

CONFLICT OF LAWS

Spring 2010

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A "conflict of laws" problem arises when two or more judicial or legislative jurisdictions have a jurisdictional claim over the same event or transaction. In this course, we will concentrate on debates surrounding and approaches to deciding "which law" applies to such events. We will examine the history of these debates as a case-study in the history of American legal theory, from Legal Formalism to the many forms of Post-Realism. Students will learn the variety of styles of legal reasoning that this history has bequeathed us. We will also devote part of the course to an analysis of international conflict of laws problems, often referred to as "Private International Law." Throughout the course, we will interrogate the following description of Conflict of Laws offered by a noted commentator: "The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors, who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court or lawyer is quite lost when engulfed and entangled in it." William L. Prosser, quoted in *McElreath v. McElreath*, 162 Tex. 190, 345 SW 2d 722 (1961).

Readings:

Students are **required to purchase**: Lea Brilmayer & Jack Goldsmith, *Conflict of Laws: Cases and Materials*, 5th ed. (2002). Readings marked "**SUPP**" are available in electronic form through the TWEN site for the course. Readings are shown in square brackets [] are optional. **In addition, it is highly recommended that all students read by the end of the term the article by William Reppy, *Eclecticism in Choice of Law: Hybrid Method or Mishmash*, 34 Mercer L. Rev. 645 (1981). Supp (folder "Reppy Article").**

Exam:

A take home exam will be available on the last day of the course and will be due on the last day of the exam period. Your exam will count for 50% of your evaluation.

Short Papers:

You are required to write three short (2-4 pages) papers analyzing some aspect of the readings for three class days of your choice. These short papers will count for 50% of your evaluation.

I. INTRODUCTION

Class 1 Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, (David Kairys, ed.) 13-37 (1982). **SUPP**

The Traditional Approach to Choice of Law, *CONFLICT OF LAWS: CASES, COMMENTS AND QUESTIONS* (Roger C. Cramton, et al., eds) 1-8 (1987). **SUPP**

II. INTERNATIONAL CONFLICTS

Class 2 1. Comity: *Hilton v. Guyot*, 159 U.S. 113 (1895) (and related commentary), in *CONFLICT OF LAWS*, (E. Scoles & P. Hay, eds.) (1982) (excerpts). **SUPP**

2. Antitrust Cases

- Intro, *CONFLICT OF LAWS* (E. Scoles & P. Hay, eds. 894-899 (1982). **SUPP**

Class 3 - Vested Rights: *American Banana Company v. United Fruit Company*, 213 U.S. 347 (1909). **SUPP**

[Background: CHARLES D. KEPNER, JR. & JAY H. SOOTHILL, *THE BANANA EMPIRE: A CASE STUDY IN ECONOMIC IMPERIALISM*, 53-63 (1967). **SUPP**]

- Policy Analysis: *Timberlane Lumber Company v. Bank of America*, 549 F.2d 597 (1976). **SUPP**

III. VESTED RIGHTS (First Restatement)

A. BASIC RULES

Class 4 1. Torts, **CB** 1-21 n.3

2. Contracts, **CB** 23-39

Class 5 3. Domicile, **CB** 40-57

4. Marriage, **CB** 57-72

5. Real Property, **CB** 72-81

B. REFLECTIONS ON TERRITORIALISM

Class 6

Introduction to Joseph Beale and the First Restatement, in JAMES A. MARTIN, *PERSPECTIVES ON CONFLICT OF LAWS: CHOICE OF LAW* 1-11 (1980) (hereinafter, MARTIN, *PERSPECTIVES ON CONFLICT OF LAWS*). **SUPP**

Critiques: Hassell E. Yntema and Walter W. Cook, in GENE R. SHREVE, *A CONFLICT OF LAWS ANTHOLOGY* (excerpts) (1997) (hereinafter, SHREVE, *A CONFLICT OF LAWS ANTHOLOGY*). **SUPP**

An Overview—Themes Animating Conflict of Laws, in SHREVE, *A CONFLICT OF LAWS ANTHOLOGY* (excerpts) **SUPP**

