

# THE IDENTITIES OF PRIVATE INTERNATIONAL LAW: LESSONS FROM THE U.S. AND EU REVOLUTIONS

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*This article, first presented as part of a conference entitled “What is private international law?”, responds to this question through analysis of four different “identities” through which private international law has been viewed. It begins by exploring two contrasting classical approaches, under which private international law is concerned with the international ordering of state power, or with the national recognition of private rights. It then turns to examine the US and EU private international law “revolutions,” and the very different further identities of private international law which have emerged as a consequence of each. After reflecting critically on the experiences of these revolutions, the article offers some concluding thoughts as to how the identity or identities of private international law can or should be constructed, arguing that there are valuable lessons and potentially propitious elements in each of the four examined identities.*

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## INTRODUCTION

The question “what is private international law” – raised by the title of the conference at which this article was first presented – could be approached in a number of different ways. It might, for instance, invoke consideration of what we decide to include within the subject, and what we determine falls beyond its periphery;<sup>1</sup> an increasingly difficult question in the European Union as non-traditional regulatory mechanisms at least functionally comparable to private international law rules have been developed.<sup>2</sup> It might similarly raise questions concerning whether private international law should be viewed as a “subject” – a set of rules dealing with cross-border private law relations – or as a “technique” for managing the boundaries of normative systems which could potentially be brought to bear on a range of other, perhaps analogous, problems.<sup>3</sup> But there is also a deeper challenge posed by the question, which is almost existential in character – it asks what is the *identity* and *purpose* of private international law; what is it *for*, what does it *do*? To ask these questions is really to ask two different things. First, how does private international law see itself; what is its “self-image,” representing its goals, ideals or aspirations? Second, how does private international law look from the outside; what are its “objective” characteristics, products, or effects? The reason it is important to distinguish these two questions – which we might also call the questions of the identities of private international law in theory and in practice – is that the answers in each case may well be different, and this may give rise to something of an “identity crisis,” as through the force of the pressures created by this discrepancy private international law (in theory and/or practice) undergoes a revolutionary transformation.

The focus of this article is on two traditional ideas of private

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1. For the purposes of this article, private international law is understood to include rules on jurisdiction, choice of law, and the recognition and enforcement of foreign judgments. Each of these aspects of private international law has been transformed as part of the EU revolution; the analysis in this article will be principally but not exclusively focused on choice of law, as it is the part of private international law most affected by the U.S. private international law revolution.

2. For example, the “country of origin” principle. See generally ALEX MILLS, *THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW* 200 (2009); Ralf Michaels, *The New European Choice of Law Revolution*, 82 TUL. L. REV. 1607, 1625 (2008); Ralf Michaels, *EU Law as Private International Law? Reconceptualising the Country-of-Origin Principle as Vested-Rights Theory*, 2 J. PRIVATE INT’L L. 195 (2006); Geert De Baere, “*Is this a conflict rule which I see before me?*” *Looking for a Hidden Conflict Rule in the Principle of Origin as Implemented in Primary European Community Law and in the “Directive on Electronic Commerce,”* 11 MAASTRICHT J. OF EUR. & COMP. L. 287 (2004).

3. See, e.g., Karen Knop, Ralf Michaels & Annelise Riles, *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 STAN. L. REV. 589 (2012); Ralf Michaels and Joost Pauwelyn, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law*, 22 DUKE J. COMP. & INT’L L. 349 (2012).

international law, as well as two such “revolutions” in private international law thinking – what they reacted against, how and why, and what we may learn from each.<sup>4</sup> The first is the U.S. revolution which was sparked by the work of scholars such as Cavers<sup>5</sup> and Currie<sup>6</sup> in the middle of the twentieth century, although in many ways it is still on-going or at least has thus far proved inconclusive.<sup>7</sup> The second is the EU revolution which was initiated with the Brussels Convention of 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters,<sup>8</sup> but which has accelerated over the last decade or so. To describe these as revolutions is to highlight that in each case, private international law undertook something of an identity transformation. These phases of development were periods in which in which the basic conceptions of the purposes of private international law were shifted in a fundamental way, rather than periods in which the details or techniques of private international law rules have been reworked based on established foundations (as in, for example, the evolutionary EU “upgrades” from the Brussels Convention to the Brussels I Regulation,<sup>9</sup> and from the Rome Convention on Choice of Law in Contractual Obligations<sup>10</sup> to its successor the Rome I Regulation<sup>11</sup>). To borrow an expression from the philosophy of science, these are times in which private international law underwent a paradigm shift.<sup>12</sup>

The premise of this article is that our understanding of the identities of private international law may profit from a closer examination of the experiences of both the U.S. and EU revolutions. The U.S. revolution rightfully rejected the artifice of vested rights which had become foundational to common law private international law in favor of policy-

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4. This article aims to contribute to a growing literature considering and comparing developments in the EU and United States, perhaps most notably Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 TUL. L. REV. 1607 (2008).

5. See *infra* note 54 and accompanying text.

6. See *infra* note 55 and accompanying text.

7. See generally SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT, AND FUTURE* (2006).

8. 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (consolidated version), 1998 O.J. (C 27) 1, 3.

9. Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1.

10. Convention on the Law Applicable to Contractual Obligations (consolidated version), 1998 O.J. (C 27) 34, 36.

11. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6.

12. See Thomas S. Kuhn, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970); see Michaels, *supra* note 2, at 1610; but see Symeon C. Symeonides, *The American Revolution and the European Evolution in Choice of Law: Reciprocal Lessons*, 82 TUL. L. REV. 1741 (2008).

oriented approaches, but (it is argued) went too far in its wholesale adoption of a destructive and fragmenting anti-formalist critique inspired by American legal realism. The EU revolution has, by contrast, largely successfully revived traditional ideas of private international law within a new federal context, but (it is argued) with a commitment to formalism and narrowly defined objectives that carries its own unsatisfactory consequences, including the obscuring of policy decisions and consequences and the adoption of overly rigid rules precluding decisional sensitivity to facts. There are lessons to be learned in both the contrasting and shared experiences of these two revolutions, as well as from the traditions they rejected.

## I. THE OBJECTIVES OF “CLASSICAL” PRIVATE INTERNATIONAL LAW

This section outlines two historical understandings of private international law, which both put the later U.S. and EU experiences in context, and to some extent have also informed their development. The views are presented as strongly contrasting and even contradictory to highlight their polarity, which is not to say that intermediate or hybrid positions cannot be or have not been adopted.

### A. International ordering of state power

The first perspective is that private international law is concerned with state power. The clearest historical articulation of this approach was provided by Savigny in the early part of the nineteenth century. He identified private international law rules as responsive to the problem of coexisting sovereign states and their legal orders. In his own (translated) words:

It is the function of the rules of law to govern legal relations. But what is the extent or sphere of their authority? What legal relations (cases) are brought under their control?<sup>13</sup>

Which of the different local laws with which the legal relation in dispute in any way comes in contact, is to be applied in the decision of the question?<sup>14</sup>

Presented in this way, the essential function of private international

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13. Friedrich Carl Von Savigny, PRIVATE INTERNATIONAL LAW – A TREATISE ON THE CONFLICT OF LAWS 5 (William Guthrie trans., T. & T., Law Publishers 1869).

14. *Id.* at 17-18.

law is the allocation of regulatory authority between states. The function of Savigny's study of private international law was therefore declared to be: To discover for every legal relation (case) that legal territory to which, in its proper nature, it belongs or is subject (in which it has its seat).<sup>15</sup>

Savigny thus thought that each legal relation had a "natural" seat (according to "its proper nature") – but such dependence on an "intuited" natural law framework was already suspect in the nineteenth century, and few would find it convincing today.<sup>16</sup> Later scholars and law-makers working in this classical tradition have generally focused on developing and evaluating further secondary criteria or objectives which might justify a particular choice of law rule – the identification of the most appropriate "connecting factor" (or factors) for each type of dispute.<sup>17</sup> They have thus focused on the *way* in which private international law should serve this function – the principles according to which the regulatory authority of states ought to be determined, or through which legal relationships should be "localized."<sup>18</sup> These have traditionally included reliance on both personal and territorial connections (recognizing community-based or territory-based power or affiliation), as well as considerations of balancing fairness to claimants and respondents, and balancing predictability and the benefits of legal certainty against a flexibility which might lead to more appropriate results in particular cases.<sup>19</sup> This allocation of regulatory authority is also carried out within a framework of public international law rules which define the permitted grounds on which a state may assert "jurisdiction" (as understood in public international law) – although this public international dimension of private international law has not

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15. *Id.* at 89.

