ESSAYS

# A PLEA FOR PRIVATE INTERNATIONAL LAW (CONFLICT OF LAWS)

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Public international law primarily deals with the legal rights and duties of nations. But there is another body of international law—*private* international law—that seeks to coordinate private legal rights and duties in cases that straddle national borders or involve citizens of different countries.

This law has a long history.[1] But it really took off with the expansion of travel, communication, and trade in the nineteenth century. And American courts played an outsized role in its development. Because the constituent states of the United States were, in large part, understood as retaining the sovereignty of nations, American courts took private international law to be implicated in interstate cases too. As a result, they were forced to develop and apply this body of law much more than the courts of other nations. Indeed, in the nineteenth century the normal dependence of American cases on English precedents was often reversed: when a private international law issue



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1 *See, e.g.*, PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 5–141 (5th ed. 2010); Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMPAR. L. 297 (1953); Friedrich K. Juenger, *A Page of History*, 35 MERCER L. REV. 419 (1984).

came up, English courts looked to the Americans.[2] This influence extended even to civil law jurisdictions, where Justice Joseph Story's treatise on the topic, first published in 1834, was highly influential.[3]

By the early twentieth century, private international law was considered of sufficient importance to legal education in this country that a class on the topic was invariably offered.[4] Indeed, it was not unusual for it to be a required course in the final year.[5] This was not just

2 *E.g.*, The Sussex Peerage Case (1844) 8 Eng. Rep. 1034, 1055 (HL).

3 See, for example, the influence of JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (Boston, Hillard, Gray, & Co. 1834), on Friedrich Karl von Savigny, discussed in ROXANA BANU, NINETEENTH-CENTURY PERSPECTIVES ON PRIVATE INTERNATIONAL LAW 27–43 (2018).

4 *See* Joseph H. Beale, *The Conflict of Laws, 1886–1936*, 50 HARV. L. REV. 887, 888 (1937) (stating that the course "is now probably offered in all those [law schools] of the first class"); David F. Cavers, *Reviews*, 46 YALE L.J. 1098, 1099 (1937) (reviewing ELLIOT E. CHEATHAM, NOEL T. DOWLING & HERBERT F. GOODRICH, CASES AND OTHER MATERIALS ON CONFLICT OF LAWS (1936) and CHARLES WENDELL CARAHAN, CASES AND MATERIALS ON CONFLICT OF LAWS (1935)) ("[T]he Conflict of Laws is one of the major courses from the standpoints of hours allotted and of student attendance in the third year law curriculum in most law schools."); ASSOCIATION OF AMERICAN LAW SCHOOLS, HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AND PROCEEDINGS OF THE TWENTY-FIRST ANNUAL MEETING 66 (1923) (stating that most graduates of a law school will have covered constitutional law and conflict of laws).

