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## The New European Choice-of-Law Revolution

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*Conflict of laws in Europe was long viewed by outsiders as formalist, antiquated, and uninteresting. Now that the European Union has become more active in the field, things are changing, but most view these changes as a mere gradual evolution. This is untrue. Actually, and fascinatingly, we are observing a real European conflicts revolution—in importance, radicalness, and irreversibility comparable to the twentieth-century American conflicts revolution.*

*European developments go beyond the federalization of choice-of-law rules in EU regulations. In addition, EU choice of law is being constitutionalized, in particular through the principles of mutual recognition and the country-of-origin principle, along with the influence from nondiscrimination, EU citizenship, and EU fundamental rights. Together, these developments create a methodological pluralization that leads to a bifurcation of intra-Community and external conflicts and to a conflict between two methods, one developed on the basis of classical choice of law, the other based on specific EU-law reasoning.*

*These developments constitute a genuine choice-of-law revolution. Classical European choice of law was characterized by three principles: privatization, nationalization, and domestic internationalism. These are replaced by three new principles: regulation, Europeanization, and mediatization. This revolution is different from that in the United States, but it nonetheless holds important lessons.*

*In the course of the argument, this Article introduces the other contributions to this issue. These articles were first delivered at a Symposium, jointly organized by the Duke Law Center for International and Comparative Law and the Tulane Law Review, and titled “The New European Choice-of-Law Revolution—Lessons for the United States?”*

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I.	INTRODUCTION.....	1608
II.	REVOLUTIONS IN CHOICE OF LAW .....	1610
	A. <i>The American Conflicts Revolution as Archetype</i> .....	1610
	B. <i>The European Conflicts Revolution of the Nineteenth Century</i> .....	1612
III.	EUROPEANIZATION.....	1616
	A. <i>Federalization</i> .....	1617
	B. <i>Constitutionalization</i> .....	1624
	1. Mutual Recognition and the Country-of-Origin Principle .....	1625
	2. Nondiscrimination, EU Citizenship, and Human Rights .....	1633
	C. <i>Pluralization of Method</i> .....	1635
	1. Internal and External Conflicts .....	1635
	2. From Method of Conflicts to Conflict of Methods.....	1638
IV.	EUROPEANIZATION AS REVOLUTION.....	1641
	A. <i>A Genuine Revolution</i> .....	1641
	B. <i>Comparison with the United States</i> .....	1643

## I. INTRODUCTION

“The New European Choice-of-Law Revolution—Lessons for the United States?” The title of this Symposium, convened in collaboration between the *Tulane Law Review* and the Duke Law Center for International and Comparative Law on February 9, 2008, presents a provocation for Europeans and Americans alike: Europeans do not believe in conflicts revolutions and Americans rarely believe they can learn from Europe. But the provocation also serves as the thesis of this Article. What we are observing in Europe is nothing less than a revolution. Americans will be probably unwilling and certainly unable to copy it entirely into their system. But the European developments provide ample material for inspiration.

Few consider the growing influence of EU law on choice of law to be a revolution.<sup>1</sup> For many, Community law appears to be of only

1. Cf., e.g., Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons*, 82 TUL. L. REV. 1741, 1743 (“[T]he use of the term *revolution* is less appropriate for describing the European developments [in choice of law] than the American movement . . .”). But see Fausto Pocar, *La comunitarizzazione del diritto internazionale privato: una “European Conflict of Laws Revolution”?*, 36 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE [RIV. DIR. INT. PRIV. PROC.] 873, 883-84 (2000) (Italy); Johan Meeusen, *Instrumentalisation of Private International Law in the*

tangential importance. Yet a comparative analysis suggests that Europe is undergoing a real conflicts revolution—in importance, radicalness and irreversibility comparable to the twentieth-century American conflicts revolution. Federalization, constitutionalization, and pluralization of European choice of law succeed where reform proposals in the 1970s failed: They bring about a genuine paradigm change.

The designation as revolution does not imply an evaluation. A revolution may be good or bad—or, as is usually the case, good for some and bad for others. It may be progressive or regressive—counterrevolutions are revolutions, too. It may begin brutally, with the storming of the Bastille, or it may be realized only gradually, like the Russian October Revolution, which initially did not stop trams from running and people from visiting the opera. It may reverse results or only reasoning. In any event, a revolution results in the irreversible loss of the old. That this is likely for European choice of law will be shown here. Comparison with the United States makes it clear not only that we are observing a real revolution in Europe, but also how much this European revolution differs from the American one.

The Article is structured as follows. Part II develops the concept of a conflicts revolution on the archetype of the U.S. conflicts revolution of the twentieth century and relates this to European developments in the nineteenth century. Those developments constituted a movement that defined three foundational principles of classical contemporary European choice of law: privatization, nationalization, and domestic internationalism. Part III analyzes in more depth three revolutionary developments of European choice of law. The first development is federalization of choice of law, by way of European codification. The second development is constitutionalization, in particular through the principles of mutual recognition and the country-of-origin principle, and through the influence from nondiscrimination, EU citizenship, and EU fundamental rights. The third development is methodological pluralization, which leads to a bifurcation of intra-Community and external conflicts and to a conflict between two methods, one developed on the basis of classical choice of law, the other based on specific EU law reasoning. Part IV demonstrates, first, why these developments constitute a genuine choice-of-law revolution. The classical principles of privatization, nationalization, and domestic internationalism are replaced by three new

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*European Union: Towards a European Conflicts Revolution?*, 9 EUR. J. MIGRATION & LAW 287, 290-91 (2007); Symeon C. Symeonides, *Rome II and Tort Conflicts: A Missed Opportunity*, 56 AM. J. COMP. L. 173, 174 (2008).

principles: regulation, Europeanization, and mediatization. Part IV.B suggests that this revolution, although different from that in the United States, nonetheless holds important lessons. The individual articles in this Symposium issue are introduced in the course of this argument.

## II. REVOLUTIONS IN CHOICE OF LAW

### A. *The American Conflicts Revolution as Archetype*

The model for each conflicts revolution<sup>2</sup> is the U.S. conflicts revolution. Its story is well known, at least in its main features—its early forerunners in the 1930s with academic critique against the formalism of the First Restatement, its escalation to a highpoint in the 1960s with important court decisions and sometimes radical academic reconceptualizations of the field, its subsequent decline when some of its achievements were adopted and others replaced, and the current widespread disillusionment. This sequence of events—reform, radicalization, restoration—is not atypical for revolutions. Nor is the fact that resulting practical outcomes have not changed much.<sup>3</sup> What the revolution has changed is not so much the outcomes of cases but the way in which we in the United States think about choice of law. Revolutions are, first and foremost, paradigm changes, reactions against old paradigms.<sup>4</sup> The Copernican Revolution succeeded over the Ptolemaian world view not because the latter created inaccurate results but because it required an ever more complicated system of epicycles. Similarly, the old U.S. choice-of-law paradigm yielded workable results, but the path to these results was too complicated and left too little space for those considerations considered actually relevant. The role of epicycles was played by the so-called “escape devices”—characterization, the substance/procedure distinction, renvoi, and the public policy exceptions.

Formalism and “escape devices” existed in Europe, too. Nonetheless, the Europeans remained largely critical, both toward

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2. On the *Canadian* “conflicts revolution” (which differs significantly from the American one), see generally Peter Kincaid, *Jensen v. Tolofson and the Revolution in Tort Choice of Law*, 74 CAN. BAR REV. 537 (1995); William A. Tetley, *The On-Going Saga of Canada’s Conflict of Law Revolution—Theory and Practice* (pt. 1), 24 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [IPRAX] 457 (2004) (F.R.G.).

3. For a vivid characterization, see Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 44 (1984) (“The mountains labored mightily only to give birth to a mouse.”).

4. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 92 (2d ed. 1970).

American revolutions<sup>5</sup> and toward the European reform proposals they inspired.<sup>6</sup> Adaptation and evolution were preferred over real revolution.<sup>7</sup> The reasons are manifold. Because European nations are older and more homogenous than U.S. states, they may have a greater desire for stability and their courts may be less prone to legal change than their U.S. counterparts.<sup>8</sup> In the United States, choice of law largely concerns interstate conflicts between legal systems whose common laws are structurally quite similar but often differ significantly in their policies; choice of law in Europe deals with legal orders that differ more in doctrine and system than in their policies.<sup>9</sup>

Yet the most important reason is the very nature of revolutions. Revolutions are defined less by what they aim for and more by what they tear down, less by what they are for and more by what they are against. Revolutions are always reactions against the status quo. When Brainerd Currie wrote that “[a]lmost all constructive writing on conflict of laws in this century has been in revolt against this ‘heritage,’”<sup>10</sup> by “constructive writing” he meant writing in the United States, and by “heritage” he meant the formalism of the American vested rights theory as established by Joseph Beale and as codified in the Restatement of Conflict of Laws in 1934.

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5. See, e.g., Gerhard Kegel, *Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers*, 27 AM. J. COMP. L. 615, 633 (1979).

6. For an overview, see generally Erik Jayme, *The American Conflicts Revolution and the Impact on European Private International Law*, in FORTY YEARS ON: THE EVOLUTION OF POSTWAR PRIVATE INTERNATIONAL LAW IN EUROPE 15, 15-27 (1990); Frank Vischer, *New Developments in European Conflict of Laws and the Influence of the U.S. Doctrine—A Short Survey*, in LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 459 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002) [hereinafter LAW AND JUSTICE IN A MULTISTATE WORLD].

7. See generally Kurt Siehr, *Revolution and Evolution in Conflicts Law*, 60 LA. L. REV. 1353 (2000) (discussing the pragmatic development of European conflicts law). For the common law developments, see generally Peter M. North, *Reform But Not Revolution: General Course on Private International Law*, in 220 ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9 (1990).

8. MATHIAS REIMANN, CONFLICT OF LAWS IN WESTERN EUROPE: A GUIDE THROUGH THE JUNGLE 12-13 (1995); Vischer, *supra* note 6, at 460.

9. Ralf Michaels, *American Law (United States)*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 66, 70 (Jan M. Smits ed., 2006); see Mathias Reimann, *Domestic and International Conflicts Law in the United States and Western Europe*, in INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM—ESSAYS IN HONOR OF FRIEDRICH K. JUENGER 109, 113 (Patrick Borchers & Joachim Zekoll eds., 2001) [hereinafter INTERNATIONAL CONFLICT OF LAWS].

10. BRAINERD CURRIE, *The Verdict of Quiescent Years*, in BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 584, 613 (1963).

This was not Europe's heritage. Of course, there are superficial similarities between the First Restatement and classical European choice of law. Both prefer rules over principles. Both are jurisdiction-selecting instead of rule-selecting. Both determine the applicable law on the basis of a connecting factor, without regard to the substance of or the policies behind the law so determined. Both favor predictability and uniformity of outcomes over substantive justice in the individual case. Finally, as already mentioned, European choice of law makes ample use of the same escape devices as the traditional method in the United States.<sup>11</sup>

But the similarity is superficial.<sup>12</sup> Traditional European choice of law is paradigmatically different from the First Restatement. The vested-rights theory, the main target for the American Revolution, never took strong hold in Europe: Wächter and Savigny had refuted it in Germany in the 1840s before it could become prominent; a later approach by Antoine Pillet remained largely irrelevant.<sup>13</sup> When the American conflicts revolution set in, European choice of law had its revolution already behind it.

### *B. The European Conflicts Revolution of the Nineteenth Century*

This European conflicts revolution occurred in the nineteenth, not in the twentieth century. What Paul Neuhaus called a "Copernican turn" of choice of law was a genuine Copernican revolution, a paradigm shift in the way here described, which leaves the objects unaltered but defines our perspective on these objectives in a fundamentally new way.<sup>14</sup> The wealth of opinions in nineteenth-

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11. Cf. Jacob Dolinger, *In Défense of the "General Part" Principles*, in INTERNATIONAL CONFLICT OF LAWS, *supra* note 9, at 23, 24 (commenting that in Europe, "escape clauses . . . carefully manipulate the method of choice of law"); Kurt Siehr, *General Problems of Private International Law in Modern Codifications—De Lege Lata and De Lege Europea Ferenda*, 2005 Y.B. PRIVATE INT'L L. 17, 26-29 (summarizing the recent development of escape clauses in Europe).

