

HARVARD LAW REVIEW

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ARTICLE

NON-EXTRATERRITORIALITY

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NON-EXTRATERRITORIALITY

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The extraterritorial application of statutes has received a great deal of scholarly attention in recent years, but very little attention has been paid to the non-extraterritoriality of statutes, by which I mean their effect on cases beyond their specified territorial reach. The question matters when a choice-of-law rule or a contractual choice-of-law clause directs application of a state's law and the state has a statute that, because of a provision limiting its external reach, does not reach the case. On one view, the state has no law for cases beyond the reach of the statute. The territorial limitation is a choice-of-law rule; it instructs courts to adjudicate the case under the law of another state. Because one state's choice-of-law rules are not binding on the courts of other states, the provision may be disregarded by such courts, which may apply the statute's substantive provisions to cases beyond the statute's specified scope. On another view, cases beyond the reach of the statute are subject to another law of that state, such as its more general common law rules. A third view agrees with the first view that the enacting state has no law for excluded cases but insists that the provision limiting the law's scope is not a choice-of-law rule. The provision is written as a limit on the law's reach, and this substantive limitation must be respected by all courts. The statute may not be applied to cases beyond its specified scope.

Each of the competing understandings of non-extraterritoriality has prominent judicial and scholarly defenders, and each finds support in successive iterations of the Restatement of Conflict of Laws. This Article considers the judicial and scholarly support for each of the three positions and defends the view that external scope limitations are choice-of-law rules. Limitations on external scope ordinarily reflect the lawmaker's deference to the legislative authority of other states. They do not reflect a legislative preference that a statute's substantive provisions not be applied to cases beyond its specified scope. If the legislature did intend to establish a different rule for cases involving out-of-state persons or events, the provision limiting the statute's scope would in most cases be unconstitutional. In function and intended effect, a statutory provision limiting a statute's external scope is a choice-of-law rule and, as such, may be disregarded by the courts of other states. But this position poses a conundrum: If a state has no law for cases beyond a statute's territorial scope, do courts violate their duty to decide cases according to law when they apply the statute to a set of facts that the statute does not purport to reach? Resolving this puzzle yields valuable insights into the nature of choice-of-law rules and the choice-of-law enterprise.

INTRODUCTION

When a state's legislature enacts a statute and specifies that it only reaches persons or conduct having certain connections to the state, what is the law of that state with respect to persons or conduct lacking such connections? For example, Title VII of the Civil Rights Act of 1964¹ prohibits employment discrimination on the basis of gender

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¹ 42 U.S.C. §§ 2000e to 2000e-17.

identity,² but the statute specifies that it “shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.”³ In light of this limitation on the statute’s scope, what is the law of the United States on discrimination against persons employed abroad by employers lacking the specified connection to the United States? Or, suppose that California’s legislature enacts a statute imposing strict liability for certain types of tort injuries but limits the scope of the statute to injuries suffered in California. What is California’s law for injuries caused by California corporations in Bangladesh? The issue would arise if a claim were brought in Bangladesh for injuries caused in Bangladesh and Bangladesh’s choice-of-law rule called for application of the law of the state of the defendant’s domicile, or if a choice-of-law clause in an employment contract selected the law of the United States as the applicable law but the employee were employed abroad by a non-U.S. employer.

On one view, the state with the scope-limited statute has *no* law for excluded cases. The legislature’s decision to limit the statute’s reach reflects its judgment that persons or conduct lacking the specified connection to the enacting state should be governed by the law of another state. On this view, the legislative provision limiting the external reach of the statute functions as a choice-of-law rule. (I will refer to a statutory provision limiting the external reach of the statute as an external scope limitation (ESL).⁴) It instructs courts to resolve cases lacking the specified nexus to the enacting state by applying the law of another state. The statutory provision limiting the statute’s external scope reflects the legislature’s deference to the legislative authority of other states. Thus, in these hypotheticals, the United States does not have a substantive law either permitting or prohibiting discrimination in the employment of persons abroad by non-U.S. employers, and California does not have any law regarding the standard of liability for torts causing injuries outside California.⁵

² See *id.* § 2000e-2(a)(1); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) (establishing that under Title VII, discrimination on the basis of sex includes discrimination on the basis of sexual orientation or gender identity).

³ 42 U.S.C. § 2000e-1(c)(2).

⁴ ESLs might specify that a state’s law extends only to conduct that occurred in the state. I call these act-territorial ESLs. Or, an ESL might specify that the statute extends to persons domiciled or resident in the state. I refer to these as person-territorial ESLs. See generally Perry Dane, *Conflict of Laws, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 209, 211, 214 (Dennis Patterson ed., 1996) (explaining this terminology). As explained below, I distinguish ESLs from internal scope limitations (ISLs).

⁵ Glossary: I use the term “state” to include not just states of the United States (such as California or New York) but also states in the international sense (such as France or China). I use the term “enacting state” to refer to the state that has a statute with an ESL or ISL. I use the term “forum state” to refer to the state in whose courts the lawsuit is pending. The term “excluded cases” refers to cases beyond the scope of the statute as specified in the ESL, while the term “included cases” refers to cases within the statute’s specified scope.

On another view, a legislature that limits a statute's reach to cases having specified connections to the enacting state contemplates that excluded cases are to be governed by another rule of the enacting state. On this view, federal law *permits* discrimination on the basis of gender identity against persons employed abroad by foreign employers. California's law for persons suffering tort injuries in Bangladesh might be its common law rule as it existed when the statute was enacted, which presumably requires a showing of negligence. Or, by limiting the reach of its law to injuries suffered in California, the legislature might be understood to have implicitly denied liability against California corporations that cause tort injuries in Bangladesh.

How to understand provisions limiting the reach of a state's law to persons or conduct having specified connections to the enacting state has long bedeviled the conflict of laws. The view that such provisions are choice-of-law rules has a long and venerable lineage.⁶ Following legal scholar F.A. Mann, I will call this the "one-sided conflicts" understanding of ESLs because it regards the enacting state as having a substantive law for included cases but only a choice-of-law rule for excluded cases.⁷ Since a state's choice-of-law rules are traditionally understood to bind the courts of the enacting state, the enacting state's courts will regard the ESL as instructing them to resolve excluded cases according to the law of another state. But, because one state's choice-of-law rules do not bind the courts of other states, the courts of other states would be free to resolve excluded cases according to the substantive provisions of the scope-limited statute, disregarding the ESL. This is the position adopted by the *Restatement (Second) of Conflict of Laws*⁸ ("Second Restatement"), the most widely adopted choice-of-law approach in the United States.⁹

⁶ See, e.g., SYMEON C. SYMEONIDES, CHOICE OF LAW: THE OXFORD COMMENTARIES ON AMERICAN LAW 494 (2016) ("Despite their location in substantive statutes (and despite variations in content and wording), all of these localizing provisions qualify as *choice-of-law* rules, albeit of the *unilateral* type."); Willis L.M. Reese, *Statutes in Choice of Law*, 35 AM. J. COMPAR. L. 395, 395 (1987) (describing provisions "concerned with the extraterritorial application of a particular statute" as one of two categories of "choice-of-law statutes"); F.A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 55 & n.7 (1964) (calling ESLs "one-sided" conflicts rules and criticizing scholars who call them "spatially conditioned internal' rules," *id.* at 55, "because [the name] conceals the fact that a conflict rule is involved," *id.* at 55 n.7); *id.* at 69 (stating that rules of construction regarding the extraterritorial scope of statutes "constitute implied 'one-sided' or particular choice-of-law rules"); J.H.C. Morris, *The Choice of Law Clause in Statutes*, 62 L.Q. REV. 170, 170 (1946) (describing ESLs as "particular choice of law clause[s]"). For additional authorities taking this view, see *infra* notes 42, 128, 132 and accompanying text.

⁷ Mann, *supra* note 6, at 55. But see *infra* note 124 and accompanying text (noting that Mann later changed his position).

⁸ RESTATEMENT (SECOND) OF CONFLICT OF L. § 4(1) (AM. L. INST. 1971) [hereinafter R2]. See generally *infra* section I.A.1, pp. 1302–04.

⁹ See John F. Coyle, William S. Dodge & Aaron D. Simowitz, *Choice of Law in the American Courts in 2021: Thirty-Fifth Annual Survey*, 70 AM. J. COMPAR. L. 318, 320 (2022) (noting that twenty-five states have adopted the Second Restatement approach to choice of law for tort cases).

The one-sided conflicts understanding of ESLs has always had its detractors, however. I will call the principal competing view the “two-sided substantive” understanding of ESLs because it regards the enacting state to have one substantive law for included cases and a different substantive law for excluded cases. According to this view, if another state’s choice-of-law rule calls for application of the enacting state’s law and the statute does not reach the case because of a provision limiting its external reach, the court could apply a more general rule of the enacting state (such as its common law rule). Alternatively, it could conclude that, for cases beyond the statute’s reach, the enacting state has a law permitting what the statute prohibits or denying whatever rights the statute grants.¹⁰ The two-sided substantive approach has been adopted by a number of courts in the United States¹¹ and has been endorsed by distinguished scholars inside and outside the United States.¹² This approach also finds support in some parts of the draft *Restatement (Third) of Conflict of Laws*¹³ (“draft Third Restatement”).

Other parts of the draft Third Restatement suggest that the project may be moving toward an intermediate position, which I will call the “one-sided substantive” understanding of ESLs.¹⁴ This view accepts that the enacting state has no law for excluded cases, but nevertheless insists that an ESL is not a choice-of-law rule. On this view, an ESL is an inseverable part of the enacting state’s substantive law. As such, it is binding on all courts. No court may apply the substantive provisions of the statute to cases falling outside the statute’s specified scope. Indeed, “[a] State court applying another State’s statute to a set of facts outside its specified scope would violate the Full Faith and Credit Clause of the U.S. Constitution if the scope restriction is clear and has been brought to the court’s attention.”¹⁵ Because the enacting state has

¹⁰ For an explanation of the important difference between not having a law prohibiting something and having a law permitting that thing, see *infra* section III.A, pp. 1328–31.

¹¹ See, e.g., *Budget Rent-A-Car Sys., Inc. v. Chappell*, 304 F. Supp. 2d 639 (E.D. Pa. 2004), *rev’d on other grounds*, 407 F.3d 166 (3d Cir. 2005); see also *infra* Part III, pp. 1326–41.

¹² See, e.g., ANDREW DICKINSON, *THE ROME II REGULATION: THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS* 138 (2008) (taking the position that, when a choice-of-law rule directs application of the law of a state, and the state has a statute with an ESL, the court should resolve excluded cases by applying “a (normally more general) rule of local origin”); see also *infra* note 167.

¹³ The Third Restatement has not yet been finalized, but the provisions of greatest relevance to this Article — those in Tentative Drafts 2 and 3 — have been approved by the entire membership of the American Law Institute (ALI). See *RESTATEMENT (THIRD) OF CONFLICT OF L. (AM. L. INST., Tentative Draft No. 3, 2022)* [hereinafter R3 TD3] (approved by the ALI membership on May 18, 2022); *RESTATEMENT (THIRD) OF CONFLICT OF L. (AM. L. INST., Tentative Draft No. 2, 2021)* [hereinafter R3 TD2] (approved by the ALI membership on June 10, 2021). “Once a draft or section is approved by the membership at an Annual Meeting . . . , it is a statement of the Institute’s position on the subject.” *How the Institute Works*, AM. L. INST., <https://ali.org/about-ali/how-institute-works> [<https://perma.cc/9NRP-48B2>].

¹⁴ See generally *infra* section I.A.3, pp. 1307–11.

¹⁵ R3 TD3 § 5.02 reporters’ note 1.

no law for cases falling outside the statute's external scope, the court cannot apply the law of the enacting state. To decide the merits, it accordingly *must* apply the law of another state.

The issue matters when the forum's choice-of-law rule or a contractual choice-of-law clause directs the court to apply the law of a state that has a statute with an ESL according to which the statute does not reach the case. Consider this hypothetical: The draft treaty on business and human rights ("BHR treaty") currently being considered at the United Nations includes a choice-of-law provision instructing courts to apply, at the plaintiff's preference, the law of the state where the conduct occurred or produced effects, or the law of the state where the defendant is domiciled.¹⁶ Assume that a corporation based in California causes severe injuries to workers in Bangladesh.¹⁷ Suppose a suit is brought in Bangladesh, and suppose further that Bangladesh has ratified and implemented the BHR treaty. Assume that California has a law that imposes strict liability for the sort of conduct that resulted in the injuries suffered by the plaintiffs, but suppose the California law includes an ESL specifying that the statute only reaches injuries suffered in California. Under the one-sided conflicts theory, the Bangladeshi court would apply California's strict liability rule. The court would regard California's ESL as its choice-of-law rule, reflecting the California legislature's view that conduct occurring in Bangladesh should not be governed by California law. If Bangladesh agreed, it would apply Bangladeshi law to the case. But Bangladesh's ratification and implementation of the BHR treaty, with its own different choice-of-law rule, reflects Bangladesh's view that the plaintiffs should have the option of selecting California law instead. Under the one-sided conflicts theory, the Bangladeshi court would apply California's strict liability rule, which is the only substantive law that California has on the matter.

If the ESL were interpreted in the two-sided substantive sense, on the other hand, the court would conclude that California *does* have a law addressing liability for injuries occurring in Bangladesh — a law *denying* strict liability. Finally, under the one-sided substantive theory, the court would recognize that California does not have a law for injuries in Bangladesh, but, on this view, California's ESL is not a choice-of-law rule. It is a limit on the law's substantive reach that must be

¹⁶ Updated Draft Legally Binding Instrument to Regulate, In International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises art. 11, OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS. (July 2023), <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf> [https://perma.cc/B4GN-N9BC].

¹⁷ This hypothetical is loosely based on the litigation following the collapse of Rana Plaza. See generally Quest TV, *Rana Plaza Collapse: "The Worst Garment-Factory Disaster Ever Recorded,"* YOUTUBE (Mar. 25, 2021), <https://www.youtube.com/watch?v=H9hau1Ek4-s> [https://perma.cc/5S5C-93SL] (providing background on the Rana Plaza collapse). For the Ontario Court of Appeal's resolution of the relevant conflict of laws issues, see *Das v. George Weston Ltd.*, 2018 ONCA 1053, paras. 79–82 (Can.).

respected by all courts. The court has no choice but to apply Bangladeshi law, thus rendering ineffective the portion of the Bangladeshi choice-of-law rule that authorizes application of California law.

The competing understandings of ESLs also lead to different results with respect to contractual choice-of-law clauses. Assume that your employer has discriminated against you on the basis of your gender identity.¹⁸ Assume further that your employment contract specifies that the employment relationship shall be governed by the law of the United States. U.S. law, in Title VII of the Civil Rights Act of 1964, prohibits employment discrimination on the basis of gender identity,¹⁹ but Title VII specifies that this provision “shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.”²⁰ If you are employed outside the United States by a non-U.S. employer, are you protected because the contract specifies that the applicable law is that of the United States, or are you unprotected because Title VII does not extend to persons employed abroad by foreign employers? How we answer that question depends on how we understand Title VII’s ESL.

The three competing theories, producing three quite different results, are depicted in Table 1, below.

Table 1: The Competing Theories²¹

THEORY	EFFECT ON EXCLUDED CASES	BINDINGNESS
One-sided conflicts view	Enacting state has no law for excluded cases	ESL is binding on courts of the enacting state but may be disregarded by courts of other states
Two-sided substantive view	Enacting state has a law for excluded cases with different content than for included cases	ESL is binding on courts of the enacting state and courts of other states
One-sided substantive view	Enacting state has no law for excluded cases	ESL is binding on courts of the enacting state and courts of other states — all courts <i>must</i> apply the law of another state to excluded cases

¹⁸ This hypothetical closely tracks *Rabé v. United Air Lines, Inc.*, 636 F.3d 866 (7th Cir. 2011), a case involving an airline attendant who faced discrimination based on her sexual orientation.

¹⁹ See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) (interpreting Title VII to prohibit employment discrimination on the basis of gender identity, considering such discrimination to be on the basis of sex).

²⁰ 42 U.S.C. § 2000e-1(c)(2).

²¹ For a glossary of the terms used in this table, see *supra* note 5.

The proper understanding of ESLs is, in the first instance, a question of statutory interpretation. In most cases, however, the legislature will not have addressed the choice among the three possible interpretations. This Article argues that the two-sided substantive understanding of ESLs reflects a misunderstanding of the likely intent of the legislatures that enact ESLs. A legislature that enacts such a limitation has very likely done so out of a sense of interstate or international comity. The non-extraterritoriality of the statute is best understood as an act of legislative modesty. To interpret the ESL as establishing that the enacting state has a law for excluded cases relegating such cases to a substantive rule that it has rejected as inappropriate for local cases is the opposite of legislative modesty. Moreover, if the legislature did intend that the ESL operate in the two-sided substantive sense, the ESL would be unconstitutional in many — perhaps most — cases. Disparate treatment of out-of-state persons or conduct would be valid if adopted out of a sense of interstate comity, but comity-based ESLs do not establish a different rule for out-of-state cases.

Recognizing that the two-sided substantive theory is implausible and (in many cases) unconstitutional advances our analysis significantly, requiring the rejection of what is currently one of the official positions of the American Law Institute (ALI) — a position also espoused by a number of courts and prominent scholars. The two remaining theories both accept that the enacting state has no rule for cases beyond the statute's external scope. The main difference between the two concerns the obligations of the courts of other states in the face of an ESL. Under the one-sided conflicts theory, an ESL is a choice-of-law rule. As such, it will be given effect by the courts of the enacting state, which will accordingly resolve the case under the law of another state. But, since the courts of one state are not bound by the choice-of-law rules of other states, the courts of other states will be free to apply the substantive provisions of the enacting state's law without regard to its ESL. The one-sided substantive theory, by contrast, insists that an ESL is an inseverable part of the enacting state's substantive law, which all courts must respect.²² The Bangladeshi court, on this theory, *may not* apply California's strict liability rule; it has no option but to apply the law of a state other than California. As noted above, the draft Third Restatement takes the position that a U.S. state violates the Full Faith and Credit Clause when it applies the substantive provisions of a sister state's statute to cases beyond the statute's external scope as specified by an ESL.²³ This Article argues that nothing in the Full Faith and Credit Clause or in the nature of law prevents the courts of other states from disregarding an ESL and applying an enacting state's substantive

²² See *supra* p. 1294.

²³ R₃ TD₃ § 5.02 reporters' note 1.

rule to cases beyond a statute's specified scope. (Whether they *should* do so is a separate question.)

Scholarship on extraterritoriality is plentiful.²⁴ Most of it, however, focuses on the circumstances in which it is proper for states to exert legislative authority beyond their borders.²⁵ This Article focuses on how to understand *non*-extraterritoriality, meaning a state's decision *not* to exert its legislative authority externally.²⁶ Although I focus on this question in the context of statutory ESLs, my thesis has relevance beyond ESLs found in statutes. Courts often read external scope limitations into statutes that do not expressly contain them. The U.S. Supreme Court, for example, applies a presumption against extraterritoriality to limit the reach of federal statutes that do not expressly address the question of external scope.²⁷ Some state courts in the United States apply a similar presumption in interpreting their own statutes.²⁸ Going further, some scholars maintain that the first step of *any* choice-of-law inquiry is to determine the external scope of the contending laws.²⁹ Going further still, according to one school of thought, the point of *all* choice-of-law rules is to delimit the external scope of forum law. This was the view of the statisticians of old,³⁰ and this view is reflected in U.S. case

²⁴ See, e.g., A.V. LOWE, EXTRATERRITORIAL JURISDICTION: AN ANNOTATED COLLECTION OF LEGAL MATERIALS (1983); EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE (Karl M. Meessen ed., 1996); THE EXTRATERRITORIALITY OF LAW: HISTORY, THEORY, POLITICS (Daniel S. Margolies et al. eds., 2019).

²⁵ See, e.g., Austen L. Parrish, *The Interplay Between Extraterritoriality, Sovereignty, and the Foundations of International Law*, in THE EXTRATERRITORIALITY OF LAW: HISTORY, THEORY, POLITICS, *supra* note 24, at 169; Ellen Gutterman, *Extraterritoriality as an Analytic Lens: Examining the Global Governance of Transnational Bribery and Corruption*, in THE EXTRATERRITORIALITY OF LAW: HISTORY, THEORY, POLITICS, *supra* note 24, at 183.

²⁶ ESLs raise different issues for cases that are *within* the statute's specified scope. For example, does the provision *require* or merely *permit* application of the statute to cases within its specified scope? For a discussion of the issues that ESLs raise in cases that are within the statute's specified external scope, see SYMEON C. SYMEONIDES, PRIVATE INTERNATIONAL LAW: IDEALISM, PRAGMATISM, ECLECTICISM 172–79 (2021).