5 We were able to find a smattering of old law school catalogs through a Google Book search for the period 1920–25. Around half had conflicts as a required course. *See, e.g.*, LA. ST. UNIV., LOUISIANA STATE UNIVERSITY CATALOGUE, 1919–1920: ANNOUNCEMENTS, 1920–1921, at 126 (1920) (listing Conflict of Laws as a required course); WASHINGTON UNIV. ST. LOUIS, BULLETIN OF WASHINGTON UNIVERSITY ST. LOUIS: SIXTY-SEVENTH ANNUAL CATALOGUE 282–85 (1924) (same); NORTHWESTERN UNIV., NORTHWESTERN UNIVERSITY BULLETIN: ANNUAL CATALOG 1922–1923, at 293 (1923) (same); THE CATH. UNIV. OF AM., COURSES OF STUDY 1924–1925, at 35–39 (1924) (same); UNIV. OF ILL., UNIVERSITY OF ILLINOIS ANNUAL REGISTER 1919–1920, at 206 (1920) (same); VANDERBILT UNIV., REGISTER OF VANDERBILT UNIVERSITY FOR 1923–1924: COLLEGE OF ARTS AND SCIENCE, SCHOOL OF ENGINEERING; ANNOUNCEMENT FOR 1924–1925, at 143–45 (1924) (same); UNIV. OF MISS., ANNOUNCEMENTS AND CATALOGUE OF THE UNIVERSITY OF MISSISSIPPI: SIXTY-NINTH SESSION SEVENTY-THIRD YEAR 1920–1921, at 108–09 (1921) (same); YALE UNIV., CATALOGUE OF YALE UNIVERSITY: 1924–1925, at 265–68 (1924) (listing Conflict of Laws as an elective course); UNIV. OF MO., CATALOG: SEVENTY-SEVENTH REPORT OF THE CURATORS TO THE GOVERNOR OF THE STATE 1918–1919; ANNOUNCEMENTS 1919–1920, at 250 (1919) (same); GEORGETOWN UNIV., GENERAL CATALOGUE OF THE UNIVERSITY: 1920–1921, at 98 (1921) (same); UNIV. OF KAN., GENERAL INFORMATION 64–65 (1921) (same); UNIV. OF S. CAL., YEAR BOOK FOR 1923–1924 WITH ANNOUNCEMENTS FOR 1924–1925, at 242 (1924) (same); STANFORD UNIV., ANNOUNCEMENT OF COURSES 1920–21, at 118–121 (same); UNIV. OF MINN., THE BULLETIN OF THE UNIVERSITY OF MINNESOTA: THE LAW SCHOOL ANNOUNCEMENT FOR THE YEAR 1923–1924, at 13 (1923) (same); UNIV. OF PA., CATALOGUE OF THE UNIVERSITY OF PENNSYLVANIA FOR THE SESSION OF 1921–22, at 179–80 (1921) (same); UNIVERSITY OF CAL., ANNOUNCEMENT OF COURSES OF INSTRUCTION IN THE DEPARTMENTS AT BERKELEY FOR THE ACADEMIC YEAR, 1922–23, at 143–45 (1922) (same); N.Y. UNIV., CATALOGUE: 1922–1923, at 218–19 (appearing to be required); CORNELL UNIV., ANNOUNCEMENT OF THE THIRTY-FOURTH SUMMER SESSION 1925: JULY 6—AUGUST 14, at 46

because it was important for practitioners. It also functioned as a course on jurisprudence, exploring the law's foundations and structure.[6] It is not surprising, therefore, that American philosophers of law as diverse as Wesley Newcomb Hohfeld, the American legal realists, and Ronald Dworkin started out working on it.[7]

Private international law can reveal law's structure by forcing a court to dissociate—and assign to different jurisdictions' authority—legal elements that tend to be conjoined (and so conflated) in a fully domestic case.[8] And, by taking a panoptic perspective on multiple legal systems, it can bring into focus questions of law's ultimate source.[9] When a jurisdiction's law extends to a fully local transaction, questions of its validity tend to stop with the highest domestic law—the jurisdiction's constitution and the domestic legal practices keeping it in force. But private international law may also ask whether a law can validly extend to an interjurisdictional transaction even when such domestic requirements are satisfied.[10]

Private international law can also inspire reflection on fundamental legal categories—such as tort, contract, property, status, and procedure. This is because traditional choice-of-law methods (still used by a handful of states in this country) see a jurisdiction's regulatory power as depending on the category within which the issue falls. To be sure, more modern methods don't care as much about categorization. Their primary concern is usually whether the competing laws, when

(1925) (appearing to be an elective); THE OHIO STATE UNIV., COLLEGE OF LAW 1922–1923, at 14 (1922) (same); UNIV. OF MICH., CATALOGUE OF THE UNIVERSITY OF MICHIGAN 1922–1923, at 540–41 (1923) (same); UNIV. OF IDAHO, TWENTY-NINTH ANNUAL CATALOG OF THE UNIVERSITY OF IDAHO WITH ANNOUNCEMENTS FOR 1921–1922, at 177–78 (1921) (same); COLUMBIA UNIV., CATALOGUE 1921–1922, at 225–26 (1922) (same). At Harvard it appears that conflicts was elective but was de facto required. *See* Sidney Post Simpson, *The New Curriculum of the Harvard Law School*, 51 HARV. L. REV. 965, 974 n.20 (1938) (stating that a considerable majority of the third-year class chose five courses: Business Organizations III, Conflict of Laws, Constitutional Law, Property III, and Taxation).

6 Felix Frankfurter, *Joseph Henry Beale*, 56 HARV. L. REV. 701, 703 (1943) (stating that conflicts functioned as a "course in Jurisprudence").