12. Bernard Audit, *A Continental Lawyer Looks at American Choice-of-Law Principles*, 27 AM. J. COMP. L. 589, 590-98 (1979).

13. See 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, 216-20, 226-27 (2006).

14. Paul Neuhaus, *Savigny und die Rechtsfindung aus der Natur der Sache*, 15 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 364, 366 (1949-1950) (F.R.G.). For a discussion in English, see Kahn-Freund, *General Problems of Private International Law*, in 143 ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 139, 244 (1974). Savignyan choice of law is discussed as paradigm in the sense used by KUHN, *supra* note 4, by Julio D. Gonzáles Campos, *Diversification, spécialisation, flexibilisation et*

century Europe is no smaller than that of twentieth-century America. Carl Georg Wächter developed a local law theory that predated and possibly influenced those of Cook and Ehrenzweig.<sup>15</sup> Heinrich Thöl discussed whether principles should be preferred over rules and developed, long before Currie, a kind of governmental interest analysis, under which the scope of statutes was determined by their interpretation, and forum law would yield to foreign law only if the forum had no interest.<sup>16</sup> This idea was confronted with the criticism, well known from the American debate,<sup>17</sup> that the lawmaker usually does not think about the territorial scope of his rules.<sup>18</sup>

The most important developments in the nineteenth century, however, that led to the foundation of the traditional European conflict of laws, differed from those in twentieth-century United States. They can be described under three key concepts—privatization, nationalization, and domestic internationalism.

The first element—*privatization*—can be found in the work of Savigny.<sup>19</sup> By shifting the focus of choice of law away from the statute and its focus on the legal relation and its seat, he changed not so much the results, but the perspective. In particular, he so achieved a privatized understanding of choice of law that was different from both older European approaches and from those by Joseph Story, whom he otherwise often followed.<sup>20</sup> Story had viewed private international law as an international law for private matters; Savigny established it as a

*matérialisation des règles de droit international privé (Cours général)*, in 287 ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 30-34 (2000). The idea of a paradigm is often invoked by critics. See, e.g., H.U. JESSURUN D'OLIVEIRA, DE RUÍNE VAN EEN PARADIGMA: DE KONFLIKTREGEL (1976); Rudolf Wiethölter, *Begriffs- oder Interessenjurisprudenz—fälsche Fronten im IPR und Wirtschaftsverfassungsrecht*, in INTERNATIONALES PRIVATRECHT UND RECHTSVERGLEICHUNG IM AUSGANG DES 20 JAHRHUNDERTS: FESTSCHRIFT FÜR GERHARD KEGEL 213, 222-24, 256-60 (Alexander Lüderitz & Jochen Schröder eds., 1977).

15. For the influence on Ehrenzweig, see K. Lipstein, *The General Principles of Private International Law*, in 135 ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 144-47 (1972) (“Ehrenzweig—Wächter redivivus”).

16. HEINRICH THÖL, EINLEITUNG IN DAS DEUTSCHE PRIVATRECHT 170-71, 175-76 (Göttingen, 1851).

17. E.g., Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 392-93 (1980).

18. CARL FRIEDRICH VON GERBER, SYSTEM DES DEUTSCHEN PRIVATRECHTS 728 n.5 (6th ed. 1858).

19. FRIEDRICH CARL VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS (Wm. Guthrie transl., 1868).

20. See Gerhard Kegel, *Story and Savigny*, 37 AM. J. COMP. L. 39 (1989); Ralf Michaels, *Public and Private International Law: German Views on Global Issues*, 4 J. PRIVATE INT'L L. 121, 126-28 (2008).

private law for international connections.<sup>21</sup> Story's conflict of laws was a system of competences, resembling jurisdiction and the recognition of foreign judgments. Savigny's was a system of references, separating the applicable law from jurisdiction and the application of foreign law from the recognition of foreign judgments. Comity was no longer, as it had been for Story, a concept of public international law and international relations; it became a concept of a global civil community.<sup>22</sup> Territoriality was no longer an expression of territorial sovereignty but a means to determine the closest connection, the "seat" of a legal relation. The legal relation predated its regulation by the state—other than jurisdiction for Story, and also other than Beale's vested right, which was conferred by a state. Private law was detached from specific regulatory interests by states (though not from the state at large)<sup>23</sup> so "public" common interests, which of course were important in nineteenth-century private law too,<sup>24</sup> could be taken into account in a specific private-law manner. This made it possible to formulate abstract and universal rules of reference that determined the applicability of foreign law without giving it extraterritorial validity.

The second element—*nationalization*—is linked with the name of Mancini.<sup>25</sup> Mancini adopted many of Savigny's postulates, but not his depoliticized vision of private international law. For Mancini (like for the authors of the French Civil Code before him)<sup>26</sup> the most important connecting factor in choice of law was membership in a political community (the nation) as realized in a principle of nationality. Territoriality was restricted to those areas of the law that implicate public policy. This foundation of choice of law in

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21. Michaels, *supra* note 20, at 127.

22. *See id.*

23. *See* Ralf Michaels, *Globalizing Savigny? The State in Savigny's Private International Law and the Challenge from Europeanization and Globalization*, in *AKTUELLE FRAGEN ZU POLITISCHER UND RECHTLICHER STEUERUNG IM KONTEXT DER GLOBALISIERUNG* 119, 128-30 (Michael Stolleis & Wolfgang Streeck eds., 2007).

24. Nils Jansen & Ralf Michaels, *Private Law and the State—Comparative Perceptions and Historical Observations*, 71 *RABELSZ* 345, 351, 380 (2007); *cf.* Hans-Peter Haferkamp, *The Science of Private Law and the State in 19th Century Germany*, 56 *AM. J. COMP. L.* (forthcoming 2008).

25. *See* CHRISTIAN VON BAR & PETER MANKOWSKI, *INTERNATIONALES PRIVATRECHT* 517-21 (2d ed. 2003). On nationalization as the defining characteristic of nineteenth- and twentieth-century choice of law, see JEAN-LOUIS HALPÉRIN, *ENTRE NATIONALISME JURIDIQUE ET COMMUNAUTÉ DE DROIT* 67-85 (1999); JAN KROPHOLLER, *INTERNATIONALES PRIVATRECHT* 14-15 (6th ed. 2006); ERIK JAYME, PASQUALE STANISLAO MANCINI—INTERNATIONALES PRIVATRECHT ZWISCHEN RISORGIMENTO UND PRAKTISCHER JURISPRUDENZ (1980); Kurt H. Nadelmann, *Mancini's Nationality Rule and Non-Unified Legal Systems: Nationality Versus Domicile*, 17 *AM. J. COMP. L.* 418 (1969).

26. HALPÉRIN, *supra* note 25, at 24-26.



community membership and the preference of community affiliation over territoriality may appear, at first sight, similar to interest analysis as established by Currie, which also widely prioritizes community affiliation (as expressed in domicile) over territoriality. But an important difference exists: Whereas Currie focuses on domicile in order to determine the regulatory interests of governments, Mancini prioritizes nationality over domicile because it expresses the individual's membership in the community (the nation) itself.

Finally, the third element of the nineteenth-century European conflicts paradigm is *domestic internationalism*. Broadly, for Savigny, choice-of-law rules were based on reason; for Mancini, they were based on (public) international law. In either case, they were distinct from domestic law and thus not in need of legislative regulation (though both acknowledged existing state rules). The counter-idea, that choice of law is not universal but based in each state's law, shapes the American understanding, where choice of law stands in close proximity to the state's substantive law and the underlying interests. For a long time, this dichotomy of universalism and particularism shaped debates in choice of law. The prevailing view in Europe today combines both approaches: rules of choice of law are rules of domestic law and thus open to legislative discretion, but they are strictly different from domestic substantive law rules,<sup>27</sup> and their focus is international. Accordingly, the considerations going into choice-of-law rules are not firmly connected with those of substantive law nor those of public international law, a position sometimes described as the "third school of private international law" (besides the internationalist and nationalist approaches).<sup>28</sup> The most important connecting factors are nationality and territoriality; yet because choice of law does not merely enforce sovereignty interests, it is not confined to this dichotomy and instead uses further connecting factors. In U.S. law, an occasional consequence from this distinction between substantive law and conflict of laws is the characterization of choice-of-law rules as procedural rules and the procedural resolution of conflict-of-laws

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27. GERHARD KEGEL & KLAUS SCHURIG, INTERNATIONALES PRIVATRECHT 52-58 (9th ed. 2004); KLAUS SCHURIG, KOLLISIONSNORM UND SACHRECHT: ZU STRUKTUR, STANDORT UND METHODE DES INTERNATIONALEN PRIVATRECHT (1981).

28. Konrad Zweigert, *Die dritte Schule im internationalen Privatrecht. Zur neueren Wissenschaftsgeschichte des Kollisionsrechts*, in Festschrift für Leo Raape 35, 43, 49 (1948); cf. Kurt Lipstein, *Private International Law with a Social Content—A Super Law?*, in Festschrift für Konrad Zweigert zum 70 Geburtstag 179, 179 (Herbert Bernstein et al. eds., 1981) (noting Zweigert's use of the phrase).

problems by reference to the law of pleading.<sup>29</sup> In continental European law, by contrast, choice-of-law rules are quite clearly neither substantive nor procedural law but represent a third category of rules.<sup>30</sup> Conflict of laws is domestic in its foundation, international in its focus. The regulation of conflicts problems is decentralized in the sense that every state has its own rules. But uniformity is a goal, and the way toward it leads first to bilateral choice-of-law rules and finally to unification by treaty.

These three principles—privatization, nationalization, domestic nationalism—provided the pillars of European choice of law until today. The European paradigm proved more flexible than the First Restatement in the United States and was therefore capable of integrating many of the American innovations in a broadened system of conflicts interests.<sup>31</sup> Substantive interests could be accounted for through special types of choice-of-law rules protecting weaker parties or recognizing specific regulatory interests, which the American theory of vested rights did not allow. Institutions of the “general part,” which figured in the United States as “escape devices” inconsistent with the logic of the vested-rights theory, constituted the cornerstone of European choice of law. Application of the law of the common domicile to car accidents, which became crucial for the American conflicts revolution with the decision in *Babcock v. Jackson*,<sup>32</sup> could be reached effortlessly through special choice-of-law rules without the need of a revolution.<sup>33</sup>

### III. EUROPEANIZATION

Europeanization, thus the thesis of this Article, is not so easy to integrate into classical choice of law as the American reforms of the twentieth century because the political background is shifting. Such political changes have triggered each paradigmatic shift in European conflicts thinking up until today. In the thirteenth century, the rise of city states led to conflicts between local statutes as islands within the sea of the *ius commune*; the reaction was the development of a conflict of laws based on this very *ius commune*. In the seventeenth century,

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29. Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 324-29 (1990); Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2472 (1999).

30. KROPHOLLER, *supra* note 25, 103-04.

31. KEGEL & SCHURIG, *supra* note 27, at 128-58; KROPHOLLER, *supra* note 25, at 31-36. For comparison with governmental interest analysis, see Kegel, *supra* note 5, at 621-25.

32. 191 N.E.2d 279 (N.Y. 1963).

33. For a comparative overview, see Siehr, *supra* note 7, at 1354-59.

the *ius commune* was declining and the sovereign state was rising, so conflicts now existed between states; the comity doctrine reacted by founding choice of law in international relations. The nineteenth century saw the rise of the private bourgeois society in partial opposition to the state and the nation as fundament of the nation state; the reactions were privatization and nationalization of choice of law. The strengthened social-interventionist state in the twentieth century, which spurred the conflicts revolution in the United States, could be integrated in Europe without a revolution, because conflict of laws was already understood as domestic.