²⁷ See, e.g., *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010). See generally William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020); Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 1 (2014).

²⁸ See William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1403–07 (2020); Hannah L. Buxbaum, *Determining the Territorial Scope of State Law in Interstate and International Conflicts: Comments on the Draft Restatement (Third) and on the Role of Party Autonomy*, 27 DUKE J. COMPAR. & INT'L L. 381, 397–401 (2017); John F. Coyle, *Party Autonomy and the Presumption Against Extraterritoriality*, 55 WILLAMETTE L. REV. 559, 560–64 (2019). On whether the presumption should be applied to state common law rules, see Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 GEO. L.J. 301 (2014).

²⁹ See, e.g., Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1852–53 (2005).

³⁰ See ROXANA BANU, NINETEENTH-CENTURY PERSPECTIVES ON PRIVATE INTERNATIONAL LAW 41–69 (2018) (noting that the European statutory school “divided statutes into personal, real, or mixed . . . in order to determine their extraterritorial reach” and explaining that this view made a “comeback” in the nineteenth century, *id.* at 41); SYMEONIDES, *supra* note 26, at 47 (noting that statisticians “try to determine the spatial reach of substantive laws”).

law.³¹ This Article focuses on ESLs found in statutes because such statutory provisions pose the issues under discussion most starkly. My analysis of statutory ESLs applies a fortiori to ESLs read into statutes by the courts.³²

Beyond its doctrinal ramifications, my thesis illuminates important questions of choice-of-law theory. There is a puzzle at the center of an ESL if understood as a choice-of-law rule. As written, ESLs purport to limit the substantive reach of the statute, and I argue that this means that the enacting state has no law for cases beyond the statute's reach. As noted above, however, it has been traditionally understood that a state's choice-of-law rules are not binding on the courts of other states, meaning that the courts of other states may resolve excluded cases according to the rules the enacting state would apply to purely local cases. But, if one takes the position that California has no law at all for cases in which the injury occurred in Bangladesh, how can the Bangladeshi courts be free to apply California's strict liability law to such cases? If a Bangladeshi court decides a case by applying a law that, by its terms, does not extend to the case, isn't it violating its obligation to resolve cases according to law? Isn't it resolving the case according to no law at all? Adherents of the one-sided substantive view maintain that that is in fact what the Bangladeshi courts would be doing — and that doing so violates fundamental rule-of-law values. I do not agree. Whether it does depends on how one conceptualizes the choice-of-law enterprise, and I offer two theories to reconcile the one-sided conflicts theory with the rule of law.

Part I of this Article explains with greater specificity how the competing understandings of ESLs would affect the resolution of concrete cases in light of well-accepted background principles of the conflict of laws. It does so by comparing how the rules and principles set forth in the Second and Third Restatements apply to cases in which the forum's choice-of-law rule or a contractual choice-of-law clause directs application of a law that, by its terms, does not reach the case. The Third Restatement is an ongoing project and it remains to be seen which of the three approaches to this problem it will adopt. I focus on the treatment of this question in succeeding drafts of the Third Restatement not

³¹ See, e.g., *Ala. Great S. R.R. Co. v. Carroll*, 11 So. 803, 807–08 (Ala. 1892). This case is discussed further in Part IV. For an extended discussion of the tradition in the United States of understanding choice-of-law rules as implicit limitations of the external scope of forum law, see Carlos M. Vázquez, *Choice of Law as Geographic Scope Limitation*, in *RESOLVING CONFLICTS IN THE LAW: ESSAYS IN HONOUR OF LEA BRILMAYER* 42 (Chiara Giorgetti & Natalie Klein eds., 2019).

³² This Article focuses on how to understand the non-extraterritoriality of state (national) law. Extraterritoriality issues can also arise with respect to international instruments. See generally MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY* (2011); Yuval Shany, *The Extraterritorial Application of International Human Rights Law*, 409 *RECUEIL DES COURS* 9 (2020). Conceptualization of the non-extraterritoriality of obligations imposed by international instruments may require a different analysis.

primarily to criticize the Third Restatement's position on these questions, which appears to have evolved over time and may well evolve further, but rather to illustrate the range of positions that courts and scholars have endorsed on this question. All three approaches find support in the case law and the writings of prominent scholars, and all three will probably continue to claim adherents regardless of how the Third Restatement ultimately comes out on this issue.

Part II explains why ESLs should generally be understood as choice-of-law rules. It explains the difference between an ESL and what I will call an internal scope limitation (ISL). An ISL limits a statute's scope in the purely domestic case, where all of the parties are from the enacting state and all of the events occurred there. A state that enacts a statute with an ISL clearly has one substantive rule for included cases and another for excluded cases. By contrast, ESLs ordinarily reflect legislative modesty and deference to the legislative authority of other states. They are therefore best understood to reflect the legislature's view that excluded cases should be governed by the law of another state.

Part III looks more closely at the view that ESLs subject excluded cases to a different law of the enacting state. Part III argues that, in most cases, the two-sided substantive view reflects a misunderstanding of the purpose and intended effect of the ESL. In the process, I explain the important difference between having a law leaving a particular matter unregulated and having no law on the matter. Part III argues further that, in the unlikely event that an ESL was intended to operate like an ISL, the statute would probably be unconstitutional, at least in the interstate context.

Part IV assesses the one-sided substantive theory, which agrees that the enacting state has no law for excluded cases but insists that an ESL is not a choice-of-law rule and therefore may not be disregarded by the courts of other states. I first explain why the Full Faith and Credit Clause does not require states to apply the ESLs in their sister states' laws. I then consider a more fundamental objection sounding in rule-of-law principles. Part IV puts forward two theories to reconcile the one-sided conflicts view of ESLs with the courts' obligation to decide cases according to law. Under the first, ESLs should be understood, like other choice-of-law rules, to be procedural rules addressed only to the enacting state's courts. The second theory accepts that an ESL substantively limits the reach of the enacting state's law but reconceptualizes *the forum's* choice-of-law rules. Under this theory, the forum court is not applying the enacting state's law because that law operates on the dispute of its own force; it is, rather, *incorporating* the enacting state's law *as* forum law for the purpose of resolving the matter at hand. We need not choose between these theories. How a state conceptualizes its choice-of-law rules is (within the limits imposed by constitutional and international law) a matter for that state to decide. Neither approach is

foreclosed by the Constitution or by anything inherent in the nature of choice of law.

This Article's claim that the courts of one state may disregard the ESLs in the laws of other states does not tell us that they *should* disregard them. The Article's Conclusion offers some brief observations on that normative question. I maintain that there should be a presumption that contractual choice-of-law clauses refer to the law that the selected state would apply to the purely internal case, disregarding ESLs. For cases not involving contractual choice-of-law clauses, if the forum's choice-of-law rules select the law of a state that has a statute on the matter and the statute has an ESL, the forum's courts would be entirely within their rights to decline to apply the selected state's law to excluded cases. But they would be equally free to disregard the ESL and apply the selected state's law even to excluded cases, and there may be strong reasons for them to do so, as the negotiators of the draft BHR treaty have instructed states parties to do. States should make that choice self-consciously, not out of a mistaken belief that one of the two options is required by the Full Faith and Credit Clause or by the nature of the choice-of-law enterprise.

I. EXTERNAL SCOPE LIMITATIONS IN THE SECOND AND THIRD RESTATEMENTS

To appreciate the significance and ramifications of the competing understandings of ESLs, it is useful to consider how the Second and Third Restatements diverge in their treatment of such provisions. The Second Restatement reflects the one-sided conflicts understanding of ESLs, while the draft Third Restatement adopts (in different drafts concerning different sections) both the two-sided substantive and the one-sided substantive understandings. The two restatements' different understandings of ESLs come through most clearly in their divergent approaches to renvoi and contractual choice-of-law clauses. Because the restatements are virtually identical in their treatment of the relevant background principles, a comparison of the divergent ways the two restatements instruct courts to resolve these issues offers us an ideal vehicle for exploring the practical significance of the competing understandings of non-extraterritoriality. This Part first considers the restatements' treatment of the problem of renvoi, and then considers the restatements' treatment of contractual choice-of-law clauses.

A. *Renvoi*

A court engages in renvoi when its choice-of-law rules select the law of a given state and, rather than applying the selected state's internal (or "local") law, the court applies the selected state's choice-of-law rules. Thus, if state *A* is the forum and its choice-of-law rules select the law of state *B*, a court engages in renvoi if, instead of applying state *B*'s

internal law, it applies state *B*'s choice-of-law rules, thus potentially resolving the case under the substantive law of state *A* (or of state *C* or state *D*). Renvoi has long been disfavored. The traditional rejection of renvoi, in turn, reflects the view, mentioned above, that choice-of-law rules purport to bind only the courts of the forum state; they do not purport to bind, and are generally not applied by, the courts of other states.

The two restatements reject renvoi (for most cases) in almost identical language. The Second Restatement provides that "[w]hen directed by its own choice-of-law rule to apply 'the law' of another state, the forum applies the local law of the other state, except [in two specified circumstances]."³³ According to the Second Restatement, the term "local law" means "the body of standards, principles and rules, exclusive of its rules of Conflict of Laws, which the courts of that state apply in the decision of controversies brought before them."³⁴ The draft Third Restatement similarly provides that "[w]hen the forum's choice-of-law rules direct it to apply the law of some state, the forum applies the internal law of that state, except as stated in subsection (2)."³⁵ According to the draft Third Restatement, the term "internal law" means "a state's law exclusive of its choice-of-law rules."³⁶ Although the restatements use different terms, the draft Third Restatement makes clear that "[i]nternal law' is the same concept as 'local law.'"³⁷ Both restatements distinguish this concept from a state's "whole law," which they define as a "state's internal law, together with its choice-of-law rules."³⁸ Thus, both restatements reject renvoi for most cases, instructing courts to apply the selected state's "internal law," and thus to disregard the selected state's choice-of-law rules.

Despite the nominally identical rules rejecting renvoi, however, the two restatements' divergent understandings of ESLs yield very different understandings of what counts as renvoi, which in turn produce very different outcomes in cases involving ESLs. The two restatements' divergent understandings of ESLs are reflected in their divergent understandings of the concept of internal law.

I. The Second Restatement and the One-Sided Conflicts Theory. —

The Second Restatement defines a state's "local law" as the state's law exclusive of its rules of conflict of laws. The Second Restatement's comments and illustrations make clear that a state's local law is the law that

³³ R2 § 8(1).

³⁴ *Id.* § 4(1).

³⁵ R3 TD3 § 5.06(1). Subsection (2) provides that "[w]hen the objective of the particular choice-of-law rule is that the forum reach the same result on the facts as would the courts of another state, the forum applies the choice-of-law rules of the other state, subject to considerations of practicability and feasibility." *Id.* § 5.06(2).

³⁶ R3 TD2 § 1.03(1).

³⁷ *Id.* § 1.03 cmt. b. I use the terms interchangeably unless otherwise specified.

³⁸ *Id.* § 1.03(2); accord R2 § 4(2).

the courts of that state would apply to a case “involv[ing] facts purely local to it,”³⁹ that is, a hypothetical case in which all of the parties are from the enacting state and all of the conduct occurred in the state. In our opening hypothetical, California’s internal law would be its rule of strict liability. This is the rule the courts of California would apply to a case in which all of the relevant facts occurred in California. This analysis shows that the Second Restatement regards California’s internal law as California’s law minus its ESLs — which in turn means that ESLs are choice-of-law rules.⁴⁰ It follows that, in our opening hypothetical, the courts of Bangladesh would apply California’s strict liability standard to injuries suffered in Bangladesh, disregarding California’s ESL.

If further evidence were needed that the Second Restatement embraces the one-sided conflicts understanding of ESLs, it is provided in Illustration 1:

A, a national of state X who is domiciled in state Y, dies intestate leaving chattels in state X. A proceeding is brought in state X to determine how the chattels should be distributed. Under the X choice-of-law rule, the distribution of movables upon intestacy is determined by the “law” of the deceased’s domicile at the time of death. . . . If the X court decides that the reference is to Y local law, it will decide the case *in the same way as a Y court would have decided if A had been a Y national and if all other relevant contacts had been located in Y.*⁴¹

The illustration confirms what the comment plainly says: a state’s local law is the law the state’s courts apply to the purely local case. This understanding of internal law has been widely endorsed by scholars over the years.⁴² Given both restatements’ definition of a state’s internal law

³⁹ R2 § 8 cmt. d.

⁴⁰ See *supra* notes 34 and 36 and accompanying text.

⁴¹ R2 § 8 cmt. d, illus. 1 (emphasis added).

⁴² See, e.g., Joseph M. Cormack, *Renvoi, Characterization, Localization and Preliminary Question in the Conflict of Laws: A Study of Problems Involved in Determining Whether or Not the Forum Should Follow Its Own Choice of a Conflict-of-Laws Principle*, 14 S. CAL. L. REV. 221, 249 (1941) (“The domestic, or internal, law is that which a court of the foreign jurisdiction applies when all the facts are local to, that is, occurred within, that jurisdiction.”); Erwin N. Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1166 (1938) (“Now the question obviously arises: when the English conflicts rule directs the court to ‘the law of’ France, is the reference (a) simply to the ‘internal law’ of France, that is, the law which a French court would apply to a situation all of whose elements were French, or is it (b) to what may be called the ‘whole law’ of France, including not only the French internal law but also the French rules of conflict of laws?”); Elliott E. Cheatham, *Internal Law Distinctions in the Conflict of Laws*, 21 CORNELL L.Q. 570, 571 (1936) (“The ‘internal law’ of a state is the law applied to internal or local cases, cases with all their elements in the state.”); Roosevelt, *supra* note 29, at 1884 (describing a situation in which both states have the same substantive law but “the tort does not fall within the scope of either state’s law” as one in which “[t]he plaintiff has . . . suffered a tort according to the internal law of each state”); see also WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 20–21 (1942) (“[T]he forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision

as its law exclusive of its choice-of-law rules, the Second Restatement's recognition that a state's internal law is the law the state would apply to the purely local case reflects its understanding that ESLs are choice-of-law rules. The authorities expressing the view that a state's internal law is the law the state would apply to the purely internal case, therefore, provide additional support for the proposition that an ESL is a choice-of-law rule.⁴³

As California's choice-of-law rule for the matters addressed in the statute, the ESL in our opening hypothetical would be followed by the courts of *California* according to the Second Restatement, which provides that "[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."⁴⁴ For the enacting state's courts, an ESL operates to displace any otherwise applicable general choice-of-law rule of the forum.⁴⁵ The California courts would thus treat the ESL as an instruction to apply a law other than California's to cases involving injuries occurring in Bangladesh. The Second Restatement's rejection of *renvoi*, however, means that the Bangladeshi court, instructed by Bangladesh's choice-of-law rule to apply California law, would apply the rule that California courts would apply if all of the facts had been purely local to California. In other words, the Bangladeshi court would disregard the ESL and apply the strict liability standard.

2. *The Draft Third Restatement and the Two-Sided Substantive Theory.* — The draft Third Restatement denies that ESLs are choice-of-law rules. A choice-of-law rule, it maintains, is a rule that "select[s] the law of one state rather than another."⁴⁶ ESLs fail that test because they do not indicate which state's law applies. According to the draft Third Restatement, ESLs are inseverable parts of the enacting state's substantive law. Such geographic limitations are binding on all courts. "[A] foreign statute that specifies its scope must be applied as written and cannot, through choice-of-law analysis, be extended to a set of facts that falls outside its specified scope."⁴⁷ The Bangladeshi court therefore *may not* apply California's strict liability rule to a case in which the injury occurred outside California.

identical . . . in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected, the rule so selected being . . . the rule of decision which the given foreign state or country would apply, not to this very group of facts now before the court of the forum, but to a *similar but purely domestic group of facts involving for the foreign court no foreign element.*" (emphasis in original).

⁴³ See *supra* note 6 and accompanying text.

⁴⁴ R2 § 6(1).

⁴⁵ SYMEON C. SYMEONIDES, *CODIFYING CHOICE OF LAW AROUND THE WORLD* 295 (2014) ("[ESLs,] being more specific, override the choice-of-law rules of a choice-of-law codification, which usually has a general and residual character.").

⁴⁶ R3 TD2 § 1.03 cmt. a.

⁴⁷ R3 TD3 § 5.06(2) cmt. k (referencing R3 TD2 § 1.03 cmt. b).

Which rule would the Bangladeshi court apply? Like the Second Restatement, the draft Third Restatement instructs the Bangladeshi court to apply California's "internal law."⁴⁸ But, unlike the Second Restatement, the draft Third Restatement's definition of internal law embraces the two-sided substantive understanding of ESLs. While the Second Restatement understands California to have just one internal law — the law providing for strict liability — the draft Third Restatement's definition of internal law leads to the conclusion that California has one internal law for injuries occurring in California (strict liability) and a different internal law for injuries occurring outside California (no strict liability). Apparently, California's internal law for injuries occurring in Bangladesh would either require a showing of negligence (if that is California's common law rule)⁴⁹ or deny liability altogether.

Let's see how the draft Third Restatement's provisions lead us to this conclusion. According to the draft Third Restatement's black letter, a state's internal law is "the body of law which the courts of that state apply when they have selected their own law as the rule of decision for one or more issues."⁵⁰ This definition is, on its face, compatible with the one-sided conflicts understanding of ESLs. If the ESL were understood as a choice-of-law rule, it would indicate that the state would *not* select its own law for cases beyond the statute's specified scope. This definition would thus yield the conclusion that the state's internal law is the law that the state would apply to the purely internal case — which is the Second Restatement's definition. But, in the comments and illustrations, the draft Third Restatement expressly rejects this view. Comment (a) makes clear that "[i]nternal law includes both specifications of the persons who can assert rights under the law and specifications of the geographic scope of the law."⁵¹ Illustration 1 posits a wrongful death statute of state *X* that imposes a cap on damages and provides further that it applies to "deaths 'caused in this state.'"⁵² The illustration goes on to posit that a domiciliary of state *X* causes the death of another domiciliary of state *X*, but the death was caused in state *Y*.⁵³ The case is brought in state *Y* courts and state *Y*'s choice-of-law rule selects the law of state *X* as the applicable law.⁵⁴ According to the draft Third Restatement, the court would apply the internal law of state *X* and would conclude that, because state *X*'s statute imposes a damages cap only for deaths caused in state *X*, state *X*'s internal law permits

⁴⁸ *Id.* § 5.06(1).

⁴⁹ This is apparently the view of Professor Andrew Dickinson. See DICKINSON, *supra* note 12, at 138.

⁵⁰ R₃ TD₂ § 1.03(1).

⁵¹ *Id.* § 1.03 cmt. a.

⁵² *Id.* cmt. c, illus. 1.

⁵³ *Id.*

⁵⁴ *Id.*

unlimited damages for deaths caused in state *Y*.⁵⁵ In other words, state *X* has one internal law for deaths caused in state *X* (a rule capping damages in wrongful death cases) and another internal law for deaths caused in state *Y* (a rule authorizing unlimited damages).⁵⁶

The draft Third Restatement's explanation of the black letter of section 1.03 thus rejects the view that a state has no law for cases beyond the statute's specified external scope. It makes clear that state *X* has an internal law for deaths caused in state *Y*. In the words of the black letter, the law that "courts of [state *X* would] apply when they have selected [state *X*] law as the rule of decision"⁵⁷ for deaths caused in state *Y* is one that permits unlimited damages. State *X* has an internal law for deaths caused in state *Y*, the content of which is different from its internal law for deaths caused in state *X*.

As applied to our opening hypothetical, the two-sided substantive theory would lead the Bangladeshi courts, pursuant to the Bangladeshi

⁵⁵ *Id.*; see also *id.* illus. 2 ("[D]eciding the issue under state *X* law would result in an unlimited recovery.").

⁵⁶ Even assuming the correctness of the two-sided substantive view, the draft Third Restatement's conclusion that state *X*'s internal law for cases beyond the statute's external scope is one that authorizes unlimited damages is questionable. Some of the cases that adopt the two-sided substantive understanding of ESLs, whose general approach to ESLs the draft Third Restatement cites with approval, take the position that a state's law for cases beyond the statute's external scope is the state's preexisting common law. See, e.g., *Budget Rent-A-Car Sys., Inc. v. Chappell*, 304 F. Supp. 2d 639, 645, 648 (E.D. Pa. 2004), *rev'd on other grounds*, 407 F.3d 166 (3d Cir. 2005); R3 TD3 § 5.02 reporters' note 1 (citing *Budget Rent-A-Car* with approval). (This case is discussed at greater length in Part III, *infra* pp. 1326–41.) The common law rule for wrongful death, however, denied liability entirely. Liability for wrongful death, in other words, has traditionally been considered nonexistent in the absence of a statute. If state *X*'s wrongful death statute as a whole reaches only deaths caused in state *X*, one would apparently be forced to conclude that state *X*'s law for deaths caused in state *Y* authorizes *no* damages. The draft Third Restatement avoids this conclusion through the device of *dépeçage* — applying the laws of different states to different issues in the case. Illustration 1 posits that state *Y*'s choice-of-law rule selects the law of state *X* "to govern the issue of a limit on damages." R3 TD2 § 1.03 cmt. c, illus. 1. That presumably leaves open the possibility that state *Y*'s choice-of-law rule selects the internal law of state *Y* to govern the question of the existence of a cause of action. However, the draft Third Restatement's comments addressing *dépeçage* make clear that *dépeçage* should not be used where "two rules . . . are closely connected in purpose, so that applying only one would produce an unacceptable distortion." R3 TD3 § 5.02 cmt. g. If state *X* is understood to have one rule denying a cause of action for deaths caused in state *Y* and another rule not imposing a damage cap for deaths caused in state *Y*, it would seem an unacceptable distortion of state *X* law to apply the second rule without the first rule.

