"²²⁹ A few years later in 1934, the First Restatement on the Conflict of Laws, drafted by Professor Joseph Beale, attempted to codify nationally uniform rules of conflict of laws. In *Alaska Packers Association v. Industrial Accident Commission of California*,²³⁰ the Supreme Court held that "it is unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another," suggesting that the methodology for doing this should involve "appraising the governmental interests of each jurisdiction and turning the scale of decision according to their weight."²³¹ In *Boseman v. Connecticut General Life Insurance Co.*,²³² federal choice of law rules were found to be necessary so "that inequalities and

²²⁴ E. Merick Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533, 560 (1926).

²²⁵ *Id.* at 544.

²²⁶ Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 11 (1945); see also *Milwaukee v. M.E. White*, 296 U.S. 268, 276–7 (1935) ("The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties . . . and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right . . .").

²²⁷ Jackson, *supra* note 226, at 2.

²²⁸ See *supra* Part 3.2.

²²⁹ G.W.C. Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law?*, 15 MINN. L. REV. 161 (1930).

²³⁰ *Alaska Packers Ass'n v. Industrial Accident Comm'n of Cal.*, 294 U.S. 532, 547 (1935).

²³¹ *Id.* at 547.

²³² *Boseman v. Connecticut Gen. Life Ins. Co.*, 301 U.S. 196, 196 (1937).

confusion liable to result from applications of diverse state laws shall be avoided.”²³³

Just as with private law during this period, the constitution was understood to have determined that federalized choice of law rules were at least *possibly* necessary (as a matter of constitutional settlement), and the federal courts exercised this competence to impose federal law, making a determination (as a matter of constitutional practice) that federal regulation was *actually* necessary. Indeed, federal conflict of laws rules appeared to be a shining example of the theory of *Swift v. Tyson* in successful application—in developing conflict of laws rules, federal courts were leading the way toward a coalescing of state and federal court rules and techniques.²³⁴ This approach was, however, rejected alongside the rejection of general federal common law in *Erie*, and the discipline of conflict of laws moved dramatically away from this high watermark of historical federalization.

The Supreme Court initially appeared to assume that *Erie* did not affect the existence of federal rules governing the conflict of laws. Without discussing state choice of law rules, it held in *Sibbach v. Wilson & Co., Inc.*,²³⁵ a personal injury case, that “the Rules of Decision Act required the [federal] District Court, though sitting in Illinois, to apply the law of Indiana, the state where the cause of action arose”.²³⁶ However, within six months of *Sibbach* the effect of *Erie* was in fact extended to the conflict of laws through the (much criticized)²³⁷ decision in *Klaxon v. Stentor Electric*,²³⁸ which held that:

²³³ *Id.* at 206.

²³⁴ See *supra* text accompanying note 144 (discussing the theory that *Swift v. Tyson* would lead to improvements in state justice).

²³⁵ *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

²³⁶ *Id.* at 10–11.

²³⁷ See Baxter, *supra* note 114, at 32 (suggesting that *Klaxon* was decided “without making the most cursory reference to the language, history, or purpose of the Rules of Decision Act or the grant of diversity jurisdiction or to the history or purpose of the federal courts in general”); Borchers, *supra* note 117 (arguing that the court in *Klaxon* was incorrect in holding that federal courts must apply state choice of law rules); Cook, *supra* note 114, at 517 (“[T]he condemnation of the ‘doctrine of *Swift v. Tyson*’ as an unconstitutional usurpation of power by the federal courts, including the Supreme Court itself, cannot be extended to their conduct in deciding cases in the conflict of laws”); Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 1 (1991) (arguing that Congress should enact federal choice of law rules for categories of disputes that frequently arise in multistate contexts); Hill, *supra* note 150 at 456 (criticizing *Klaxon* because the Supreme Court held that the court

[T]he prohibition declared in *Erie R. Co. v. Tompkins* . . . extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws.²³⁹

The Supreme Court is here clearly, albeit implicitly, invoking subsidiarity as a question of constitutional settlement, as operative in *Erie*—the Constitution is interpreted as having made the determination that federal choice of law rules, at least in this context, are unjustified. The effect of *Klaxon* is that federal courts exercising diversity jurisdiction must generally apply, first, state choice of law rules (specifically, those of the state in which the federal court is sitting), and then, second, state substantive law (specifically, the law selected by those choice of law rules, to the extent that they designate the law of another state,²⁴⁰ and otherwise the law of the state in which the federal court is sitting).

should have applied the law of Delaware if the state courts in Delaware would have done so, yet the court below found that Delaware was lacking any contact with the controversy which would justify application of Delaware law and this finding was not disputed); Jackson, *supra* note 226 (outlining the historical development of conflict of laws doctrine regarding conflicting state laws and arguing that integration of laws on a national level is a better solution than the current method of choosing the applicable law); Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical-Analytical Approach*, 56 MICH. L. REV. 33, 81 (1957) (arguing that *Klaxon* "has halted development of a national conflicts law by the federal courts"); *see also* Laycock, *supra* note 119 (stating that the requirement to follow another state's choice of law rules undermines the reasoning behind diversity jurisdiction because it creates the same type of discrimination which diversity jurisdiction seeks to avoid).