Now that this system of independent nation states is merging into the European Union, conflict of laws is changing as well. Although choice of law has long been a matter of some concern for the European Union<sup>34</sup> its influence was, for a long time, minimal. Only now that choice of law is widely Europeanized and thereby renewed has a real conflicts revolution been created. One might expect this new European conflict of laws to approximate the U.S. conflicts revolution because the European Union as a quasi-federal organization has quite similar conflicts to resolve as the federal system of the United States.<sup>35</sup> To some extent this is the case, as the comparison shows. But because the European paradigm against which the European revolution is directed differs from the theory of vested rights, as demonstrated earlier, the revolution looks different as well. Three relevant aspects are visible in Europe that are largely absent in the United States: federalization, constitutionalization, and pluralization. They overcome the three central elements of classical European choice of law: privatization, nationalization, and domestic internationalism.

#### A. *Federalization*

That the national character of choice of law is being overcome is most obvious in federal regulation, which withdraws control of conflicts of laws from states and instead centralizes it. Such federal legislative regulation has often been suggested in the United States, especially by reformers and revolutionaries eager to constrict and

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34. See Ulrich Drobnig, *Conflict of Laws and the European Community*, 15 AM. J. COMP. L. 204 (1967); René Savatier, *Le marché commun au regard du droit international privé*, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [REV. CRIT. DR. INT. PRIV.] 237 (1959) (Fr.).

35. See Reimann, *supra* note 9, at 119-21.

coordinate the interests of states, which had now become relevant.<sup>36</sup> Even Brainerd Currie deemed federal legislation desirable, at least for important issues.<sup>37</sup> More recently, similar proposals have been made.<sup>38</sup> The practicability of such federal codification has always been doubted. David Cavers warned as such in 1965, at the time adequately, with a comparison to the European Communities.<sup>39</sup>

Proposals for a Europe-wide unification of choice of law have existed since the 1960s; for contracts, they culminated in the Rome Convention of 1980.<sup>40</sup> Although the Convention was part of the *acquis communautaire*, it was a treaty, not a Community instrument, so the European Court of Justice did not have a general competence for choice of law.<sup>41</sup> Two special protocols to the Convention intended to establish such a competence did not enter into force until 2004. As a consequence, the truly uniform interpretation of choice-of-law rules envisaged in article 18 of the Rome Convention remained, largely, an illusion. Real EU choice-of-law rules were limited to provisions in directives determining their scope of application.<sup>42</sup> Only when the

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36. Walter Wheeler Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421, 433-34 (1919); Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 402 (1964); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513 (1954); Alfred Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 541, 542-43 (1958); Ernest G. Lorenzen *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 751 (1924).

37. CURRIE, *supra* note 10, at 183. For one such issue, see Paul S. Bird, Note, *Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse*, 96 YALE L.J. 1077, 1092-93 (1987).

38. Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 1-51 (1991); Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1224-25 (2000).

39. DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 247 (1965); David F. Cavers, *Legislative Choice of Law: Some European Examples*, 44 S. CAL. L. REV. 340, 359 (1971).

40. Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (L 266). The consolidated version appears at 1998 O.J. (C 27) 34. On the legislative history, see Peter M. North, *The EEC Convention on the Law Applicable to Contractual Obligations (1980): Its History and Main Features*, in PETER M. NORTH, *ESSAYS IN PRIVATE INTERNATIONAL LAW* 23, 29-34 (1993).

41. Teun Struycken, *Private Law Contracts to Which the European Community Is a Party*, in *INTERCONTINENTAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW: ESSAYS IN MEMORY OF PETER E. NYGH* 385, 393-94 (Talia Einhorn & Kurt Siehr eds., 2004); A.V.M. Struycken, *Les conséquences de l'intégration européenne sur le développement du droit international privé*, in 232 *ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 257, 295, 323-24 (1992).

42. PETER STONE, *EU PRIVATE INTERNATIONAL LAW—HARMONISATION OF LAWS* 316-17 (2006); Harry Duintjer Tebbens, *Les règles de conflit contenues dans les instruments de droit dérivé*, in *LES CONFLITS DE LOIS ET LE SYSTÈME JURIDIQUE COMMUNAUTAIRE* 101-15 (Angelika Fuchs, Horatia Muir Watt & Étienne Pataud eds., 2004); Lajos Vékás, *Der Weg zur Vergemeinschaftung des Internationalen Privat- und Verfahrensrechts—eine Skizze*, in *LIBER*

Treaty of Amsterdam granted the European Union the competence to regulate conflict of laws<sup>43</sup> was it possible to codify choice-of-law rules for noncontractual obligations in the Rome II Regulation,<sup>44</sup> a codification of rules for contractual obligations has just been adopted as the Rome I Regulation.<sup>45</sup> A proposed Rome III Regulation would codify rules for matrimonial property regimes.<sup>46</sup> Other proposals, or Green Papers, concern matrimonial matters,<sup>47</sup> maintenance obligations,<sup>48</sup> and successions and wills.<sup>49</sup>

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MEMORIALIS PETAR ŠARČEVIĆ: UNIVERSALISM, TRADITION AND THE INDIVIDUAL 171, 174-83 (Vesna Tomljenović, Johan Erauw & Paul Volken eds., 2006) [hereinafter LIBER MEMORIALIS ŠARČEVIĆ].

43. See PHILIPPE-EMMANUEL PARTSCH, *LE DROIT INTERNATIONAL PRIVÉ EUROPÉEN: DE ROME À NICE* (2003); Jürgen Basedow, *The Communitarization of the Conflict of Laws Under the Treaty of Amsterdam*, 37 COMMON MARKET L. REV. 687, 691-92 (2000); Katharina Boele-Woelki & Ronald H. van Ooik, *The Communitarization of Private International Law*, 2002 Y.B. PRIVATE INT'L L. 1, 3; Alegría Borrás, *Le droit international privé communautaire: réalités, problèmes et perspectives d'avenir*, in 317 ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 313, 421 (2005); Oliver Remien, *European Private International Law, the European Community and Its Emerging Area of Freedom, Security and Justice*, 38 COMMON MARKET L. REV. 53, 57 (2001). For criticism from England, see Andrew Dickinson, *European Private International Law: Embracing New Horizons or Mourning the Past?*, 1 J. PRIVATE INT'L L. 197, 200-01 (2005); Richard Fentiman, *Choice of Law in Europe*, 82 TUL. L. REV. 2021, 2024-27 (2008). The United Kingdom and Denmark are not automatically bound by EU legislation in choice of law but maintain discretion to opt in. The United Kingdom opted into the Rome II Regulation. Regulation 864/2007, On the Law Applicable to Non-Contractual Obligations (Rome II), recital 39, 2007 O.J. (L 199) 40, 43 [hereinafter Rome II]. Consultations regarding opting into the Rome I Regulation are ongoing. See MINISTRY OF JUSTICE, *ROME I—SHOULD THE U.K. OPT IN?* (2008), available at <http://www.justice.gov.uk/publications/cp0508.htm>. Denmark did not opt into the Rome II Regulation. Rome II, *supra*, recital 40.

44. Rome II, *supra* note 43.

45. Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I) (adopted June 6, 2008) [hereinafter Rome I].

46. *Commission Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition*, COM (2006) 400 final (July 17, 2006). The replies are compiled at European Comm'n, *Contributions on the Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regime, Including the Question of Jurisdiction and Mutual Recognition*, available at [http://ec.europa.eu/justice\\_home/news/consulting\\_public/matrimonial\\_property/news\\_contributions\\_matrimonial\\_property\\_en.htm](http://ec.europa.eu/justice_home/news/consulting_public/matrimonial_property/news_contributions_matrimonial_property_en.htm) (last visited June 3, 2008).

47. *Proposal for a Council Regulation Amending Regulation (EC) No. 2201/2003 as Regards Jurisdiction and Introducing Rules Concerning Applicable Law in Matrimonial Matters*, COM (2006) 339 final (July 17, 2006).

48. *Proposal for a Council Regulation on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Cooperation in Matters Relating to Maintenance Obligations*, COM (2005) 649 final (Dec. 12, 2005).

49. *Commission Green Paper on Succession and Wills*, COM (2005) 65 final (Mar. 1, 2005); European Parliament Resolution with Recommendations to the Commission on Succession and Wills, EUR. PARL. DOC. P6\_TA(2006)0496 (2006).

Most analysts do not consider this federalization as a sign of a revolution. Although there have been protests, especially in France and England,<sup>50</sup> discussion has been nowhere nearly as fierce as the parallel debate over a European private law codification.<sup>51</sup> Formally, the codification overcomes the fragmentation of choice-of-law regimes that Gerhard Kegel called the “cancer of private international law,”<sup>52</sup> and that Savigny hoped to overcome through convergence. Proponents of a nationalized conflict of laws in particular have advocated unification since Mancini, albeit through treaties; European legislation appears to fulfill this hope through legislation. Substantively, not much appears to change. Because European choice-of-law rules are typically bilateral and forum preference is disfavored,<sup>53</sup> the European legislator need not change much. Most domestic rules are therefore substantively quite similar to the Rome Convention; the method is, at first sight, similar to bilateralism.<sup>54</sup>

The view that federalization does not amount to a revolution is shared in several contributions to this issue. Dennis Solomon, in his careful analysis of the new Rome I Regulation as compared to the previous Convention, sees a “continuation of the conventional

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50. In France, some forty law professors signed an open letter to President Chirac protesting the proposed regulation. See *L'Union européenne, la démocratie et l'État de droit: lettre ouverte au président de la République*, reprinted in 2006 LA SEMAINE JURIDIQUE, ÉDITION GÉNÉRALE, ACTUALITÉS NO. 586. An English translation of the letter can be found at Comparative Law Blog, Open Letter French Private International Scholars on European Intrusion, <http://comparativelawblog.blogspot.com/2007/01/open-letter-french-private.html> (Jan. 17, 2007, 11:11 EDT). Some eighty French professors signed a letter in response, defending the regulation against what they perceived as anti-Europeanism. See *La proposition de Règlement européen sur la loi applicable aux obligations contractuelles (Rome I) en question*, reprinted in 2007 LA SEMAINE JURIDIQUE – ÉDITION GÉNÉRALE, ACTUALITÉS NO. 18. The main author of the original open letter, Vincent Heuzé, published a counter-response rejecting the criticism of anti-Europeanism: *L'honneur des professeurs de droit. Explication d'une lettre ouverte sur l'Union européenne, la démocratie et l'État de droit*, reprinted in 2007 LA SEMAINE JURIDIQUE, ÉDITION GÉNÉRALE, ÉTUDE NO. 116. For commentary, see Erik Jayme, *Frankreich: Professorenstreit zum Europäischen IPR—einige Betrachtungen*, 28 IPRAX 188-89 (2008). For the English protests, see Dickinson, *supra* note 43, at 199-200.

51. For an overview, see Nils Jansen, *European Civil Code*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW, *supra* note 9, at 247.

52. GERHARD KEGEL, INTERNATIONALES PRIVATRECHT 86 (6th ed. 1987) (author's translation). The sentence is no longer contained in the most recent edition of this book. See KEGEL & SCHURIG, *supra* note 27, at 139.

53. KROPHOLLER, *supra* note 25, at 42-47.

54. Pascal de Vareilles-Sommières, *La responsabilité civile dans la proposition de règlement communautaire sur la loi applicable aux obligations non contractuelles (“Rome II”)*, in LES CONFLITS DE LOIS ET LE SYSTÈME JURIDIQUE COMMUNAUTAIRE, *supra* note 42, at 185, 191-92.

system”.<sup>55</sup> By and large, as he shows, the rules under the final version resemble both those that existed in Europe and those that exist in the United States (with the exception that Europe provides greater protection to weaker parties). Yet Solomon also addresses what he calls the “revolutionary advances” proposed at earlier stages of the legislative process that would, if enacted, have resulted in a more drastic changes: the abolition of an escape clause, the possibility to choose nonstate law like the UNIDROIT Principles of International Commercial Contracts, and the mandatory application of the consumer’s home law applicable law for consumer contracts.

