

FOREWORD

KAREN KNOP, RALF MICHAELS & ANNELISE RILES*

I

INTRODUCTION: CAVERS'S DOUBLE LEGACY

This issue of *Law and Contemporary Problems* on transdisciplinary conflict of laws¹ comes on a double anniversary. Seventy-five years ago this year, *Law and Contemporary Problems* was founded as Duke's first law journal by David Cavers.² Cavers was a strong proponent of interdisciplinary and empirical approaches to the law, and, in fact, *Law & Contemporary Problems* was founded as an interdisciplinary alternative to traditional law reviews.³ The journal has since honored this openness to interdisciplinary studies.

Of course, Cavers was not only a proponent of interdisciplinarity; he was also a leading figure in conflict of laws. In 1933, the same year in which Cavers inaugurated *Law and Contemporary Problems*, he published his seminal "Critique of the Choice-of-Law Problem," one of the cornerstones of the early legal-realist critique of traditional methods in conflict of laws and still one of the

Copyright © 2008 by Karen Knop, Ralf Michaels, and Annelise Riles.

This article is also available at <http://www.law.duke.edu/journals/lcp>.

* Faculty of Law, University of Toronto.

** Professor of Law and Director, Center for International and Comparative Law, Duke University School of Law.

*** Jack G. Clarke Professor of Far East Legal Studies, Cornell Law School, and Professor of Anthropology, Cornell University.

This symposium issue grew out of a small workshop organized at the Faculty of Law, University of Toronto, and a conference held subsequently at Cornell Law School. We warmly thank the contributors to the issue. This symposium issue has also benefited from the comments and support of the other participants in these events: Nathaniel Berman, Dan Danielsen, David Fraser, Janet Halley, Marie-Andrée Jacob, Mitchel Lasser, Alex Mills, Ed Morgan, Sergio Muñoz-Sarmiento, Kunal Parker, Alain Pottage, Kim Lane Scheppelle, Gary Simson, Chantal Thomas, and Joel Trachtman. We draw on their work here as indicated.

1. Outside the United States, conflict of laws is often called "private international law." In this introductory article, we will use the two terms, and the term "conflicts," interchangeably.

2. See *Foreword*, 1 LAW & CONTEMP. PROBS. 1 (1933); David Cavers, *Memorandum to Dean Miller from David F. Cavers: Suggestions with Reference to the Proposed Duke Law Review* (1932); *Proposal Leading To The Creation of Law and Contemporary Problems*, 41 LAW & CONTEMP. PROBS. 167 (Spring 1977).

3. See *Remarks by David F. Cavers to Duke Students Concerning the Origin of and Vision for Law and Contemporary Problems*, 51 LAW & CONTEMP. PROBS. xxiii-xxvi (Summer 1988); see also Lyman Brownfield, *A Tribute to David Cavers*, 51 LAW & CONTEMP. PROBS. xvi (Summer 1988); Erwin Griswold, *David F. Cavers*, 51 LAW & CONTEMP. PROBS. i (Summer 1988); Maurice Rosenberg, *David F. Cavers: Champion of Law-Related Social Research*, 51 LAW & CONTEMP. PROBS. vii (Summer 1988); Albert M. Sacks, *David F. Cavers*, 51 LAW & CONTEMP. PROBS. v (Summer 1988); Paul Carrington, *In Memory of David F. Cavers*, 51 LAW & CONTEMP. PROBS. xii (Summer 1988), as well as the letters contained in *Some Letters from the Dean's Files*, 51 LAW & CONTEMP. PROBS. xviii (Summer 1988).

most influential articles written on choice of law in this country.⁴ The journal has also honored this legacy in several important issues dedicated to problems of conflict of laws, beginning in the second year of its existence.⁵

Cavers's interest in the interdisciplinary study of law and his interest in conflict of laws were interconnected. He later wrote of his famous article, "In Wall Street, financial pillars were collapsing; in Washington, the New Deal was assailing old constitutional barriers; and in the law schools, the Realists were emerging. Past doctrines were there to be challenged. I chose choice of law."⁶ In a similar spirit, this symposium brings together the relation between domestic law and foreign law, encapsulated in the conflict of laws, and the relation between law and other disciplines, expressed in the focus on interdisciplinarity. It does so at an important moment, both for conflict of laws and for interdisciplinarity in law.

Conflict of laws has been relatively dormant for some time. Of course, scholars continually repeat the mantra that private international law is becoming ever more important as international transactions are ever increasing, the same mantra proclaimed by their predecessors in the nineteenth century. But there is a feeling of staleness to these proclamations, at least for North America.⁷ The U.S. Supreme Court has not ruled on interstate conflict of laws since its trilogy of cases in the 1980s;⁸ and its jurisprudence on the extraterritorial application of U.S. law can safely be called erratic and lacking a firm conceptual basis. More is happening in the lower courts, but annual reports⁹ can do little more than map the approaches and criticize the frequently unsatisfactory opinions. In Canada, the Supreme Court systematically rebuilt much of private international law in the early 1990s in four decisions concerning jurisdiction, *forum non conveniens*, recognition of judgments, and choice of law in tort.¹⁰ However, the Court's explicit rejection of all governmental-interest

4. David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

5. See 2 LAW & CONTEMP. PROBS. 289 (Summer 1935) (Migratory Divorce); 21 LAW & CONTEMP. PROBS. 427 (Summer 1956) (The Preventive Law of Conflicts); 28 LAW & CONTEMP. PROBS. 673 (Autumn 1963) (New Trends in the Conflict of Laws); 41 LAW & CONTEMP. PROBS. vi (Winter 1977) (Contemporary Perspectives in Conflict of Laws: Essays in Honor of David F. Cavers); 50 LAW & CONTEMP. PROBS. 1 (Summer 1987) (Extraterritoriality of Economic Legislation); 57 LAW & CONTEMP. PROBS. 1 (Summer 1994) (The Hague Conference on Private International Law).

