

# INTERNATIONAL CONFLICT OF LAWS AND THE NEW CONFLICTS RESTATEMENT

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## INTRODUCTION

In the United States, there is a constructive chaos<sup>1</sup> to the conflict-of-laws process because, for the most part, conflicts rules are judge made.<sup>2</sup> Compounding this common law approach to conflict-of-laws problems, “there is no single institution that currently possesses the power to (1) determine when uniformity in multistate and multinational transactions is desirable, and (2) mandate that uniformity, whether through a single conflict-of-laws system, uniform substantive rules for multistate and multinational transactions, or otherwise.”<sup>3</sup> Given the lack of a central conflict-of-laws arbiter, there have been many attempts, especially academic ones, at bringing

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1. I note that the extent of this chaos, especially in international choice of law, is subject to debate. *See generally* Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719 (2009).

2. As Professor Symeon Symeonides comprehensively details, there have been some movements—most notably in Louisiana and Oregon—to codify by statute conflict-of-laws rules. However, U.S. conflicts law is still largely judge-made. *See generally* SYMEON C. SYMEONIDES, *CODIFYING CHOICE OF LAW AROUND THE WORLD* (2014).

3. Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT’L L.J. 559, 580 (2002).

order to the chaos.<sup>4</sup> Chief among them are the *Restatement* projects offered by the American Law Institute.

A brief history of this dialogic process is as follows: conflict-of-laws rules are identified and (re)stated; conflicts rules beget judicial exceptions; judicial exceptions engender criticism; criticism produces reconceptualization; reconceptualization begets a new attempt to bring order to conflicts chaos through the identification and restatement of new standards and rules.<sup>5</sup> We now arrive at the *Restatement (Third) of the Law of Conflict of Laws*, where this process will now play out in this generation.

As Professor Kermit Roosevelt, the Reporter for the new *Conflicts Restatement*, explained in the *University of Pennsylvania Law Review Online*, the new *Conflicts Restatement* will take data compiled from the experience of U.S. courts with conflict-of-laws methods, especially the *Second Conflicts Restatement*, and “create a new set of rules that incorporates the relevant factors in a way that gives precise guidance [to courts] in particular cases.”<sup>6</sup> According to Professor Roosevelt, a process that “began with the overthrow of arbitrary rules should end with better rules.”<sup>7</sup>

As part of this process, the new *Conflicts Restatement* details that a U.S. court confronted with a conflict-of-laws problem should perform two steps. First, the court must determine the *scope* of the law or laws that may be applicable.<sup>8</sup> Second, it must then decide how to resolve *conflicts* uncovered by the first step.<sup>9</sup> The second step is a question of which law should take “priority” in the event of a conflict.<sup>10</sup> Presumably, the first step will alleviate the need for a choice between competing laws in most cases because the scope question will identify the law that should be applied by a court in a given case. As such, the appropriate law will be identified and the more weighty approach of choosing the applicable law—the priority question—

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4. Since the publication in 1834 of Justice Joseph Story’s seminal *Commentaries on the Conflict of Laws*, various approaches have been offered. See generally Kurt H. Nadelmann, *Joseph Story’s Contribution to American Conflicts Law: A Comment*, 5 AM. J. LEGAL HIST. 230 (1961).

5. This is basically the process that led to the *First Restatement*’s “vested rights” approach and later led to the abandonment and substitution of that approach by the *Second Restatement*, which proposed the “most significant relationship” approach.

6. Kermit Roosevelt III, Response, *Legal Realism and the Conflict of Laws*, 163 U. PA. L. REV. ONLINE 325, 329 (2015), <https://www.pennlawreview.com/online/163-U-Pa-L-Rev-Online-325.pdf>.

7. *Id.*

8. RESTATEMENT OF THE LAW (THIRD) CONFLICT OF LAWS § 1.01 cmt. b(3) (AM. LAW. INST., Preliminary Draft No. 2, Aug. 12, 2016) (“The forum must determine which states’ laws include the transaction or event within their scope, and which laws shall be given priority if conflicts exist.”).

9. See *id.* (“[The choice-of-law rules] identify the laws that might create such rights or relations and choose, when necessary, among competing laws.”).

10. *Id.* (“Each state has its own rules about how to determine the scope of states’ laws and how to assign priority in conflicts between laws.”).

will be necessary only in the most difficult cases. The new *Conflicts Restatement* thus adopts Professor Brainerd Currie's view that the conflict-of-laws process is akin to garden variety statutory construction and interpretation.<sup>11</sup>

The new *Conflicts Restatement* explains that interstate and international conflicts are "broadly similar,"<sup>12</sup> and, presumably, the scope/priority analysis will apply to international conflicts cases just as it would to domestic conflicts cases. One wonders, however, whether general principles of statutory construction developed in the context of U.S. domestic law, where the distribution of legislative and adjudicatory power between the several states is paramount—a federalism concern—should be transplanted to cases with transnational elements, where the distribution of power between the United States and other nations is implicated—a foreign affairs concern. We are thus left to ask: Should the new *Conflicts Restatement* treat transnational cases differently?

Even if many, if not most, conflicts cases can be resolved by the question of a relevant law's scope, what happens when there is a priority question, especially in a transnational case? How is a U.S. court to choose the applicable law when either domestic or foreign law could be applied? What standards or rules should guide a court in transnational cases? More so, is international law relevant to this analysis?