Patrick Borchers, looking at European developments for contracts from the U.S. side, is also skeptical as to whether Europe is seeing a revolution.<sup>56</sup> Borchers points out how similar U.S. and European choice-of-law rules for contracts have become in their endorsement of party autonomy. He sees the most important difference in the concept of mandatory rules, an important element of European choice of law, but one hard to transplant into U.S. law, at least as can be gathered from the very limited success of the new section 1-301 of the Uniform Commercial Code, which adopts the concept.

Jan von Hein, discussing torts, questions the notion of a European choice-of-law revolution, arguing that the Rome II Regulation is actually the product of a long-run evolution in member states’ domestic laws.<sup>57</sup> As he notes, most EU member states have long applied Savigny’s approach to choice of law and have codified these principles during the twentieth century in an effort to influence EU choice of law. The effect of these codifications is evident in the inclusion of common domicile rules and the allowance of post-hoc party autonomy. Von Hein concludes that Rome II is successful precisely because its rules have been tested in member states’ courts and analyzed by European academics prior to its promulgation.

Symeon Symeonides seconds this view in his paper, which offers reciprocal lessons for the United States and Europe.<sup>58</sup> Noting that early U.S. choice of law was based on European principles, he also indicates that current U.S. solutions to choice-of-law problems remain similar to those of Europe, despite a purported revolution in the United States. Generally, Symeonides recommends that the United States seek to evolve its choice-of-law rules according to a long-run plan, rather than

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55. Dennis Solomon, *The Private International Law of Contracts in Europe: Advances and Retreats*, 82 TUL. L. REV. 1709, 1711 (2008).

56. Patrick Borchers, *Categorical Exceptions to Party Autonomy in Private International Law*, 82 TUL. L. REV. 1645 (2008).

57. Jan von Hein, *Something Old and Something Borrowed, but Nothing New? Rome II and the European Choice-of-Law Evolution*, 82 TUL. L. REV. 1663 (2008).

58. Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons*, 82 TUL. L. REV. 1741 (2008).

rejecting them in a short-lived revolution. For Europe, Symeonides recommends a return to issue-by-issue analysis in choice of law and an acknowledgement of states' interest in the outcomes of these cases.

In my opinion, the view that federalization does not change much underestimates the decisive difference between a treaty and a codification.<sup>59</sup> The European Union is competent to regulate choice of law only "in so far as necessary for the proper functioning of the internal market."<sup>60</sup> Although this is often read merely to suggest the need for uniform rules,<sup>61</sup> this need alone would hardly justify a regulation over a treaty. Treaties, however, leave the interests of respective nations intact. Where national interests concur, treaties will perpetuate protection of these interests; where national interests differ, treaties can achieve compromises between these interests or, if no compromise is possible, leave the issue to each national state. A supranational codification is not confined in this way; it can also decide against the interests of all states for the interest of individuals or a transnational community. In this sense, its rules are neither unilateral nor bilateral, but distributive—it allocates regulatory competence from a central point.<sup>62</sup> A supranational codification can establish neutral rules. But it also can (or even must, given the limited competences of the European Union) be based on the explicit policies of the European Union, the requirements of the common market. As an EU instrument, it stands in connection with the substantive policies of the European Union and these are often opposed to those of the individual states.

Sometimes, such a connection to EU policies is explicit. One example can be found in article 7 of Rome II ("Environmental damage"), which effectively gives the plaintiff a choice between the law of the place of conduct and that of the place of injury and justifies

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59. Ralf Michaels, *Three Paradigms of Legal Unification: National, International, Transnational*, in AM. SOC'Y INT'L L., PROCEEDINGS OF THE 96TH ANNUAL MEETING 333, 333-36 (2002); see also Ulrich Drobnig, *Unification of National Law and the Uniformisation of the Rules of Private International Law*, in THE INFLUENCE OF THE EUROPEAN COMMUNITIES UPON PRIVATE INTERNATIONAL LAW OF THE MEMBER STATES 1, 2 (P. Bourel et al. eds., 1981).

60. Treaty Establishing the European Community, art. 65, 2006 O.J. (C 321E) 37, 68 [hereinafter EC Treaty].

61. Rome II, *supra* note 43, recital 6; Rome I, *supra* note 45, recital 6.

62. See Jürgen Basedow, *Spécificité et coordination du droit international privé communautaire*, in DROIT INTERNATIONAL PRIVÉ, TRAVAUX DU COMITÉ FRANÇAIS DE DROIT INTERNATIONAL PRIVÉ—ANNÉES 2002-2004 at 275, 283-84 (2005). For criticism of this point, see BERNARD AUDIT, DROIT INTERNATIONAL PRIVÉ 50 (4th ed. 2006).



this with the goal to achieve a high level of environmental protection.<sup>63</sup> Such preferential treatment of plaintiffs is not incompatible with traditional choice-of-law rules.<sup>64</sup> Nor is the integration of substantive policy consideration in choice of law a problem (although the focus on incentives is in contrast to the traditional European concept of tort as a law of compensation, as found explicitly mentioned in the EU Commission's Rome II proposal).<sup>65</sup> The decisive novelty is that these interests are found neither in domestic law nor in a common consensus but in the law of the European Union, in this case in environmental protection and the precautionary principle as listed in article 174 of the EU Treaty.<sup>66</sup>

Article 7 of Rome II is no outlier. Provisions on consumer protection in Rome I are based on similar EU policy.<sup>67</sup> The rules on product liability in article 5 of Rome II are based not on the mere

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The law applicable to a noncontractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

Rome II, *supra* note 43, art. 7.

64. See JAN VON HEIN, *DAS GÜNSTIGKEITSPRINZIP IM INTERNATIONALEN DELIKTSRECHT* 124-26 (1999); KROPHOLLER, *supra* note 25, at 525-26; Christian von Bar, *Environmental Damage in Private International Law*, in 268 *ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 291, 367-75 (1999).

65. *Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("ROME II")*, at 12, COM (2003) 427 final (July 22, 2003) ("Article 3(1), which establishes an objective link between the damage and the applicable law, further reflects the modern concept of the law of civil liability which is no longer, as it was in the first half of the last century, oriented towards punishing for fault-based conduct: nowadays, it is the compensation function that dominates, as can be seen from the proliferation of no-fault strict liability schemes.").

66. EC Treaty art. 174(2) ("Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."); Rome II, *supra* note 43, recital 25 ("Regarding environmental damage, Article 174 of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage.").

67. See Walter G. Paefgen, *Kollisionsrechtlicher Verbraucherschutz im Internationalen Vertragsrecht und europäisches Gemeinschaftsrecht*, 2003 *ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT [ZEUP]* 266 (F.R.G.); Peter von Wilmsky, *Der internationale Verbrauchervertrag im EG-Binnenmarkt—Europarechtlicher Gestaltungsspielraum für kollisionsrechtlichen Verbraucherschutz*, 1995 *ZEUP* 735.

search for the closest connection, but on EU policy considerations.<sup>68</sup> The possibility of basing a claim for unfair competition on one single law even if several countries are affected<sup>69</sup> helps in the establishment of a common market, as opposed to local national markets. Actually, *every* rule in the EU regulations becomes an instrument of EU policy, even when it merely copies existing rules of domestic choice of law. European Union choice-of-law rules become instruments of substantive Union policies.<sup>70</sup>

This is one reason why Richard Fentiman, taking a position of an English common lawyer and a European, views European developments in a far more dramatic light.<sup>71</sup> He points out that English conflict of laws is more different from U.S. law than one may think, but that it also differs, traditionally, from continental European approaches. One point for him concerns the technique of Rome I and Rome II, which he considers “simplistic and unevolved.” Moreover, he points out that differences over more radical proposals, as discussed by the other authors, were not resolved in favor of a traditional approach, but rather have been concealed. The emerging model for him is a regulatory and social one, with an administrative view for the judge, quite unlike the market and economic model, with an adjudicatory view for the judge as favored by English law. Fentiman expresses fear that the European Court of Justice will favor predictability and uniformity over flexibility and respect for national traditions.

### B. *Constitutionalization*

Although federalization of choice of law is more important than is often thought, it alone does not represent a revolution. A further important element is the (quasi-) constitutionalization of European choice of law.<sup>72</sup>

To speak of constitutionalization in the European context may appear odd. Europe has no real constitution. The Constitutional Treaty failed after unsuccessful referenda in France and the Netherlands;<sup>73</sup> as a response, the European Union agreed, more modestly, on a “Reform

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68. de Vareilles-Sommières, *supra* note 54, at 202.

69. Rome II, *supra* note 43, art. 6(3)(b).

70. Basedow, *supra* note 62; Meeusen, *supra* note 1.

71. Fentiman, *supra* note 43.

72. Lucia Serena Rossi, *L'incidenza dei principi del diritto comunitario sul diritto internazionale privato: dalla “comunitarizzazione” alla “constitutionalizzazione”*, 40 RIV. DIR. INT. PRIV. PROC. 63 (2004).

73. See Treaty Establishing a Constitution for Europe, 2004 O.J. (C 310) 1.

Treaty,” the so-called Lisbon Treaty.<sup>74</sup> Likewise, the argument that Europe has a quasi-federalist structure faces strong opposition. But this argument would be too formalistic. Functionally, the EC Treaty operates as a constitution and its impact on choice-of-law rules is structurally similar to that of other nations’ constitutions on domestic choice-of-law rules.

Constitutionalization is the main topic in Jürgen Basedow’s contribution to this issue.<sup>75</sup> Though the political structure of the United States and the European Union are different, Basedow argues that a cautious comparison is possible since both are structured in a constitutional framework.<sup>76</sup> Generally, federalization assumes that the federal body will act as a referee in conflicts arising between jurisdictions. Basedow finds that U.S. federal law, including the U.S. Constitution, has almost no influence on choice of law in the United States.<sup>77</sup> By contrast, the European Court of Justice has actively shaped conflict of laws through its case law on the free movement of goods and services, the freedom of establishment for corporations, and basic rights. Basedow also summarizes the recent EU legislation in choice of law.<sup>78</sup> Whereas U.S. federal bodies previously have been reluctant to intervene in state conflicts law, the European Court of Justice’s approach could be adopted by the United States Supreme Court to unify U.S. choice of law. Though the Supreme Court has proven reluctant to apply balancing tests generally, a balance of collective interests against those of a single state may be manageable.

One important aspect of constitutionalization is the quasi-federal structure of the European Union and how this structure affects the relationship between its member states and their laws. The other aspect concerns nondiscrimination, EU citizenship, and human rights. These developments overcome both the national and the private character of classical choice of law.

#### 1. Mutual Recognition and the Country-of-Origin Principle

The goal of the European Community, the establishment of an internal market, has often required interference with the application of domestic law. To achieve this goal, the European Court of Justice has addressed issues that resemble conflict-of-laws problems. For

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74. Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

75. Jürgen Basedow, *Federal Choice of Law in Europe and the USA—A Comparative Account of Interstate Conflicts*, 82 TUL. L. REV. 2119 (2008).

76. *Id.* at 2122-24.

77. *Id.* at 2124-28.

78. *Id.* at 2141-45.

example, in its *Cassis de Dijon* decision of 1979, the Court held that member states were entitled to mutual recognition of their laws regarding standards of production,<sup>79</sup> a principle that was later extended to the free movement of services.<sup>80</sup> This principle effectively asserts a constitutional duty to recognize foreign law, especially (though not exclusively) that of the country of origin. The approach was refined in *Keck v. Mithouard*, which restricted the duty of mutual recognition to national rules concerning product requirements and allowed the destination state to apply its own requirements concerning selling arrangements.<sup>81</sup> From a conflicts perspective, this introduced both a subtle *dépeçage* and a difficult characterization issue.