6. David F. Cavers, *THE CHOICE OF LAW: SELECTED ESSAYS 1933-1983* 4 (1985).

7. By contrast, one of us argues that Europe is experiencing its own conflicts revolution. See Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 TUL. L. REV. 1607 (2008).

8. *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

9. Most recently, Symeon C. Symeonides, *Choice of Law in the American Courts in 2007: Twenty-First Annual Survey*, 56 AM. J. COMP. L. 243 (2008).

10. See *Tolofson v. Jensen*; *Lucas v. Gagnon*, [1994] 3 S.C.R. 1022; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Amchem Prods. Inc. v. British Columbia Workers' Comp. Bd.*, [1993] 1 S.C.R. 897; *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077. See also, e.g., Jason Herbert, *The Conflict of Laws and Judicial Perspectives on Federalism: A Principled Defence of Tolofson v. Jensen*, 56 U. TORONTO FAC. L. REV. 3 (1998); Robert Wai, *In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Canadian Private International Law*, 39 CAN. Y.B. INT'L L. 117 (2001).

approaches to choice of law in favor of a strict, formal *lex loci delicti* rule in tort¹¹ signified a moment of deep disillusionment for many Canadian common-law scholars who had hoped to bring the U.S. “conflicts revolution” to private international law in Canada.¹²

For a long time, such a feeling of staleness existed in conflict-of-laws scholarship, too. With some exceptions, the grand theoretical and methodological projects published in major law reviews had given way to minute analyses of specific doctrinal problems. More recently, though, the general trend towards interdisciplinarity has begun to spread to conflict of laws. Economic analysis has finally reached it. The first wave of writings was largely by economically oriented scholars in the United States whose background and main interest lay in other areas of the law and who found conflict of laws to border on these substantive areas—corporate law, international economic law, and so on.¹³ A second wave of work by (often non-U.S.) scholars of conflict of laws added further doctrinal details of private international law to the economic modeling.¹⁴

The infusion of political-science analyses into private international law has followed a similar trajectory, though on a smaller scale. For a long time, invocations of political ideas in the field amounted to little more than sound

11. *Tolofson v. Jensen*, *supra* note 10. Although *Tolofson* did not resolve all issues of choice-of-law methodology, judges seem to have lost the appetite for them, leaving the approach to these remaining issues unrationalized and unpredictable. See Vaughan Black, *The Continuing Incoherence of Canadian Choice-of-Law Methodology*, in FRAGMENTATION: DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW: PROCEEDINGS OF THE 34TH ANNUAL CONFERENCE OF THE CANADIAN COUNCIL ON INTERNATIONAL LAW 338, 344, 346–48 (2006).

12. See Vaughan Black, *supra* note 11, at 339 (“[I]n years gone by a leading topic of conversation in law faculty common rooms across the country was choice of law methodology. Times have changed.”); John Swan, *Federalism and the Conflict of Laws: The Curious Position of the Supreme Court of Canada*, 46 S.C. L. REV. 923, 948 (1995) (“A judgment written in 1994 that adopts so unequivocally the vested rights theory of conflicts is so unexpected that it is as if one encountered a practicing alchemist: What can one possibly say?”). For two telling snapshots of common-law Canada, compare Richard Risk, *Canadian Law Teachers in the 1930s: “When the World was Turned Upside Down,”* 27 DALHOUSIE L.J. 1, 13–17 (2004) (using John Falconbridge and Moffat Hancock to track Canadian conflicts scholars’ alliance with the U.S. “conflicts revolution”) with Herbert, *supra* note 10, at 23 (describing how from a variety of perspectives, commentators regarded *Tolofson* as souring conflict of laws in Canada).

13. See, e.g., MICHAEL J. WHINCOP & MARY KEYES, POLICY AND PRAGMATISM IN THE CONFLICT OF LAWS (2001); Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883 (2002); Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151 (2000); Joel P. Trachtman, *Economic Analysis of Prescriptive Jurisdiction*, 42 VA. J. INT’L L. 1 (2001); Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT’L L. 975 (1994).

14. E.g., AN ECONOMIC ANALYSIS OF PRIVATE INTERNATIONAL LAW (Jürgen Basedow & Toshiyuki Kono eds., 2006); Giesela Rühl, *Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency*, in CONFLICT OF LAWS IN A GLOBALIZED WORLD: ESSAYS IN MEMORY OF ARTHUR T. VON MEHREN 153 (Eckart Gottschalk, Ralf Michaels, Giesela Rühl & Jan von Hein eds., 2007); Giesela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT’L L. 801 (2006); Horatia Muir Watt, *Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy*, 9 COLUM. J. EUR. L. 383 (2003); Horatia Muir Watt, *Aspects économiques du droit international privé*, 25 RECUEIL DES COURS 307 (2004).

bites, and empirical research was rare.¹⁵ This may be beginning to change, in view of more-recent theoretical and empirical work.¹⁶

Another interdisciplinary approach comes from legal anthropology, and, more specifically, from theories of legal pluralism. Paul Schiff Berman has drawn on these literatures 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 nonstate normative orders as applicable law).¹⁷ Gunther Teubner likewise has sought to draw on conflict of laws to address three core questions of systems theory: the nature of the conflict between different functional subsystems of society,¹⁸ the nature of the conflict between state law and other “quasi-legal” orders,¹⁹ and the nature of the conflict between different legal regimes, especially in international law.²⁰

These interdisciplinary approaches are promising, but they still stand somewhat isolated from each other and from the mainstream, and perhaps the full potential of interdisciplinarity has not yet been recognized. The goal of this symposium is to strengthen and deepen the growing interdisciplinary orientation of private international law. Accordingly, the articles in the symposium push the boundaries of interdisciplinarity in the field in challenging and sometimes surprising directions. Many are experimental in nature. Many bring theoretical and disciplinary perspectives to bear upon conflict-of-laws issues that have not before been part of the conversation. Many are written by scholars who do not consider themselves to be primarily conflicts experts. Many even reframe the *goal* of conflict-of-laws analysis, from solving judicial disputes to reflecting on the wider and deeper issues at stake in conflicts problems.