Interestingly, and inconsistently, Illustration 2 notes that, even though state *X* law provides for "unlimited recovery" for deaths caused in state *Y*, "it is . . . clear that state *X* does not have a policy of imposing unlimited damages [for such deaths], since it provides no cause of action for such deaths." R3 TD2 § 1.03 cmt. c, illus. 2. The fact that the draft Third Restatement cites the lack of a cause of action as the reason state *X* has no policy of allowing unlimited recovery further supports the conclusion that § 1.03 presupposes the two-sided substantive view. If Tentative Draft No. 2 had adhered to the one-sided conflicts or the one-sided substantive view, the illustration would have said that state *X* has no policy of allowing unlimited damages because, in light of the ESL, state *X* law does not purport to reflect any policy at all for deaths caused outside state *X*. *But cf. infra* section I.A.3, pp. 1307–11 (discussing subsequently approved sections of the draft Third Restatement suggesting that it has switched to the one-sided substantive theory).

⁵⁷ R3 TD2 § 1.03(1).

choice-of-law rule, to apply California law (if the plaintiffs so request). The draft Third Restatement instructs the courts to apply California's "internal law."⁵⁸ Under section 1.03's definition of internal law, the court would conclude that California's internal law for injuries suffered in Bangladesh is one that does not impose strict liability. California's internal law for Bangladeshi injuries might be California's common law rule, which presumably requires a showing of negligence. Or its internal law for Bangladeshi injuries might deny liability altogether. In either case, the result would differ from the result produced by the Second Restatement, which instructs the court to apply California's local law, which it defines as the law that California would apply to purely local cases.

3. *The Draft Third Restatement and the One-Sided Substantive Theory.* — Subsequently approved sections of the draft Third Restatement suggest that the ALI might be moving toward the one-sided substantive view. Under this view, a state is deemed to have no law for cases beyond the statute's specified scope, but the ESL still does not count as a choice-of-law rule. The court may not disregard the ESL; it may not apply the substantive law of the enacting state beyond its specified scope. Because the enacting state has no law for cases beyond the specified scope of the statute, respecting the ESL means, according to this view, applying the law of another state. The courts of Bangladesh would be precluded from applying California's strict liability standard to injuries suffered in Bangladesh, even though Bangladesh's choice-of-law rule plainly contemplates the application of that standard. The ESL effectively overrides Bangladesh's own choice-of-law rule, requiring the application of the law of Bangladesh instead. For adherents of the one-sided conflicts understanding of ESLs, doing this would constitute prohibited *renvoi*.⁵⁹ But since the draft Third Restatement denies that ESLs are choice-of-law rules,⁶⁰ it also denies that treating California's ESL as requiring the application of a law other than the law selected by Bangladesh's choice-of-law rule is *renvoi*. Under the one-sided substantive theory, therefore, the draft Third Restatement would *require* what, according to the one-sided conflicts view, is (usually) prohibited.

That the ALI is moving toward this view is suggested by its recent approval of Tentative Draft No. 3, which includes Chapter 5's provisions describing the draft Third Restatement's general approach to choice of law,⁶¹ which it calls the "two-step model."⁶² The model claims to be a refinement of interest analysis as first developed by Professor Brainerd Currie.⁶³ According to Currie, the courts should determine the

⁵⁸ R3 TD3 § 5.06(1).

⁵⁹ See *supra* section I.A.1, pp. 1302–04.

⁶⁰ R3 TD2 § 1.03 cmt. a.

⁶¹ R3 TD3 ch. 5, topic 1, intro. note; *id.* § 5.01 cmt. b.

⁶² *Id.* § 5.01 cmt. b.

⁶³ *Id.*

applicable law by asking whether the contending states have an interest in having their laws applied.⁶⁴ According to the draft Third Restatement, Currie's analysis of state interests involves "the same process used in ordinary domestic cases to decide whether a particular set of facts fell within the scope of a law."⁶⁵ If only one state's law reaches the case, the case is a false conflict and the court should apply the law of the only interested state. If more than one state's law reaches the case (and the laws produce different results), the case involves a true conflict and the court must then move to the second step of the analysis — determining which law should be given priority.⁶⁶ The draft Third Restatement adopts this two-step framework of analysis.⁶⁷

Currie's interest analysis presupposes that a state has no law for cases beyond the external scope of its law. A false conflict is a case in which only one state's law reaches the case. Under the two-sided substantive theory, however, a state *would* have a rule for cases beyond the external scope of the rule it applies to internal cases. Interest analysis clearly rejects this view. Consider the famous case of *Babcock v. Jackson*,⁶⁸ which rejected the traditional *lex loci delicti* rule⁶⁹ in favor of Currie's interest analysis.⁷⁰ Two New Yorkers took a day trip by automobile to Ontario, where they were involved in an accident.⁷¹ The passenger was injured and sued the driver in a New York court for negligence.⁷² Ontario had a guest statute, which barred tort recovery by a guest against his host,⁷³ but New York allowed recovery by guests against negligent hosts.⁷⁴ Under the traditional *lex loci delicti* rule, the law of Ontario would have governed because the accident occurred in Ontario, and recovery would have been denied because of the guest statute.⁷⁵ But the court rejected the traditional rule.⁷⁶ Consistent with Currie's approach, the court sought to ascertain whether Ontario had an interest in having its guest statute applied.⁷⁷ It determined that the law's purpose was to protect hosts from ungrateful guests and, because the host in the case was from New York, Ontario did not have an interest

⁶⁴ BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 180–84 (1963).

⁶⁵ R₃ TD₃ ch. 5, topic 1, intro. note.

⁶⁶ *Id.* § 5.01 cmt. b.

⁶⁷ *Id.* ch. 5, topic 1, intro. note ("This Restatement sets forth choice of law according to this two-step model . . .").

⁶⁸ 191 N.E.2d 279 (N.Y. 1963).

⁶⁹ See RESTATEMENT (FIRST) OF CONFLICT OF L. § 384 (AM. L. INST. 1934) (codifying the common understanding of the *lex loci delicti* rule).

⁷⁰ *Babcock*, 191 N.E.2d at 281.

⁷¹ *Id.* at 280.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See *id.*

⁷⁵ *Id.* at 280–81.

⁷⁶ *Id.* at 285.

⁷⁷ *Id.* at 284.

in having its law applied.⁷⁸ The purpose of New York's law permitting recovery, on the other hand, was to ensure that injured guests were compensated by negligent hosts.⁷⁹ Because the injured guest in the case was from New York, the court concluded that New York did have an interest in having its law applied.⁸⁰ The case presented a false conflict: New York was the only state with an interest in having its law applied.

Under the draft Third Restatement's two-step conception of choice of law, the court's determination that Ontario did not have an interest in having its law applied is equivalent to a determination that the case was beyond the external scope of Ontario's guest statute. Ontario's guest statute, in other words, was subject to an implicit ESL. But interest analysis does not work if each state's implicit ESL is understood to subject excluded cases to another rule of the enacting state. The very notion of a false conflict is possible only on the assumption that the enacting state has no law for excluded cases. This is how the New York court understood Ontario's law. If the court had understood the ESL as establishing that Ontario had a law permitting recovery if the host were not from Ontario, its analysis would have been very different.⁸¹

Chapter 5 of the draft Third Restatement appears to endorse this approach. The comments to these sections make clear that, if a state has a statute with an ESL making the statute inapplicable to the case, the state's law is not "relevant" to the case and thus ineligible for

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Indeed, Professor Rodolfo De Nova criticized *Babcock v. Jackson* precisely on this ground. Rodolfo De Nova, *Historical and Comparative Introduction to Conflict of Laws*, 118 RECUEIL DES COURS 438, 536 (1966). He argued that the court in *Babcock* reached the correct result but should have done so without rejecting the traditional *lex loci delicti* rule. *See id.* The court should have applied the law of Ontario, but it should have held, consistent with its purposive analysis of the guest statute, that Ontario law *permitted* recovery by guests against out-of-state hosts. *See id.* at 537–38. De Nova apparently embraced the two-sided substantive theory, which for him meant that Ontario *had a law* for cases in which the host was not from Ontario: in such cases, Ontario law *permitted* recovery by a guest against the host. *See id.* But that is decidedly not the understanding that underlies interest analysis. The New York court in *Babcock* did not apply Ontario law; it rejected the *lex loci delicti* rule and instead applied the law of the only interested state — New York. *See Babcock*, 191 N.E.2d at 285.

On the facts of *Babcock*, the result would not have differed under the two theories because the laws of New York and Ontario (understood in the two-sided sense) were the same for cases in which the guest and host were both from New York. But consider a case in which the host was from New York and the guest was from Ontario. Under Currie's analysis, this would be an unprovided-for case — one in which neither state has an interest in having its law applied. *See* R3 TD3 § 5.01 cmt. b. Under the two-sided substantive theory, however, this case would be a true conflict. Both states would have a law governing the case and the laws would conflict. New York's law for cases in which the guest was from Ontario would be one denying recovery, and Ontario's law for cases in which the host was from New York would be one affording recovery. The case would be a true conflict, and the court's analysis would be very different from the analysis prescribed by standard governmental interest analysis. *See* Michael S. Green, *The Return of the Unprovided-For Case*, 51 GA. L. REV. 763, 804–06 (2017).

application.⁸² How this applies to concrete cases is explained in the illustrations. Illustration 3 to section 5.01 posits a statute of state *X* that imposes vicarious liability on the owner of any vehicle “used or operated in this state.”⁸³ The draft Third Restatement posits further that “the highest court of state *X* has interpreted the phrase ‘used or operated in this state’ to create vicarious liability only for injuries that arise out of such use or operation, i.e., only injuries occurring in state *X*.”⁸⁴ A domiciliary of state *X* lends his car to two other state *X* domiciliaries, who drive into state *Y* and have an accident there. The driver was negligent, and the passenger sues the owner in state *Y* seeking to impose vicarious liability. State *Y* law does not authorize vicarious liability. According to the draft Third Restatement, the case is beyond the scope of state *X*’s vicarious liability statute.⁸⁵ For this reason, according to the draft Third Restatement, “[t]here is no conflict between *X* and *Y* law” and “*Y* law is the only relevant law and it will govern.”⁸⁶

This analysis reflects a shift to the one-sided substantive theory. Had Tentative Draft No. 3 adhered to the theory espoused in Tentative Draft No. 2, it would have asked what state *X*’s common law rule was, or it might have taken the position that state *X* had a law denying vicarious liability for injuries occurring in state *Y*.⁸⁷ Instead, it stated that state *X* had no relevant law and that only state *Y* law could govern. The draft Third Restatement’s conclusion that, if a state has a statute with an ESL, its law is not relevant to excluded cases seems to be a recognition that, with respect to the issues addressed in the statute, state *X* has no law for excluded cases. But, as already discussed, this analysis conflicts with the draft Third Restatement’s definition of internal law in Tentative Draft No. 2.⁸⁸

The draft Third Restatement’s new recognition that, for cases beyond the statute’s specified scope, the court must apply the law of another state would appear to recognize that the ESL operates as a choice-of-law rule. When (as in Illustration 1 for section 1.03) the choice-of-law rule of state *Y* directs application of the law of state *X*, the result now contemplated by the draft Third Restatement is that state *Y* does *not* apply what the draft restatement now recognizes as the only substantive law state *X* has on the matter (the one imposing a damage

⁸² See R3 TD3 ch. 5, topic 1, intro. note; *id.* § 5.01 cmt. b; *id.* cmt. c, illus. 6.

⁸³ *Id.* § 5.01 cmt. c, illus. 3.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ The statement that “[t]here is no conflict between *X* and *Y* law” might be understood to mean that both states have a law denying vicarious liability. *Id.* In light of the further statement that *X* has no “relevant” law, however, the draft Third Restatement appears to mean that there is no conflict between *X* and *Y* law because state *X* has no law for accidents occurring in state *Y*. See *id.*

⁸⁸ See *supra* notes 50–57 and accompanying text.

cap).⁸⁹ State X's ESL operates to displace state Y's choice-of-law rule selecting state X law, requiring it to apply state Y law instead.

Even though ESLs thus clearly operate to displace State Y's choice-of-law rules, the draft Third Restatement avoids the conclusion that ESLs are choice-of-law rules through terminological fiat. It defines a choice-of-law rule as a rule that "select[s] the law of one state rather than another."⁹⁰ This definition appears to have been driven by the draft Third Restatement's view that ESLs substantively limit the reach of laws and that no court may apply a law beyond its specified reach.⁹¹ Despite the ESL's obvious choice-of-law function, to admit that ESLs are choice-of-law rules would mean that the draft Third Restatement's prohibition of renvoi would require the courts of other states to disregard them.⁹² Whether there is anything in the Constitution or the nature of choice of law that requires states to give effect to sister states' ESLs is discussed in Part IV. For now, the important point is that the draft Third Restatement now requires what the Second Restatement considers prohibited renvoi.

As applied to our opening hypothetical, the one-sided substantive theory would lead to the conclusion that California has no law for injuries suffered in Bangladesh. California neither imposes nor rejects a strict liability standard for such injuries. But, according to this theory, California's ESL is not a choice-of-law rule. Rather, the ESL is binding on the Bangladeshi courts. California has no law for injuries in Bangladesh, so the court must apply the law of Bangladesh, thus rendering ineffective Bangladesh's choice-of-law rule providing for application of California law at the request of the plaintiffs. The result would differ from the result under the Second Restatement's one-sided conflicts theory (apply California's strict liability rule) and the result under the draft Third Restatement's two-sided substantive theory (apply California's common law rule or deny recovery altogether).

B. Contractual Choice-of-Law Clauses

The competing understandings of ESLs can also result in different approaches to contractual choice-of-law clauses, although in this context, the parties have greater ability to control the result through clear drafting. The divergent understandings of ESLs mainly affect the presumptions that courts will apply in interpreting the clauses. Both the Second Restatement and the current draft of the Third Restatement establish a presumption that a contractual choice-of-law clause selects the law of the chosen state without regard to the state's choice-of-law

⁸⁹ R3 TD2 § 1.03 cmt. c, illus. 1.

⁹⁰ *Id.* cmt. a.

⁹¹ *See supra* note 47 and accompanying text.

⁹² *See* R3 TD3 § 5.06(1).

rules.⁹³ But, since the restatements disagree on whether an ESL is a choice-of-law rule, the presumptions recognized by the two restatements operate differently.

I. The Second Restatement and the One-Sided Conflicts Theory. —

The Second Restatement provides that, when the parties to a contract agree that the contract will be governed by the law of a particular state, “[i]n the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.”⁹⁴ As discussed above, the Second Restatement defines local law as the law the state applies to purely local cases.⁹⁵ In our Title VII hypothetical, therefore, a court following the Second Restatement would presume that the contract’s selection of U.S. law meant to refer to the substantive provisions of Title VII, disregarding Title VII’s ESL. Analyzed under the one-sided conflicts theory, there is no other U.S. law the clause could have been referring to because the United States has no other relevant law on gender discrimination in employment. In a case presenting this very question, the Seventh Circuit applied the Second Restatement and held that the contractual choice-of-law clause selected Title VII as the governing law without regard to its ESL.⁹⁶

That is not to say that the Second Restatement gives the parties unfettered discretion to select the law of a given state. The parties’ choice of a given state’s law will be given effect “if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.”⁹⁷ This would permit the parties to select the law of a given state unless the state whose law would otherwise apply would impose a different rule and would not allow the parties to contract around it in the purely local case. In a multistate case, moreover, the Second Restatement allows the parties to select the law of a given state even in the face of a mandatory rule of the state whose law would otherwise apply. It may do so unless the latter state has a

⁹³ See R2 § 187(3); RESTATEMENT (THIRD) OF CONFLICT OF L. § 8.03(2)(c) (AM. L. INST., Council Draft No. 5, 2021) [hereinafter R3 CD5]. Unlike Tentative Drafts Nos. 2 and 3, Council Draft No. 5 (which addresses choice of law for contracts) has not yet been approved by the ALI membership as a whole, although it has been approved by the ALI Council.

⁹⁴ R2 § 187(3).

⁹⁵ See *supra* section I.A.1, pp. 1302–04.

⁹⁶ *Rabé v. United Air Lines, Inc.*, 636 F.3d 866, 871 n.2, 872 (7th Cir. 2011); see also *Generac Corp. v. Caterpillar Inc.*, 172 F.3d 971, 976 (7th Cir. 1999) (describing a territorial limit as a “particular choice of law rule”). Other courts have reached the same conclusion without specifically citing section 187(3) of the Second Restatement. See, e.g., *C.A. May Marine Supply Co. v. Brunswick Corp.*, 557 F.2d 1163, 1166–67 (5th Cir. 1977); *Boatland, Inc. v. Brunswick Corp.*, 558 F.2d 818, 822 (6th Cir. 1977); *Infomax Off. Sys., Inc. v. MBO Binder & Co. of Am.*, 976 F. Supp. 1247, 1254 (S.D. Iowa 1997); *Hall v. Sprint Spectrum L.P.*, 876 N.E.2d 1036, 1041–42 (Ill. App. Ct. 2007); *Mon-Shore Mgmt., Inc. v. Fam. Media, Inc.*, 584 F. Supp. 186, 193 (S.D.N.Y. 1984); *Dep’t of Motor Vehicles ex rel. Fifth Ave. Motors, Ltd. v. Mercedes-Benz of N. Am., Inc.*, 408 So. 2d 627, 630 (Fla. Dist. Ct. App. 1981); *Diesel Injection Serv. v. Jacobs Vehicle Equip.*, No. CV 980582400S, 1998 WL 950986, at *4–5 (Conn. Super. Ct. Dec. 4, 1998).

⁹⁷ R2 § 187(1).

materially greater interest and the selected state's local law "would be contrary to a fundamental policy of" the state whose law would otherwise apply.⁹⁸ The Second Restatement is widely regarded as being friendly to contractual choice-of-law clauses. The parties have broad, though not unlimited, discretion to select a state's law even if it would not otherwise be selected by the forum's choice-of-law rules. This includes the discretion to select a state's local law even if the law would not reach the case of its own force.

2. *The Draft Third Restatement and the Two-Sided Substantive Theory.* — The current draft of the Third Restatement provides that a contractual choice-of-law clause is presumed to refer to the selected state's "internal law."⁹⁹ But, as discussed, its definition of internal law is very different from the Second Restatement's. Section 1.03 adopts the two-sided substantive understanding of ESLs.¹⁰⁰ This means that the reference to U.S. law in our hypothetical would be read as a reference to Title VII *as limited by its ESL*. Under the two-sided substantive theory, the court would understand the United States to have one internal law for gender discrimination by U.S. employers and the U.S. operations of foreign employers (a law prohibiting discrimination on the basis of gender identity) and another internal law for other employers (a law permitting discrimination on the basis of gender identity). Thus, if the court gives effect to the choice-of-law clause, it will apply U.S. internal law for foreign employers' foreign operations and find that the plaintiff is not protected from discrimination on the basis of gender identity.

The draft Third Restatement recognizes that the parties may by contract, in certain circumstances, incorporate the rule the selected state would apply to purely local cases.¹⁰¹ But, because the draft Third Restatement does not consider this rule to be the state's internal law, it would not presume that the choice-of-law clause does so. Indeed, since the draft Third Restatement presumes that the clause refers to the selected state's internal law,¹⁰² under the two-sided substantive theory, the contract would be presumed *not* to refer to the law the selected state would apply to purely local cases. This interpretation is supported by the illustrations provided in the draft Third Restatement, which seem to require affirmative evidence of an intent to incorporate the rule the

⁹⁸ *Id.* § 187(2)(b). The choice-of-law clause will also not be enforced if the state whose law was selected "has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice." *Id.* § 187(2)(a).

⁹⁹ R3 CD5 § 8.03(2)(c).

¹⁰⁰ See R3 TD2 § 1.03(1); *supra* section I.A.2, pp. 1304–07.

