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2. POLITICS AND PRIVATE INTERNATIONAL LAW

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2.1 INTRODUCTION

At first glance, a chapter on politics and private international law may strike the reader as puzzling. After all, "[t]he biggest criticism against traditional methods of conflict of laws is, perhaps, the absence of politics. Traditional doctrine, so it is alleged, ignores, or sidelines, political issues."[1] This chapter shows, to the contrary, that private international law is political in its content and functions; that robust debate is unfolding in the field over the appropriate levels and types of private international law's engagement with the political; and that, appreciating the relationship between politics and private international law, interdisciplinary scholars have used political science theories and methods to shed light on the normative foundations of private international law, private international law decisionmaking, and the sources of cross-national variation in private international law rules.

Some brief remarks are in order about the two terms that define this chapter's topic. Private international law scholars have different understandings of "politics" and I make no effort to settle those differences here.[2] Instead, I consider within the scope of this chapter research that presents itself as addressing questions about the relationship between private international law and politics broadly construed, including questions about the application and limits of public and private power, governance authority, and public policy. Regarding "private international law"—also known as "conflict of laws"—this chapter adopts the common understanding of the field as addressing issues that arise when a legal problem

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[1] Ralf Michaels, 'Post-critical Private International Law: From Politics to Technique' in Horatia Muir Watt and Diego P Fernández Arroyo (eds), *Private International Law and Global Governance* (OUP 2014) 54, 55.

[2] For an insightful discussion of these terms' meanings, see Patrick Kinsch, 'Le role politique en droit international privé' [2019] 402 Recueil des cours 9, 21-29. Kinsch settles on a Weberian understanding of politics and distinguishes it from legal methodology.

has connections to more than one state, including jurisdiction, choice of law, and the recognition and enforcement of foreign judgments.[3]

As Wai argues, "the politics of private international law have been obscured."[4] One reason for this obscurity is that private international law concerns private law rather than public law, as traditionally conceived. Yet the private/public distinction has been discredited, largely because it misleadingly downplays the political sources and functions of private law. As Shapiro convincingly argues, private law is as much about politics as public law, as are its regulatory purposes and its role in advancing government policies.[5]

In this chapter, I aim to put the politics of private international law in the spotlight. I first discuss debates over the extent and ways in which private international law is political, which are descriptive questions. Second, I examine normative contestation among scholars regarding how, and how much, private international law should engage with the political. Third, I examine interdisciplinary efforts to develop new insights about private international law by using normative political theory and positive political science theories of international relations, judicial decisionmaking, and political economy.

2.2 *IS* PRIVATE INTERNATIONAL LAW POLITICAL?

One dimension of debate about politics and private international law is descriptive. It focuses on whether, or to what extent, the content and functions of private international law are political.

2.2.1 Apolitical Private International Law?

The answer proposed by classical private international law itself is that the field is apolitical. This conception is often linked to Savigny, whose system of private international law placed each multistate legal problem into an established private law category (such as contracts, property, or torts), and attempted to determine its proper "seat" based on particular

[3] Private international law, it should be noted, is sometimes understood more broadly than I treat it here, so as to include problems regarding nationality, transnational arbitration, international trade, and/or international business transactions.

[4] Robert Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization' [2002] 40 Columbia Journal of Transnational Law 209, 213.

[5] Martin Shapiro, 'Public Law and Judicial Politics' in AW Finifter (ed), *Political Science: The State of the Discipline II* (American Political Science Association 1993) 365, 366. See also Leon Green, 'Tort Law Public Law in Disguise' [1959] 38 Texas Law Review 1.

connecting factors (such as domicile or the place of an event). Describing Savigny's contributions, Symeonides explains:

> The result of this classificatory approach was a network of neutral, even-handed, bilateral choice-of-law rules that assigned each legal relationship to one particular state, regardless of that state's actual or imputed 'wish' to apply its law, and regardless of that law's content....[Savigny] argued forcefully that the objective of private international law should not be to promote the forum's interests as such, but rather to produce "international uniformity of decisions"....[6]

Built on the conceptual system of private law, Savigny's private international law purported to be naturally apolitical and removed from considerations of public policy and state interests.[7]

Some contemporary accounts of private international law likewise emphasize the field's avoidance of political considerations—but they do so without claiming that avoidance is natural or inevitable, and they stop well short of describing private international law as altogether apolitical. For example, Carballo and Kramer characterize private international as having a "neutral stance."[8] Paul refers to "the isolation of private international law," arguing that it "excludes questions of international public policy, such as the role of multinationals on social and economic development or the effect of international arbitration clauses on the enforcement of domestic antitrust laws."[9]

Similarly, Muir Watt describes the field as "cut off from the politics inherent in international relations" and highlights its "avoidance of the political" due to its narrow focus on "the regulation of cross-border 'private interests' through national 'private law....'"[10] Private international law, she argues, developed in a manner that has been "self-consciously unhampered by politics"[11] and, as one consequence of that development, "private