This contribution to a symposium on internationalizing the new *Conflicts Restatement* examines the impact that transnational cases have had on judicial decisions in the United States, and how the resolution of these cases by U.S. courts may be helpful to the drafters of the new *Conflicts Restatement*. We begin with the observation that recent transnational cases, regardless of whether they are treated separately by the new *Conflicts Restatement*, offer important insights into the current and evolving conflict-of-laws process in the United States. These cases also offer insight into the ways in which the new *Conflicts Restatement's* focus on scope and priority should be developed. Part I explores how the presumption against extraterritoriality relates to the new *Conflicts Restatement's* concern with scope and priority. Part II considers whether the new *Conflicts Restatement* should consider larger, regulatory conflicts in the transnational arena, and, if so, how to deal with them, especially in the context of the priority question. This contribution concludes with some points for further study that should be examined by the new *Conflicts Restatement*.

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11. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 627 (1963).

12. *RESTATEMENT OF THE LAW (THIRD) CONFLICT OF LAWS* § 1.04 cmt. c (AM. LAW. INST., Proposed Draft No. 2, Aug. 12, 2016).

## I. PRESUMPTIONS, SCOPE, AND PRIORITY

International conflict of laws is subject to two basic methodological approaches in the United States, depending on whether federal law or state law is at issue. U.S. courts ordinarily use the presumption against extraterritoriality when federal law potentially applies and conflict-of-laws rules when tort, contract, property, and other areas of private law are potentially applicable.<sup>13</sup> Both approaches should be considered in drafting the new *Conflicts Restatement*, for they point to different methods that U.S. courts use to deal with questions of scope and priority, especially in transnational cases. Surprisingly, they also point to a convergence in approach whereby U.S. courts avoid conflicts questions altogether through scope determinations.

*Federal Law.* The presumption against extraterritoriality approach applies in transnational cases brought under federal law. Under this approach, “[w]here a federal statute is involved . . . a choice of law analysis does not apply in the first instance. The initial question, rather, is whether Congress intended the statute in question to apply to conduct occurring outside the United States.”<sup>14</sup> In determining congressional intent, the only question is one “of statutory interpretation . . . not a question of choice of law.”<sup>15</sup>

Understanding the presumption against extraterritoriality from a conflict-of-laws perspective may illuminate the new *Conflicts Restatement’s* concern with scope in the conflict-of-laws process. This is so because conflict-of-laws rules arguably serve the same goals as the presumption against extraterritoriality. As a matter of policy, the presumption against extraterritoriality, “serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries” and “also reflects the more prosaic commonsense notion that Congress generally legislates with domestic concerns in mind.”<sup>16</sup> Likewise, the “most important function” of conflict-of-laws rules “is to make the interstate and international systems work well,” and reflect that in practice “[l]egislatures usually legislate, and courts usually adjudicate, only with the local situation in mind.”<sup>17</sup>

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13. DONALD EARL CHILDRESS III, MICHAEL D. RAMSEY & CHRISTOPHER A. WHYTOCK, *TRANSNATIONAL LAW AND PRACTICE* 6 (2015).

14. Liquidation Comm’n of Banco Intercontinental, S.A. v. Renta, 530 F.3d 1339, 1351 (11th Cir. 2008) (quoting Orion Tire Corp. v. Goodyear Tire & Rubber Co., 268 F.3d 1133, 1137 (9th Cir. 2001)) (internal quotation marks omitted).

15. *Id.* (internal citation omitted).

16. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016) (internal citations and quotation marks omitted).

17. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmts. c, d.

Federal extraterritoriality analysis is subject to a two-step framework. When determining whether a federal statute<sup>18</sup> applies extraterritorially, the first step is to ask “whether the statute gives a clear, affirmative indication that it applies extraterritorially.”<sup>19</sup> As will be discussed shortly, the federal extraterritoriality approach is basically an analysis of the scope of federal law. Questions of priority are only obliquely hinted at by the Supreme Court and lower federal courts.<sup>20</sup> This may be because the presumption against extraterritoriality developed in the context of public law.<sup>21</sup> Since foreign law would not be applied because it was public law—the so-called “public law taboo”<sup>22</sup>—the only question before a U.S. court is whether the federal statute applies. However, I am unaware of any U.S. court recognizing this explicitly for avoidance of the priority question when applying the presumption against extraterritoriality. Either there is no priority analysis when courts employ the presumption against extraterritoriality because foreign law cannot be applicable, or U.S. courts are combining the scope and priority steps in one approach through the presumption.

If the first step confirms that the federal statute applies extraterritorially, then the inquiry ends there and the statute applies. If the answer is in the negative, then the federal claim must be dismissed unless it involves a *domestic* application of the federal statute. A U.S. court is to determine whether a domestic application is at issue “by looking to the statute’s ‘focus.’”<sup>23</sup> As the Supreme Court has explained:

If the conduct relevant to the statute’s focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the relevant conduct occurred in a foreign country, then the case involves an impermissible extraterritorial

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18. In *Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court held that although the presumption “typically” applies to federal statutory interpretation, “the principles underlying the canon of interpretation similarly constrain courts” recognizing federal common-law causes of action. 133 S. Ct. 1659, 1664 (2013).

19. *RJR Nabisco*, 136 S. Ct. at 2101.