Nonetheless, an impact on choice of law was long ignored, no doubt based on the perception that the European Community deals with public laws, while choice of law is a matter of private law. Only since the early 1990s have scholars addressed the relationship between European Union law and choice of law with increasing intensity and sophistication.<sup>82</sup> At about the same time, interest grew in the regulatory aspects and the economic analysis of choice of law.<sup>83</sup> The Court of Justice enriched the debate with its decisions regarding the impact of the mutual recognition principle on the law of corporations.<sup>84</sup>

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79. Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, 1979 E.C.R. 649. The Commission now plans to codify the *Cassis de Dijon* jurisprudence (though explicitly only for “administrative decision,” not for private law). See *Proposal for a Regulation of the European Parliament and of the Council Laying Down Procedures Relating to the Application of Certain National Technical Rules to Products Lawfully Marketed in Another Member State and Repealing Decision 3052/95/EC*, COM (2007) 36 final (Feb. 14, 2007).

80. Case C-76/90, *Säger v. Denemeyer & Co.*, 1991 E.C.R. I-4221, I-4243.

81. Joined Cases C-267 & 268/91, *Keck & Mithouard*, 1993 E.C.R. I-6097.

82. It has become impossible to give a comprehensive overview. For an extensive bibliography, see KEGEL & SCHURIG, *supra* note 27, at 211-18. Jayme & Kohler provide annual reports. See, e.g., Erik Jayme & Christian Kohler, *Europäisches Kollisionsrecht 2007: Windstille im Erntefeld der Integration*, 27 IPRAX 493 (2007). Notable recent collections include LES CONFLITS DE LOIS ET LE SYSTÈME JURIDIQUE COMMUNAUTAIRE, *supra* note 42, and DIRITTO INTERNAZIONALE PRIVATO E DIRITTO COMUNITARIO (Paolo Picone ed., 2004).

83. For the scholarly discussion, see generally Horatia Muir Watt, *Aspects économiques du droit international privé*, in 307 ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 25 (2004); AN ECONOMIC ANALYSIS OF PRIVATE INTERNATIONAL LAW (Jürgen Basedow & Toshiyuki Kono eds., 2006); Giesela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERK. J. INT'L L. 801 (2006); 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, Ralf Michaels, Giesela Rühl & Jan von Hein eds., 2007).

84. Case C-411/03, *SEVIC Sys. AG*, 2005 E.C.R. I-10,805; Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, 2003 E.C.R. I-10,155; Case C-208/00, *Überseering BV v. Nordic Constr. Co. Baumanagement GmbH (NCC)*, 2002

Many European countries used to subject corporations to the law of their principal place of business. The European Court of Justice has subsequently limited the application of such a choice-of-law rule (even though the Court did not explicitly address choice of law).

Instead of rehashing this now well-known story, authors in this Issue take the next step and ask what follows. Onnig Dombalagian shows how this jurisprudence moves European choice of law closer to the internal affairs rule in the United States (which, as he reminds us, has remained largely uninfluenced by the conflicts revolution).<sup>85</sup> Yet he also emphasizes the limited impact of the internal affairs rule on capital markets regulation more generally. Current United States-European Union trade is problematic where the two capital market regimes differ. Specifically, the United States and the European Union differ as to disclosure requirements, insider trading regulations, the role of independent auditors and directors, and the appropriate conduct of takeover transactions. However, Dombalagian notes, conflict of laws for capital markets is characterized by extraterritoriality, bilateral initiatives and reciprocal recognition, and issuer choice. He criticizes these *ex post* approaches, however, and proposes in their stead an *ex ante* choice-of-law regime to govern globally regulated stock exchanges, providing, in particular, that these transactions be governed by the law of the state in which security is listed on a stock exchange.

Jens Dammann focuses on the impact of the European Court of Justice's case law on *in personam* jurisdiction.<sup>86</sup> He shows why third parties should not, as currently allowed in both the United States and Europe, be able to sue a corporation at its place of incorporation, even though the law of that place governs the corporation's internal affairs. In suggesting two paths to reform—one on the level of member state corporate law and the other on the level of EU rules on jurisdiction—he shows the close interconnections between choice of law and substantive law and between EU law and member states' law in Europe.

Finally, Larry Catá Backer addresses choice of law in a broader sense.<sup>87</sup> The European Court of Justice has rendered several decisions restricting member states' ability to hold so-called "golden shares"—

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E.C.R. I-9919; Case C-212/97, *Centros Ltd. v. Ehvervs-og Selskabsstyrelsen*, 1999 E.C.R. I-1459. For a discussion of this case law, see Benjamin Angelette, Note, *The Revolution that Never Came and the Revolution Coming—De Lasteyrie du Salliant*, Marks & Spencer, *SEVIC Systems and the Changing Corporate Law in Europe*, 92 VA. L. REV. 1189 (2006).

85. Onnig H. Dombalagian, *Choice of Law and Capital Markets Regulation*, 82 TUL. L. REV. 1903 (2008).

86. Jens Dammann, *Adjudicative Jurisdiction and the Market for Corporate Charters*, 82 TUL. L. REV. 1869 (2008).

87. Larry Catá Backer, *The Private Law of Public Law: Public Authority as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law*, 82 TUL. L. REV. 1801 (2008).

shares that give the states that hold them rights going far beyond their nominal value. Backer suggests reading these decisions as choice-of-law decisions that pick among various bodies of rules—private law rules governing shareholder rights, public law rules regarding state control over corporations, and finally rules of European law.

The influence of European Union law goes beyond the Court of Justice and beyond corporate law. Another development concerns legislation and the establishment of a country-of-origin principle, under which providers need comply only with the rules of their country of origin, as provided for in the amended TV Without Borders Directive and the E-Commerce Directive of 2000.<sup>88</sup> The attempt to establish a country-of-origin principle in the Services Directive failed;<sup>89</sup> the final version contains a vaguer (though not automatically less intrusive) duty to “respect the right of providers to provide services in a Member State other than that in which they are established.”<sup>90</sup>

There have been long debates over whether the country-of-origin principle must be understood as a choice-of-law principle.<sup>91</sup> The question is not resolved simply because the E-Commerce Directive, in article 1(4), explicitly disavows any change of rules on conflict of laws.<sup>92</sup> A response is possible only against the background of a broader understanding of choice of law, which shows the paradigm shift: the country-of-origin principle is a choice-of-law principle, albeit not one according to classical conflict of laws but a new form of vested-rights principle.<sup>93</sup> Within its scope, the principle determines

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88. Council Directive 89/552, On the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, arts. 2, 2a 1989 O.J. (L 298) 23, *amended by* Directive 97/36, 1997 O.J. (L 202) 60; Directive 2000/31, On Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (“Directive on Electronic Commerce”), art. 3, 2000 O.J. (L 178) 1, 9-10 [hereinafter Directive on Electronic Commerce].

89. Michaels, *supra* note 13, at 195-96.

90. Directive 2006/123, On Services in the Internal Market, art. 16, 2006 O.J. (L 376) 36, 58-59; see Achim Kampf, *EU-Dienstleistungsrichtlinie und Kollisionsrecht*, 28 IPRAX 101, 102-03 (2008).

91. For discussion of the different viewpoints and further references, see Michaels, *supra* note 13.

92. Directive on Electronic Commerce, *supra* note 88, art. 1(4) (“This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.”).

93. See generally Michaels, *supra* note 13 (discussing the similarities between the two approaches). For a similar discussion, see Wulf-Henning Roth, *Methoden der Rechtsfindung und Rechtsanwendung im Europäischen Kollisionsrecht*, 25 IPRAX 338, 343 (2006).

that by complying with the rules of his country of origin, a provider acquires a privilege of which the country of destination may not deprive him by application of its own laws.

The discussion about a country-of-origin principle is related to a broader debate regarding the impact of a principle of mutual recognition on choice of law. Taken to the extreme, the mutual recognition principle (like before the comparable institute of comity for Joseph Story) would make it possible to develop an entire system of choice-of-law rules based on the *Keck* formula and its allocation of legislative jurisdiction between the country of origin and the country of destination. Traditional choice of law would be replaced entirely by a constitutionalized system of mutual recognition. This would raise problems not only of substance (because outcomes might change), but especially of method.<sup>94</sup> In traditional European conflict of laws, recognition is reserved to foreign judgments; foreign law is not recognized, but applied. Once the concept of recognition is extended to foreign law, choice of law moves closer to the recognition of foreign judgments.

The principle of mutual recognition can play an especially important role for same-sex partnerships, the theme of Katharina Boele-Woelki's contribution.<sup>95</sup> She begins by demonstrating the lack of uniformity among EU member states in the treatment of same-sex couples: while some member states recognize same-sex marriages, others recognize registered partnerships or civil pacts, and others none at all. In addition, current domestic laws do not clearly indicate whether same-sex relationships solemnized in the couple's home country will be recognized abroad. Though the free movement of persons principle in the European Convention on Human Rights could be interpreted to require member states to recognize same-sex relationships solemnized

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94. See Roberto Baratta, *Problematic Elements of an Implicit Rule Providing for Mutual Recognition of Personal and Family Status in the EC*, 27 IPRAX 4, 9-11 (2006); Dagmar Coester-Waltjen, *Anerkennung im internationalen Personen-, Familien- und Erbrecht und das Europäische Kollisionsrecht*, 25 IPRAX 392, 392-400 (2006); Marc Fallon & Johan Meeusen, *Private International Law in the European Union and the Exception of Mutual Recognition*, 2002 Y.B. PRIVATE INT'L L. 37, 45-46; Paul Lagarde, *Développements futurs du droit international privé dans une Europe en voie d'unification: quelques conjectures*, 68 RABELSZ 225, 235-38 (2004); Heinz-Peter Mansel, *Anerkennung als Grundprinzip des Europäischen Rechtsraums, Zur Herausbildung eines europäischen Anerkennungs-Kollisionsrechts: Anerkennung statt Verweisung als neues Strukturprinzip des Europäischen internationalen Privatrechts?*, 70 RABELSZ 651, 651-731 (2006). *Contra* Tito Ballarino & Benedetta Ubertazzi, *On Avello and Other Judgments: A New Departure in the Conflict of Laws?*, 2004 Y.B. PRIVATE INT'L L. 85, 127 (noting a parallel with Savigny).

95. Katharina Boele-Woelki, *The Legal Recognition of Same-Sex Relationships Within the European Union*, 82 TUL. L. REV. 1949 (2008).

in other member states, current law has not yet developed in this direction. The European experience should teach U.S. lawmakers that legislation on same-sex relationships must address the mobility of persons in the United States and abroad through the inclusion of private international law considerations in substantive regulation, with the end goal of contributing to the universal recognition of same-sex relationships. However, the ultimate goal must lie in substantive law unification.

Mutual recognition is a theme also for Linda Silberman, who compares EU and U.S. approaches to marriage, divorce, custody, and support.<sup>96</sup> In her view, European rules that take significant connections into account in determining the law applicable to marriage provide a helpful model for American attempts to distinguish “evasion” from “mobile” marriages, especially same-sex marriages. Regarding divorce, she finds that choice-of-law rules hardly play a role in the United States compared to rules on jurisdiction; although the new European regime distinguishes between these, she predicts no much greater role for choice-of-law rules there. Silberman then discusses international conventions on custody and support and thus addresses the global framework within which Americans and Europeans interact and within which comparison takes place.

Finally, Horatia Muir Watt discusses the new emphasis on recognition, especially in the area of family law and civil status, from a methodological and even philosophical perspective.<sup>97</sup> The move away from bilateral choice-of-law rules toward a unilateral system of recognition is, for her, in accordance with recognition of identity. However, she strongly opposes basing this method on the principle of nondiscrimination, which for her is a “nonstarter” in choice of law. Instead, a choice-of-law system based on recognition expresses a respect for identity and difference: the status acquired under foreign law must be recognized not because it is in some way similar to that of forum law, but because its intrinsic difference is constitutive of identity.