7 *See* Wesley Newcomb Hohfeld, *The Individual Liability of Stockholders and the Conflict of Laws*, 9 COLUM. L. REV. 492, 493 (1909); KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 491–92 (1962) (describing Hohfeld's teaching in the conflict of laws); Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 458 (1924); Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 468 (1928); Ronald Dworkin, *Comments on the Unity of Law Doctrine*, *in* ETHICS AND SOCIAL JUSTICE 200–01 (Howard E. Kiefer & Milton K. Munitz eds., 1968).

8 *See* Cook, *supra* note 7, at 461.

9 *See* Cook, *supra* note 7, at 459.

10 For this reason, it can cast doubt on the view—standing behind modern Anglophone positivism—that all law ultimately depends upon a particular community's law practices. *See* Michael S. Green, *Jurisdiction and the Moral Impact Theory of Law*, 29 LEGAL THEORY 29, 62 (2023).

properly interpreted, extend to the interjurisdictional facts.[11] But here too private international law has profound implications, for it can shed a new and disorienting light on questions of statutory interpretation.[12]

Private international law has not lost its jurisprudential import. And ease of travel, communication, and trade have only increased in the last century. But in American law schools (although not abroad[13]), private international law has started dropping out of the curriculum, with the trend accelerating in the last five years or so. We have gone through US News and World Report's fifty top-ranked law schools[14] and, after careful review, it appears that *twelve* have not offered a course on private international law (or its equivalent) in the last four academic years[15]: Arizona State University,[16] Boston University,[17]

11 *See* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 183–84 (1963); Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1870–71 (2005).

12 For example, a court facing a choice-of-law question can be required to determine whether a jurisdiction's *absence* of law applies to the facts, for it may be forced to choose between a jurisdiction that has a cause of action and one that does not.

13 Here we rely on private conversations with private international law scholars in other countries. Carlos Vázquez notes that it is a required course at some institutions in Italy and Spain. E-mail from Carlos Vásquez, Assoc. Dean for Graduate and Int'l Programs, Georgetown Univ. L. Ctr., to Michael Green, Professor, William & Mary L. Sch. (Sept. 15, 2024) (on file with author); *see Subjects*, ESADE, https://www.esade.edu/bachelor/en/programmes/law/subjects [https://perma.cc/V55F-PAVV] (listing compulsory "Private International Law" course as part of its bachelor of laws program); *The Program*, IE, https://www.ie.edu/university/studies/academic-programs/bachelor-laws/the-program/[https://perma.cc/E4EA-N6TX] (listing mandatory "conflicts and business law" course as part of its bachelor of laws program).

14 We used the 2023–24 rankings released in May 2023. *See 2023–24 U.S. News Law School Rankings: This Year vs. Last Year (+/-)*, SPIVEY CONSULTING GRP.: BLOG (May 11, 2023), https://www.spiveyconsulting.com/blog-post/2023-2024-rankings-with-plus-minus/ [https://perma.cc/9C3T-BP5S].

15 The years at issue are 2021–22, 2022–23, 2023–24, and the current year (2024–25).

16 Not offered as a separate course "for ages." E-mail from Charles Calleros, Professor, Ariz. State Univ. Sandra Day O'Connor Coll. of L., to Michael Green, Professor, William & Mary L. Sch. (Jan. 11, 2024) (on file with author). Professor Calleros reported that the Dean for Curriculum noted that a faculty member has taught conflicts as a unit in an Advanced Civil Procedure course. *Id.*; *see also Academic Information*, ASU L., https://apps.law.asu.edu/Apps/Registrar/CourseInfo/ [https://perma.cc/5UW7-TUUQ] (confirming the course has not been offered in the recent past).

17 Last offered in 2019. E-mail from William W. Park, Professor of L. Emeritus, Bos. Univ. Sch. of L., to Michael Green, Professor, William & Mary L. Sch. (Aug. 12, 2023) (on file with author). Professor (Emeritus) Rusty Park noted that some elements of the subject were included in his course on International Business Transactions. *Id.*; *see also Course & Seminar Descriptions*, BOS. U. SCH. OF L., https://www.bu.edu/law/about/offices/registrar/course-descriptions/ [https://perma.cc/LK4A-FVRK].