20. I take it, however, that the drafters of the new *Conflicts Restatement* suppose that analyzing questions of scope involves more than just examining domestic law but also requires an analysis of the scope, and thus potential applicability, of foreign law. The hope, one presumes, is that a U.S. court’s focus on scope will uncover many “false conflicts” and enable the application of only one law, domestic or foreign. The new *Conflicts Restatement* thus treats the scope question as a filter to avoid questions of priority.

21. I thank Professor Linda Silberman for this observation. For a general explanation of the “public-private” distinction, see William S. Dodge, *The Public-Private Distinction in the Conflict of Laws*, 18 DUKE J. COMP. & INT’L L. 371 (2008).

22. See generally William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT’L L.J. 161 (2002).

23. *RJR Nabisco*, 136 S. Ct. at 2101.

application regardless of whether other conduct occurred in U.S. territory.<sup>24</sup>

Courts however, must be wary in concluding too quickly that some minimal domestic conduct means that the statute could be applied domestically: “[I]t is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.”<sup>25</sup>

One might presume that this two-step framework is relatively straightforward. It is anything but. Indeed, this presumption of the domestic scope of U.S. federal law does not limit the potential applicability of federal law to foreign conduct. Foreign conduct that produces some effect in the United States might be swept within the “focus” of a federal statute. Furthermore, domestic conduct that produces effects in foreign jurisdictions may also be subject to a federal statute. It depends on what the “focus” of a statute is, which itself can be open to debate. While the focus inquiry is still early in its U.S. legal development, some courts have concluded that the inquiry turns on the location of the wrong for which Congress sought to impose liability.<sup>26</sup>

In cases following the Supreme Court’s *RJR Nabisco* decision, which held that a private RICO plaintiff must allege and prove a domestic injury to its business or property to be within the RICO statute’s focus,<sup>27</sup> courts have held that it is the location “where the injury itself arose” and not the location of the “purportedly injurious conduct” that controls the question of scope.<sup>28</sup> U.S. courts may in fact be adopting a *lex loci delicti* rule on the question of focus that will limit the applicability of federal law to foreign harms. Under

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24. *Id.* at 2094.

25. *Morrison v. Nat’l Australia Bank*, 561 U.S. 247, 266 (2010).

26. *See, e.g.*, *Warfaa v. Ali*, 811 F.3d 653, 660 (4th Cir. 2016) (inquiry under the Alien Tort Statute turns on the location of the conduct alleged to violate international law); *Doe v. Drummond Co.*, 782 F.3d 576, 592, 593 (11th Cir. 2015) (same), *cert. denied*, 136 S. Ct. 1168 (2016); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 184 (2d Cir. 2014) (same). *But see* *Absolute Activist Value Master Fund, Inc. v. Ficeto*, 677 F.3d 60, 69 (2d Cir. 2012) (illustrating that location of the conduct is irrelevant by holding that “rather than looking to the identity of the parties, the type of security at issue, or whether each individual defendant engaged in conduct within the United States, we hold that a securities transaction is domestic when the parties incur irrevocable liability to carry out the transaction within the United States or when title is passed within the United States”).

27. *RJR Nabisco*, 136 S. Ct. at 2106 (“A private RICO plaintiff therefore must allege and prove a domestic injury to its business or property.”).

28. *City of Almaty, Kazakhstan v. Ablyazov*, 15–CV–5345 (AJN), 2016 WL 7756629, at \*7 (S.D.N.Y. Dec. 23, 2016).

this view, unless the place of injury is in the United States, federal law is not applicable at all.

We have thus far discussed only the scope question. The Supreme Court's focus inquiry may also be relevant to questions of priority. Perhaps in cases where the harms complained of were within the focus of a federal statute then a secondary, priority analysis would be undertaken. However, I am unaware of court decisions adopting such an approach. Rather, the focus inquiry is a secondary attempt at statutory construction, as opposed to a priority analysis. As such, the focus inquiry does not seek to weigh the priority of laws that may compete for application. Again, this may be because of the "public law taboo."<sup>29</sup> If a court determines either (1) that federal law is extraterritorial or (2) that the harms complained of fall within the "focus" of a statute, then federal law is applied barring some other limitation.

Importantly, questions of "focus" are only relevant to interpreting the domestic scope of federal law.<sup>30</sup> The focus of a statute is not relevant to the first step, whether the statute applies extraterritorially (the foreign scope question). There remains uncertainty, therefore, in the first step whether there are other limitations that limit the applicability of U.S. federal law which, by its terms, has extraterritorial effect.

In *RJR Nabisco*, the Supreme Court observed that if a statute does apply extraterritorially, "we would not need to determine which [foreign conduct] it applied to; it would apply to all [foreign conduct] (barring some other limitation)."<sup>31</sup> The Court has been silent as to what these other limitations might be. The Court may have been offering a nod to the *Charming Betsy* canon—a presumption that Congress does not legislate beyond what is permitted by international law.<sup>32</sup> The Court may also have been acknowledging doctrines such as personal jurisdiction, *forum non conveniens*, international comity, or other doctrines limiting the application of U.S. federal law.<sup>33</sup> To be sure, the Supreme Court's parenthetical leaves much undetermined.

The new *Conflicts Restatement* can learn much from the recent experience of U.S. federal courts in the wake of the Supreme Court's renewed interest in the presumption against extraterritoriality as applied in transnational cases. Chief among the difficult questions facing the new

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29. I thank Professor Bill Dodge and Professor Linda Silberman for this observation. See generally Dodge, *supra* note 22.