16. *But see* Perry Dane, *The Natural Law Challenge to Choice of Law*, in D.E. CHILDRESS III, *THE ROLE OF ETHICS IN INTERNATIONAL LAW* (2010).

17. *See infra* note 68 and accompanying text.

18. "Whether, for example, the legal effect of a given transaction ought to be tested by the *lex actus*, the *lex domicilii*, or the *lex fori*, is a matter admitting of discussion, which ought to be discussed, on intelligible grounds of principle." – Albert Venn Dicey, *On Private International Law as a Branch of the Law of England*, 6 L. QUARTERLY REV. 1, 17 (1890).

19. *See, e.g.*, Catherine Kessedjian, Edward Ho, and Jacob van de Velden, *International Civil Litigation and the Interests of the Public*, Report of the International Law Association, Sofia Conference (2012) (noting the need for "rules which strike a fair balance between, on the one-hand, the importance of safeguarding the legitimate interests of Defendants and, on the other, ensuring that no injury is left without redress"), <http://www.ila-hq.org/download.cfm/docid/D7AFA4C8-E599-40FE-B6918B239B949698>; Symeon C. Symeonides, *Codification and Flexibility in Private International Law*, in *GENERAL REPORTS OF THE XVIIIITH CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW* (K.B. Brown & D.V. Snyder eds., 2012); Mills, *supra* note 2, at 236; Peter Hay, *Flexibility Versus Predictability and Uniformity in Choice of Law: Reflections on Current European and United States Conflicts Law*, 226 RECUEIL DES COURS 281 (1991); *see infra* note 67 and accompanying text.

infrequently been obscured.<sup>20</sup>

Perhaps the most important secondary objective guiding the allocation of regulatory authority of states under this perspective is the avoidance of a conflict of legal orders. The three traditionally identified components of private international law may each be viewed in this light as strategies to minimize a possible conflict of laws – by reducing the situations in which more than one state might assert jurisdiction, by attempting to ensure that even if more than one state has jurisdiction they will each apply the same substantive law,<sup>21</sup> and by providing that a judgment obtained in one state is at least presumptively considered determinative in other states, precluding re-litigation. This emphasis on avoiding regulatory conflicts is both a reflection of the interests of private parties who may suffer under contradictory rules, as well as a recognition that such international ordering is a strongly desirable feature of a lawful international community of states, since in a principally horizontal international order such conflicts may typically be resolvable, if at all, only through extra-legal exercises of power.

## B. National recognition of private rights

An opposing and contrasting perspective on private international law is that the subject is not concerned with state power but with private rights. This approach had its origins in the Dutch private international law school of the seventeenth century,<sup>22</sup> and later influenced (in turn) Joseph Story<sup>23</sup> (in the United States), Albert Venn Dicey<sup>24</sup> (in the United Kingdom), and Joseph Henry Beale<sup>25</sup> (in the United States), who would author the First Restatement of Conflict of Laws (1934) for the American Law Institute. Beale's first published work on private international law was in fact an 1896 book review of Dicey's "A Digest of the Law of England with

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20. See generally MILLS, *supra* note 2; Alex Mills, *Normative Individualism and Jurisdiction in Public and Private International Law: Toward a "Cosmopolitan Sovereignty"?* (CAMBRIDGE J. INT'L COMP. L. CONF., Working Paper May 1, 2012) [hereinafter Mills, *Normative Individualism*], available at <http://ssrn.com/abstract=2055295>.

21. In Savigny's words, "in cases of *conflict of laws*, the same legal relations (cases) have to expect the same decision, whether the judgment be pronounced in this state or in that." Savigny, *supra* note 13, at 27.

22. Ulrich Huber, 'De Conflictu Legum' (1684) reprinted in Ernest G. Lorenzen, *Huber's de Conflictu Legum* 13 ILL. L. REV. 375, 401-18 (1919).

23. See generally JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834).

24. See generally ALBERT VENN DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS (1896) [hereinafter DICEY, DIGEST].

25. See generally JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935) [hereinafter BEALE, TREATISE (1935)].

Reference to the Conflict of Laws,” published that same year.<sup>26</sup> In that review, Beale cited approvingly Dicey’s formulation of a private rights based approach to the subject:

[T]he rules of so-called private international law are based on the recognition of actually acquired rights, i.e. of rights which when acquired could be really enforced by the sovereign of the State where they have their origin.<sup>27</sup>

The foundations of this approach lay in the equality of sovereign states and their exclusive sovereignty over territory, which were taken to imply that acts within a territory “vested” rights in private parties, which ought then to be recognized by foreign legal systems – necessitating rigid territorial choice of law rules.<sup>28</sup> This “ought,” however, was not a legal imperative, as no sovereign could be commanded to do anything,<sup>29</sup> and thus the sense of obligation to recognize foreign rights arose, purely as part of domestic law, from the need to do justice between the parties. From this perspective, Dicey had earlier argued (with parts again cited approvingly by Beale in his book review):

The application of foreign law is not a matter of caprice or option. It does not arise from the desire of the sovereign of England, or of any other sovereign, to show courtesy to other States. It flows from the impossibility of otherwise determining whole classes of cases without

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26. 10 HARV. L. REV. 168, 168 (1896) [hereinafter Beale, *Book Review*]. Dicey’s continuing influence on Beale might also be attributed to the fact that Dicey was a visiting lecturer at Harvard University Law School in 1898, where Beale was appointed a Professor in 1897 (after serving as an Assistant Professor since 1892), although Beale had lectured on Conflict of Laws since the 1893-94 academic year. See Erwin N. Griswold, *Mr. Beale and the Conflict of Laws* 56 HARV. L. REV. 690, 690-91 (1943). Beale’s first major work on conflict of laws was a multi-volume casebook (*Selection of Cases on the Conflict of Laws*) completed in 1902. *Id.*

27. Albert Venn Dicey, *Book Review*, 1 L. Q. REV. 246, 248(1885) (reviewing FRANCIS T. PIGGOTT, *THE LAW AND PRACTICE OF THE COURTS OF THE UNITED KINGDOM RELATING TO FOREIGN JUDGMENTS AND PARTIES OUT OF THE JURISDICTION* (2d ed. 1884)) [hereinafter Dicey, *Book Review*], cited with approval in Beale, *Book Review*, *supra* note 26, at 168.

28. Thus, “a contract gives rise to legal obligations, because in the place where the act of contract takes place a legal obligation is created by that act. When two men shake hands in Boston, the law of England is incapable of attaching any legal consequence to their act. There is no law of England where the act is done. The law of Massachusetts is there, ready, if it chooses, to give the act legal significance. If it does not choose, the act is incapable of having a legal significance. No right, in other words, can spring up on the soil of Massachusetts, unless it is created by the laws of Massachusetts.” Beale, *Book Review*, *supra* note 26, at 170.

29. Thus, Dicey argued (following Austin) that “The principles of international law, properly so called. . . are not in the proper sense of the term ‘laws’, for they are not commands proceeding from any sovereign.” DICEY, *DIGEST*, *supra* note 24, at 14.

gross inconvenience and injustice to litigants, whether natives or foreigners. . . . [T]he courts, e.g. of England, never in strictness enforce foreign law; when they are said to do so, they enforce not foreign laws, but rights acquired under foreign laws.<sup>30</sup>

The one point of criticism which Beale made in his review of Dicey's book was to query whether Dicey had himself been consistent with this underlying principle, in accepting a role for party autonomy in the law applicable to contracts. In Beale's view, this was contrary to the sovereignty of states, as "parties cannot by their own will change the law of the country in which they are"<sup>31</sup> – an apparent conundrum which has proved stubbornly elusive in private international law theory.<sup>32</sup> Thus he argued that a contract should exclusively be governed by the law of the place of contracting, with only a secondary role, aiding in interpretation of the contract, played by the law which the parties intended to govern their relationship.<sup>33</sup> This highlights that, although scholars like Beale and Dicey characterized private international law as concerned with private rights, they also derived the existence of those rights from a particular view of state power – focusing on the exclusive territorial sovereignty of each state. This, however, implied a major difference in the approach of these scholars when compared to Savigny – for them, private international law was strictly a matter of national law, and not a question of ordering derived from the existence of an international community of states. These two perspectives on private international law may, therefore, be fairly described as competing "paradigms" – approaches or perspectives whose incompatible foundational principles render them incommensurable.<sup>34</sup> It is for this reason that Savigny could simply dismiss vested rights as "a complete circle; for we can only know what are vested rights, if we know beforehand by what local law we are to decide as to their complete acquisition"<sup>35</sup> – but equally that such criticism would be entirely unpersuasive to later figures such as Dicey and Beale. As Thomas Kuhn

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30. *Id.* at 10.