Brigham Young University,[18] Fordham University,[19] University of Georgia,[20] University of Minnesota,[21] The Ohio State University,[22] Pepperdine University,[23] Stanford University,[24] University of Southern California,[25] Vanderbilt University,[26] and University of Washington.[27]

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18 Last offered in 2018. E-mail from GaeLynn Smith, Registrar, Brigham Young Univ. J. Reuben Clark L. Sch., to Michael Green, Professor, William & Mary L. Sch. (Aug. 7, 2023) (on file with author); *see also Course Catalog*, BYU L., https://law.byu.edu/students/course-information/course-catalog#0 [https://perma.cc/P83B-9ASW].

19 Last offered in spring 2021. E-mail from Pamela Bookman, Assoc. Dean for Acad. Affs., Fordham L. Sch., to Michael Green, Professor, William & Mary L. Sch. (Oct. 29, 2023) (on file with author). Professor Pam Bookman noted that some elements of the subject are taught in her course on International Litigation and Arbitration. *Id.*; *see also Courses*, FORDHAM L., https://digital.law.fordham.edu/viewbook/courses/ [https://perma.cc/3X5W-VD4F].

20 Last offered in 2015. E-mail from Kent Barnett, Assistant Professor, Univ. of Ga. Sch. of L., to Michael Green, Professor, William & Mary L. Sch. (Jan. 12, 2024) (on file with author); *see also Course Offerings*, U. OF GA. SCH. OF L., https://www.law.uga.edu/course-offerings?page=2 [https://perma.cc/TB9Z-5Y23].

21 Not offered since 2018. E-mail from Allan Erbsen, Professor, Univ. of Minn. L. Sch., to Michael Green, Professor, William & Mary L. Sch. (Aug. 7, 2023) (on file with author); *see also Course List*, MINN. L., https://law.umn.edu/academics/course-guide/course-list [https://perma.cc/69QJ-CGR7].

22 Not offered for at least ten years. E-mail from Daniel C.K. Chow, Professor, The Ohio State Univ. Moritz Coll. of L., to Michael Green, Professor, William & Mary L. Sch. (Jan. 14, 2024) (on file with author); *see also The Moritz College of Law Registrar*, OHIO ST. U. MORITZ COLL. OF L., https://moritzlaw.osu.edu/about/registrar [https://perma.cc/9BML-PHMS].

23 Last offered in 2015. E-mail from Donald Earl Childress III, Professor, Pepperdine Caruso Sch. of L., to Michael Green, Professor, William & Mary L. Sch. (Aug 14, 2023) (on file with author). Professor Trey Childress noted that he teaches some of the material in his International Litigation class. *Id.; see also Course Descriptions*, PEPP. CARUSO SCH. OF L., https://law.pepperdine.edu/straus/academic-programs/course-descriptions/ [https://perma.cc/W75X-NJV4].

24 Last offered in 2018. E-mail from Susan Fleischmann, Assoc. Dean for Acad. Affs. & Chief of Staff, Stanford L. Sch., to Michael Green, Professor, William & Mary L. Sch. (Jan. 12, 2024) (on file with author); *see also Course Catalog*, STAN. L. SCH., https://law.stanford.edu/courses/ [https://perma.cc/6MB4-SQEM].

25 Last offered in 2013. E-mail from Daniel Klerman, Professor, Univ. of S. Cal. Gould Sch. of L., to Michael Green, Professor, William & Mary L. Sch. (Aug 6, 2023) (on file with author); *see also Upper-Level Course Descriptions*, USC GOULD SCH. OF L., https://gould.usc.edu/academics/courses/ [https://perma.cc/R2QK-DAXL].

26 Last offered in 2017–18 per course catalog. *See Law School: Academic Catalog*, VAND. UNIV., https://www.vanderbilt.edu/catalogs/kuali/law-24-25.php#/courses [https://perma.cc/CD2F-7A6W].

27 Last offered in summer 2021 per course catalog. *See School of Law Course Catalog 2024–2025*, U. OF WASH. SCH. OF L., https://www.law.washington.edu/coursecatalog/courselist.aspx?YR=2024 [https://perma.cc/5WKZ-XBJM].

And even where the course is taught, in some law schools—such as Duke, New York University, and Yale—it is by visitors, adjuncts, or emerita.[28] It is no longer a valued subject in faculty hiring.

