LITTLE

CONFLICT OF LAWS

Cases, Materials, and Problems

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CONFLICT OF LAWS

Cases, Materials, and Problems

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INTRODUCTION

If you were to tell a lay person that you are taking a course in conflict of laws, you would likely be faced with a blank stare. You might add something like "Well, it's about when laws conflict with each other and how to resolve that conflict. In that way, conflict of laws is kind of the law of laws and it regulates how laws interact with each other." That description might provoke at least a glimmer of understanding.

As a newcomer to the discipline of conflict of laws, you might be reassured to find that the best way to approach the subject is to remain mindful that — like all law — it regulates human affairs. When humans interact, they sometimes clash and sometimes defer to one another. Often they do both — either explicitly or implicitly coming up with ways to share control. And that, it turns out, is what it's all about: whether to defer or share control.

Because conflict of laws has developed in the structured realm of law, its doctrines have themselves become highly formalized. Further complications and abstractions arise because conflict of laws operates in the context of regulating clashes between artificial entities — and generally, those entities are governmental sovereigns. Those abstractions provide potential for creating invigorating puzzles for lawyers. The puzzles can be fun. But the

abstractions also raise the risk that legal principles become divorced from the more accessible, easily comprehensible components of real life. For conflict of laws to retain meaning anchored in human relations, it is important to identify the consequences of the conflict of laws decisions for the lives of the litigants.

The field of conflict of laws sometimes displays an unfortunate disconnect between the theory of conflict of laws and the real-life consequences of power clashes between governmental sovereigns. A major goal of this book is to encourage enthusiasm for the elegance of conflict of laws doctrine. Perhaps as a consequence of conflict of laws' abstract character—or perhaps out of affinity with old-fashioned things—law professors have generally adhered to an approach to conflict of laws teaching that is venerable, but outdated. This book ventures a dramatic change of pace.

While celebrating the traditional qualities of the discipline, this book also tries to situate conflict of laws within contemporary problems that will confront you—with regularity no doubt—in law practice or otherwise. Accordingly, nearly every small section of the book contains at least one problem designed to show how the particular area of conflict of laws doctrine presented actually plays out in real life. Conflict of laws is crucially important to how people should plan their affairs, and thus is a key part of a lawyer's job in giving fully informed advice and in structuring transactions. In the transactional drafting process, an able lawyer will attempt to "predict" how the parties' affairs will unfold, "provide" for those occurrences though various contingencies in the transactional documents, and sometimes even "protect" the client from the results of untoward events and disintegrating relationships by specifying certain remedies.[1] For each of these steps, the drafting lawyer should consider which law would most favorably protect the client's interests and take steps to make it more likely that law will apply.

Conflict of laws also includes many concepts useful for the litigator's toolbox. A litigator who is nimble in understanding and using these tools is better able to represent her client not only in litigation itself, but also in rendering advice aimed at avoiding litigation and explaining its likely consequences.

For these reasons, conflict of laws is enormously practical and—indeed—essential to skilled lawyering. This book would be inadequate, however, if it did not also explore an altogether different side of conflict of laws. Perhaps more than any other legal discipline (except jurisprudence itself), conflict of laws provides a clear lens into the patterns of how governments interact with each other and into the nature of law itself. From the

1. Scott J. Burnham, Drafting and Analyzing Contracts §1.3, at 329 (3d ed.) (articulating the "predict," "provide," and "protect" components of drafting transactional documents).

governmental perspective, the discipline explores the co-equal relationships between sister states in the United States and between foreign nationals — as well as the more hierarchical relationship between the United States federal government and state governments. In exploring these relationships, conflict of laws exposes and examines jurisprudential questions such as the legitimate reach of legal authority, the possible sources for a government's prerogative to control an individual's affairs, as well as the relationship between legal rules and public policy.

These governmental and jurisprudential issues make conflict of laws particularly rewarding. You will find lawyers, scholars, and lay people who ridicule the complexity of conflict of laws and its inability to give a clear bottom-line answer to most legal questions. But that view fails to appreciate how conflict of laws strikes at the heart of power itself. One would not expect such a subject matter to be clean or uncomplicated. What one can expect, however, is for the subject to be fascinating and illuminating. One hopes this book does not disappoint.