31. Beale, *Book Review*, *supra* note 26, at 170.

32. *See, e.g.*, Mills, *Normative Individualism*, *supra* note 20.

33. Such a distinction between the "governing law" and the "law regulating interpretation" is not unknown to the modern common law – it is similar to the position which is still applied in relation to the law governing a will. The system of law governing the material validity of a will is determined to be the law of the place of domicile of the deceased at the time of death, but the *interpretation* of the will is regulated by the law which has been chosen or was intended by the deceased. *See Dellar v. Zivy*, [2007] EWHC (Ch.) 2266 [21]-[23] (Eng.).

34. *See* Kuhn, *supra* note 12, at 150; Michaels, *supra* note 2, at 1610.

35. Savigny, *supra* note 13, at 102-03.



described it in introducing the concept of paradigms to the philosophy of science:

[T]he proponents of competing paradigms practice their trades in different worlds. . . . Practicing in different worlds, the two groups of scientists see different things when they look from the same point in the same direction. . . . That is why a law that cannot even be demonstrated to one group of scientists may occasionally seem intuitively obvious to another.<sup>36</sup>

## II. THE U.S. CHOICE OF LAW REVOLUTION

In the early part of the twentieth century, Beale's vested rights approach dominated thinking about private international law in the United States – perhaps at least in part because “When he started to teach, his was apparently the only course on Conflict of Laws given in any law school in the country.”<sup>37</sup> His approach was understood to require rigid territorial choice of law rules, developed as part of federal law (and under the influence of the Full Faith and Credit<sup>38</sup> and Due Process<sup>39</sup> clauses of the U.S. Constitution), as a necessary consequence of the need to protect vested rights. In 1926, it was suggested that the “Supreme Court has quite definitely committed itself to a program of making itself, to some extent, a tribunal for bringing about uniformity in the field of conflicts,”<sup>40</sup> on the basis that “the full faith and credit clause . . . impose[s] on a state court the duty, in framing its local rule, to follow the statute of another state where, in the opinion of the Supreme Court, the demands of justice require that such a course be adopted.”<sup>41</sup>

But as Beale's work culminated in the First Restatement on Conflict

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36. Kuhn, *supra* note 12, at 150.

37. Griswold, *supra* note 26, at 690.

38. U.S. CONST. art. IV, § 1 (“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.”). Key cases included *Converse v. Hamilton*, 224 U.S. 243 (1912), *New York Life Insurance Company v. Head*, 234 U.S. 149 (1914), *New York Life Insurance Company v. Dodge*, 246 U.S. 357 (1918), *Modern Woodmen of America v. Mixer*, 267 U.S. 544 (1925), and *Bradford Electric Light Company v. Clapper*, 286 U.S. 145 (1932).

39. *See, e.g.*, *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). There are two components to ‘due process’: Amendment V, “No person shall be . . . deprived of life, liberty, or property, without due process of law” (affecting federal authorities, ratified in 1791); and Amendment XIV, § 1, “nor shall any State deprive any person of life, liberty, or property, without due process of law” (affecting the States, ratified in 1868).

40. E. Merrick Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533, 560 (1926).

41. *Id.* at 544.

of Laws, published in 1934, it came under major challenge, principally as a result of the rise of American legal realism.<sup>42</sup> Broadly put, American legal realism was a reaction against a mechanical and formalistic approach to jurisprudence, under which the application of law was (or aspired to be) a quasi-scientific rational process. Legal realists argued instead that the application of law was inherently indeterminate and necessarily involved policy choices, with legal rules serving as rationalizations rather than justifications for those choices.<sup>43</sup> Methodologically, these critics shared with Dicey an emphasis on the study of law as an empirical phenomenon, with rules derived from case law representing the real practice of judges – that theory should, therefore, follow from practice, and not the other way round. As Walter Wheeler Cook put it:

In the present discussion it is proposed, instead of following the a priori method, to adopt the procedure which has proved so fruitful in other fields of science, viz. to observe concrete phenomena first and to form generalizations afterwards. We shall therefore undertake to formulate general statements as to what the “law” of a given country “can” or “cannot” do in the way of attaching legal consequences to situations and transactions by observing what has actually been done. In making our observations we shall, however, find it necessary to focus our attention upon what courts have done, rather than upon the description they have given of the reasons for their action. Whatever generalizations we reach will therefore purport to be nothing more than an attempt to describe in as simple a way as possible the concrete judicial phenomena observed, and their “validity” will be measured by their effectiveness in accomplishing that purpose.<sup>44</sup>

Taking this empirical methodology further, other legal realists argued that there was, indeed, nothing more to law than such “concrete judicial

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42. See generally, e.g., Bruce Wardhaugh, *From Natural Law to Legal Realism: Legal Philosophy, Legal Theory, and the Development of American Conflict of Laws since 1830*, 41 ME. L. REV. 307 (1989).

43. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 465-66 (1897) (“Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form.”); L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 435 (1934) (“The traditional conception of legal method imposes a . . . hypocrisy on the modern judge. Often his procedure is to decide the case first on the basis of ‘non-technical’ considerations. Then armed . . . with . . . fictions, analogies, [and] ‘theories’, he proceeds to wring from his code or other body of doctrine the legally acceptable basis for his decision.”); see also *infra* note 54 and accompanying text.

44. Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L. J. 457, 460 (1924); see also Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L. J. 736 (1924).

phenomena observed.” In the famous words of Oliver Wendell Holmes Jr., “prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law”,<sup>45</sup> and thus “a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right.”<sup>46</sup> Somewhat ironically, as a Justice of the Supreme Court Holmes provided one of the most influential endorsements of the vested rights approach in holding (in respect of a claim arising out of an accident in Mexico, but sued on in Texas) that:

The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. . . . But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation . . . but equally determines its extent.<sup>47</sup>

As a legal theorist, however, Holmes’ realist skepticism helped sow the seeds for the US choice of law revolution against this approach.

For private international law, and choice of law in particular,<sup>48</sup> the legal realist perspective gave rise to an entirely different critique of vested rights than that offered by Savigny – an external view of the identity of private international law, which initiated the U.S. choice of law revolution’s paradigm shift. If rights are not recognized by courts, but rather created by them through judicial acts, then the idea that choice of

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45. Holmes, *supra* note 43, at 460-1.

46. *Id.* at 458.

47. Slater v. Mexican National Railroad Co., 194 U.S. 120, 126 (1904) (footnotes omitted). Holmes remained committed to this position at least as late as 1924, where in a letter to the English legal scholar Sir Frederick Pollock he reaffirmed the strictness of his adherence to the vested rights approach, even suggesting that “Dicey went further than I should in emphasizing local policy”, adding “We used to fight about it. I mean Dicey and I.” See HOLMES-POLLOCK LETTERS – THE CORRESPONDENCE OF MR. JUSTICE HOLMES & SIR FREDERICK POLLOCK 1874-1932 (Peabody Museum) (Harvard University Press, 1961), p.138 (letter dated 11 June 1924).

