AFTERWORD:
CONFLICTS AS A LAW OF LAWS?

MARIANNE CONSTABLE*

I

Law, however conceived, tells its addressees what to do. "Conflicts of laws" decides what law governs when two or more laws claim to tell an addressee what to do. Conflicts is, in some sense then, a law of laws. Just as Hannah Arendt suggested that law constitutes the walls of the polis and that domestic constitutional law is in some sense prior to and distinct from the local and national politics it enables,[1] so too a rethought private international law—as a law of laws—offers exciting possibilities for international or transnational—not merely interstate—politics in an era of increased globalization.

The articles in this symposium suggest that private international law, rethought, could constitute another way of thinking not only about international commercial transactions, but also about meaningful cross-state politics and actions by non-simply-state players. When the traditional forms, contexts, and inscriptions of private international law are shaken up just a bit, they offer—to jurisprudence and political theory, but to other fields as well—fresh ways of considering old questions of relations between states and international law, of relations between domestic laws and fundamental rights, of the recognition of everyday relationships and statuses of persons under varying local laws and customs, and of the proper governance of financial transactions across markets. In its openness to a multiplicity of laws and to what counts as law and in its attention to questions of what to do, conflicts of law as the "law of laws" of our time productively challenges mainstream political-theoretical accounts of sovereignty and citizenship. As it does so, it also blurs the ostensibly bright lines between public and private, state and individual, that seem to ground many liberal institutions of law. The articles thus provoke us to think further not only about conflicts and politics, but also about what is to become of law as we know it.

In the far-ranging accounts of private international law these articles provide, private international law appears in many guises. Conflicts of law. Transnational private law. *Lex mercatoria*. International law merchant. Laws of private business transactions. Global economic law. Extraterritorial state law.

This Article is also available at http://www.law.duke.edu/journals/lcp.
* Professor, Department of Rhetoric, UC Berkeley. E-mail: constable@berkeley.edu.
1. HANNAH ARENDT, THE HUMAN CONDITION 63–64, 194–99 (1958).

Normative ordering. System of regulation. Technique. Principle. Rules. Form. Practice. Outmoded. And revitalized—or potentially so.

Conventionally conceived, private international law distinguishes itself from public international law by its concern not with conflicts involving states and "public"—or criminal and constitutional—law, but with suits between private parties, in such areas as torts, contracts, property, and family law. Private international law or "conflicts law" traditionally addresses which law governs when parties disagree as to whose law should govern. The rethought private international law that emerges from this issue draws attention to international and transnational—not merely interstate—conflicts. And the conflicts described ensue among parties outside, beyond, within states—rather than *between* "private" parties. Even as conflicts are addressed by state institutions, the articles emphasize the permeable and overlapping identities of legal parties whose primary identification is not state citizenship and whose appeal to law is not necessarily to that of positive state law. Together, the articles thus suggest that private international law may offer fruitful insights into the multitudinous and multilayered conflicts of the more-broadly conceived "laws" of a global age.

The importance of this insight transcends the scholarly field and practice of that area of law variously known as conflicts of law or private international law. It resonates for all who are interested in the meanings and possibilities of law and of politics and judgment in a so-called era of globalization. In what follows, this Afterword first shows how questions of conflicts relate to questions of sovereignty, citizenship, and the public–private distinction in politics and economics. It then considers the ramifications of considering conflicts as a law of laws and what such consideration reveals about law in our time.

II

CONFLICTS, LAW, AND POLITICS

Political theorists and others often seem daunted by law. Perhaps the specialization implied by professional training keeps many scholars interested in politics away from legal texts, doctrine, and theory. Perhaps the commitment of political theorists to their own canon largely keeps them from discussing law in any but the most general terms and legal issues in any terms other than those of rights and constitutional values. Whatever the case, conflicts law—itself often considered a marginal area of law in legal education and legal theory—shows how political theorists and others neglect law at their peril. Even if one does not go so far as to accept Arendt's notion of law as constituting the walls of the city, law is fundamental to politics. In a world where politics is all too often conceived simply in relation to the state, conflicts turns out to have much to say about key concerns of political theorists with, for instance, sovereignty and citizenship.

A. Sovereignty

Conflicts of law are regularly adjudicated through state (and European Union) courts. Yet an adjudicating state's consideration and acknowledgment of the law of a foreign state appears as something other than simply the adjudicating state's positivist domestic law. Although such consideration may be considered a principle of domestic law, it can also be characterized—as Joel Paul's article on "comity" reveals[2]—in other ways: as mutuality of obligation, as practice, custom, interest, necessity, policy, and so forth.

The ostensible limit to state authority (from the point of view of the adjudicating state) and the ostensible expansion of state jurisdiction (from the point of view of the foreign state whose law is being invoked) cautions against absolutist and simplistic analyses of state sovereignty. Neither strictly state nor interstate (or "international") law, what is the status of the law that decides among laws? If conflicts law, roughly speaking, governs conflicts among laws, what becomes of the state and of the authority and reach of state law?