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[6] Symeon C Symeonides, *Choice of Law* (OUP 2016), 51.
[7] Kinsch (n 2) 46. See also Laura Carballo Piñeiro and Xandra Kramer, 'The Role of Private International Law in Contemporary Society: Global Governance as a Challenge' [2014] 7 Erasmus Law Review 109, 111 ("Traditionally, and particularly on the European continent, private international law has been viewed primarily as a system of value neutral rules, indicating the applicable law and establishing international jurisdiction.").
[8] Carballo and Kramer (n 7) 110.
[9] Joel Paul, 'The Isolation of Private International Law' [1988] 7 Wisconsin International Law Journal 149, 150.
[10] Horatia Muir Watt, 'The Relevance of Private International Law to the Global Governance Debate' in Horatia Muir Watt and Diego P Fernández Arroyo (eds), *Private International Law and Global Governance* (OUP 2014) 1, 2.
[11] Horatia Muir Watt, 'Theorizing Private International Law' in Anne Orford and Florian Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (OUP 2016) 862, 863.

international law has remained closeted from concerns of global private power."[12] As we will see, these descriptive claims about private international law's avoidance of politics serve as a foundation for critique of private international as insufficiently engaged with questions of politics, power, and policy.[13]

2.2.2 The Political Content and Sources of Private International Law

Other scholars, rather than downplaying the politics of private international law, instead emphasize precisely that.[14] Perhaps the most ambitious attempt to draw out the political aspects of private international law is Kinsch's general course on private international law on that topic delivered at the Hague Academy of International Law.[15] Kinsch systematically explores the political content of the principal private international law methodologies and the political sources of particular private international law rules. Kinsch argues that even Savigny's purportedly apolitical private international law was political in the sense that it reflected the socio-political model of his era, according to which the state remained separate from private law matters and civil society more generally.[16]

Kinsch also catalogs the political aspects of many features of the rules, methods, and theories of contemporary private international law. For example, the public policy exception enables a court to reject otherwise applicable foreign law in favor of forum law, not as a matter of characterization and localization of connecting factors, but rather based on the distinctive policies of the forum state, which are themselves a product of forum state politics.[17] Private international law codifications are a product of legislative politics; the political interests of states are manifest in the negotiation of international conventions in the field of private international law; and policy considerations influence the private international law jurisprudence of courts.[18] The interest analysis method of choice of law is explicitly based on an analysis of states' interests in advancing the policies underlying their private law rules.[19]

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[12] Horatia Muir Watt, 'Private International Law Beyond the Schism' [2011 2 Transnational Legal Theory 347, 354.

[13] See below Section at 3.

[14] For example, Lehman argues: "It would be wrong to assert that private international law has disregarded regulation so far. Quite to the contrary, significant strides have been taken to incorporate public interest norms into the conflicts methodology." Matthias Lehmann, 'Regulation, global governance and private international law: squaring the triangle' [2020] 16 Journal of Private International Law 1, 10.

[15] Kinsch (n 2).

[16] Kinsch (n 2) 63.

[17] Kinsch (n 2) 76.

[18] Kinsch (n 2) 84-90.

[19] Kinsch (n 2) 91-110.

Kinsch characterizes the concept of *lois de police* ('mandatory rules') as another manifestation of the political aspects of private international law. This concept requires the application of legal rules that are based on the strong policy interests of a state, even if choice-of-law rules otherwise call for the application of another state's law.[20] Result-selective choice-of-law rules are also political in the sense that they are designed to achieve substantive results that are considered desirable as a matter of state policy.[21] These include choice-of-law rules designed to advance social policies that are protective of certain parties (such as children, consumers, employees, tort victims, or maintenance obligees),[22] to favor the validity of certain juridical acts (such as wills or contracts),[23] or to favor a particular status (such as adoption or marriage).[24] Other rules of private international law are intended to bar recognition of marriages not meeting specified principles of substantive validity[25] or avoid application of discriminatory divorce laws.[26] One impact of neoliberal ideology on private international law has been the expansion of private party autonomy—and, as Kinsch points out, whether one favors that move or not, it represents a political choice, and not a purely technical choice.[27]

2.2.3 Global Governance and the Political Functions of Private International Law

Beyond content and sources, a significant stream of scholarship explores the global governance functions of private international law.[28] In this respect, Wai's work

[20] Kinsch (n 2) 110-25.
[21] Symeon C. Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (OUP 2014) 251.
[22] Kinsch (n 2) 128-64; Symeonides, *Codifying Choice of Law* (n 21) 271-85.
[23] Symeonides, *Codifying Choice of Law* (n 21) 252-60.
[24] Symeonides, *Codifying Choice of Law* (n 21) 260-71.
[25] See Symeonides, *Codifying Choice of Law* (n 21) 268 (citing example of the Netherlands' private international law codification, which prohibits recognition of marriage if the parties are under age 15 or too closely related).
[26] See Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] L 343/10, art. 10 (where the otherwise applicable law "makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the forum shall apply"). See also Eva Lein, 'Article 10 Rome III' in (Gralf-Peter Calliess and Mortiz Renner (eds), *Rome Regulations: Commentary* (3rd edn, Kluwer Law 2020) 978, 985-86.
[27] Kinsch (n 2) chapter V.
[28] See, for example, Lehmann (n 14) 1. As Mills argues: "Private international law, properly understood, is about determining the most 'just' distribution of regulatory authority." Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press 2009) 18.

demonstrating the regulatory function of private international law is seminal.[29] He begins by establishing the regulatory function of domestic private law, revealing private law's role in supporting and governing private transactions and protecting third parties from the negative externalities of those transactions, and arguing that private law is thus as much a matter of public policy as public law.[30] On the one hand, private international law can enhance this regulatory function by coordinating the application of domestic private law in multistate contexts—but by increasing party autonomy, private international law has also facilitated what Wai calls "lift off" of private actors from national regulatory oversight.