48. This section focuses on choice of law, as it is in this field that the major theoretical challenges have arisen in respect of private international law in the United States. A comparable analysis of rules on jurisdiction in the United States might also be attempted – noting, for instance, the abandonment of traditional territorial jurisdictional rules in favor of more open-textured ‘fairness-based’ approaches, such as California’s rule that “A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States” (California Code of Civil Procedure, s.410.10), which limits jurisdiction only according to Due Process minimum contacts requirements. These requirements appear, however, to have been recently tightened in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011).

law involves the recognition of foreign vested rights is not circular but rather a meaningless legal fiction. Under this approach, rights do not in fact exist until the local court decides whether or not to “enforce” them – a decision which is not determined by legal doctrine but by judicial policy and preference. Cook illustrated this problem by considering complex foreign cross-border torts, such as where the wrongful act, the direct injury, and the ultimate loss were suffered in different places. Since (according to his analysis) more than one state might rightfully claim to regulate the consequences of the act, under which law should it be decided whether a right has vested. “Obviously”, concluded Cook, “we can no longer turn the crank of the logical machine and produce the answer ready-made, for no single state has exclusive jurisdiction; there is no single foreign right to recognize and enforce.”<sup>49</sup> For Cook, this posed an unanswerable question for the vested rights approach: “If [a court] nevertheless gives the plaintiffs a judgment, can we accurately describe that action otherwise than by saying that the right so enforced is a right created by the law of [the court] and not a foreign-created right?”<sup>50</sup> Under this perspective, the right enforced is really local in its foundation (thus Cook is sometimes described as having developed the ‘local law’ theory),<sup>51</sup> and its enforcement cannot be explained or justified by a theory of vested rights. On this basis, Cook highlighted the inconsistency between Holmes’ theoretical work and his Supreme Court judgment cited above, arguing that:

The decision thus appears not as an inevitable outcome from fixed premises (that the forum is enforcing an *obligatio* created by foreign law,

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49. Cook, *supra* note 43, at 468; *see similarly* Lorenzen, *supra* note 44. This analysis reflected both a practical reality of asserted extraterritorial jurisdiction, as well as the increased legal acceptance of extraterritorial jurisdiction as part of U.S. law (*see id.* at 482-85), as well as under both public and private international law. *See generally, e.g.,* Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 LAW & CONTEMP. PROBS. 11 (1987); Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT’L L. 280 (1982). In public international law, the general permissibility of extraterritorial regulation was controversially endorsed by the Permanent Court of International Justice in *SS “Lotus” (France v. Turkey)* (1927) PCIJ Ser A, No 10, which held (at pp.18-19) that international law is “Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property or acts outside their territory”, but rather “leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.” *Id.* at 19; *see also* Mills, *supra* note 20.

50. *Id.* at 469.

51. The judgments of Justice Learned Hand were influential here. For example, in *Guinness v. Miller* (1923), 291 F 769, he had held that “no court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign.” *Id.* at 770.

and must inevitably take it or leave it, just as it is), but for what it is, and for what Mr. Justice Holmes undoubtedly knew it was – a practical result based upon the reasons of policy established in prior cases.<sup>52</sup>

The need for reliance on prior cases was an important aspect of Cook's approach – he was not arguing that all judging is indeterminate, but accepting that a decision may be guided by similar precedents which establish relevant policies. In cases where analogies might be drawn with more than one precedent – where more than one “rule” might govern – the choice between analogies or precedents would itself be a policy decision for the judge. He argued that this phenomenon had arisen more often in conflict of laws, because of the relative scarcity of precedents, suggesting that:

[A] writer attempting to set forth the “American law” upon the conflict of laws is necessarily compelled more often than in any other field to choose between conflicting rules. In making a choice between such rules, it is obvious that here as elsewhere the basis must be a pragmatic one of the effect of a decision one way or the other in giving a practical working rule.<sup>53</sup>

Although Cook set the stage for the realist revolution by focusing attention on the policy analysis inherent in deciding choice of law cases, other scholars such as David F. Cavers carried the analysis further, arguing that a more fundamental indeterminacy in legal decision-making displaced the supposed certainty provided by precedent. In part, this was reflective of a broader and more general philosophical critique of linguistic determinacy, and in part it was a critique focused on the particular characteristics (or perceived characteristics) of choice of law rules – the availability of a variety of flexible exceptions, including characterization, public policy, renvoi, and the substance-procedure distinction. Cavers thus argued that existing choice of law rules were fundamentally flawed because they failed to provide an accurate predictive device for judicial behavior – to put this another way, there was a disconnect between the theory and practice of private international law. Instead of a deterministic rule-based analysis, judges were in fact making policy decisions based to some extent on precedent but also significantly on their own evaluation of competing policy interests.<sup>54</sup>

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52. *Id.* at 480.

53. *Id.* at 488.

54. *See generally, e.g.,* David F. Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L.

Dual and opposing – almost contradictory – criticisms were therefore raised. On the one hand, the rigid rules favored by the vested rights approach often led to inappropriate results because the rules were insufficiently attentive to policy considerations, and (since vested rights viewed choice of law through the lens of state power) took insufficient account of the expectations of private parties – as noted above, there was for instance no room for party autonomy in Beale’s First Restatement, despite practice and precedent to the contrary. On the other hand, such rigid rules were often evaded through escape devices, which enabled judges to circumvent the ‘undesirable’ consequences of their application. To adopt the words of one prominent scholar, Brainerd Currie:

A sensitive and ingenious court can detect an absurd result and avoid it; I am inclined to think that this has been done more often than not and that therein lies a major reason why the system has managed to survive. At the same time, we constantly run the risk that the court may lack sensitivity and ingenuity; we are handicapped in even presenting the issue in its true light; and instances of mechanical application of the rules to produce indefensible results are by no means rare. Whichever of these phenomena is the more common, it is a poor defense of the system to say that the unacceptable results that it will inevitably produce can be averted by disingenuousness if the courts are sufficiently alert.<sup>55</sup>

For such critics, then, the only choice of law rule which would adequately describe and predict (and liberate) judicial decision making would be an open-textured rule which expressly invited judges to carry out an analysis of competing policy interests<sup>56</sup> – in full awareness and cognizance of the content of potentially applicable substantive laws (a consideration strikingly absent in the traditional approaches examined above, under which conflict of laws rules are blind to the content of the potentially applicable laws).<sup>57</sup> This required a reorientation of private international law, away from the traditional objective of “conflicts” justice,

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REV. 173 (1933); see DAVID F. CAVERS, *THE CHOICE OF LAW PROCESS* (1965).

55. See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 181 (1963).

56. This approach was at least partially inspired by the Supreme Court decision in *Alaska Packers Ass’n v. Industrial Accidents Commission of California*, 294 U.S. 532 (1935), in which the Court had held that choice of law disputes should be resolved “not by giving automatic effect to the Full Faith and Credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight.” *Id.* at 547. This “interest-balancing” approach to the Due Process clause was subsequently rejected by the Supreme Court. See, e.g., *Allstate Insurance v. Hague*, 449 U.S. 302 (1981).

57. See, e.g., Cavers, *supra* note 54, at 180ff.

toward the same values of “material” or “substantive” justice which motivate private law.<sup>58</sup>

There are of course a wide and diverse range of different approaches and techniques which were introduced as part of the U.S. conflict of laws revolution – perhaps as many techniques as scholars, if not more. Not all of these invite the courts to evaluate the potential substantive outcomes of a choice of potentially applicable laws themselves. We might again highlight, for instance, the work of Currie, who argued that an analysis of government interests would frequently reveal a “false conflict,” under which only one state was genuinely interesting in regulating the disputed relationship. Where a true conflict did exist, he argued that the forum ought to resolve it in favor of its own law – a consequence which flowed from the fact that the court would be evaluating domestic against foreign policies, and was in no position to decide that the foreign policy was superior to that of their own legislature.<sup>59</sup>

It is characteristic of Currie’s approach that the analysis of the “interests” of each state should be conducted at least principally through interpretation of the potentially applicable statutes. It thus involves the determination of whether a state has subjectively asserted an interest, rather than an objective determination of which state has the ‘greater’ or ‘more genuine’ interest.<sup>60</sup> It should be noted that at times Currie did stretch the boundaries of interpretation toward more objective considerations, suggesting for example that it might involve asking “whether the relation of the forum to the case is such as to provide a *legitimate* basis for the assertion of an interest in the application of that policy”<sup>61</sup> (although he did not develop in depth criteria for determining this question of legitimacy<sup>62</sup>). Nevertheless, his method in general attempts to detect a literal ‘conflict of laws’, rather than resolve a potential conflict of regulatory authority. Under this approach, an assertion of regulatory authority – local or foreign – can never be invalid, although foreign assertions may be trumped by an

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58. See, e.g., FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE (1993); Symeon C. Symeonides, *Material Justice and Conflicts Justice in Choice of Law*, in INTERNATIONAL CONFLICT OF LAWS FOR THE THIRD MILLENNIUM: ESSAYS IN HONOR OF FRIEDRICH K. JUENGER (Borchers & Zekoll eds., 2001),

59. Currie, *supra* note 55, at 181, arguing that “assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy.”

60. See Mills, *supra* note 2, at 259ff.

61. See Currie (1963), *supra* note 55, at 183 (emphasis added).

62. See Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM J. COMP. L. 1, 9 (1984).

overlapping claim by the forum state.

