AFTER THE REVOLUTION – DECLINE AND RETURN OF U.S. CONFLICT OF LAWS

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I. Introduction: The Aging Revolution

When lawyers outside the United States think of (and write about) new developments in private international law in the United States, they usually think of the choice-of-law revolution with its new theories and new approaches. They think of Walter Wheeler Cook's local law theory with its counter-intuitive idea that judges, when they proclaim to apply foreign law, in reality create local law specifically catered to the case with its interstate or international implications. They think of the full-blown attack on traditional private international law by Brainerd Currie's interest analysis, which asks for the court to explicitly address the policies underlying specific substantive law rules from different legal systems and the question of how to deal with potential true conflicts among those rules. They think of David Cavers's attack on what he called system-selecting choice-of-law rules and his preference for rule-selecting approaches that do not designate the applicable contract law in general but instead determine the applicable law rule by rule, even

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¹ W.W. COOK, The Logical and Legal Bases of the Conflict of Laws (1942).

² B. Currie, Selected Essays on the Conflict of Laws (1963).

issue by issue.³ They think of William Baxter's idea of comparative impairment,⁴ of Ehrenzweig's *lex fori* theory,⁵ of Leflar's 'better law theory,⁶ and of von Mehren's and Donald Trautman's functionalism.⁷

In other words, the new developments they think of are old news. The U.S. conflicts revolution has aged, and it has not aged well. The foundations for the revolution were formulated in the 1920s and 1930s; the most important theoretical texts and judicial decisions stem from the 1950s and 1960s. The Second Restatement of Conflict of Laws dates from 1971 and is thus older than the vast majority of conflicts codifications worldwide. The most famous case – *Babcock v. Jackson*, which overcame the strict territoriality principle for the law of torts – is almost 50 years old. Its holding, the application of the law of the parties' common domicile to liability for an accident suffered elsewhere, is now, from a comparative law perspective, unexciting. Tellingly, in his authoritative recent book on the past, present, and future of the revolution, Symeon Symeonides confines the chapter on 'the scholastic revolution' to 'the writings of the most influential members of the revolution's first generation, all but three of whom are now deceased.'

Even more discomfiting, however, is Prof. Symeonides' subsequent list of '[t]he next generation, the present. ', [...]a diverse and prolific group that includes revolutionaries, counter-revolutionaries, and reformers,' because most of the articles for which he cites this group were written decades ago, too. Even if a number of more recent publications, by these and other authors, could be added,¹² the

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³ D. CAVERS, The Choice-of-Law Process (1965); id., The Choice of Law: Selected Essays 1933-1983 (1985).

⁴ W. F. BAXTER, 'Choice of Law and the Federal System', in: 16 Stan. L. Rev. 1 (1963).

 $^{^{5}}$ A. A. Ehrenzweig, 'The Lex Fori -Basic Rule in the Conflict of Laws', in: 58 $\it Mich.\ L.\ Rev.\ 637\ (1960).$

⁶ R. B. Leflar, 'Choice-Influencing Considerations in Conflicts Law', in: 41 *NYU L. Rev.* 367 (1966); id., 'More on Choice Influencing Considerations', in: 54 *Cal. L. Rev.* 1584 (1966).

⁷ A. T. VON MEHREN & D. TRAUTMAN, *The Law of Multistate Problems* (1965).

⁸ 191 N.E.2d 279 (N.Y. 1963); republished, e.g., in H. SCHACK, *Höchstrichterliche Rechtsprechung zum Internationalen Privat- und Verfahrensrecht* (2d ed. 2000) case no. 21, p. 89, where all other published decisions (except for two other non-German decisions) are more recent.

 $^{^{9}}$ K. Siehr, 'Revolution and Evolution in Conflicts Law', in: 60 $\it La.\ L.\ Rev.\ 1353$ (2000).

¹⁰ S. C. SYMEONIDES, *The American Choice-of-Law Revolution: Past, Present and Future* (2006) 9-35. The book is a revised version of S. C. SYMEONIDES, *The American Choice-of-Law Revolution in the Courts: Today and Tomorrow*, 298 Rec. des cours 1 (2003).

¹¹ Id. at 9, n. 5.

¹² For recent bibliographies, see S. C. SYMEONIDES, 'Conflict of Laws Bibliography: U.S. Sources, 2005-2006', in: 54 *Am. J. Comp. L.* 789 (2006); id., 'Private International Law

general gist seems clear: some fifty years after the revolution, the intellectual excitement that once defined U.S. scholarship has largely petered out.¹³ One gets the feeling that the revolution has run out of steam; it is merely being administered. At the same time, the opposition to the revolution has lost interest, apparently unable to present viable alternatives.

A similar picture emerges from case law. Symeonides' annual surveys of conflict-of-laws decisions in U.S. courts, published in the *American Journal of Comparative Law*, ¹⁴ have long ceased to report big methodological developments, largely because there are none. This would not be a reason for despair if courts' decisions still provided valuable insights, or at least some continuity could be discovered, but neither really is the case. What we observe could be called, euphemistically, pragmatism in the solution of conflict-of-laws problems: all available methods can be used to justify all desirable (and undesirable) outcomes, so the best approach is to downplay the importance of method altogether and instead resolve cases on the basis of what seems right. Less euphemistically, this could be called muddling through – making necessary decisions without a clear theoretical framework of why they should come out *this* way rather than another.

It is remarkable how much the crisis of conflict of laws is a particularly US-American, or perhaps North American, ¹⁵ matter. Elsewhere in the world, conflict of laws is thriving. Europe is perhaps the most obvious example. Some scholars have suggested that the difference is due to the European preference for evolution, a slow, gradual development of conflicts thinking, over revolution. ¹⁶ Others, less generously, think that Europeans are still caught in naïve faith in the power of formal doctrine. By contrast, I have argued that these developments amount to a veritable choice-of-law revolution, European style. ¹⁷ Developments in Europe, both legislative and in the case law of the Court of Justice, replace the traditional conflict of laws paradigm with one based on the federalization and

Bibliography 2007-08: U.S. and Foreign Sources in English', in: 57 Am. J. Comp. L. 331-346 (2009).

 $^{^{13}}$ K. Knop, R. Michaels & A. Riles, 'Foreword: Transdisciplinary Conflicts of Law', in: K. Knop et al. (note *) 1, 3.

¹⁴ Most recently S. C. SYMEONIDES, 'Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey', in: 58 *Am. J. Comp. L.* 227 (2010) with references for earlier reports. These reports are also available at http://www.willamette.edu/wucl/journals/wlo/conflicts.

¹⁵ For Canada, see the references in K. KNOP, R. MICHAELS & A. RILES (note 13) 2-3.