²³⁸ *Klaxon Co. v. Stentor Elec. & Mfg. Co.*, 313 U.S. 487 (1941).

²³⁹ *Id.* at 496.

²⁴⁰ The focus of the analysis in this section is on disputes internal to the United States. But note that in cases with international elements, federal courts must equally apply state choice of law rules, which designate foreign law rather than the law of any U.S. state. *See Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975).

One important, but fundamentally uncertain, aspect of this decision is whether, like the *Erie* principle more generally,²⁴¹ it should be extended beyond diversity cases to disputes before federal courts based on other heads of jurisdiction (such as bankruptcy or federal question jurisdiction). The Supreme Court has declined to answer this question on several occasions,²⁴² and some, but not all,²⁴³ Circuit Courts of Appeals have refused to extend *Klaxon* to non-diversity cases, instead developing federal choice of law rules for application in these cases,²⁴⁴ largely based on the Restatement (Second) of Conflict of Laws.²⁴⁵

This uncertainty is perhaps a reflection of the fact that the justification for the decision in *Klaxon* also remains somewhat contentious. It was clearly intended (following the policy in *Erie*) to ensure that federal and state courts applied the same law, thus

²⁴¹ See *supra* text accompanying note 151 (discussing *Erie's* scope over diversity cases and cases regarding federal law).

²⁴² See, e.g., *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Hoosier Cardinal Corp.*, 383 U.S. 696, 705 n.8 (1966) (noting that the possible application of *Klaxon* in the case did not arise because all of the operative activities took place in the forum state); *Richards v. United States*, 369 U.S. 1, 7 (1962) (“[W]e need not pause to consider the question whether the conflict of laws rule applied in suits where federal jurisdiction rests upon diversity of citizenship shall be extended to a case such as this, in which jurisdiction is based upon a federal statute.”).

²⁴³ See, e.g., *A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 62 F.3d 1454 (D.C. Cir. 1995) (following *Klaxon's* rule that the federal courts must apply the choice of law rules of the state in which the court sits); *In re Payless Cashways*, 203 F.3d 1081, 1084 (8th Cir. 2000) (holding that bankruptcy courts should apply the choice of law rules of the state in which the court is located).

²⁴⁴ See, e.g., *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006) (considering that when federal jurisdiction arises from a federal statute, such as the applicable statute on foreign banking transactions, federal common law choice of law rules apply); *Edelmann v. Chase Manhattan Bank*, 861 F.2d 1291 n.14 (1st Cir. 1988) (noting that federal common law should be used to resolve conflicts of law in cases where federal jurisdiction is not based on diversity); *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 795 (2d Cir. 1980) (“[In] a federal question case . . . it is appropriate that we apply a federal common law choice of law rule.”). See generally Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 B.U. L. REV. 881 (2006) (reviewing the use, effects, and limitations of federal common law in bankruptcy cases); Little, *supra* note 151 (highlighting the development of hybrid law between federal and state choice of law conflicts, specifically in bankruptcy courts and foreign affairs).

²⁴⁵ See, e.g., *Huynh*, 465 F.3d at 997 (outlining the federal common law's adherence to the Second Restatement of Conflict of Laws to apply statutes of limitations); see also *infra* text accompanying notes 272–75 (discussing further the influence of the Second Restatement of Conflict of Laws).

limiting forum shopping between the different court systems. State choice of law rules had to be applied, “[o]therwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side.”²⁴⁶ This rested on the assumption that “[a]ny other ruling would do violence to the principle of uniformity within a state upon which the *Tompkins* decision is based.”²⁴⁷ But this uniformity could equally have been achieved by recognizing federal choice of law rules as being invested with constitutional authority, which would preempt state choice of law.²⁴⁸ As discussed above, modern federal common law has this binding character—it is applicable in both federal and state courts, and overrides inconsistent state law.²⁴⁹ In the case of choice of law rules, the authority to develop federal common law could have been derived either from specific provisions of the Constitution, such as the Full Faith and Credit clause, or more generally from the structure of the federal system, in particular the horizontal, perhaps territorial, division of state powers.²⁵⁰ There is even some suggestion of support for this in the Rules of Decision Act itself, which requires that in federal courts “[t]he laws of the several states . . . shall be regarded as rules of decision . . . in cases where they apply,”²⁵¹ perhaps (although certainly not unambiguously) suggesting a federal standard for determining the applicability of state law.

Federal common choice of law rules, in diversity cases and otherwise, would have an additional benefit—not only limiting

²⁴⁶ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

²⁴⁷ *Id.*

²⁴⁸ See Friendly, *supra* note 130, at 402 (supporting the decision in *Erie*, but arguing that “the constitutional basis of *Erie* does not apply to choice of law issues”).

²⁴⁹ See *supra* note 171 and accompanying text (discussing the effect of judge-made federal common law on the states).