Whytock's work examines the global governance functions of private international law from the perspective of political science. Whytock conceptualizes private international law as dealing with what political scientists have long considered to be a fundamental question of governance: *Who governs?*[31] Governance includes the setting of rules, the application of rules, and the enforcement of rules.[32] When the question is who governs transnational activity, the question is how to allocate the authority to govern that activity among states and between state and nonstate actors. Private international law's three traditional branches help answer these questions. Its choice-of-law and jurisdiction branches help allocate prescriptive and adjudicative authority among states and the foreign judgments branch helps coordinate enforcement. In addition, insofar as private international law defines the contours of party autonomy to choose governing law and transnational dispute resolution methods, it contributes to the allocation of governance authority along a public/private dimension.[33] Whytock treats the judicial role in the application of private

[29] Wai (n 4) 209. See also Robert Wai, 'Transnational Private Law and Private Ordering in a Contested Global Society' [2005] 46 Harvard International Law Journal 471 (arguing that "regulation and governance are a function of private international law").
[30] Wai (n 4) 232-38.
[31] Christopher A Whytock, 'Conflict of Laws, Global Governance, and Transnational Legal Order' [2016] 1 UC Irvine Journal of International, Transnational, and Comparative Law 117. The "who governs" question is a fundamental question that has long preoccupied political scientists, including contemporary scholars of global governance. See Robert Dahl, *Who Governs? Democracy and Power in an American City* (Yale University Press 1961); Deborah D Avant, Martha Finnemore and Susan K Sell (eds), *Who Governs the Globe?* (Cambridge University Press 2010).
[32] Anne Mette Kjaer, *Governance* (Polity Press 2004) 10.
[33] Christopher A Whytock, Domestic Courts and Global Governance: The Politics of Private International Law (unpublished PhD dissertation, Duke University 2007) (https://hdl.handle.net/10161/452); Christopher A. Whytock, Whytock, 'Domestic Courts and Global Governance' [2007] 101 Proceedings of the Annual Meeting of the American Society of International Law 166; Christopher A Whytock, 'Domestic Courts and Global Governance' [2009] 84 Tulane Law Review 69.

international law rules as a distinct form of governance, which he calls 'transnational judicial governance.'[34]

Whytock distinguishes private international law from other responses to the global "who governs" problem. International law tries to transcend national legal systems by creating a single body of international legal rules to govern transnational activity and a system of international courts to adjudicate transnational disputes. Harmonization seeks convergence and ultimately uniformity of national laws, thereby reducing the salience of the "who governs?" question, but leaving application and enforcement of uniform laws to national legal institutions. In contrast, private international law embraces the role of national legal institutions in governing transnational activity (unlike international law's impulse), and it accepts cross-national legal diversity (unlike harmonization's impulse). Instead, conflict of laws responds by providing rules to help nations allocate governance authority among themselves.[35]

Mills also elucidates the global governance functions of private international law, conceiving it as "concerned with the allocation of regulatory authority in matters of private law between states, in terms of both institutional authority (jurisdiction) and substantive regulatory authority (applicable law)."[36] In an important study of party autonomy, Mills highlights the relationship between global governance and party autonomy in private international law, building on a theme earlier explored by Wai:

> What is distinctive and even remarkable about party autonomy is that it allows private parties to determine the distribution of private law authority themselves, thus essentially privatising an important allocative function of global governance. Even more significantly, where a non-state forum (arbitration) or non-state law is chosen, the effect can be viewed as a double privatisation, not just of the allocative function but also of the regulatory function.[37]

Thus, Mills argues that private international law should be considered an important part of global governance, and one that operates at a higher level insofar as it deals with "the regulation of regulation."[38]

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[34] Christopher A Whytock, 'Domestic Courts and Global Governance' [2009] 84 Tulane Law Review 69; Christopher A Whytock, 'Transnational Judicial Governance' [2012] 2 St. John's Journal of International & Comparative Law 55.
[35] Whytock, 'Conflict of Laws and Global Governance' (n 31) 118.
[36] Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press 2018) 3.
[37] Mills, *Party Autonomy* (n 38) 3.
[38] Mills, *Party Autonomy* (n 38) 3.

2.2.4 Assessment

The descriptive dimension of the debate about the politics of private international law is not an either/or debate. Rather, scholars disagree about the extent to which and ways in which private international law is political, in terms of its content, its sources, and its functions. Even those who emphasize the field's neglect of the political acknowledge its political aspects. After all, even that neglect may itself have "eminently political consequences."[39] Even if some law students, lawyers, legislators, and judges tend to experience private international law as a technical field devoid of politics, political considerations have long been part of the field.