¹⁰¹ R3 CD5 § 8.04 cmt. d.

¹⁰² See *id.* § 8.03(2)(c).

selected state would apply to purely local cases — typically an affirmative reference to a particular statute.¹⁰³

3. *The Draft Third Restatement and the One-Sided Substantive Theory.* — The current draft of the Third Restatement addressing contractual choice-of-law clauses provides further evidence that the draft Third Restatement is shifting from the two-sided substantive theory to the one-sided substantive theory.¹⁰⁴ The current sections of the draft Third Restatement addressing contractual choice-of-law clauses take the position that the parties' selection of the law of a state with a scope-limited statute renders the choice-of-law clause ineffective if the case is beyond the statute's specified scope.¹⁰⁵ As in the context of renvoi, the consequence of the ESL is to require the application of another state's law in such cases. The draft Third Restatement's new position is consistent with the one-sided substantive theory, which maintains that the enacting state has no law for excluded cases. Although the draft Third Restatement's conclusion that the ESL requires application of another state's law appears to be the sort of contractual renvoi that both restatements presume against,¹⁰⁶ this does not count as renvoi for the draft Third Restatement because the draft Third Restatement does not regard ESLs as choice-of-law rules.

(a) *Interpretation of the Choice-of-Law Clause.* — The draft Third Restatement's insistence that an ESL is not a choice-of-law rule and, thus, that a state's internal law is its law subject to its ESLs, means that there is no presumption that the law selected by the parties in the choice-of-law clause is the law that the selected state would apply to purely local cases. The draft Third Restatement recognizes that the parties might have intended to incorporate that law, but determining whether they did so is, according to the draft Third Restatement, a matter of contract interpretation to be decided without the aid of a presumption.¹⁰⁷ This no-presumption approach seems to follow mechanically from the draft Third Restatement's carrying over of the Second

¹⁰³ See *id.* § 8.04 cmt. d & illus. 4. The draft Third Restatement would also place greater limits on the parties' discretion to choose the law the selected state would apply to purely local cases for cases beyond the specified external reach of that law than for cases within the law's external reach. The draft Third Restatement's treatment of the enforceability of choice-of-law clauses that select the local law of a state is discussed in the next section.

¹⁰⁴ The sections discussed in this subsection of the Article have not yet been approved by the ALI's membership, however.

¹⁰⁵ R₃ CD₅ § 8.04 cmt. b.

¹⁰⁶ Both restatements provide that a contractual choice-of-law clause is presumed to refer to the selected state's law exclusive of its choice-of-law rules. See R₂ § 187(3); R₃ CD₅ § 8.03(2)(c).

¹⁰⁷ R₃ CD₅ § 8.04 cmt. d ("Whether the parties intended incorporation is a question of contract interpretation that should . . . be decided under the law that governs interpretation of the contract. An intent to incorporate may be inferred from specific reference to the scope-limited law."). Even if the parties intended to choose the law the selected state would apply to purely local cases, their choice may not be enforceable. As discussed below, the draft Third Restatement would uphold the parties' choice of a law that does not reach the case of its own force in narrower circumstances than it would their choice of a law that does reach the case.

Restatement's presumption that the parties intended to refer to a state's internal law, combined with the draft Third Restatement's interpretation of internal law as a state's law including its ESLs.¹⁰⁸

As the draft Third Restatement acknowledges, its definition of internal law does not foreclose the possibility of interpreting a contractual choice-of-law clause as incorporating the law that the selected state would apply to purely internal cases — that is, the selected state's local law as the Second Restatement defines it. There is, accordingly, nothing in the Third Restatement's definition of internal law that precludes a presumption that a contractual choice-of-law clause selects the chosen state's local law disregarding its ESLs. Such a presumption would be warranted for a number of reasons, foremost among them that the presumption would better capture the likely intent of the contracting parties. “[T]he ordinary expectation of commercial parties is not that selection of a specified law will require further (uncertain) analysis as to whether some aspects of that law are ‘scope-limited’ or whether particular rules are scope-limitations or conflict of laws rules.”¹⁰⁹

The draft Third Restatement's apparent espousal of the one-sided substantive theory strongly supports the adoption of such a presumption. First, under the one-sided substantive theory, the selected state *has no law* for cases beyond the statute's external scope. It follows that a contractual provision selecting that state's law for a contract that is beyond the scope of the state's statute could be referring *only* to the law the state would apply to purely local cases. There is no other law of the selected state to which the clause could be referring. Second, according to the draft Third Restatement, a contract's selection of a state whose law on the matter does not extend to the case renders the choice-of-law clause ineffective:

[P]arties selecting the law are left in the same position they would have been had they made no selection. Thus, a court must perform an ordinary choice-of-law analysis to identify the governing law. The scope-limited law will not be a candidate for selection in that analysis because it is not a relevant law.¹¹⁰

The parties are hardly likely to have intended to adopt an ineffective choice-of-law clause. Third, the parties to a contract typically include a choice-of-law clause in the contract in order to avert complex choice-of-law inquiries. As the Second Restatement recognizes and the draft Third Restatement echoes, a “basic objective[.]” of a choice-of-law clause

¹⁰⁸ R3 TD2 § 1.03 cmt. a.

¹⁰⁹ Gary Born & Cem Kalelioglu, *Choice-of-Law Agreements in International Contracts*, 50 GA. J. INT'L & COMPAR. L. 44, 104 (2021); see also Coyle, *supra* note 28, at 574 (arguing that when parties select the law of a particular state they likely do not intend to include that state's presumption against extraterritoriality).

¹¹⁰ R3 CD5 § 8.04 cmt. c.

is to achieve greater “certainty and predictability.”¹¹¹ Yet, according to the draft Third Restatement, the result of interpreting the clause to select a state’s law that does not reach the case because of an ESL is precisely to *require* a choice-of-law inquiry *as if the parties had not included a choice-of-law clause*.¹¹² The draft Third Restatement’s recognition that a state has no law for cases beyond the statute’s specified external scope thus strongly supports a presumption that a choice-of-law clause refers to the selected state’s law excluding its ESLs.

(b) *Enforceability of the Choice-of-Law Clause*. — With respect to the question of enforceability, the draft Third Restatement departs from the Second Restatement by distinguishing between the enforceability of a clause selecting a law that, because of an ESL, does not extend to the case of its own force and a clause selecting a law that does extend to the case. Both types of clauses are effective insofar as they displace a “default rule” of the state whose law would otherwise apply — that is, a rule that the parties are allowed to contract around. And both types of clauses are ineffective insofar as they would displace an “overriding mandatory rule” of the state whose law would otherwise apply — meaning a rule that reflects that state’s fundamental public policy. But the enforceability of the two types of clauses differs in the face of a “simple mandatory rule” of the state whose law would otherwise apply. A clause selecting a law that does reach the case of its own force may displace such a rule in certain circumstances, but a clause selecting a law that does not reach the case of its own force may not.¹¹³

The draft Third Restatement’s treatment of the issue of enforceability does not turn on its apparent rejection of the one-sided conflicts theory. Rather, it appears to rest on the notion that the selected state has no law for cases beyond the statute’s specified external scope (a point on which both one-sided theories agree). This Article will therefore not dwell on the draft Third Restatement’s treatment of the issue of enforceability beyond noting that it is far from clear that the question whether the selected state’s law extends to the case of its own force should have any bearing on whether parties should be able to select it as the governing law. The draft Third Restatement claims that its conclusion that a clause selecting the local law of the chosen state cannot modify or displace simple mandatory rules is a matter of respecting the choices of the

¹¹¹ R2 § 187(3) cmt. h. To the same effect, see R3 CD5 § 8.03 cmt. f. *See also* Rabé v. United Air Lines, Inc., 636 F.3d 866, 871 n.2 (7th Cir. 2011) (relying on the Second Restatement’s section 187(3) and comment (h) in finding that a choice-of-law clause selected scope-limited law without regard to the ESL).

¹¹² R3 CD5 § 8.04 cmt. c.

¹¹³ *See id.* cmt. d. & illus. 4; *id.* reporters’ note 3.

selected state's legislature regarding the content of its law.¹¹⁴ As the one-sided substantive theory recognizes, however, the enacting state *has no relevant preferences* regarding cases beyond the statute's specified external scope. Moreover, whether a selected state's law is enforceable is not a matter of the preferences of the selected state; it is a matter of the law *of the state whose law would otherwise apply*. It is *the latter state's* distinction between default rules, simple mandatory rules, and overriding mandatory rules that determines the enforceability of the choice-of-law clause. It is unclear why the state whose law would otherwise apply would care about whether the selected state's rule would extend to the case of its own force. Perhaps it would, and perhaps it wouldn't. The draft Third Restatement's flat rule that a choice-of-law clause is unenforceable in the face of a simple mandatory rule, if it selects a law that would not otherwise reach the case of its own force, is unwarranted.

* * *

By applying the provisions of the two restatements to cases involving ESLs in the context of renvoi and contractual choice-of-law provisions, this Part has shown how the competing understandings of non-extraterritoriality produce significantly different outcomes if the case is beyond the statute's specified external scope. The Second Restatement adopts the one-sided conflicts theory, which means that the enacting state's courts will resolve the case by applying the law of another state, but the courts of other states are free to apply the law the enacting state would apply to purely local cases, disregarding the ESL. To the extent the forum rejects renvoi, as both restatements recommend for most cases, it will disregard the ESL. And contractual choice-of-law clauses are presumed to refer to the selected state's law excluding its ESLs.

Section 1.03 of the draft Third Restatement adopts the two-sided substantive theory, under which the enacting state is deemed to have one internal law for cases within the external scope of the statute and another internal law for cases beyond the external reach of the statute. Accordingly, when another state's choice-of-law rule or a contractual choice-of-law clause selects the law of the enacting state, the court will apply the enacting state's internal law for cases beyond the scope of the statute.

Subsequently approved provisions of the draft Third Restatement suggest that the ALI may be moving toward the one-sided substantive understanding of ESLs, which recognizes that the enacting state has no law for excluded cases but denies that the ESL is a choice-of-law rule

¹¹⁴ See *id.* cmt. a ("Because the scope of a law is a matter of its content — a matter of what legal consequences it imposes on what people under what conditions — and states are authoritative as to the content and meaning of their own law, a scope restriction in a state's law must be respected by the courts of all states.")

that can be disregarded by the courts of other states. This approach means that, for excluded cases, the law of the enacting state is ineligible for application. The courts have no choice but to apply the law of another state if the forum's choice-of-law rule or a contractual choice-of-law clause directs application of the enacting state's law, and the enacting state has a statute on the matter that does not reach the case because of an ESL. This theory would thus render ineffective the choice-of-law rules of the forum or the choice-of-law clause agreed to by the parties. It would require what, for the Second Restatement, constitutes prohibited renvoi.

II. THE ONE-SIDED CONFLICTS THEORY

The type of provision examined in this Article has gone by a variety of names in the conflict-of-laws literature. Professor Arthur Nussbaum referred to such provisions as "spatially conditioned internal rules,"¹¹⁵ and he noted that "[t]he realm of [such] rules is wide and unexplored"¹¹⁶ and that examination of such rules "should form an integral part in any complete discussion of" conflict of laws.¹¹⁷ Professor Rodolfo De Nova called these provisions "self-limiting" rules and statutes containing these provisions "self-limited" laws.¹¹⁸ Nussbaum and De Nova denied that these rules are choice-of-law rules.¹¹⁹ Professor Symeon Symeonides has called them "localizing provisions"¹²⁰ and "localizing rules,"¹²¹ and he considers them "choice-of-law rules, albeit of the unilateral type."¹²² F.A. Mann at one time characterized such rules as "one-sided" conflicts rules and criticized scholars who call them "spatially conditioned internal rules" because the name "conceals the fact that a conflict rule is

¹¹⁵ ARTHUR NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 71 (1943) (emphasis omitted). "Private international law" is the term more commonly used in civil law systems to describe the field otherwise known as conflict of laws. See *id.* at 3. I use the terms synonymously.

¹¹⁶ *Id.* at 72.

¹¹⁷ *Id.* at 73. As examples, he cited "an exemption statute [that] reserve[s] its benefits to local residents, or an insurance statute [that] confine[s] its regulations to insurance contracts made within the state." *Id.* at 70-71.

¹¹⁸ See, e.g., Rodolfo De Nova, *Self-Limiting Rules and Party Autonomy*, 5 *ADEL. L. REV.* 1, 3 (1973); Rodolfo De Nova, *Conflits des lois et normes fixant leur propre domaine d'application*, 1 *MÉLANGES OFFERTS À JACQUES MAURY* 377 (1960).

¹¹⁹ See NUSSBAUM, *supra* note 115, at 73; De Nova, *supra* note 81, at 535.

¹²⁰ SYMEONIDES, *supra* note 6, at 494.

¹²¹ SYMEONIDES, *supra* note 26, at 172. Professor David St. Leger Kelly also calls these rules "localising rule[s]." See DAVID ST. LEGER KELLY, *LOCALISING RULES IN THE CONFLICT OF LAWS* 6 (1974); D. St. L. Kelly, *Localising Rules and Differing Approaches to the Choice of Law Process*, 18 *INT'L & COMPAR. L.Q.* 249, 249 (1969). Others have called them "inherent limitations in statutes," "spatially conditioned internal rules," "legislatively localised rules," "laws containing localising limitations," "functionally restricting rules," and "special substantive rules for multi-State problems." K. Lipstein, *Essay, Inherent Limitations in Statutes and the Conflict of Laws*, 26 *INT'L & COMPAR. L.Q.* 884, 885 (1977). I have previously called them "geographic scope limitation[s]." See *supra* note 31.

¹²² SYMEONIDES, *supra* note 6, at 494 (emphasis omitted).

involved.”¹²³ In a later work, however, Mann declared it “obvious” that such provisions are not choice-of-law rules and pronounced any contrary view to be “clearly untenable.”¹²⁴ Here, I use the term “external scope limitation” to contrast such provisions with what I call “internal scope limitations.”

British scholar J.H.C. Morris divided statutes into three categories: (a) those that do not address choice of law; (b) those with a “general choice of law clause,” meaning a clause that specifies the state whose law shall govern for a particular class of cases; and (c) statutes containing “a particular choice of law clause purporting to delimit the scope of a rule of domestic law.”¹²⁵ He gave as an example of the second category a statute providing that the validity of a will of movables shall be governed by the law of the place of execution.¹²⁶ He equated the third category with what Nussbaum denominated a “spatially conditioned internal rule,” but he made clear that, unlike Nussbaum, he regarded the delimitation of the scope of domestic rules as a choice-of-law rule.¹²⁷ He did, however, recommend that legislatures employ the second rather than the third type of clause: “Confusion is bound to result unless a clear distinction is maintained between domestic rules and conflict rules; and a statute with a particular choice of law [provision] is a bastard hybrid.”¹²⁸ The treatment of ESLs by the courts and scholars that have embraced the substantive theories described in this Article bears out Morris’s concern.

Lord Collins, Morris’s successor as coauthor of the Dicey & Morris treatise on the conflict of laws, notes that “conflict rules are of two kinds, particular or unilateral and general or multilateral.”¹²⁹ As an example of a unilateral conflict-of-laws rule, the treatise cites the Marriage (Scotland) Act, which provides that “[n]o person domiciled in Scotland may marry before he attains the age of 16.”¹³⁰ The treatise recognizes that the limitation of the provision to persons domiciled in Scotland is a “conflict rule” and thus that a court that rejects *renvoi* might disregard

¹²³ Mann, *supra* note 6, at 55 & n.7.

¹²⁴ F.A. Mann, *Statutes and the Conflict of Laws*, 46 BRIT. Y.B. INT’L L. 117, 130 (1974). I have found no acknowledgement or explanation by Mann of his change of position.

¹²⁵ Morris, *supra* note 6, at 170.

¹²⁶ *Id.* at 173. Such statutes, he says, “are rare.” *Id.* The Second Restatement makes the same point. See R2 § 6(1) cmt. a.

¹²⁷ See Morris, *supra* note 6, at 178; NUSSBAUM, *supra* note 115, at 72–73.

¹²⁸ Morris, *supra* note 6, at 172; cf. PAUL HEINRICH NEUHAUS, DIE GRUNDBEGRIFFE DES INTERNATIONALEN PRIVATRECHTS 49–50 (1962) (calling ESLs “disguised conflict rules”); ALEXANDER N. MAKAROV, GRUNDRISS DES INTERNATIONALEN PRIVATRECHTS 16 (1970) (same).

¹²⁹ 1 DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS ¶ 1-042, at 21 (Sir Lawrence Collins et al. eds., 14th ed. 2006) [hereinafter DICEY].

¹³⁰ *Id.* ¶ 1-043, at 21.

it.¹³¹ All of this is consistent with understanding ESLs as one-sided conflicts rules, and the corresponding understandings of the concepts of internal law and renvoi.¹³² The distinction is also consistent with Morris's analysis and with that of other scholars who regard ESLs as unilateral choice-of-law rules.¹³³

But, confusingly, Collins goes on to distinguish statutes that include unilateral conflicts rules from "[s]elf-limiting statutes."¹³⁴ The latter include statutes that "provide that some of its provisions apply only to British citizens, or to British ships, or to the capital city, or on Sundays, or during the close season for various classes of game birds, or to certain kinds of employees."¹³⁵ Such "self-limiting" provisions, according to the treatise, "are clearly not rules of the conflict of laws whether multilateral or unilateral."¹³⁶ Insofar as he is referring to provisions limiting the statute's applicability to the capital city or to Sundays or to the close season or to certain types of employees, the distinction between such limitations and unilateral conflict-of-laws rules corresponds to my distinction between ISLs and ESLs. Insofar as a provision limits the statute's applicability to British citizens or ships, however, Collins's distinction between self-limiting statutes and unilateral conflict-of-laws rules is elusive. The treatise does not explain, and it is not self-evident, why the limitation of the Marriage (Scotland) Act to "person[s] domiciled in Scotland" is a unilateral conflicts rule while provisions that limit a law's reach to British citizens or ships are not conflicts rules at all.¹³⁷

¹³¹ *Id.* The treatise notes that a statute containing a unilateral conflict rule "can be dissected into (a) a rule of domestic law and (b) a conflict rule indicating when the rule of domestic law is to apply." *Id.* ¶ 1-044, at 21. In the case of the Marriage (Scotland) Act, the conflict rule is the limitation of the statute's scope to persons domiciled in Scotland. The rule of domestic law (the internal law, if one defines that term as the state's laws exclusive of its conflict-of-laws rules) is that persons may not marry before they have reached the age of sixteen. My analysis calls for a similar dissection of statutes containing ESLs.

¹³² Also consistent with the one-sided conflicts understanding of the term is the treatise's distinction between a narrower and a broader view of the term "law." In its discussion of renvoi, the treatise explains: "The term 'law of a country,' e.g. the law of England or the law of Italy is ambiguous. It means in its narrower and most usual sense the domestic law of any country, i.e. the law applied by its courts in cases which contain no foreign element. It means in its wider sense all the rules, including the rules of the conflict of laws, which the courts of a country apply." *Id.* ¶ 4-002, at 73. If the narrower sense of the term "law" corresponds to the concept of local law, the treatise seems to be embracing here the Second Restatement's understanding of the latter term. *Cf.* R2 § 6(1) cmt. a.

¹³³ See sources cited *supra* note 6. Currie's views, though equivocal, are consistent with the view that ESLs are choice-of-law rules. He wrote that ESLs "would not be choice-of-law rules, in the sense of universals assigning 'jurisdiction' to the only competent state," but would instead be "exercises of the lawmaking power, directed to local courts, providing aids to statutory construction." Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 248 (1958). The fact that he regarded ESLs as being "directed to local courts" indicates that he regarded ESLs as choice-of-law rules in a broader sense. See *id.*

¹³⁴ See DICEY, *supra* note 129, ¶ 1-049, at 23.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See *id.* ¶¶ 1-042 to -051, at 21-23.

Collins himself recognizes the elusiveness of his distinction, acknowledging that “it is not always easy to distinguish between unilateral conflict rules and self-limiting provisions; nor has any writer succeeded in formulating a satisfactory test for distinguishing between them.”¹³⁸ In the remainder of this Part, I offer what I hope is a satisfactory test.

A. External vs. Internal Scope Limitations

Many statutes include limitations on the scope of their internal applicability. A statute that prohibits vehicles in parks applies only in parks. An antidiscrimination statute may apply only to employers having fifteen or more employees.¹³⁹ If so, the statute permits discrimination by employers having fewer than fifteen employees. I call these “internal” scope limitations because they limit the applicability of the statute even when all of the events occurred within the enacting state and all parties are principally affiliated with that state. When a state’s legislature enacts a substantive rule but imposes an ISL, purely local cases falling outside the statute’s scope are governed by another law *of the enacting state*. The provision reflects the legislator’s judgment that cases outside the statute’s designated scope should be governed by a different substantive rule. The other rule may be permissive — for example, vehicles are not prohibited and are thus permitted outside parks. But such a law reflects the legislator’s judgment that vehicles should be permitted outside parks.