30. *RJR Nabisco*, 136 S. Ct. at 2101.

31. *Id.* at 2101–02 (quoting *Morrison*, 561 U.S. at 267 n.9) (internal quotation marks omitted).

32. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814–15 (1993).

33. See generally Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995 (2015).

*Conflicts Restatement* is whether a federal law that is extraterritorial may still be limited by other doctrines, especially international law doctrines. Furthermore, identifying factors that should guide courts' focus analyses would help clarify the extent of the new *Conflicts Restatement's* inquiries into scope and priority. At a minimum, careful analysis by the drafters will offer insight into what "other limitations" might constrain the extraterritorial application of U.S. federal law.

These unanswered questions of scope and priority in the context of federal law provide fruitful investigative opportunities for the new *Conflicts Restatement*.

*State Law.* The above two-step approach is the standard method for determining the scope of *federal law*. But, what of the extraterritorial scope of state statutory and common law (a question of state law that the federal presumption does not automatically apply to)?

While most courts applying state law rely on conflict-of-laws methodologies to resolve questions concerning the extraterritorial application of state law, some courts—especially in transnational cases involving the interpretation of state statutory law—also apply a presumption against the extraterritoriality of state law. This state law application of the extraterritoriality presumption, as in the case of the federal presumption, may obviate the need for a conflict-of-laws analysis. Courts applying state law are thus developing a scope-like inquiry that the new *Conflicts Restatement* would do well to consider. In short, the new *Conflicts Restatement* should not assume that conflict-of-laws methods are the only ways that state courts and federal courts applying state law are dealing with conflicts in transnational cases. Courts may also be using a presumption against the extraterritoriality of state law.

In California, for instance, state statutory laws are presumed not to apply outside of California "unless such intention is clearly expressed or reasonably to be inferred from the language of the act or from its purpose, subject matter or history."<sup>34</sup> This is a strong presumption that applies even when there is a contractual choice-of-law provision that selects California law.<sup>35</sup> Nevertheless, California statutory remedies "may be available to non-California residents if those persons are harmed by wrongful conduct

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34. *Diamond Multimedia Sys., Inc. v. Super. Ct.*, 19 Cal. 4th 1036, 1059 (1999) (internal quotation marks and citation omitted).

35. *See O'Connor v. Uber Techs., Inc.*, 58 F. Supp. 3d 989, 1005 (N.D. Cal. 2014) ("[A] contractual choice of law provision that incorporates California law presumably incorporates *all* of California law—including California's presumption against extraterritorial application of its law."); *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059, 1065 (N.D. Cal. 2014) ("Even if the choice of law provision were intended to confer upon out-of-state drivers a cause of action for violation of California's wage and hour laws, it could not do so. An employee cannot create by contract a cause of action that California law does not provide.").



occurring in California.”<sup>36</sup> In determining whether wrongful conduct occurred in California, courts consider factors such as where the defendant conducts business, whether the defendant’s principal offices are located in California, where the plaintiff is located, and where the alleged actionable conduct took place.<sup>37</sup> California appears to have basically developed its own version of the federal presumption’s two-step framework for extraterritoriality questions. California’s presumption may be “a craven watchdog”<sup>38</sup> in light of these factors that permit the application of California state law.<sup>39</sup>

While some states, like California, have adopted a presumption against extraterritoriality,<sup>40</sup> other states have remained silent on extraterritoriality. For instance, some state courts apply the presumption against extraterritoriality through the backdoor by limiting the scope of state law by reference to federal counterpart law, such as securities or antitrust law.<sup>41</sup> While there may be a certain level of convergence among the federal and state approaches, at least one state supreme court has recognized but applied a more limited view of the presumption against the extraterritorial application of state law, thus permitting the application of a state tort claims act to torts committed outside of the state, including in foreign countries.<sup>42</sup> One state supreme court has held that because the state statute applied to claims “*outside of Iowa*” the presumption was rebutted.<sup>43</sup> Furthermore, the metes and bounds of the presumption against the extraterritoriality of state law are even less clear with regards to the scope of state common law.<sup>44</sup>

Recent case law suggests that there may be some level of convergence between federal and state law and that both federal and state courts will apply a presumption against extraterritoriality to statutory and common law claims. This focus on scope will limit the potential for a conflict-of-laws analysis. The only question before the courts is whether federal or state law applies as a matter of statutory construction and not whether another law competes for

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36. *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 916 (C.D. Cal. 2011).

37. *Id.* at 917.

38. *Morrison*, 561 U.S. at 266.

39. Many examples exist of California explicitly seeking to apply its law extraterritorially. *See, e.g.*, CAL. CORP. CODE § 2115(b) (“[T]he following chapters and sections of this division shall apply to a foreign corporation . . .”). California’s restraint in this area may thus be illusory in many contexts. I thank Professor John Coyle for this observation.

40. Besides California, other states that utilize the presumption include Connecticut, Massachusetts, New York, Texas, and Utah.

41. *See, e.g.*, *Glob. Reinsurance Corp. v. Equitas Ltd.*, 969 N.E.2d 187, 195 (N.Y. Ct. App. 2012).

42. *Griffen v. State*, 767 N.W.2d 633, 637 (Iowa 2009).

43. *Id.* at 637.