2.3 *SHOULD* PRIVATE INTERNATIONAL LAW BE POLITICAL?

Another dimension of debate about politics and private international law is normative.[40] To what extent should private international law strive for political and policy neutrality? To what extent should it instead embrace politics and policy? A related debate has long existed in the field, animated by the concepts of "conflicts justice" and "material justice." Conflicts justice, which is associated with traditional private international law, is "preoccupied with choosing the proper *state* to supply the applicable law, rather than directly searching for the proper *law* or, much less, the proper *result*," whereas material justice favors the resolution of disputes "in a manner that is substantively fair and equitable to the litigants" and calls for this to be an objective of private international law as much as it is for internal law.[41] Recently, however, contention in the field has played out in more explicitly political terms and around values that extend beyond notions of material justice as commonly understood.

2.3.1 Politics and Private Power

Building on the descriptive claim that private international law is unduly detached from politics, some scholars argue for more political awareness and engagement. Among the central concerns of these critics is that private international law has excessively focused on facilitating private activity, at the expense of adequately regulating it. Wai argues that the

[39] Muir Watt, 'Theorizing Private International Law' (n 11) 863.
[40] For discussions of this debate by two of its leading participants, see Ralf Michaels, 'Global Legal Pluralism and Conflict of Laws' in Paul S Berman (ed), Oxford Handbook of Global Legal Pluralism (OUP 2020) 630, 638-40 and Muir Watt, 'Relevance of Private International Law' (n 10) 1-8.
[41] Symeon C Symeonides, 'Material Justice and Conflicts Justice in Choice of Law' in Patrick J Borchers and Joachim Zekoll (eds), *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K. Juenger* (Transnational Publishers 2001) 125, 126-27.

internationalist goals of commerce and cooperation that animate private international law "can exclude other worthwhile policy objectives such as distributive justice, democratic political governance, or effective transnational regulation," all of which can be equally worthy objectives.[42] According to him, in order to adequately fulfill its governance role, private international law must be more connected to "public policy debates and academic studies concerning law in an era of globalization…," including debates about the expansion of private power in transnational relations.[43] Having described how private international law has facilitated the "liftoff" of private actors from national regulatory oversight, he argues that it is important to also focus on "touchdown" points—where private parties need or benefit from state institutions to achieve their goals—to better regulate private power and address the negative externalities of transnational business activity.[44]

Muir Watt criticizes private international law for having "remained remarkably silent before the new and increasingly unequal distribution of wealth and authority in the world, and the growing ranks of the vagrant, the migrant and the stateless."[45] She calls for the "de-closeting" of private international law from the realm of politics,[46] with a positive project of exploring how "the tools, methods, and underlying axiology of the field could be reinvented to contribute to regulate the transnational exercise of private power by a variety of non-state actors whose cross-border economic activities fall within its traditional remit."[47] She argues that with a more expansive understanding of private international law's horizons, its tools could be used to address world problems in ways that could have a "significant impact on the reduction of social unfairness and economic inequalities."[48] According to Muir Watt, "private international law might be better able than its public counterpart has been so far…to articulate a political project for the global governance of private power."[49] That project could extend to a wide range of important issues, such as liability for human rights abuses by corporate actors, accountability of rating agencies, regulation of private forms of dispute resolution, and remedying environmental torts.[50] Although critical in her outlook, her vision of private international law's potential role in global governance is highly ambitious, extending well beyond the allocative functions emphasized by others.

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[42] Wai, 'Transnational Liftoff' (n 4) 231.
[43] Wai, 'Transnational Liftoff' (n 4) 213.
[44] Wai, 'Transnational Liftoff' (n 4) 265-68.
[45] Horatia Muir Watt, 'Globalization and private international law' in Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017) 845, 847.
[46] Muir Watt, 'Beyond the Schism' (n 12) 347.
[47] Muir Watt, 'Relevance of Private International Law' (n 10) 2.
[48] Muir Watt, 'Relevance of Private International Law' (n 10) 12.
[49] Muir Watt, 'Beyond the Schism,' (n 12) 355.
[50] Muir Watt, 'Relevance of Private International Law' (n 10) 3-4.

Others, too, criticize private international law for being insufficiently attentive to the political. Paul criticizes private international law's exclusion of "questions of international public policy, such as the role of multinationals on social and economic development or the effect of international arbitration clauses on the enforcement of domestic antitrust laws."[51] Carballo Piñeiro and Kramer call for a reconsideration of the role of private international law, suggesting that it should "more explicitly lay[] bare…policy considerations" and embrace "the protection of specific interests and rights."[52] As they put it, private international law should remove its "Savignian blindfold" and take a more holistic approach.[53]

In stark contrast, O'Hara and Ribstein make what is roughly the opposite normative argument.[54] They characterize the dominant private international law methodologies as political. According to them, vested rights theory emphasizes states' political power (which is territorially limited) and interest analysis focuses on states' political objectives (state interests). But they criticize those approaches, arguing that "political leaders cannot be expected to maximize social welfare" because "political decisionmaking is infected by…agency costs."[55] Instead, O'Hara and Ribstein, drawing on public choice theory, advocate for a system based on wealth-maximization and individual choice, realized by maximal enforcement of choice-of-law clauses to enable them to "structure their behavior to avoid laws ill-suited to their affairs."[56] This, they argue, will better achieve socially optimal outcomes than political methods.