States are conventionally thought to lawfully exercise jurisdiction on the basis of territoriality or of citizenship. Conflicts law itself complicates any easy identification of a state's jurisdiction with the physical borders of state territory or with the membership of its citizen–subjects. Articles such as those of Teemu Ruskola, on early twentieth-century U.S. exercise of extraterritorial jurisdiction in China,[3] and of Andrea Slane, on the challenges to legal conceptions of jurisdiction posed by Internet practices,[4] show how even conflicts-law categories may become more complicated—or their complications reduced or denied—in practice. Brenda Cossman's study of the appearance in public cultural spaces of non–legally recognized "migrating" same-sex marriages—unions entered into in one jurisdiction whose partners seek recognition in another—suggests the further possibility of spaces that are only incompletely governed by state law.[5]

B. Citizenship

The study of conflicts law not only cautions against taking territoriality for granted, but also warns against accepting parallels between such apparent dichotomies as citizen and noncitizen, rights-bearer and non–rights bearer, state subject and non–state subject. A party invoking a foreign law relates to both the foreign law and the law of the state in which the suit occurs. At a minimum then, conflicts law suggests the possibility of a party's relations and obligations to the laws of more than one state.

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2. Joel R. Paul, *The Transformation of International* Comity, 71 LAW & CONTEMP. PROBS. 19 (Summer 2008).

3. Teemu Ruskola, *Colonialism Without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China*, 71 LAW & CONTEMP. PROBS. 217 (Summer 2008).

4. Andrea Slane, *Tales, Techs, and Territories: Private International Law, Globalization, and the Legal Construction of Borderlessness on the Internet*, 71 LAW & CONTEMP. PROBS. 129 (Summer 2008).

5. Brenda Cossman, *Betwixt and Between Recognition: Migrating Same-Sex Marriages and the Turn Toward the Private*, 71 LAW & CONTEMP. PROBS. 153 (Summer 2008).

Conflicts certainly occurred and were adjudicated before the emergence of state law as such, however.[6] In England and in the U.S., changes in conceptions of membership, alienage, and community correspond to changes in legal practices for dealing with conflicts and with the story of the emergence of legal positivist conceptions of state law. In part an account of how aliens are and are not accorded their law in Anglo-American history, Karen Knop's article argues for thinking about citizenship less in terms of political participation or cultural membership as such than in terms of status in and access to law.[7]

Although one's identities are not limited to those accorded by state law, state courts recognize status under state law. Audra Simpson shows how the dismissal of a RICO suit against R.J. Reynolds brought in the U.S. by Canada to recover revenue losses presumed the legitimacy of only two regimes of state law and completely disregarded the possibility of indigenous political orders.[8] As *lex mercatoria* becomes a buzzword for those with an interest in a-national or supra-national systems and a concern for market liberalization, Nikitas Hatzimihail too moves beyond a concern with state law to show how different historical narratives of the law merchant correlate to differing contemporary legacies and disputes in contemporary private international law.[9]

C. The "Private"

If a rethought private international law draws attention to the limitations of usual thinking about state sovereignty and political membership, it also disturbs stock thinking in law and elsewhere about the very distinctions between private and public law, the nature of the private sphere, and the meaning of a private person or party. Others have suggested that private international law may offer resources for thinking about public law. Jacco Bomhoff's article critiques and qualifies this suggestion while developing it.[10] Bomhoff looks to cases involving extraterritorial extensions of rights and execution of foreign judgments to show how private international law offers compelling ways of thinking about domestic fundamental-rights issues in cases that involve "foreign elements" and are not wholly internal to the domestic order.

In the context of an enlarged "private sphere" that includes global or at least transnational commercial activity, "private" parties' contractual agreements to use arbitration or to sue in the courts of or to abide by the law of

6. *See* MARIANNE CONSTABLE, THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW AND KNOWLEDGE 7–8 (1993).

7. Karen Knop, *Citizenship, Public and Private*, 71 LAW & CONTEMP. PROBS. 309 (Summer 2008).

8. Audra Simpson, *Subjects of Sovereignty: Indigeneity, the Revenue Rule, and the Juridics of Failed Consent*, 71 LAW & CONTEMP. PROBS. 191 (Summer 2008).

9. Nikitas E. Hatzimihail, *The Many Lives—and Faces—of* Lex Mercatoria*: History as Genealogy in International Business Law*, 71 LAW & CONTEMP. PROBS. 169 (Summer 2008).

10. Jacco Bomhoff, *The Reach of Rights: "The Foreign" and "The Private" in Conflict-of-Laws, State-Action, and Fundamental-Rights Cases with Foreign Elements*, 71 LAW & CONTEMP. PROBS. 39 (Summer 2008).

a particular state challenge the ostensible primacy of state law and interests. Robert Wai's article warns that private-law norms in some ways allow private interests to regulate state and nonstate "normative orders."[11] Fleur Johns's article then shows how private-law presumptions attributing coherence to the agreements of "private" parties downplay—or downright disregard—the diverse practices of many contributors to "deals" where boiler-plate arbitration, forum-selection, and choice-of-law clauses may receive little or no attention.[12]

III

LAW OF LAWS OR LAW NO MORE?

