Abstract

International relations (IR) scholars now widely agree that law matters in world politics. But so far they have focused almost exclusively on one type of law—public international law—and primarily on one aspect of world politics—international relations. I argue that by doing so IR scholars are missing types of law that are equally if not more important to international relations than public international law. Moreover, by neglecting types of law that are important to transnational relations—that is, the cross-border activity of private actors—IR scholarship on international law is behind the more general trend in IR scholarship away from state-centric approaches toward more holistic analyses of world politics. I therefore advocate a move from the study of international law and international relations (IL/IR) to a research agenda on law and world politics (L/WP). As a step in that direction, this paper focuses on two fields of law that are largely missing in IR research—foreign relations law and private international law—and explains how they matter in world politics and how a better understanding of them will help IR scholars advance knowledge of international cooperation, international conflict, and global governance.
1. Introduction

In the decades following World War II, law had little place in international relations (IR) scholarship (Dunoff & Pollack 2013b, 3). Beginning in the mid-1980s, however, legal scholars began drawing on IR theory in their research on international law (Boyle 1985; Abbott 1989; Slaughter Burley 1993). By the early 2000s, IR scholars had responded in kind with a growing body of their own research on international law. The result is an active interdisciplinary international law and international relations (IL/IR) research program on “the development, operation, spread, and impact of international legal norms, agreements, and institutions” (Hafner-Burton, Victor & Lupu 2012, 47). Although many open questions remain about international law and its influence, IR scholars now widely agree that law matters in world politics.

So far, however, IL/IR scholars have focused almost exclusively on one type of law—public international law—and primarily on one aspect of world politics—international relations. International law is law that has one of three sources: treaties, international custom, and general principles of law common to the world’s major legal systems (Crawford 2012, ch. 2). Public international law is international law that governs state behavior (Whytock 2004, 185). Traditionally understood, public international law mostly concerned political and economic relations among states (Janis 2008, 2). Now human rights law (which governs how states treat individuals) is part of public international law, as is the field of international criminal law (which governs how individuals treat each other). IR scholars have devoted considerable attention to these and other aspects of public international law, all of which are important (Dunoff & Pollack 2013; Hafner-Burton, Victor & Lupu 2012; Shaffer & Ginsburg 2012).

I argue, however, that there are other types of law that are equally if not more important for international relations than public international law. These include foreign relations law and the conflict-of-laws branch of private international law. Foreign relations law includes the domestic legal rules of states that govern the making and the domestic effect of international law, and are thus foundational to international law; domestic constitutional rules that govern the use of military force, and may have a stronger influence on states than international legal rules governing the use of force; and domestic legal rules that determine when a state will apply its law extraterritorially to govern transnational activity which, given the limited scope of international law, may play a greater role in global governance than international law. Conflict of laws is the branch of private international law that includes rules that determine which state will govern particular transnational activity by applying its law to that activity and by using its courts to adjudicate disputes arising out of that activity, and that determine whether one state will enforce the decisions of another state’s domestic courts. IL/IR scholarship has paid little attention to these types of law, notwithstanding their significance for international relations.

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1 This is the traditional list of sources of international law. International norms that are not legally binding are also important in world politics. Many scholars refer to these non-legally binding international norms as “soft law.” I avoid this terminology in order to maintain the analytical distinction between norms that are and are not legally binding and thus to allow for social scientific inquiry into the effect that the legally binding character of a norm has on its role in world politics. For this reason, I do not include non-legally binding norms in my definition of international law.
The tight focus of IL/IR research on public international law is problematic for another reason, too. Public international law may have been an appropriate match for the traditional state-centric orientation of IR scholarship in general, as well as the state-centric orientation of regime theory in particular, which served as an early bridge between IL and IR. After all, public international law governs state behavior, and traditional IR scholarship aims to explain that behavior. But IR scholarship has increasingly moved from a state-centric focus on international relations toward a more holistic world politics orientation that is also attentive to transnational relations—that is, the cross-border activities of private actors (Nye & Keohane 1971; Keohane & Nye 1974; Pollack & Shaffer 2001, 29-34), including the role of private actors as governors of transnational activity in their own right (Büthe 2010; Büthe & Mattli 2011). Thus, there is a mismatch between the type of law that is the focus of IL/IR scholarship and more general trends in IR scholarship. This mismatch will only grow if IL/IR scholars do not move beyond public international law to other types of law that are more directly relevant to private actors. One such type of law consists of the substantive rules of private international law, which include international and domestic rules that govern transnational relations and rules that facilitate (and sometimes hinder) private governance.

I therefore advocate a move from the study of international law and international relations (IL/IR) to a research agenda on law and world politics (L/WP). The agenda would be open to examining the role of any type of law relevant to world politics, not only public international law; and it would be open to examining law’s relationship not only with international relations, but also with transnational relations and private governance. As a step in that direction, this paper focuses on two fields of law that are largely missing in IR research—foreign relations law and private international law—and explains how they matter in world politics and how a better understanding of them will help IR scholars advance knowledge of international cooperation, international conflict, and global governance. My hope is that this paper will be a useful introduction to these other types of law for those IR scholars who may be unfamiliar with them, and that by showing how the matter in world politics it might serve as a corrective to the narrow focus on public international law in IR scholarship.

This paper is addressed not only at IR scholars, but also to legal scholars—in particular scholars of foreign relations law, conflict of laws, and private international law. IR scholarship’s focus on public international law has persisted even though one early and influential call for interdisciplinary scholarship on international law in fact noted the significance of other types of law to world politics, including domestic constitutional law and private international law (Slaughter Burley 1993, 228-232). Perhaps one reason IR scholars have yet to incorporate these other types of law into their work is that legal scholars participating in the IL/IR movement have for the most part been predominantly focused on the study of public international law, resulting in limited transmission of knowledge and limited collaboration about other types of law in IL/IR scholarship. One implication of my argument is that scholars of foreign relations law, conflict of laws, and private international law have a central role to play in the interdisciplinary study of law and world politics—indeed, a role that is at least as important as that of public international law scholars.
2. Foreign Relations Law

Foreign relations law is the domestic law of a state that governs its foreign relations. For example, foreign relations law includes a state’s domestic law governing its use of military force, its making of treaties, the domestic effect of international law, separation of powers over foreign relations matters and, in federal systems, the allocation of foreign relations powers between the federal government and its federal subunits (Bradley & Goldsmith 2008; Franck, Glennon, Murphy & Swaine 2012; Henkin 1996). Given its subject matter, foreign relations law is an area of domestic law that is directly relevant to many questions of interest to IR scholars. So far, however, it is only on the margins of IR scholarship. As a preliminary step toward bridge building between IR scholarship and foreign relations law scholarship, this section focuses on three areas of foreign relations law and links them to core subfields of IR scholarship: the domestic rules governing the making and effect of international law; the domestic rules governing a state’s use of military force against other states; and the domestic rules governing the extraterritorial application of domestic law to govern transnational activity.