²⁵⁰ See, e.g., Clark, *supra* note 117 (tracing the development of federal common law and arguing that a number of traditional rules are actually based upon and required by the Constitution); Hill (Part II), *supra* note 150, at 565 (suggesting that Congress or the Supreme Court could establish a uniform conflict of laws code under the full faith and credit clause or similar power derived from the Constitution); see also David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 *YALE L.J.* 1584 (2009) (arguing that Congress is well suited to form conflict of laws rules under the full faith and credit clause of the Constitution). There is, of course, a further ‘separation of powers’ issue about whether any such recognition should be made by the Supreme Court or by Congress.

²⁵¹ 28 U.S.C. § 1652 (2010) (emphasis added).

forum shopping between federal and state courts, but also forum shopping between state courts themselves. As discussed previously, however, this second form of forum shopping has often been viewed much more favorably in U.S. jurisprudence than the first, as part of the positive process of regulatory competition.²⁵² Some have even advocated forum shopping because of the benefit it offers to plaintiffs "as agents of law enforcement,"²⁵³ although many would not see choice of law rules as the appropriate mechanism to achieve such substantive policy goals.²⁵⁴

Another aspect of the explanation for the decision in *Klaxon* must be the status of choice of law rules when it arose, so soon after the adoption of the First Restatement on the Conflict of Laws in 1934.²⁵⁵ Allocating authority over conflict of laws rules to the states would not have seemed likely to lead to widespread diversity, in light of their common history under the influence of federal common law and the Constitution, and the harmonizing influence of the Restatement. In *Home Insurance Co. v. Dick*,²⁵⁶ for example, Justice Brandeis (who later wrote the opinion in *Erie*) held for the Court that Texas could not apply its law or public policy to "abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them"²⁵⁷ without violating Due Process, suggesting at least the potential for the development of significant constitutional constraints on state choice of law. As noted above, *Alaska Packers Association v. Industrial Accident Commission of California*²⁵⁸ appeared to begin

²⁵² See *supra* Part 4.1.

²⁵³ Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 65 (1991).

²⁵⁴ See, e.g., Gottesman, *supra* note 237, at 14 (finding both conservative and liberal enforcement of forum-preferring choice of law rules problematic).

²⁵⁵ See, e.g., Borchers, *supra* note 117, at 120 (noting that the First Restatement gained popularity in courts soon after its adoption and minimized the practice of forum shopping).

²⁵⁶ *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

²⁵⁷ *Id.* at 410; see also *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 150 (1934) (holding that a state may not, on grounds of policy, ignore a right which has lawfully vested elsewhere if the interest of the forum has but slight connection with the substance of the contract obligations, because it would violate the Fourteenth Amendment).

²⁵⁸ *Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal.*, 294 U.S. 532 (1935); see *supra* note 230 and accompanying text (reviewing the court's attempt in *Alaska Packers* to weigh each state's interests against one another to determine which state's law should rule).

developing a methodology to achieve this. However, while there remains some role for the requirements of Full Faith and Credit and Due Process in limiting state choice of law rules, they have generally been interpreted to have only a narrow effect in modern U.S. conflict of laws.²⁵⁹ The existence of some constitutional constraints on choice of law does mean that it is more accurate to say that conflict of laws rules are an example of 'hybrid' rules made up of both federal and state influences, rather than purely a matter of state law.²⁶⁰ Nevertheless, there has been a clear shift away from the constitutional limits previously thought to constrain the conflict of laws.

As part of the U.S. "conflict of laws revolution," discussed further below, there has also been a significant (although not universal) rejection of the formalist and territorial rules adopted in

²⁵⁹ See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (holding that the full faith and credit clause and the due process clause are violated when the court disregards another state's clearly recognized laws brought to the court's attention); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (indicating that the full faith and credit clause and the due process clause are only violated when one state unfairly applies its laws or shows complete disregard for another state's interests); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (discussing the decline of weighing states' interests in determining whether application of a law violates the full faith and credit clause or the due process clause); see also Basedow, *supra* note 44, at 2127 (noting that the full faith and credit clause and due process clause have had limited effect on modern conflict of laws since *Allstate Ins. Co. v. Hague*); Engdahl, *supra* note 250 (discussing the historical development of the full faith and credit clause and Congress' discretion in applying full faith and credit to sister-states legislation); Gottesman, *supra* note 237, at 20 (arguing that framers of the Constitution did not intend the full faith and credit clause to allow the Supreme Court to regulate conflict of laws decisions, but to ensure that states do not apply law that has no connection to a controversy); MILLS, *supra* note 12, at 140; Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271 (1996) (observing that the due process clause and full faith and credit clause exert only a small influence over conflict of laws decisions).