As I define the term here, an ESL is a provision that specifies the applicability of the substantive rule by reference to the existence of some connection with the enacting state, such as a provision specifying that the statute applies to conduct that occurs within the state or to persons domiciled in the state. Adherents of the two-sided substantive theory treat ESLs as if they were ISLs.¹⁴⁰ Just as a state that enacts a statute with an ISL has one rule for included cases and a different rule for excluded cases, a state that enacts a statute with an ESL (according to adherents of the two-sided substantive theory) has one rule for cases within the statute’s external scope and another rule for cases beyond the statute’s external scope. And just as a court of another state purporting to apply the statute is bound by the statute’s limits in the domestic context (for example, what counts as a “vehicle” that may not be used in a

¹³⁸ *Id.* ¶ 1-051, at 23.

¹³⁹ See, e.g., 42 U.S.C. § 2000e(b) (defining covered “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year”).

¹⁴⁰ For example, when it embraced the two-sided substantive theory, the draft Third Restatement equated ESLs with “a charitable immunity statute that protects charities ‘with fewer than 100 employees.’” See RESTATEMENT (THIRD) OF CONFLICT OF L. reporters’ memorandum at xx (AM. L. INST., Preliminary Draft No. 2, 2016); see also *id.* reporters’ memorandum at xxii (“If a state statute limits a cause of action to people over 18, that limit will be considered part of its internal law. The reason to treat an explicit limit to state citizens differently is not obvious . . .”).

park), it is bound by the limits incorporated into the statute regarding its external scope.¹⁴¹

But, in equating ESLs and ISLs, adherents of the two-sided substantive understanding of ESLs miss a fundamental difference between the likely intended functions of the two. When the legislature attaches an ISL to a statute, it has determined that the substantive rule should apply to included cases *and* should not apply to excluded cases. ESLs are different. If a state enacts a substantive rule and specifies that the rule is applicable to conduct performed within the state, or to domiciliaries of the state, it is not necessarily saying that the rule is inappropriate for conduct that takes place outside the state, or for persons who are not domiciled in the state. Indeed, presumably it enacted the rule because, in its view, it considers it the best rule to govern the type of issue it addresses. It most likely limited the application of the rule to conduct or persons that have the specified connection to the state in order to accommodate the legislative authority and interests of other states.¹⁴²

The requirement of some sort of link between the dispute and the enacting state is, indeed, a requirement of international law.¹⁴³ In order to have jurisdiction to prescribe its law to a given matter, a state must have certain types of ties to the matter.¹⁴⁴ In addition, a state's constitution may limit the authority of the national or subnational legislatures to prescribe law to cases having foreign elements. For example, the U.S. Constitution permits a state to make its law applicable to cases having foreign elements only if the state has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."¹⁴⁵ An ESL may sometimes serve as the jurisdictional hook on which the

¹⁴¹ See R3 TD3 § 5.06 cmt. k.

¹⁴² For a related but distinct argument that determining a law's external scope is very different from determining its internal (or domestic) scope, see Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 417–23 (1980).

¹⁴³ RESTATEMENT (FOURTH) OF THE FOREIGN RELS. L. OF THE U.S. § 407 (AM. L. INST. 2018).

¹⁴⁴ For example, a state has jurisdiction to prescribe rules for conduct that occurs within its territory or for conduct that has certain effects within its territory. *Id.* §§ 408–409. A state also has jurisdiction to prescribe rules applicable to its own nationals, whether or not their conduct took place within, or had effects in, its territory. *Id.* § 410. A state also has jurisdiction under certain circumstances over conduct outside its territory that harms its nationals, *id.* § 411, or is directed against its security or other fundamental interests, *id.* § 412. With respect to a limited set of human rights norms, states have "Universal Jurisdiction," allowing them to prescribe rules in the absence of any connection to the parties or conduct. *Id.* § 413. But, outside of that small set of cases, a connection between the state and the regulated party or conduct is required by international law.

¹⁴⁵ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (plurality opinion); see also *id.* at 332 (Powell, J., dissenting) (noting that the Due Process Clause invalidates a state's application of its own law "when there are no significant contacts between the State and the litigation"). For a discussion of other constitutional provisions imposing limits on a state's authority to make its law applicable to cases having out-of-state elements, see LEA BRILMAYER ET AL., *CONFLICT OF LAWS: CASES AND MATERIALS* 281–362 (8th ed. 2019).

state bases its legislative authority under international law or the state's constitution.

If a state's legislature enacted an ESL to reflect the limitations placed on its prescriptive jurisdiction by international law or the state's constitution, it clearly did not intend to establish any rule for cases falling outside the statute's specified scope. In the view of the legislature, the state lacked the *power* to extend its law to cases excluded from the statute's scope. Even within the limits imposed by international law and the state's constitution, the state likely decided to limit its law to cases having certain links to the state for reasons of interstate or international comity. The legislature may have chosen the jurisdictional hook in order to coordinate application of laws on a particular issue at the interstate or international level with other states having a different substantive rule on the topic. It may have wished to signal to other states with a different substantive law on the issue that it would welcome application of their law on the topic on the basis of the same sort of jurisdictional hook. It may have wished to avert interstate or international friction that would result from exercising legislative authority over persons or conduct having a closer connection to other states.¹⁴⁶ Or it may simply have been uncertain about the appropriateness of its substantive rule for cases lacking the specified connection to its territory.¹⁴⁷

B. *The Test of Alternatives*

Professor Patrick Kinsch offers the following test for distinguishing between ISLs (which he calls self-limiting provisions¹⁴⁸) and choice-of-law rules:

If we are dealing with a conflict of laws rule that determines the applicability of a norm, the choice is between the application of that norm and the application of the substantive norm of a *different* legal system; if we are dealing with a self-limited law, the choice is between the application of that norm and the application of another norm of *the same* legal system.¹⁴⁹

¹⁴⁶ This is how the U.S. Supreme Court has explained the purpose of its rules addressing whether federal statutes should be construed to apply extraterritorially. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20–22 (1963)) (noting that the purpose of the federal presumption against extraterritoriality is “to protect against unintended clashes between our laws and those of other nations which could result in international discord”).

¹⁴⁷ Some might argue that an ESL simply reflects the enacting state's disinterest in cases lacking the specified link to the state. But this is not necessarily true. The enacting state may be interested but not interested enough to prescribe a rule that might conflict with the rule prescribed by another state. In other words, its interest in the substance of the matter may be outweighed by the benefits it thinks it can derive from accommodation of other states' substantive interests in this context. In any event, the view that the enacting state is uninterested in such cases is perfectly consistent with my claim that the enacting state does not have a rule for cases lacking the specified link to the state.

¹⁴⁸ Patrick Kinsch, *L'autolimitation implicite des normes de droit privé matériel* [*The Implicit Self-Limitation of Substantive Private Law Norms*], 92 *REVUE CRITIQUE DE DROIT INTERNATIONALE PRIVÉ* 403, 405–06 (2003) (Fr.).

¹⁴⁹ *Id.* at 410 (emphasis in original) (author's translation).

Kinsch attributes this test to German scholar Klaus Schurig, who called it the test of alternatives (*Alternativentest*).¹⁵⁰ As a way to distinguish scope limitations that function as choice-of-law rules from scope limitations that do not, this test makes a lot of sense. If a state's legislature did not mean to leave excluded cases to be governed by another law of the enacting state, the statute establishes that the enacting state does not have a rule of its own to govern the case. Such provisions function as choice-of-law rules insofar as they tell the courts that cases beyond the statute's specified scope are to be resolved under the law of another state.

Under this test, comity-based ESLs function as choice-of-law rules. As noted, they reflect the legislature's accommodation of other states' legislative authority. An ESL adopted for this reason does not reflect the legislature's preference that the substantive rule it has adopted *not* be applied to conduct or persons beyond the specified scope of the law. Most likely, the legislature would be delighted if the rule that it regards as substantively superior were applied to conduct or persons lacking the specified link to the enacting state. The most that can be said is that the legislature is agnostic about the proper rule to govern cases beyond the statute's specified scope, or is unsure about the suitability of the rule for states with different traditions, different values, or different characteristics.¹⁵¹ These are the sorts of considerations that typically underlie choice-of-law rules.¹⁵²

C. ESLs as Incomplete Choice-of-Law Rules

An ESL is undoubtedly a less complete choice-of-law rule than a rule that goes on to specify *which* other state's law does govern the case. But it is nonetheless a choice-of-law rule in the sense that its sole purpose is to convey the legislature's view that, for cases lacking the specified

¹⁵⁰ *Id.* (citing KLAUS SCHURIG, KOLLISIONSNORM UND SACHRECHT 61 (1981)). Schurig, in turn, attributes his analysis to FRANZ KAHN, 1 ABHANDLUNGEN ZUM INTERNATIONALEN PRIVATRECHT 40 (Otto Lenel & Hans Lewald eds., 1928). See also GERHARD KEGEL & KLAUS SCHURIG, INTERNATIONALES PRIVATRECHT 57 (9th ed. 2004) (describing *Alternativentest*).

¹⁵¹ A legislature might have more nefarious reasons for limiting the scope of its statutes. This possibility is discussed in section III.B, *infra* pp. 1331–40.

¹⁵² See, e.g., Alex Mills, *The Identities of Private International Law: Lessons from the U.S. and EU Revolutions*, 23 DUKE J. COMPAR. & INT'L L. 445, 472 (2013) (“[O]ne . . . fundamental value [in private international law] is . . . ‘justice pluralism’ — the acceptance that the questions of private law do not have a single ‘correct’ answer, that different societies are capable of making (and entitled to make) different decisions about such questions, and that in a world of coexisting states those differentiated determinations of the just outcome of a dispute ought to be given at least a degree of accommodation.” (footnote omitted)); Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 6 (1989) (“[T]he forum should not apply . . . forum law if this will significantly interfere with the ability of another state to constitute itself as a normative and political community and the relationship between the forum and the dispute is such that the forum should defer to the internal norms of the foreign normative community. The forum must determine under what circumstances it is obligated to subordinate its own concerns to the ability of its neighbor to create and enforce a different way of life.”).

link to the enacting state, the law of some other state should govern. Professor Morris called an ESL a “hybrid,”¹⁵³ and his characterization is apt: in outward form, an ESL is a limit on the reach of the enacting state’s substantive law, but in purpose and intended effect, it is a choice-of-law rule.

Morris recommended that legislatures use “general” choice-of-law clauses rather than unilateral ones.¹⁵⁴ Once we acknowledge that ESLs are meant to function as choice-of-law rules, however, many of these provisions may be understood in a way that dissolves Morris’s distinction between general and unilateral choice-of-law rules. An ESL indicating that a statute addressing a specific issue in tort extends to cases in which the injury occurred in the state, for example, could be understood to express the legislature’s view that this tort issue should be governed by the law of the place of injury.¹⁵⁵ So understood, the provision would function in the same way as what Morris described as a general choice-of-law provision — it would displace the state’s general choice-of-law rule for tort cases (if different).¹⁵⁶ Even so, Morris was right to suggest that a prudent legislature would avoid ESLs. Using general choice-of-law provisions rather than ESLs would avoid the confusion surrounding the latter provisions that stems from their formulation as rules of substantive scope.

* * *

In sum, most ESLs are very different from ISLs in purpose and intended effect. An ISL establishes one rule of the enacting state for included cases and a different rule of the enacting state for excluded cases.

¹⁵³ See *supra* note 128 and accompanying text.

¹⁵⁴ See *supra* note 128 and accompanying text; see also Morris, *supra* note 6, at 184.

¹⁵⁵ See Peter Hay, *Comments on “Self-Limited Rules of Law” in Conflicts Methodology*, 30 AM. J. COMPAR. L. 129, 134 (Supp. 1982) (“[A] self-limited rule of substantive law does have aspects of a conflicts rule and can perform a broader function Thus, a rule of local law can often be generalized. An example is the rule against perpetuities: its application may be regarded as limited to property situated in the forum or be generalized into a choice-of-law rule that situs law (or the law applicable to succession in a particular case) governs the descent and distribution of the decedent’s property.”).

¹⁵⁶ See *supra* notes 125–26 and accompanying text. Not all ESLs will be easily generalizable, however. For example, a law regulating liability for injuries caused by automobiles might include an ESL specifying that it applies to automobiles that have ever been used or operated in the state. *Cf. infra* notes 158–59 and accompanying text (discussing section 388 of New York Vehicle and Traffic Law). This sort of ESL would be unsuitable as a general choice-of-law rule, as it would result in the laws of many states possibly applying to the same case. If generalized, such a rule would have to be supplemented by subsidiary rules to select among the states in which the automobile has been used or operated. If not generalized as suggested in the text, an ESL would operate as a specific exception to the state’s general choice-of-law rules on the matter addressed in the statute. Thus, if the state’s general choice-of-law rule for torts directs application of forum law to the case, an ESL in a statute addressing a tort issue would modify that rule with respect to the issue addressed in the statute, instructing the courts to apply the law of another state to cases lacking the specified link to the state.

Generally speaking, a state limits the external scope of its law out of legislative modesty. The ESL reflects deference to the legislative authority of other states. ESLs are generally adopted out of a sense of interstate or international comity. It is inconsistent with these purposes to read the ESL as leaving excluded cases to be governed by a different rule of the enacting state. They should instead be understood as reflecting the legislature's view that excluded cases should be resolved under the law of another state. A rule with this purpose and effect is best understood as a choice-of-law rule. It is, admittedly, a unilateral and partial choice-of-law rule, but it is a choice-of-law rule nevertheless.

III. THE TWO-SIDED SUBSTANTIVE THEORY

The judges and scholars who deny that ESLs are choice-of-law rules understand ESLs very differently. *Budget Rent-A-Car System, Inc. v. Chappell*¹⁵⁷ is a good example. This case involved section 388 of New York's Vehicle and Traffic Law,¹⁵⁸ which provides that owners of vehicles are vicariously liable to persons injured by the vehicle.¹⁵⁹ This law includes an ESL specifying that it applies to "[e]very owner of a vehicle used or operated in this state."¹⁶⁰ In deciding whether to apply New York or Michigan law to the case, the court first identified the content of the laws of both states. Treating the ESL as if it were an ISL, the court concluded that New York had one rule for vehicles that had been "used or operated" within New York (vicarious liability) and another rule for vehicles that were neither registered in New York nor "used or operated" in New York (no vicarious liability).¹⁶¹ Because the vehicle before the court had not been used or operated in New York, the court concluded that, "under New York law, Budget is not vicariously liable to Chappell."¹⁶² The court then went on to determine whether to apply New York's no-vicarious-liability rule for vehicles not used or operated in New York or Michigan's vicarious-liability rule instead.¹⁶³ If the court had treated the ESL as a choice-of-law rule, it would have determined (a) that the only substantive law New York had on the issue was one imposing vicarious liability (the same substantive law as Michigan's), and (b) that the ESL merely reflected the New York legislature's willingness to leave it to other states to address the vicarious liability of owners of vehicles that had not been used or operated in New York. The court instead concluded that New York *did* have a law for

¹⁵⁷ 304 F. Supp. 2d 639 (E.D. Pa. 2004), *rev'd on other grounds*, 407 F.3d 166 (3d Cir. 2005).

¹⁵⁸ N.Y. VEH. & TRAF. LAW § 388(1) (Consol. 2003).

¹⁵⁹ *Chappell*, 304 F. Supp. 2d at 645-46.

¹⁶⁰ *Id.* at 645 (alteration in original) (quoting VEH. & TRAF. § 388(1)).

¹⁶¹ *Id.* at 648 (citing *Atkinson v. City of New York*, 751 N.E.2d 455, 456 (N.Y. 2001)).

¹⁶² *Id.* (emphasis added).

¹⁶³ *See id.* at 650. Michigan's law authorizing vicarious liability was subject to a damage cap, but the damage cap was, in turn, subject to an ISL that, the court held, rendered the cap inapplicable to the case. *See id.* at 648-50.

vehicles not used or operated within New York — a law *denying* vicarious liability.¹⁶⁴

This Part examines more closely the view that ESLs operate just like ISLs — that is, the view that the enacting state has one substantive rule for cases having the specified link to the enacting state and a different rule for cases lacking the specified link. Understanding ESLs as establishing one rule for persons or conduct having the specified link to the enacting state while leaving persons or conduct lacking the specified link to be governed by a different rule of the same state misconceives the likely purpose and intended effect of such provisions. As explained above, the requirement of a link to the enacting state most likely reflects the legislature’s view that cases lacking the specified link to the enacting state should be governed by the law of a different state. Section A explains why legislatures are unlikely to have intended that ESLs be treated as if they were ISLs.¹⁶⁵ The issue is ultimately one of statutory interpretation, however, and it is certainly conceivable that a legislature intended to subject excluded cases to a different rule of the same state. Section B argues that, if an ESL were so intended, it would be

¹⁶⁴ On appeal, the Third Circuit determined that the vehicle involved in this case was covered by section 388, which the New York Court of Appeals had construed more broadly. *See Budget Rent-a-Car Sys., Inc. v. Chappell*, 407 F.3d 166, 172–73 (3d Cir. 2005). But the appellate court, too, seemed to regard the ESL as bearing on whether New York law established or denied vicarious liability, rather than as a choice-of-law rule. Indeed, the Third Circuit criticized the New York Court of Appeals for its “unfortunate . . . conflat[ion of] . . . the substantive law question (the scope of the statute) with the choice-of-law issue (the extent of New York’s interest in applying the statute).” *Id.* at 173.

¹⁶⁵ Professor Michael S. Green has suggested that section 388 of the New York Vehicle and Traffic Law might reasonably be understood to establish a no-vicarious-liability rule as New York’s law for New York owners of vehicles not used or operated in New York. *See* Michael S. Green, *Federal Common Law Permissions and Federal Noughts* 14 (Wm. & Mary L. Sch., Working Paper No. 09-471, 2023), <http://ssrn.com/abstract=4482052> [<https://perma.cc/KVV8-2BLP>]. Because the statute also requires the owners of vehicles used or operated in New York to have insurance for derivative liability, he argues, the legislature might reasonably have concluded “that imposing liability on New York owners of cars not used or operated in the state would be unfair by New York lights.” *Id.* It is worth noting, however, that section 388 does not draw a distinction between New York owners and non-New York owners. Green would presumably agree that New York’s legislature did not mean to establish a no-vicarious-liability rule for non-New York owners of vehicles not used or operated in New York. Whether the statute could be read to establish a no-vicarious-liability rule for owners of vehicles not used or operated in New York, but only if the owner is from New York, is ultimately a matter of statutory interpretation. I think it is much more likely that the legislature meant to leave the issue of vicarious liability for vehicles not used or operated in New York to the law of the place where the vehicle is being used or operated. Since that state might itself have a law requiring the owner to obtain insurance, imposing vicarious liability on such owners under the law of the place where the vehicle was used or operated may not be unfair even under Green’s analysis. Even in the absence of a requirement to obtain insurance, a prudent owner would obtain insurance if the law of the place where the vehicle was used or operated imposed vicarious liability. Applying a New York no-vicarious-liability rule to such owners thus seems like a windfall. It is also worth noting that the current version of the draft Third Restatement apparently disagrees with Green’s interpretation. *See supra* notes 83–87 and accompanying text; R3 TD3 § 5.01 cmt. c, illus. 3 (posing illustration based on section 388 and concluding that such a law is not “relevant” and may not be applied to cases in which the automobile was not “used or operated” in the state).

unconstitutional in many, perhaps most, cases and could legitimately be resisted by other states as an aggressive act.

A. The Implausibility of the Two-Sided Substantive Theory

Consider a statute enacted by the Kansas legislature comprehensively regulating franchises. Suppose the statute contains an ESL specifying that the statute extends only to franchises operating in Kansas. If ESLs function like ISLs, as some courts have concluded, Kansas has one law for franchises operating in Kansas and another law for franchises operating outside of Kansas.¹⁶⁶ If so, what is the content of Kansas's law for out-of-state franchises? One possibility is that out-of-state franchises are governed by Kansas's common law.¹⁶⁷ If so, would that be Kansas's common law frozen in time as of the date of the statute's enactment, or would it be Kansas's common law as the Kansas courts might develop it over time? The former approach would risk holding out-of-state franchises to an anachronistic rule that Kansas and many (perhaps all) other states have long since abandoned. The latter approach would burden the Kansas courts with the obligation to continue to develop the state's common law regarding franchises for cases having

¹⁶⁶ A number of the decisions adopting the two-sided substantive view of ESLs involve franchise or fair-dealership statutes from a state whose law was selected by a contractual choice-of-law clause. See, e.g., *Highway Equip. Co. v. Caterpillar Inc.*, 908 F.2d 60, 62–64 (6th Cir. 1990) (refusing to apply Illinois Franchise Disclosure Act because of implied ESL, notwithstanding a contractual Illinois choice-of-law clause); *Peugeot Motors of Am., Inc. v. E. Auto Distribs., Inc.*, 892 F.2d 355, 358 (4th Cir. 1989) (refusing to apply New York Franchised Motor Vehicle Dealer Act because of an ESL, despite New York choice-of-law clause); *Baldewein Co. v. Tri-Clover, Inc.*, 606 N.W.2d 145, 153 (Wis. 2000) (“Indeed, choice-of-law provisions in dealership agreements have nothing to do with the [ESL] analysis at all.”); *Bimel-Walroth Co. v. Raytheon Co.*, 796 F.2d 840, 841–43 (6th Cir. 1986).