The choice of law revolution in the United States was further facilitated by the decision of the Supreme Court to back down from its previous program of establishing federal choice of law rules.<sup>63</sup> In *Klaxon v Stentor Electric* (1941), the Court determined instead that federal courts exercising diversity jurisdiction are obliged to apply the choice of law rules of the states within which they are sitting – effectively, that choice of law rules fell within state and not federal regulatory authority.<sup>64</sup> Although subsequently the Court has continued to recognize *some* constitutional limits on state choice of law rules, requiring ‘significant contacts’ to justify the application of a state’s own law,<sup>65</sup> the effect of this decision was to shift almost entirely the choice of law debate from the federal level to the diverse states. This opened US choice of law to the process of legal experimentation which has characterized it since. At the same time, however, it largely undermined the collective goals which had been an inherent part of the perspective which had previously been adopted on choice of law. Left to each state, it was impossible for choice of law rules to aspire to the universalism of Savigny’s objective system of allocation of private law regulatory authority. This in turn transferred attention to the content of choice of law rules, now viewed as policy decisions for each individual state. The focus of analysis thus shifted from issues of ordering or conflict avoidance to questions of justice, fairness, or appropriateness for the resolution of the particular conflict at hand. This in turn reinforced the work of theorists who had argued that choice of law rules should be open-textured and allow judges to evaluate competing interests, particularly legislative objectives, in determining the governing law.

While a Second Restatement of Conflict of Laws was produced in 1969, it has been criticized for incoherently combining a variety of theoretical approaches rather than bringing clarity. In reference to a claim in contract, for example, under the Second Restatement the courts should follow an express or implied choice of law by the parties,<sup>66</sup> unless there is no substantial relationship with the parties or the dispute and there is no other reasonable basis for the choice, and subject to the rule that the parties cannot contract contrary to a “fundamental policy of a State which has a materially greater interest than the chosen state in the determination of the

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63. See Alex Mills, *Federalism in the European Union and the United States: Subsidiarity, Private Law and the Conflict of Laws*, 32 U. PA. J. INT’L L. 369, 408-21 (2010).

64. 313 U.S. 487, 494-98 (1941).

65. See, e.g., *Allstate Insurance v. Hague*, 449 U.S. 302 (1981); *Philips Petroleum Company v. Shutts*, 472 U.S. 797 (1985); *Sun Oil Company v. Wortman*, 486 U.S. 717 (1988).

66. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1969).



particular issue.”<sup>67</sup> If no choice of law is made by the parties, flexible choice of law rules apply, for example, selecting the law of the State with the “most significant relationship” to the contract.<sup>68</sup> The Second Restatement lists a series of relevant principles to be considered in determining which State has the most significant relationship, which include “the needs of the interstate and international systems,” “the relevant policies of the forum,” “the relevant policies of other interested states,” “the protection of justified expectations,” and “certainty, predictability and uniformity of results.”<sup>69</sup> Additional “contacts” are specified for particular subject areas, such as, in the case of contracts, the “place of contracting”, “place of performance”, and location of the parties.<sup>70</sup> Given this diversity of considerations, there seems little cause for confidence that the Second Restatement is (or aspires to be) a useful tool to predict the outcome of individual cases, or that it strongly advances consistent decision making in choice of law problems. In effect, if not in intention, the variety of theoretical positions seemingly combined in the Second Restatement has had the effect of expanding the degree of judicial discretion in choice of law problems, consistent with the aspirations (if not the methodologies) of most U.S. choice of law revolutionaries.

### III. THE EU PRIVATE INTERNATIONAL LAW REVOLUTION

Prior to the emergence of unified European rules, private international law had become a matter of fairly diverse national regulation in the various European states – the product of increased dissonance in the debate about which connecting factors should be relied upon to “localize” a legal relationship.<sup>71</sup> Savigny’s vision of a uniform system of private international law was thus largely sidelined by the reality of disparate national traditions – only partially countered by the harmonizing influence of the Hague Conference on Private International Law, an institutional embodiment and direct inheritor of the internationalist tradition in private international law.<sup>72</sup> In the diverse European legal systems, private international law – while retaining a sense of its traditional internationalist aspirations – was increasingly adapted to serve domestic policies, partly influenced by U.S.

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67. *Id.* at § 187(2)(b).

68. *Id.* at § 188.

69. *Id.* at § 6.

70. *Id.* at § 188(2).

71. *See supra* Part I.A.

72. *See, e.g.*, Geert De Baere & Alex Mills, *T.M.C. Asser and Public and Private International Law: The Life and Legacy of “a Practical Legal Statesman,”* NETH. YEARBOOK INT’L L., Dec. 2011, at 3, 28.

theoretical developments, but less so by US techniques.<sup>73</sup>

Under the common law, the theoretical baggage of Dicey's vested rights theory had been largely cast off, in favor of a pragmatism which involved loosening rather than entirely abandoning old choice of law techniques, but which placed greater emphasis on finding the most appropriate solution for each individual case.<sup>74</sup> Private international law was thus, in the common law tradition, considered to be focused on achieving justice and fairness in individual cases, although with little analysis of what these criteria might mean when more than one legal order is potentially applicable, and while remaining blind to the substance of the possible governing laws.<sup>75</sup>

Within the European Union, the conception and function of private international law has, however, been transformed over recent years.<sup>76</sup> Instead of being viewed as national law, serving national policy interests, private international law has developed a new identity as part of the process of defining the European legal order and facilitating the efficient functioning of the internal market. In 1999, the Treaty of Amsterdam gave the institutions of the European Union a new competence in the field of private international law.<sup>77</sup> As amended and renumbered by the Lisbon Treaty (2009), Article 81(2) of the Treaty on the Functioning of the European Union (previously the Treaty on the European Community) now provides (in part) that:

the European Parliament and the Council . . . shall adopt measures,

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73. See, e.g., Michaels, *The New European Choice of Law Revolution*, *supra* note 2, at 1616.

74. JAMES FAWCETT & JANEEN M. CARRUTHERS, CHESHIRE, NORTH AND FAWCETT: PRIVATE INTERNATIONAL LAW 37 (14th ed. 2008) ("There is no sacred principle that pervades all decisions, but when the circumstances indicate that the internal law of a foreign country will provide a solution more just, more convenient and more in accord with the expectations of the parties than the internal law of England, the English judge does not hesitate to give effect to the foreign rules. What particular foreign law shall be chosen depends on different considerations in each legal category. Neither justice nor convenience is promoted by rigid adherence to any one principle. . . . Private international law is no more an exact science than is any other part of the law of England; it is not scientifically founded on the reasoning of jurists, but it is beaten out on the anvil of experience.").

75. See e.g., MILLS, *supra* note 2, at 3.

76. See Mills, *Federalism in the European Union and the United States*, *supra* note 63, at 399-400.

77. See generally Andrew Dickinson, *European Private International Law: Embracing New Horizons or Mourning the Past?*, 1 J. PRIVATE INT'L L. 197 (2005); Katharina Boele-Woelki & Ronald H. van Ooik, *The Communitarization of Private International Law*, 4 YEARBOOK OF PRIVATE INT'L LAW 1 (2002); Oliver Remien, *European Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice*, 38 COMMON MKT. L. REV. 53, 60 (2001); Jurgen Basedow, *The Communitarization of the Conflict of Laws under the Treaty of Amsterdam*, 37 COMMON MKT. L. REV. 687 (2000).

particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; [and]

....

(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction<sup>78</sup>

This enhanced regulatory capability has received expression in an active legislative program which sees private international law developing an increasingly prominent role in the European legal system.<sup>79</sup> The Brussels I Regulation (2001)<sup>80</sup> has been followed by the Brussels II Regulation (2003),<sup>81</sup> Rome I Regulation (2008),<sup>82</sup> and Rome II Regulation (2007).<sup>83</sup> A new Rome III Regulation has recently been adopted and come into effect from June 2012 in certain Member States (under enhanced cooperation rules),<sup>84</sup> dealing with choice of law in divorce and legal separation. A proposal for a Regulation on succession and wills<sup>85</sup> was presented in 2009, and two further proposals for Regulations on matrimonial property<sup>86</sup> and the property consequences of registered partnerships<sup>87</sup> were presented in March 2011.

78. Consolidated Version of the Treaty on the Functioning of the European Union, art. 81(2) Mar. 30, 2010, 2010 OJ (C 83) 47.

79. See, e.g., Elizabeth B. Crawford & Janeen M. Carruthers, *Conflict of Loyalties in the Conflict of Laws: The Cause, The Means and the Cost of Harmonisation*, JURID. REV. 251 (2005); Boele-Woelki & van Ooik, *supra* note 78; Peter North, *Private International Law: Change or Decay?*, 50 INT'L COMP. L.Q. 477 (2001).

