

Conflict of Laws

Law 186-001

Professor Greve

Spring 2023

Tue-Thurs 1:50 – 3:15 p.m.

Welcome

to Conflicts, famously known as a “dismal swamp” and “the insane asylum of the American legal profession.” It’s not as bad as all that, though, or at least it offers compensating advantages. (1) It’s a brave, new, interconnected world out there. Some of the subjects you’ll encounter (antitrust, arbitration, class actions) are sufficiently convoluted to require full treatment in other courses. But a decent lawyer (transactional or litigating) ought to know that this stuff is out there; how to approach it; and where to look it up. (2) Conflicts forces you to think seriously about the purpose, operation, and limits of legal order(s). Fun stuff—and if you’re a 3L, perhaps your last chance to engage a serious legal thought. (3) A lot of the material builds on things you (should have) learned in CivPro, Contracts, Torts, ConLaw, Property, and perhaps Family Law, Trusts, FedCourts, Antitrust, or Products Liability. It’s not a bad idea to refresh and deepen your comprehension.

Note of Caution: Conflicts questions may appear on your bar exam. However, the bar questions are most likely to involve domestic relations—which neither your textbook authors nor I seriously attempt to cover. (Almost the entire course is about commercial affairs and transactions.) In short, **this is not a bar prep course.** (For partial redress, *see infra* “Study Aids”).

Course Materials

Our required textbook is Lea Brilmayer, Jack Goldsmith, Erin O’Hara O’Connor, & Carlos M. Vasquez, *Conflict of Laws: Cases and Materials* (Wolters Kluwer; 8th ed. 2020). We’ll work through it, with a few omissions and a few additions that will be posted on TWEN.

Additional Materials (Purely Optional)

Further Readings (on Library Reserve). Your textbook rests on the conviction that “the only preparation [for Conflicts] is understanding, not memorization.” (xix). Amen. That’s what makes the book teachable, and it’s what you’ll get in this course. More technical treatises are of course available. A standard (though now slightly dated) work in this vein is Eugene F. Scoles, Peter Hay, Patrick J. Borchers, & Symeon Symeonides, *Conflict of Laws* (3d ed. 2000) (on reserve). Useful

for looking things up if the spirit moves you; lots of literature cites for the theoretically inclined; interminable case cites for the insatiable.

Conflicts teems with various “modern” theories (as well as postmodern theories bordering on nihilism). But the problems are very old, and sometimes it helps to understand the questions to which the modern jazz is supposed to be the answer. Still the best introduction—and the fount of American Conflicts theory—is Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic* (1834). It’s a breathtaking display of scholarship—a summary of the entire *corpus juris* at the time. Unfortunately, all the scholarship back then came from the Continent. Justice Story gives you interminable excerpts in Latin and French without bothering to translate them (because what are you—illiterate?). Still, the book has terrific discussions of interesting English, Scottish, and U.S. cases, especially on contracts and negotiable instruments. (We no longer think like Justice Story. Whether that’s progress is another matter.) I’ve put a copy of the *Commentaries* on library reserve.

Study Aids. If you purchase the textbook new, it comes with one-year access to an e-book with study aids, which may be helpful. (You can purchase that separately if you buy a used copy.) Use it judiciously, though. For purposes of class prep the supporting materials may help but are not assigned, and I’d rather have you think on your own two feet about the key cases and the questions in the Syllabus.

Other study aids are of course available. One plausible reason for using them: they do cover the domestic relations stuff that falls by the wayside in this course. A selection from West Academic:

- Law School Legends Audio on Conflict of Laws, by Blair, Henry Allen (2020) <https://subscription.westacademic.com/Book/Detail?id=26901&q=conflict%20of%20laws&goBackUrl=https%3A%2F%2Fsubscription.westacademic.com%2Fsearch%3Fq%3Dconflict%20of%20laws>. NOTE: This is an audio recording.
- Black Letter Outline on Conflict of Laws, by Hay, Peter (2019) <https://subscription.westacademic.com/Book/Detail?id=26220&goBackUrl=https%3A%2F%2Fsubscription.westacademic.com%2Fsearch%3FsubjectFilter%3D30%26sort%3Ddocument-views>.
- Conflicts in a Nutshell, by Borchers, Patrick J. (2020) <https://subscription.westacademic.com/Book/Detail?id=27159&goBackUrl=https%3A%2F%2Fsubscription.westacademic.com%2Fsearch%3FsubjectFilter%3D30%26sort%3Ddocument-views#description-tab>.
- CALI has a section in the Civ. Pro. Outline: <https://www.cali.org/content/lessons-subject-outline-civil-procedure#:~:text=Determining%20the%20Applicable%20Law>.