That private international law should be falling out of fashion at this moment is puzzling, for we are currently experiencing something of a renaissance in private international law scholarship, both abroad[29] and in the United States.[30] Academic work on the topic tends to come in bursts, and a decade ago we were arguably in a quiescent period. Not so now.[31]

The trend is also puzzling because popular interest in private international law tends to increase when states' lawmakers engage in culture wars. In the early nineteenth century, interest in private

28 At Duke it was taught in the 2023–24 and 2024–25 academic years by Justin Desautels-Stein (visiting from the University of Colorado). *See Course Browser*, Duke L., https://law.duke.edu/academics/course/browser [https://perma.cc/ZJ57-9A7W]. It was not offered in the 2021–22 and 2022–23 academic years. *Id.* The last time Linda Silberman taught the course at New York University was in the 2021–22 academic year. *See Course Descriptions*, N.Y.U. L., https://its.law.nyu.edu/courses/index.cfm#searchResults2 [https://perma.cc/6KXE-5ZZ6]. It was taught by Louise Ellen Teitz (visiting from Roger Williams) in the 2022–23 and 2023–24 academic years and by Christopher A. Whytock (visiting from the University of California, Irvine) in the fall 2024 semester, and will be taught by Yuko Nishitani in the spring 2025 semester. *See id.* At Yale it was taught in the 2021–22 year by Carlos Vázquez (visiting from Georgetown) and in the 2022–23 year by Kermit Roosevelt (visiting from Penn). *See Courses*, YLS: COURSES, https://courses.law.yale.edu/Courses?TermId=13 [https://perma.cc/VZ9L-RBYU]. It was not offered in the 2023–24 academic year, but was offered by Lea Brilmayer in the 2024–25 academic year. *See id.*

29 *See, e.g.*, PHILOSOPHICAL FOUNDATIONS OF PRIVATE INTERNATIONAL LAW (Michael S. Green et al. eds., 2024); Hanoch Dagan & Sagi Peari, *Choice of Law Meets Private Law Theory*, 43 OXFORD J. LEGAL STUD. 520 (2023).

30 *See, e.g.*, Carlos M. Vázquez, *Non-Extraterritoriality*, 137 HARV. L. REV. 1290 (2024); Roger Michalski, *Fractional Sovereignty*, 13 U.C. IRVINE L. REV. 683 (2023); Emma Kaufman, *Territoriality in American Criminal Law*, 121 MICH. L. REV. 353 (2022); Anthony J. Colangelo, *Extraterritoriality and Conflict of Laws*, 44 U. PA. J. INT'L L. 1 (2022); Daniel B. Listwa & Lea Brilmayer, *Jurisdictional Problems, Comity Solutions*, 100 TEX. L. REV. 1373 (2022); John F. Coyle, *The Mystery of the Missing Choice-of-Law Clause*, 56 U.C. DAVIS L. REV. 707 (2022); William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020); Katherine Florey, *Substance-Targeted Choice-of-Law Clauses*, 106 VA. L. REV. 1107 (2020); William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389 (2020); Maggie Gardner, *Foreignness*, 69 DEPAUL L. REV. 469 (2020); Lea Brilmayer & Charles Seidell, *Jurisdictional Realism: Where Modern Theories of Choice of Law Went Wrong, and What Can Be Done to Fix Them*, 86 U. CHI. L. REV. 2031 (2019); Aaron D. Simowitz, *The Extraterritoriality Formalisms*, 51 CONN. L. REV. 375 (2019).

31 To this one can add discussion of the American Law Institute's proposed RESTATEMENT (THIRD) OF CONFLICT OF L. (AM. L. INST., Tentative Draft No. 4, 2023). *See, e.g.*, Joseph William Singer, *Choice of Law Rules*, 50 CUMB. L. REV. 347 (2020); Lea Brilmayer & Daniel B. Listwa, *Continuity and Change in the* Draft Restatement (Third) of Conflict of Laws*: One Step Forward and Two Steps Back?*, 128 YALE L.J.F. 266 (2018); Kermit Roosevelt III & Bethan R. Jones, *The* Draft Restatement (Third) of Conflict of Laws*: A Response to Brilmayer & Listwa*, 128 YALE L.J.F. 293 (2018).

international law in the United States was often generated by interstate disputes concerning slavery.[32] Later culture wars that motivated interest in the field concerned interracial and same-sex marriage.[33] And we are in the middle of another culture war—about states' regulation of abortion post-*Roe v. Wade*.[34] In divisive times, it becomes more important than ever to study the body of law whose purpose is allowing states and nations with different fundamental policies to live together in harmony.