2.1 International Cooperation and the Domestic Legal Foundations of International Law

International cooperation is one of the principal subfields of IR scholarship (Grieco 1990; Keohane 1984). By the 1980s, international regimes—defined by Keohane (1989, 4) as “institutions with explicit rules, agreed upon by governments, that pertain to particular sets of issues in international relations”—had become a central focus of this stream of research. As Haggard & Simmons (1987, 495) put it, regimes are important both because they are a form of international cooperation and because they facilitate international cooperation. IR scholars and IL scholars alike soon recognized that what the former called “international regimes” was what the latter had long studied as international law (Slaughter 1993, 220). By the 2000s, the study of international law had become well established in the international cooperation subfield of IR scholarship, and today there is extensive IR scholarship on international law (Dunoff & Pollack 2013a).

So far, however, IR scholarship on international law—and on international cooperation more generally—has tended to neglect domestic law. If international law operated autonomously from domestic law, this approach might be sensible. To the contrary, however, international law and domestic law are deeply intertwined. Indeed, the domestic rules of foreign relations law are in at least four ways foundational to international law, and therefore foundational to cooperation based on international law.

First, a state’s domestic law governs the political processes for the internal approval of treaties. These rules vary cross-nationally. In some states, at least some treaties may be made by the head of state or government alone. For example, in the United States, sole executive agreements may be made with other states on the authority of the President alone (Bradley 2013, 86-95). In other states, domestic law allows the head of state or government to take the initiative

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2 The Vienna Convention on the Law of Treaties contains rules governing the international level of the treaty-making process—for example, the steps that must be taken for a treaty to be legally binding on states under international law.
to negotiate treaties with other states, but requires legislative approval prior to ratification (Shelton 2011, 8). Some states with bicameral legislatures require both houses to approve, while others require only one (Shelton 2011, 8). For example, treaties made under Article II of the U.S. Constitution must be approved by two-thirds of the Senate, whereas executive-legislative agreements must be approved by a majority of both houses of Congress.

Domestic rules of foreign relations law thus determine both the number and type of domestic political actors that must approve a state’s treaties with other states. As such, domestic law is a foundation of international cooperation through treaties. Political scientists and legal scholars have studied these domestic rules in the U.S. context to develop and test theories about the political factors that influence the President’s choice between sole executive agreements, executive-legislative agreements, and Article II treaties (Hathaway 2008; Martin 2005; Setear 2002). But far more could be learned about the domestic legal foundations of treaty-based cooperation by using comparative data. By moving beyond single-nation case studies, IR scholars could empirically analyze the effects of cross-national legal variation on the treaty-making behavior of states, including treaty-making propensity and choice of available domestic treaty-making processes across different dyads of states and across different issue areas. For example, Simmons (2009, 69, 87) hypothesizes that “the higher the ratification hurdle, the less likely a government will be to ratify an international human rights agreement, even if it is sympathetic to its contents,” and using cross-national analysis, finds some evidence supporting that hypothesis.

Second, domestic rules of foreign relations law also guide treaty interpretation. The Vienna Convention on the Law of Treaties (VCLT) also includes principles of treaty interpretation. However, domestic rules of treaty interpretation—whether enacted through legislation or common law—do not always follow them, and in any event states may interpret and apply the VCLT’s principles in different ways (Bradley 2013, 66). A sophisticated understanding of treaty interpretation by states thus depends on an understanding of both domestic and international rules and practices. Domestic law also allocates states’ internal treaty interpretation authority. In most states, domestic courts are understood to be the principal interpreters of treaties (Shelton 2011, 10-11). But in other states—including the United States—domestic courts give considerable deference (“great weight”) to the executive branch’s views on the proper interpretation of a treaty (Bradley 2013, 67). By using cross-national data on domestic principles and practices of treaty interpretation, IR scholars can develop a more sophisticated understanding of treaty-based international cooperation. In particular, it would seem that treaties might have a greater constraining effect on the behavior of states where courts are the principal interpreters and enjoy judicial independence, compared to states where courts are legally required to defer to executive interpretations or lack judicial independence.

Third, domestic law determines the domestic legal effect of international law. IR scholars sometimes note the difference between monist and dualist systems (Simmons 2009, 130-131)—but these are theoretical categories that do not reflect real-world variation in how states treat international law (Crawford 2012, 50). For example, domestic law determines where treaties (and in some cases customary international law) fit in the hierarchy of types of law. At one extreme, a state may give treaties a status equal to that of the constitution and superior to that of domestic legislation. Of states that do not give treaties that status, some give treaties a status
superior to legislation and some do not. In states that give treaties and legislation equal status, conflicts are generally resolved with a later-in-time rule, whereby the more recent of the two rules prevails (Shelton 2011, 5). Domestic law also determines the steps (if any) beyond domestic treaty approval that must be taken for a treaty to have domestic legal effect (including as binding rules of decision in domestic courts). Here, again, there is cross-national variation. In some states, treaties are automatically incorporated into domestic law, whereas in others legislation is required to accomplish this. In the United States, for example, treaties that are deemed to be self-executing are automatically part of domestic law, whereas treaties that are deemed non-self-executing do not have domestic legal effect unless and until they are implemented by legislation (Shelton 2011, 9-11). An interesting question for IR scholars is whether these two types of cross-national variation in domestic law affect domestic-level compliance with treaties. Scholars have already started to collect data on cross-national variation in constitutional provisions on the domestic status of international law (Ginsburg, Elkins & Chernykh 2008).

Finally, domestic law can influence the creation and evolution of two other types of international law: customary international law and general principles of law. The two required elements of a rule of customary international law are state practice that is consistent with a putative rule, and opinio juris—that is, a sense of legal obligation to follow the rule ( ). Domestic law can serve as evidence of either or both of these elements. For example, the fact that the domestic law of most states prohibits torture has been used as evidence of a customary international law prohibition on torture (Filartiga). Along with treaties and customary international law, general principles of law are a type of international law (Statute of the International Court of Justice art. 38(1)). Specifically, “this phrase refers to general principles of law common to the major legal systems of the world” (Restatement (Third) of U.S. Foreign Relations Law § 102, reporter’s note 7, 1987). Determining whether a putative general principle of law exists involves an exercise in comparative legal analysis (Janis 2008, 59). For example, the widespread incorporation of the right to court access into domestic constitutions may be evidence that this right is emerging as a general principle of law (Whytock 2013, 2057). In these ways, domestic law can be understood as at least partially constitutive of international law. By using cross-national data on domestic legal rules, IR scholars can better analyze the creation and evolution of customary international law and general principles of law, and perhaps develop measures of these two types of international law that will enable analysis of their impact on state behavior.

In short, foreign relations law is integral to understanding the role of states in making international law and the impact of international law on state behavior. It would therefore seem natural for IR scholars to bring domestic rules of foreign relations law—including domestic rules governing treaty making, treaty interpretation, and the domestic effect of international law—into their analyses of international law and international cooperation more generally.