80. See *supra* note 9.

81. Council Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (EC), repealing Regulation 1347/2000, EU OJ L 338, 23 December 2003 (EC).

82. See *supra* note 11.

83. Regulation 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II), 2007 O.J. (L 199).

84. Council Regulation 1259/2010, Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation (Rome III), 2010 O.J. (L 343) 10, 16.

85. *Commission Proposal for a Regulation of the European Parliament and of the Council on jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in Matters of Succession and the Creation of a European Certificate of Succession*, COM (2009) 154 final (Oct. 14, 2009).

86. *Commission Proposal for a Council Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of Matrimonial Property Regimes*, COM (2011) 126 final (Mar. 16, 2011).

87. *Commission Proposal for a Council Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions Regarding the Property Consequences of Registered Partnerships*, COM (2011) 127 final (Mar. 16, 2011).

The significance of this European regulation is that it has effected a transformation not only in the source of rules of private international law – from national law to European law – but a transformation in their character and function. Within the European Union, private international law rules are viewed as serving a *systemic* or *public ordering* function, allocating regulatory authority between Member States in the service of “the proper functioning of the internal market”. The transformation of private international law – the ‘paradigm shift’ – has thus come once again in response to an external critique of the subject. Private international law was examined from the point of view of the needs of the European internal market, and found wanting. The diversity of private international law rules was found to be an obstacle to the efficient functioning of the market, and national rules (and the national policies they inherently reflected) were cast aside. This was, therefore, not a theoretical revolution from the *inside*, led by private international lawyers, but a practical revolution led by European actors focused on economic considerations – with the theory coming largely *ex post facto* in an effort to understand the transformations which are occurring or have already occurred.

To some extent, the EU revolution *may* be considered a rediscovery of the original function of rules of private international law, albeit newly adapted to the service of particular regulatory objectives – the EU revolution has (re)conceived of private international law rules as concerned with the appropriate allocation of regulatory authority, distantly echoing Savigny. Although these ideas have been transplanted to a federal context, they have nevertheless provided an important renewal of private international law’s traditional public dimension, and given the subject fresh prominence and academic interest in the European Union. This is perhaps particularly notable with respect to the revival in significance and stature of the traditional objective of avoiding conflicts between legal orders. Strict rules of *lis pendens* and judgment recognition in the Brussels I Regulation strive to achieve this by reducing instances of overlapping jurisdiction between Member States, based on the argument that “In the interests of the harmonious administration of justice it is necessary to minimize the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States.”<sup>88</sup> The harmonisation of choice of law similarly aims to ensure decisional consistency, based on the argument that “The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for

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88. Brussels I Regulation (2001), *supra* note 9, Recital 15.

the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.”<sup>89</sup> These traditional objectives of private international law are, however, reconceived as means to a ‘greater’ end – the principal objective of improving the efficient functioning of the European internal market.

#### IV. LEARNING FROM THE U.S. AND EU EXPERIENCES

The analysis above has highlighted four strikingly different models of private international law, and four different ways of thinking about its function and purpose. First, the idea of private international law as concerned with the international allocation of state power (which we might associate with Savigny). Second, the idea of private international law as concerned with the national recognition of private rights (which we might associate with Dicey and Beale). Third, the idea of private international law as a question of identifying and pursuing state policy interests (which we might associate with the US choice of law revolution). And fourth, the idea of private international law as aiming to increase the efficiency of the functioning of the European internal market (which we might associate with the EU private international law revolution).

The following are some critical reflections on what we might learn from the experiences of the U.S. and EU revolutions in private international law. The final section then offers some concluding thoughts as to how private international law might be conceived or reconceived in light of the analysis in this article.

##### A. The U.S. experience

It is easy to see why U.S. scholars reacted against the artificial formalism of the vested rights approach. Savigny’s criticism of the approach – that it is circular, because it is private international law rules which *determine* when rights arise – has a great deal of bite, at least once ideas of ‘natural rights’ are dismissed.<sup>90</sup> The strict territorialism which underpinned Huber’s commitment to vested rights was also increasingly untenable by the early nineteenth century, when it was already clear that states were asserting regulatory authority extraterritorially in a range of circumstances.<sup>91</sup> Since private international law rules were not serving their purported function of mechanically recognizing private rights, but were

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89. Rome I Regulation (2008), *supra* note 11, Recital 6; and (identically) Rome II Regulation (2007), *supra* note 83, Recital 21.

90. *See, e.g.*, Mills (2009), *supra* note 2, at 57-58.

91. *See supra* note 50 and accompanying text.

rather determining when such rights should be said to have arisen, judges were in reality navigating blindly with no policy direction from the theoretical fictions which purported to guide them.<sup>92</sup> US revolutionary scholars sought to uncover the ‘real’ policies and decisions operating behind or through private international law rules, and argued that the rules ought to openly reflect those practices.<sup>93</sup> The U.S. revolution was of critical importance in drawing attention to the fact that private international law rules are not mechanical or neutral, but themselves engage with a variety of policy considerations. Private international law would be – and indeed was – much poorer without these insights.

It is less certain whether the variety of approaches introduced by US private international law scholars have represented clear progress in filling this policy void – the limited international influence of the US revolution might suggest otherwise. A range of difficulties might be tentatively highlighted.<sup>94</sup> There seems to be a tendency in much US scholarship to subsume private international law questions within other considerations. There is indeed something perhaps inevitably destructive in the idea, central to the legal realist critique, that private international law theory should follow private international law practice (and not the other way round),<sup>95</sup> as this leaves practice to be shaped by externally defined considerations. It is difficult to avoid the impression that at least some choice of law scholarship has theorized itself into the margins, achieving only a form of self-obsolence. Perhaps this is indeed reflected in the (at least perceived) decline of private international law as an object of academic study in the United States, flying otherwise paradoxically in the face of its ever-increasing practical importance.

Some strains of government interest analysis, for instance, require the court to do nothing more than interpret potentially applicable state statutes, and in case more than one purports to govern the dispute or relationship, apply the law of the forum.<sup>96</sup> From this perspective, however, choice of law almost seems to disappear as an independent process or consideration, supposedly swallowed by statutory interpretation and by subservience to legislative policies. But such an approach may itself be highly artificial and unpredictable as legislators are seldom cognizant, let alone expressly clear, as to whether the rules they are adopting will apply to international cases

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92. See Wardhaugh, *supra* note 43 and accompanying text.

93. See *supra* note 57 and accompanying text.

94. See, e.g., Juenger (1984), *supra* note 62.

95. See *supra* note 43.

96. See *supra* note 58.

(or as to what exact policies they are trying to advance).<sup>97</sup> In addition, there are difficulties in adapting this approach to cases governed by the common law, in which there is no legislative intention to divine. This approach may also be highly unsatisfactory, as it reduces choice of law to mere *assertions* of interest – in the absence of any underlying criteria for when an assertion of interest is ‘legitimate’, which begs a raft of questions. The focus on asserted interests also implicitly discards the important possibility that other states may have an interest in or policy in favor of *non-regulation*. It may further over-emphasize the role of private international law in the resolution of particular disputes, and under-emphasize the role private international law plays in guiding the behavior of international actors, many of whom might favor certainty of any kind over open-textured rules which seek to advance indeterminate state policy interests. Indeed, it is difficult to see what role it leaves for the expectations and agreements of private parties. In addition, it may further ignore or underplay interests which states may have beyond their legislative assertions, such as interests in harmonious co-existence with other states, in the avoidance of duplicative or inefficient litigation<sup>98</sup>, or in the forms of international cooperation which take place through the Hague Conference on Private International Law in response to concrete practical problems, such as cross-border adoption<sup>99</sup> or child abduction.<sup>100</sup>

Finally, the favoring of the law of the forum either expressly or implicitly adopted in many such approaches seems to make choice of law a secondary consideration to jurisdiction – under this approach it may be jurisdictional rules which effectively determine the applicable law. But this again neglects the particular policy considerations at stake in choice of law rules in favor of the different considerations at play in determining

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97. See generally Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980). It should also be pointed out that where questions do clearly arise concerning the intended scope of potentially applicable statutes, traditional choice of law methodology does not preclude that determination through statutory interpretation as a second stage of the choice of law process – once the governing legal order has been determined, a further inquiry may indeed be required into which *specific* laws of that order apply. This does not, however, render the first stage (the determination of the applicable legal order through choice of law rules) redundant, except to the extent that it is overridden through ‘mandatory’ rules. See generally Trevor C. Hartley, *Mandatory Rules in International Contracts: The Common Law Approach*, in 266 RECUEIL DES COURS 337 (1997). 337.