15. An exception is Lea Brilmayer, *Rights, Fairness and Choice of Law*, 98 YALE L.J. 1277 (1989). See also the criticism by Hillel Y. Levin, *What Do We Really Know About the American Choice-of-Law Revolution?*, 60 STAN. L. REV. 247 (2007) (reviewing SYMEON SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT, AND FUTURE* (2006)).

16. See, e.g., Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49–93 (1989); Christopher A. Whytock, *Domestic Courts and Global Governance: The Politics of Private International Law* (unpublished Ph.D. thesis, Duke Univ. 2007), available at http://www.law.utah.edu/_personfiles/6580/whytock-dissertation-111607-final.pdf. See also Symeon Symeonides, *supra* note 16; Patrick Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357 (1992).

17. See Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819 (2005).

18. Gunther Teubner, *LAW AS AUTOPOIETIC SYSTEM* 100–22 (Anne Bankowska & Ruth Adler trans., Zenon Bankowski ed., 1993); Gunther Teubner, *De collisione discursuum: Communicative Rationalities in Law, Morality and Politics*, 17 CARDOZO L. REV. 901 (1996).

19. See Gunther Teubner, *Global Bukowina*, in *GLOBAL LAW WITHOUT A STATE 3* (Gunther Teubner ed., 1997). For a friendly critique from within systems theory, see Ralf Michaels, *The True Lex Mercatoria: Global Law Beyond the State*, 14 IND. J. GLOBAL LEG. STUD. 447 (2007).

20. Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004).

II

THEMES: INTERDISCIPLINARITY
OF CONFLICTS AND CONFLICTS OF INTERDISCIPLINARITY

An interdisciplinary approach opens up two different themes. One is the familiar insight that other disciplines can both enlighten and enrich; they can provide new and exciting perspectives on a field. This is true for conflict of laws as for other legal disciplines, if not more so. The other, less-developed theme is the value that can come from the ensuing conflict between law and the other disciplines in question.

Drawing on the articles in the symposium, this introduction surveys existing approaches to interdisciplinarity in conflict of laws. It distinguishes between an interdisciplinarity internal to the law that relates conflicts to other legal spheres and issue areas (II.A), and an external interdisciplinarity that engages nonlegal disciplines such as economics, political science, and anthropology (II.B). Later sections outline a number of ways in which the contributors to the symposium push the interdisciplinary project further: approaching the study of conflicts through its discourse and imagery (II.C), through the historical and present-day context of colonialism (II.D), and through ethnographies that detail how its doctrines are experienced and produced in the real world (II.E). The last section discusses how these and other interdisciplinary insights yielded by the symposium might provide a richer and more-productive concept of conflict of laws (II.F). It goes without saying that although each article appears under one heading, many of the articles relate to several of them.

A. The Conflict within Conflicts: Public and Private

For much of the twentieth century, private international law has been subjected to quite radical critique. Brainerd Currie's exclamation that "[w]e would be better off without choice-of-law rules"²¹ is emblematic of a general concern. One challenge to conflict of laws is internal to the law: the decline of the public-private distinction. Conceived as specifically *private* international law, conflict of laws seemed ill-equipped to deal with conflicts between public laws, or even with the public aspects of conflicts between private laws.

One possible consequence is critique. If indeed all law is public law, as standard critiques of the public-private distinction maintain, this must mean that conflict of laws as private international law is open to the same critique as was private law before: it assumes a separate private sphere that does not really exist; it restricts the courts' adjudicatory power in a way that prevents courts from effectuating social change; it prioritizes the market over the political system. Much of the early realist critique of conflict of laws can be viewed in this light. In the first article in this symposium, Joel Paul, in scrutinizing the

21. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 183 (1963).

recent history of the concept of comity,²² draws on this theme to mount a scathing critique of private international law. He lays out how comity was expanded in two ways to restrict the regulatory power of U.S. courts. First, comity turned from a mere discretionary instrument to a system of virtual obligations: courts were no longer free, in practice, to determine whether and when they could defer to foreign law; after the comity revolution they were reduced to following rules in doing so. Second, Paul argues, comity is no longer owed merely to foreign laws; now, courts owe similar deference to private autonomy, to the executive, and even to the global market, as evidenced in the recent *Empagran*²³ decision of the U.S. Supreme Court establishing the limited reach of U.S. antitrust law with regard to global cartels.

Such critique need not lead to a rejection of the field. Another response to the claim that the private is always already public in conflicts would be to bring choice of law to bear more directly on matters of public law, whether domestic or international. Indeed, much recent interest in the field seems to be devoted to such possibilities. In general, the relation of conflict of laws to domestic public law is being measured anew,²⁴ as is the relationship between public and private international law.²⁵ Thus, the revenue rule (“no country ever takes notice of the revenue laws of another”),²⁶ buried doctrinally somewhere within the much maligned public-law exception to choice of law,²⁷ now makes a surprise return to the center of the field. Once the embarrassment of a discipline otherwise proclaiming openness towards foreign law, the rule has assumed new significance in the context of the global fight against smuggling.²⁸

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

23. *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

24. William S. Dodge, *The Public-Private Distinction in the Conflict of Laws*, 18 DUKE J. COMP. INT'L L. ____ (forthcoming 2008).