¹⁶ E.g. J. VON HEIN, 'Something Old and Something Borrowed, but Nothing New? Rome II and the European Choice-of-Law Evolution', in: 82 *Tul. L. Rev.* 1663 (2008); D. SOLOMON, 'The Private International Law of Contracts in Europe: Advances and Retreats', in: 82 *Tul. L. Rev.* 1709 (2008); S. C. SYMEONIDES, 'The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons', in: 82 *Tul. L. Rev.* 1741-91 (2008).

¹⁷ R. MICHAELS, 'Die europäische IPR-Revolution: Regulierung, Europäisierung, Mediatisierung', in: *Festschrift J. Kropholler* (2008), 151-173; English version as 'The New European Choice-of-Law Revolution', in: 82 *Tul. L. Rev.* 1607-1644 (2008).

constitutionalization of private international law, and by a plurality of methods: different methods apply to conflicts between laws of the member states and conflicts with the law of third countries; classical conflict of laws and new regulatory conflict of laws methods stand in productive conflict with each other.

In some ways, the European revolution is in even more radical than the American one, because it has achieved goals that the U.S. revolution missed, notably the federalization and constitutionalization of choice of law. The U.S. revolution, by contrast, led to a dead end, perhaps because it did not go far enough in two aspects central to early realist critiques: politics and theory. The revolution discarded old doctrinal instruments of conflicts – characterization, renvoi, preliminary questions – as mere formalism, fig leaves concealing the politics at stake, the social goals aimed at. A new theory of law emphasized law's relation to social ends. The plea to formalize these social goals was incorporated in governmental interest analysis, which essentially views every law as the embodiment of some governmental policy. But in application, governmental interests were depoliticized and detheorized: To be manageable, these interests had to be stripped of their political and social content and treated as mere preferences, data. The antiformalism of the revolution spurred a method that spawned a new formalism.

Is there a chance for a revival? There has been talk, most recently at a big conference at New York University in the spring of 2009, of a new Restatement of Conflict of Laws, to replace the Restatement Second, which is forty years old and has been controversial from the start.²⁰ At present, support for such a project does not seem great. The main counterargument against such a Restatement – that the field is in such disarray that there is nothing to restate – seems overstated: debates over a new Restatement might very well spur the necessary broader discussions, as did discussions over earlier Restatements. The big problem is not virulent disagreement but rather uniform disenchantment: the inability in the field to even discuss issues of politics and theory makes it hard to see how the necessary excitement could be spurred that would be needed for such a broader discussion.

There is little hope for such excitement in the core of the discipline – especially choice of law for tort and contract – because, it seems, everything that could be said (and more) has already been said; 'everything worthy of trying has been

¹⁸ Ibid. at 1643.

¹⁹ Cf. A. RILES, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities', in: 53 *Buff. L. Rev.* 973 (2005), 1018-21.

²⁰ 'Symposium: The Silver Anniversary of the Second Conflicts Restatement', in: 56 *Maryland L. Rev.* 1193 (1997); 'Symposium: Preparing for the Next Century – A New Restatement of Conflicts', in: 75 *Indiana L. J.* 399-686 (2000); S.C. SYMEONIDES, 'A New Conflicts Restatement: Why Not?', in: 5 *J. Pr. Int. L.* 383-424 (2009); see also M. TRAYNOR, 'The First Restatements and the Vision of the American Law Institute, Then and Now', in: 32 *So. Ill. U. L. J.* 145 (2007).

tried before, under the same or other labels.'²¹ However, not all is lost. There are in fact exciting developments in conflict of laws, but they are taking place at the fringes and not in the center. Politics is an issue for the most hotly debated topic in conflict of laws at the moment, same-sex marriage, and many scholars of marriage law or gender studies have become interested in conflict of laws. Theory is an issue for interdisciplinary interest in conflict of laws from the perspective of other disciplines – economics, political science, anthropology. What some of the participants in these debates lack in specific conflict of laws expertise, they make up for by bringing new perspectives into an intradisciplinary debate that has long been chasing its own tail. In the next two sections I discuss these developments in turn, and analyze what they could mean for a broader revival of U.S. conflict of laws, before addressing, briefly, the implications for a new Restatement.

II. The Return of Politics: Same-Sex Marriage

The focus of the choice-of-law revolution and of most debates on method had been on contract and torts. Both of these areas have consolidated – contracts especially through the acceptance of party autonomy, tort law through what may be loosely described as a presumption for *lex loci* with an exception for common domicile cases. The most important developments today happen outside the law of obligations, first among them the question of same-sex marriage.

Same-sex marriage is currently one of the most disputed political topics generally, and the country remains deeply divided over the issue. The first state to legalize same-sex marriage was Massachusetts, where a 2003 court decision declared the ban on same-sex marriage to be a violation of the state constitution.²² Since 2008, developments have accelerated tremendously. On the one hand, courts in California,²³ Connecticut²⁴ and Iowa²⁵ have rendered decisions under their own states' constitutions by and large similar to the one in Massachusetts. Legislators in Vermont,²⁶ Maine²⁷ and New Hampshire²⁸ and the District of Columbia²⁹ took

²¹ K. H. NADELMANN, 'Marginal Remarks on the New Trends in American Conflicts Law', in: 28 *Law & Contemp. Probs.* 860 (Autumn 1963), cited in F. K. JUENGER, *Choice of Law and Multistate Justice* 6 (1993).

 $^{^{22}}$ Goodridge v. Department of Public Health, 798 N.E.2d 941 (Sup. Jud. Ct. Mass. 2003).

²³ In re Marriage Cases, 183 P.3d 384 (Sup. Ct. Cal. 2008).

²⁴ Kerrigan v. Commr. of Pub. Health, 957 A.2d 407 (Sup. Ct. Conn. 2008).

²⁵ Varnum v. Brien, 763 N.W.2d 862, (Sup. Ct. Iowa 2009).

 $^{^{\}rm 26}$ 15 Vermont Statutes Annotated \S 8, as amended by 2009 Vermont Laws No. 3 (S. 115).

²⁷ An Act To End Discrimination in Civil Marriage and Affirm Religious Freedom, 2009 Maine Legislative Service Ch. 82 (S.P. 384) (L.D. 1020). The Act explicitly also granted recognition to same-sex marriage celebrated elsewhere.

similar steps through the legislative process. On the other hand, opposition against these movements is strong. Referenda have overturned the decisions in California³⁰ and in Maine;³¹ the New York State and New Jersey Senates have each rejected proposals to legalize same-sex marriage in domestic law in the last half year.³² Furthermore, some thirty states explicitly reject same-sex marriage in either statute or their constitution. Thus, although one may expect some more states to recognize same-sex marriage in the future, chances are that differences among states will remain.

Although much of the debate on same-sex marriage concerns substantive law, the topic has also spurred significant conflict of laws debates.³³ That alone is not surprising, given the differences between state laws, the lack of uniform federal law that would trump such law, and the frequency with which Americans, including same-sex couples, travel across state boundaries. More surprising perhaps is how much the interest groups themselves – supporters of same-sex marriage on the one hand, defenders of exclusive classical marriage on the other – are focusing not just on substantive law but strongly on conflict of laws. Indeed, both sides have stakes in conflict of laws. Mutual recognition among states would make it unnecessary to change laws in every state to allow for same-sex marriage – same-sex partners could travel to get married in Massachusetts and subsequently have their marriage recognized in their home states. (Under most choice-of-laws approaches the *lex celebrationis* governs the validity of marriage.)

