The New European Choice-of-Law Revolution

Ralf Michaels

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?”

© 2008 Ralf Michaels. Professor of Law and Director, Center for International and Comparative Law, Duke University School of Law. First State Exam 1994, Dr. jur. 2000, University of Passau; LL.M. 1995, Cambridge University; Second State Exam 2000, Oberlandesgericht Hamburg. Catherine Gibson provided splendid editing help; she also drafted some of the article summaries contained in this Article. Special thanks to the editors of the Tulane Law Review, in particular Haller Jackson and Mary Nagle, for the splendid cooperation in organizing the conference and publishing its results.
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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.\textsuperscript{1} For many, Community law appears to be of only

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  \item \textsuperscript{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 \textit{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

principles: regulation, Europeanization, and mediatization. Part IVB 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 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. 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. 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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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.”).

American revolutions and toward the European reform proposals they inspired. Adaptation and evolution were preferred over real revolution. 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. 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.

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,’” 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.

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.\textsuperscript{11}

But the similarity is superficial.\textsuperscript{12} 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.\textsuperscript{13} 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.\textsuperscript{14} The wealth of opinions in nineteenth-

\begin{footnotesize}
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\item Cf. Jacob Dolinger, In Defense 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).
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. 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. This idea was confronted with the criticism, well known from the American debate, that the lawmaker usually does not think about the territorial scope of his rules.

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. 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.

Story had viewed private international law as an international law for private matters; Savigny established it as a
private law for international connections. 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. 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) so “public” common interests, which of course were important in nineteenth-century private law too, 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. 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) 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

22. See id.
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,27 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).28 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.

problems by reference to the law of pleading.\textsuperscript{29} 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.\textsuperscript{30} 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, nationalism, 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.\textsuperscript{31} 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 \textit{Babcock v. Jackson},\textsuperscript{32} could be reached effortlessly through special choice-of-law rules without the need of a revolution.\textsuperscript{33}

\section*{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 \textit{ius commune}; the reaction was the development of a conflict of laws based on this very \textit{ius commune}. In the seventeenth century,

\begin{itemize}
  \item \textsuperscript{30} Kropholler, \textit{supra} note 25, 103-04.
  \item \textsuperscript{31} Kegel & Schurig, \textit{supra} note 27, at 128-58; Kropholler, \textit{supra} note 25, at 31-36. For comparison with governmental interest analysis, see Kegel, \textit{supra} note 5, at 621-25.
  \item \textsuperscript{32} 191 N.E.2d 279 (N.Y. 1963).
  \item \textsuperscript{33} For a comparative overview, see Siehr, \textit{supra} note 7, at 1354-59.
\end{itemize}
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 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. 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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35. See Reimann, supra note 9, at 119-21.
coordinate the interests of states, which had now become relevant.\textsuperscript{36} Even Brainerd Currie deemed federal legislation desirable, at least for important issues.\textsuperscript{37} More recently, similar proposals have been made.\textsuperscript{38} 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.\textsuperscript{39}

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.\textsuperscript{40} Although the Convention was part of the \textit{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.\textsuperscript{41} 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.\textsuperscript{42} Only when the

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\item[37.] CURRIE, supra note 10, at 183. For one such issue, see Paul S. Bird, \textit{Note, Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse}, 96 \textit{Yale L.J.} 1077, 1092-93 (1987).
\item[42.] PETER STONE, EU \textit{PRIVATE INTERNATIONAL LAW—HARMONISATION OF LAWS} 316-17 (2006); Harry Duintjer Tebbens, \textit{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, \textit{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\textsuperscript{43} was it possible to codify choice-of-law rules for noncontractual obligations in the Rome II Regulation;\textsuperscript{44} a codification of rules for contractual obligations has just been adopted as the Rome I Regulation.\textsuperscript{45} A proposed Rome III Regulation would codify rules for matrimonial property regimes.\textsuperscript{46} Other proposals, or Green Papers, concern matrimonial matters,\textsuperscript{47} maintenance obligations,\textsuperscript{48} and successions and wills.\textsuperscript{49}

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\item Rome II, supra note 43.
\item Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I) (adopted June 6, 2008) [hereinafter Rome I].
\end{enumerate}
\end{footnotesize}
Most analysts do not consider this federalization as a sign of a revolution. Although there have been protests, especially in France and England,\footnote{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: Professorensstreich zum Europäischen IPR—einige Betrachtungen, 28 IPRAX 188-89 (2008). For the English protests, see Dickinson, supra note 43, at 199-200.} discussion has been nowhere nearly as fierce as the parallel debate over a European private law codification.\footnote{For an overview, see Nils Jansen, _European Civil Code_, in _ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW_, supra note 9, at 247.} Formally, the codification overcomes the fragmentation of choice-of-law regimes that Gerhard Kegel called the “cancer of private international law,”\footnote{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.} 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,\footnote{KRÖPHOLLER, supra note 25, at 42-47.} 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.\footnote{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.}