But what makes the trend most puzzling is that American law schools increasingly emphasize their international law offerings.[35] To highlight the oddity that these same law schools are cutting a foundational course in international law, we have used the course's name in civil law countries—*private international law*.[36] In common law countries, like the United States, it is usually called *conflict of laws* (or *conflicts*, for short).[37]

We suspect that part of the problem is that many American law professors and law school administrators are unaware that conflict of laws *is* private international law. One of us is an editor of a volume on the philosophical foundations of private international law,[38] and in conversation several law professor friends (we won't name names) told him that they weren't aware that he worked on private international law, even though they knew that he worked on conflicts. Reintroducing conflicts to the law school curriculum might be as simple a matter

32 *See, e.g.*, Lynn D. Wardle, *From Slavery to Same-Sex Marriage: Comity Versus Public Policy in Inter-Jurisdictional Recognition of Controversial Domestic Relations*, 2008 BYU L. REV. 1855, 1865–92; Note, *American Slavery and the Conflict of Laws*, 71 COLUM. L. REV. 74 (1971).

33 Wardle, *supra* note 32, at 1893–1919. There was a flurry of conflicts articles on same-sex marriage in the decades before *Obergefell v. Hodges*, 576 U.S. 644 (2015). *See, e.g.*, Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

34 Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); *see, e.g.*, David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023); Paul Schiff Berman, Roey Goldstein & Sophie Leff, *Conflicts of Law and the Abortion War Between the States*, 172 U. PA. L. REV. 399 (2024); Joseph William Singer, *Conflict of Abortion Laws*, 16 NE. U. L. REV. 313 (2024); Roger Michalski, *How to Survive the Culture Wars: Conflict of Laws Post-*Dobbs, 72 AM. U. L. REV. 949 (2023).

35 David Tobenkin, *Legal Minds: Internationalization is Expanding Rapidly at Law Schools*, 2009 INT'L EDUCATOR 28, 28.

36 *See Conflict of Laws*, BLACK'S LAW DICTIONARY (12th ed. 2024).

37 *See* David D. Siegel, *A Retrospective on* Babcock v. Jackson*: A Personal View*, 56 ALB. L. REV. 693, 693 (1993).

38 Green et al., *supra* note 29.

as rebranding the course to make its connection with international law clear, as Georgetown has done.[39]

But is the law covered in an American conflicts course really international? A body of law might be called international based on its *source* (those responsible for its creation), its *subject* (the transactions it deals with), or its *motivations* (the considerations involved in its creation). Let's start with the argument that the law taught in an American conflicts course is not international because it has a domestic source. It is largely created by state lawmakers (in particular, state courts) and, to the extent that these courts are limited in their power, these limits are also domestic, for they have their source in the United States Constitution.[40]

As a threshold matter, this argument, if valid, applies equally to conflicts and private international law courses offered in foreign jurisdictions. It is true that foreign courses will usually cover conflict-of-laws treaties[41] (which are largely ignored in this country[42] because, with some minor exceptions, we are not parties[43]). But the bulk of the law

39 At Georgetown it is called "Conflict of Laws (Private International Law)." *Law 084 v04: Conflict of Laws (Private International Law)*, GEORGETOWN L. CURRICULUM GUIDE, https://curriculum.law.georgetown.edu/course-search/ [https://perma.cc/8T45-Y7DT] (search in search bar for "conflict of laws").

40 In particular, the Full Faith and Credit Clause and the Due Process Clause of the Fifth and Fourteenth Amendments limit state courts' power. U.S. CONST. art. IV, § 1; *id.* amends. V, XIV § 1; *see* Sun Oil Co. v. Wortman, 486 U.S. 717, 730–31 (1988).

41 *See, e.g.*, E-mail from Carlos Vásquez, Assoc. Dean for Graduate and Int'l Programs, Georgetown Univ. L. Ctr., to Michael Green, Professor, William & Mary L. Sch. (Nov. 1, 2024) (on file with author).