A. COURSE THEMES

As a starting point in defining what conflict of laws is all about, you might find it helpful to remember that — since the field is about "conflict" and about government by "laws" — the field by definition involves more than one governmental entity. Although a governmental entity can be internally conflicted, that is not what we are talking about here. Rather, conflict of laws starts from the proposition that it "takes two to make a fight" and then seeks to find a reasoned resolution for the conflict between two governmental entities. This concept helps to pin down two overarching themes of this book: (i) conflict of laws governs how governments interact with each other and (ii) conflict of laws reveals qualities that distinguish law from less formal influences on human interaction, such as social norms, policies, or brute force. Weaving in and out of these themes are five other questions:

(1) How do rules of conduct obtain authority in human society?
(2) What is the optimum structure for a federalist system?
(3) How should government operate in the global era?
(4) How does one determine whether local public policies are so important that they displace other governmental concerns such as respect for another sovereign?
(5) How does technology — such as the internet — change how governments and people interact?

In today's world, these themes are interwoven into most legal problems. Accordingly, this book dispenses with an approach taken in older casebooks

of segregating internet problems and international issues into separate chapters. Those topics appear throughout the book, reflecting the reality that transnational and international legal issues are a staple of law practice in the United States, no longer reserved for specialists.[2] With the goal of fostering a contemporary lawyering style that is both effective in servicing clients and in providing responsible leadership on social issues, the book also contains discussion of litigation strategy, fairness, and procedural justice. In particular, you will encounter extensive discussion of procedural values such as consistency, predictability, and efficiency.

Lest the above is somehow not sufficient to hold interest, you will also find discussion in this book about unique qualities of the legal process, reasoning, and rhetoric in conflicts case law. These unique qualities seem to result from the intractable nature of conflict of laws problems: there is simply no "right" answer to many power clashes presented in most conflict of laws cases. Some conflict of laws problems — such as the clash between state and federal law — contain a "tie breaker" that points to a ready answer, such as the supremacy clause of the United States Constitution. More commonly, however, conflicting laws come from sovereigns of equal status. When this occurs, courts must be creative to designate a rational "winner." The resulting analysis takes many forms, but provides you with a chance to become more expert in some of the rhetorical and linguistic devices useful where human affairs requires lawyers to operate with subtlety, creativity, and sometimes even stealth. For example, conflict of laws questions often require some kind of characterization. Courts must sort the facts of a dispute into various legal categories: Is the issue one of contract or tort? Substantive or procedural? Is his partner a "spouse" for the purpose of both the domestic relations law *and* the probate code? Is charitable immunity a loss allocating rule or a conduct regulating rule? The type of thinking required to frame

2. *See, e.g.*, Susan L. DeJarnatt & Mark C. Rahdert, *Preparing for the Globalized Law Practice: The Need to Include International and Comparative Law in the Legal Writing Curriculum*, draft at 22-23 (2010) (reporting on results of survey suggesting that a substantial majority of practitioners in a United States metropolitan area handled matters requiring knowledge of international or foreign law); M.C. Mirow, *Globalizing Property: Incorporating Comparative and International Law into First Year Property Courses*, 54 J. Legal Ed. 183, 185-186 (2004) (arguing for the need to globalize law school curriculum on matters implicating both litigation and transactional practice). Moreover, the United States continuing to act as a magnet for international litigation, which requires United States lawyers with international expertise. *See, e.g.*, Gary B. Born & Peter B. Rutledge, International Civil Litigation in U.S. Courts 3 (outlining reasons why the United States is "a particularly attractive forum for plaintiffs) (5th ed. 2011); David J. Levy, Foreword to International Litigation: Defending and Suing Foreign Parties in U.S. Courts xi, xii (David J. Levy ed.) (noting that the increasingly globalized economy has led to more international litigation in United States courts); Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, 79.5 Foreign Aff. 102, 104 (2000) (noting an increasing trend of filing suit in United States courts for violations of international law); *see also* William Glaberson, *U.S. Courts Become Arbiters of Global Rights and Wrongs*, N.Y. Times, June 21, 2001, *available at* http://www.nytimes.com/2001/06/21/national/21LEGA.html.

these questions is common in all forms of lawyering, whether it be counseling, brief writing, arguing, negotiating, or interacting with the press. The material in this book provides you with an opportunity to think meaningfully about rhetorical techniques and to practice using them.