25. At the symposium underlying the present issue, Alex Mills presented his study of the history of private international law as a subset of international law. Alex Mills, *The Private History of International Law*, 55 INT'L & COMP. L. Q. 1 (2006). See also Ralf Michaels, *Public and Private International Law: German Views on Global Issues*, 3 J. PRIV. INT'L L. 121 (2008) (reviewing VÖLKERRECHT UND IPR (Stefan Leible & Matthias Ruffert eds., 2006)); Symposium, *Public and Private Law in the Global Adjudication System*, 18 DUKE J. COMP. & INT'L L. 253 (2008). Although Philip Jessup's famous 1956 lectures on transnational law are best known for the proposition that the separate fields of public and private international law be merged in a single new field of “transnational law,” which would include all law regulating actions or events that transcend national frontiers, Jessup also emphasized that this would extend choice of law beyond private international law. PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2, 106 (1956). See generally Peer Zumbansen, *Transnational Law*, in *ENCYCLOPEDIA OF COMPARATIVE LAW* 738 (Jan M. Smits ed., 2006).

26. *Holman v. Johnson*, (1775) 98 Eng. Rep. 1120, 1121 (K.B.) (per Lord Mansfield).

27. See Jean-Gabriel Caste, *The Erosion of the Foreign Public Law Exception: Recent Canadian Developments*, in LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 243 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002); William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161 (2002); Philip J. McConaughay, *Reviving the “Public Law Taboo” in International Conflict of Laws*, 35 STAN. J. INT'L L. 255 (1999).

28. *Att’y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 118 n.4 (2d Cir. 2001); *Pasquantino v. United States*, 544 U.S. 349 (2005); *European Cmty. v. RJR Nabisco, Inc.*, 544 U.S. 1012 (2005); *Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01, Philip Morris International, Inc., et al. v. Comm’n of the European Communities* 2003 E.C.R. II-1. See also Jürgen

In public international law, the proliferation of international courts and tribunals with sometimes overlapping jurisdictions and the growing number of different spheres of international law and systems of rules applicable to the same facts have led the United Nations International Law Commission to propose an “international law of conflicts.”²⁹ Christian Joerges and others have made the constructive proposal to conceptualize the relationship between European Union Law and the law of the member states as a conflict of laws.³⁰ And in the current debate over the role, if any, of customary international law in U.S. courts, several scholars have reached for choice-of-law rules as a middle ground.³¹

And yet two articles in this issue demonstrate that the distinction between public and private does not evaporate quite as easily as some commentators might wish, nor perhaps should it. Ralf Michaels shows how the public-private distinction reappears in economic analysis of conflict of laws ostensibly predicated on abolishing it.³² Karen Knop demonstrates the potential of the distinction for new and alternative ideas of private as opposed to public citizenship.³³ In this light, as we argue elsewhere,³⁴ the demise of the public-private distinction may in fact mean not the death but the growth of conflict of

Basedow et al., *Foreign Revenue Claims in European Courts*, 6 Y.B. PRIV. INT'L L. 1 (2004); Adrian Briggs, *The Revenue Rule in the Conflict of Laws: Time for a Makeover*, 2001 SINGAPORE J. OF LEGAL STUD. 280 (2001), available at <http://ssrn.com/abstract=439281>; William S. Dodge, *supra* note 27, at 208–19; Brenda Mallinak, *The Revenue Rule: A Common Law Doctrine for the Twenty-First Century*, 16 DUKE J. COMP. & INT'L L. 79 (2006); ED MORGAN, *THE AESTHETICS OF INTERNATIONAL LAW* 164–69 (2007). See also Audra Simpson, *Subjects of Sovereignty: Indigeneity, the Revenue Rule, and Juridics of Failed Consent*, 71 LAW & CONTEMP. PROBS. 191 (Summer 2008).

29. UN INTERNATIONAL LAW COMMISSION, FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW, U.N. Doc. A/CN.4/L.682 at 211 (2006). *But compare id.* at 8 (presenting a close analogy with conflict of laws as apt to deal with this fragmentation of public international law) with JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 8–9 (2003) (rejecting the analogy with conflict of laws).

30. See, most recently, Christian Joerges, *Integration Through De-legislation? An Irritated Heckler* 13–18 (European Governance Papers No. N-07-03, 2007), available at <http://www.connex-network.org/eurogov/pdf/egp-newgov-N-07-03.pdf>. See also Marc Amstutz, *In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning*, 11 EUR. L.J. 766 (2004); ANDREAS FURRER, ZIVILRECHT IM GEMEINSCHAFTSRECHTLICHEN KONTEXT—DAS EUROPÄISCHE KOLLISIONSRECHT ALS KOORDINIERUNGSTRUMENT FÜR DIE EINBINDUNG DES ZIVILRECHTS IN DAS EUROPÄISCHE WIRTSCHAFTSRECHT (2001); Christoph Schmid, *Vertical and Diagonal Conflicts in the Europeanisation Process*, in PRIVATE GOVERNANCE, DEMOCRATIC CONSTITUTIONALISM AND SUPRANATIONALISM 185 (Christian Joerges & Oliver Gerstenberg eds., 1998).