In many ways, the tendency towards constitutionalization is reminiscent of the United States experience in the first half of the twentieth century.<sup>98</sup> Once the country-of-origin principle is recognized

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96. Linda J. Silberman, *Rethinking Rules of Conflict of Laws in Marriage and Divorce in the United States: What Can We Learn from Europe?*, 82 TUL. L. REV. 1999 (2008).

97. Horatia Muir Watt, *European Federalism and the “New Unilateralism,”* 82 TUL. L. REV. 1983 (2008).

98. For comparisons demonstrating the similar developments, see generally Pedro A. de Miguel Asensio, *Conflictos de leyes e integración jurídica: Estados Unidos y la Unión Europea*, 5 ANUARIO ESPAÑOL DE DERECHO INTERNACIONAL PRIVADO 43-102 (2005); Horatia Muir Watt, *Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy*, 9 COLUM. J. EUR. L. 383 (2003); Holger Spamann, *Choice of Law in a Federal*



as a constitutionalized vested-rights theory, parallels ensue not only to the First Restatement but also to case law by the Supreme Court in the early twentieth century, when vested rights were protected under the Due Process Clause of the Constitution.<sup>99</sup> Thus, the vested-rights theory was all but constitutionalized.

A further parallel, well known from the area of recognition of judgments<sup>100</sup> but widely ignored in choice of law,<sup>101</sup> exists between the principle of mutual recognition and the Full Faith and Credit Clause of the Constitution. Shortly after its case law regarding the Due Process Clause, the Supreme Court began to apply the Full Faith and Credit Clause for choice of law as a duty to recognize foreign law—first as a strict duty to apply foreign law, and later as a duty to balance the regulatory interests of the various states.<sup>102</sup> This duty strongly resembles the duty of mutual recognition from *Cassis de Dijon*, and the development from a duty of application to one of balancing resembles the jurisprudential development in Europe.

Finally, the unclear distinction between a country-of-origin principle and a principle of mutual recognition finds its parallel in a trilogy of Supreme Court cases in the 1980s, in which the Court combined its Due Process and Full Faith and Credit Clause tests into one uniform test.<sup>103</sup>

And yet, the same trilogy of cases stands for an important difference between the United States and Europe. The Supreme Court

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*System and an Internal Market* (Jean Monnet Program, Working Paper No. 8/01, 2001), available at <http://www.jeanmonnetprogram.org/papers/01/012601.rtf>.

99. See *Home Ins. Co. v. Dick*, 281 U.S. 397, 411-12 (1930); *Mut. Life Ins. Co. of N.Y. v. Liebong*, 259 U.S. 209, 213-14 (1922); *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357, 373-74 (1918); EDWIN SCOTT FRUEHWALD, *CHOICE OF LAW FOR AMERICAN COURTS: A MULTILATERALIST METHOD* 12-14 (2001); John K. Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 *YALE L.J.* 656, 656-57 & n.5 (1918); P.E. Herzog, *Constitutional Limits on Choice of Law*, in 234 *ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW* 234, 239, 260-66 (1992); G.W.C. Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law?*, 15 *MINN. L. REV.* 161, 165 (1931).

100. E.g., Georg Haibach, *The Mutual Recognition of Decisions in Civil and Commercial Matters in the European Union in the Light of the Full Faith and Credit Clause of the U.S. Constitution*, 10 *MAASTRICHT J. EUR. & COMP. L.* 291, 291-300 (2003).

101. But see Horatia Muir Watt, *Experiences from Europe: Legal Diversity and the Internal Market*, 39 *TEX. INT'L L.J.* 429, 438 (2004).

102. *Alaska Packers Ass'n v. Indus. Accident Comm'n of Cal.*, 294 U.S. 532, 547-50 (1935); *Pac. Employers Ins. Co. v. Indust. Accident Comm'n*, 306 U.S. 493, 500-05 (1939); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 159-62 (1932), *overruled in part by Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965).

103. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730-34 (1988); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-19 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 320 (1981) (plurality opinion).

reduced constitutional control of state approaches to choice of law to an absolute minimum (with a possible exception for the law of corporations, which also has an exceptional role before the European Court of Justice).<sup>104</sup> A recent decision states, “Without a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States’ competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause.”<sup>105</sup> The European Court of Justice, by contrast, seems either to need no rudder or is willing to build it on its own. This is true even outside commercial law, as recent developments in the law of family names suggest. This is an area of the law that may appear marginal to Americans, but in fact it epitomizes the cultural identities underlying the most pertinent European conflicts case. In *Garcia Avello*, the Court decided that children with dual Belgian and Spanish citizenship are entitled to bear their last name according to Spanish law, even though the choice-of-law rules of Belgium, where the children resided, designated Belgian law as the law applicable to Belgian citizens who are dual citizens of another country.<sup>106</sup> In *Grunkin-Paul*, the question was whether a child born in Denmark to two German parents was entitled to have his name registered in Germany as a double name combining both parents’ names according to Danish law, even though the German law applicable under German choice-of-law rules rejects a double name under these circumstances.<sup>107</sup> A referral by the German registry to the European Court of Justice was rejected for formal reasons;<sup>108</sup> a new referral on essentially the same question has not yet been decided,<sup>109</sup> but the opinions by the Advocate General in both cases, which would permit double-name registration in Germany despite German law, may

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104. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 93 (1987); *Edgar v. MITE Corp.*, 457 U.S. 624, 644-46 (1982). More explicit (for obvious reasons) is case law from the Delaware Supreme Court. See, e.g., *VantagePoint Venture Partners 196 v. Examen, Inc.*, 871 A.2d 1108, 1115-18 (Del. 2005); *McDermott Inc. v. Lewis*, 531 A.2d 206, 214-16 (Del. 1987). See generally Deborah A. DeMott *Perspectives on Choice of Law for Corporate Internal Affairs*, 48 LAW & CONTEMP. PROBS. 161, 183-90 (1985).

105. *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 499 (2003).

106. Case C-148/02, *Garcia Avello v. État Belge*, 2003 E.C.R. I-11,613. For a summary and analysis of the case, see Johan Verlinden, *European Court of Justice, Judgment of October 2, 2003, Case C-148/02, Carlos Garcia Avello v. État Belge (the State of Belgium)*, 11 COLUM. J. EUR. L. 705 (2005).

107. Case C-96/04, *Standesamt Stadt Niebüll (Grunkin-Paul)*, 2006 E.C.R. I-3561. The affair even made the news in the United States. See Mary Jacoby, *No Hyphens, Please: Germany Tells Parents To Keep Names Simple*, WALL ST. J., Oct 12, 2005, at A1.

108. *Grunkin Paul*, 2006 E.C.R. para. 20.

109. See Case C-353/06, *Grunkin v. Grunkin-Paul* (Apr. 24, 2008) (opinion of AG Sharpston), available at <http://curia.europa.eu>.

give some guidance for how the Court will decide.<sup>110</sup> It becomes clear how the basic freedoms impact classical conflict of laws even beyond traditionally market-relevant areas of the law.

## 2. Nondiscrimination, EU Citizenship, and Human Rights

Two important provisions in both these cases are the principle of nondiscrimination and the new institution of EU citizenship.<sup>111</sup> This alone does not sound revolutionary: equal treatment is one of the oldest principles of conflict of laws, and citizenship is a traditional connecting factor. Comparison with the United States, however, demonstrates the importance.

In the United States, the principle of equal protection, established in the Fourteenth Amendment,<sup>112</sup> has had fairly limited impact on choice of law. Domicile is one of the most important connecting factors; states' preference for their own residents over the residents of other states is a cornerstone of interest analysis. In Europe, similar arguments exist.<sup>113</sup> Early on, scholars discussed whether use of nationality as a connecting factor was barred by EU law.<sup>114</sup> Yet although the Court has applied the nondiscrimination principle in several civil procedure cases,<sup>115</sup> it has not yet gone so far as to bar nationality as a connecting factor in choice of law.<sup>116</sup> In fact, neither in *Garcia Avello* nor in *Grunkin-Paul* does the tension between nationality and habitual residence play any role. In both cases, the children successfully avoided application of the law of both their nationality and their habitual residence. In *Grunkin-Paul*, the relevant connecting factor for the Advocate General was the child's Danish

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110. *Grunkin Paul*, 2006 E.C.R. I-3561 (opinion of AG Jacobs); Case C-353/06, *Grunkin* (opinion of AG Sharpston), available at <http://curia.europa.eu>.

111. EC Treaty arts. 12, 17-18.

112. U.S. CONST. amend. XIV, § 1, cl. 3 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

113. VON BAR & MANKOWSKI, *supra* note 25, § 3 no. 41.

114. SAVATIER, *supra* note 34; Ulrich Drobnič, *Verstößt das Staatsangehörigkeitsprinzip gegen das Diskriminierungsverbot des EWG-Vertrages?*, 34 RABELSZ 636, 636-62 (1970). For further references, see KROPHOLLER, *supra* note 25, at 277.

115. See, e.g., Case C-323/95, *Hayes v. Kronenberger GmbH*, 1997 E.C.R. I-1711, I-1724; Case C-122/96, *Saldanha v. Hiross Holding AG*, 1997 E.C.R. I-5325, I-5342; Case C-43/95, *Data Delecta Aktiebolag v. MSL Dynamics Ltd.*, 1996 E.C.R. I-4661, I-4676; Case C-398/92, *Mund v. Hatrex Int'l Transport*, 1994 E.C.R. I-467, I-481 to 82; Case C-20/92, *Hubbard v. Hamburger*, 1993 E.C.R. I-3777, I-3793 to 94; Case 22/80, *Boussac Saint-Frères SA v. Gerstenmeier*, 1980 E.C.R. 3427, 3436.

116. See Case C-430/97, *Johannes v. Johannes*, E.C.R. I-3475; Michael Bogdan, *The EC Treaty and the Use of Nationality and Habitual Residence as Connecting Factors in International Family Law*, in INTERNATIONAL FAMILY LAW FOR THE EUROPEAN UNION 303, 308-15 (Johan Meeusen et al. eds., 2007).

birth certificate.<sup>117</sup> And in *Garcia Avello*, the Court invoked the children's Spanish nationality over their Belgian residence and nationality: "It is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty."<sup>118</sup> It follows that the question of whether nationality as a connecting factor accords with EU law or whether it must be replaced by habitual residence is not broad enough. *Garcia Avello* can perhaps be implemented by granting dual nationals free choice of the applicable law;<sup>119</sup> whether the result in *Grunkin Paul* can sensibly be translated into classical choice of law appears doubtful. The decisions can be understood only from a principle of mutual recognition.

Something else is relevant. The basis for the nondiscrimination principle is neither nationality nor habitual residence, but EU citizenship.<sup>120</sup> The children are protected not as individuals or as nationals of a member state but as EU citizens. This results in another obvious parallel with the United States, where the Fourteenth Amendment commands that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."<sup>121</sup> Yet the Privileges and Immunities Clause has never played a great role for choice of law, occasional scholarly suggestions notwithstanding.<sup>122</sup> In Europe, things look different: EU citizenship superimposes in an important way the traditional importance of the nation.

Finally, a third new factor in European choice of law is fundamental rights. Fundamental (or human) rights are sometimes viewed as the basis of classical conflict of laws;<sup>123</sup> that they can

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117. Case C-96/04, *Standesamt Stadt Niebüll (Grunkin Paul)*, 2006 E.C.R. I-3561 (opinion of AG Jacobs); Case C-353/06, *Grunkin v. Grunkin-Paul* (opinion of AG Sharpston), paras. 67-70, available at <http://curia.europa.eu>.

118. Case C-148/02, *Garcia Avello v. État Belge*, 2003 E.C.R. I-11,613, I-11,645 to 46.

119. *Mansel*, *supra* note 94, at 692, 694-96.

120. EC Treaty art. 18. For an overview, see Flora Goudappel & Silvia Romein, *Evolving Legal Personality: The Case of European Union Citizenship*, 11 IUS GENTIUM 1 (2005); Jo Shaw, *E.U. Citizenship and Political Rights in an Evolving European Union*, 75 FORDHAM L. REV. 2549 (2007).