B. WHAT ARE THE STAKES?

As you become acquainted with the complexities of conflict of laws doctrine, try not to become distracted away from the tremendously large stakes that often hang in the balance. Remembering the significance of the legal issues in a case is helpful to identifying what is motivating the parties and the court, and thus provides greater insight into the reasoning and bottom line of the decision.

Many ways exist for illustrating how important conflict of laws can be to people's lives, but two examples — one historical and one contemporary — are particularly apt:

(1) *The Historical*: the lawsuit that gave rise to the United States Supreme Court's decision in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), and
(2) *The Contemporary*: political, practical, and legal struggles over same-sex marriage.

Both contexts are laden with conflict of laws issues and both contexts implicate powerful social and cultural issues of their day: the institution of slavery and social attitudes toward homosexuality.

Dred Scott dealt with the issue of status: when enslaved persons were brought into a free state, were they free or enslaved? The answer came from choice of law principles of the time, which broke down as interstate relationships deteriorated in the mid-1800s.[3] Indeed, for many years leading up to the Civil War, conflict of laws issues arose in fugitive slave cases as well as cases where persons held in slavery claimed freedom upon being transported by their "owners" to free states. These cases raised state choice of law puzzles, issues pertaining to the constitutional duty of full faith and credit due to sister state laws governing slavery, and questions about

3. For further discussion of the conflict of laws implications of *Dred Scott v. Sanford*, and other slavery cases, see, e.g., Louise Weinberg, *Methodological Interventions and the Slavery Cases — or, Night Thoughts of a Legal Realist*, 56 Md. L. Rev. 1316 (1997); Jane Larson, *"A House Divided": Using* Dred Scott *to Teach Conflict of Laws*, 27 U. Tol. L. Rev. 577 (1996). *See also* Robert M. Cover, Justice Accused (1975) (describing how anti-slavery judges in the antebellum northern United States were able to enforce laws they found morally repugnant because their commitment to the judicial role enabled them to dedicate themselves to fidelity to legal principles, including conflict of laws principles).

the extent to which federal Fugitive Slave Act preempted state law. Ultimately, federal constitutional doctrine — in the form of the Thirteenth Amendment — provided clear guidance.

In the contemporary context, same-sex marriage deals with the issue of status as well: can two persons of the same sex be deemed married when they are lawfully married in one state, but move to another state that does not recognize such a marriage as valid? The answer to that question is also informed by conflict of laws principles as well as constitutional doctrine.[4] It is matters of this profound magnitude that this book covers.

C. TRIPARTITE STRUCTURE OF CONFLICT OF LAWS

From one perspective, conflict of laws is about power. Specifically, conflict of laws principles designate which sovereign should win when an issue arises over which sovereignty gets to control the disposition of a lawsuit and the scope of rights implicated in a dispute. In the United States, the power struggle often occurs between two states. This is sometimes called a horizontal conflict, since the states are on an equal plane in terms of sovereign power. The United States Constitution provides some guidance on how to handle these conflicts by imposing an obligation on one state to give "full faith and credit" to the laws of sister states. Yet — as you will see — this full faith and credit obligation provides only partial guidance.

In the global context, two sovereign nations are also on an equal plane and thus can also become ensnared in horizontal conflict of laws. Where one sovereign has a claim to superiority — such as position of the federal government in relation to state governments in the United States system — a vertical conflict of laws is presented. Finally, there is the complicated situation where state authority conflicts with the authority of a foreign, non–United States sovereign. This conflict has qualities of both a horizontal and a vertical clash.