42 *See, e.g.*, HERMA HILL KAY, LARRY KRAMER, KERMIT ROOSEVELT & DAVID L. FRANKLIN, CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS (11th ed. 2022).

43 The Senate has ratified only the United Nations Convention on Contracts for the International Sale of Goods, the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, the Hague Convention on the Civil Aspects of International Child Abduction, the Hague Convention on Intercountry Adoption, the Hague Convention on Service Abroad, the Hague Convention on Taking Evidence Abroad, and the Hague Convention on the Legalization of Foreign Public Documents. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. TREATY DOC. NO. 98-9, 1489 U.N.T.S. 3; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3; Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 98; Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, S. TREATY DOC. NO. 105-51, 32 I.L.M. 1134; Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (1969); Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, July 27, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231; Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, Oct. 5, 1961, 33 U.S.T. 883, 527 U.N.T.S. 189.

taught is likewise the domestic law of that country—law that tells the country's courts how to deal with international cases.

More fundamentally, it is not clear that *all* of the law taught in a conflicts/private international law course has a domestic source. In the past, conflicts scholars, including those in this country, understood a nation's power to create binding laws and judgments to be limited by genuinely international (or transnational) law.[44] This law of legislative and personal jurisdiction authorized nations' officials to regulate international transactions—and the officials' efforts were legally invalid to the extent that they went beyond that authorization. Legislative and personal jurisdiction are now understood to be broader than they once were,[45] but they still have limits, and it remains an open question whether those limits are simply what the relevant nation's domestic law says they are.

In this respect, private and public international law are twins. Just as one might argue that there is no private international law, because it is only each nation's views about personal and legislative jurisdiction, as expressed in its domestic conflicts law, that have actual legal effect, so one can argue that there is no public international law, because it is only domestic views about nations' rights and duties, as expressed in a nation's law, that matter legally. Despite these worries, we still use the term *public international law*—and questions of whether the law at issue is really international (or really law) are simply issues for discussion in a course on the topic. The same thing is, or should be, true of conflicts/private international law.

And when one moves beyond its source to its subject and motivations, the law taught in an American conflicts course is unquestionably international. It deals with international transactions and takes into account international considerations, such as the appropriate level of comity and cooperation between nations. It is true that most of the cases discussed in a typical American conflicts course involve solely American transactions and parties. This is because American courts still understand states to retain some of the sovereignty of nations and so still take private international law to be implicated in interstate as

44 *See* Michael S. Green, *Legal Monism: An American History*, *in* 1 LEGAL POSITIVISM, INSTITUTIONALISM AND GLOBALISATION: VIENNA LECTURES ON LEGAL PHILOSOPHY 23, 35 (Christoph Bezemek et al. eds., 2018).

45 Concerning personal jurisdiction, compare *Pennoyer v. Neff*, 95 U.S. 714, 736 (1878), with *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Concerning legislative jurisdiction, compare *New York Life Insurance Co. v. Dodge*, 246 U.S. 357, 377 (1918), with *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493, 503 (1939), and *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 313 (1981) (opinion of Brennan, J.).

well as international cases.[46] But this fact—which is a testimony to the greater relevance of private international law in this country—is hardly a reason to describe the law taught as purely domestic. Plenty of the cases discussed (including some of the most important[47]) involve international transactions. And because the conclusions drawn from interstate cases generally apply to international ones too, states' conflicts law is created with international considerations in mind.

In short, despite their increasing emphasis on international law offerings, law schools have been cutting a foundational course in what can only be described as international law. But perhaps this trend is not as disturbing as it seems, because students get a sufficient introduction to this body of international law in first-year civil procedure.

Private international law has three main areas: personal (or adjudicative) jurisdiction, choice of law, and the recognition of foreign judgments. And it is true that American law students typically get substantial exposure to personal jurisdiction in civil procedure. It is also common for the course to briefly discuss state courts' obligations to recognize and enforce sister-state judgments.

Because it is covered in civil procedure, an American conflicts course (unlike a conflicts or private international law course in a foreign law school) often omits personal jurisdiction. And concerning the recognition of foreign judgments, it tends to focus on what civil procedure ignored, such as the recognition of the judgments of foreign nations. Its main focus, however, is choice of law. And choice of law is given little, if any, attention in civil procedure.