²⁶⁰ See *supra* notes 204-05 and accompanying text (recognizing the Supreme Court's sometime support of hybridization between state and federal laws). For an argument that conflict of laws rules are also, more generally, a hybrid of international and domestic law, see MILLS, *supra* note 12, at 295. Note that this is a different issue from the question of whether choice of law rules should be open to the application of hybrid law, rather than choosing discretely between different legal systems. See, e.g., Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007) (arguing that legal pluralism in a deterritorialized world requires the acceptance and management of hybridity); Little, *supra* note 151 (exploring hybrid lawmaking as an example of judicial restraint); Arthur Taylor Von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974) (looking favorably upon accommodating the views of all appropriate jurisdictions through legal blending rather than choice).

the First Restatement of Conflict of Laws, and a rapid development of diverse techniques and approaches in choice of law. The United States has been and continues to be a laboratory for conflict of laws experimentation. Together, these developments have encouraged the eclectic diversity of state choice of law rules which characterizes the United States today²⁶¹—many of which overtly or covertly favor the law of the forum (as discussed below). This multiplicity is frequently the source of criticism—it is, perhaps, unclear whether the laboratory is producing useful science.²⁶² In any case, it is arguably this development (together with the acceptance of broad and potentially overlapping grounds for state court jurisdiction),²⁶³ and not the allocation of regulatory authority over choice of law to the states per se, which gives the decision in *Klaxon* its adverse effects, potentially encouraging forum shopping between states in search of a more favorable applicable law.

It is therefore understandable, but perhaps nevertheless still ironic, that just as the need for federal conflict of laws was at its greatest (with the additional need to coordinate conflicts between the diverse state rules of private law potentially applicable in different federal courts following *Erie*), federal control over conflict of laws was in fact (at least in diversity cases) largely curtailed. This problem is even obliquely acknowledged by the Supreme Court in *Clearfield Trust*, where the Court noted that “[t]he application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty.”²⁶⁴ The Court thus implicitly accepted

²⁶¹ See, e.g., Symeon C. Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMP. L. 227 (2010) (reviewing the 2009 results of an annual survey on which choice of law methods each jurisdiction implements and developments in U.S. courts).

²⁶² See, e.g., Laycock, *supra* note 119 (arguing that full deference should be paid to constitutional provisions, such as the full faith and credit clause, and Congress or the Supreme Court should create a uniform set of choice of law rules); Gottesman, *supra* note 237, at 11 (noting that most academics today disapprove of this disorganized approach); Ralph U. Whitten, *Curing the Deficiencies of the Conflicts Revolution: A Proposal for National Legislation on Choice of Law, Jurisdiction, and Judgments*, 37 WILLAMETTE L. REV. 259 (2001) (reasoning that the only solution to modern conflict of laws problems is to preempt state laws with national, uniform legislation).

²⁶³ See, e.g., Gottesman, *supra* note 237 (arguing that the development of state conflict of laws resolutions and each state’s typical preference for forum law has led to waste and unfairness); MILLS, *supra* note 12, at 147.

²⁶⁴ *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (emphasis added).

that the multiplicity of state choice of law rules created by *Klaxon* has contributed to that uncertainty, and adds further justification for the development of federal substantive rules of law, under the subsidiarity analysis adopted as part of *Clearfield Trust*.

Part of the explanation for the decision of the U.S. Supreme Court in *Klaxon* may also lie in its conceptualization of the conflict of laws, which the Court held to be a means for states to pursue “local policies diverging from those of its neighbors.”²⁶⁵ Choice of law rules are here (problematically) conceived as serving the interests of a local conception of “justice” or “fairness,” as a matter of private law.²⁶⁶ A contrast may be drawn with the previous U.S. approach, and with the modern conception of the conflict of laws under the European Union, where the subject is viewed as serving a function of public constitutional ordering. Such a ‘public law’ characterization clearly makes a justification of federalized regulation more persuasive – if conflict of laws rules are to serve a federal coordinating function, this is likely to be performed much more efficiently through federalized rules rather than *ad hoc* state regulation. It also suggests the development of federal rules governing international conflict of laws disputes, by analogy with other areas of law in which the federal interest in governing foreign relations has been held to justify federal common law.²⁶⁷ Such a consideration is, however, neglected if the conflicts of laws rules applicable to a private dispute are themselves viewed as purely private in character.

If a private law perspective on the conflict of laws was indeed at least part of the basis for the decision in *Klaxon*, then it requires fresh consideration. It is no longer accurate to describe rules of conflict of laws in the United States as being concerned with “private law.” As noted above, in the middle of the twentieth century conflict of laws in many U.S. states underwent a dramatic revolution in perspective and techniques. This ironically drew on the Supreme Court’s suggestion in *Alaska Packers Association v.*

²⁶⁵ *Klaxon v. Stentor Elec. & Mfg.*, 313 U.S. 487, 496 (1941).

²⁶⁶ See MILLS, *supra* note 12, ch. 1.

²⁶⁷ See sources cited *supra* note 179 (discussing the use of federal common law in cases implicating foreign relations). *But see supra* note 240 (noting that when dealing with foreign law issues, courts must still apply the conflict of laws rules of the state in which the court sits).