2.3.2 Conflict of Laws as Technique

Michaels acknowledges that "[t]he biggest criticism against traditional methods of conflict of laws is, perhaps, the absence of politics."[57] Yet, he contends, along with Knop and Riles, that it is precisely the technical nature of private international law methodology—including techniques such as characterization, localization, and dépeçage—that that makes it so promising as a way of managing global legal pluralism.[58] These techniques allow it to

[51] Paul (n 9) 150.
[52] Carballo and Xandra Kramer (n 7) 111.
[53] Carballo and Xandra Kramer (n 7) 111.
[54] Erin A O'Hara and Larry E Ribstein, 'From Politics to Efficiency in Choice of Law' (2000) 67 University of Chicago Law Review 1151.
[55] O'Hara and Ribstein, 'From Politics to Efficiency' (n 54) 1152.
[56] O'Hara and Ribstein, 'From Politics to Efficiency' (n 54) 1152.
[57] Ralf Michaels, 'Post-critical Private International Law: From Politics to Technique' in Horatia Muir Watt and Diego P Fernández Arroyo (eds), *Private International Law and Global Governance* (OUP 2014) 54.
[58] Karen Knop, Ralf Michaels and Annelise Riles, 'From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style' [2014] 64 Stanford Law Review 589.

operate "in relative oblivion to outcomes, and indeed (for the time being) politics."[59] The value of private international law lies "precisely in its technical character as a way to deal with intrinsic politics."[60] The importation of politics into conflict-of-laws methodology would at a certain point risk overshadowing its distinctively technical characteristics, undermining—rather than enhancing—its governance potential.

Notwithstanding the emphasis on technique, the aspiration is emphatically not for private international law to stay removed from politics, as is often said about Savigny's vision.[61] As Michaels argues: "Technique is not used in the ignorance of politics but, quite to the contrary, in sight of the impossibility of resolving political conflicts otherwise."[62] Knop, Michaels and Riles reconcile the technical and the political by arguing that "[t]he language of conflict of laws can be used in an 'as if' mode: problems can be described in a technical way as if they were unpolitical, although we are all aware that they are not."[63] Thus, one might say, even if private international law's content is primarily technical, its functions are largely political.

2.3.3 Assessment

It is hard to disagree about the importance of, and the need to respond to, the global problems noted by those who criticize private international law for being insufficiently engaged with politics. Nor is there great debate about *whether* private international law should aim to further certain policy objectives. However, there are a number of pressing and more difficult-to-answer questions that deserve attention. First, how ambitious should private international law's governance goals be? Through features like the public policy exception and a variety of result-oriented choice-of-law rules that favor the validity of wills and contracts, statuses such as adoption and marriage, weaker parties such as consumers or employees,[64] and plaintiffs in environmental damage suits,[65] private international law already seeks to advance a variety of policy goals. How far beyond these objectives should private international law reach? Should they extend as far as Muir Watt suggests? Or are more modest ambitions appropriate, as Lehman suggests:

[59] Michaels, 'Post-critical Private International Law' (n 57) 66.
[60] Michaels, 'Global Legal Pluralism and Conflict of Laws' (n 40) 640.
[61] As Michaels notes, "Savigny, so the traditional story goes, supported a strictly apolitical private law," and he goes on to explain why that picture is not entirely accurate. Michaels, 'Post-critical Private International Law' (n 57) 61.
[62] Michaels, 'Post-critical Private International Law' (n 57) 67.
[63] Michaels, 'Global Legal Pluralism and Conflict of Laws' (n 40) 644.
[64] Symeonides, 'Material Justice and Conflicts Justice' (n 41) 128-38.
[65] Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ I.199/40, art 7.

> Private international law is not a panacea to all the daunting tasks humanity is facing. Contrary to public international law, its focus is not on global governance issues. Its objective has always been much more limited—to solve day-to-day problems created by the existence of different national laws. In this more modest ambition, private international law has been tremendously successful.[66]

The answer to the first question depends in large part on the answer to a second question: Which types of global problems is private international law most capable of addressing? Are other fields of law, other legal techniques, or extra-legal solutions more promising than private international law for particular problems?[67] The question becomes one of comparative institutional competence that requires not only a reimagining of private international law, but also a deep understanding of its strengths and weaknesses as a tool of global governance, as well as those of other approaches, in light of the particular problems to be solved.