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But see Crawford [Brownlie] 2012, [16] (“It would be incorrect to assume that tribunals have in practice adopted a mechanical system of borrowing from domestic law after a census of domestic systems.”).
2.2 International Conflict and Constitutional Law

IR scholars have also long been interested in the causes of international peace and conflict (Levy 2002). They have already incorporated international law into their research on international peace and conflict (e.g. Huth, Croco & Appel 2011; Simmons 2002). Because international law is familiar to most IR scholars, and because international law contains rules governing the use of force (e.g. Article 2(4) of the United Nations Charter), this focus is unsurprising.

But IR scholars have paid little attention to another type of law that is directly relevant to the international use of force: domestic constitutional rules governing the use of force. The constitutions of most states contain rules governing the use of military force against other states (Mello 2014, 32-37). As one legal expert on constitutions and use-of-force decisionmaking summarizes, “National constitutional law may have a constraining effect on the external behavior of states, both by restricting the circumstances in which military force may lawfully be deployed and by establishing the procedural framework for taking decisions to use force” (Damrosch 2003, 40). Compared to international law—the efficacy of which IR scholars have questioned in the realm of high politics (e.g. Grieco 1993)—constitutional law may be a more important factor than international law in use-of-force decisionmaking. Moreover, constitutional rules governing the use of force vary cross-nationally. This variation presents new and rich opportunities for empirical analysis of the effects of law on the use of force in international relations (Ginsburg 2014). For these reasons, constitutional law research—especially comparative constitutional law research—could benefit IR research on international peace and conflict.

To illustrate, consider the branch of international peace and conflict scholarship that tries to explain the “democratic peace”—that is, the observation that armed conflict is less likely between democracies than between a democracy and an autocracy or between autocracies. According to the institutional constraints theory of the democratic peace, executive decisionmaking in democracies is subject to more extensive institutional constraints than in autocracies (Russett & Oneal 2001, 53). For example, executive decisions in democracies often require legislative approval. This makes decisions to use military force more difficult in democracies than in autocracies, where such constraints are lacking. Moreover, the time it takes for an executive to overcome institutional constraints can create a window of opportunity for peaceful settlement of international disputes (Gowa 2011, 2), and the willingness and ability to overcome those constraints demonstrates resolve that can allow an executive to send credible signals in crisis bargaining, thus reducing the likelihood of escalation to military conflict (Morrow 2002, 175).

So far, however, empirical research on the democratic peace has used poor measures of executive constraints. Most studies have used the Polity scale, which ranges from -10 (strongly autocratic) to +10 (strongly democratic) (e.g. Gowa 2011; Russett & Oneal 2001; Schultz 1999). This measure is based on three components—(1) the competitiveness and openness of executive recruitment, (2) constraints on the chief executive, and (3) the regulation and competitiveness of political participation (Marshall, Gurr & Jaggers 2014, 14-16). One problem is that because the three components are combined, the Polity variable cannot discriminate among them and studies
relying on it therefore cannot estimate the distinct effects of institutional constraints. Scholars could mitigate this problem by using Polity’s component variable for executive constraints (XCONST). But this also is problematic, because the variable is coded based on constraints on executive authority generally and not constraints on use-of-force decisionmaking specifically.\(^4\) Moreover, because XCONST blends different types of executive constraints (e.g. legislative rights to initiate some categories of legislation, legislative power to block some categories of executive action, the existence of an independent judiciary, dependence on a ruling party, etc.) (Marshall, Gurr & Jaggers 2014, 24-25), it cannot discern which types of constraints matter. As another way of mitigating this problem, some scholars have used a legislative veto players variable developed by Henisz (2000) instead of Polity (Choi 2010; Tsebelis & Choi 2009). This variable measures a particular type of executive constraint—legislative vetoes—but because it is coded based on veto players generally rather than veto players in use-of-force decisionmaking specifically, it, too, is at best only a rough measure of theoretically relevant constraints.

Constitutional law research can advance the research program on the democratic peace in at least three ways. First, IR scholars tend to assume that “the checks and balances that constrain a leader at home apply a fortiori to his decisions about using force abroad” (Gowa 2011, 2). By doing so, however, they neglect distinctions between different policy areas (Mello 2014, 20). Comparative constitutional law scholarship on separation of powers reveals that even within states, institutional constraints on the executive vary by issue area (e.g. Dixon & Ginsburg 2014; Krotoszynski 2011; Moellers 2013; Tushnet 2014). In particular, constraints on use-of-force decisionmaking are often stronger or weaker than constraints on other types of decisions. This means that generic measures of institutional constraints are unlikely to be good measures of the institutional constraints that are relevant to international peace and conflict. This basic insight from comparative constitutional law gives IR scholars a reason to move toward developing more accurate measures of those institutional constraints that are theoretically-relevant—that is, institutional constraints on executive use-of-force decisionmaking specifically.

Second, comparative constitutional law research can provide a source of data on cross-national variation of institutional constraints on use-of-force decisionmaking. Existing research reveals multiple dimensions of variation (Ginsburg 2014; Mello 2014). Most fundamentally, some constitutions impose constraints on executive use-of-force decisions, while others do not. Of those constitutions that do impose constraints, they vary from robust legislative veto powers over executive decisions to less robust requirements that the executive consult with or inform the legislative branch before or after a use-of-force decision. This legislative power may be vested in a single house or two houses jointly. Whether through original analysis of cross-national variation, or by using existing data sources such as the Comparative Constitutional Law Project data (Elkins, Ginsburg & Melton XXXX), comparative constitutional law can help IR scholars develop better measures of the institutional constraints that are most relevant to international peace and conflict.

Third, comparative constitutional law can contribute to the theory-building efforts of IR scholars by identifying other domestic institutional features that may affect the likelihood of armed conflict. For example, in addition to procedural constraints on executive use-of-force

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\(^4\) The XCONST variable is designed to measure “the extent of institutionalized constraints on the decisionmaking powers of chief executives ...” (Marshall, Gurr & Jaggers 2014, 24).
decisionmaking such as those discussed above, there may be substantive constraints. As Mello (2014, 32) finds, “considerable variation exists and the constitutional level regarding the scope of military operations that democracies are legally permitted to engage in.” Some constitutions prohibit aggressive wars, and allow only defensive wars. See, e.g., Constitution of Bahrain, Article 36 (“Aggressive war is forbidden. A defensive war is declared by a Decree which shall be presented to the National Assembly immediately upon its declaration, for a decision on the conduct of the war.”). Other constitutions allow the executive to use force without legislative approval, but only for self-defense. See, e.g., Constitution of Denmark, Article 19(2) (“Except for purposes of defense against an armed attack upon the Realm or Danish forces the King shall not use military force against any foreign state without the consent of the Folketing. Any measure which the King may take in pursuance of this provision shall immediately be submitted to the Folketing. If the Folketing is not in session it shall be convoked immediately.”). By incorporating substantive institutional constraints into models of use-of-force decisionmaking, IR scholars may be able to advance international peace and conflict research.