Whether the conflict is vertical or horizontal, the law generally provides three sets of legal rules for resolving the conflict: personal jurisdiction doctrine, choice of law doctrine, and judgments doctrine. Personal jurisdiction doctrine governs the prerogative of forum courts to exercise power over particular litigants to a controversy. (A forum court is the court where a lawsuit is filed.) Sometimes called judicial jurisdiction, court power to resolve disputes between people has evolved over the years, switching from an emphasis on citizenship and territorial power to an emphasis on party contacts within the jurisdiction where the court sits.

4. In several places throughout this book, you will find materials related to same-sex marriage. For further discussion of the analytical connection between same-sex marriage and Dred Scott, see Jeffrey L. Rensberger, Interstate Pluralism: The Role of Federalism in the Same Sex Marriage Debate, 2008 B.Y.U. L. Rev. 1703, 1805-1807.

By contrast to personal jurisdiction rules, choice of law doctrines designate what legal rules (or laws) govern human affairs where more than one jurisdiction could make a claim for control in a particular situation. The question of what legal rules control people's lives is sometimes called legislative jurisdiction. A forum court will apply a choice of law doctrine to determine which sovereign has power to proscribe the general legal principles that govern the parties' rights at issue in a lawsuit.

Judgments law focuses on the effect of judicial decrees that affect the rights of parties to the litigation that gave rise to the decree. Judgments law determines the power of judicial enforcement of laws, designating what effect a court judgment rendered in one jurisdiction should have in other jurisdictions. While judgments law pertains to court decrees that resolve the rights of parties to a dispute, personal jurisdiction law pertains only to whether a particular court has the power to even entertain the dispute in the first place. Moreover, court judgments resolve the rights of specific parties in specific disputes. This is different from the general legal principles that are chosen when a court applies choice of law doctrine to ascertain which sovereign has the prerogative of enunciating the general legal rules that govern a dispute.[5]

As you will see in the materials that follow, you can easily sort some legal problems into one of three doctrines. For example, the question of whether a California court may entertain a lawsuit filed against an out-of-state corporation seems plainly to present a personal jurisdiction problem. Likewise, the question of whether Illinois or Singapore principles governing the duty of care in a negligence action filed in Illinois suggests a choice of law analysis. Finally, judgments law would seem to control whether a court in Louisiana must enforce a New York court decree requiring the parties to honor a surrogate motherhood contract that is contrary to public policies of Louisiana. You will see, however, that particular legal problems do not sort so easily into one of three doctrines. The reason for this is that the three doctrines each derive from the same impetus: the law's attempt to resolve power struggles between sovereigns. If you have trouble figuring out which of the three doctrines works best, that probably means you have a deep understanding of a conflict of laws tenet: the three doctrines are merely manifestations of the same basic questions of power. You can think of the three doctrines as legs to a three-legged stool: the conflict of laws stool.

The American approach to conflict of laws owes its lineage in substantial part to the work of a Dutch thinker named Ulric Huber. Huber conceived of the conflict of laws power question as one of sovereign prerogative.

5. International law traditionally enunciates three categories of jurisdiction that resemble the personal jurisdiction, choice of law, and judgments components of domestic conflict of laws. These international law categories include adjudicative, prescriptive, and enforcement authority. Although the two sets of principles overlap, courts and scholars have struggled to identify precise similarities and differences.

Specifically, he argued that sovereigns have dominion over those who are present in the territory as well as those who are its "subjects." As for the effect of one sovereign's law within the jurisdiction of another sovereign, Huber maintained that one sovereign should accept the law of other sovereigns in appropriate circumstances because of comity, and not because any supremacy principle or overriding principle of justice requires the sovereign to follow the law of another sovereignty.[6] (Comity is a principle whereby one sovereign voluntarily accommodates itself to the law of another sovereign because individual fairness or governmental concerns suggest that it is appropriate to do so.) Huber's position presents the core of the power controversy: to what extent do justice principles actually require one sovereign to cede to the extraterritorial effect of another sovereign's law? It is helpful to remain mindful of this key question as you make your way through the material in this course. As you will read in Chapter 2, Huber's ideas proved enormously influential for United States Supreme Court Justice Joseph Story, who incorporated them into his 1834 treatise on the conflict of laws.