Third, insofar as private international law aspires to advance particular policy goals, how should those goals be identified? Conceptions of the good are themselves globally diverse and prone to political contestation, and in a decentralized global legal system,[68] "[t]here is no neutral or mutually accepted standard under which different values could be balanced."[69] Might private international law derive these values internally? Michaels is skeptical:

> Private international law does not contain universal substantive values, because its whole *raison d'être* is to resolve conflicts between different non-universal values without merely superimposing one set of substantive values. Private international law is not characterized by universal conflicts values because all potential candidates are opposed by countervailing values, but also because private

[66] Lehmann (n 14) 2.
[67] For a discussion of alternatives to private international law, see Michaels, 'Global Legal Pluralism and Conflict of Laws' (n 40) 631-36.
[68] Christopher A Whytock, 'The Concept of a Global Legal System' in Peer Zumbansen (ed), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (Cambridge University Press 2020) 72.
[69] Ralf Michaels and Joost Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law' [2012] 22 Duke Journal of Comparative and International Law 349, 357.

international law, like substantive law, is always a view from somewhere, decentralized.[70]

Reimann, on the other hand, proposes fundamental fairness as a universal value for private international law, and sketches a vision for its content.[71] Lehmann argues for the development of a "global public policy exception," which would serve as a minimum standard of conduct in cross-border contexts.[72] Human rights law is an external source that has already had an impact on private international law, and might give content to the concepts of fundamental fairness proposed by Reimann or the global public policy exception proposed by Lehmann.[73]

Far more work remains to be done on these questions, which are likely to animate private international law scholarship in the years ahead.

2.4 INTERDISCIPLINARY EFFORTS: PRIVATE INTERNATIONAL LAW AND POLITICAL SCIENCE

Beyond research addressing questions about the actual and desirable political content and functions of private international law, interdisciplinary scholars have used theories and methods from political science—the discipline devoted to the study of politics—to shed light on private international law. Interdisciplinary scholars have drawn on normative political theory to study the justifications for private international law, and used positive political theory—including theories of international relations, judicial behavior, and political economy—to uncover and explain patterns of private international law in action.[74]

2.4.1 Normative Political Theory

One fruitful interdisciplinary stream of research brings together private international law and normative political theory. Brilmayer, for example, develops a "rights-based model of

[70] Ralf Michaels, 'Private international law and the question of universal values' in Franco Ferrari and Diego P Fernández Arroyo (eds), *Private International Law: Contemporary Challenges and Continuing Relevance* (Edward Elgar 2019) 148, 176-77.
[71] Mathias Reimann, 'Are there universal values in choice of law rules? Should there be any?' in Franco Ferrari and Diego P Fernández Arroyo (eds), Private International Law: Contemporary Challenges and Continuing Relevance (Edward Elgar 2019) 178, 191-94.
[72] Lehmann (n 14) 27-29.
[73] James J. Fawcett, Máire Ní Shúillebháin and Sangeeta Shah, *Human Rights and Private International Law* (OUP 2016).
[74] On the distinction between law in books and law in action, see Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 American Law Review 12.

choice of law" built upon theories of political rights drawn from the field of political philosophy. In her model, when judges decide to apply forum law to a multistate dispute, they apply the coercive power of the state. This application of state power must be based on legitimate political authority. According to her political rights model, a state must "justify its exercise of coercive authority over an individual aggrieved by the application of the state's law."[75]

Brilmayer then turns to principles of political fairness to identify criteria for the legitimate exercise of that authority.[76] The central question is "whether an individual's connections with a state are such as to make it fair to impose on him or her the state's conception of substantive justice."[77] She identifies domicile and territorial connections as primary criteria for making this determination,[78] tempered by a complementary principle of mutuality, according to which "the substantive rule [must] not be applied to an individual's detriment unless the individual would be eligible to receive the benefits if the tables were turned."[79]

Brilmayer's work demonstrates how generative normative interdisciplinary private international law scholarship can be. First, although there is nothing new about domicile and territoriality in choice-of-law analysis, Brilmayer's model offers a novel justification for private international law's emphasis on these types of connecting factors. Second, although the concept of rights in vested rights theory is familiar in private international law theory, the rights-based model introduces a role for negative rights that operate vertically between the individual and the state, as opposed to the positive rights that operate between litigants that are at the center of vested rights theory.[80] Third, and perhaps most importantly, the rights-based model provides "constraints on policy-based analysis" by requiring justification of a choice of law based not only on state policy, but also on principles of political fairness.[81]

Linarelli, too, uses political theory to develop normative foundations for private international law.[82] His work addresses a central difficulty that confronts efforts to politically justify the

[75] Lea Brilmayer, *Conflict of Laws: Foundations and Future Directions* (Little Brown and Company 1991) 210.
[76] Brilmayer (n 75) 207.
[77] Brilmayer (n 75) 219.
[78] Brilmayer (n 75) 210.
[79] Brilmayer (n 75) 225.
[80] As Brilmayer puts it, "[B]oth conceptions of rights are linked to state sovereignty. The key differences, however, are two: The rights are mostly negative rights instead of positive rights, and they are vertical rights that the individual possesses against the state directly, rather than horizontal rights against the other party to the litigation." Brilmayer (n 75) 207.
[81] Brilmayer (n 75) 195.
[82] John Linarelli, 'Toward a Political Theory for Private International Law' (2016) 26 Duke Journal of Comparative and International Law 299.

coercive features of private international law. Political theories of rights are generally grounded on an assumption that there is a relationship (such as citizenship or a social contract) between the individual and the state that defines a political community.[83] But private international law deals with multistate situations, in which at least one person is typically "foreign" from the vantage point of the forum state. Private international law needs a non-relational theory to justify a state's legal authority over foreigners.[84]