Of course, it cannot be taken for granted that executives will comply with the constraints imposed on them by national constitutional law. Therefore, just as compliance with public international law has been a research agenda for IR scholars, so should compliance with domestic constitutional law (Whytock 2004). Use-of-force decisionmaking could provide a fertile domain of research on constitutional law compliance that could complement international law compliance research and contribute toward a fuller understanding of the influence of law on international peace and conflict than can an approach that focuses exclusively on international law.

In short, comparative constitutional law provides a rich source of cross-national variation in the domestic foreign relations law rules governing the use of force that can be used to improve measurement and build theory in international peace and conflict studies. More fundamentally, it might lead to a departure from democratic peace theory as such, and toward theories based on specific constitutional features rather than democracy in general. Particular features of foreign relations law are not necessarily correlated with regime type. Insofar as features of foreign relations law that decrease the likelihood of armed conflict are not correlated with democracy, it may be that what is observed as a democratic peace is not in fact a result of distinctively democratic institutions.

2.3 Sovereignty, International Political Economy, and Extraterritorial Application of Domestic Law

Foreign relations law also includes the domestic legal principles that determine whether a state will apply its law extraterritorially—that is, whether a state will apply its domestic law to persons or activity that are outside its territory. In the United States, for example, the domestic law of extraterritoriality provides that Congress has the constitutional authority to legislate extraterritorially, but courts shall not apply a U.S. statute extraterritorially unless there is a clear indication that Congress intended it to apply extraterritorially (Morrison v. Australia National Bank Ltd., 561 U.S. 247 (2010))—this is the so-called “presumption against extraterritoriality.” But the rules governing extraterritorial application of domestic law vary cross-nationally, and even within a single state they can vary by subject area and over time. The basic problem
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addressed by this subfield of foreign relations law remains the same, however: can a state apply its domestic law extraterritorially? In practice, the answer is often yes. For example, both the United States and the European apply their antitrust laws extraterritorially. The United States has also extraterritorially applied is laws governing securities fraud, criminal procedure, and trademarks (Spillenger 2010, 392-393, 411).

The law of extraterritoriality directly implicates IR scholarship on the institution of state sovereignty. Sovereignty is a defining attribute of states, and one of the core principles of sovereignty is that a state has the exclusive right to govern within its own territory. But as Krasner (1999) has argued, there have always been exceptions to sovereignty. For example, international human rights law is an exception to sovereignty, insofar as it is a form of international law that applies to how states treat their citizens within their own territory. The application of one state’s domestic law to persons or activity in another state’s territory is another exception—one that has so far escaped sustained attention from IR scholars (but see Putnam 2009; Raustiala 2009). Yet, by defining when a state will apply its law extraterritorially, this subfield of foreign relations law helps shape the contours of state sovereignty—or, to use Krasner’s (1999) phrase, helps define the “organized hypocrisy” that characterizes the institution of sovereignty.

Extraterritorial regulation is also significant from the perspective of international political economy (IPE). Broadly defined, IPE includes “all work for which international economic factors are an important cause or consequence” (Frieden & Martin 2002, 118). IR scholars studying IPE have long studied the international legal institutions through which states regulate transnational economic activity, such as international trade and international finance (). Much transnational economic activity, however, is not regulated by international law, and often states find it difficult or impossible to agree on new international legal solutions to regulatory challenges. Under those circumstances, states may use extraterritorial application of their own domestic law as an alternative to regulation of transnational economic activity through international law. Extraterritorial application of domestic law is thus an important tool used by states to regulate transnational economic activity, one tied to and in tension with state sovereignty—but IR scholars have made little progress toward understanding its causes and consequences.

To understand the causes of extraterritorial regulation, it is necessary to understand the domestic institutions that decide whether or not to apply a domestic law extraterritorially—legislative bodies, courts, and regulatory agencies. Raustiala (2009) finds that assertions of extraterritorial authority by the United States has been influenced by its relative power in the international system, as well as by other changes in world politics and the global economy. Putnam (2009, 464) finds that U.S. courts tend to apply U.S. law extraterritorially in two situations: “where extraterritorial conduct threatens to undercut the domestic operation of a regulator rule or regime” or “where conduct is alleged to violate … ‘basic’ rights at the core of U.S. political and legal identity.” It is also necessary to understand the domestic legal rules that determine the circumstances in which extraterritorial application of domestic law is permitted. In the United States, for example, Congress has the power to legislate extraterritorially. Under some circumstances, doing so may violate international law limits on prescriptive authority—but it would not violate the U.S. Constitution (Equal Employment Opportunity Commission v. Arabian
American Oil Company, 499 U.S. 244 (1991)). For their part, U.S. courts may not apply a domestic statute extraterritorially unless the statute gives a “clear indication” of extraterritorial application (Morrison 2010). How do the domestic legal rules governing extraterritorial regulation vary cross-nationally? And how does this variation affect the likelihood that states will apply their domestic law extraterritorially to regulate transnational activity? Are states more likely to do so when there is no existing international law that applies to activity? Analysis of these and other systemic and domestic factors promises to improve understanding of the causes of extraterritorial economic regulation and of global governance and international political economy more generally.

In terms of consequences, extraterritorial regulation contributes to the allocation of authority among states to govern transnational activity—albeit in a unilateral and incomplete way. One state may decide to regulate extraterritorially by applying its own law to transnational activity, but without considering the interests that other states may have in regulating the same activity with their own law (Whytock 2009a, 80). Extraterritorial regulation also influences the strategic behavior of private actors and other states (Putnam 2009, 460). Perhaps most importantly, one state’s extraterritorial application of its domestic law may influence the evolution of other states’ domestic law. In a recent study, for example, Kaczmarek & Newman (2011) find that U.S. application of its anti-bribery laws in the territory of other states was associated with increased domestic enforcement of anti-bribery standards in those other states.

3. Private International Law

Private international law consists of two categories of legal rules: substantive rules that govern private transnational activity, such as cross-border commercial transactions and family relationships; and conflict-of-laws rules that domestic courts use to allocate governance authority among states. This is in contrast to public international law, which governs relations among states. Some private international law takes the form of treaties, and in that sense is properly understood as a type of international law. However, the use of the phrase “international law” in the term “private international law” can be misleading, because large portions of private international law take the form of domestic law, as we will see, including most conflict-of-laws rules.

More than a decade ago, Martin Shapiro (1993, 367) and Anne-Marie Slaughter (1993, 230-232) called on international relations scholars to pay more attention to private international law, arguing that this area of legal doctrine was highly relevant to the study of international political economy. Yet international relations scholars, while increasingly studying public international law, have virtually ignored private international law. By clarifying the relationship between private international law and world politics, this section makes the case for IR scholars to take seriously Shapiro and Slaughter’s advice.