121. U.S. CONST. amend. XIV, § 1, cl. 2.

122. See BRAINERD CURRIE, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, in CURRIE, *supra* note 10, at 445, 445-525; Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 274-88 (1992).

123. See sources cited in Michaels, *supra* note 20, at 131-33.

influence choice of law, especially within the public policy exception, is not new, either.<sup>124</sup> However, when the Advocate General based his opinion in *Grunkin-Paul* in part on the right to private and family life in article 8 of the European Convention on Human Rights, which, according to the European Court of Human Rights, includes the right to one's name,<sup>125</sup> this suggests a considerable expansion of their importance, with far-reaching consequences,<sup>126</sup> up to the possibility that choice of law itself becomes an instrument for human rights.<sup>127</sup>

### C. *Pluralization of Method*

If these developments lead to a paradigm shift, as is claimed here, the new paradigm still needs to be formulated.<sup>128</sup> However, two important developments can be discovered. One replaces the international focus of choice of law, the other one the role of the closest connection.

#### 1. Internal and External Conflicts

Classical European conflict of laws is international in focus and makes no difference between different countries. Prima facie, this is true also for European choice of law: Rome I and Rome II Regulations also apply vis-à-vis third countries—despite doubts about European Union competence for relations with third countries. Although conflicts scholars hope to maintain this international focus as much as possible,<sup>129</sup> it was predicted early on that the similar treatment of all countries' laws could not be maintained.<sup>130</sup> This is now proving true. Europeanization of choice of law distinguishes importantly between intra-Community conflicts and conflicts with third countries.

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124. KROPHOLLER, *supra* note 25, at 249-50.

125. Case C-96/04, Standesamt Stadt Niebüll (*Grunkin-Paul*), 2006 E.C.R. I-3561 (opinion of AG Jacobs) (citing Stjerna Case App. No. A280-B, 37 Y.B. EUR. CONV. ON H.R. 278 (1994); Burghartz Case, App. No. A299-B, 37 Y.B. EUR. CONV. ON H.R. 166 (1994)).

126. Meeusen, *supra* note 1, at 296-97.

127. Veerle van den Eeckhout, *Promoting Human Rights within the Union: The Role of European Private International Law*, 14 EUR. L.J. 105, 105-06 (2008).

128. For first attempts, see Stefan Grundmann, *Internal Market Conflict of Laws: From Traditional Conflict of Laws to an Integrated Two Level Order*, in LES CONFLITS DE LOIS ET LE SYSTÈME JURIDIQUE COMMUNAUTAIRE, *supra* note 42, at 5; KATRIN SCHILLING, BINNENMARKTKOLLISIONSRECHT (2006).

129. *E.g.*, Karl Kreuzer, *Zu Stand und Perspektiven des Europäischen Internationalen Privatrechts—Wie europäisch soll das Europäische Internationale Privatrecht sein?*, 70 RABELSZ 1, 78-86 (2006).

130. *E.g.*, IAN F. FLETCHER, CONFLICT OF LAWS AND EUROPEAN COMMUNITY LAW 44 (1982).

As between member states, European private law becomes even more “bilateral” than before, because the principle of mutual recognition widely bars preference of the forum, as becomes clear from *Garcia Avello*. This rules out submitting dual nationals not only to the law of the forum if it presents one of the nationalities but also to the “effective” nationality, which was not allowed a role in *Garcia Avello*.<sup>131</sup> Party autonomy is no longer merely a tool to determine the applicable law but an instrument toward a competition among legal orders; choice of the applicable law is not only (perhaps) a right,<sup>132</sup> but also an obligation to avoid losing protection from the basic freedoms.<sup>133</sup> Renvoi may be largely excluded between member states.<sup>134</sup> Domestic public policy is restricted between member states;<sup>135</sup> the importance of a European public policy has grown.<sup>136</sup> The application of mandatory rules by third countries is bound by EU law.<sup>137</sup> The duty to determine the content of foreign law and apply it properly is greater toward member states than toward third countries; the same is true for appealability of questions of foreign law.<sup>138</sup> Circumvention of the

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131. See Mansel, *supra* note 94, at 692.

132. For further references, see SCHILLING, *supra* note 128, at 176-77, 260-64.

133. Case C-339/89, *Alsthom Atlantique v. Sulzer*, 1991 E.C.R. I-107, para. 15.

134. Kreuzer, *supra* note 129, at 84; cf. KROPHOLLER, *supra* note 25, at 178-79 (discussing renvoi in the context of treaties).

135. Ralf Michaels & Hans-Georg Kamann, *Europäisches Verbraucherschutzrecht und IPR*, 52 JURISTEN ZEITUNG [JZ] 601, 607 (1997) (F.R.G.); Luigi Fumagalli, *EC Private International Law and the Public Policy Exception—Modern Features of a Traditional Concept*, 2004 Y.B. PRIVATE INT'L L. 171, 178-79; see Marc Fallon, *Les conflits de lois et de juridictions dans un espace économique intégré—L'expérience de la Communauté Européenne*, in 253 ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 252-53 (1996).

136. See Jürgen Basedow, *Recherches sur la formation de l'ordre public européen dans la jurisprudence*, in LE DROIT INTERNATIONAL PRIVÉ : ESPRIT ET MÉTHODES. MÉLANGES EN L'HONNEUR DE PAUL LAGARDE 55 (2005) [hereinafter MÉLANGES LAGARDE]; Hans van Houtte, *From a National to a European Public Policy*, in LAW AND JUSTICE IN A MULTISTATE WORLD, *supra* note 6, at 841, 847-48, 852-53; Savatier, *supra* note 34, at 252; For a comprehensive analysis, see generally IOANNA THOMA, *DIE EUROPÄISIERUNG UND DIE VERGEMEINSCHAFTUNG DES NATIONALEN ORDRE PUBLIC* (2007).

137. Hans-Jürgen Sonnenberger, *Zweites Kapitel, Internationales Privatrecht: Einleitung*, in 10 MÜNCHENER KOMMENTAR BÜRGERLICHES GESETZBUCH: INTERNATIONALES PRIVATRECHT 5, no. 216, at 131-33 (4th ed. 2006).

138. Andreas Schwartze, *Die Ermittlung und Anwendung des Vertragsrechts anderer EU-Staaten im deutschen Zivilprozeß nach § 293 ZPO—ein besonderer Fall*, in RECHT IN EUROPA: FESTSCHRIFT FÜR HILMAR FENGE 127, 144 (Pelaya Yessiou-Faltsi et al. eds., 1996); Oliver Remien, *Iura novit curia und die Ermittlung fremden Rechts im europäischen Rechtsraum der Art. 61ff. EGV—für ein neues Vorabentscheidungsverfahren bei mitgliedstaatlichen Gerichten*, in AUFBRUCH NACH EUROPA, 75 JAHRE MAX-PLANCK-INSTITUT FÜR PRIVATRECHT 617, 625, 630 (Jürgen Basedow et al. eds., 2001); Maarit Jännerä-Jareborg, *Foreign Law in National Courts—A Comparative Perspective*, 304 ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF

ordinarily applicable law is encouraged by the deliberately formal factors of the principles of mutual recognition and country-of-origin, as the *Centros* decision by the Court of Justice made clear.<sup>139</sup>

Of these developments, the most important one for Erin O'Hara and Larry Ribstein is the rising role of party autonomy.<sup>140</sup> Their interest in developing a market for law leads them to develop five requirements for efficient choice-of-law regimes. Applying this framework to the centralized top-down choice-of-law regime in Europe and the decentralized bottom-up regime in the United States, they find that both systems can learn from each other: Americans can learn about constitutionalized and centralized choice of law, especially from European Court of Justice jurisprudence. Europeans can learn how the decentralized state of choice of law in the United States may actually favor a market for laws.

In relation to third countries, by contrast (where the European Union adopts the former role of its member states through its membership in the Hague Conference), the trend goes toward unilateral preference for European law. Thus, favoring of member state citizenship is not only still allowed: EU citizenship will likely restrict even more the scope of the law of third countries for dual nationals. Public policy and European mandatory rules have become more important, too. A striking example can be found in the European Court of Justice's *Ingmar* decision of 2000.<sup>141</sup> The Court had to decide whether a commercial agent operating within the European Union was protected by certain provisions of the 1985 European directive on commercial agents, even though the agent was working for a Californian principal and had signed a contract stipulating that California law governed their relationship.<sup>142</sup> Given that the directive was largely modeled on German and French law, it would have followed to adopt decisions by these countries' highest courts and to characterize such protection as not immune against party choice of

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INTERNATIONAL LAW 181, 368 (2003); Ralf Michaels & Nils Jansen, *Die Auslegung und Fortbildung ausländischen Rechts*, 116 ZEITSCHRIFT FÜR ZIVILPROZESS 3, 48 (2003).

139. FRANÇOIS VIANGALLI, LA THÉORIE DES CONFLITS DE LOIS ET LE DROIT COMMUNAUTAIRE 116-17 (2004); Klaus Schurig, *Unilateralistische Tendenzen im europäischen Gesellschaftskollisionsrecht, oder: Umgehung als Rechtsprinzip*, in LIBER AMICORUM GERHARD KEGEL 199 (Hilmar Krüger et al. eds., 2002).

140. Erin Ann O'Hara & Larry E. Ribstein, *Rules and Institutions in Developing a Law Market: Views from the United States and Europe*, 82 TUL. L. REV. 2147 (2008).

141. Case C-381/98, *Ingmar GB Ltd. v. Eaton Leonard Techs., Inc.*, 2000 E.C.R. I-9305.

142. *Id.* at I-9332.

law.<sup>143</sup> However, the European Court of Justice did not hesitate to enforce the directive over the parties' choice of law<sup>144</sup> and thus gave greater weight to the regulatory interests of the European Union than classical choice of law did for states' regulatory interests. The Court's justification was that this protection was necessary to achieve equal market conditions in the European marketplace,<sup>145</sup> thereby demonstrating the difference with internal conflicts: If member states use this argument to justify application of their own law over that of the country of origin, it regularly fails. The use of regulatory interests to determine the territorial scope and mandatory character of EU choice of law resembles, in its method and in its results, the Supreme Court jurisprudence regarding the scope and binding force of federal statutory law. This suggests, at least in relations with third countries, an Americanization of European choice of law.<sup>146</sup>

## 2. From Method of Conflicts to Conflict of Methods

In the United States, the demise of the vested-rights theory led to two kinds of new methods. One set of proposals suggested a new uniform focus, for example on governmental interests, which made them better adapted for some problems than others. Other methods collected a number of relevant factors with unclear relations among themselves.

This is the focus of Bill Reppy's article for this issue.<sup>147</sup> Reppy distinguishes three theories of choice of law: territorialism, personal law, and interest analysis. These methods can be combined in various ways, and Reppy tries to show how harmful such combinations can be. He distinguishes between three kinds of eclecticism. The first is second-look eclecticism, where courts apply primarily one method but will apply another method if the first method is inconclusive. A second type is *dépeçage* eclecticism, where different parts of one area of the law are resolved by different methods. The third, and for Reppy the

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143. Bundesgerichtshof [BGH] [Federal Court of Justice], Jan 30, 1961, 14 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1061 (F.R.G.); Cour de cassation [Cass com.] [highest court of ordinary jurisdiction], Nov. 28, 2000, Bull. civ. IV No. 183 (Fr.) (basing its decision on the prevalent view in France; the decision came down two weeks after the *Ingmar* decision).

144. See *Ingmar*, 2000 E.C.R. at I-9335.

145. See *id.* at I-9334 to 35.

146. Ralf Michaels & Hans-Georg Kamann, *Grundlagen eines allgemeinen gemeinschaftlichen Richtlinienkollisionsrechts—“Amerikanisierung” des Gemeinschafts-IPR?*, 12 EUROPÄISCHES WIRTSCHAFTS- UND STEUERRECHT 301, 311 (2001).