What is fascinating in the debate is how politics reenters the conflict of laws discussion. In Europe, politics became a part of conflict-of-laws discussions once European choice of law became federalized (or Europeanized) and

²⁸ New Hampshire Revised Statutes § 457:1-a.

²⁹ D.C. Code § 46-401.01, as amended by the Religious Freedom and Civil Marriage Equality Amendment Act of 2009, L18-110, effective March 3, 2010

³⁰ Proposition 8 (2008) added sec. 7.5 to Art. 1 of the State Constitution: 'Only marriage between a man and a woman is valid or recognized in California.' The amendment was held compatible with the California Constitution in *Strauss v. Horton*, 207 P.3d 48 (Sup Ct. Cal. 2009), The court ruled, however, that the approximately 18,000 same-sex marriages that took place in 2008 would remain valid. Ibid. at 119 ff. For the impact on marriages celebrated elsewhere, see infra, text after note 42. A challenge in federal court is pending as *Perry v. Schwarzenegger*, where the challengers are represented by former U.S. Solicitor General (in the Bush administration) Theodore Olson and David Boies, famous lawyers who had been on opposite sides in *Bush v. Gore*, the US Supreme Court decision that decided the presidential election in 2000.

³¹ 19-A Maine Revised Statutes Annotated § 650.

³² New York State Senate Votes Down Gay Marriage Bill, *New York Times*, 3 December 2009, p. A1; New Jersey Senate Defeats Gay Marriage Bill, *New York Times*, 8 January 2010, p. A18.

³³ The most comprehensive analysis is A. KOPPELMAN, *Same Sex, Different States.* When Same-Sex Marriages Cross State Lines, Yale Univ. Press 2006; an excellent brief survey is P. HAY, 'Recognition of Same-Sex Legal Relationships in the United States', in: 54 Am. J. Comp. L. 257 (2006).

constitutionalized (especially in the ECJ jurisprudence on the fundamental freedoms).34 The U.S. conflict-of-laws revolution had stopped short of federalization and constitutionalization, against the wishes of many of its proponents. Now, some of this is taking place, at the least in same-sex marriage debate, putting politics back into the debate. Let me address each of these developments in turn.

A. Constitutionalization

The most intensive discussion concerns the U.S. Constitution and the question whether it requires states to recognize marriages celebrated elsewhere. The basis for this argument is Full Faith and Credit Clause (Art. IV Sec. 1) of the U.S. Constitution:

'Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof'.

The first sentence could require states to recognize marriages celebrated elsewhere if two conditions are met - that 'full faith and credit' announces a duty to recognize, and that marriage celebrations qualify as 'public acts' in the sense of the Constitution. Historically, the provision was understood to relate merely to evidentiary force of state acts; what exact effects were to be given to acts of other states would have been left to Congress, as the second clause of the provision suggests. 35 Today, the clause has different relevance for choice of law and for judgments: As regards judgments, it is understood to require states to recognize each other's court decisions (with few limitations). As regards choice of law, by contrast, the clause has almost no impact under Supreme Court law.36 Traditionally, the clause was read not to preclude states from denying recognition for marriages celebrated elsewhere, but recent scholarship has drawn this interpretation into question.).37 Lower

³⁴ R. MICHAELS (note 17).

³⁵ Most recently, D.E. ENGDAHL, 'The Classic Rule of Faith and Credit', in: 118 Yale L.J. 1584 (2009); S. E. SACHS, 'Full Faith and Credit in the Early Congress', in: 95 Va. L. Rev. 1201 (2009), both with further references.

³⁶ Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981); Sun Oil v. Wortman, 486 U.S. 717 (1988); Franchise Tax Board of California v. Hyatt, 538 U.S. 488 (2003). The current interpretation of the clause is summarized in R. U. WHITTEN, 'Full Faith and Credit for Dummies', in: 38 Creighton L. Rev. 465 (2005).

³⁷ E.g. L. Kramer, 'Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception', in: 106 Yale L.J. 1965 (1997); cf. R. U. WHITTEN, 'The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act', in: 32 Creighton L. Rev. 255 (1998); S. E. Cox, 'Nine Questions About Same-Sex Marriage Con-

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courts faced with the question have so far denied a duty for states to recognize same-sex marriages celebrated abroad, at least for their own domiciliaries.³⁸ By contrast, recognition of marriage celebrated in foreign countries, e.g. in Canada, is not a matter for the full faith and credit clause, so there is little doubt that the public policy exception is available,³⁹ although of course states remain free to recognize foreign-nation marriages, too.⁴⁰

B. Federalization

The Constitutional issues have spurred a rarity in conflict of laws: federal legislation. Unlike most other conflict-of-laws issues that are left to the states, the recognition of same-sex marriages is an issue that has for some time engaged the federal legislator. One reason is that substantive family law is largely a matter for state law; the federal legislator can only define marriage insofar as it concerns federal law. By contrast, interstate recognition of laws, judgments, and other public acts is a matter available to the U.S. Congress under the Full Faith and Credit clause of the U.S. Constitution, as are federal questions.

Traditionally, the definition of marriage was left to the states; whether marriages celebrated elsewhere could be recognized was a conflict-of-laws issue largely determined by courts. Now, with all the attention, the question has become more complicated. In response to the acceptance of same-sex marriage in Massachusetts, several states have adopted either legislation or constitutional amendments explicitly refusing the recognition of same-sex marriages celebrated elsewhere. In other states that recognize domestic same-sex marriages, the decision has been made to also recognize same-sex marriages celebrated elsewhere. Frequently, the position on the latter decision is derived directly from the domestic policy: a state that refuses same-sex marriage domestically will, for that reason alone, deny recognition to marriages celebrated elsewhere. For example, in California, marriages celebrated elsewhere before the referendum are recognized under the

flicts', in: 40 New Eng. L. Rev. 361 (2006), 377-84. As a consequence, the Defense of Marriage Act, discussed under B., would be unconstitutional.

³⁸ Wilson v. Ake, 354 F.Supp.2d 1298 (M.D.Fla., 2005).

³⁹ Hennefeld v. Township of Montclair, 22 N.J.Tax 166 (N.J. Tax 2005); Funderburke v. New York State Dep't of Civ. Servs., 822 N.Y.S.2d 393 (Nassau County Sup. Ct. 2006) (but see also Funderburke v. State Dept. of Civil Service, 854 N.Y.S.2d 466 (2d Dep't 2008)); Lane v. Albanese, 2005 WL 896129 (Conn.Super.,2005).