3.1 Private Actors and the Substantive Rules of Private International Law

One of the major trends in IR scholarship over the last two decades has been its move away from state-centric analysis to analysis that incorporates the role of private actors—that is, a move from “international relations” to “world politics” (Nye & Keohane 1971). For example, IR
scholars are increasingly studying the role of private rulemaking in the regulation of the global economy (Büthe & Mattli 2011) and the impact of domestic and transnational private actors on the evolution and effectiveness of international law (Sandholtz & Stiles 2008; Simmons 2009; Finnemore & Sikkink 1998). They also have started to examine how private actors govern transnational activity through arbitration (Whytock 2010a).

To a large extent, this stream of IR scholarship has conceived of private actors as challengers to the state—as escaping the reach of state regulation, as becoming global governors in their own right, even as constituting a form of private governance that is autonomous from states. An approach that so strongly emphasizes the agency of private actors is perhaps a natural reaction to the excessively state-centric analyses of the past. However, it risks overstating the power and autonomy of private actors by paying insufficient attention to the state-created legal context of transnational activity, including the substantive rules of private international law.

Private international law treaties are one type of private international law that governs private transnational activity. For example, the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) provides rules governing contracts for the cross-border sales of goods between private businesses, including rules of contract formation, the obligations of buyers and sellers, and remedies for breach of contract. The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (“Hague Rules”) governs the carriage of goods by sea, and specifies the rights and obligations of shippers and carriers.

States also have used another legal tool to govern transnational private activity: transnational model laws. Transnational model laws are negotiated by states or drafted by international organizations (often with the involvement of private actors), not for adoption as treaties but as templates for domestic legislation. One of the leading bodies for the development of transnational model laws is the United Nations Commission on International Trade Law (“UNCITRAL”), which aims to modernize and harmonize the rules governing transnational business. For example, in the realm of transnational electronic commerce, the Model Law on Electronic Signatures was adopted by UNCITRAL in 2001 and has so far been adopted as domestic law by 29 states.5

The CISG, the Hague Rules, and the Model Law on Electronic Signatures govern the transnational economic activity of private actors. But private actors also regulate transnational activity—that is, they can themselves act as global governors (Büthe & Mattli 2011). Although some scholars have suggested that private governance is increasingly autonomous from states (Stone Sweet 2006), this view may underestimate the extent to which private governance relies on states for its effectiveness. Just as states use private international law to govern private transnational activity, they use it to support private governance. The key to understanding global governance today is to understand private-public interaction (Whytock 2010a), and a central element of this interaction is private international law.

As an illustration, consider transnational commercial arbitration, which is a pervasive form of private transnational governance. Arbitration is a method of dispute resolution whereby

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two or more parties ("disputants") submit their dispute to a third-party decision maker (the "arbitrator"). The party initiating arbitration is the "claimant," and the other party is the "respondent." Arbitration has four defining characteristics. First, the arbitrator is a private actor selected by the disputants themselves, or in accordance with a procedure agreed in advance by the disputants. Often, there are several arbitrators. Second, arbitration is consensual. An arbitrator cannot resolve a dispute unless the disputants have agreed to have the arbitrator resolve that dispute. Third, in arbitration, the disputants are free to choose the procedural and substantive rules governing the dispute resolution process. Fourth, the arbitrator’s final decision—called an "award"—is binding on the disputants. When the claimant prevails, the award typically takes the form of an order that the respondent (now the "award debtor") pay a certain sum of money to the claimant (now the "award creditor"). Transnational commercial arbitration involves the arbitration of disputes arising out of commercial activity having connections to more than one state. These connections may be territorial, when the activity or its effects touch the territory of more than one state; or they may be based on legal relationships between a state and the actors engaged in or affected by that activity, such as citizenship.

Transnational commercial arbitration performs several closely related functions in the governance of transnational commerce. First, by offering a mechanism for third-party interpretation and enforcement of contracts, it provides a means by which transnational actors can enhance the credibility of their commitments to each other. Second, by providing a process for filling gaps in contracts, arbitration can mitigate the incomplete contracting problems routinely faced by transnational commercial actors. Third, the transnational commercial arbitration system offers dispute resolution services that can help transnational actors manage the costs of conflict in commercial relationships. Arbitration typically involves disputes over the allocation of rights and resources. Thus, arbitral awards are part of the answer to one of the central framing questions of political science: “Who gets what?” (Lasswell 1936; Caporaso et al. 2008, 406). It is therefore natural to think of transnational commercial arbitration as a form of private global governance in which arbitrators and private arbitral institutions play the role of "global governors."

However, transnational commercial arbitration depends largely on states for its efficacy, including the private international law infrastructure—consisting of both private international

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6 Under some circumstances, an arbitration agreement between two or more parties may also be binding on other parties based on legal theories such as agency and the “group of companies” doctrine. Blackaby and Partasides 2009, 99-105; Born 2009, 1142. In general, once arbitration has begun, a party does not have a right to stop the proceedings unilaterally. If a party fails to participate in the proceedings, it runs the risk of a default award being entered against it. Blackaby and Partasides 2009, 524.
7 This freedom is subject to mandatory provisions of law. See Born 2009, 1765.
8 On the importance of third-party enforcement for credible commitments and, hence, for contracting, see North 1993. See also Stone Sweet 2002, 324-326.
9 Blackaby & Partasides 2009, 536f.
law treaties and the domestic adoption of model laws—created by states to support transnational commercial arbitration. The most important transnational commercial arbitration treaty is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention). As one arbitration expert puts it, the convention “is the foundation on which the whole of the edifice of international arbitration rests.” Article II of the New York Convention establishes a general rule (subject to enumerated exceptions) that signatory states shall recognize written arbitration agreements “concerning a subject matter capable of settlement by arbitration.” It also requires the domestic courts of signatory states, at the request of a party to an arbitration agreement, to refer the parties to that agreement to arbitration “unless it finds that the said agreement is null and void, inoperative or incapable of being performed.” Article III establishes a general rule (subject to exceptions specified in Article V) that signatory states shall recognize and enforce arbitral awards.

In addition, individual states have enacted domestic laws providing for domestic judicial enforcement of arbitration agreements and arbitral awards. For example, in the United States, Section 206 of the Federal Arbitration Act (FAA) authorizes U.S. courts to order arbitration in accordance with an arbitration agreement covered by the New York Convention. Section 207 of the FAA requires U.S. courts to enforce an arbitral award covered by the New York Convention “unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.” In addition to the FAA, the U.S. Supreme Court has announced a variety of important rules governing the enforcement of arbitration agreements and arbitral awards by U.S. courts, and is generally considered to have a strong pro-arbitration policy. Other states have also adopted domestic laws governing transnational commercial arbitration. For example, some states have adopted domestic legislation based on the United Nations Commission on International Trade Law’s (UNCITRAL) Model Law on International Commercial Arbitration, which, among other things, provides for enforcement of arbitration agreements and arbitral awards. Although the Model Law was produced by an international organization—UNCITRAL—it was developed in consultation with private experts and arbitral institutions, and is thus, like the New York Convention, a result of private-public interaction. The UN General Assembly has encouraged states to consider the Model Law, but there is no requirement that states adopt it—it is only a model upon which states may base domestic legislation. Thus, its legal status depends on the domestic legislative action of states.