31. See Arthur Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995); Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365 (2002); see also Beth Van Schaack, *Boumediene and Choice of Law* (June 13, 2008), available at <http://opiniojuris.org/2008/06/13/boumediene-and-choice-of-law/>.

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

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

34. Karen Knop, Ralf Michaels & Annelise Riles, *The Fall and Rise of Private International Law: From Conflict of Laws to Theory of Private Global Governance* (draft presented at the Globalization, Law & Justice Workshop, Faculty of Law, University of Toronto (Nov. 1, 2007)) (on file with authors).

laws. For instance, the paradigmatically public question of the status of prisoners held by the U.S. government at Guantánamo is being reconceived by some as a matter of private international law, that is, of the territorial reach of U.S. laws and jurisdiction.³⁵

Whether conflict of laws is methodologically suited to such tasks is often not discussed in depth. In this symposium, Jacco Bomhoff takes on these questions.³⁶ He enriches the debate over the extraterritorial scope of application of human-rights doctrines by connecting it to the doctrine of state action and also to conflict of laws. What may at first sound like a curious conflation of three incommensurables yields fascinating insights: The *territorial* limits on governmental regulation addressed in the problem of extraterritorial human rights can be informed by the *substantive* limits on such regulation addressed in the state-action doctrine. And the conflict with foreign sovereigns, which the question of extraterritorial human rights treats as a problem of *public* law, can be linked to the conflict with foreign sovereigns regarding the applicable *private* law as addressed in the conflict of laws. In Bomhoff's analysis, the collapsed public-private distinction is used not as a tool of critique but as a source of mutual inspiration, even a kind of interdisciplinarity within the law: after the collapse of the distinction between public and private, conflict of laws can usefully inform constitutional law, and vice versa.

B. The Conflict between Conflicts and Other Disciplines

The debates surveyed in the previous section concern discussions within the law. But much recent interest in conflict of laws goes beyond legal doctrine per se. Some 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.

One use of interdisciplinarity currently in vogue seeks to directly translate insights from other disciplines into substantive legal rules. Unfortunately, the rules that result from such translations more often than not closely resemble what already existed before the doctrine. For the example of law and

35. See, e.g., Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085 (2005); James Gathii, *Torture, Extraterritoriality, Terrorism, and International Law*, 67 ALB. L. REV. 335 (2003–2004); Kermit Roosevelt, III, *Guantánamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017 (2005). For commentary, see, e.g., Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 EUR. J. INT'L L. 613 (2005); Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After Rasul v. Bush*, 153 U. PA. L. REV. 2073 (2005).

36. 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).

economics, Ralf Michaels shows in this volume that most new economic analyses, at least if read as substitutes for legal doctrine, do not yield new and more objective solutions³⁷ When read as doctrine, they reformulate existing doctrinal models, reinstating in particular the old standoff in the field between views privileging governmental interests and views attentive to private interests. When these analyses are used to resolve specific doctrinal problems—the applicable law in transboundary torts, the problem of characterization, the question whether choice-of-law rules should be formulated as rules or standard—they simply replicate existing doctrinal debates.

On another level, however, such “outsider interdisciplinarity” can help 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. 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 that, ironically, are based on concepts like governmental interests that once carried enormous political significance. Such studies may also show the opposite: the political significance of these technicalities within global governance. If, as Michaels demonstrates in his article, economic analyses cannot overcome the struggle between public and private conceptions of private international law, this may suggest how fundamental this struggle is to the field. Building on this, he shows that economic analysis can highlight what traditional analysis ignores: the regulatory competition between legal orders, the role of individuals in shaping this competition, and the dependence, deliberate or not, of conflict-of-laws norms on the structure of the global legal system. The same could be said of the effort to reorganize the field of conflicts around debates in legal pluralism, as Annelise Riles argues in her article.³⁸ If this effort largely bumps up against familiar problems and, by its own admission, ends up advocating already familiar doctrinal solutions, the insights of legal pluralism nevertheless 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.

Robert Wai’s contribution to this symposium³⁹ also engages with legal pluralism. Writing in the international business context, Wai lauds accounts of global legal pluralism for their analyses of the growth of multiple normative orders and their recognition of interlegality, meaning the superimposition, interpenetration, and mixture of different legal spaces in both mind and action.⁴⁰

37. See Michaels, *supra* note 32.

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

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

40. *Id.* (quoting BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE 437 (2d ed. 2002)).

However, Wai argues that while these accounts serve as an important corrective to a doctrinal focus on state norms, they overemphasize nonstate normative orders, for example, insisting on a purely nonstate *lex mercatoria* unrecognizable to legal practitioners. For Wai, they also miss the full extent of their own conception of interlegality. 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 nonstate. Seen as a decentralized and intermediate form of transnational governance, Wai’s notion of transnational private law also highlights his own distinct view of interlegality, which regards a certain degree of contestation and conflict among normative orders as legitimate.

C. Discourse and Imagery of Conflicts

The true promise of interdisciplinarity, then, is not the mere substitution of one discipline for another, but mutual enrichment.⁴¹ This insight becomes all the more important if we want to dramatically broaden the range of issues, questions, theoretical frameworks, methodological approaches, and historical and cultural contexts in which conflicts problems are analyzed. We believe the interdisciplinary project can be pushed further to engage a much wider range of methods and concerns, including, in particular, approaches that are noninstrumentalist in character, those that do not aim to translate immediately into technical solutions to doctrinal problems. A broader interdisciplinary approach—broader by virtue of the fact that it highlights what is left out of traditional conflicts analysis—demonstrates in concrete and consequential ways the remarkable ability of conflicts methodologies, whether by courts or by academics, to make what is often most pressing, most poignant, most epistemologically challenging and most politically and morally difficult about particular questions mysteriously vanish from the foreground.