44. *See generally, e.g.*, Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 GEO. L.J. 301 (2014).

application—a priority question. I note that while many cases subject to the presumption against extraterritoriality will be dismissed as impermissible extraterritorial applications of a federal or state law, many cases will still be subject to applicable U.S. law when they fall within the focus of the statute or involve acts or effects in the forum state. Whether courts will next undertake a priority analysis is an open question. This question should be addressed by the new *Conflicts Restatement*.

All of this is to say that conflict-of-laws methodology in the United States may be taking on a slightly different approach than that detailed in earlier conflicts *Restatements*. It remains possible that a more developed approach to the presumption against the extraterritoriality of state law in state courts could limit the need for conflict-of-laws analyses entirely. To the extent the federal law of extraterritoriality is adopted by courts applying state law, either federal courts sitting in diversity or state courts, there will be an impact on conflict-of-laws methods generally. In particular, questions of priority may be resolved by a focus analysis grounded in an extraterritoriality analysis that only takes account of domestic law.

At bottom, doctrines developed in the context of transnational cases are perhaps changing domestic conflict-of-laws methods, particularly in the context of the extraterritorial application of U.S. law, both federal and state. This insight fits within the conceptual framework of the new *Conflicts Restatement's* concern with scope, but a more nuanced accounting of how the scope and priority inquiries are playing out in federal and state law—especially in transnational cases—is necessary.

*Priority.* At present, the drafters have remained relatively silent as to how the priority prong of the new *Conflicts Restatement's* analysis will work in domestic or transnational cases. Let me begin with an observation. As illustrated in the previous sections, U.S. courts do their very best to minimize conflicts and avoid dealing directly with questions of priority. This is so because courts continue, notwithstanding academic commentary, to operate under traditional notions of territoriality. Courts tend to focus on whether domestic legislative jurisdiction requires the application of domestic law to foreign facts and spend very little time considering foreign law.<sup>45</sup> Courts also spend little time analyzing the priority question between domestic and foreign law.

Even when there is a conflict recognized by a court, thus encouraging recourse to the conflict-of-laws process, that process itself seeks to diminish conflicts. Of course, we have come a long way since Professor Joseph Beale

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45. See Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1493 (2013) (“[T]here is little empirical evidence that courts extensively cite foreign law.”).

claimed in the *First Restatement* that laws never compete for application and that the question for a court is only to determine the appropriate jurisdiction whose laws control the case.<sup>46</sup> Modern choice of law theories, however, do no better in embracing conflicts. Professor Brainerd Currie sought to minimize conflicts through his “governmental interest analysis” and resisted the ability of courts to resolve actual conflicts until late in his career when he moderated his position.<sup>47</sup> Similarly, the *Second Restatement* offers very little guidance in analyzing actual conflicts of law. One hopes that the new *Conflicts Restatement* will avoid falling into a similar trap, especially in transnational cases.

In many cases, U.S. courts are willing to assume that there is no conflict between foreign and domestic law, and thus that the court can apply domestic law—that is, U.S. federal or state law—to a foreign occurrence. And, even in cases where there is a conflict, the trend of U.S. case law is to dismiss the case on *forum non conveniens* or other grounds on account of the comparative difficulties incident to a U.S. court applying foreign law.<sup>48</sup>

In light of the above state of affairs, what does this signal about the role of U.S. courts as they go about negotiating the priority question, especially in transnational cases? And what should it tell the drafters of the new *Conflicts Restatement*? These questions submit to no easy answer. One hopes, however, that the drafters of the new *Conflicts Restatement* will account for them in their drafting process. If the priority question really matters, courts need concrete analytical guidelines.

The lack of a clear method for negotiating conflicts, which is a priority question, perhaps encourages courts to resist conflicts. Furthermore, in the United States legal questions are more often being resolved at the procedural level, especially in transnational cases, and procedural resolution does not invite analysis of foreign law. Even when cases survive procedural questions, many substantive questions are resolved by invoking legal formulae designed to resist applying foreign law.

The question for the new *Conflicts Restatement* is whether consideration of a court’s usage of these doctrines will bear insights for the

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46. William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L.J. 101, 111–13 (1998).

47. Herma Hill Kay, *A Defense of Brainerd Currie’s Interest Analysis*, in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 68–71 (Academie de Droit International de la Haye ed., 1989).

48. See Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT’L L. 157, 168–72, 167–68 (2012) (discussing recent empirical studies on the prevalence of forum non conveniens motions, and noting, with concern, that “[t]he upshot of this case law is that a court is vested with wide discretion to dismiss a case with foreign elements, especially where a foreign plaintiff and foreign law is involved”).

proposed priority analysis. More work must be done by the drafters in examining foreign law conflicts of priority and offering standards for the resolution of such conflicts.

## II. BIG CONFLICTS AND INTERNATIONAL COMITY

One might say that cases involving the extraterritorial application of U.S. law are markedly different than the bread-and-butter cases that courts, especially U.S. state courts, routinely confront in conflict-of-laws matters, where the legal question is typically whether the law of one U.S. state or another should be applied. The question is whether the new *Conflicts Restatement* should consider “big conflicts” as well as “little” ones.<sup>49</sup>

This is an observation made recently by Professor Katherine Florey.<sup>50</sup> She explains that conflict-of-laws doctrine today “present[s] two distinct faces.”<sup>51</sup> The first face, which she argues encapsulates garden-variety tort and contract cases, produces uncontroversial results in relatively simple cases. These are, in her terms, “little conflicts.”<sup>52</sup> Other conflicts, which she terms “big conflicts,” present tough issues when a court is asked to favor one state’s policy over another.<sup>53</sup> These conflicts arise most often in international conflict-of-laws cases. These cases present, among other things, regulatory choices as to which state’s law, domestic or foreign, can operate, and the courts ultimately determine which state’s policies will be pursued.<sup>54</sup>

Professor Florey’s observations are, I believe, very helpful to the drafters of the new *Conflicts Restatement*. Even if we assume that the scope and priority analyses identified by the present draft can be applied serviceably by U.S. courts in both interstate and international cases, it is not clear how this approach should be used to resolve larger, cross-border regulatory and other international conflicts. Indeed, the new *Conflicts Restatement* may wish to give consideration to the fact that foreign sovereigns are nowadays frequently involved in U.S. litigation.