⁴⁰ *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (N.Y. App. Div. 4th Dep't 2008), leave to appeal dismissed, 889 N.E.2d 496 (2008); see also *Godfrey v. DiNapoli*, 866 N.Y.S.2d 844 (New York Sup. Ct. 2008).

 $^{^{\}rm 41}$ E.g. Opinion of the Attorney-General of Connecticut, 2005 WL 2293060 (Conn.A.G.).

Marriage Recognition and Family Protection Act of 2009; marriages celebrated later get all legal rights of marriage but not the status.⁴²

However, in a number of states, differences exist. Although a New York Court had declared the ban on same-sex marriage under New York's own substantive law to be constitutional,⁴³ the decision of a New York county to nonetheless recognize same-sex marriages celebrated elsewhere has been upheld.⁴⁴ Moreover, the governor of New York in 2008 directed all state agencies to recognize marriages celebrated validly elsewhere.⁴⁵ Similarly, the Council for the District of Columbia voted to recognize same-sex marriages celebrated elsewhere,⁴⁶ well before it allowed same-sex couples to marry domestically. A Texan court held that the constitutional ban on same-sex marriage in Texas violates the federal Constitution and thus does not prevent recognition of a same-sex marriage celebrated in Massachusetts to provide a jurisdictional basis for divorce proceedings.⁴⁷

In response to fears that the acceptance of same-sex marriage in individual states might effectively bind other states and the federal legislature the U.S. Congress passed, in 1996, the Defense of Marriage Act (DOMA).⁴⁸ The act defines, for purposes of federal law, marriage as a union between a man and a woman.⁴⁹ Moreover, it leaves the question of interstate recognition of same-sex marriages and civil unions to each individual state.⁵⁰ This latter part has been much criticized,

 $^{^{\}rm 42}$ California 2009 Legislative Service Ch. 625 (S.B. 54), amending Section 308 of the Family Code.

 $^{^{43}}$ Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); for the fate of a recent legislative proposal, see supra n. 33.

⁴⁴ Godfrey v. Spano, 13 N.Y.3d 358 (New York Court of Appeals 2009).

⁴⁵ Constitutionality of the directive under the New York State Constitution has been upheld: directive/executive order has been challenged, and its constitutionality has been upheld: *Golden v. Paterson*, 877 N.Y.S.2d 822 (N.Y.Sup., 2008). For developments in New York, see Arthur S. Leonard, 'New York Recognition of Legal Status for Same-Sex Couples: A Rapidly Developing Story', in: 54 N.Y. L. Sch. L. Rev. 479 (2010).

 $^{^{46}}$ D.C. Code \S 46-405.01, as amended by the Jury and Marriage Amendment Act of 2009, L 18-9 effective July 7, 2009.

 $^{^{47}\} In\ re\ J.B.$ (District Court of Texas, 302nd Judicial District. 2009), 2009 WL 3316580.

⁴⁸ Defense of Marriage Act (DOMA) (Pub.L. 104-199, Sept. 21, 1996, 110 Stat. 2419).

⁴⁹ I U.S.C. Sec. 7: 'In determining the meaning of any act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies in the United States, the word «marriage» means only a legal union between one man and one woman as husband and wife, and the word «spouse» refers only to a person of the opposite sex who is a husband or a wife.'

⁵⁰ 29 U.S.C. Sec. 1738: 'No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of

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although it is not clear whether it changes very much, at least as regards the recognition of marriages themselves. If, as many think, states are free to decide whether to recognize marriages celebrated under the U.S. Constitution, then the provision is merely declaratory. If, on the other hand, the Full Faith and Credit clause is read to require states to recognize marriages celebrated elsewhere, as some argue, then a statute cannot change this and would be unconstitutional and therefore invalid.⁵¹ The bill's sponsors' hope was that states would feel free to reject recognition without the need to resort to a strong public policy exception,⁵² though it is not clear why this changed much with regard to existing law. A more complicated question is whether DOMA can release the states from their duty to recognize foreign judgments that recognize same-sex marriages, given that the duty to recognize sister-state judgments is considered all but absolute.⁵³

A 2006 constitutional proposal, the 'Federal Marriage Amendment,' later called 'Marriage Protection Amendment', which failed to reach the necessary qualified majority, tried to go further, though its exact meaning was always ambiguous.⁵⁴ Its first sentence suggested a uniform definition of marriage (for federal and state law) as a union between a man and a woman; its second sentence, by contrast, suggested merely that no Federal or State Constitution should be read to require same-sex marriage, apparently leaving it open for the legislature to allow it. Although President Bush explicitly justified the proposed amendment with the potential effect of decisions in one state on the rest of the country,⁵⁵ the impact of the amendment on the liberty of states to decide whether to recognize marriages celebrated elsewhere was not clear.⁵⁶

the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.'

- ⁵¹ Cf. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 n.18 (U.S. Sup. Ct. 1980): 'while Congress clearly has the power to increase the measure of full faith and credit that a State may accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court.'
 - ⁵² House Report No. 104–664 at 10-11.
- 53 See the discussion in L. D. WARDLE, 'Non-Recognition of Same-Sex Marriage Judgments under DOMA and the Constitution', in: 38 *Creighton L. Rev.* 365 (2005).
- 54 For details on both legislative history and academic commentary, see Th. B. Colby, 'The Federal Marriage Amendment and the False Promise of Originalism', in: 108 $\it Colum.~L.~Rev.~529~(2008).$
- ⁵⁵ G. W. Bush, President Calls for Constitutional Amendment Protecting Marriage: Remarks by the President (Feb. 24, 2004), available at http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html>.
- ⁵⁶ Cf. W. SINGER, 'Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation', in: 1 *Stan. Civ. Rts. Civ. Liberties J.* 1 (2005) 46 ('One thing is clear however; if adopted, this provision would allow states to refuse to recognize same sex marriages validly performed in other jurisdictions.') with H. WILKINSON III, 'Gay Rights and American Constitutionalism: What's a Constitution For?', in: 56 *Duke L. J.* 545 (2006), 553-57.

C. The Return of Politics

After all the developments, states remain in all likelihood still largely free to determine whether or not to recognize marriages celebrated elsewhere. Nonetheless, the federal legislation is by no means irrelevant: it highlights the crucial element of federalism in the same-sex marriage debate. Often, federalism discussions are confined to the vertical dimension: how much regulatory discretion is left to the states vis-à-vis the federal government. In the same-sex marriage context, the horizontal dimension, the relation between states, comes to the fore. How can states still define what should count as a marriage if parties can simply enter elsewhere into a marriage that their home state must then recognize? On the other hand, what is the value of same-sex marriage if it loses its effectiveness once the parties cross state boundaries? The debate on same-sex marriage reintroduces these big political topics into conflict-of-laws debates that had otherwise become detached and merely technical, and it reintroduces them in very concrete ways.