147. William A. Reppy, Jr., *Eclecticism in Methods for Resolving Tort and Contract Conflict of Laws: The United States and the European Union*, 82 TUL. L. REV. 2053 (2008).



most despised, is big-mix eclecticism, where courts are unable to say both what goes into the mix and how the methods relate to each other. Finding examples of these three kinds of combinations in both European and American choice of law, Reppy provides a critique of both regimes.

In Europe, it looks as though a new choice of law is emerging as the combination of two methods. The first of these methods largely resembles classical choice of law, moderated, however, in the way discussed through federalization. This method is supplemented by a second method grounded in EU law. That second method looks neither to balances between regulatory interests of states, nor to the closest connection.<sup>148</sup> Instead, it regulates the conflict between states' regulatory interest on the one hand, and private rights on the other hand, as protected (indirectly) through the four freedoms.

Two recent decisions by the European Court of Justice may illustrate this combination. In the *Viking* case, Finnish employees had attempted to prevent the reflagging of a shipping company from Finland to Estonia.<sup>149</sup> The *Laval* case raised the question of whether Swedish unions could take collective action to enforce a Swedish collective agreement against a Latvian company posting Latvian workers to building sites in Sweden.<sup>150</sup> From a classical choice-of-law perspective, the relations between employer and employees would likely be governed by Swedish or Finnish law respectively, because article 8(1) of Rome I determines that the protective provisions of the law of the country in which the employee habitually carries out his work in performance of the contract remain applicable. If, in the *Laval* case, the employees are only temporarily employed in Sweden, then Latvian law applies to them pursuant to article 8(2). With regard to the unions, the law applicable to injuries from industrial action under article 9 of Rome II (which was inapplicable to these cases), would be "the law of the country where the action is to be, or has been, taken"; this is true also for preliminary injunctions.<sup>151</sup> For the Court of Justice, however, such choice-of-law rules played no role. Instead, the Court addressed the conflict as one between the unions exercising their social

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148. Mansel, *supra* note 94, at 724.

149. Case C-438/05, Int'l Transport Workers' Fed'n v. Viking Line ABP, 2007 ECJ (Dec. 11, 2007), *available at* <http://curia.europa.eu>.

150. Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, 2007 ECJ (Dec. 18, 2007), *available at* <http://curia.europa.eu>.

151. Rome II, *supra* note 43, arts. 9, 15(d).

rights under state law on the one hand, and the respective corporation exercising its right to free movement on the other.<sup>152</sup>

The coexistence of two fundamentally different choice-of-law methods has three important implications. First, the EU method deviates deliberately from the closest connection, so a conflict of methods is often unavoidable.<sup>153</sup> For example, the country of origin is not the law of the marketplace (which will often have the closest connection);<sup>154</sup> its law is applied precisely in order to break open the monopolistic position of the law of the market, if that law's application stifles competition. The *Centros* decision, requiring Denmark to apply English law to a company that was Danish in almost all respects except that it was registered in England, illustrates a similar point. The decision was not based on the idea that connections to England were closer than to Denmark, but rather on the desire to enable parties to escape the restrictions of the law of the closest connection. Because the traditional method and the new European law have conflicting goals, it will hardly be sufficient merely to translate the EU method into new connecting factors under the traditional paradigm.<sup>155</sup>

A second important consequence ensues. The conflict within the EU method between private rights and state regulation can be decided entirely by EU law, in particular the provisions and case law on the four freedoms and the goals of the European Union, without a need to resort to traditional choice of law. This is obvious in the *Laval* and *Viking* decisions, which were decided in one case for the employees, in the other for the employer.

This means, thirdly, that the method of conflicts in Europe has now turned into a conflict of methods. It is no longer sufficient to resolve conflicts of law on the basis of one method that is, in and by itself, more or less coherent. Often, the traditional method would yield a result different from that ensuing from application of EU constitutional law. The decision to be made is then which method trumps the other, with regard to the specific case before the judge. In

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152. For a discussion of the cases, see Norbert Reich, *Free Movement v. Social Rights in an Enlarged Union: The Laval and Viking Cases Before the European Court of Justice*, 9 GERMAN L.J. 125 (2008).

153. Michaels, *supra* note 13, at 238. *But see* Marc Fallon, *Le principe de proximité dans le droit de l'Union européenne*, in MÉLANGES LAGARDE, *supra* note 136, at 241, 246.

154. Dieter Martiny, *Die Anknüpfung an den Markt*, in FESTSCHRIFT FÜR ULRICH DROBNIG ZUM SIEBZIGSTEN GEBURTSTAG 389 (Jürgen Basedow et al. ed., 1998).

155. *Cf.* Jürgen Basedow, *European Private International Law of Obligations and Internal Market Legislation—A Matter of Coordination*, in LIBER MEMORIALIS ŠARČEVIĆ, *supra* note 42, at 13, 21-24.

the United States, it is clear that the Constitution merely sets outer limits and does not specify a choice-of-law method the states must follow. The same was true in Europe for a long time. Now that choice of law itself has become an EU instrument, this conflict of methods occurs within Community law. It seems likely that the conflict will frequently be resolved to the detriment of classical choice of law.

One example is the *Rüffert* case recently decided by European Court of Justice.<sup>156</sup> The question in this case was whether German procurement law could require a Polish bidder to commit to paying wages according to German law to its Polish employees.<sup>157</sup> Under article 8(2) of Rome I, the employment contract would be governed by Polish law if the employees were only temporarily employed in Germany; mandatory rules of German law might also be applicable under article 9. Though the Advocate General began his analysis with these provisions (more exactly, the parallel provisions of the Rome Convention), he ended up using them merely to trigger a discussion of specific EU provisions and considerations, in particular the Posting of Workers Directive.<sup>158</sup> Article 9 of Rome I turns from an exception and opening clause into a mere entry gate for EU law.<sup>159</sup> Whether the Court of Justice will give more weight to traditional choice of law when the Rome I Regulation becomes applicable to such cases appears doubtful.

#### IV. EUROPEANIZATION AS REVOLUTION

These developments constitute a genuine revolution. Europeanized choice of law can hardly be accommodated with the three pillars of classical choice of law developed in the nineteenth century. It represents a paradigm shift that is at least as fundamental as was the U.S. conflicts revolution. European choice of law is no longer private, national, and domestic/international. It is now European, regulatory, and mediatized.

##### A. *A Genuine Revolution*

First, Europeanization replaces the *privatized* choice of law in the sense of Savigny with a *regulatory* choice-of-law regime. Privatization

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156. Case C-346/06, *Rüffert v. Land Niedersachsen*, 2008 ECJ (Apr. 3, 2008), available at <http://curia.europa.eu>.

157. See *id.* para. 17.

158. See Directive 96/71, Concerning the Posting of Workers in the Framework of the Provision of Services, 1997 O.J. (L 18) 1.

159. See *Rüffert*, 2008 ECJ (opinion of AG Bot), paras. 10-12, available at <http://curia.europa.eu>.

does not refer to the exclusion of public interests but to the specific private law resolution of conflicts through reference on the basis of the closest connection; this approach now steps to the background. This becomes clear in the principles of mutual recognition and country-of-origin, which use recognition instead of reference, use formal criteria instead of the criterion of the closest connection, and draw European choice of law close to the recognition and enforcement of foreign judgments. The horizontal relation between two parties is supplanted by the vertical relation between actors in the internal market on one hand and regulating states on the other. Even more importantly, the rules in the federalized choice-of-law regime of the Rome Regulations can no longer be understood as *referring* rules in the sense of Savigny. They are now *distributive* rules—European rules which redistribute legislative competence among the member states from a central position and on the basis of EU policies.

The *national* character of choice of law is replaced by a truly *European* choice-of-law regime. For Mancini, choice of law found its political foundation in the individual's membership in the nation; this was the ground for the nationality principle.<sup>160</sup> If this nationality principle now loses its fundamental role for choice of law not to the (unpolitical) habitual residence but to supranational EU citizenship, membership in the European Union has implications far beyond determination of the law applicable to personal status. The legal positions accruing to the individual via her EU citizenship—EU basic rights, fundamental freedoms, nondiscrimination—are not emanations of her link to a nation state (as were, for example, the fundamental rights of domestic constitutions). Instead they limit these links: the individual can appeal to the European Union against the rules of her own state.<sup>161</sup>

Finally, the *domestic internationalism* of choice of law is replaced by a mediatised choice of law.<sup>162</sup> This is immediately apparent from its foundation, which is no longer national but supranational: choice of law is now European law. Moreover, the focus of choice of law is now European as well. Internally, conflicts of laws are resolved with a view to a uniform area of justice; externally, they serve essentially to protect and delimit the European Union. If choice of law before was bilateral,

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160. See *supra* note 25 and accompanying text.

161. See 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, 178-79 (2004).

162. For a critique, see Hélène Gaudemet-Tallon, *Quel droit international privé pour l'Union Européenne?*, in INTERNATIONAL CONFLICT OF LAWS, *supra* note 9, at 317, 329-38.

now its external side is (at least partly) unilateral; its internal side is regulatory.

In theory it is possible that these developments will in the long run merge into the classical paradigm. This would require that the federalized choice-of-law regime remain oriented toward the closest connection, that the mutual recognition and country-of-origin principles be translated into classical referring choice-of-law rules, that the European Union in the long run replace the nation, and that European choice of law again become more bilateral. This is not likely to happen. It would presuppose that the European Union will not utilize the regulatory competence it has acquired, and there is little reason to think that.

### *B. Comparison with the United States*

This European revolution is at least as significant as the U.S. revolution. As in the United States, the outcomes of many conflicts cases may be the same. But the way in which Europeans think about choice of law will change fundamentally.

In one way, the European revolution is even more radical than the American one. In the United States, the step away from the formalism of vested rights toward a choice-of-law approach that takes seriously the relevant regulatory interest was entwined with the idea that the coordination of these interests should occur on the federal level—through federal legislation,<sup>163</sup> the federal courts,<sup>164</sup> or a greater role for the Constitution. None of these steps occurred: the Congress lacks incentives to enact legislation,<sup>165</sup> and the Supreme Court essentially barred the federal courts from developing a meaningful choice-of-law regime<sup>166</sup> and restricted the influence of the Constitution to a minimum in the trilogy of cases in the 1980s discussed earlier.<sup>167</sup> In this important sense, the American conflicts revolution has remained incomplete.

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163. See *supra* note 36-38 and accompanying text.

164. E.g., William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 23 (1963); Elliott E. Cheatham, *A Federal Nation and Conflict of Laws*, 22 ROCKY MT. L. REV. 109, 111 (1950); Harold W. Horowitz, *Toward a Federal Common Law Choice of Law*, 14 UCLA L. REV. 1191, 1193 (1967); Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 26 (1945); Laycock, *supra* note 122, at 333.

165. Laycock, *supra* note 122, at 334.

166. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-98 (1941).

167. See cases cited *supra* note 103.

It goes without saying that the European developments cannot simply be transplanted to the United States. Just as the American conflicts revolution was, so is the new European choice-of-law revolution ultimately contingent upon its own framework. In the United States, federal legislation is generally suspect and unlikely to succeed in choice of law; the current emphasis on states rights probably makes federalization and constitutionalization impossible. Whether a model code would be more promising<sup>168</sup> appears doubtful. But even short of a direct transplant, the European developments should be of interest to the United States. Revolutionaries learn from one another, even if they aim for different goals. If the comparison of U.S. and EU choice of law, long confined to the influence of United States on European choice of law, can become a true dialogue again,<sup>169</sup> the European conflicts revolution will have at least one undeniably positive consequence.

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168. Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 MICH. L. REV. 2134, 2134-49 (1991).

169. Cf. Reimann, *supra* note 9, at 113; Jan Kropholler & Jan von Hein, *From Approach to Rule-Oriented in American Tort Conflicts?*, in LAW AND JUSTICE IN A MULTISTATE WORLD, *supra* note 6, at 317, 339.