Linarelli's solution is to use the constructivist method of political philosophy, conceptualizing private international law principles as "social practices," which are then examined in case studies and subjected to moral assessment—that is, "substantive moral reasoning about whether the law is reasonably acceptable to each person affected."[85] For example, using this method, he derives a basic principle of personal jurisdiction: persons should be free from a court's coercive powers unless two conditions are satisfied: "(i) the defendant's connections to the forum make it unreasonable for the defendant to reject the court's jurisdiction and (ii) the burdens for all affected persons associated with participation in the court proceedings make it unreasonable for each of them to reject the court's jurisdiction."[86]

2.4.2 Positive Political Theory

Interdisciplinary scholars have also used positive political theory to understand the causes and consequences of private international law and private international law decisionmaking. Three branches of political science are especially relevant: international relations, judicial behavior, and political economy.

For example, international relations scholars Efrat and Newman develop and empirically test a socio-cultural model of transnational litigation frameworks to explain variation in states' openness to cooperate on litigation. Using statistical analysis of data on cross-national and U.S. sub-national variation in laws governing the recognition and enforcement of foreign judgments, they find that more ethnocentric societies are less willing to cooperate on transnational litigation by being open to foreign judgments.[87]

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[83] Linarelli (n 82).
[84] Linarelli (n 82) 307.
[85] Linarelli (n 82) 308.
[86] Linarelli (n 82) 324. Using the same method, Linarelli also develops a basic moral principle for the recognition and enforcement foreign judgments. Ibid. 331.
[87] Asif Efrat and Abraham L Newman, 'Intolerant justice: ethnocentrism and transnational-litigation frameworks' (2020) 15 Review of International Organizations 271. See also Asif Efrat and Abraham L Newman, 'Cultural Intolerance and Aversion to Foreign Judgments in the American States' (2018) 9(2) Asian Journal of Law and Economics 20180001.

To date, however, interdisciplinary private international law and political science research has come mainly from those who identify primarily as private international law scholars, rather than from within the field of political science itself. For example, Whytock uses international relations theory and judicial behavior theory to develop hypotheses about the legal and non-legal factors that influence how courts make private international law decisions, and he tests those hypotheses using statistical analysis of original datasets of United States federal district court decisions in two contexts: choice of law in international tort cases and forum non conveniens.[88]

According to liberal international relations theory, "courts of liberal states handle cases involving other liberal democratic states differently from the way they handle cases involving nonliberal states."[89] This theory suggests that the probability that a judge will apply a foreign state's law depends at least in part on whether the foreign state is a liberal democracy. However, Whytock's analysis reveals no statistically significant effect of a state's liberal democratic status on courts' international choice-of-law decisions.[90] Liberal international relations theory further posits that within the community of liberal democratic states, courts see themselves as "cooperating in an effort to direct…litigation to the natural or most appropriate forum."[91] This implies that, other things being equal, a court in a liberal democratic state should be more likely to dismiss transnational litigation in favor of the courts of other liberal democratic states than in favor of a court in a state outside the community of liberal democracies. Unlike the choice-of-law context, Whytock finds that a state's liberal democratic status has a strong positive effect on the probability of a U.S. district court dismissing a suit in favor of another state's courts on forum non conveniens grounds, consistent with the liberal international relations theory hypothesis.[92]

According to political science's attitudinal model of judicial decisionmaking, an important factor influencing a judge's decisions is the judge's ideological attitudes.[93] The attitudinal

[88] Christopher A Whytock, 'Domestic Courts and Global Governance: The Politics of Private International Law' (unpublished PhD dissertation, Duke University 2007) (https://hdl.handle.net/10161/452); Christopher A Whytock, 'Myth of Mess? International Choice of Law in Action' [2009] 84 New York University Law Review 719; Christopher A Whytock, 'The Evolving Forum Shopping System' [2011] 96 Cornell Law Review 481.
[89] Anne-Marie Burley, 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine' [1992] 92 Columbia Law Review 1907, 1917.
[90] Whytock, 'Myth of Mess?' (n 88) 771.
[91] Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' [1994] 29 University of Richmond Law Review 99, 105.
[92] Whytock, 'Evolving Forum Shopping System' (n 88) 525.
[93] For a leading statement of the attitudinal model, see Jeffrey A Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002).

model of judicial decisionmaking implies that the probability that a judge will apply domestic rather than foreign law depends at least in part on whether the judge is conservative or liberal. In the international tort choice-of-law context, Whytock's findings suggest that judges nominated by Republican presidents may be less likely to apply domestic law than those appointed by Democrats. He speculates that this result might be explained by a particularly strong conservative desire to deter plaintiffs seeking more favorable U.S. tort law from engaging in international forum shopping in U.S. courts.[94] In the forum non conveniens context, he finds no statistically significant effect of judicial ideology on decisionmaking.[95] However, he does find that while Republican nominees are substantially more likely to dismiss suits brought by foreign plaintiffs, the nationality of the plaintiff does not significantly affect the forum non conveniens decisions of Democratic nominees.[96]