The relevance of the analyses in these articles to concerns in a variety of fields—politics, economics, sociology, anthropology, jurisprudence—raises issues about the place of legal scholarship and of conflicts law not only in the academy but more broadly. Setting aside the topic of transdisciplinarity addressed in the introduction to this issue, one might still wonder whether conflicts law, interpreted here as a law of laws, might someday become a "model" for resolving transnational conflicts.

The answer is no. Even as the innovative and subtle articles in this symposium show how conflicts law offers new ways of thinking about politics, none go so far as to assert that the new private international law could decide, determine, or dictate outcomes. Indeed, the articles mine private international law for what it offers to various fields of analysis, ever-cognizant of its limitations. Ralf Michaels' article even shows how the appropriation of private international law by the subfield of economics known as rational choice, for instance, succeeds only in regurgitating in economic formulas ideas already found in private-international-law doctrines.[13] And even as Annelise Riles explicitly suggests that conflicts of law can serve as a resource for thinking about conflicts of cultures, she is careful to acknowledge the circumscribed forms within which conventional conflicts law analyses proceed.[14]

All this is to the good. That the rethought private international law of this issue could never serve as a model for law or global governance is not a drawback. On the contrary, it points—as do many of the articles—to the limitations inherent in our desires for law to provide formulas, models, and fail-safe techniques for telling us what to do. At a time when the knowledge and reality of law is generally taken to be the knowledge and reality of statistics and of state law that claims increasing mastery over the world, understanding conflicts as a law of laws offers possibilities for thinking about politics—and

11. Robert Wai, *The Interlegality of Transnational Private Law*, 71 LAW & CONTEMP. PROBS. 107 (Summer 2008).

12. Fleur Johns, *Performing Party Autonomy*, 71 LAW & CONTEMP. PROBS. 243 (Summer 2008).

13. Ralf Michaels, *Economics of Law as Choice of Law*, 71 LAW & CONTEMP. PROBS. 73 (Summer 2008).

14. Annelise Riles, *Cultural Conflicts*, 71 LAW & CONTEMP. PROBS. 273 (Summer 2008).

law—in terms other than those of the state, state policies, state interests, and the instrumental means thereto.

State power today lies in a mastery of social organization that manifests itself in state policies, which are neither the outcome of divine sovereignty nor the direct commands of human sovereigns. States and their policies deny the status of law to all that does not pertain to the interests of the state and of the society it ostensibly governs. Acknowledging the laws of others, as conflicts law does (even when it decides in favor of the forum law or treats the foreign law selected as "fact"), drives a wedge into the seemingly monolithic claims of domestic state and public international (or, again, read more properly, "interstate") law to govern or to establish the terms for self-rule.

For Hannah Arendt, fifty years ago, "the . . . 'public' signifie[d] the world itself . . . . To live together in the world," she wrote, "means essentially that a world of things is between those who have it in common, as a table is located between those who sit around it; the world, like every in-between, relates and separates men at the same time."[15] Today, the articles in this symposium suggest, the ostensibly public world that "relates and separates men" is not constructed by a constitutional state law that forms the walls and boundaries of and in the city; constitutional state law no longer makes the table of politics. Rather, a rethought *private* international law, or conflicts law as law of laws, constructs a place in which to consider and discuss how a variety of laws join and divide—or "relate and separate"—parties over issues in common and overlapping causes of action.

The understanding of politics emerging from this symposium upsets the primacy that scholars—of global and local phenomena alike—often accord to politics over law. Law—now broadly understood as non–simply state law—is, as Arendt suggested of constitutional law, prior to the politics of states and also of transnational interactions. The priority of law over politics, though, comes at a cost for those committed to using law to determine what to do. Under the new pluralist conceptions of law, as much as a law claims to tell someone what to do, it cannot determine what is done. Unlike current state law, its claims are not compelling: they must not only be heard, but must also be considered in the context of the claims of other laws before they are acted on.

The priority of law over politics that emerges in the notion of conflicts as a law of laws thus weighs in against the likelihood of finding in such law determinate legal solutions or answers to social and global problems and conflicts. In this sense, the law of laws is a useless law. It fails at the task that state law has inherited and accepted as its own: reconciling, or articulating the reconciliation of, *is* and *ought*. And yet, in failing at this task, the law of laws presented in this symposium nevertheless reveals something about us that state law, in all its knowledge and power, has missed: the world is not in need of such reconciliation. The need for the reconciliation of *is* and *ought*, like the need for

15. Arendt, *supra* note 1, at 52.

the recognition of the conflicts manifest in our laws, is ours. We need to know and judge our world and others in it; we need to be known and judged by others. Law—not necessarily state law—is the way, this symposium shows, that we know and judge others and allow ourselves to be known and judged by others.