C. FIRST RESTATEMENT ESCAPE DEVICES

Class 7

1. Characterization, **CB** 114-119

2. Substance vs. Procedure, **CB** 129-145

Class 8

3. Public Policy, **CB** 158-163

4. Renvoi

- Introduction to Renvoi, *AMERICAN CONFLICTS LAW*, 4th ed. (R. Leflar, et al., eds.) (1986) (excerpts). **SUPP**

- Cases, **CB** 119-129

IV. MODERN CHOICE OF LAW THEORIES,

Class 9

Introduction, **CB** 181-182

A. Interest Analysis and its Progeny

Interest Analysis—The Emergence of Unilateralism in Modern American Conflicts Law, in SHREVE, *A CONFLICT OF LAWS ANTHOLOGY* at 70-83. **SUPP**

1. Currie I

- False conflicts, **CB** 188-195

Class 10

- False conflicts cont., **CB** 200-210

- *Kell v. Henderson*, 263 N.Y.S.2d 647 (1965). **SUPP**

- *Brainerd Currie*, in SHREVE, *A CONFLICT OF LAWS ANTHOLOGY* at 68-69. **SUPP**

- Class 11
- True Conflicts, **CB** 215-223
 - Unprovided for Case, **CB** 228-233
2. Currie II (Apparent Conflicts /Restrained Interpretation) **CB** 223-228
- Class 12
3. Comparative Impairment
- William F. Baxter, *Choice of Law and the Federal System*, 14 STAN. L. REV. 1-42 (1963). **SUPP**
 - **CB** 240-252
- Class 13
4. Better Rule ("Choice Influencing Considerations")
- **CB** 252-254
 - Robert A. Leflar, *Conflicts Law: More Choice Influencing Considerations*, 54 CAL. L. REV. 1584, 1588-98 (1966), in SHREVE, A CONFLICT OF LAWS ANTHOLOGY at 199-204. **SUPP**
 - **CB** 254-262
- Class 14
- B. MODIFIED TERRITORIALISM
1. Neoterritorialism—Same Sex Marriage
- Aaron Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method*, 9 DUQUESNE L. REV. 373, 381-393 in MARTIN, PERSPECTIVES ON CONFLICT OF LAWS at 112-118. **SUPP**
 - Note, *In Sickness and In Health, In Hawaii and Where Else?: Conflict of Laws and Recognition of Same Sex Marriages*, 109 HARV. L. REV. 2038 (1996). **SUPP**
 - *Langan v. St. Vincent's Hospital*, 2003 N.Y. Misc. LEXIS 673 **SUPP**
- Class 15
2. "Center of Gravity," etc., **CB** 182-188
3. Second Restatement, **CB** 262-279
4. New Principles, **CB** 195-200
5. The Lex Fori Approach, *Foster v. Leggett*, 484 S.W.2d. 837 (Ky. App. 1972). **SUPP**
- Class 16
- C. MULTISTATE APPROACHES
- *Other Approaches, Noted Briefly*, LEA BRILMAYER & JACK GOLDSMITH, CONFLICT OF LAWS: CASES AND MATERIALS, 4th ed., 367-368 (1994) (hereinafter, BILMAYER & GOLDSMITH, CONFLICTS 4th ed.). **SUPP**

- *In re: "Agent Orange" Product Liability Litigation*, 635 F.2d 987 (1980). **SUPP**

Class 17 D. ESCAPE DEVICES REVISITED

1. Domicile, **CB** 303-309

2. Renvoi, **CB** 309-315

3. *Public Policy Analysis, Misc. Cases*, in BILMAYER & GOLDSMITH, *CONFLICTS* 4th ed. **SUPP**

V. CONSTITUTIONAL LIMITATIONS

Class 18 A. DUE PROCESS, **CB** 342-375

Class 19 B. LIMITS ON INTERSTATE DISCRIMINATION, **CB** 410-427

John Hart Ely, *Choice of Law and the State's Interest in Protecting its Own*, 23 *William and Mary L. Rev.* 173, 173-191 (1981). **SUPP**

VI. CONFLICTS IN THE INTERNATIONAL SETTING

Class 20 A. EXTRATERRITORIALITY OF FEDERAL STATUTES, **CB** 735-765

Class 21 B. UNIVERSAL JURISDICTION AND PASSIVE PERSONALITY, **CB** 765-782

C. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, **CB** 807-811.