*Industrial Accident Commission of California*²⁶⁸ that the federal reconciliation of conflicting state statutes should involve “appraising the governmental interests of each jurisdiction.”²⁶⁹ Under various new approaches, choice of law rules were taken to be concerned with competing state policies, interests and statutes, and judges were invited to evaluate these before determining which state law should apply. Of course, choice of law rules have always been concerned, at least to some extent, with an analysis of state interests. That analysis has traditionally taken place in the design of the rules, whether carried out by the courts or a legislator—thus, the traditional *lex loci delicti* rule in tort reflects an analysis that the law of the place of a tort is most ‘interested’ in governing the tort. Interest analysis approaches in the United States defer this decision to the judge in each individual case, rather than adopting a general rule. Many state courts in the United States (and thus, under *Klaxon*, federal courts), when faced with conflict of laws disputes, thus frequently adopt approaches which very much emphasize public, governmental, regulatory interests, or at least combine consideration of those elements with traditional choice of law rules. To some extent this is shaped by constitutional Due Process concerns, examined above.²⁷⁰ It may, however, as analyzed above in respect of the European Union,²⁷¹ also be viewed as reflecting the horizontal effect of subsidiarity, the determination that the governing law should be the law closest to those affected by the regulation.

The Restatement (Second) of Conflict of Laws, adopted in 1969, requires consideration of both traditional territorial connecting factors (such as the place of performance of a contract, or the place of contracting),²⁷² as well as consideration of “the relevant policies of the forum” and “the relevant policies of other interested

²⁶⁸ *Alaska Packers Ass’n v. Indus. Accident Comm’n of Cal.*, 294 U.S. 532 (1935) (holding that not every statute of another state will override a conflicting statute of the forum state by virtue of the full faith and credit clause).

²⁶⁹ *Id.* at 547.

²⁷⁰ See *supra* note 257 and accompanying text (quoting Justice Brandeis’s opinion in *Home Ins. Co. v. Dick* regarding a state’s inability to abrogate rights of people beyond its borders over a conflict that has no connection to that state).

²⁷¹ See *supra* Part 3.3.

²⁷² RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1968) (outlining the factors to be considered in choosing the law applicable to a contract in the absence of an effective choice by the parties).

states.”²⁷³ It has thus been criticized as “a hodgepodge of all theories”²⁷⁴ that added little by way of progressive development of the law. Its apparent influence, including on the development of federal choice of law rules in non-diversity cases,²⁷⁵ may rather be readily attributable to its compatibility with a wide variety of approaches and outcomes. Calls for a more effective Third Restatement of Conflict of Laws are occasionally made,²⁷⁶ but while there is some recognition of the advantages of reaching an agreement on a single approach, there seems to be little prospect of obtaining widespread agreement on which approach should be adopted, although new interdisciplinary scholarship offers the potential for fresh perspectives.²⁷⁷

Dramatic as the changes in choice of law technique have been, they have not had an impact in practice on the allocation of competence between federal and state levels, at least in diversity cases, despite continuing calls by scholars for a new federal common law of choice of law.²⁷⁸ Even the Second Restatement and proposals for a putative Third Restatement arguably implicitly reinforce the idea that conflict of laws is within state and not federal competence—they reflect the technique of ‘bottom-up’ harmonization adopted in the context of private law in both the European Union and the United States.²⁷⁹ At least part of the

²⁷³ *Id.* § 6 (1967).

²⁷⁴ Gottesman, *supra* note 237, at 8; see also Friedrich K. Juenger, *General Course on Private International Law*, 193 RECUEIL DES COURS 119, 220 (1985); Laycock, *supra* note 119, at 253 (“Trying to be all things to all people, [the Second Restatement] produced mush.”).

²⁷⁵ See *supra* note 245 (discussing the influence of the Second Restatement on federal common law choice of law rules).

²⁷⁶ See, e.g., Symposium, *Preparing for the Next Century – A New Restatement of Conflicts*, 75 IND. L.J. 399 (2000) (discussing the debate over a proposed Third Restatement of Conflict of Laws).

²⁷⁷ See *supra* note 6 (discussing the recent growth in interdisciplinary scholarship in the United States relating to the conflict of laws).

²⁷⁸ See, e.g., Daniel C.K. Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165, 169 (1988) (arguing that a “federal common law rule” should “preempt state law” in a situation where “the use of state law to decide international choice of law issues” would result in a “compromise [of] significant federal interests”); Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 TEX. L. REV. 1715 (1992) (advocating for a recognition of the “inherently federal nature of choice-of-law questions”).

²⁷⁹ See *supra* notes 77 and 191–92 and accompanying text. But note also the role that the Second Restatement has played in developing federal choice of law

reason for this continuing subjection of choice of law to ideas of subsidiarity is that the prevailing conception of the conflict of laws as 'public' law in the United States is very different from the conception adopted in the European Union. The evaluation of state interests required under U.S. approaches does not (usually) adopt a systemic perspective on the appropriate ordering of authority over private law between U.S. states.²⁸⁰ Rather, the courts of each state evaluate the competing interests of different state laws, and sometimes consider not only their applicability but their substantive desirability. One product of this difference is that E.U. choice of law rules place much greater emphasis on systemic objectives of certainty and predictability than on achieving the ideal outcome for each individual case, the basis for much of the criticism of E.U. rules from lawyers in the United Kingdom.²⁸¹

Another product of the highly flexible, policy-oriented U.S. approaches is that state courts are more likely to give effect to the policies adopted under their own law, an approach openly advocated by some U.S. conflicts scholars,²⁸² leaving choice of law rules as subservient to other state policies. Where an interstate dispute arises, and proceedings are commenced in a state whose substantive law favors the plaintiff (as may frequently be the case, given the forum shopping opportunities afforded by the flexibility of jurisdictional rules), choice of law rules which favor forum law potentially institutionalize a type of "bias." This bias will not

rules in non-diversity cases. See *Huynh v. Chase Manhattan Bank*, 465 F.3d 992 (9th Cir. 2006).