¹⁶⁷ This is the approach favored by Professor Robert Sedler. See Robert A. Sedler, *Functionally Restrictive Substantive Rules in American Conflicts Law*, 50 S. CAL. L. REV. 27, 35 (1976) (“[I]n [a] conflicts situation, where [a] statute is construed as constituting a functionally restrictive substantive rule, the common law rule is applicable to the decision of the case.”); see also DICKINSON, *supra* note 12, at 138; *Highway Equip. Co.*, 908 F.2d at 64 (refusing to apply Illinois Franchise Disclosure Act because of implied ESL, notwithstanding a contractual Illinois choice-of-law clause, and applying Illinois common law instead); *Peugeot Motors of Am.*, 892 F.2d at 358 (refusing to apply New York Franchised Motor Vehicle Dealer Act because of an ESL, despite New York choice-of-law clause, and applying New York common law instead). Professor Kurt Lipstein, on the other hand, concluded that “[s]uch a solution displays a touch of the unreal.” Lipstein, *supra* note 121, at 893.

only a limited connection to Kansas.¹⁶⁸ The legislature is unlikely to have intended either approach.¹⁶⁹

Other courts have taken a different approach to determining the content of a state's law for cases lacking the specified link to the enacting state. They have concluded that a state's law for such cases is nonregulation — anything goes.¹⁷⁰ In our hypothetical involving the Kansas Franchise Act, a court taking this approach would say that the law of Kansas for franchises operating outside of Kansas is that everything is permitted.¹⁷¹ But this is an even less plausible interpretation of the ESL than one that leaves excluded cases to be governed by the state's common law. Statutes are usually thought to build upon the state's common law, changing it where necessary.¹⁷² Thus, if the legislature did intend that excluded cases be governed by another rule of the enacting state, it would seem to follow that cases beyond the territorial reach of the

¹⁶⁸ The Kansas courts will be developing their common law rules in cases not involving franchises, but these decisions will not take into account the particular issues that arise in the context of franchises. Perhaps the court would conclude that Kansas's common law for out-of-state franchises should be informed by the policies reflected in the Kansas Franchise Act. A court that does so would appear to be reading the ESL as not reflecting the statute's minimum external scope, a possibility considered and endorsed in section IV.B.1, *infra* pp. 1347–50.

¹⁶⁹ Moreover, Kansas's common law can supply Kansas's substantive law for cases lacking the specified link to Kansas only if the common law rule is not *also* territorially limited. A key insight of governmental interest analysis, as developed by Currie and applied by the courts, was that courts should construe both statutes and common law rules to determine their applicability to multistate cases. BRAINERD CURRIE, *The Verdict of Quiescent Years*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 584, 627 (1963) (“[T]he method I advocate is the method of statutory construction, and of interpretation of common-law rules, to determine their applicability to [multi-state] cases.”). The draft Third Restatement has endorsed the view that a court's determination that a state does not have an interest in having its law applied is a determination that the law is subject to an implicit ESL. See R3 TD3 ch. 5, topic 1, intro. note.

¹⁷⁰ This appears to have been the conclusion reached by the court in *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376 (7th Cir. 2003), in which the court denied the plaintiffs the protection of the franchise statute of Illinois (the state whose law was selected in the contractual choice-of-law clause) on the ground that the contract was beyond the law's specified territorial scope, but did not go on to consider whether the plaintiff would have been protected by Illinois's common law. See *id.* at 386. The court's analysis was similar in *Banks v. Ribco, Inc.*, 933 N.E.2d 867 (Ill. App. Ct. 2010), in which the court decided that Illinois law applied to the case and then denied liability because the Illinois statute provided for liability only if the injury occurred in Illinois (and the injury had occurred in Iowa). See *id.* at 873. But see Dodge, *supra* note 28, at 1426 (criticizing this decision for “ironically appl[ying] Illinois's policy of non-liability extraterritorially in Iowa, leaving the injured party without a remedy,” even though Iowa law provided for liability).

¹⁷¹ This appears to have been the draft Third Restatement's understanding in earlier iterations of its provisions on contractual choice-of-law clauses. See RESTATEMENT (THIRD) OF CONFLICT OF L. § 8.04 cmt. g (AM. L. INST., Preliminary Draft No. 5, 2019) (“When the parties select a scope-limited law that excludes them or their transaction, . . . the effect of the choice is not to opt in to one rather than another State's regulatory regime but rather to opt out of regulation entirely.”).

¹⁷² For a classic statement of this view, see RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 489 (7th ed. 2015) (“Congress acts . . . against the background of the total *corpus juris* of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.”).

statute are to remain governed by the state's common law. To conclude that Kansas's law for out-of-state franchises is one prescribing unfettered freedom of action would require an interpretation of the statute as preempting the field, displacing the preexisting common law for both included and excluded cases, and then prescribing nonregulation as the law of Kansas for excluded cases. This is a highly implausible understanding of what the legislature had in mind when it comprehensively regulated franchises but limited the statute's reach to cases having specified links to Kansas. It is far more likely that the legislature did not intend to establish any rule for out-of-state franchises, but instead meant to leave them to be governed by the law of other states.

The foregoing analysis rests on what may seem to be a very subtle distinction between (a) Kansas having a law prescribing complete freedom of action with respect to a given matter, and (b) Kansas having no law on the matter for cases lacking the specified connection to Kansas. The distinction is indeed subtle, but it is important.¹⁷³ If the United States has a federal statute prohibiting fraud in the sale of securities but limits the statute's scope to securities sold in the United States,¹⁷⁴ we do not say that the United States has a law *permitting fraud* in the sale of securities sold on foreign markets. If New York has a law prohibiting murder but makes it applicable only to murders taking place within New York, we do not say that New York has a law *permitting* murder in New Jersey.

Proponents of the two-sided substantive view might seek to reject this distinction on the basis of the truism that whatever is not legally prohibited is legally permitted. Scholars have indeed cited this "familiar closure rule"¹⁷⁵ as a reason to conclude that legal systems are complete normative systems, having no gaps.¹⁷⁶ As then-Professor Hersch Lauterpacht put the point in defending the completeness of international law:

The absence of direct legal regulation of a particular matter is the result of the determination, or at any rate the acquiescence, of the community in the view that, in the particular case, the needs of society and the cause of justice are best served by freedom from interference. To that extent it may correctly be said that the absence of explicit legal regulation is tantamount to an implied recognition of legally protected freedom of action.¹⁷⁷

¹⁷³ Green has usefully coined the term "noughting" to describe what I have been referring to here as a state "having no law" on a given matter, and he distinguishes noughting statutes from statutes that are properly construed as permitting the conduct the statute does not prohibit. *See* Green, *supra* note 165, at 4.

¹⁷⁴ *See* *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 264–65 (2010) (interpreting U.S. securities statute that way).

¹⁷⁵ JOSEPH RAZ, *THE AUTHORITY OF LAW* 76 (1979).

¹⁷⁶ *See, e.g., id.* Professor Joseph Raz concludes that, because of closure rules such as the one mentioned in the text, "there are no gaps when the law is silent." *Id.* at 77.

¹⁷⁷ H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 392 (1933).

The principle that what is not prohibited is permitted may well serve as a gap-filler *within* legal systems. (Note Lauterpacht's references to a given "community" or "society."¹⁷⁸) It is why we can say, for example, that a state that bans vehicles in parks implicitly permits vehicles outside of parks. But the claim does not hold true *between* legal systems. If New York prohibits intentional unprivileged killings but extends that prohibition only to killings occurring in New York, the scope limitation *does not* reflect the New York community's determination that persons enjoy "legally protected freedom" to kill outside New York. Even the hypothesized New York law permitting unfettered use of vehicles outside of parks is presumably subject to an implicit ESL. It would be a mistake to read that ISL to reflect New York's determination to permit unfettered use of vehicles outside of parks *in New Jersey*. New York should be understood to have limited the external scope of its law penalizing intentional unprivileged killings, as well as its law permitting unfettered use of vehicles outside of parks, *out of deference to the legislative authority of other states*. Usually, another state's law will attach legal consequences to the act or omission. If the laws of the other relevant states are also subject to ESLs and the case before the court falls between the cracks of these rules, there may well be a legal gap.¹⁷⁹ But to say that there is a gap is not to say that such killings are legally permitted. Quite the opposite — a legal gap denotes that the conduct is neither legally prohibited *nor* legally permitted.¹⁸⁰ How courts should decide a case when faced with such lacunae is discussed further in Part IV. But the difficulty of this question should not obscure the fact that New York's murder statute does not establish *as New York's law* for cases lacking the specified link to New York a "legally protected freedom" to commit murder in New Jersey. The ESL is more plausibly understood to mean that New York *has no law* for cases lacking the specified link to New York.¹⁸¹

B. The Unconstitutionality of the Two-Sided Substantive Theory

Whether an ESL purports to relegate excluded cases to another rule of the enacting state is, in the end, a question of statutory interpretation. It is conceivable that a legislature might enact an ESL not for reasons of comity or deference to other states, but for more nefarious reasons.

¹⁷⁸ See also RAZ, *supra* note 175, at 63 (noting that a legal statement, including a statement about legal "[p]ermissions, duties and powers," "is not a statement of law in the abstract but a statement of English law or of German law, etc.>").

¹⁷⁹ Alternatively, one might say that the forum's choice-of-law rules close the legal gap by incorporating or adopting another state's substantive rules for the case at hand. See *infra* note 295 and accompanying text.

¹⁸⁰ See RAZ, *supra* note 175, at 58 (noting that a legal permission closes the legal gap).

¹⁸¹ *But cf. infra* section IV.B.2, pp. 1350–52 (suggesting, as an alternative view consistent with my overall thesis, that ESLs could be understood as procedural rules instructing forum courts to apply the law of another state to cases lacking the specified link to the state).

Consider a statute that establishes a remedy for certain types of injuries but says that it extends only to injuries suffered by domiciliaries of the state.¹⁸² I argued above that the legislature should not be understood to have established as the law of the state that nondomiciliaries have no remedy. Rather, it should be understood to have left cases involving nondomiciliaries to the laws of other states. But perhaps the legislature *did* want nondomiciliaries to be denied a remedy. Maybe the legislature meant to favor domiciliaries and to *disfavor* nondomiciliaries. We might call this a protectionist law.¹⁸³

That some legislatures might desire to protect only in-state persons or businesses cannot be ruled out. The legislative process is often characterized by logrolling and rent-seeking activity in which, for obvious reasons, out-of-staters are likely to be at a disadvantage.¹⁸⁴ Some courts embracing the two-sided substantive theory have candidly recognized that the legislature that enacted the statute before it intended to limit the statute's benefits to residents or domiciliaries of the state.¹⁸⁵ If a legislature did mean to enact a protectionist ESL, however, the resulting legislative regime would very likely be unconstitutional in most cases, at least in the interstate context. This section first considers constitutional problems with a two-sided substantive understanding of ESLs specifying that a statute applies only to persons or entities affiliated in some way with the state. It then considers constitutional problems with a two-sided substantive understanding of ESLs specifying that the law extends only to conduct occurring within the state.¹⁸⁶

¹⁸² See NUSSBAUM, *supra* note 115, at 70 (citing, as an example of a spatially conditioned internal rule, "an exemption statute [that] reserve[s] its benefits to local residents").

¹⁸³ See Larry Kramer, *The Myth of the "Unprovided-For" Case*, 75 VA. L. REV. 1045, 1067–68 (1989).

¹⁸⁴ See Kermit Roosevelt III, *Brainerd Currie's Contribution to Choice of Law: Looking Back, Looking Forward*, 65 MERCER L. REV. 501, 510 (2014) ("It is plausible — it's a basic tenet of political and constitutional theory — that legislatures look after the interests of those who have a voice in the political process.").

¹⁸⁵ See, e.g., *Highway Equip. Co. v. Caterpillar, Inc.*, 908 F.2d 60, 63 (6th Cir. 1990) ("[When] the Illinois legislature reenacted . . . the [Illinois] Franchise Disclosure Act of 1987 . . . [it] confirmed that the statute is intended to protect Illinois residents only."); *Bimel-Walroth Co. v. Raytheon Co.*, 796 F.2d 840, 842–43 (6th Cir. 1986) ("[T]he legislative history of [an amendment to a Wisconsin Franchise statute] makes it abundantly clear that the language was intended to ensure that [the statute] would only be applied to Wisconsin dealers, or those geographically 'situated' in Wisconsin, who were the desired beneficiaries of the legislation . . ."). Indeed, some legislatures have clearly expressed an intent that the statute not be applied beyond its specified scope even if the contract selects the law of the state as the applicable law. See *Diesel Serv. Co. v. Ambac Int'l Corp.*, 961 F.2d 635, 638 (7th Cir. 1992) (discussing legislative history of Wisconsin Franchise Dealer Law), *overruled on other grounds by Generac Corp. v. Caterpillar Inc.*, 172 F.3d 971, 974–75 (7th Cir. 1999).

¹⁸⁶ In the international context, a state's attempt to relegate cases lacking connections to the state to a rule that it has abandoned for internal cases may not be unconstitutional, but might legitimately be resisted by other states as an unfriendly act. See *infra* note 243.

I. *Person-Territorial ESLs*.¹⁸⁷ —

(a) *Equal Protection/Privileges and Immunities Clauses*. — Consider again a statute that establishes a remedy for certain classes of injuries but extends only to injuries suffered by those domiciled in the state.¹⁸⁸ If the statute is read to enact one rule for domiciliaries of the state and a different, less favorable rule for nondomiciliaries, the resulting regime would in most cases be unconstitutional.¹⁸⁹ Support for this conclusion comes from an unlikely source: Brainerd Currie. Currie is an unlikely source because interest analysis has been criticized precisely on the ground that it discriminates against nondomiciliaries.¹⁹⁰ Currie generally assumed that a state was interested in having its law applied to a case if the policy advanced by the law would operate in favor of a domiciliary.¹⁹¹ Thus, if the purpose of a law is to protect hosts from ungrateful guests, the state has an interest in having its law applied if the host is a domiciliary. For Currie, then, such a law would effectively extend to domiciliaries but not to nondomiciliaries. This disparate treatment of nondomiciliaries has led to charges that Currie's governmental-interest analysis discriminates against out-of-staters in violation of the Privileges and Immunities Clause and the Equal Protection Clause of the U.S. Constitution.¹⁹²

The most persuasive rebuttal to this constitutional objection begins by denying that the enacting state has, through its ESL, enacted a law denying nondomiciliaries the benefits that its law provides for domiciliaries. Because the ESL is based on deference to the legislative authority of other states, the enacting state *does not have a substantive law* for

¹⁸⁷ This term refers to ESLs providing that a statute extends to persons having certain affiliations with the enacting state. I use the term “act-territorial” to describe ESLs providing that the statute extends to acts occurring in the state. See *supra* note 4.

¹⁸⁸ See *supra* note 182 and accompanying text.

¹⁸⁹ Not all distinctions based on a person's affiliation with the state will be invalid in all circumstances. For example, it is well established that political rights can be restricted to citizens. See, e.g., International Covenant on Civil and Political Rights, art. 25, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). More broadly, statutes conferring public benefits can generally be restricted to persons having some affiliation with the enacting state, although the U.S. Constitution imposes some limits. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (holding that the fundamental right to travel and the Equal Protection Clause forbid a state from reserving welfare benefits only for persons that have resided in the state for at least a year).

¹⁹⁰ See, e.g., Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 250, 269–70 (1992); John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 179, 183 (1981).

¹⁹¹ See BRILMAYER ET AL., *supra* note 145, at 199–200.

¹⁹² See sources cited *supra* note 190. Currie anticipated and responded to such criticisms in two separate articles. See Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960) [hereinafter Currie & Schreter, *Privileges and Immunities*]; Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960).

nondomiciliaries.¹⁹³ Currie himself rested the constitutionality of his approach on the idea that limitations on the scope of state laws were based on comity:

Differential treatment of the citizen and the foreigner . . . may . . . violate the privileges-and-immunities clause or the equal-protection clause of the Constitution. Yet differential treatment of some sort is essential if laws are to be rationally administered and if the state is to maintain a decent respect for the legitimate spheres of responsibility of other states.¹⁹⁴

After a comprehensive examination of the constitutional issues, Currie concluded:

[A] classification excluding some citizens of other states may be reasonable if it distinguishes among persons according to whether or not they are so protected by the laws of their home states. The validity of such a classification . . . is . . . supported by the consideration that such a classification evinces no provincial or hostile attitude toward citizens of other states, but reasonably distinguishes between those persons who are regarded by their home states as needing special protection and those who are not.¹⁹⁵

Professor Larry Kramer's analysis is similar. He argues that the Privileges and Immunities Clause bars distinctions based on state residency when such distinctions are designed "to obtain an advantage for residents at the expense of nonresidents."¹⁹⁶ But distinctions based on state residency are not problematic when they serve a "substantial non-protectionist objective."¹⁹⁷ ESLs that limit the benefit of state laws to residents are generally permissible when "the justification for limiting the scope of [such] law[s] . . . is comity."¹⁹⁸ In such cases, the scope limitation "is a means of accommodating the interests of other states,"¹⁹⁹ which is permissible because "reducing interstate friction is the central purpose of the privileges and immunities clause."²⁰⁰ "A state may withhold the benefits of its law [from nonresidents] in order to apply the law

¹⁹³ Even if so understood, Currie's interest analysis might still be vulnerable to the objection that it discriminates against nondomiciliaries because it relegates them to their home state's law only when doing so disadvantages them. See Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 415 (1980). More broadly, antiformalists would surely be unconvinced that interest analysis is constitutional because it does not establish that the enacting state has a law imposing a less favorable rule for nondomiciliaries. If a state's choice-of-law rule operates systematically to relegate nondomiciliaries to a less favorable law than domiciliaries, it might be argued, the rule is as unconstitutional as if the state had enacted a less favorable law for nondomiciliaries as its own law. Indeed, adherents of the "local law" theory would see no difference between the two situations. See *infra* section IV.B.3, pp. 1353–55. If so, then my discussion of the unconstitutionality of a state prescribing different rules of the enacting state for domiciliaries and nondomiciliaries can be taken as a thought experiment that helps establish the unconstitutionality of (some applications of) interest analysis.

¹⁹⁴ See Currie & Schreter, *Privileges and Immunities*, *supra* note 192, at 1324 (footnotes omitted).

¹⁹⁵ *Id.* at 1391.

¹⁹⁶ Kramer, *supra* note 183, at 1066.

¹⁹⁷ *Id.* at 1067.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1067–68.

of another interested state, but not otherwise.”²⁰¹ Thus, Kramer, like Currie, concludes that states do not violate the Constitution when they restrict the scope of their laws to domiciliaries out of deference to the legislative authority of the state of domicile. But both would conclude that an ESL would be unconstitutional if meant to deny nondomiciliaries an advantage granted to domiciliaries. On this analysis, an ESL understood to establish an unfavorable rule for nondomiciliaries *as the law of the enacting state* would be unconstitutional.

(b) *Full Faith and Credit Clause*. — The Supreme Court’s decision in *Franchise Tax Board v. Hyatt*²⁰² (*Hyatt II*) shows that a state law subjecting out-of-state persons or entities to a different, less favorable substantive rule would also violate the Full Faith and Credit Clause. In *Hyatt*, a Nevada resident sued California tax authorities in the Nevada courts, alleging several intentional torts.²⁰³ California law gave tax authorities absolute immunity from these intentional tort claims.²⁰⁴ Nevada law permitted these claims but subjected them to a \$50,000 damage cap.²⁰⁵ In *Franchise Tax Board v. Hyatt*²⁰⁶ (*Hyatt I*), the Supreme Court upheld the Nevada court’s decision not to apply California’s absolute immunity rule.²⁰⁷

On remand, the Nevada court declined to give California’s tax authorities the benefit of the \$50,000 damage cap provided by Nevada law.²⁰⁸ This damage cap, the Nevada court explained, was applicable only to *Nevada* tax authorities.²⁰⁹ This time, the U.S. Supreme Court held that Nevada had violated the Full Faith and Credit Clause.²¹⁰ In the terms we have been using, the Nevada court construed the Nevada statute imposing a \$50,000 cap on damages as being subject to an ESL — it applies only to the tax authorities *of the state of Nevada*. Moreover, it construed this ESL in the two-sided substantive sense — that is, as establishing a different substantive rule *of Nevada law* applicable to out-of-state taxing authorities (that is, a rule *allowing* recovery without a damage cap). Establishing a special rule for out-of-state cases, the Court concluded, violates the Full Faith and Credit Clause:

²⁰¹ *Id.* at 1068.