It would be useful for the new *Restatement* to consider one doctrine where U.S. courts appear to take account of questions of priority and foreign sovereign submissions: international comity.

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49. These terms come from Katherine Florey, *Big Conflicts Little Conflicts*, 47 ARIZ. ST. L.J. 683 (2015).

50. *Id.* at 683.

51. *Id.* at 685.

52. *See id.* at 687 (noting the “relatively smooth resolution of conflicts problems in small-scale cases”).

53. *Id.* at 689–90.

54. *Id.* at 690.

It is generally recognized under international law that courts are bound to apply the “norms of the national legal order only” as represented by “the law of the state whose organs they are.”<sup>55</sup> Courts in the United States, however, will apply the norms of other legal systems, be they foreign law or judgments. The dictates of comity, or a respectful consideration of the foreign forum, its law, and its legal judgments, has long been recognized as the most appropriate way for U.S. courts to resolve conflicts in private law between juridical systems.<sup>56</sup>

While a precise definition of comity remains “elusive,”<sup>57</sup> it has been explained as “the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another.”<sup>58</sup> Comity thus serves as a legal justification for the resolution of conflict-of-laws problems—namely, the laws of one country and their judgments may be applied by a court in another country by virtue of comity.<sup>59</sup> International comity has also been described by the U.S. Supreme Court in its most-cited case on the subject, *Hilton v. Guyot*, as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.”<sup>60</sup> Comity here serves as a judicial canon (as recognition) encouraging a court’s deference to a foreign sovereign—namely, a court is empowered to balance various public, private, and international factors when determining if comity is due in cases involving legislative, executive, and judicial proclamations. As

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55. HANS Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 254 (1952).

56. See, e.g., Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 30 (2010) (“The Supreme Court expressly adopted Story’s views [on comity] . . . in 1839 and has applied the doctrine, as have the lower federal courts, in various forms ever since.”). For a comprehensive treatment of the various instances of international comity in U.S. case law, see generally William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015).

57. See, e.g., *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) (describing comity as “a complex and elusive concept”); *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005) (“The doctrine has never been well-defined, leading one scholar to pronounce it ‘an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith.’”) (quoting Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT’L L. 280, 281 (1982)).

58. JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* § 38 (1865).

59. See, e.g., Hessel N. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9, 12 (1966) (detailing the evolution of the comity doctrine and describing comity as “a rational basis for choice of law among competing local customs or municipal enactments according to the nature of the case”). Such invocations of the comity doctrine are largely directed at questions of private law—that is, questions of whether foreign contract, tort, or property law should be applied in a domestic forum.

60. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

such, U.S. courts frequently apply the law or judgment of a foreign court in the interest of comity.

In the United States, respectful consideration of foreign governments and their laws generally counsels in favor of application of foreign law and enforcement of foreign judgments through comity. To the extent the public policy exception might be used to resist application of enforcement, its use has been generally limited. When it has been used, U.S. courts tend to focus on the international and domestic issues at stake, although not clearly. In fact, to the extent that there is any discussion at all, the concern is mostly with the domestic interests at stake in the case at hand. As such, the lower federal courts and the courts of the several states have been left to their own devices in developing these doctrines. Here again, the new *Conflicts Restatement* has a comparative advantage in precisely identifying the contours of this doctrine.

What is perhaps more interesting is the fact that for all the ink spilled regarding increased internationalization and comparative constitutionalism in the United States, there is very little real evidence that the U.S. Supreme Court, or the U.S. judiciary generally, has gone international or transnational.<sup>61</sup> Indeed, the comity analysis in the United States is perhaps forum-centric, just like many U.S. conflict-of-laws methods. The new *Conflicts Restatement* should rise to the challenge to consider the opportunities that international comity presents. A recent case serves as a cautionary tale.

In 2003, a group of residents of Santo Domingo, Colombia, brought suit against Occidental Petroleum Corporation (“Occidental”) and Airscan, Inc. (“Airscan”) in the United States District Court for the Central District of California for harms incurred in a 1998 bombing in Santo Domingo. The bombing was allegedly conducted by the Colombian Air Force.<sup>62</sup> Occidental, as part of a joint venture with the Colombian government, operated an oil pipeline and facility in Colombia.<sup>63</sup> Airscan provided security for the pipeline and facility.<sup>64</sup> The plaintiffs alleged that the bombing was carried out by the Colombian Air Force in the course of defending the pipeline from insurgent attacks. They also alleged that Occidental and Airscan conspired

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61. Roger P. Alford, *Lower Courts and Constitutional Comparativism*, 77 *FORDHAM L. REV.* 647, 647 (2008) (“Despite extensive analysis, there is one aspect of this subject that has been almost completely ignored by scholars: the reception or lack thereof, of constitutional comparativism by state and lower federal courts.”).