²⁸⁰ For counter-examples, see *MILLS*, *supra* note 12, at 217.

²⁸¹ See sources cited *supra* note 94 (collectively debating the necessity and methodology of European regulation of the conflict of laws).

²⁸² See Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966) (discussing the evolution of "choice-influencing considerations," including the advancement of the forum's interests); see also Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 885 (2002) (critiquing existing approaches to choice of law, including those which exhibit forum preference, and arguing that choice of law rules should be economically based, because "the objective of a choice-of-law regime should be to provide a legal ordering that goes as far as possible toward maximizing global welfare"); Joseph William Singer, *Pay No Attention to That Man Behind the Curtain: The Place of Better Law in a Third Restatement of Conflicts*, 75 IND. L.J. 659 (2000) (discussing the importance of substantive justice to conflict of laws cases and arguing for its explicit recognition in the Third Restatement); Weinberg, *supra* note 253 (favoring forum law over foreign law because plaintiffs often rely on universal principles embodied in local law, whereas defendants assert foreign law as an excuse or defense from liability for damaging conduct).

always be in favor of the local party – the plaintiff may commence proceedings in the defendant’s residence, and benefit from choice of law rules that select favorable substantive rules from that state. Nevertheless, in many situations it will be a defendant from outside the state who suffers at the hands of forum-biased state choice of law rules. This suggests that the modern development of U.S. state choice of law rules may have subtly created the very conditions of discrimination that diversity jurisdiction originally sought to negate, and whose apparent redundancy inspired the abandonment of the goal of ‘neutrality’ under *Erie* and *Klaxon*.²⁸³

While the U.S. conflict of laws revolution has thus transformed choice of law from a subject concerned with private interests to a subject concerned with public interests, it has stopped short of giving strong weight to systemic, federal interests, although the development of federalized choice of law rules in non-diversity cases in some federal circuits suggests that this may be changing. The “unilateralism” of much modern U.S. conflict of laws scholarship, which views the subject as serving local interests and policies, remains strongly contrasted with the federal “multilateralism” of modern E.U. regulation, which has been emphasized by the shift in the function of the conflict of laws toward coordinating the internal market system.²⁸⁴ This remains an enduring consequence of the allocation of authority over conflict of laws rules to the states by the Supreme Court in *Klaxon*. Even though U.S. choice of law methodologies now frequently recognize public interests in a variety of ways, they have largely not discarded the basic characterization of conflict of laws as state law, concerned primarily with state policies.

²⁸³ See *supra* Part 4.1.2 (discussing the policy and impact of *Erie*).

²⁸⁴ See, e.g., sources cited *supra* note 8; FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 45–46 (Special ed. 2005) (claiming that historically, “there are only three basic choice-of-law methods:” substantive, unilateralist and multilateralist); Stanley E. Cox, *Substantive, Multilateral and Unilateral Choice-of-Law Approaches*, 37 WILLAMETTE L. REV. 171 (2001) (examining the effects of substantive, multilateral, and unilateral “choice-of-law approaches” and offering suggestions for how each approach can help guide the drafters of a Third Restatement); Symeon C. Symeonides, *American Choice of Law at the Dawn of the 21st Century*, 37 WILLAMETTE L. REV. 1 (2001) (proposing six overlapping questions that may help to establish a choice of law framework that strikes the right balance between flexibility and certainty).

4.3. *Too Little Subsidiarity, Too Late?*

In resurrecting a part of federal common law, the Supreme Court in *Clearfield Trust* reasoned (as noted above)²⁸⁵ that: “The application of state law . . . would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.”²⁸⁶ On its face, there seems to be no clearer justification for the harmonization of choice of law rules in the United States than the application of this test—an argument recognized by the Supreme Court itself in previous case law.²⁸⁷ It has not, however, justified the adoption of federalized conflict of laws rules in practice. It is difficult to resist the temptation to look back at the history of subsidiarity, private law, and choice of law in the United States as a missed opportunity,²⁸⁸ perhaps even merely a case of bad timing. The need for subsidiarity came as a reaction to the centralization of private law effected by *Swift v. Tyson* and the “New Deal.” It thus first emerged as a negative principle, limiting the scope of federal regulatory authority over private law (in *Erie*), before being counterbalanced by the emergence of its positive, centralizing function, justifying federalized regulation (in *Clearfield Trust*). But this more balanced conception of subsidiarity emerged only after the conflict of laws had already been determined to be subject to distributed state regulation, under *Klaxon*. If *Klaxon* had arisen after the *Clearfield Trust* test had been established, or even after the dramatic diversifying effects of the conflict of laws revolution were felt, there must at least be an argument that the Supreme Court, applying its own test, would have held that the special problems raised by the possibility of conflicting choice of law rules justified federalized regulation—a realization which is perhaps reflected in

²⁸⁵ See *supra* Part 4.1.3. (discussing the impact of *Clearfield Trust Co. v. United States*).