Restatements. We’ll talk a fair bit about the Restatements (First and Second). (The ALI is working on a Third but they’re not very far along.) Key sections appear in your textbook. Occasionally it helps to look up the comments. The Restatement (Second) is of course on Westlaw and LEXIS.

Teaching Format

My classes are a mix of lecture and conventional, “Socratic” teaching. I strongly encourage active class participation (I freely alternate between cold calls and “any volunteers?”), and I will consider it for purposes of your grade. Active, constructive participation means a .33 upgrade; consistent failure to prepare for class or to follow the discussion may result in a downgrade.

If for some reason you have been unable to prepare for a class, send me an advance email. No harm if you do this once or twice; just don’t make a habit of it.

I use PowerPoint (albeit sparingly), and I will from time to time post the slides for prior sessions on TWEN. Also, if you miss a class or things remain obscure even after reviewing your notes etc., I am willing to share my class notes, on an individual basis and upon request. Please don’t overuse this privilege. *You may not share the class notes with anyone, and you must delete them from your computer after use and, in any event, no later than the last day of class.*

Learning Outcomes; Assessments

Here’s what you are expected to take away from this course:

- Working knowledge of the principal areas of Conflicts law (choice of law, jurisdiction, recognition of judgments).
- Basic knowledge of the Restatement (First) and (Second), especially in relation to torts, contract, and property.
- Basic understanding of the various theoretical approaches to Conflicts law (e.g., “vested rights” theory, “choice-of-law revolution”).
- Ability to conceptualize and analyze Conflicts cases.

It’s a good idea to check on your progress during the semester (and the ABA requires it). I’ve experimented with mid-Terms and quizzes—only to have students rebel. Far preferable: at least one **mandatory consultation session** roughly half-way through the semester. Details, scheduling to follow.

Obviously, you may request additional consultations at any time. That is a good idea especially if this or that topic or session leaves you confounded.

Exams/Grading

The 3-hour final exam (April 28) will be open-book, internet-blocked. Essay questions.

It pays to mark up your book and related materials as we go along. I will supply additional information and distribute a practice exam well before the actual exam. You’ll have a full opportunity to review your exam (and, if you wish, the practice exam) with me. I’ll explain the mechanics when the time comes.

Office Hours

Thurs 4:30 – 5:30pm; or by appointment. Please use this address for all email communication: mgreve@gmu.edu.

Syllabus

All page numbers below refer to the textbook. By way of rough overview:

First comes an Introduction (Ch.1): why and how is Conflicts a problem, and how should we think about it? Then come theories, ancient (roughly, the “territorial” understanding of Story, Beale and the Restatement (First)) and “modern” (roughly, Cook, Currie, Baxter, Leflar and the Restatement (Second)) (Ch. 2&3). Then comes the Constitution (Ch. 4), which (technically) tells you how to understand conflicts in a federal system that’s practically programmed to produce them. Then come the three standard pieces of Conflicts: jurisdiction (Ch. 5), choice of law (Ch. 6), recognition of judgments (Ch. 7). I’ve changed that conventional order in the Syllabus because I want the *Erie/Klaxon* issues (Ch. 6) immediately following the Constitution (you’ll see why). Finally, three more specialized topics: extraterritoriality (Ch. 8); contractual choice of law/forum (Ch. 9); complex litigation (Ch. 10).

The Syllabus lists only 24 sessions instead of 26. That’s because some sessions will undoubtedly run over; and with all the planning in the world it’s impossible to know which ones those will be. Accordingly, *the Syllabus is subject to periodic change*, depending on our progress. The operative version at all times is on TWEN; **please check on a regular basis**.

Session (1): Introduction

pp. xxiii-xxv; 1-14

Suppose you could invent a full set of Conflicts rules. What would or should it contain? Make a list as you read and noodle over the three “problems.” And what exactly should that set of rules protect or maximize—state or national sovereignty? Fairness to litigants? Uniformity? Interstate harmony and free trade? Make another list.

You won’t understand the problems. Don’t fret: that’s what this course is about. We’ll take a first whack at how to approach these sorts of problems. If time allows, I’ll have a few words on the history of Conflicts.

Session (2): Traditional Approaches (I): Torts, Contracts, Property

pp. 15-32 (Torts); 33-48 (Contracts); Property (79-97).