It is important to see the difference between politics in the same-sex marriage debate and in governmental interest analysis. Interest analysis uses political preferences of states as data; whether Texas should recognize a marriage celebrated in Massachusetts depends on which state cares more about this, not on the content of the policies as such. In this vein one can argue that 'the conflicts issues have little to do with the pros and cons of same-sex marriage.'58 But that does not seem to grasp the conflicts debate, which appears, on both sides, very much as an extension of a substantive law debate. Conflict of laws is seen as a tool to promote certain public policies parallel to their promotion in substantive law, and this is what gets so many non-conflicts scholars interested in the debate. However, conflicts is not merely the continuation of substantive laws by other means. The recognition of a marriage that has been validly celebrated, even if elsewhere, is obviously quite different from the provision of domestic procedures to get married. The challenge for married same-sex couples coming from a change of status once they travel among states is quite different from the challenge coming from not being able to marry at all.

Another aspect gives the conflict-of-laws issue a partial autonomy from the substantive law debate. Conflict of laws addresses problems and provides techniques that go beyond the pure 'yes or no' dichotomy in substantive law. In conflict-of-laws decisions, a variety of issues arise beyond the mere recognition of a status – intramarital obligations, visiting rights, adoption rights, succession, etc. – and the considerations may be different for each one of these. ⁵⁹ Further, it is in the conflict-of-laws situation that the subtle differences between the regimes of different states that all allow same-sex unions in one way or other play a role,

⁵⁷ See, most recently, J. RENSBERGER, 'Interstate Pluralism: The Role of Federalism in the Same-Sex Marriage Debate', in: *B.Y.U.L. Rev.* 1703 (2008).

⁵⁸ S.E. Cox (note 39), at 361.

 $^{^{59}}$ T. WOLFF, 'Interest Analysis in Interjuris dictional Marriage Disputes', in: 153 $\it U$. $\it Penn.\ L.\ Rev.,\ 2215-50.\ (2005).$

because the foreign status must somehow be made to fit into the domestic legal landscape.⁶⁰

The potential of conflict of laws is twofold, as the same-sex marriage debate demonstrates: First, it brings to the fore the conflict between different conceptions as an actual conflict (of laws), not a mere technical question without real political relevance. Second, it responds to the conflict in a way catered to the specifics of the case, not on an abstract level.61 This potential of conflict of laws as an alternative site for political debate is not confined to same-sex marriage. For example, Karen Knop shows that although we ordinarily think of citizenship as public, private international law covers some of the same ground. 62 In fact, conflict of laws as private citizenship has particular value in a post-9/11 world because its treatment of enemy aliens, illegal immigrants, and members of religious immigrant groups and other minorities offers us examples of already-existing cosmopolitanism within the common law. Rather than deny the political relevance of these contexts, then, conflict of laws has a more differentiated way of dealing with them. As Marianne Constable points out from the perspective of political theory, conflict of laws can be thought of as the discipline that deals with 'meaningful cross-state politics and actions by non-simply-state players.'63

III. The Return of Theory: Interdisciplinarity

Once it is clear (again) that conflict of laws is not 'merely' about pure technicalities, the need for a proper theory becomes acute again. Indeed, a second development can be seen in new attempts to theorize conflict of laws, in particular from an interdisciplinary perspective. In 1987, Richard Posner named 'the destruction of certainty in the field of conflict-of-laws' as a prime example of the inadequacy of lawyerly as opposed to interdisciplinary reform. More recently, the general trend towards interdisciplinarity has begun to spread to conflict of laws – first from the social sciences, more recently also from the humanities and critical theory. Some

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⁶⁰ H. Y. LEVIN, 'Resolving Interstate Conflicts Over Marriage, Marriage-Like, and Marriage-Lite Relationships' (2009), available at http://works.bepress.com/hillel_levin/>.

⁶¹ See K. KNOP, R. MICHAELS & A. RILES, 'International Law in Domestic Courts: A Conflict of Laws Approach' (2009) at 10, available at http://ssrn.com/abstract=1413189>.

 $^{^{62}}$ K. Knop, 'Citizenship, Public and Private', in: 71/3 Law & Cont. Probs. 309 (Summer 2008).

 $^{^{63}}$ M. Constable, 'Afterword: Conflicts as a Law of Laws?', in: 71/3 $\it Law$ & $\it Contemp. Probs.$ 343 (Summer 2008).

⁶⁴ R. POSNER, 'The Decline of Law as an Autonomous Discipline: 1962-1987', in: *Harv. L. Rev.* 100 (1987) 761, 769-70; see also his fundamental criticism in *Kaczmarek v. Allied Chemical Corp.*, 836 F.2d 1055 (7th Cir. 1987).

⁶⁵ See especially *Law & Contemp Probs* 71/3 (Summer 2008): 'Transdisciplinary Conflicts' (K. KNOP, R. MICHAELS & A. RILES, special eds.) (note *).

of this interdisciplinary work comes from conflict-of-laws scholars who, disappointed by traditional methods, or perhaps in search of new things to say, import approaches from outside the law. Some such work comes from scholars from other disciplines altogether – economics, political science, anthropology – who view conflict of laws as a fruitful field for experimentation. Sometimes, these interdisciplinary approaches amount to little more than reformulations of traditional approaches in conflict of laws. Sometimes, however, the new perspectives open new potential for the discipline.

A. Law and Economics

The greatest interdisciplinary interest comes from law and economics. For a long time, conflict of laws was largely out of sight for economic analysis. More recently, however, we have begun to see a small boom in interest, not only in academic scholarship,⁶⁶ but also occasionally in court decisions. One example is the decision in *Spinozzi v. ITT Sheraton Corp.*, where Richard Posner found an economic justification for the presumption that *lex loci delicti* should apply to claims in tort law:⁶⁷

For that is the place that has the greatest interest in striking a reasonable balance among safety, cost, and other factors pertinent to the design and administration of a system of tort law. Most people affected whether as victims or as injurers by accidents and other injury-causing events are residents of the jurisdiction in which the event takes place. So if law can be assumed to be generally responsive to the values and preferences of the people who live in the community that formulated the law, the law of the place of the accident can be expected to reflect the values and preferences of the people most likely to be involved in accidents — can be expected, in other words, to be responsive and responsible law, law that internalizes the costs and benefits of the people affected by it.

As a consequence, Mexican tort law was applied, even though the specific case concerned only U.S. parties – an Illinois domiciliary as plaintiff, and Sheraton Corp., a US-based corporation, as owner of the Hotel in Mexico where the plaintiff had suffered an injury. Judge Posner's argument that Mexico has a regulatory

⁶⁶ A collection of representative articles (in two volumes) is E. O'HARA (ed.), *The Economics of Conflict of Laws, Elgar Publishing* (2007); a recent survey with a comprehensive bibliography is E. O'HARA & L. E. RIBSTEIN, *Conflict of Laws and Choice of Law* (2009), available at http://ssrn.com/abstract=1499311>.