62. *Mujica v. Airscan Inc.*, 771 F.3d 580, 592 (9th Cir. 2014).

63. *Id.* at 584–85.

64. *Id.* at 585.

and worked in tandem with the Colombian military to carry out the attack.<sup>65</sup> The plaintiffs brought claims under the Alien Tort Statute, the Torture Victims Protection Act, and claims under state law for wrongful death, infliction of emotional distress, and unfair business practices.<sup>66</sup>

On February 3, 2004, before the filing of the answer or any dispositive motion, the federal district court solicited the views of the Department of State. After initially declining to take a position, the United States filed a statement of interest in December 2004 urging dismissal on account of foreign policy and practical problems with “U.S. courts second-guessing the actions of the Colombian government and its military officials.”<sup>67</sup> The district court permitted the federal claims to go forward, but dismissed the state law claims on grounds of foreign affairs preemption. The court also found all the claims non-justiciable under the political question doctrine.

On appeal, the United States Court of Appeals for the Ninth Circuit dismissed the federal claims. After concluding that a true conflict is not always required to apply the international comity doctrine, the Ninth Circuit offered a set of factors to guide its analysis of the state law claims. These factors are (1) the United States’ interest in the case, (2) the foreign government’s interest in the case, and (3) the adequacy of the alternative forum. Having determined that a true conflict is not required for the application of adjudicatory comity and that the district court abused its discretion in concluding otherwise, the Ninth Circuit proceeded to consider the proper framework for analyzing whether the state law claims could proceed in light of international comity.

Relying on international law, the Ninth Circuit noted that:

[t]he (nonexclusive) factors we should consider when assessing U.S. interests include (1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of the United States, and (5) any public policy interests. When some or all of a plaintiff’s claims arise under state law, the state’s interests, if any, should be considered as well.<sup>68</sup>

The court went on to note that “[t]he proper analysis of foreign interests essentially mirrors the consideration of U.S. interests. Foreign states, no less than the United States, have legitimate interests in regulating conduct that occurs within their borders, involves their nationals, impacts their public and

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65. *Id.* at 591.

66. *Id.* at 586.

67. Brief of United States as Amicus Curiae in Support of Affirmance at 6, *Mujica v. Airscan Inc.*, 771 F.3d 580, 592 (9th Cir. 2014) (Nos. 10–55515, 10–55516, 10–55587) (internal quotation marks omitted).

68. *Id.* at 604.

foreign policies, and implicates universal norms.”<sup>69</sup> And finally, these interests were to be evaluated in light of the adequacy of the foreign forum. Finding that the U.S. interest was slight, the Ninth Circuit dismissed that state law claims.

What is striking about the Ninth Circuit’s decision is that the court undertook this comity analysis without *first* conducting a conflict-of-laws analysis. California’s conflict-of-laws method, like the comity test announced by the court, is based on the relative interests of the governments involved in application of their law to the dispute—a priority question. The state where the challenged conduct occurred holds a “predominant” interest in regulating conduct within its borders. In contrast, the state in which the defendant resides, here California, holds a weak interest (at best) in the application of its law. So, Colombian law presumably would govern and would have barred recovery. As such, the Ninth Circuit needed to go no further than California’s conflict-of-laws rules to dismiss the case.

Yet, neither the district court nor the Ninth Circuit undertook a formal conflict-of-laws analysis. And, as noted above, the Ninth Circuit went out of its way to avoid conflict-of-laws methods, and indeed the direct invocation of international law, through the invocation of the international comity doctrine. It also did not inquire into the scope of California’s law. The court bypassed the scope question and went right to priority. But, its priority analysis did not find that a U.S. court should apply foreign law. The court held that the case should be dismissed.

The most notable question facing courts is whether they should view their role and the application of the comity doctrine as domestic or international. Should they be charged with ascertaining whether certain foreign normative commitments should be respected, accommodated, or preempted based on an evaluation of the differences between the domestic forum’s policies and those of the foreign forum? Or should the role of the courts be to develop international rules to negotiate these differences that give respect not only to domestic legal interests but also those of the international legal system writ large?

The question for the new *Conflicts Restatement* is whether this international comity analysis can be used as part of the conflict-of-laws analysis to guide courts, especially in resolving priority questions and in transnational cases.

Let’s consider another recent case to test these boundaries. In late 2016, the Second Circuit reversed a jury verdict of \$147 million after trebling and dismissed antitrust claims against a Chinese manufacturer of vitamin C,

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69. *Id.* at 607.



ruling that the case should have been dismissed by the district court on a motion to dismiss, filed just over ten years earlier.<sup>70</sup> The district court permitted China's Ministry of Commerce (the "Ministry" or "MOFCOM") to participate in the case as an *amicus curiae* but refused to credit the Ministry's interpretation of Chinese law. Holding that the district court's refusal to defer to the Chinese government was reversible error, the Second Circuit recognized that when "we receive from a foreign government an official statement explicating its own laws and regulations, we are bound to extend that explication the deference long accorded such proffers received from foreign governments."<sup>71</sup>