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
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 change: 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. 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. 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. 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

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. The European Union is competent to regulate choice of law only “in so far as necessary for the proper functioning of the internal market.” Although this is often read merely to suggest the need for uniform rules, 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. 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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this with the goal to achieve a high level of environmental protection.\textsuperscript{63} Such preferential treatment of plaintiffs is not incompatible with traditional choice-of-law rules.\textsuperscript{64} 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).\textsuperscript{65} 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.\textsuperscript{66}

Article 7 of Rome II is no outlier. Provisions on consumer protection in Rome I are based on similar EU policy.\textsuperscript{67} The rules on product liability in article 5 of Rome II are based not on the mere

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\item \textsuperscript{63} 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.

\item \textsuperscript{64} See JAN VON HEIN, DAS GÜNSTIGKEITSPRINZIP IM INTERNATIONALEN DELIKTSRECHT 124-26 (1999); KRÖPHOLLER, 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).

\item \textsuperscript{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.”).

\item \textsuperscript{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.”).

\item \textsuperscript{67} See Walter G. Paefgen, Kollisionsrechtlicher Verbraucherschutz im Internationalen Vertragsrecht und europäisches Gemeinschaftsrecht, 2003 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT [ZEURP] 266 (F.R.G.); Peter von Wilmowsky, Der internationale Verbrauchervertrag im EG-Binnenmarkt—Europarechtlicher Gestaltungsspielraum für kollisionsrechtlichen Verbraucherschutz, 1995 ZEURP 735.
\end{itemize}
search for the closest connection, but on EU policy considerations.\textsuperscript{68} The possibility of basing a claim for unfair competition on one single law even if several countries are affected\textsuperscript{69} 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.\textsuperscript{70}

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.\textsuperscript{71} 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.\textsuperscript{72}

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;\textsuperscript{73} as a response, the European Union agreed, more modestly, on a “Reform
Treaty,” the so-called Lisbon Treaty. 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. 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. 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. 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. 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

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, a principle that was later extended to the free movement of services. 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. 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. At about the same time, interest grew in the regulatory aspects and the economic analysis of choice of law. The Court of Justice enriched the debate with its decisions regarding the impact of the mutual recognition principle on the law of corporations.


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). 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. 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. The European Court of Justice has rendered several decisions restricting member states’ ability to hold so-called “golden shares”—
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. The attempt to establish a country-of-origin principle in the Services Directive failed; 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.

There have been long debates over whether the country-of-origin principle must be understood as a choice-of-law principle. 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. 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. Within its scope, the principle determines

89. Michaels, supra note 13, at 195-96.
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.\textsuperscript{94} 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.\textsuperscript{95} 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


\textsuperscript{95} Katharina Boele-Woelki, \textit{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. 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. 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. Once the country-of-origin principle is recognized

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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. Thus, the vested-rights theory was all but constitutionalized.

A further parallel, well known from the area of recognition of judgments but widely ignored in choice of law, 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. 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.

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


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).\textsuperscript{104} 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.”\textsuperscript{105} 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.\textsuperscript{106} 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.\textsuperscript{107} A referral by the German registry to the European Court of Justice was rejected for formal reasons;\textsuperscript{108} a new referral on essentially the same question has not yet been decided,\textsuperscript{109} but the opinions by the Advocate General in both cases, which would permit double-name registration in Germany despite German law, may


\textsuperscript{108} Grunkin Paul, 2006 E.C.R. para. 20.

give some guidance for how the Court will decide.\textsuperscript{110} 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.\textsuperscript{111} 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,\textsuperscript{112} 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.\textsuperscript{113} Early on, scholars discussed whether use of nationality as a connecting factor was barred by EU law.\textsuperscript{114} Yet although the Court has applied the nondiscrimination principle in several civil procedure cases,\textsuperscript{115} it has not yet gone so far as to bar nationality as a connecting factor in choice of law.\textsuperscript{116} In fact, neither in \textit{Garcia Avello} nor in \textit{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 \textit{Grunkin-Paul}, the relevant connecting factor for the Advocate General was the child’s Danish