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12 This paper does not discuss two other important transnational commercial arbitration treaties: the Inter-American Convention on International Commercial Arbitration (known as the Panama Convention), and the European Convention on International Commercial Arbitration.
14 The full text of Section 206 is as follows: “A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.”
15 Moses 2008, 64. Under Article 8(1) of the Model Act, “A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.” Article 35 states the general rule that arbitral awards shall be enforced, and Article 36 specifies exceptions to enforcement. The Model Law was amended in 2006. Article 34 specifies the circumstances in which a court may set aside an arbitral award.
State support for transnational commercial arbitration has varied cross-nationally and over time. The number of state parties to the New York Convention increased from nine in 1960, to fifty-five in 1980, to 124 in 2000. As of 2009, the New York Convention had entered into force in 144 of the 192 members of the United Nations. Similarly, the number has increased steadily from one in 1986, to thirty-five in 2000, to a total of sixty-one as of 2008. These figures suggest broad and steadily increasing state support for the rules favoring enforcement of arbitration agreements and arbitral awards.

What factors explain variation in levels of state support for transnational commercial arbitration and other forms of private governance, through private international law treaties or domestic legislation based on model laws? Can policy diffusion theory, used by IR scholars in other contexts, provide answers? What is the role of international organizations such as UNCITRAL as agents of diffusion of domestic rules to support private governance? How does state governance of private governance systems affect the processes, outcomes, effectiveness and legitimacy of private governance? As noted above, state governance and private governance are not necessarily independent of each other. Private actors influence state responses to transnational problems, including private international law responses; and states use private international law to govern transnational actors, including by providing or withholding support for efforts by private actors to become global governors in their own right. In short, to understand global governance, it is necessary to understand private-public interaction in global governance, and private international law is one key to this understanding.

3.2 Global Governance and the Conflict-of-Laws Branch of Private International Law

Another branch of private international law that plays a role in world politics consists of conflict-of-laws rules that help allocate governance authority among states. To understand conflict of laws, a concrete example may be helpful. On a December night in 1984, a chemical plant in the city of Bhopal, India leaked a highly toxic gas, methyl isocyanate, killing over 2,000 people living in the vicinity and injuring over 200,000 others.

The plant was operated by an Indian subsidiary of the U.S. chemical company Union Carbide. Activity relating to the design and operation of the plant and the training of plant employees occurred in both the United States and India. Many of the victims and relatives of those killed sued Union Carbide in U.S. courts. The U.S. District Court for the Southern District

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18 This account is taken from the opinion of judge John F. Keenan in In re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India, 634 F. Supp. 842 (S.D.N.Y. 1986).

19 However, the parties vigorously disagreed about the relevance and extent of the U.S. activity, with plaintiffs emphasizing, and Union Carbide deemphasizing, its importance. While agreeing with Union Carbide that India was the primary locus of the activity giving rise to the disaster, the court noted that Union Carbide conducted business in the United States that “may have been directly related to development or operation of [its subsidiary’s] facility in Bhopal.” 634 F. Supp. 842, at 861.
of New York, before which the cases were consolidated, confronted a basic question: should the dispute be adjudicated by the courts of the United States or the courts of India? Because the case had connections to both states—Union Carbide was a New York corporation and the accident occurred in India—the answer was not obvious. Nor could the question be avoided by adjudicating the case in an international court, because no international court exists with jurisdiction over this type of dispute. Relatively few international courts allow claims to be filed by or against private actors, and in any event most require the consent of a state before jurisdiction can be asserted over it.

In the Bhopal case, the plaintiffs argued that a U.S. court should adjudicate the dispute. The United States is Union Carbide’s home. Moreover, the plaintiffs argued, deficiencies in the Indian judicial system—including endemic delays and a lack of procedural devices necessary to adjudicate complex cases—would thwart their quest for justice. Adjudicating the dispute in a U.S. court also would create a precedent that would “bind all American multinationals henceforward,” deterring wrongful conduct both inside and outside the United States. Failure to hold Union Carbide accountable in the United States, they argued, would create a double standard of responsibility for U.S. multinational corporations—they would be held accountable to more stringent U.S. rules for injuries caused to Americans, but more lenient rules for injuries caused to developing country victims.

Union Carbide disagreed. India, it argued, had a stronger interest than the United States in having its courts adjudicate the dispute. And as one commentator worried, the “export of [U.S.] ideas about social policy” that would result from adjudicating the case in the United States would be troubling: “All law represents a compromise among many policy objectives; if an American court, even one applying Indian . . . law, were to award damages many times higher than would an Indian court, Indian policy necessarily would be disrupted. The relatively low risk of an award of significant damages probably plays a role in India’s ability to attract foreign business. The Indian government (including its courts) might find that risk an acceptable price to pay for attracting an American company to build a plant there and stimulate a depressed economy” (Reynolds 1992, 1708).

The U.S. district court ruled in favor of Union Carbide, dismissing the case in favor of the courts of India. The United States may have some interest in “deterring multinationals from exporting allegedly dangerous technology,” reasoned the court, but India’s interest “in creating standards of care, enforcing them or even extending them, and [in] protecting its citizens,” is simply stronger. Regarding the victims’ argument, the court said that it was “well aware of the moral danger of creating the ‘double-standard’ feared by plaintiffs,” but concluded that “to retain litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation.”

As part of its analysis, the court also determined whether Indian or U.S. law prescribed the standards applicable to Union Carbide’s conduct. Just as international courts were not an option for adjudicating the plaintiffs’ claims, there exists no body of international law that governs the industrial activities of corporations—international law remains primarily, although certainly not exclusively, focused, on prescribing rules of state behavior. As a result, there is no
single source of law that governs transnational activity. In theory, globally uniform law might be possible, and the substantive rules of private international law discussed below are steps in that direction. But they are only very small steps. This leaves the diverse domestic laws of states, which are based on diverse policy objectives, to govern most transnational activity. In the Bhopal case, the U.S. court concluded that Indian law rather than U.S. law prescribed the standards of behavior applicable to Union Carbide’s conduct.

Each year, U.S. district court judges make hundreds of decisions like these in transnational litigation—decisions about whether a U.S. court or a foreign court should adjudicate disputes arising from transnational activity, and about whether domestic or foreign law should govern that activity. These decisions are made in cases dealing with matters as diverse as transnational activity itself, ranging from cross-border business transactions to human rights, from intellectual property to terrorism, from tourism to large-scale incidents like the Bhopal disaster. Moreover, they are made not only by federal judges in the United States, but also by their counterparts in U.S. state courts and in foreign courts around the world. But these decisions have a fundamental characteristic in common: they involve choices between assertion of domestic governance authority and deference to foreign governance authority, including the authority to adjudicate transnational disputes and prescribe the rules governing transnational activity.