²⁰² 136 S. Ct. 1277 (2016).

²⁰³ *See id.* at 1279–80. The suit was brought before the Court held (in a later appeal in *Hyatt* itself) that state instrumentalities are constitutionally entitled to sovereign immunity from suit in the courts of sister states. *See Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (*Hyatt III*) (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)). The sovereign immunity holding of *Hyatt III* does not call into question the Full Faith and Credit holdings of *Hyatt I* and *Hyatt II*.

²⁰⁴ *Hyatt II*, 136 S. Ct. at 1280.

²⁰⁵ *Id.*

²⁰⁶ 538 U.S. 488 (2003).

²⁰⁷ *Id.* at 499.

²⁰⁸ *Hyatt II*, 136 S. Ct. at 1280.

²⁰⁹ *See id.*

²¹⁰ *Id.* at 1283.

Nevada has not applied the principles of Nevada law ordinarily applicable to suits against Nevada's own agencies. Rather, it has applied a special rule of law applicable only in lawsuits against its sister States, such as California. With respect to damages awards greater than \$50,000, the ordinary principles of Nevada law do not "conflic[t]" with California law, for both laws would grant immunity. Similarly, in respect to such amounts, the "polic[ies]" underlying California law and Nevada's usual approach are not "opposed"; they are consistent.

But that is not so in respect to Nevada's special rule. That rule, allowing damages awards greater than \$50,000, is not only "opposed" to California law; it is also inconsistent with the general principles of Nevada immunity law. . . . A constitutional rule that would permit this kind of discriminatory hostility is likely to cause chaotic interference by some States into the internal, legislative affairs of others.²¹¹

Because Nevada's special rule for out-of-state tax authorities "reflects a constitutionally impermissible 'policy of hostility to the public Acts' of a sister State,"²¹² the Court concluded, the rule violates the Full Faith and Credit Clause.

The Court thus held that a state's courts may apply its own local law, disregarding ESLs. The Court called these the "ordinary principles of Nevada law,"²¹³ by which it meant the principles that Nevada applies to local cases. The Court also recognized that a court may apply its sister state's local law (meaning, in this case, California's law of absolute immunity).²¹⁴ But it generally may not fashion a special rule to cover only out-of-state cases.²¹⁵ The Court did not completely rule out the possibility that a state could provide "sufficient policy considerations" for such a special rule that did not reflect disparagement or hostility towards sister states,²¹⁶ but it gave no clue as to what such policy considerations would look like. Presumably, a special rule for multistate cases of the sort proposed by Professor Arthur von Mehren,²¹⁷ carefully

²¹¹ *Id.* at 1282 (alteration in original) (citations omitted) (quoting *Carroll v. Lanza*, 349 U.S. 408, 412-13 (1955)) (citing *Hyatt I*, 538 U.S. at 499).

²¹² *Id.* at 1282-83 (quoting *Hyatt I*, 538 U.S. at 499).

²¹³ *Id.* at 1282.

²¹⁴ *See id.* at 1283.

²¹⁵ *See id.*; *see also infra* note 233 and accompanying text.

²¹⁶ *See Hyatt II*, 136 S. Ct. at 1282 (quoting *Carroll*, 349 U.S. at 413).

²¹⁷ Arthur Taylor von Mehren, Comment, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347, 356 (1974). Professor von Mehren encouraged states to enact special substantive rules for multistate situations to address problems that arise in such contexts but do not arise in a purely local case. *See id.* Some scholars have lumped this type of law in the same category as laws having an ESL, e.g., Lipstein, *supra* note 121, at 885, but, at least for present purposes, the two types of laws are very different. A special rule for multistate cases would not be a choice-of-law rule under the test of alternatives: the enacting state would have one law for domestic cases and a different rule for multistate cases. Indeed, even a special rule for multistate cases will usually be applicable only if the multistate case has some link to the enacting state. The provision limiting application of the special rule for multistate cases to cases having specified links to the enacting state would be an ESL and thus a choice-of-law rule under the test of alternatives.

tailored to account for the special characteristics of such cases, would pass muster.²¹⁸ But, in light of the above analysis, it is difficult to conceive of valid policy reasons that would justify a statute that establishes as the state's rule for out-of-state cases the common law rules that it has abandoned for in-state cases, or that simply prescribes nonregulation for such cases.

2. *Act-Territorial ESLs*. — The Privileges and Immunities and Equal Protection Clauses are less directly relevant to the validity of ESLs that draw distinctions based on the place where certain events occurred. The Court's holding in *Hyatt II* that a state violates the Full Faith and Credit Clause when, in the absence of good reasons, it creates a special rule for out-of-state cases that differs from its own local law would appear to extend to ESLs based on the location of conduct. But *Hyatt II* itself concerned an ESL based on the out-of-state affiliation of the regulated entity.

(a) *Due Process Clause*. — Even if an ESL based on the location of events would not violate the Full Faith and Credit Clause, however, it would be suspect under other constitutional provisions. Consider a Minnesota statute establishing a remedy for certain types of injuries but having an ESL specifying that it applies only to injuries suffered in Minnesota. If the statute were understood to establish a no-remedy rule for injuries suffered outside of Minnesota, it would likely violate the Due Process Clause. Under the Due Process Clause, a state may extend its law to a dispute if it has “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”²¹⁹ Facially, a law denying relief based solely on the fact that the injury did *not* occur in the state would appear to violate that standard. With respect to injuries suffered outside the state, the applicability of the state's no-remedy rule would turn on the *absence* of contacts with the state.²²⁰

Of course, there will be cases in which the injury did not occur in Minnesota but the state has sufficient contacts to make its law

²¹⁸ In encouraging development of special rules for multistate problems, von Mehren cautioned that “the principle of equality requires that a legal order not distinguish between the treatment of localized and multistate situations or transactions unless the circumstances are such as clearly to justify departing from the norm represented by domestic-law solutions.” Von Mehren, *supra* note 217, at 357.

²¹⁹ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981); *see also id.* at 332 (Powell, J., dissenting) (noting that the Due Process Clause invalidates a state's application of its own law “when there are no significant contacts between the State and the litigation”).

²²⁰ The district court in *Budget Rent-a-Car* noted the problems under the Due Process Clause with extending New York's vicarious liability law to a case having scant connections with New York. *Budget Rent-A-Car Sys., Inc. v. Chappell*, 304 F. Supp. 2d 639, 647 (E.D. Pa. 2004), *rev'd on other grounds*, 407 F.3d 166 (3d Cir. 2005). But the court overlooked the due process problems with its conclusion that New York prescribed a *different law* for such cases — one insulating the owner from vicarious liability. *See id.* at 648.

applicable consistent with the Due Process Clause.²²¹ But for such cases, there is a lingering due process problem: prescribing a different substantive rule for conduct occurring outside the state would be arbitrary or irrational.²²² The state would be establishing a law either consisting of the antiquated common law rules that it has rejected domestically, or simply prescribing nonregulation, solely on the ground that the conduct did not occur within the state's territory. It is difficult to conceive of a rational and legitimate policy that would be advanced by such a law. Comity would be a valid reason to limit the scope of the law to cases in which the injury occurred in Minnesota, but a limitation based on comity would not establish a different rule for out-of-state cases. There may be valid reasons in certain circumstances to prescribe a different rule for some cases involving out-of-state conduct.²²³ More generally, a state might validly decide to establish a special substantive rule for multistate situations to address special problems that arise in such contexts but do not arise in a purely local case.²²⁴ But a state that establishes an anachronistic common law rule that it has displaced for local cases as its special rule for conduct occurring outside the state, or that prescribes nonregulation for such cases, would very likely be acting arbitrarily or irrationally.

(b) *Dormant Commerce Clause.* — Such an ESL would also be vulnerable under the branch of dormant commerce clause doctrine that invalidates state regulation of “conduct occurring wholly outside the state.”²²⁵ This so-called extraterritoriality branch of dormant commerce clause doctrine has been criticized by judges and scholars,²²⁶ and was recently pared back by the Supreme Court in *National Pork Producers Council v. Ross*.²²⁷ The claim that the Constitution forbids all extraterritorial regulation is clearly implausible. States will often, and

²²¹ Perhaps the injury did not occur in Minnesota but the conduct causing the injury did.

²²² See *Nebbia v. New York*, 291 U.S. 502, 536–37, 537 n.39 (1934) (listing cases where “the requirements of due process were not met because the laws were found arbitrary in their operation and effect”).

²²³ For example, a statute treating out-of-state cases more favorably because of the added difficulty of litigating from a greater distance would be rational. Cf. NUSSBAUM, *supra* note 115, at 71 (giving as an example of a spatially limited substantive rule “a statute of limitation . . . provid[ing] special periods for action on documents executed abroad” (citing *Michelin Tire Co. of Cal. v. Coleman & Bentel Co.*, 178 P. 507 (Cal. 1919))).

²²⁴ See generally von Mehren, *supra* note 217.

²²⁵ *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 582 (1986) (quoting *U.S. Brewers Ass'n v. Healy*, 692 F.2d 275, 279 (2d Cir. 1982)).

²²⁶ See *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1170 (10th Cir. 2015) (then-Judge Gorsuch describing the extraterritoriality branch of the dormant commerce clause as “the most dormant doctrine in dormant commerce clause jurisprudence”); Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 LA. L. REV. 979, 995 (2013) (“In the space of a decade and a half, extraterritoriality went from being a potentially robust limit on the power of states to extend their regulatory reach into other states to a narrow limit on the power to regulate prices in other jurisdictions. . . . What killed extraterritoriality or, at least, limited it significantly?”).

²²⁷ 143 S. Ct. 1142 (2023).

uncontroversially, extend their laws to “conduct occurring wholly outside the state” if the dispute has other connections with the state.²²⁸ For this and other reasons, the Court in *National Pork Producers* rejected the claim that the dormant commerce clause imposes a “*per se* [non-] extraterritoriality rule.”²²⁹ As the majority wrote: “In our interconnected national marketplace, many (maybe most) state laws have the ‘practical effect of controlling’ extraterritorial behavior.”²³⁰

But the two-sided substantive understanding of ESLs presents perhaps the strongest case for objecting to legislation on the ground that it operates extraterritorially, and the extraterritoriality branch of the dormant commerce clause doctrine appears to have survived the *National Pork Producers* decision insofar as it invalidates this sort of provision. The pre-*National Pork Producers* cases decided under this branch of the dormant commerce clause invalidated state legislation as impermissibly extraterritorial under certain circumstances when the state “*project[s] its legislation into [other States].*”²³¹ The Court in *National Pork Producers* made clear that it was rejecting the petitioners’ argument that “any question about the ability of a State to project its power extraterritorially must yield to an ‘almost *per se*’ rule under the dormant Commerce Clause.”²³² But a legislature that enacts a two-sided substantive ESL is not seeking to regulate out-of-state conduct through the extraterritorial “projection” of the same substantive law that the state applies to in-state conduct. Instead, it is creating a special rule applicable *only* to out-of-state conduct.²³³ This would appear to be the epitome of an impermissibly extraterritorial law. If an ESL establishes a different rule purely for cases involving out-of-state conduct, the portion of the law that applies to the out-of-state conduct is, by definition, one that regulates *only* “conduct occurring wholly outside the state.”²³⁴ Even the pre-*National Pork Producers* courts that regarded the extraterritoriality branch of the dormant commerce clause as moribund

²²⁸ See, e.g., *Tooker v. Lopez*, 249 N.E.2d 394, 398 (N.Y. 1969) (applying New York law to accident occurring entirely outside New York).

²²⁹ *Nat'l Pork Producers*, 143 S. Ct. at 1171 (Roberts, C.J., concurring in part and dissenting in part) (agreeing with the plurality’s rejection of such a *per se* rule); see also *id.* at 1156 (majority opinion).

²³⁰ *Id.* at 1156.

²³¹ *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 583 (1986) (second alteration in original) (emphasis added) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935)).

²³² *Nat'l Pork Producers*, 143 S. Ct. at 1157 (first emphasis omitted).

²³³ This was precisely the Supreme Court’s objection to the Nevada law in *Hyatt II*. See *supra* p. 1336.

²³⁴ *Brown-Forman Distillers Corp.*, 476 U.S. at 582 (quoting *U.S. Brewers Ass’n v. Healy*, 692 F.2d 275, 279 (2d Cir. 1982)).

acknowledged that the clause invalidates laws “directed at interstate commerce and *only* interstate commerce.”²³⁵

The *National Pork Producers* decision appears to recognize that such a law remains invalid under the dormant commerce clause. In distinguishing *Healy v. Beer Institute*,²³⁶ the Court stressed that, “[b]y its plain terms, the Connecticut affirmation statute applie[d] *solely* to interstate’ firms.”²³⁷ If a statute that applies only to interstate firms is impermissibly extraterritorial, then a fortiori a statute that applies only to out-of-state firms (or conduct) is as well. In invalidating statutes that subject out-of-state conduct to different rules than in-state conduct without good reason, the dormant commerce clause dovetails with the Full Faith and Credit Clause, which, as the Court established in *Hyatt II*, similarly invalidates statutes that create a “special rule” for out-of-state entities.²³⁸ What remains of the extraterritoriality branch of the dormant commerce clause also dovetails with the cases establishing that the clause invalidates commercial legislation that discriminates against interstate commerce,²³⁹ a line of cases that the Court in *National Pork Producers* forcefully reaffirmed as “[l]ying] at the ‘very core’ of [its] dormant Commerce Clause jurisprudence.”²⁴⁰

* * *

In sum, it is unlikely that a legislature that enacts an ESL understands it to relegate persons or conduct lacking the specified connection to the enacting state to a different rule of the enacting state — be it the common law rule that the legislature has found inappropriate for in-state cases or simply nonregulation. If the legislature does have such an intent, the resulting legal regime would pose severe constitutional problems in interstate cases. Some statutes distinguishing among the types of affiliations a person might have with the enacting state might be valid in certain circumstances,²⁴¹ as might a statute establishing a special rule for multistate cases that addresses legitimate differences between such

²³⁵ *Nat’l Pork Producers Council v. Ross*, 6 F.4th 1021, 1030 (9th Cir. 2021) (emphasis added) (quoting *Nat’l Collegiate Athletic Ass’n v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993)), *aff’d*, 143 S. Ct. 1142.

²³⁶ 491 U.S. 324 (1989).

²³⁷ *Nat’l Pork Producers*, 143 S. Ct. at 1155 (second alteration in original) (emphasis added) (quoting *Healy*, 491 U.S. at 341).

²³⁸ *Cf. id.* at 1175–76 (Kavanaugh, J., concurring in part and dissenting in part) (intimating that the statute involved in *National Pork Producers* could violate the Full Faith and Credit Clause as well as the dormant commerce clause).

²³⁹ *See, e.g.*, *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 336–37 (1992); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978); *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (“Such facial discrimination by itself may be a fatal defect, regardless of the State’s purpose . . .”).

²⁴⁰ *Nat’l Pork Producers*, 143 S. Ct. at 1153 (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581 (1997)).

²⁴¹ *See supra* note 189.

cases and purely local cases.²⁴² But if a statute specifying that it extends to persons or conduct having certain links to the enacting state without providing a rule for excluded cases were interpreted to relegate excluded cases to a different law of the same state, the state's legal regime would in most cases be unconstitutional.²⁴³

IV. THE ONE-SIDED SUBSTANTIVE THEORY

Having rejected the view that states with statutes with ESLs have a different law for excluded cases, we are left with two theories that agree that the enacting state has no law for excluded cases. The difference between them is that one maintains and the other denies that ESLs are choice-of-law rules. The two theories have divergent implications for cases in which the forum's choice-of-law rule directs application of the enacting state's law but the selected state's law does not reach the case. Under the one-sided conflicts understanding of ESLs, the forum may apply the selected state's local law, disregarding the ESL. To the extent the forum rejects *renvoi* — as both restatements do for most cases²⁴⁴ — it will apply that law. Under the one-sided substantive view, the court must respect the enacting state's ESL. Because the enacting state has no law for cases beyond the external scope of the statute, the selected state's law is not relevant and the court has no choice but to apply the law of another state.²⁴⁵

*Hall v. Sprint Spectrum L.P.*²⁴⁶ illustrates one of the many types of differences in outcome that could result from adhering to the one-sided

²⁴² See *supra* notes 217–18 and accompanying text.

²⁴³ The objections based on the Privileges and Immunities Clause, Full Faith and Credit Clause, and dormant commerce clause would apply only in the interstate context (that is, New York versus California). The Due Process Clause objections, on the other hand, would potentially also apply to international cases (for example, New York versus France). See, e.g., *Asahi Metal Indus. Co. v. Superior Ct. of Cal.*, 480 U.S. 102, 113–14 (1987) (applying Due Process Clause limits on personal jurisdiction to an international case). In addition, a state law that affirmatively establishes a different substantive rule for nondomiciliaries than for domiciliaries might, in an international case, violate treaties of friendship, commerce, and navigation (FCN), which typically include a national treatment provision. See Herman Walker, Jr., *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 811 (1958); Friendship, Commerce, and Navigation Treaty, S. Kor.-U.S., Nov. 28, 1956, 8 U.S.T. 2217, 2232. The constitutional objections would of course not apply to ESLs in statutes of other countries. If such provisions were construed as establishing a different substantive rule for nonresidents or nondomiciliaries, however, they might violate national treatment provisions in FCN treaties and perhaps some regional trading arrangements. In addition, provisions that purport to establish a rule for non-nationals acting outside the state's territory could raise questions under general international law regarding prescriptive jurisdiction, which requires a state to have certain specified connections to the enacting state. In any event, the courts of one nation, confronted with a law of another nation that discriminates so blatantly against its domiciliaries, would be unlikely to be under a constitutional obligation to give effect to the other state's ESL. In the absence of a treaty obligation to do so, they could legitimately decline to apply such provisions because they are contrary to their public policy.

²⁴⁴ See *supra* notes 33–38 and accompanying text.

²⁴⁵ See *supra* section I.A.3, pp. 1307–11.

²⁴⁶ 876 N.E.2d 1036 (Ill. App. Ct. 2007).

substantive theory, as distinguished from the one-sided conflicts theory or the two-sided substantive theory. The trial court in *Hall* had certified a forty-eight-state class “predicated upon the application of Kansas law based on the choice-of-law provision contained in Sprint’s form contract.”²⁴⁷ Sprint argued on appeal that the certification should be reversed because the Kansas Consumer Protection Act (KCPA) “cannot be applied extraterritorially.”²⁴⁸ Noting that the contractual choice-of-law provision in Sprint’s form contract selected “the laws of the State of Kansas, without regard to choice[-]of[-]law principles,”²⁴⁹ the court rejected Sprint’s argument.²⁵⁰ “The fact that Kansas law might not otherwise apply is irrelevant, because the parties chose to apply Kansas law.”²⁵¹ The court’s conclusion was consistent with the idea that an ESL is a choice-of-law rule and is presumptively to be disregarded in interpreting contractual choice-of-law clauses under the Second Restatement’s section 187(3) (and, in this case, according to the express terms of the choice-of-law clause).²⁵² The applicability of Kansas law to all class members pursuant to the choice-of-law clause thus supported the certification of the class.²⁵³

Sprint’s argument reflected the one-sided substantive theory, as it was seeking to reverse the court’s certification of the class on the ground that different laws would have to be applied to the different class members. According to the draft Third Restatement, in the absence of affirmative evidence that the parties intended to incorporate the KCPA, the court would have had to conduct a separate choice-of-law analysis for each of the class members as if the contract did not contain a choice-of-law clause.²⁵⁴ Sprint’s argument for decertifying the class would not have prevailed if the court had adopted the two-sided substantive theory, as, under this theory, Kansas law would have been applicable to all

²⁴⁷ *Id.* at 1041.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 1040 (alterations in original).

²⁵⁰ *Id.* at 1041.

²⁵¹ *Id.*

²⁵² See R2 § 187(3).

²⁵³ *Hall*, 876 N.E.2d at 1040–41.