\begin{itemize}
\item \textsuperscript{110} Grunkin Paul, 2006 E.C.R. I-3561 (opinion of AG Jacobs); Case C-353/06, Grunkin (opinion of AG Sharpston), \textit{available at} http://curia.europa.eu.
\item \textsuperscript{111} EC Treaty arts. 12, 17-18.
\item \textsuperscript{112} U.S. \textit{CONST.} amend. XIV, § 1, cl. 3 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).
\item \textsuperscript{113} VON BAR & MANKOWSKI, supra note 25, § 3 no. 41.
\item \textsuperscript{114} SAVATIER, \textit{supra} note 25; Ulrich Drobnig, \textit{Verstößt das Staatsangehörigkeitsprinzip gegen das Diskriminierungsverbot des EWG-Vertrages?}, 34 \textit{RABELSZ} 636, 636-62 (1970). For further references, see KROPHOLLER, \textit{supra} note 25, at 277.
\item \textsuperscript{116} See Case C-430/97, Johannes v. Johannes, E.C.R. I-3475; Michael Bogdan, \textit{The EC Treaty and the Use of Nationality and Habitual Residence as Connecting Factors in International Family Law}, \textit{in} \textit{INTERNATIONAL FAMILY LAW FOR THE EUROPEAN UNION} 303, 308-15 (Johan Meeusen et al. eds., 2007).
\end{itemize}
birth certificate. 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.”

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; 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. 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.” Yet the Privileges and Immunities Clause has never played a great role for choice of law, occasional scholarly suggestions notwithstanding.

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; that they can

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121. U.S. CONST. amend. XIV, § 1, cl. 2.
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. 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, this suggests a considerable expansion of their importance, with far-reaching consequences, up to the possibility that choice of law itself becomes an instrument for human rights.

C. **Pluralization of Method**

If these developments lead to a paradigm shift, as is claimed here, the new paradigm still needs to be formulated. 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, it was predicted early on that the similar treatment of all countries’ laws could not be maintained. 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.
126. Meeusen, supra note 1, at 296-97.
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).
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.\footnote{See Mansel, supra note 94, at 692.} 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,\footnote{For further references, see Schilling, supra note 128, at 176-77, 260-64.} but also an obligation to avoid losing protection from the basic freedoms.\footnote{Case C-339/89, Alsthom Atlantique v. Sulzer, 1991 E.C.R. 1-107, para. 15.} Renvoi may be largely excluded between member states.\footnote{Kreuzer, supra note 129, at 84; cf. Kropholler, supra note 25, at 178-79 (discussing renvoi in the context of treaties).} Domestic public policy is restricted between member states;\footnote{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. PRIVA TE 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).} the importance of a European public policy has grown.\footnote{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 Orde Public (2007).} 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.\footnote{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).} Circumvention of the
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.  

Of these developments, the most important one for Erin O’Hara and Larry Ribstein is the rising role of party autonomy. 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. 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. 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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142. *Id.* at I-9332.
However, the European Court of Justice did not hesitate to enforce the directive over the parties’ choice of law\textsuperscript{144} 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,\textsuperscript{145} 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.\textsuperscript{146}

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.\textsuperscript{147} 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

\textsuperscript{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).

\textsuperscript{144} See Ingmar, 2000 E.C.R. at I-9335.

\textsuperscript{145} See id. at I-9334 to 35.


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. 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. 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. 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. 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

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.\textsuperscript{152}

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.\textsuperscript{153} For example, the country of origin is not the law of the marketplace (which will often have the closest connection);\textsuperscript{154} 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 \textit{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.\textsuperscript{155}

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 \textit{Laval} and \textit{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

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

\textsuperscript{153} Michaels, \textit{supra} note 13, at 238. \textit{But} see Marc Fallon, \textit{Le principe de proximité dans le droit de l’Union européenne}, \textit{in} MÉLANGES LAGARDE, \textit{supra} note 136, at 241, 246.


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.\footnote{156}{Case C-346/06, Rüffert v. Land Niedersachsen, 2008 ECJ (Apr. 3, 2008),
available at http://curia.europa.eu.} 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.\footnote{157}{See id. para. 17.} 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.\footnote{158}{See Directive 96/71, Concerning the Posting of Workers in the Framework of the
Provision of Services, 1997 O.J. (L 18) 1.} Article 9 of Rome I turns from an exception and
opening clause into a mere entry gate for EU law.\footnote{159}{See Rüffert, 2008 ECJ (opinion of AG Bot), paras. 10-12,
available at http://curia.europa.eu.} 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
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. 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.

Finally, the domestic internationalism of choice of law is replaced by a mediatized choice of law. 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.
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,163 the federal courts,164 or a greater role for the Constitution. None of these steps occurred: the Congress lacks incentives to enact legislation,165 and the Supreme Court essentially barred the federal courts from developing a meaningful choice-of-law regime166 and restricted the influence of the Constitution to a minimum in the trilogy of cases in the 1980s discussed earlier.167 In this important sense, the American conflicts revolution has remained incomplete.

163. See supra note 36-38 and accompanying text.
165. Laycock, supra note 122, at 334.
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 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, the European conflicts revolution will have at least one undeniably positive consequence.