One approach to the cultural study of conflict of laws is to look at *discourse* and *imagery*: to bring intricate techniques of discourse analysis to bear upon the language of conflicts cases and scholarship. The discourse of conflict of laws can conceal or highlight important underlying concerns. For example, the regulation of cyberspace has famously been conceived as a matter of conflict of laws, in which the state is asked to grant comity to the allegedly autonomous normative

41. For a sampling of views on the meanings and values of interdisciplinarity in the context of public international law, see David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT’L L. 9 (1999); Kenneth Abbott, *Toward a Richer Institutionalism for International Law and Policy*, 1 J. INT’L L. & INT’L REL. 9 (2005); David Kennedy, *The Disciplines of International Law and Policy*, 12 LEIDEN J. INT’L L. 9 (1999); Jan Klabbers, *The Relative Autonomy of International Law or The Forgotten Politics of Interdisciplinarity*, 1 J. INT’L L. & INT’L REL. 35 (2005); Gerry Simpson, *Duelling Agendas: International Relations and International Law (Again)*, 1 J. INT’L L. & INT’L REL. 61 (2005); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205 (1993).

regime of the Internet.⁴² Much of the ensuing debate has dealt with substantive questions: How different is the Internet, really, or how much deference is appropriate? Andrea Slane, in her article for this symposium, does not address these policy questions but instead focuses on the imagery used to define them.⁴³ She dissects the images of globalization at work in conflicts cases involving harms caused by postings on the Internet and demonstrates how these images work to produce a coherence for the field of conflicts as well as the nature of the Internet as a discursive space.

Such discourse analysis bears fruit in other debates as well. For example, much of the debate on the legality of same-sex marriage in the United States now takes the form of choice-of-law analysis, a move away from the constitutional mandate for or against same-sex marriage to the constitutional mandate of states to recognize marriages entered into in other states.⁴⁴ It seems fair to state that for most participants in the debate, conflicts is a mere end towards a substantive goal: proponents of same-sex marriage propagate the duty of states to recognize out-of-state marriages; opponents emphasize doctrinal conflict-of-laws arguments like the public-policy exception against such a duty. This substantive and instrumental focus has led scholars such as Gary Simson to argue that the proper space for such debates is not conflict of laws at all, but substantive law, and most importantly constitutional law.⁴⁵ Brenda Cossman's article in this issue takes a very different tack. Cossman reads the battery of arguments at work in doctrinal debates about the recognition of gay and lesbian marriages alongside other images of these migrating marriages in television and film and in wedding announcements in the *New York Times*. At a most basic level, this cultural analysis reminds us that doctrinal efforts to abstract from the substance of disputes aside, substance and, in particular, cultural and political context continue to matter in ways that are often both crucial and unappreciated in the discipline. Cossman's analysis also shows how the intricate moves of recognition and deference that characterize technical doctrinal maneuvering in the conflict of laws are actually consequential for the political substance of debates. The question of same-sex marriage is in essence one of recognition—not only by other states, but by publications like the *New York Times* with its wedding announcements, by society at large. Even public policy, when invoked against recognition, restricts

42. David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1391–95 (1996).

43. 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).

44. See, e.g., Andrew Koppelman, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES (2006). For an (already surpassed) bibliography of articles on the topic, see William A. Reppy, Jr., *The Framework of Full Faith and Credit and Interstate Recognition of Same-Sex Marriages*, 3 AVE MARIA L. REV. 393, 477–81 (2005). At the conference underlying this issue, Janet Halley expressed such an outsider's interest in conflict of laws. See Janet Halley, *Traveling Marriage* (June 26, 2005) (unpublished manuscript, on file with authors).

45. Gary Simson, *Beyond Interstate Recognition in the Same-Sex Marriage Debate*, 40 U.C. DAVIS L. REV. 313 (2006) (paper presented at the Cornell conference underlying this symposium issue).

same-sex marriage only in the narrow doctrinal sense. Brenda Cossman uses Judith Butler's version of speech-act theory⁴⁶ to think about what is "sayable" and not sayable in the language of conflicts. The invocation of public policy, Cossman shows, is also a speech act, which paradoxically reinforces the existence of gay and lesbian marriage as a political problem, and recognizes the validity of a same-sex marriage, even if elsewhere. In this sense, the question of the enforceability of foreign marriages cannot but be part of a wider, global cultural conversation—a conversation taking place through global forms of media as much as through global forms of law and in particular conflict of laws—about the politics of sexuality.

For Nikitas Hatzimihail, likewise, a close reading of the imagery conflicts scholars use to describe their own doctrine tells us something important about the identity of the discipline itself.⁴⁷ Writing on *lex mercatoria*, the allegedly autonomous law of international commerce, Hatzimihail takes as his subject not *lex mercatoria* itself or its actual history, but its frequent description as "new" in comparison to an "ancient" law merchant said to have flourished in medieval and early modern Europe. He scrutinizes different ways in which history is invoked to legitimate different twentieth-century notions of *lex mercatoria*. In view of the great likelihood that a historical *lex mercatoria* has always been a latter-day fabrication, these historiographies gain importance not for the past but for the present.

D. Conflicts as Colonialism

Although in its doctrines conflict of laws focuses paradigmatically on similarly situated states or sub-state jurisdictions, many conflicts problems are, in one way or another, a product of histories or present-day forms of colonization. Here once again conflicts can benefit from a rapprochement with public international law. Critical scholars of colonialism working in public international law have dramatically turned on its head the conventional wisdom that public international law is a product of European civilization and a tool of peace. They have shown that public international law in fact evolved principally out of practical problems associated with colonial domination, such as how to make sense of, govern, appropriate the resources of, manage, and convert what is "Other" to the cosmopolitan West.⁴⁸ Several articles in this issue make a similar move with regard to private international law.