²⁸⁶ *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

²⁸⁷ See *Boseman v. Conn. Gen. Life Ins. Co.*, 301 U.S. 196, 206 (1937) (concluding that Pennsylvania law governed a life insurance policy because the contract was made and delivered in Pennsylvania, the policy declared that Pennsylvania law governed, the petitioner accepted the terms of the policy, and the parties intended that “inequalities and confusion liable to result from applications of diverse state laws sh[ould] be avoided”).

²⁸⁸ See, e.g., Laycock, *supra* note 119, at 282 (arguing that the Supreme Court in *Klaxon Co. v. Stentor Electric Manufacturing Co.* erred in “requir[ing] the federal court to follow state choice-of-law rules instead of the other way around”).

the development of federal choice of law rules in some federal circuits when dealing with non-diversity cases.²⁸⁹

Perhaps, however, this argument understates the significance of the historical private law conception, and modern unilateralist methodology, of U.S. conflict of laws. The perspective of a judge or academic on these developments is no doubt determined, at least to some extent, by their basic conception of conflict of laws and of the federal system itself. One writer may look at the present diversity of choice of law techniques in the United States and see a rich range of voices, a properly functioning federal market of legal ideas striving competitively for acceptance. Another may see U.S. choice of law as a disordered and discordant cacophony, particularly when compared with the rising tide of harmonization in Europe. Those with a more international perspective recognize that this may pose particular problems for the United States in negotiating and implementing international efforts to harmonize conflict of laws rules, given the ongoing dispute over federal power to implement treaties.²⁹⁰

Perhaps, in the face of growing interstate litigation and forum shopping inefficiencies, pressure for harmonized federal regulation of substantive private law might provide the impetus for (judicial or Congressional) development of federal choice of law rules as a

²⁸⁹ See sources cited *supra* note 244 (collectively noting the refusal of some Federal Circuit Courts of Appeals to apply *Klaxon* to non-diversity cases, favoring instead federal choice of law rules).

²⁹⁰ See, e.g., *Medellín v. Texas*, 552 U.S. 491 (2008) (holding that a state may apply its “default rules” because “[w]hile a treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on that basis”); Ronald A. Brand, *The European Magnet and The U.S. Centrifuge: Ten Selected Private International Law Developments of 2008*, 15 ILSA J. INT’L & COMP. L. 367, 368 (2009) (proposing that the rise of the federal system in Europe as the “primary source[] of . . . private international law” and the simultaneous rise of the U.S. states in creating such law may “diminish the role of the United States and enhance the role of the European Community as global players in the development of private international law”); Symposium, *Return to Missouri v. Holland: Federalism and International Law*, 73 MO. L. REV. 921 (2008) (revisiting *Missouri v. Holland* in an effort to understand how “international law and federalism” have developed since the Supreme Court handed down its decision in 1920); see also Julian G. Ku, *The Crucial Role of the States and Private International Law Treaties: A Model for Accommodating Globalization*, 73 MO. L. REV. 1063 (2008) (discussing the “central role” of state government to “the development and integration of private international law treaties into the United States legal system”). This may be contrasted with the situation in the European Union. See sources cited *supra* note 98.

more palatable alternative.²⁹¹ This is an argument which has been (implicitly) recognized by the Supreme Court itself.²⁹² If such a development were to occur, it would provide a further striking parallel to the emergence of federalized conflict of laws rules in the European Union. The reasoning here is clearly recognizable as equivalent to the analysis behind the emergence of E.U. conflict of laws—viewing choice of law not as subject to subsidiarity, but as its agent, coordinating and thus helping to preserve the diverse private law systems of the European Member States. If U.S. state private law competence were to come under serious threat from federal regulation, federalized choice of law rules may be embraced as a compromise solution—an ordering of private state law which makes federal private law significantly more difficult to justify. Thus, federal conflict of laws rules may act in aid of the requirements of subsidiarity and federal balancing.

Without a stronger recognition of the systemic dimension of the conflict of laws in the United States, it is difficult to see the potential for federalized regulation of choice of law to serve this important constitutional function being recognized. Perhaps, however, this will be one of the products of the nascent interdisciplinarity being introduced into conflict of laws scholarship²⁹³—a law and economics approach, for example, might easily forego analysis of the efficiency of conflict of laws rules in individual cases, and instead examine their national systemic effects. Such a change might lead U.S. scholars to embrace at least some of the federalist “theology”²⁹⁴ of the European conflict of

²⁹¹ See Gottesman, *supra* note 237, at 32 (“[T]he framers of the Constitution would have been aghast at the notion that Congress could enact a tort law, but they plainly envisioned that Congress could referee the application of competing state tort laws in multistate contexts”).

²⁹² See *supra* note 163 and accompanying text (quoting *Clearfield Trust*: “The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty.”) (emphasis added).