By making such decisions, domestic courts in the United States and elsewhere help determine how governance authority is allocated among states. One must therefore understand judicial allocation of governance authority in order to answer satisfactorily the question that international relations scholar Miles Kahler (2004, 3) says is first and prior to all other questions about global governance: “Who governs?”

Conflict-of-laws rules provide a foundation for today’s highly decentralized and pluralistic system of global governance by guiding three dimensions of judicial allocation of governance authority, which correspond to three aspects of the “who governs” question and three branches of conflict of laws: choice of law, jurisdiction, and recognition and enforcement of judgments. First, who prescribes? That is, which state’s laws should govern particular transnational activity? An important point is that a domestic court will not necessarily apply its own state’s domestic law to decide a case. To the contrary, as the U.S. court in the Bhopal case indicated, a U.S. court would have applied Indian law. Domestic courts use choice-of-law rules to decide whether to apply domestic or foreign law.

Second, who adjudicates? That is, which state’s courts should interpret and apply the applicable law in order to resolve disputes arising out of that activity? In the Bhopal case, the U.S. court could have asserted U.S. adjudicative authority, but it instead deferred to the adjudicative authority of India. Domestic court judges use the rules of jurisdiction and related doctrines, such as the doctrine of forum non conveniens, to decide whether to assert domestic adjudicative authority by hearing a transnational case, or defer to foreign adjudicative authority by declining to hear a case.

20 See also Pollack and Shaffer (2001, 287) (also emphasizing the “who governs” question). Dahl (1961) was the first to prominently frame the study of politics in terms of this question.
Third, who enforces? That is, which state or states will recognize and enforce the decisions of another state’s courts? For example, if the plaintiffs obtained a judgment against Union Carbide in an Indian court, and Union Carbide refused to pay and had no remaining assets in India, would a court in the United States—where Union Carbide did have assets—order seizure of those assets to enforce the judgment against Union Carbide? In practice, courts sometimes decide to enforce foreign court judgments, and sometimes decide not to.

In this sense, conflict-of-laws rules are an attempt to mitigate “clashes between sovereigns, each attempting to impose its own regulatory scheme in furtherance of its own policies” (Roosevelt 1999, 2463). As one expert puts it, conflict-of-laws rules are “structural rules” that help “determine the effectiveness of transnational regulation” (Dodge 2002, 162). For law-and-economics scholars, the notion that the conflict-of-laws rules have important implications for the global governance is nothing new. According to them, properly designed rules of private international law can enhance regulatory competition, thus leading to more efficient domestic legal rules, more efficient economic transactions, and greater global welfare, whereas poorly designed rules allow states to externalize the costs of inefficient domestic legal rules (Carbonara and Parisi 2007; Guzman 2002; Muir Watt 2003; O’Hara and Ribstein 1999; Parisi and Ribstein 1998; Whincop and Keys 2001). Other scholars are concerned that private international rules that focus too narrowly on economic efficiency or private party autonomy may compromise other important regulatory objectives (Trachtman 1994; Wai 2002).

Yet IR scholars have yet to systematically engage with conflict of laws. One reason may be the complexity of conflict of laws. Conflict-of-laws rules are not only designed to deal with global legal diversity; they are themselves highly diverse. Different states have different conflict-of-laws rules that may answer the three dimensions of the “who governs” question in different ways, even for the same transnational activity. For example, French conflict-of-laws rules are different from Swiss conflict-of-laws rules. Moreover, in some federal states, different federal subunits may have different conflict-of-laws rules. For example, in the United States, California’s conflict-of-laws rules are different from New York’s.

To illustrate, choice-of-law rules typically instruct judges to consider the connections different states have to the transnational activity under consideration—such as the territorial location of the activity and the nationality of the parties involved—when deciding which state’s law to apply. The choice-of-law rules of some states specify that one type of connection is determinative—for example, that a court must apply the law of the state where the injury occurred. Others states’ choice-of-law rules may instead instruct courts to treat these connections not as dispositive, but rather as factors to use to determine which states have an interest in having its law apply under the circumstances. Some states’ choice-of-law rules favor “party autonomy” by allowing transnational actors to decide for themselves which state’s law will govern their relationship, while others limit the ability of transnational actors to do so. Jurisdictional rules likewise vary cross-nationally, with some states allowing its courts to assert jurisdiction over a defendant simply because the plaintiff is domestic, and other states rejecting that rule; and some states allowing its courts to assert jurisdiction over a domestic person or business regardless of whether the plaintiffs’ claims have any other domestic connection, while other state’s reject that rule. The rules governing foreign judgments also vary cross-nationally, with some states’ rules favoring recognition and enforcement and others generally refusing recognition or enforcement.
absent special arrangements with the state of the court that rendered the judgment. This diversity of approaches to conflict-of-laws is part of the reality of today’s highly decentralized and pluralistic system of global governance, but it also makes conflict of laws daunting for many non-specialists. Conflict-of-laws scholars have, however, carefully cataloged and tracked these rules, making it possible for non-specialists to grasp the major differences without too much difficulty (Hay, Borchers, Symeonides & Whytock forthcoming; Richman, Reynolds & Whytock 2013).

The European Union (“EU”) has made considerable progress toward uniform conflict of laws rules. For example, two EU regulations govern the law applicable to contractual and non-contractual obligations (the “Rome I Regulation” and the “Rome II Regulation”), and another governs the jurisdiction of EU member states’ courts and the recognition and enforcement by EU member states of the judgments of other member states’ courts (the “Brussels I Regulation”). This progress has been driven by the recognition that the accomplishment of a true common market requires internal uniformity of conflict-of-laws rules. In certain areas, however, progress has been more politically difficult to achieve. In recent negotiations on amendments to the Brussels I Regulation’s provisions on the recognition and enforcement of judgments, EU members were unable to agree to eliminate an exception allowing a member state to refuse to recognize or enforce another member state’s court judgment on the ground that the judgment is contrary to its national public policy. Moreover, although EU members were able to agree on rules to govern the enforcement of judgments rendered by the courts of EU member states, they were unable to agree on the rules to govern the recognition and enforcement of the judgments of non-EU members’ courts. As a result, non-EU judgments continue to be governed by the domestic law of each EU member state.

Less progress has been made at the international level. After more than a decade of contentious negotiations through the Hague Conference on Private International Law, states failed to reach agreement on a general treaty to govern jurisdiction and the recognition and enforcement of judgments. The result was the adoption by the Hague Conference of a treaty covering choice-of-court agreements—that is, agreements by two or more parties that any dispute between them will be resolved in the court of a specified state—and judgments entered by courts selected in a choice-of-court agreement. However, it has yet to enter into effect. So far, only the EU, Mexico and the United States have signed the convention, and only Mexico has ratified it. In short, other than within the EU, conflict-of-laws rules remain overwhelmingly rules of domestic law.