46. See JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* (1997).

47. 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).

48. See, e.g., ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005); ANTHONY CARTY, *THE DECAY OF INTERNATIONAL LAW? A REAPPRAISAL OF THE LIMITS OF LEGAL IMAGINATION IN INTERNATIONAL AFFAIRS* 43–64 (1986); EVE DARIAN-SMITH & PETER FITZPATRICK, *LAWS OF THE POSTCOLONIAL* (1999); Nathaniel Berman, *In the Wake of Empire*, 14 *AM. U. INT'L L. REV.* 1521 (1999); James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 *BUFF. L. REV.* 1013 (2007); Vasuki Nesiah, *From Berlin to Bonn to Baghdad: A Space for Infinite Justice*, 17 *HARV. HUM. RTS. J.* 75 (2004); Joel Ngugi, *The Decolonization-Modernization Interface and the Plight of Indigenous Peoples in Post-Colonial*

Conflicts doctrines manage political and cultural conflict involving overlapping and contested forms of sovereignty. Although the dominant view in the field often treats such conflict as conflict among equal states, in fact much of this conflict arises out of situations of domination, hegemony, or imperialism. In doctrinal terms, this is treated as irrelevant. It is just “background” to the technical doctrinal problem. But this context is often the engine of doctrinal development, and it is impossible to make sense of the doctrine without understanding it as a tool of colonization and also, sometimes, as a place of resistance to colonial authority.⁴⁹ Joel Paul’s article describes how the doctrine of comity evolved in intimate relationship to the global debate about slavery in the nineteenth century.⁵⁰ Most of the theories of legal pluralism discussed in the papers by Wai and Riles evolved out of efforts to impose foreign law on colonial subjects and efforts to integrate law and custom in colonial and postcolonial states.⁵¹

Two articles address these issues head-on. Audra Simpson’s article concerns conflict-of-laws problems in cases involving the smuggling of cigarettes from the United States into Canada.⁵² In *R.J. Reynolds*, the best known of these cases,⁵³ the Canadian government brought an action in the United States against a cigarette manufacturer to recover lost tobacco duties and taxes and money spent on additional law enforcement due to an alleged conspiracy to smuggle cigarettes into Canada for sale on the black market. The ordinary doctrinal focus in these cases is the revenue rule as a vehicle for addressing conflict between two sovereigns—the U.S. and Canada—and between public and private concerns. Simpson shows how this emphasis blinds us to another,

Development Discourse in Africa, 20 WISC. INT’L L.J. 297 (2002); Ileana M. Porras, *Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius’ De Iure Praedae—The Law of Prize and Booty, or “On How to Distinguish Merchants from Pirates,”* 31 BROOK. J. INT’L L. 741 (2006).

49. In this vein, see Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT’L L.J. 419, 430–33 (2000) (arguing that, contrary to the assumptions of Northern and Southern scholars alike, international commercial arbitration should not be viewed as the twentieth-century resurrection of the merchant tribunals of medieval Europe, but as the functional successor to the imperial-era system of legal capitulations and mixed courts in the Middle East and elsewhere that helped to consolidate international trade on terms favorable to European parties).

50. Paul, *supra* note 22. In the Cornell symposium underlying this issue, David Fraser surveyed and critiqued the approaches that courts in several countries took in their choice-of-law analysis of the applicability of German anti-Semitic laws. See David Fraser, “The Forces of Civilization Cannot Retreat”: The Public Policy Exception, the Nazis and Private International Law (April 7–8, 2006) (paper presented at Symposium, *Rethinking the Private in Private International Law: New Methods*, Cornell Law School) (on file with authors). For further discussion on this topic, see David Fraser, “*This Is Not Like Any Other Legal Question*”: A Brief History of Nazi Law Before U.K. and U.S. Courts, 19 CONN. J. INT’L L. 59 (2003). See also DAVID FRASER, *LAW AFTER AUSCHWITZ: TOWARD A JURISPRUDENCE OF THE HOLOCAUST* (2005).

51. Annelise Riles, *Comparative Law and Socio-legal Studies*, in OXFORD HANDBOOK OF COMPARATIVE LAW 775 (Mathias Reimann & Reinhard Zimmermann eds., 2007).

52. Simpson, *supra* note 28.

53. *Att’y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 118 n.4 (2d Cir. 2001).

arguably more-pertinent conflict: the question of Native American sovereignty and of the colonial history underlying the territorial boundary between the United States and Canada. *R.J. Reynolds* involved the St. Regis–Akwesasne Indian Reservation on the New York border with Canada, yet this sovereignty question miraculously vanishes from the picture when Native American movements across state borders become a question of the applicability of the revenue rule to a dispute about cigarette smuggling. Simpson thus reminds us that the sovereignty question can reappear once we remind ourselves of what is at stake in conflict-of-laws disputes. The article highlights the dramatic erasure of the colonization of North America from disputes concerning the exercise of Native American treaty rights.