⁶⁷ 174 F.3d 842, 845 (7th Cir. 1999). Discussed in S. C. SYMEONIDES, 'Choice of Law in the American Courts 1999: One More Year', in: 48 *Am. J. Comp. L.* 143, 150-52. Judge Posner has reiterated the principle announced in the case frequently, most recently in *Abad v. Bayer Corp.*, 563 F.3d 663, 669 (7th Cir. 2009) and in *Kamelgard v. Macura*, WL 3400953 at *6 (7th Cir. 2009) (where the principle was not extended to defamation).

advantage over accidents happening in Mexico has been challenged in another economic analysis by Jack Goldsmith and Alan Sykes.⁶⁸ They argue that the basis for *lex loci delicti* lies not in regulatory advantage but in principles of antidiscrimination in trade (and thus in economics-based principles of market competition): If a state applied Mexican law to Mexican-owned hotels in Mexico and U.S. law to US-owned hotels in Mexico, it would discriminate against the U.S. owner because U.S. law is more plaintiff-friendly than Mexican law.⁶⁹

Broadly speaking, three different models of law and economics scholarship exist in conflict of laws. A first model extends ideas from private law, in particular private ordering and efficiency among individuals, into private international law. Not surprisingly, given the starting point, there is an emphasis on party autonomy; otherwise, choice-of-law rules should either promote private ordering or otherwise appear as the result of hypothetical bargaining between individuals. A second model, based on interest analysis, focuses on regulatory interests among states and seeks efficient accommodation of these interests. Most solutions in this field end up with a sophisticated version of Baxter's comparative impairment solution. A third model, finally, takes the theory of regulatory competition as a starting point and assesses the interaction between conflict of laws and domestic law, in particular the incentives for states to adapt their substantive laws in view of their scope of application.

All of these proposals hold potential for conflict of laws. The first two models ultimately tend to collapse into substantive law paradigms (of private law and international law respectively),⁷⁵ which means that they challenge conflict of laws to take seriously its basis in one or the other substantive law fields, even

⁶⁸ J. L. GOLDSMITH & A. O. SYKES, 'Lex loci delictus and global economic welfare: *Spinozzi v. ITT Sheraton Corp.*', in: 120 *Harv. L. Rev.* (2007) 1137.

⁶⁹ More generally on the impact of WTO law on conflict of laws, see M. KRAUS, *Die Auswirkungen des Welthandelsrechts auf das Internationale Kollisionsrecht* (2007).

⁷⁰ R. MICHAELS, 'Economics of Law as Choice of Law', in: 71 *Law & Contemp. Probs.* 73, 77-87; for application to choice of law in torts, R. MICHAELS, 'Two Economists Three Opinions? Economic Models for Private International Law – Cross-Border Torts as Example', in: J. BASEDOW & T. KONO (eds.), *An Economic Analysis of Private International Law* (2006) 143.

⁷¹ E. O'HARA & L. E. RIBSTEIN, 'From Politics to Efficiency in Choice of Law', in: 67 U. Chi. L. Rev. 1151 (2000); see also M. J. WHINCOP & M. KEYES, Policy and Pragmatism in the Conflict of Laws (2001) (a book by two Australian scholars but with impact in the United States).

⁷² E. O'HARA & L. E. RIBSTEIN, *The Law Market* (2009).

⁷³ J. Trachtman, *The Economic Structure of International Law* (2008).

⁷⁴ See, e.g., M. J. WHINCOP & M. KEYES (note 71); E. O'HARA & L.E. RIBSTEIN (note 71); J. P. TRACHTMAN, 'Economic Analysis of Prescriptive Jurisdiction', in: 42 Va. J. Int'l L. 1 (2001); J. P. TRACHTMAN, 'Conflict of Laws and Accuracy in the Allocation of Government Responsibility', in: 26 Vand. J. Transnat'l L. 975 (1994).

 $^{^{75}}$ R. MICHAELS (note 70), at 94-101; see also K. ROOSEVELT, $\it Conflict$ of Laws (2010) 39-41.

though it is unlikely they will lead to fundamentally new approaches or even theories. The third model provides considerations that are altogether absent from traditional conflict of laws thinking and that may prove fruitful ideas.

B. Political Science

Economics is not the only social science with a newly found interest in conflict of laws; another is political science. For a long time, that was not the case. Lea Brilmayer argued earlier that the application of foreign law had to be justified in considerations of rights and fairness, and that the application of a certain law to a person had to be justified on political grounds,76 but she has moved her scholarly interest to other areas. Anne-Marie Slaughter's earlier work on international law and international relations incorporated conflict of laws because it has a place for private actors and thus for private international law;77 but conflict of laws no longer plays a role in her recent work. 78 Most political theory still ignores conflict of laws; even analyses in international relations that address prescriptive jurisdiction and sovereignty rarely deal with matters of conflict of laws. However, this may be changing. Political science analyses draw attention to the connection between private international law and global governance in a way that is largely ignored by insider experts. At the same time, political science and political theory may (re)insert a political perspective into a discipline that has long been defined by technicalities. These, ironically, are based on concepts like governmental interests that once carried enormous political significance.

To begin with empirics, one fashionable topic in political science in the United States is the determination of factors that impact judicial decisions. Political scientists are often skeptical that legal doctrine has any role to play, let alone a decisive one, in how judges rule on cases. Earlier empirical studies came to the same conclusion for choice of law and thereby fed into the general criticism of conflict of laws as a field with too many methodological approaches that ultimately leave too much discretion to judges to decide cases as they see fit.⁷⁹ By contrast, a recent analysis by Chris Whytock on choice of law in international transactions,

⁷⁶ An exception is L. BRILMAYER, 'Rights, Fairness and Choice of Law', in: 98 Yale L.J. 1277 (1989).

⁷⁷ E.g. A.-M. SLAUGHTER, 'Liberal International Relations Theory and International Economic Law', in: 10 *Am. U. J. Int'l L. & Pol'y* 717 (1995) 730 ('The choice of law governing individuals and groups in transnational society is an important factor shaping the predictability and facility of transnational social relations.')

⁷⁸ A.-M. SLAUGHTER, A New World Order (2004).