The plaintiffs sued four vitamin C manufacturers, and an affiliate of one of them, based in the People's Republic of China, alleging they violated the Sherman Antitrust Act by entering into a cartel organized by the Chinese Chamber of Commerce (the "Chamber") to fix the prices and amount of vitamin C exported to the United States. The defendants moved to dismiss the complaint on the grounds of comity, the Act of State doctrine and the doctrine of foreign sovereign compulsion. The motion to dismiss was supported by an *amicus* brief submitted on MOFCOM's behalf. In it, "[t]he Ministry explained that the Chamber, which Plaintiffs refer to as an 'association,' is entirely unlike a 'trade association' or the 'chamber of commerce' in the United States and, consistent with China's state-run economy, is a 'Ministry-supervised entity authorized . . . to regulate vitamin C export prices and output levels.'"<sup>72</sup> The Ministry's *amicus* brief explained that the export prices and output levels alleged as unlawful by the plaintiffs were actually the result of a consensus on price and output reached by the manufacturers under direct instructions from MOFCOM through the Chamber. However, unwilling to defer to the Chinese government's explanation of its own laws and regulations, the district court denied the defendants' motion to dismiss. Similar arguments, supported by similar *amicus* statements proffered by the Ministry, were offered in support of subsequent motions for summary judgment and interlocutory appeal, both of which were denied. The remaining manufacturer defendant and its affiliate appealed that verdict.

On appeal, the Second Circuit reversed the district court's dismissal below. According to the Second Circuit,

[T]he district court abused its discretion by not abstaining, on international comity grounds, from asserting jurisdiction because the court erred by concluding that the Chinese law did not require Defendants to violate U.S.

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70. *In re Vitamin C Antitrust Litig.*, 837 F.3d 175, 178–79 (2d Cir. 2016).

71. *Id.* at 179.

72. *Id.* at 180.

antitrust law and further erred by not extending adequate deference to the Chinese government's proffer of the interpretation of its laws.<sup>73</sup>

The Second Circuit relied on the seminal U.S. Supreme Court case of *U.S. v. Pink* and its progeny “for the proposition that an official statement or declaration from a foreign government clarifying its laws must be accepted as ‘conclusive.’”<sup>74</sup> The court rejected the plaintiffs’ argument, which was accepted by the district court, “that Rule 44.1, adopted in 1966 long after *Pink* was decided, modified the level of deference that a U.S. court must extend to a foreign government’s interpretation of its own laws.”<sup>75</sup>

Finally, the Second Circuit noted that MOFCOM’s amicus filings before both the district and circuit courts were “historic” because “it is the first time any entity of the Chinese government has appeared *amicus curiae* before any U.S. court.”<sup>76</sup> Moreover, the Second Circuit noted that:

[T]he Chinese Government has repeatedly made known to the federal courts . . . [and] the United States Department of State . . . that it considers the lack of deference it received in our courts, and the exercise of jurisdiction over this suit, to be disrespectful and that it “has attached great importance to this case.”<sup>77</sup>

Clearly, MOFCOM’s decision to participate directly in the litigation and present its position on the proper interpretation of Chinese law was pivotal to the outcome. In fact, the Second Circuit commented in a footnote that “if the Chinese government had not appeared in this litigation,” the district court’s decision to engage in a wide ranging analysis of Chinese law “would have been entirely appropriate.”<sup>78</sup> And in another footnote, the Second Circuit cautioned that “deference may be inappropriate” where “there is no documentary evidence or reference of law proffered to support a foreign sovereign’s interpretation of its own laws.”<sup>79</sup>

The decision suggests—in the Second Circuit at least—that a high degree of deference must be accorded when a foreign government appears directly in a U.S. court and provides a reasonably detailed explanation of its own nation’s laws or regulations. Of course, what a reasonably detailed explanation by a foreign sovereign must look like to be accorded deference is an open question. Another question left unanswered by the decision, however, is what level of deference will be accorded to such official statements when they are proffered by a private defendant in a subsequent

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73. *Id.* at 182–83.

74. *Id.* at 186–87.

75. *Id.* at 187.

76. *Id.* at 180 n.5.

77. *Id.* at 193–94.

78. *Id.* at 191 n.10.

79. *Id.* at 189 n.8.

action in which the foreign government does not directly participate. Should private parties be permitted to step in the shoes of the foreign government to raise that government's regulatory interests? If so, what level of deference is due in these cases?

Besides its relevance for international comity analysis, this case also highlights the fact that many "big conflicts" cases will implicate state interests to a greater degree than standard "little conflicts" cases. Most notably, states themselves may have important regulatory policies in play. Either because the state is a litigant or because the litigation of private claims implicates important state regulatory interests, there is the increasing potential for "big conflicts." This conflict does not seem susceptible to the standard focus/priority analysis offered by the new *Conflicts Restatement*, but perhaps it should be considered by the drafters.

### CONCLUSION

The new *Conflicts Restatement* presents the opportunity for a reconsideration of the conflict-of-laws method in international conflicts. As part of this process, the drafters should not only consider transnational cases but also the ways in which federal and state presumptions against extraterritoriality illuminate the scope and priority approach proffered by the new *Conflicts Restatement*. An opportunity is also present for the new *Conflicts Restatement* to focus on conflicts cases of great significance, such as cross-border regulatory cases involving foreign sovereigns. In reviewing such cases, the drafters may benefit from careful study of the international comity doctrine as well as the submissions of foreign sovereigns before U.S. courts. At a minimum, some sensitivity and recognition by the drafters that different types of conflicts may counsel in favor of different conflicts rules is in order.