I've departed from the order in the book to keep these three pieces together. For each piece read the Restatement (First) provisions first; then the cases and notes. *Before* you conclude that the (“territorial” and “vested rights”) approach is obviously stupid: why did some pretty smart people think it might actually make sense?

Session (3): Traditional Approaches (II): Domicile, Marriage, Corporations

pp. 48-63 (Domicile); 63-79 (Marriage); 97-108 (Corporations)

Who is domiciled where matters big time for jurisdiction and choice of law. This is true under “traditional” and “modern” approaches, so pay attention.

The argument against teaching corporations (here and later in the course) is that it gets very technical, very quickly; we'll have to skip most of the nuances. The argument *for* teaching it is that it is terribly important; endlessly intriguing; and connected to lots of other pieces in this course. *E.g.*, the “internal affairs” doctrine (which governs corporate *but not* securities or antitrust law—why?!) is actually a solution to a *constitutional* Conflicts problem. Can you see it?

Session (4): Traditional Approaches (III): Wrinkles

pp. 108-124; 129-146

“Wrinkles” (here and in Sessions 5 and 8) is a bit of a misnomer. It's more accurate to say that the first-order Conflicts rules won't work without a bunch of second-order doctrines. That's what this is. *E.g.*, “characterization” has to do an awful lot of work. The wretched substance/procedure distinction makes a first appearance.

Skip *Sampson v. Channell*, pp. 124-128; we'll discuss it in a later Session.

Session (5): Traditional Approaches (III): More Wrinkles; Proof of Foreign Law

pp. 146-163 (Public Policy, Penal Law Exceptions); 163-169 (Proof)

Do we believe that the “public policy” and “penal laws” exceptions are sensible? Constitutional? In what ways (if any) should they differ for international and domestic law, respectively?

Session (6): Modern Approaches (I): Theories

pp. 171-227

Tables, State Court Methodologies (TWEN)

What all the “modern” approaches have in common is a pronounced homeward bias: the forum will apply its own law unless something really funky happens. Is that a problem?

Session (7): Modern Approaches (II): Restatement (Second)

pp. 227-248 (Restatement)

It's a widely held view that the Restatement (Second) hasn't fared much better than the First. Fair? Why and in what respects (give it your best guess and withhold judgment until the end of this course)?

Session (8): Modern Approaches (III): Wrinkles Again

pp. 249-280

Whole bunch of problems; we'll work through them.

Session (9): Constitutional Limitations (I): Choice of Law

pp. 281-326 (Choice of Law)

Think carefully about the connection between the Due Process Clause and the Full Faith and Credit Clause. Did the Court get this right?

Allstate (297pp) is obviously nuts. Is the dissent any more persuasive?

Shutts and *Sun Oil* (310pp) are class action cases. We'll examine the statutory questions and mechanics later; for now, focus on the constitutional issues.

Session (10): Constitutional Limitations (II): Forum; Discrimination

pp. 326-338 (Forum); 339-352 (Discrimination)

Franchise Tax Bd. v. Hyatt (Hyatt II), 136 S.Ct. 1277 (2016) (TWEN)

"We decline to embark on the constitutional course" is one of the Supreme Court's best sentences, ever. It could and should appear in a ton of opinions; but don't you think this case calls for something a bit more thoughtful? Did they do any better in *Hyatt II*? Believe it or not, the case went up for a third time (not assigned—fun stuff if you're into sovereign immunity metaphysics).

The "discrimination" piece requires a bit more context than the book supplies; I'll explain.

Session (11): Conflict of Laws (I): The *Erie* Doctrine

pp. 465-475

Swift v. Tyson, 41 U.S. 1 (1842) (TWEN)

Baltimore & O.R.R. v. Baugh, 149 U.S. 368 (1893) (TWEN)

Black & White Taxicab v. Brown & Yellow Taxicab, 276 U.S. 518 (1928) (TWEN)

Oh, yes: after CivPro and ConLaw and FedCourts we will do this yet again. I've assigned the older cases because to comprehend *Erie* (and with it, the entire modern Conflicts architecture) you must comprehend the 150 years of jurisprudence that went by the boards. So:

Assume Story is right about Section 34 (he probably is). What exactly is wrong with *Swift*? Then suppose *Swift* is wrong: can you think of a plausible choice of law rule *except* the “general” law?

What's the solution to the Conflicts problem in *Baugh*? In *Black & White Taxicab*? Do those cases compel *Erie* (or make it more plausible)?