⁷⁹ M. E. SOLIMINE, 'An Economic and Empirical Analysis of Choice of Law', in: 24 *Ga. L. Rev.* 49 (1989); P. J. BORCHERS, 'The Choice-of-Law Revolution: An Empirical Study', in: 49 *Wash. & Lee L. Rev.* 357 (1992); S. E. THIEL, 'Choice of Law and the Home-Court Advantage: Evidence', in: 2 *Am. L. & Econ. Rev.* 291 (2000), 305; see also S.C. SYMEONIDES (note 10), and the critique by H. Y. LEVIN, 'What Do We Really Know About the American Choice-of-Law Revolution?', in: 60 *Stan. L. Rev.* 247 (2007).

using more sophisticated regression analysis than some earlier studies, reaches the result that methods do have an impact on the outcome of cases. 80 This result is relevant for conflict of laws not only because it suggests that conflict of laws doctrine is practically relevant; more importantly, it reenters conflict of laws among the disciplines relevant for global governance, a point that Whytock makes elsewhere, too. 81

C. Legal Pluralism

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A third interdisciplinary approach to conflict of laws integrates insights from legal pluralism, a concept previously formulated mainly within anthropology. Paul Schiff Berman has drawn on ideas of legal pluralism to argue for an approach to conflict of laws that is both cosmopolitan (and thus more open than current approaches to foreign claims to regulation) and pluralist (and thus open to the designation of non-state normative orders as applicable law). The cosmopolitan component of this suggestion sounds not revolutionary for the European tradition, but it is certainly welcome in the United States. The pluralist suggestion that non-state law should be applied under a choice-of-law analysis, by contrast, might have the potential to reinvigorate the methodological debates because some traditional factors – governmental interests, territorial connections – are unavailable for communities that have neither governments nor territories.

While this amounts largely to a one-way translation from pluralism to private international laws, other scholars focus more on a mutual interaction between both fields. Robert Wai, writing in the international business context, lauds accounts of global legal pluralism for their analyses of the growth of multiple normative orders and their recognition of inter-legality, meaning the superimposition, interpenetration, and mixture of different legal spaces in both

⁸⁰ C. A. WHYTOCK, 'Myth of Mess? International Choice of Law in Action', in: 84 N.Y.U. L. Rev. (2009) 719.

⁸¹ С. A. WHYTOCK, 'Domestic Courts and Global Governance', in: 84 Tulane Law Review (forthcoming 2009). See also T. PUTNAM, 'Courts Without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere', in: 63 International Organization 459-490 (2009).

 $^{^{\}rm 82}$ See also R. MICHAELS, 'Global Legal Pluralism', in: 5 Annual Review of Law 243 (2009).

⁸³ See P. S. Berman, 'Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era', in: 153 U. Pa. L. Rev. 1819 (2005); P. S. Berman, 'The New Legal Pluralism', in: 5 Annual Review of Law and Social Science 225 (2009), 234-36.

⁸⁴ See N. HATZIMIHAIL, 'On Mapping the Conceptual Battlefield of Private International Law', in: 13 *Hague Y.B. Int'l L.* 57 (2000).

⁸⁵ R. MICHAELS, 'The Re-State-ment of Non-State Law, The State, Choice of Law, and the Challenge from Global Legal Pluralism', in: 51 *Wayne L. Rev.* 1209 (2005).

mind and action.⁸⁶ However, he argues that while these accounts serve as an important corrective to a doctrinal focus on state norms, they overemphasize non-state normative orders, for example, insisting on a purely non-state *lex mercatoria* unrecognizable to legal practitioners. For Wai, they also miss the full extent of their own conception of inter-legality. He proposes instead 'transnational private law' as a frame of reference that adds private international law to private law, thereby reminding us of private law's concern with relationships among plural and transnational normative orders, both state and non-state.

As a last example, Annelise Riles shows how contemporary anthropological insights into the character of cultural difference and cultural fragmentation can reframe conflict-of-laws analysis in productive ways.⁸⁷ Taking up the example of the treatment of Native American sovereignty in U.S. courts, she argues that a theory of conflict of laws as a discipline devoted to addressing the problem of cultural conflict is more doctrinally illuminating than the mainstream view of conflict of laws as political conflict. Rethinking these cultural conflicts, examining them through the prism of recent anthropological insights about culture as a problem of empathetic description and collaborative engagement with others, both reveals the importance of conflicts as a field and draws attention to aspects of the field's methodology, such as the description of foreign law, that are given too little attention in mainstream analyses.

D. The Return of Theory

The benefits of different interdisciplinary approaches to conflict of laws can be shown in the example discussed previously, namely same-sex marriage. Writing in the social sciences, particularly law and economics, can simplify and bring more order to the discussion. Thus, from a law-and-economics perspective, the proposal has been made that the law of the place of celebration should determine all effects as between the parties, but that states remain free to define the third-party effect of marriages celebrated elsewhere. Law-and-economics authors freely admit that this is more a perspective than a solution, leaving specific questions open. By contrast, writings from the humanities and critical theory help add necessary complexity, by demonstrating the social meaning of legal recognition. For example, Brenda Cossman demonstrates how recognition of same-sex marriage takes place not only through court decisions but also, more publicly, in announcements in the *New York Times*. She also shows how the invocation of

 $^{^{86}}$ R. WAI, 'The Interlegality of Transnational Private Law', in: 71/3 $\it Law~\&~Contemp.~Probs.~107$ (Summer 2008).

⁸⁷ A. RILES, 'Cultural Conflicts', in: 71/3 Law & Contemp. Probs. 273 (Summer 2008).

 $^{^{88}}$ F. Buckley & L. E. Ribstein, 'Calling a Truce in the Marriage Wars', in: *U. Ill. L. Rev.* 561 (2001).

⁸⁹ E. O'HARA & L.E. RIBSTEIN (n. 72) at 165-66.

public policy against same-sex marriage celebrated elsewhere paradoxically reinforces the existence of gay and lesbian marriage as a political problem, and recognizes the validity of a same-sex marriage, even if celebrated elsewhere. In this sense, the very proceedings in which courts decide whether to recognize a same-sex marriage celebrated elsewhere is already an act of recognition insofar as the proceedings must recognize publicly, for purposes of the proceedings, the existence of this very marriage, even if they ultimately deny legal recognition. We see a similar occurrence in the Texan decision reported above: if a marriage celebrated in Massachusetts is recognized for the purpose of allowing divorce, its effect is paradoxical: the marriage in question is at the same time recognized as valid and destroyed through the divorce. This kind of paradoxical (and fruitful) engagement with the issues of same-sex marriage would be hard to conceive in domestic law, yet it also requires theoretical analysis to become visible.

We see, thus, two promises of the new interdisciplinarity in conflict of laws. One use of interdisciplinarity currently in vogue seeks to directly translate insights from other disciplines into substantive legal rules. Even though the rules that result from such translations often merely resemble what already existed before the doctrine, the interdisciplinary lens provides an additional perspective on what exists. Unfortunately, interdisciplinary suggestions for legal rules rarely achieve the complexity and specificity needed for adequate legal solutions; this is nowhere more true than in conflict of laws. This seems to be true especially for the United States: recent economic analysis of choice of law pursued by European and Japanese scholars is more closely tied to doctrine. But the return to simple models may be beneficial for a discipline mired in complexities.

Another use of interdisciplinarity can be both to highlight the specific sensitivities and rationalities existing within conflict of laws and to develop a new, richer and more theoretical, view of the field. Thus, political-science analyses draw attention to the connection between private international law and global governance in a way that is largely ignored by insider experts. The insights of legal plu-

⁹⁰ B. COSSMAN, 'Betwixt and Between Recognition: Migrating Same-Sex Marriages and the Turn Toward the Private', in 71/3 *Law & Contemp. Probs.* 153-68 (Summer 2008).