What can IR scholars gain from and contribute to the study of conflict of laws? There is a long tradition of legal scholarship describing, analyzing, critiquing, and proposing conflict-of-laws rules. Little progress has been made, however, in explaining cross-national variation in conflict-of-laws rules or their real-world impact on transnational activity. By bringing in conflict of laws, IR scholars can advance the study of conflict of law, while also advancing the study of the world’s decentralized and pluralistic system of global governance.

First, IR scholars can study conflict of laws as a dependent variable. What factors explain the variation in conflict-of-laws rules cross-nationally and over time? What explains the relative success of the EU in arriving at largely uniform conflict-of-laws rules, and the relative failure of
such initiatives at the international level? What are the politics of conflict of laws and the differences in state interests that make international agreement on these rules difficult? Prior work of IR scholars on cross-national policy diffusion and on the design of international agreements could be used to help answer these questions.

Second, IR scholars can study conflict of laws as an independent variable. How do conflict-of-laws rules affect transnational activity? For example, how and to what extent do conflict-of-laws rules influence the strategic behavior of transnational actors, by shaping their expectations about which states’ laws apply to their activity, or which states’ courts would adjudicate a dispute arising out of that activity, or whether their home state would enforce a judgment against them rendered by another state? Lawyers help transnational actors understand the implications of conflict-of-laws rules, and it is taken as axiomatic by legal scholars that conflict-of-laws rules are a principal determinant of “forum shopping”—that is, the choices transnational actors make about where to conduct their activity and in which state to sue in the event of a dispute arising out of that activity.

Moreover, as discussed above, law-and-economics scholars have extensively theorized about the impact of conflict-of-laws rules on international regulatory competition and national and global economic welfare. But so far there has so far been very little empirical analysis of the systematic effects of conflict-of-laws rules on transnational activity. Perhaps most fundamentally, to what extent to conflict-of-laws rules actually determine how domestic courts allocate governance authority? After all, if conflict-of-laws decisions are based on politics rather than law, conflict-of-laws rules would have little influence on actual judicial allocation of governance authority and thus little independent influence on economic welfare. Two prior empirical studies of conflict-of-laws decisionmaking by U.S. federal courts found that legal factors are important in these decisions, but also political factors (Whytock 2009b; Whytock 2011). But so far this work has addressed only certain conflict-of-laws rules (international choice-of-law decisionmaking and forum-non-conveniens decisionmaking), and only in one state’s courts (the United States).

4. Conclusion

In this paper, I have argued that by focusing narrowly on public international law, IR scholars are missing other types of law that are equally if not more important in world politics, including foreign relations law and private international law. Therefore, I have argued for a move from the study of international law and international relations (IL/IR) to a research agenda on law and world politics (L/WP).

To recapitulate, some of the basic premises and implications of a move from IL/IR to L/WP are the following:

• A move from IL/IR to L/WP does not suggest that public international law does not matter in world politics. But a basic premise of L/WP is that public international law is not the only type of law or even the main type of law that matters in international relations, and in world politics more generally.
• For example, *private international law matters in world politics*, including the international rules of private international law that govern transnational relations and that facilitate (and sometimes hinder) private governance.

• Even more fundamentally, *domestic law matters in world politics*, including domestic rules of foreign relations law and domestic rules of private international law, such as conflict-of-laws rules.

• This means that whereas legal scholars engaged in IL/IR scholarship have been predominantly public international law scholars, *L/WP scholarship is open to—and indeed needs—the active participation of other legal scholars, including scholars of foreign relations law, conflict of laws, and private international law.*

• IL/IR scholarship was initiated by public international law scholars who used IR theory to advance IL scholarship (Boyle 1985; Abbott 1989). They asked: How can IR theory advance our understanding of public international law? This may help explain IL/IR’s focus on public international law. L/WP has a different motivating question: *What types of law are relevant to core problems in IR scholarship, such as international cooperation, international conflict, and global governance?*

• This way of asking L/WP’s motivating question is very much in the spirit of Dunoff and Pollack’s call for “reversing field” in IL/IR scholarship (2004, 1). As they point out, IL/IR “has primarily involved the application of IR theories and methods to the study of international legal phenomena (2014, 1). They propose a shift in the “intellectual terms of trade” between the two disciplines by “reversing field’ and applying international legal theory and knowledge to IL/IR inquiries” (2014, 2). But my intuition is that reversing field will be more fruitful if it is not limited to international law—and especially not limited to public international law; and that if the motivating questions are not only about international relations as such, but more broadly about world politics, including transnational relations and private governance.

• Much IL/IR scholarship has tended to take an “outside-in” approach that emphasizes the influence of public international law (as an independent variable) on state behavior (as the key dependent variable) (e.g. Simmons 2000; Von Stein 2005). *The L/WP perspective can enrich outside-in studies.* For example, as discussed above, domestic rules of foreign relations law determine the domestic effect of international law. Moreover, *L/WP would be attentive to other types of outside-in processes, including the ways that one state’s domestic law can be influenced by “outside law” (model laws, foreign law or international law) through various pathways of internalization and diffusion* (Whytock 2010b, 56-57).

• But the L/WP perspective suggests that the ways in which law influences world politics are more varied than IL/IR scholarship’s outside-in tendency suggests. In particular, *the L/WP perspective highlights “inside-out processes,” whereby domestic law (as an independent variable) influences international relations and transnational
relations (as dependent variables). These processes include the effect of domestic rules of foreign relations law on the making of international law, the use of military force, and the extraterritorial application of domestic law to govern transnational activity, and the effect of domestic conflict-of-laws rules on the allocation of governance authority among states.

- The L/WP perspective also has implications how we should understand the legalization of world politics. Abbott et al. (2000, 37) define legalization as “a particular set of characteristics that institutions may (or may not) possess”: obligation, precision, and delegation. Legalization scholars have generally emphasized the role of international institutions in the legalization of world politics, such as international law and international courts. But the L/WP perspective suggests that the legalization of world politics does not depend exclusively—or even primarily—on international institutions. To the contrary, the L/WP perspective suggests that domestic legal institutions—including domestic rules and domestic courts—are an equally important (and perhaps more foundational) part of the legalization of world politics.

- The L/WP perspective could help IR scholars build bridges with the transnational legal orders (TLO) movement in sociolegal studies (Halliday & Shaffer 2014).

But is L/WP an excessively broad agenda? I don’t think so. My focus has not been on changes to the core research problems of IR, which already include the problems discussed in this paper—international cooperation, international conflict, transnational relations, and global governance. Instead, I have taken these research problems as given, and argued that there are types of law heretofore neglected by IR scholars that are equally if not more relevant to those core problems than public international law. To be sure, the reorientation I suggest would require IR scholars to learn about types of law with which they may not already be familiar—including foreign relations law and private international law. But my wager is the effort is worth it, and will help IR scholars advance their work on core problems of world politics.
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