²⁹³ See sources cited *supra* note 6 (illustrating an increasing interdisciplinary interest in the United States in the conflict of laws sphere).

²⁹⁴ See Fentiman, *supra* note 94, at 2050–51 (noting that the European model of “federalized choice of law” does not necessarily require “absolute uniformity” and positing that such uniformity would be unlikely to result from a federalized American choice of law regime).

laws revolution, perhaps recalling Judge Calabresi's observation that "[w]ise parents do not hesitate to learn from their children."²⁹⁵

5. CONCLUSIONS

In both the European Union and the United States, the question of the distribution of competence between federal and state levels of government over private law and the conflict of laws has been contentious. Each federal system has experimented (and continues to experiment) with a range of competing regulatory strategies, including harmonization ("top-down" or "bottom-up"), hybridization, and the coordination of state private law diversity through federal conflict of laws rules.

Put in a broader historical context, the trajectories of federalized private law in each system initially seem markedly different. The days of general federal common law under *Swift v. Tyson* are well and truly in the past for the United States, since *Erie* rejected general federal court competence to develop private law. By contrast, a revolutionary European Civil Code appears to be at least possibly blooming (or looming) in the future for the European Union. At present, however, the status of federal private law in the European Union and United States, as a limited and fragmented indirect consequence of other federal powers, is strikingly similar. In both the European Union and United States, early developments in the centralization of law were met by counter-movements which emphasized the importance of balancing the constitutional imperatives toward harmonization and unification with decentralizing principles. These ideas have pointed toward the need for matters of substantive private law to be principally governed by subsidiary legal orders, as part of the balance of regulatory competence in the federal system. However, each constitutional settlement also makes a fairly similar determination that, while competence over private law largely remains with the states, the boundaries of federal authority remain open to contestation. The E.U. Treaties have expressly incorporated a principle of subsidiarity to govern this federal balancing. In the United States, similar principles have been developed in the case law of the Supreme Court, in particular under *Clearfield Trust* and, at times, under the Commerce Clause, potentially offering a model

²⁹⁵ *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring).

from which the European Court of Justice might develop the justiciability of the subsidiarity principle. In respect of both E.U. and U.S. private law, subsidiarity is partially 'hard-wired' as a matter of constitutional settlement, but also plays a significant role in the political and legal negotiation of shared powers, as a question of constitutional practice.

Conflict of laws rules are, by contrast, treated dramatically differently in each system. In the European Union, the conflict of laws, despite being left out of the original E.U. Treaties, has now been clearly embraced as a cornerstone of the federal constitutional framework. A federalized conflict of laws is thus flourishing under the exercise of an authority expressly hard-wired into the constitutional treaties. In the United States, choice of law was part of general federal common law, but now, although still a hybrid of federal constitutional constraints and state law, it falls predominantly under the diverse regulation of the different states. Federal judicial competence over choice of law was strictly curtailed under *Klaxon* – although perhaps there are signs of its re-emergence in non-diversity cases.

While there are innumerable factors at play, one key part of the explanation for this difference seems to be the characterization of the conflict of laws itself as a subject. In the European Union, the conflict of laws is increasingly viewed as part of the public law infrastructure which orders the diversity of Member State laws, serving the needs of the internal market, while preserving Member State legal cultures. Hence, federalized E.U. conflict of laws rules are viewed as satisfying the political and legal requirements of subsidiarity – they achieve systemic objectives which could not easily be met through national regulation. In the United States, the conflict of laws has predominantly been viewed either as a matter of private law, which should be part of the diversity of state laws, or as a matter of the unilateral advancement of forum policies. In either case, the failure to adopt a systemic perspective undermines the case for federalized regulation. Without such a change in perspective, the policy arguments in favor of state regulation of choice of law, whether expressed as states' rights or as the benefits of regulatory competition among conflict of laws rules, cannot easily be overcome.

The transformation in the character of the conflict of laws in the European Union, from national to European law, and from private to public law, is every bit as radical as the U.S. conflict of laws revolution, but with the opposite effect. In the European Union,

2010] *FEDERALISM IN THE E.U. AND THE U.S.* 455

conflict of laws rules *support* subsidiarity, by ordering the diversity of Member State laws, diminishing the need for harmonized federal private law. In the United States, the conflict of laws is predominantly viewed as *subject to* the centrifugal forces of subsidiarity, a matter where the diversity of state laws is inherently valued. In the face of a perception of excessive legal centralization, federal conflict of laws rules have been increasingly embraced in the European Union as part of the solution, while in the United States they have been rejected as part of the problem. This contrast is all the more striking when put in the context of the similarity in the general treatment of private law in each system, and the common recognition of the role of ideas of subsidiarity in striking a federal balance.

While the world is no doubt “shrinking” under the influence of globalization, making international and interstate disputes (and thus conflict of laws issues) more frequent, when it comes to understanding the complex relationship between subsidiarity, private law and the conflict of laws, it seems the North Atlantic has never looked wider. At the same time, however, it seems that the potential benefits of looking comparatively across it, in both directions, have never been greater.