⁹¹ The flipside is true as well: non-recognition of the marriage means divorce is impossible, so the marriage survives. D. JOHNSON, 'Same-Sex Divorce Jurisdiction: A Critical Analysis of *Chambers v. Ormiston* and Why Divorce is an Incident of Marriage That Should Be Uniformly Recognized Throughout the States', in: 50 *Santa Clara L. Rev.* 225 (2009).

⁹² An Economic Analysis of Private International Law (J. BASEDOW & T. KONO eds., 2006); G. RÜHL, 'Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency', in: Essays In Memory of A.T. von Mehren (2007); G. RÜHL, 'Methods and Approaches in Choice of Law: An Economic Perspective', in: 24 Berkeley J. Int'l L. 801 (2006); H. MUIR WATT, 'Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy', in: 9 Colum. J. Eur. L. 383 (2003); H. MUIR WATT, 'Aspects économiques du droit international privé', in: 25 Rec. des cours 307 (2004).

ralism can help develop an understanding of the sensitivities necessary to deal with the global legal pluralism that characterizes the situation of law in today's world.

IV. Conclusion: Ready for a New Restatement?

What does all of this mean for a new Restatement? A Restatement would have to consist of some type of rules, and this presents a problem in a discipline that has, at least in the United States, become deeply suspicious of rules. Admittedly, the emphasis on politics has not prevented a certain return to legal rules in choice of law.93 Courts in New York attempted to formulate their approach to determining the law applicable for guest statute conflicts (and later loss-allocating rules more generally) in what has become known as the Neumeier rules, but these rules have not gained many fans. 94 Choice of law has since been codified, arguably with more success, in Louisiana95 and Oregon – first for contracts,96 then generally.97 This is sometimes viewed with relief - at last, as basis for judicial decisions - but often with suspicion. Opposition to technique is deeply engrained in U.S. post-realist legal thinking; technique and rules are viewed as standing in opposition to politics and theory. For example, Gary Simson, himself a highly regarded scholar of conflict of laws, has suggested that the interstate and conflict-of-laws discussion distracts from the real issue, which is not whether states can or cannot recognize marriages celebrated elsewhere but if they have the right to refuse same-sex marriage under their own law.98 This would suggest that truly political questions

⁹³ J. KROPHOLLER & J. VON HEIN, 'From Approach to Rule-Orientation in American Tort Conflicts, in Law and Justice in a Multistate World', in: *Essays in Honor of A.T. von Mehren* (2002), 317.

⁹⁴ For discussion, see S.C. SYMEONIDES, (note 10), at 105-14; for criticism, see, e.g., G. SIMSON, 'The Neumeier-Schultz Rules: How Logical a «Next Stage in the Evolution of the Law» after Babcock?', in: 56 *Alb. L. Rev.* 913 (1993).

⁹⁵ Book IV of the Louisiana Civil Code, La. Civ. Code Ann. arts. 3515-3549; see P. BORCHERS, 'Louisiana's Conflicts Codification: Some Empirical Observations Regarding Decisional Predictability', in: 60 La. L. Rev. 1061 (2000); S. C. SYMEONIDES, 'The Conflicts Book of the Louisiana Civil Code: Civilian, American, or Original?', in: 83 Tul. L. Rev. 1041 (2009).

⁹⁶ J.A.R. NAFZIGER, 'Oregon's Conflicts Law Applicable to Contracts', in: 3 Yb. Pr. Int. L. (2001), 391 (republished in 38 Willamette L. Rev. 397 (2002)); S. C. SYMEONIDES, 'Codifying Choice of Law for Contracts: The Oregon Experience', in: 67 RabelsZ 726 (2003); S. C. SYMEONIDES, 'Oregon's Choice-of-Law Codification for Contract Conflicts: An Exegesis', in: 44 Willamette L. Rev. 205-52 (2007).

⁹⁷ Chapter 451, 2009 Laws (signed into law June 23, 2009; effective January 1, 2010).

⁹⁸ G. J. SIMSON, 'Beyond Interstate Recognition in the Same-Sex Marriage Debate', in: 40 U.C. Davis L. Rev. 313 (2006).

are matters for substantive law and for the constitution, but not for the technicalities of conflict of laws. And indeed, the heritage from legal realism seems to suggest an insurmountable difference between politics and theory on the one hand, doctrine on the other.

Symeonides has suggested that one way to deal with this problem is to formulate a technique that faces no opposition from politics or theory because it mirrors their outcome. He suggests using empirical surveys of outcomes to conflict-of-laws cases⁹⁹ as the basis for the formulation of new and better rules.¹⁰⁰ He has applied this approach for rather general rules on issues of loss-distribution¹⁰¹ and conduct regulation¹⁰² as well as cross-border torts¹⁰³ and, more specifically, for product liability.¹⁰⁴ Now, he suggests using the experiences gained in the process as a basis for a third Restatement of Conflict of Laws, though one limited to the law of obligations.¹⁰⁵

The return to rules and thus an openly technical approach to choice of law may serve as a welcome antidote to the exaggeratedly open-ended approaches favored in the conflicts revolution. The revolution in the United States was directed against, and thus spurred by, the particular choice-of-law rules formulated in the First Restatement, leaving open the possibility that better rules than the ones formulated in the First Restatement are possible. The Nonetheless, the fundamental opposition to rules may stymie the development of new, better rules as well. The attempt to ground new rules on surveys of case outcomes, with little attention to either doctrine or theory, may be insufficient. The conflict of laws revolution combined its antiformalism with the rise of politics and theory, but this need not mean that those categories are incompatible. The new developments discussed above may be able to provide substance for projects towards a new Restatement. At the very least, they may help make the field at large interesting enough for a new Restatement to attract the necessary support.

⁹⁹ See above pp. 25-26.

¹⁰⁰ S.C. SYMEONIDES (note 10), at 433-37; see the favorable review by W. M. RICHMAN, 'A New Breed of Smart Empirically Derived Conflicts Rules: Better Law than «Better Law» in the Post-Tort Reform Era: Reviewing Symeon C. Symeonides, 'The American Choice-of-Law Revolution: Past, Present and Future (2006)', in: 82 *Tul. L. Rev.* 2181 (2008).

¹⁰¹ S.C. SYMEONIDES (note 10), at 207-8.

¹⁰² Ibid. at 259-60.

¹⁰³ Even three different options: S. C. SYMEONIDES, 'Choice of Law in Cross-Border Torts: Why Plaintiffs Win, and Should', in: 61 *Hastings L. J.* 337 (2009), 404-411.

¹⁰⁴ S.C. SYMEONIDES (note 10), 346.

¹⁰⁵ S.C. SYMEONIDES (note 10), 20.

¹⁰⁶ For this point, see R. MICHAELS (note 17), at 1611.

¹⁰⁷ S.C. SYMEONIDES (note 10), at 428-29.