Likewise, Teemu Ruskola shows how the United States Court for China, created in 1906 and abolished in 1943, was another way in which conflict of laws figured in the colonizers' imposition of their own law and values elsewhere.⁵⁴ Although the court has been described as a legal curiosity—"probably the strangest federal tribunal ever constituted by Congress"⁵⁵—Ruskola sets it against a history of Western powers' assertions of extraterritorial jurisdiction over their citizens in non-Western countries.⁵⁶ Tasked with treating China as if it were part of the United States, the Court fashioned its jurisprudence from laws including pre-independence American common law, the codes of the District of Columbia and the Territory of Alaska, and Chinese property law. Ruskola invokes theories of language, writing, and discourse to analyze both how American understandings of extraterritoriality make themselves blind to their own contradictions and their political consequences and how these doctrines confront, and often suppress, their own political and epistemological limits.

E. Ethnographies of Conflicts

Another approach to conflict-of-laws problems is ethnographic or interpretive. Rather than analyze the hidden grammar of the language and imagery of conflicts doctrine, or bring a new body of theory to bear upon conflicts problems, the interpretive approach paints a rich and revealing picture of how conflicts doctrines are experienced and produced in the real world. Its value is that it highlights aspects of ordinary lawmaking that may be so important and fundamental to the field that they ironically become too

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

55. David J. Bederman, *Extraterritorial Domicile and the Constitution*, 28 VA. J. INT'L L. 451, 452 (1988).

56. For a discussion of extraterritorial jurisdiction in the period 1815 to 1939, situating this system in the context of Western international legal theory and practice of the time, see generally, e.g., GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES; UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* 227–53 (2004).

mundane for comment and hence are overlooked by insider-theorists and doctrinalists.⁵⁷

Fleur Johns's article in this issue exemplifies this approach.⁵⁸ Her article, informed by both theoretical erudition and experience as a former practicing attorney,⁵⁹ gives us a richly textured picture of what "party autonomy," a keystone of conflicts doctrine, actually means in the real world—how it is experienced, enacted, and produced—within the global culture of transnational dealmaking. Johns's focus on "the deal" reveals a much richer picture of the actual exercise of party autonomy than what conflicts doctrine typically assumes. One of the insights of this approach that is particularly relevant is that the field of conflicts is not just a set of norms embedded in doctrine but a set of knowledge practices.⁶⁰

F. Towards Interdisciplinary Conflicts

The contributions to this symposium suggest that conflict of laws, understood in its broader implications and context, is far from stale, but can actually become an exciting site for current debates. Moreover, even if interdisciplinarity cannot generate directly applicable rules, it can lead to more informed, richer, more adequate ways of doing conflict of laws.

In her article, 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.⁶¹ 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 through the prism of recent anthropological insights about culture as a problem of empathetic description and collaborative engagement with others, moreover, 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.

Karen Knop develops private international law as the private side of citizenship.⁶² She shows that although we ordinarily think of citizenship as public, private international law covers some of the same ground. Private international law also harks back to a historical conception of the legal citizen

57. See, e.g., ANNE LISE RILES, COLLATERAL KNOWLEDGE: LEGAL REASON IN THE GLOBAL FINANCIAL MARKETS (forthcoming 2008).

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

59. For another such blend, see Dan Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 HARV. INT'L L.J. 411, 416–20 (2005) (giving an insider perspective on a corporation's decision regarding governing law in a contract).

60. Annelise Riles, *The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State*, 58 AM. J. COMP. L. (forthcoming 2008).

61. Riles, *supra* note 38.

62. Knop, *supra* note 33.

as someone who could sue and be sued, and someone who belonged to a community of shared or common law that was not necessarily a territorial community. Knop demonstrates that Anglo-Canadian private international law has particular value as private citizenship 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 actually existing cosmopolitanism within the common law. Related to Riles's article, she proposes that the value of private international law for citizenship lies in its store of technicalities through which we can think about cosmopolitanism on the public side of citizenship as well. As Marianne Constable points out from the perspective of political theory in her afterword, the uses of conflicts in modern national and transnational politics is an example of the way law is now often prior to politics—how it not only responds to, but creates the allegiances and the divisions of the contemporary world. And yet the straddling of insider and outsider perspectives advocated in this issue also usefully keeps an awareness of the precise limits of doctrine and technicalities—of what law perhaps cannot achieve. Constable argues that what conflicts ultimately cannot achieve, despite its many uses, stems from the failure of all technocratic law: it “fails at reconciling . . . ‘is and ought.’”

III

CONCLUSION: BEYOND THE SOCIAL SCIENCES

Cavers's ambition for this journal was that it could “become a medium for that correlation of the law with other social sciences concerning which so much is being said everywhere and so little is being done anywhere.”⁶³ In many ways, this plea for interdisciplinarity has still not been fully heeded, at least as regards the conflict of laws. At the same time, Cavers's plea arguably did not go far enough. Although the social sciences, on which he focused, are not ignored in this volume, many of the essays instead invoke the humanities and their methods and theoretical approaches to bear upon conflict-of-laws problems. This interdisciplinarity demonstrates and informs how conflict of laws, long chided as overly technical, utilizes this very technicality to address some of the biggest problems the law faces today, such as the character of sovereignty, the nature of legitimacy in situations of exceptional political conflict, the problem of the accommodation of cultural and political difference, the relationship between minorities and majorities, the relative nature of any singular set of values, the impact of diasporic communities on the authority of the nation-state, the role of state and power in defining subjects and communities, the relationship between global communities and local markets, or between local communities and global market forces, and, perhaps most generally, the global fragmentation and proliferation of systems of politics and values.

63. Cavers, *supra* note 2, at 168.

Summer 2008]

FOREWORD

17

Much of the potential of interdisciplinarity has so far remained untapped; much still needs to be done. In this sense, the conclusion to this introduction can be no more than an overture—to the articles in this symposium issue, but also to further research and debate. Our hope is that over and above a number of individual studies, this volume showcases what is possible, both for choice of law and for other, extralegal, disciplines.