98. See, e.g., Alfred Hill, *Governmental Interest and the Conflict of Laws-A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960).

99. See generally, *Intercountry Adoption Section of the Hague Conference on Private International Law*, [http://www.hcch.net/index\\_en.php?act=text.display&tid=45](http://www.hcch.net/index_en.php?act=text.display&tid=45) (last visited Apr. 5, 2013).

100. See generally *Child Abduction Section of the Hague Conference on Private International Law*, [http://www.hcch.net/index\\_en.php?act=text.display&tid=21](http://www.hcch.net/index_en.php?act=text.display&tid=21) (last visited Apr. 5, 2013).

jurisdiction – which may be based, for example, on general contacts between the defendant and the forum rather than any connection between the subject matter of the dispute and the forum.<sup>101</sup>

In short, such approaches – under which private international law is seen to serve other domestic policies – seem inevitably to neglect the specific issues raised by cross-border private disputes and the insights which private international law and particularly choice of law might have to offer. In this view of private international law, there is little room left for considerations of the appropriate allocation of state power, or the avoidance of conflicting regulation. The experience of the Second Restatement of Conflict of Laws has given rise to other, similar concerns. It has been argued that by “[t]rying to be all things to all people, it produced mush”.<sup>102</sup> More particularly, the Second Restatement approach is open to the criticism that by including too many ‘choice-influencing considerations’<sup>103</sup> and being too open-textured, it effectively defers any decisions to individual judges in individual cases, leaving little room for the development of broad and coherent policies. By individualizing choice of law decisions under rules which do little to constrain discretionary decision-making, such an approach once again seems to deny private international law its own policy impact – in being open to everything, it strives for nothing.

## B. The EU experience

It is, once again, not difficult to understand the perspective of the instigators of European private international law reforms. Viewed from the point of view of the interests of the internal market, the range of inconsistent private international law regulations which were present in the various Member States prior to European reforms clearly appears as an obstacle or obstruction to the smooth functioning of the market. European harmonization of private international law is an obvious response to this problem, at least in the absence of the more legally and politically challenging and contentious project of the harmonization of European private law.<sup>104</sup> While such harmonization projects always present difficulties in terms of the potential for inconsistent national interpretations of the rules, the European Court of Justice has gradually been, and will

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101. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011).

102. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 253 (1992).

103. See Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966).

104. See, e.g., Mills, *supra* note 63.



continue to be, able to offer definitive guidance on disputed provisions. As further practical harmonization is achieved, private international law in the European Union is moving ever closer to at least some of the traditional aspirations associated in this article with Savigny. Rules of private international law will increasingly effect an ordering of private law regulatory authority between the various Member States, aiming to minimize the potential for jurisdictional conflicts by ensuring that only one Member State takes jurisdiction over a dispute (through harmonized rules on jurisdiction and *lis pendens*), that wherever a dispute is litigated the same law will be applied (through harmonized choice of law rules), and that the resolution of a dispute in one Member State will almost always preclude the re-litigation of that dispute in another Member State (through rules on the recognition and enforcement of judgments).

There are, however, a number of problems which have arisen in practice with the development of European private international law regulation. One is a consequence of the fact that this regulation is focused on achieving federal rather than international objectives. The Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments<sup>105</sup> has faced particular difficulties concerning its scope of application. The terms of the Regulation determine its applicability principally on the basis of the domicile of the defendant in any civil or commercial litigation – potentially encompassing claims against EU domiciled defendants which are otherwise entirely unconnected with the internal market. However, the rules of the Regulation are drafted only with internal market problems in mind – giving no consideration, for example, to the effect of jurisdiction agreements in favor of non-Member States, subject matter connections with non-Member States, or prior proceedings in non-Member States.<sup>106</sup> The practical impact of this limitation is that the allocation of regulatory competence to Member States may not sufficiently take into consideration the connections between a dispute and non-Member States. The Regulation may thus end up allocating regulatory authority inappropriately, and actually facilitate *more* conflicts between Member State and non-Member State legal orders. The general problem with the Brussels I Regulation is a failure for its rules to match up to its scope (both as interpreted by the European Court of Justice) – its scope encompasses a variety of non-internal market questions, but its rules are motivated only by

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105. Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, O.J. (L 12).

106. This well-known problem is highlighted by the ECJ decision in *Owusu v. Jackson* [2005] ILPr 25, [2005] ECR I-553; see, e.g., Richard Fentiman, *Choice of Law in Europe: Uniformity and Integration*, 82 TUL. L. REV. 2021, 2041 (2008).

internal market considerations, with limited recognition of their ‘externalities’.

Further related problems also arise from the influence of the internal market on the *design* of European rules of private international law. One impact is that European rules have tended to be more rigid, aimed at achieving certainty and predictability for market participants, rather than necessarily at achieving appropriate outcomes.<sup>107</sup> From a common law perspective, having moved away from the rigid rules previously adopted under the motivation of Dicey’s vested rights approach, this change has appeared regressive.<sup>108</sup> In some cases, the selection of rule has also itself been problematic. In the Rome Convention and now Rome I Regulation, for instance, the law applicable to a contract in the absence of party choice is (rebuttably) presumed to be the law of the location (variously defined) of the characteristic performer of the contract.<sup>109</sup> In many cases it is difficult to see much sense behind this choice – why one party’s home law ought to govern a relationship which is centered elsewhere, around the place of performance of the contract. This is a concern which has arguably led English courts (historically more used to applying territorial choice of law rules, including under the influence of vested rights, which also led to a territorial influence in applying the later “proper law of the contract” approach<sup>110</sup>) to a greater willingness to overcome the presumption compared with the courts of other Member States.<sup>111</sup> The presumption has the benefit of at least appearing more certain and predictable, particularly where contractual performance crosses borders, but this ‘internal market’ objective is not a value traditionally protected in private international law rules which have historically been more focused on ensuring the *appropriate* allocation of regulatory authority.

Similarly, in the context of jurisdiction the Brussels I Regulation has been interpreted to mean that considerations of *lis pendens* – motivated by

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107. This is of course a question of balancing rather than absolutes – for example, Recital 16 to the Rome I Regulation, *supra* note 11, provides that “[t]o contribute to the general objective of this Regulation, legal certainty in the European judicial area, the conflict-of-law rules should be highly foreseeable,” but immediately acknowledges that “[t]he courts should, however, retain a degree of discretion to determine the law that is most closely connected to the situation.”

108. *See, e.g.*, Fentiman, *supra* note 106.

109. Rome I Regulation, *supra* note 11, Article 4(1) and 4(2), in conjunction with Article 19.

110. *See Amin Rasheed Shipping Corp v. Kuwait Insurance Co* [1984] A.C. 50 (H.L.), 62 (stressing the general importance of the ‘lex loci solutionis’ (law of the place of performance) in identifying the system of law governing a contract, although noting that the importance of this factor “varies with the nature of the contract”); *see also, Coupland v. Arabian Gulf Oil Co* [1983] 1 W.L.R. 1136, 1150.

111. *See, e.g.*, Jonathan Hill, *Choice of Law in Contract under the Rome Convention: The Approach of the UK Courts*, 53 INT’L & COMP. L.Q. 325 (2004).

avoiding potentially conflicting parallel proceedings in different Member States – outweigh the need to give practical effect to jurisdiction<sup>112</sup> or arbitration<sup>113</sup> agreements. Thus, a court of an EU Member State second seized of a dispute, even if it believes there is an exclusive jurisdiction agreement in its favor, is obliged to stay its proceedings in favor of the Member State court first seized, clearing the way for ‘strategic’ (even bad faith) litigation tactics – the infamous “Italian torpedo.”<sup>114</sup>

It is true that these problems are being (partially) addressed under recently agreed reforms.<sup>115</sup> They nevertheless highlight a problematic prioritization of the avoidance of possible conflicts of laws – a ‘secondary’ objective of traditional private international law – over its ‘primary’ objective of appropriately allocating regulatory authority between states. The lack of concern over appropriateness is almost reminiscent of Currie’s (seemingly half-joking) suggestion that, since “[a]ll that is required . . . is a way of determining, simply and certainly, what law will be applied, so that transactions can be planned and litigation undertaken with some confidence as to the outcome – and, in addition, assurance that the decision will not vary according to the forum . . . a nearly ideal choice-of-law rule . . . would be that the governing law shall be that of the State first in alphabetical order.”<sup>116</sup> In the unlikely event a common language could be agreed upon, such a rule would no doubt achieve a level of certainty and predictability in choice of law between EU Member States, but at the cost of a *principled* or *appropriate* allocation of regulatory authority.