D. MORE ON VOCABULARY AND CHARACTERIZING THE POWER CLASH

"Conflict of laws" is the term used in the United States for the power struggle among sovereigns. In United States jurisprudence, we generally think of conflict of laws as pertaining to disputes in a private civil context—not in criminal cases or cases dealing with the constitutional relationship between a citizen and the state. In other parts of the world, the term "private international law" is often invoked when referring to what Americans think of as conflict of laws—and generally refers to legal principles governing choice of law, personal jurisdiction, and judgments. As the world is becoming more integrated and the distinction between what is "private" and "public" starts to erode, these distinctions may become less meaningful. In the meantime, however, they are part of the traditional lexicon of which you should be aware.

6. In a work published in 1689, Huber asserted the following core propositions:

1. The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.
2. All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.
3. Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or its subjects.

Ulric Huber, *De Conflictu Legaum Diversarum in Diversis Imperiis (On the Conflict of Diverse Laws of Different States)*, in Ernest G. Lorenzen, Selected Articles on the Conflict of Laws 136-137 (1947).

Some of terms in the discipline are terms of art, and thus have a precise definition beyond that in common parlance. For example, the term "law" refers to an exercise of sovereign authority that can come in a variety of forms, including statutes, common law principles from court decisions, court rules of procedure, court judgments, court rulings on motions, and an individual court's exercise of personal jurisdiction over parties to the lawsuit. Thus, when we talk about conflict of laws, we might be referring to a conflict among laws appearing in any one of these forms. Technically speaking, "conflict of laws" is different from "choice of law." "Conflict of laws" is the umbrella term including the three subject matters described above: personal jurisdiction, choice of law, and judgment recognition questions. Thus, "choice of law" is only a subset of "conflict of laws," pertaining only to the process of selecting legal principles to govern parties' lives. Because the terms (conflict of laws and choice of law) are similar, they are sometimes used interchangeably. This book endeavors to keep the terms separate in order to avoid confusion. Finally, it is helpful to remember that—within the domestic discipline of conflict of laws—the term "state" usually refers to a state within the United States, but in the international context, the term often refers to the more generic concept of a sovereign government. This book uses the terms "country" or "foreign country" in the international context so as to avoid confusion. Likewise, many conflict of laws sources use "foreign state" to denote a different state of the United States than the forum. Accordingly, this book uses the terms "foreign country" when discussing an international matter. For similar reasons, the book will use "foreign country judgment" when discussing international matters, since conflict of laws materials often use the phrase "foreign judgment" when discussing a United States state's obligations toward the judgment of a United States sister state.

INTRODUCTORY PROBLEM: CASSANDRA AND JULIAN

Cassandra is a resident of New Jersey. She researched and wrote an article about Julian, which was published in a newspaper. A resident of Ohio, Julian is convinced that the article defames him and he files a defamation suit against Cassandra in Ohio. Cassandra has never been to Ohio and has never had anything to do with Ohio. Unbeknownst to her, however, the newspaper distributes 20 papers in the state (less than 1 percent of its total circulation). Although Cassandra never appeared before the Ohio court, Julian convinced the court to entertain his lawsuit. Applying Ohio law, the court decided that Cassandra had defamed him and entered judgment against Cassandra in the amount of $100,000. Julian wishes to turn this judgment from a piece of paper into cash in his pocket. He knows that the only way he can do so is to enforce

the judgment. He hires a private investigator who finds out that Cassandra has all her assets in New Jersey. Accordingly, Julian files suit in New Jersey, asking the New Jersey court to enforce the judgment against Cassandra. Cassandra consults you to defend this action, and you recall the "three legs" of conflict of laws: personal jurisdiction, choice of law, and recognition of judgments. Framing your arguments in terms of these three legs, what type of arguments would you make?

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