Most choice-of-law questions are about selecting between jurisdictions' substantive law. Should the tort (or contract or property) law of jurisdiction A or jurisdiction B be used? And the many choice-of-law approaches employed by state, federal, or foreign courts to answer these questions are at best only touched upon in an American civil procedure course.

A smaller set of choice-of-law questions concerns substance/procedure problems. A court of jurisdiction A is entertaining an action under the substantive law of jurisdiction B and the question is whether the law of A or of B (or, indeed, of a third jurisdiction) should determine the *means* by which B's action is litigated in A's court. Here too the average American civil procedure course will not discuss how state or foreign courts solve these problems.

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46 Another reason is that constitutional limits on states' choice-of-law methods are remarkably weak. *See Allstate*, 449 U.S. at 313.

47 *See, e.g.*, Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963) (New York vs. Ontario); Home Ins. Co. v. Dick, 281 U.S. 397 (1930) (Texas vs. Mexico); Hurtado v. Superior Ct., 522 P.2d 666 (Cal. 1974) (California vs. Mexico); Milkovich v. Saari, 203 N.W.2d 408 (Minn. 1973) (Minnesota vs. Ontario).

What is often covered is the so-called *Erie* doctrine, which concerns the extent to which a federal court entertaining a state law action should use federal or state standards in determining how the action is litigated.[48] Because the *Erie* doctrine brings up unique issues of the role of federal courts—including worries about vertical forum shopping—it is different from the substance/procedure questions faced by state and foreign courts.[49] The *Erie* doctrine is not a proper introduction to the topic and to treat it as if it were is a recipe for confusion.

Another argument that the disappearance of conflicts from the law school curriculum is not a problem is that a practitioner can identify a choice-of-law issue and get up to speed on the relevant law in short order. The truth, however, is that one is unlikely to recognize a choice-of-law issue without having taken conflicts. We have often been shocked at how law professors without a conflicts background (again, we are not naming names) will make questionable choice-of-law inferences in the course of an argument, based on nothing more than their a priori intuitions. They appear to be unaware that there is *law*—and law that differs markedly as one moves from one state or nation to another—on the matter. One can recognize a choice-of-law issue only by knowing what is possible, and someone who has not taken conflicts will not know the universe of possibilities.

And even if a litigator recognizes a choice-of-law issue, getting up to speed on the relevant law can be difficult. One hurdle is picking up the theory that stands at the basis of the relevant state's approach. Concerning most areas of law, professors' theories are of minimal importance to courts deciding cases. But choice of law is different. It is, to our knowledge, the only area of law where professors' theories are, in effect, the positive law of a state. Robert Leflar's "better law" approach is the law of Minnesota.[50] William Baxter's comparative impairment approach is the law of California.[51] The *Restatement (First) of Conflict of Laws*—which is largely the product of the Harvard law professor (and first dean of the University of Chicago Law School) Joseph Henry

48 It is in the context of the *Erie* doctrine, for example, that students will commonly learn that a federal court sitting in diversity uses the choice-of-law rules of a forum state court (without learning in detail what those rules are). *See* Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487 (1941).

49 *See* Michael Steven Green, *The Twin Aims of* Erie, 88 NOTRE DAME L. REV. 1865, 1881–87 (2013).

50 Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1588 (1966); SYMEON C. SYMEONIDES, CHOICE OF LAW 145–47 (2016).

51 William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 42 (1963); SYMEONIDES, *supra* note 50, at 165–68.

Beale—is the law of Virginia.[52] These professorial theories are not the sort of thing a litigator can pick up on the fly.

To make matters worse, an effective choice-of-law argument does not merely require familiarity with the underlying theory but also with the freedom that the theory allows (or that courts using the theory in fact tolerate). That does not mean that "anything goes" in a choice-of-law argument: depending on the relevant approach, there are good arguments and bad ones. But there is nevertheless a wide variety of arguments that each approach permits. Only those who have taken a course in conflicts are likely to be familiar with this argumentative freedom, allowing them to run circles around their opponents.

For these (and other) reasons, we consider the fact that conflicts has dropped out of so many law schools' curricula to be a serious mistake, and we ask the schools at issue to reintroduce the course and to strongly consider hiring those who work in the field.

52 *See* McMillan v. McMillan, 253 S.E.2d 662, 663 (Va. 1979); SYMEONIDES, *supra* note 50, at 145–47.