Session (12): Conflict of Laws (II): *Erie* and Choice of Law; Judgments

pp. 475-499

Sampson v. Channell, pp. 124-128

Is *Klaxon* compelled by *Erie*? What difference would it make, at this point?

Session (13): Conflict of Laws (III): Federal Common Law

Clearfield Trust (TWEN)

Illinois v. City of Milwaukee (TWEN)

International Paper Co. v. Ouelette, 479 U.S. 481 (1987) (TWEN)

Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398 (1964) (TWEN)

The textbook authors have yanked this stuff from the latest edition; for reasons I'll explain I've retained it. Once you have a preemptive federal common law rule you'd think that horizontal conflicts go out the window—but they don't. I've added two cases where the Court *imposes* a (horizontal) choice of law rule—as distinct from a more “substantive” rule of decision—as a matter of federal common law. Did they get it right?

Session (14): Jurisdiction (I): Consent and Waiver

pp. 363-374

Recommended for review purposes:

Pennoyer v. Neff, 95 U.S. 714 (1877) (TWEN)

International Shoe Co. v. Washington, 326 U.S. 310 (1945) (TWEN)

One of the textbook authors (Erin O'Hara) doesn't teach jurisdiction in this course at all—perhaps, on the assumption that students have heard and learned it before. I've kept it in because the principal theme for this and the following sessions—the interdependence between jurisdiction and choice of law—usually gets short shrift in CivPro. Plus, the Supreme Court has re-entered the arena.

Session (15): Jurisdiction (II): Activities

pp. 374-445

Norfolk Southern v. Malloy (TWEN)

Very messy stuff; lots of reading. Is it actually a jurisdictional problem—or a (products) liability problem?

Session (16): Jurisdiction (III): Property

pp. 445-463

Shaffer is a big deal. Make sure you get it.

Session (17): Recognition of Judgments

pp. 501-557

Copious reading but it's not terribly difficult: most of this is readily look-uppable in real life. *Baker* (533pp) is the central case.

Session (18): Extraterritoriality (I): Global

pp. 575-645

Departing from the textbook I have paired “foreign” extraterritoriality (this session) with “domestic” extraterritoriality (next) and in that session supplied a domestic antitrust case (*Harmar*) for comparison with *Empagran*. Concentrate on the “presumptions” that apply in each setting, and compare and contrast the antitrust cases.

Session (19): Extraterritoriality (II): Domestic

pp. 352-361

Coca-Cola Co. v. Harmar Bottling Co., 218 S.W. 3d 671 (2007) (TWEN)

National Pork Producers Council v. Ross (TWEN)

Should the Supreme Court constitutionalize domestic territorialism, or apply a presumption against extraterritoriality to *state* law?

The question of whether the “dormant” Commerce Clause exists and, if so, whether it has an “extraterritoriality” prong is the stuff of creedal passions, and at issue in the Supreme Court’s pending *National Pork Producers* case. I’ll assign the decision if and when it comes out.

Session (20): Choosing Legal Regimes (I): Contractual Choice of Law

pp. 647-676

Contractual choice of law or forum has generated a hugely interesting Law & Econ literature, much of it produced by current and former ASLS faculty members. Do your intuitions about efficient choice of law (and its limits) depend entirely on what you think about efficient contracting in the first place—or also on something else (and if so, what?)

Could or should Congress prescribe a preemptive, quasi-contractual choice of law default rule for products liability cases (in diversity)? What might that rule look like?

Session (21): Choosing Legal Regimes (II): Forum Choice

pp. 677-706

Think about the differences between law choice and forum choice. Why might parties contractually choose, and why might courts enforce, one or the other?

Session (22): Choosing Legal Regimes (III): Arbitration

pp. 707-735

Concepcion (714pp) is (for the time being) the tail end of the long, *very* weird history of the FAA. (Its principal holding has since been extended to labor arbitration, *see Epic Systems Corp. v. Lewis*). I’ll summarize the trajectory.

Are you more surprised by the fact that *Concepcion* was written by Justice Scalia—or by the California courts’ response?

Session (23): Complex Litigation (I): Basics

pp. 737-772

Re-read: pp. 326-341 (*Shutts, Sun Oil*)

A mess, isn't it? Should there be special/different choice of law rules for multi-state class or mass actions? What might that look like?

Session (24) Complex Litigation (II): Multiple Governing Laws

pp. 773-803

Complex enough for you?