In addition to developing and testing hypotheses derived from political science theories, Whytock's analysis challenges certain sticky beliefs about private international law decisionmaking.[97] For example, it is widely claimed that U.S. courts have a strong tendency to apply forum law; that the Second Restatement method is too indeterminate to significantly affect choice-of-law decisionmaking; and that the Second Restatement thus exacerbates forum law bias. Whytock finds, however, that U.S. courts applying the Second Restatement are considerably *less* likely to apply forum law than courts applying other methods, which suggests both that choice-of-law methods do matter and that—at least in the context of international tort choice-of-law decisions—there is not a pronounced forum law bias. Moreover, he finds that the factors one would expect to matter under choice-of-law rules—such as territorial and personal connections—have the strongest effects on choice-of-law decisions.[98] Overall, his findings suggest that choice of law in the United States is not the "mess" it is sometimes said to be—at least in the context of international tort cases in the U.S. federal district courts.[99]

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[94] Whytock, 'Myth of Mess?' (n 88) 779.
[95] Whytock, 'Evolving Forum Shopping System' (n 88) 525.
[96] Whytock, 'Evolving Forum Shopping System' (n 88) 525.
[97] See generally Christopher A. Whytock, 'Sticky Beliefs about Transnational Litigation' [2022] 28 Southwestern Journal of International Law 284.
[98] Whytock, 'Myth of Mess?' (n 88) 771-76.
[99] In addition, several studies have used empirical analysis to examine choice-of-law decisionmaking in domestic cases in U.S. courts. See, e.g., Michael E. Solimine, 'An Economic and Empirical Analysis of Choice of Law' [1989] 24 Georgia Law Review 49; Patrick J. Borchers, 'The Choice of Law Revolution: An Empirical Study' [1992] 49 Washington and Lee Law Review 357; Stuart E. Thiel, 'Choice of Law and the Home-Court Advantage: Evidence' [2000] 2 American Law and Economics Review 291; and Daniel Klerman, 'Bias in Choice of Law: New Empirical and Experimental Evidence' [2023] 179 Journal of Institutional and Theoretical Economics 32.

Interdisciplinary scholars have also pointed out the connections between private international law and the international political economy. Shapiro argues that private international law plays "major roles" in the international political economy,[100] as does Slaughter, who posits that private international law "helps structure patterns of individual and group interaction in transnational society" in ways that can "encourage or discourage transnational economic interaction."[101] Similarly, Guzman argues that "[b]ecause choice-of-law rules determine which countries' laws govern a particular transaction, they can influence the efficiency of the global legal system."[102] O'Hara and Ribstein develop a political economic model of how the enforcement of choice-of-law clauses can affect the efficiency of legal rules,[103] and Baumgartner and Whytock incorporate the enforcement of foreign judgments into that model.[104] Focusing on political economic explanations for private international law, Solimine uses political science theories of diffusion and empirical analysis to uncover political economic correlates of state adoption of different choice-of-law methods.[105]

2.4.3 Assessment

As the foregoing discussion illustrates, there has been significant interdisciplinary scholarship on private international law and political science—but far more could be done. There are, for example, opportunities to fruitfully build on the work of scholars like Brilmayer and Linarelli by drawing on political philosophy to better understand private international law's normative foundations. Existing work using international relations theory and judicial decisionmaking theory to shed light on private international law decisionmaking has been limited by its focus on U.S. courts and on only certain types of private international law decisions. Promising next steps could include research on other types of private international law decisions in more diverse contexts, perhaps drawing on yet another branch of political science: comparative politics. In addition, work applying international relations theories of treaty negotiation and design could be extended to shed light on private international law treaties.[106] Although interdisciplinary scholars have developed theories about private international law's relationship to the behavior of transnational actors,

[100] Shapiro (n 5) 367.
[101] Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' [1993] 87 American Journal of International Law 205, 231.
[102] Andrew A Guzman, 'Choice of Law: New Foundations' [2002] 90 Georgetown Law Journal 883-900.
[103] Erin A O'Hara and Larry E Ribstein, *The Law Market* (OUP 2009).
[104] Samuel P Baumgartner and Christopher A Whytock, 'Enforcement of Foreign Judgments, Systemic Calibration, and the Global Law Market' [2022] 23 Theoretical Inquiries in Law 119.
[105] Solimine (n 99). See also Thiel (n 99).
[106] See Barbara Koremenos, Charles Lipson and Duncan Snidal (eds), *The Rational Design of International Institutions* (Cambridge University Press 2009).

economic outcomes, and the optimality of legal rules, these theories generally remain untested, creating opportunities for further empirical analysis.

2.5 CONCLUSION

Private international law has important political aspects. Scholars debate the extent to which private international law *is* political, as well as the extent to and ways in which it *should* be political. The research reviewed in this chapter moreover shows that the content, sources, and functions of private international law have political dimensions. It is therefore appropriate that scholars are increasingly taking interdisciplinary approaches to private international law, using normative and positive political theory to generate new knowledge and insights about the field. It is hoped that some of the avenues of further research on private international law and politics proposed in this chapter may prove fruitful.