In summary, the various criticisms leveled at European regulation of private international law tend to circle around the idea that it has favored certainty and predictability over appropriateness – both in terms of applying relatively rigid rules which preclude fact-sensitive decisions, and in terms of the questionable appropriateness of some of the rules chosen. In general, it seems that at least to some extent a traditional policy objective of private international law – the appropriate allocation or division of regulatory authority – has been partially sidelined by other policy objectives, in particular the efficiency of the internal market. This is, of

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112. *Gasser v. MISAT*, [2003] E.C.R. I-14693.

113. *Allianz SpA v. West Tankers*, [2009] E.C.R. I-663.

114. Mario Franzosi, *Worldwide Patent Litigation and the Italian Torpedo*, 7 EUR. INTELL. PROP. REV. 382 (1997); see also, Trevor C. Hartley, *The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws*, 54 INT’L & COMP. L.Q. 813, 815 (2005).

115. See Council Regulation 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast), O.J. (L 351).

116. Brainerd Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258, 279 (1961).

course, a question of degree – EU private international law has not adopted arbitrary choice of law rules, and in some cases specialized choice of law rules have been designed with other regulatory goals in mind,<sup>117</sup> particularly when it comes to the protection of weaker parties, like consumers<sup>118</sup> and employees,<sup>119</sup> and the protection of the environment.<sup>120</sup> But in general the critics of EU private international law rules have highlighted what is perceived as an excessive focus on the interests of the internal market over other policy objectives which ought to be taken into consideration, including the traditional interests of private international law in regulating the allocation of competence between states, not limited to EU Member States.

#### V. SO WHAT IS (OR SHOULD BE) THE IDENTITY OF PRIVATE INTERNATIONAL LAW?

It should be apparent from the analysis in this article that there is a considerable range of different ideas of what private international law “is” in the sense of how we should understand its purpose and function. Under different theoretical and practical perspectives, private international law has been considered as international or at least natural law, federal law, regional law, or local law. It has been considered as serving the public functions of ordering authority between states or pursuing state-defined legislative policy interests, or as serving the private functions of giving effect to party expectations or protecting private rights acquired under foreign law. Clearly more than one answer might be given to the question of private international law’s “true” character. Private international law is, to some extent, what we choose it to be, and this choice reflects (or ought to reflect) the values we have which we think it might serve to promote. For this author at least, one such fundamental value is what I have referred to elsewhere as “justice pluralism”<sup>121</sup> – the acceptance that the questions of private law do not have a single ‘correct’ answer, that different societies are capable of making (and entitled to make) different decisions about such questions, and that in a world of coexisting states those differentiated determinations of the just outcome of a dispute ought to be given at least a degree of accommodation. This value is by no means the only value which might underpin a theory of private international law, and it is of course not

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117. See, e.g., Ulla Liukkunen, *Managing Legal Diversity in the EU: The Case of Subject-Specific Conflicts Rules*, 20 Eur. Rev. Priv. Law 1045 (2012).

118. Rome I Regulation, *supra* note 11, at Article 6.

119. Rome I Regulation, *supra* note 11, at Article 8.

120. Rome II Regulation, *supra* note 83, at Article 7.

121. See Mills, *supra* note 2, at Chapter 1.

enough on its own (it does not tell us how or when that accommodation should be provided – itself at least partly a question of “justice” in the distribution of regulatory power),<sup>122</sup> but a choice of this or some other value frames our perspective on private international law in foundational ways. Advocating for a particular ‘identity’ for private international law may therefore ultimately best be characterized less as a contest of legal arguments or traditions, and more as a choice between competing values. Perhaps the ostensible stagnation in private international law theory may at least be partially attributed to the philosophical depth of the problems it invites us to confront.

At the same time, however, in the face of seemingly ever-increasing globalization, the practical significance of private international law has never been greater. Perhaps, then, there is some cause for hope that the subject might receive renewed attention,<sup>123</sup> and that through this the traditional values of private international law, seemingly neglected in both the United States and European Union, might be given renewed consideration. This is not to advocate a luddite response to the machinery of modern techniques. Indeed, it may be observed that each approach to private international law analyzed in this article seems to have something to offer in developing a full understanding of private international law’s actual and potential identity, in both positive and negative terms. We might admire Savigny’s idealistic internationalism and value his analysis of the traditional policy objectives of private international law in allocating regulatory authority and avoiding conflicting regulation – but his dependence on natural law foundations which obscure the policy decisions and practical difficulties inherent in the design and negotiation of particular private international law rules seems anachronistic. From Dicey, we might recognize the necessity of an attentiveness to private party interests – but it is difficult to see much in favor of his circular dependence on an equally outmoded theory of vested rights. Looking at the U.S. choice of law revolution, we might learn from the greater focus placed on the policy choices inherent in private international law – but be wary of the overshadowing of private international law’s own traditional policy goals and interests, including the neglect of its systemic objectives. And finally,

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122. *Id.* at 23, 303.

123. Although as a note of pessimism, each era of private international law seems to characterize itself as a period of unprecedented globalization under which the subject demands urgent attention – Joseph Story, for instance, noted in the Preface to his 1834 *Commentary on the Conflict of Laws* that “[t]he subject is one of great importance and interest; and from the increasing intercourse between foreign States, as well as between the different States of the American Union, it is daily brought home more and more to the ordinary business and pursuits of human life.”

from the EU revolution in private international law, we might welcome the revival of the traditional public systemic perspective on private international law – but be less enthusiastic about the narrow and at times formalist conception of private international law’s function and effect which is the product of the centrality of the internal market in the development of EU private international law.

So where might this all leave us? I would argue that the identity, special significance and potential ‘unique selling point’ of private international law can best be understood through a public perspective – something which the U.S. and EU revolutions have in common – but one which should not neglect (or construe narrowly) its policy dimensions or real world effects. This does not mean a nostalgic return to the abstract idealist traditions of Savigny’s private international law – but it does mean not losing sight of the values and objectives which private international law has traditionally sought to promote. Recognizing this identity of private international law means seeing it as a form of “secondary law” (in H.L.A. Hart’s sense)<sup>124</sup> which serves the international, federal or regional function of ordering the distribution of regulatory authority between legal orders, accepting and reinforcing their pluralism. The interaction between these different levels of governance in private international law may itself give rise to complications, which have been insufficiently appreciated in the development of at least EU rules, but this does not render them incommensurable.<sup>125</sup> At each level, by imposing ‘architectural’ order on the allocation of regulatory authority between systems, private international law acts ‘publicly’ (although largely without a public institutional hierarchy<sup>126</sup>) to coordinate and preserve the diversity of those legal orders. In so doing, it serves its own traditional policy purposes (regrettably marginalized in different ways under both US and EU developments), as well as potentially interacting in various ways with the substantive policy purposes underlying different private law legal orders, by prioritizing certain parties or interests.

Private international law is thus not only important for *what* it does, but for *how* it does it: the way in which, for instance, it defines the contours of potentially applicable legal systems, and balances the interests of claimants against those of defendants, at the same time as balancing the

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124. H.L.A. HART, *THE CONCEPT OF LAW* 79 (2d ed. 1994); see MILLS, *supra* note 2, at 19.

125. See Alex Mills, *Variable Geometry, Peer Governance, and the Public International Perspective on Private International Law*, in *PRIVATE INTERNATIONAL LAW AS GLOBAL GOVERNANCE* (Diego P. Fernández Arroyo & Horatia Muir Watt eds., forthcoming 2014).

126. See *id.* for further discussion of this issue, and of the potential role of the idea of “peer governance” in explaining the international systemic functioning of private international law.

interests of private parties against the individual and collective interests of states, grappling in its own way with what is perhaps the central issue facing the international legal order as a whole. An important part of the idea and identity of private international law which emerges from this analysis is that it should therefore not just be viewed as a set of rules for solving disputes. As a regulatory technique for coordinating diversity and for managing and supporting pluralism, it can and should be part of the legal response to the practical problems of our globalized world, alongside and in partnership with the universalist techniques and aspirations of public international law.