²⁵⁴ See *supra* note 112 and accompanying text. Indeed, the draft Third Restatement provides illustrations based on *Hall* to make clear that the case would have come out differently under the one-sided substantive approach. See R3 CD5 § 8.04 cmt. b, illus. 1; *id.* cmt. c, illus. 2; see also *id.* reporters’ note 4 (noting that the Illustrations are based on *Hall*). If the contract specifically references the KCPA, the draft Third Restatement would interpret it as incorporating the Act for cases beyond the Act’s scope, but the clause would be unenforceable if the Act conflicts with a simple mandatory rule of the state whose law would otherwise apply. See *id.* cmt. b, illus. 3 & 4. See generally *supra* section I.B.3(b), pp. 1316–17. The reporters of the draft Third Restatement argue that *Hall* was wrongly decided because the court did not make clear that the parties had “incorporated” the substance of Kansas’s scope-limited statute (which they may do) as opposed to extending the scope of Kansas’s statute (which they may not do). R3 CD5 § 8.04 reporters’ note 4. *But cf. Hall*, 876 N.E.2d at 1042 (noting that “the parties may incorporate the [scope-limited statute] into their agreement and that agreement will be given effect” (quoting *Bartlett Bank & Tr. Co. v. McJunkins*, 497 N.E.2d 398, 403 (Ill. App. Ct. 1986))).

of the class members, but the relevant Kansas rule for non-Kansas class members would have come from Kansas's common law rather than Kansas's scope-limited Consumer Protection Act.

The remainder of this Part focuses on the claim by proponents of the one-sided substantive theory that, at least in cases not involving a contractual choice-of-law clause, a court applying the law of a given state must respect an ESL in a statute of that state — meaning, according to the one-sided substantive view, that the court must apply the law of another state. Adherents of the one-sided conflicts approach do not deny that the forum has the option of treating the ESL as a reason to apply the law of another state, notwithstanding its own choice-of-law rule calling for application of the enacting state's law. They recognize that states may authorize *renvoi* for particular categories of cases. But, under the one-sided conflicts approach, the forum has another option: it may call for application of the law the enacting state would apply to purely local cases. Thus, if California's strict liability statute specifies that it only reaches injuries occurring in California, Bangladesh may instruct its courts to respect the ESL and apply Bangladeshi law if the injury occurred in Bangladesh, but it may also authorize its courts to apply California's strict liability rule. Adherents of the one-sided substantive theory insist that Bangladesh does not have this second option.²⁵⁵ In the interstate context, according to the draft Third Restatement, the second option is foreclosed by the Full Faith and Credit Clause.²⁵⁶

This Part considers and rejects two objections to the claim that the forum state may properly apply the substantive provisions of the enacting state's law to cases beyond the law's specified external scope. It first considers and rejects the constitutional objection based on the Full Faith and Credit Clause. It then considers a more fundamental rule-of-law objection, which itself may have constitutional underpinnings.

A. *The Full Faith and Credit Clause*

The draft Third Restatement maintains that a U.S. state violates the Full Faith and Credit Clause²⁵⁷ when it applies a sister state's statute “to a set of facts outside its specified scope . . . if the scope restriction is clear and has been brought to the court's attention.”²⁵⁸ Supreme Court dicta suggests that the clause is violated if the court misconstrues its sister state's law and its misconstruction “contradict[s] law of the other State that is clearly established and that has been brought to the court's

²⁵⁵ See *supra* section I.A.3, pp. 1307–11.

²⁵⁶ R₃ TD₃ § 5.02 reporters' note 1.

²⁵⁷ U.S. CONST. art. IV, § 1.

²⁵⁸ R₃ TD₃ § 5.02 reporters' note 1.

attention.”²⁵⁹ But the draft Third Restatement cites no cases involving ESLs, and the idea that one state fails to give due faith and credit to a sister state when it applies its law to cases beyond the law’s reach is counterintuitive. The argument might have some plausibility if the ESL were understood in the two-sided substantive sense, although then the ESL would be unconstitutional in most cases and should, if severable, be disregarded for that reason. If we accept that the enacting state has no law for excluded cases, however, the argument based on the Full Faith and Credit Clause collapses.

The Supreme Court has not directly addressed this question.²⁶⁰ Some decisions suggest that the Full Faith and Credit Clause does not require states to respect the localizing provisions of sister states’ laws. For example, the Court has held that the Full Faith and Credit Clause is not violated when a court entertains a cause of action created by the law of a sister state but disregards a provision in the statute purporting to limit adjudication of such actions to the courts of that state.²⁶¹ But such provisions purport to reserve *judicial* jurisdiction to the enacting state’s courts rather than limit the external reach of its substantive law.

²⁵⁹ Sun Oil Co. v. Wortman, 486 U.S. 717, 731 (1988) (citing Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 96 (1917); W. Life Indem. Co. v. Rupp, 235 U.S. 261, 275 (1914); Louisville & Nashville R.R. Co. v. Melton, 218 U.S. 36, 51–52 (1910); Banholzer v. N.Y. Life Ins. Co., 178 U.S. 402, 408 (1900); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 834–42 (1985) (Stevens, J., concurring in part and dissenting in part)).

²⁶⁰ *Hughes v. Fetter*, 341 U.S. 609 (1951), involved an ESL but sheds little light on the question. *Hughes* arose from a Wisconsin wrongful death statute with an ESL limiting its applicability to “deaths caused in that state.” *Id.* at 610. The Wisconsin Supreme Court read the ESL as evincing a strong public policy against entertaining wrongful death actions based on the laws of other states, and on this basis dismissed “on the merits” a complaint based on Illinois law for a wrongful death caused in Illinois. *Id.* The Wisconsin Supreme Court’s treatment of the ESL is inconsistent with both the one-sided conflicts theory and the one-sided substantive theory. Both theories would view the ESL as a reason to apply Illinois law, not to refuse to apply it. The Wisconsin Supreme Court’s dismissal of the case on the merits suggests that it applied Wisconsin law and interpreted it in the two-sided substantive sense — that is, as denying a remedy for deaths caused outside Wisconsin. But the Wisconsin court’s decision is hardly a strong precedent, as the U.S. Supreme Court reversed it. The Supreme Court held that a policy of refusing to entertain actions based on sister state law violated the Full Faith and Credit Clause. *Id.* at 613. If the Wisconsin Supreme Court had indeed applied Wisconsin law and interpreted it in the two-sided substantive sense, its holding would have been binding on the U.S. Supreme Court unless that interpretation violated the Constitution. But the Court said in a footnote that “[t]he present case is not one where Wisconsin, having entertained appellant’s lawsuit, chose to apply its own instead of Illinois’ statute to measure the substantive rights involved.” *Id.* at 612 n.10. The footnote suggests that it would have been permissible for Wisconsin to apply its own law to the case, but it doesn’t directly address whether the Court meant Wisconsin’s local law or its law as limited by the ESL. In any event, the question under discussion is whether *another state’s courts* may apply Wisconsin’s local law notwithstanding the ESL. The Court’s decision did not address that issue.

²⁶¹ See *Crider v. Zurich Ins. Co.*, 380 U.S. 39, 42–43 (1965); *Tenn. Coal, Iron & R.R. Co. v. George*, 233 U.S. 354, 361 (1914); *Atchison, Topeka & Santa Fe Ry. Co. v. Sowers*, 213 U.S. 55, 70–71 (1909).

These holdings are suggestive,²⁶² but whether the Court's reasoning in these cases extends to ESLs is debatable.²⁶³

Despite the lack of definitive precedents, rejection of the draft Third Restatement's claim regarding the Full Faith and Credit Clause is compelled by broader considerations. First, if we recognize that a state that has enacted a statute but limited its scope to cases having specified links to the state *does not have a law* for excluded cases, as the more recent drafts of the Third Restatement appear to do, we cannot maintain that a court fails to give due faith and credit to the law of its sister state by applying that law's substantive provisions to cases lacking the specified link to the enacting state. For cases lacking the specified link to the enacting state, the enacting state *has no law* for the sister state's court to disrespect. The analysis would be different if a sister state has disregarded the enacting state's *internal* scope limitation. In such cases, the second state does have a different law to govern cases beyond the statute's specified scope. But, if the second state has no law that touches the particular case, a court cannot have failed to give proper faith and credit to a sister state's law by applying the state's substantive law to the case.²⁶⁴

²⁶² Also suggestive are the cases to the effect that the Full Faith and Credit Clause does not prevent a state from giving greater preclusive effect to a judgment than the judgment would have under the law of the rendering state. See, e.g., *Durfee v. Duke*, 375 U.S. 106, 109 (1963) ("Full faith and credit . . . generally requires every State to give to a judgment *at least* the *res judicata* effect which the judgment would be accorded in the State which rendered it." (first emphasis added)); *Williams v. Ocean Transp. Lines, Inc.*, 425 F.2d 1183, 1189 (3d Cir. 1970) ("Section 1738 does not prohibit the second federal court from affording to the first judgment a greater precluding effect than would be afforded by the laws of the first forum state." (citing *Durfee*, 375 U.S. at 109)). See generally David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 326–27 (1978); Allan D. Vestal, *The Constitution and Preclusion/Res Judicata*, 62 MICH. L. REV. 33, 41, 52 (1963). There are, however, decisions looking the other way. See 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4467 n.76 (3d ed. 2023). The latter decisions are not necessarily inconsistent with my interpretation of the Full Faith and Credit Clause, however, as a state's rules of preclusion, being the rules that the rendering state's courts will apply to determine the preclusive effect of its own judgments in the purely internal case, can be understood as ISLs, establishing the rendering state's preferences for both included and excluded cases. To say that the Full Faith and Credit Clause requires sister states not to give effect to judgments that would not be considered preclusive under the law of the rendering state would thus not require the conclusion that the clause requires states not to give effect to a statute in cases beyond the statute's scope as specified in an ESL.

²⁶³ The Court in *Tennessee Coal, Iron & Railroad Co. v. George*, 233 U.S. 354, held that a state could not create a transitory cause of action yet limit its enforcement to its own courts, but it also said that "[t]he courts of the sister State . . . would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action or which name conditions on which the right to sue depend." *Id.* at 360. This dictum is unproblematic insofar as the Court was referring to ISLs. It is not clear whether the Court meant to refer to ESLs as well.

²⁶⁴ The claim that the Full Faith and Credit Clause requires courts to give effect to sister states' ESLs thus depends on acceptance of the draft Third Restatement's understanding that ESLs establish a rule of the enacting state for cases lacking the specified link to the enacting state. For the reasons explained in Part II, this understanding of ESLs misunderstands their purpose and intended effect and, in any event, renders the enacting state's law unconstitutional in most cases.

This formalist analysis accords with the legislature's purposes in adopting the ESL. As discussed, and as the draft Third Restatement now appears to agree, an ESL likely reflects the legislature's deference to the legislative authority of other states. If so, then the ESL does not reflect the legislature's preference that the statute's substantive rules *not* be applied to cases beyond its specified scope. If the sister state to which the legislature deferred declines the deference and concludes that the enacting state's substantive rule should be applied notwithstanding the ESL, the sister state is not disrespecting the preferences of the enacting state's legislature. Indeed, one might say that the sister state is giving the enacting state's substantive law *more* faith and credit than the enacting state's legislature has asked for.

B. *The Rule of Law*

At bottom, it would appear that the claim that the courts of one state may not apply the law of a sister state to a case lacking the specified link to the second state does not rest on an obligation to respect the second state's laws. Rather, it rests on the notion that a court cannot decide a case in the absence of law.²⁶⁵ If a state that has enacted a statute with an ESL has no law at all for cases lacking the specified link to the state, a court that applies the substantive provisions of the statute to such cases would appear to be deciding a case pursuant to no law at all. But "[r]ights that can be enforced in court do not exist in the abstract. Courts only enforce rights that are conferred by positive law."²⁶⁶ If one accepts this premise about the obligations of courts, does it follow that a court may not resolve a case pursuant to a law that does not reach the case because of an ESL?

On the one hand, as explained in Part II, a state that limits the external scope of its law generally does so out of a sense of interstate or international comity. If so, then, the courts of another state do not contravene the preferences of the enacting legislature when they apply that law to cases beyond its specified scope. By hypothesis, the enacting legislature had no preferences regarding the substantive law to be applied in those cases. On the other hand, ESLs are written as specifications of the law's substantive reach. If the law does not reach cases beyond its specified scope, it would appear that, if a court resolves the case pursuant to the enacting state's local law, it is resolving the case pursuant to no law at all.

²⁶⁵ This principle might itself have constitutional status. If so, its home would probably be the Due Process Clause.

²⁶⁶ Kramer, *supra* note 183, at 1052; *see also* Roosevelt, *supra* note 29, at 1872 ("Since the aim of the two-step model is to enforce rights created by positive law, if the courts of a foreign state would find that no rights exist under foreign law, the forum cannot disregard that fact.").

Note that this conundrum is not restricted to cases involving ESLs. As noted, some states regard their choice-of-law rules as implicitly limiting the scope of their laws.²⁶⁷ Consider the old choice-of-law chestnut, *Alabama Great Southern Railroad Co. v. Carroll*.²⁶⁸ Alabama had enacted a statute repealing the common law fellow servant rule,²⁶⁹ but the legislature had not addressed the statute's applicability to multistate cases. The injury in the case had occurred in Mississippi, and the court decided that the traditional *lex loci delicti* rule called for application of the law of the place in which the injury occurred.²⁷⁰ The Alabama statute used all-encompassing language, but the court assumed that the legislature had not focused on the issue of multistate reach. The court held that the statute should be interpreted to extend only to cases in which the injury occurred in Alabama. In the court's words:

Section 2590 of the Code . . . is to be interpreted in the light of universally recognized principles of private[] international, or interstate law, as if its operation had been expressly limited to this state, and as if its first line read as follows: "When a personal injury is received in Alabama by a servant or employe," etc.²⁷¹

In this way, the state's general choice-of-law rule (*lex loci delicti*) served to implicitly circumscribe the general language of the statute. The legislature was presumed to have limited the statute's reach to cases in which the injury occurred in the state.

Yet, at the same time, it has long been understood that the choice-of-law rules of one state are not binding on the courts of other states.²⁷² Thus, under the traditional approach to renvoi, the courts of Mississippi have been regarded as free to apply the law of Alabama even if Alabama would not apply its law to the case according to its choice-of-law rules, even though the Alabama Supreme Court made clear in *Carroll* that it regarded its choice-of-law rules as implicitly limiting the scope of its laws. This section defends the traditional view that the Mississippi courts can disregard Alabama's choice-of-law rules and apply Alabama's local law to a case even if Alabama's courts would not, without inquiring into whether Alabama regards its choice-of-law rules as determining its laws' substantive reach.

1. *ESLs as Specifying the Law's Minimum Scope.* — One possible solution to this conundrum would be to interpret the ESL as specifying the statute's *minimum* rather than maximum scope.²⁷³ This solution

²⁶⁷ See *supra* notes 30–31 and accompanying text.

²⁶⁸ 11 So. 803 (Ala. 1892).

²⁶⁹ *Id.* at 805.

²⁷⁰ See *id.* at 806.

²⁷¹ *Id.* at 807.

²⁷² See *supra* p. 1293.

²⁷³ Professor Symeonides has called attention to this possibility. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMPAR.

would be consistent with the statutory language of many, perhaps most, ESLs. A statute that says that it extends to injuries that occur “in this state” does not say that it does not to extend to injuries occurring outside the state. Maxims of interpretation (for example, *expressio unius est exclusio alterius*) could lead a court to interpret the provision as setting forth the statute’s maximum scope, but, for the reasons given in Part II, it is reasonable to presume that ESLs were enacted out of a sense of interstate or international comity. As discussed above, a comity-based ESL does not reflect the legislature’s preference that the local law not be applied to excluded cases.

If a statute is amenable to such a construction, even the courts of the enacting state could justifiably interpret the provision as specifying the statute’s minimum scope. So understood, the provision reflects the legislature’s view that the state’s interest in applying the substantive rule is at its apex in the specified circumstances, acknowledging that in other cases it may be more appropriate to apply the law of another state. This construction would leave it open to the enacting state’s courts (and, a fortiori, the courts of other states) to apply the statute’s substantive rule to cases lacking the specified link to the state in appropriate circumstances.²⁷⁴

But what if the legislature has clearly phrased the ESL as a maximum, unqualified limit? For example, Title VII’s ESL provides that the statute “shall *not* apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.”²⁷⁵ In the face of clear statutory language, the courts of the enacting state would likely feel constrained to apply the statute as written.

L. 227, 244 (2010) (noting that, rather than interpret a provision as expressing a statute’s maximum scope, “[i]t would have been equally plausible to hold that the statute simply delineated the *minimum* reach of Nebraska law”); see also SYMEONIDES, *supra* note 6, at 495. This approach has been suggested by others as well. See, e.g., DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS 230 (1965) (“The solution that I would find most satisfactory would be a holding that no negative inference is to be drawn from the specification of ‘delivery or issued for delivery,’ that the legislature was concerned to assure the coverage of those cases but not to preclude the use of choice-of-law principles to deal with cases that failed to satisfy the statutory conditions.”); KELLY, *supra* note 121, at 31 (“Express localising rules are normally concerned with the minimum application sought to be ensured for certain decisional[, that is, substantive,] rules by the legislator, rather than with setting the outer limits of the relevance of those rules. Localising rules of this type are *directive* but not *exclusive*. In other words, while directing the application of the decisional rules which they qualify to a minimum set of circumstances they do not exclude the possibility of *further* application of those decisional rules in appropriate cases.”).

²⁷⁴ The draft Third Restatement adopts a presumption that an ESL does not mandate application of forum law to cases that fall within its scope. See R3 TD3 § 5.01 reporters’ note cmt. d; *id.* § 5.02(b); see also Carlos M. Vázquez & Russell C. Bogue, Choice of Law as Statutory Interpretation: The Rise and Decline of Governmental Interest Analysis 55–56 (Oct. 28, 2023) (unpublished manuscript) (on file with the Harvard Law School Library). Thus, even if the statute reaches the case, the courts of the enacting state can decline to apply it if they conclude that the law of another state should be given priority, unless clear statutory language says otherwise. It would be reasonable to apply a similar presumption that the ESL sets forth a statute’s minimum, not maximum, scope.

²⁷⁵ 42 U.S.C. § 2000e-1(c)(2) (emphasis added).

This is true even if we understand such a provision as a choice-of-law rule. A state's legislature has the power to legislate choice-of-law rules for the courts of the state. The Second Restatement and the draft Third Restatement both provide that the courts of a state will follow a choice-of-law directive of the state's own legislature.²⁷⁶ Even if we accept that the legislature enacted the ESL to identify the types of cases it regarded as most important, without meaning to suggest that it would prefer that its substantive rule not be applied to other cases, the ESL may reflect the legislature's additional purpose of simplifying the courts' burden by providing an easy-to-administer choice-of-law rule.²⁷⁷ Thus, there are legitimate reasons why the courts of the enacting state would treat an ESL clearly phrased as a maximum scope limitation as binding, even if they regarded the provision as a choice-of-law rule.

Moreover, in some cases, interpreting the statute to extend to cases beyond its clearly expressed maximum scope may itself raise constitutional problems. This would be the case if the statute imposes criminal penalties, or is otherwise penal in nature.²⁷⁸ States generally do not enforce the penal laws of other states, so statutes of this type are not likely to pose the problem under discussion here.²⁷⁹ More generally, though, there may be constitutional problems, or at least fairness concerns, with applying a statute beyond its clearly expressed maximum scope where private parties may have reasonably relied on the statute's limited external reach in structuring their conduct. These fairness concerns will not be implicated in all cases, however; some legal rules are not of the type that persons rely on in structuring their primary conduct.²⁸⁰ If the case does implicate fairness concerns, states can and should structure their choice-of-law rules to take account of these concerns, and in some cases they may be constitutionally required to do so.²⁸¹

²⁷⁶ See R2 § 6(1); R3 TD3 § 5.06(1).

²⁷⁷ Cf. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168–69 (2004). For additional discussion of this case, see *infra* note 284.

²⁷⁸ See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 51 (1999) (invalidating a loitering ordinance for being unconstitutionally vague); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (striking down a vagrancy ordinance because its language “fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden” (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954))); *Coates v. City of Cincinnati*, 402 U.S. 611, 611–14 (1971) (holding that a city ordinance banning conduct “annoying to persons passing by,” *id.* at 613 (quoting CINCINNATI, OHIO, CODE OF ORDINANCES § 901-L6 (1956)), was unconstitutionally vague).

²⁷⁹ See generally BRILMAYER ET AL., *supra* note 145, at 156–63.

²⁸⁰ See R2 § 6 cmt. g (“There are occasions, particularly in the area of negligence, when the parties act without giving thought to the legal consequences of their conduct or to the law that may be applied.”); see also *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 685 (N.Y. 1985).

²⁸¹ Cf., e.g., R2 § 6(2)(d) (listing “the protection of justified expectations” as one of the “factors relevant to the choice of the applicable rule of law” when the forum does not have a statutory directive on choice of law). See generally *Lea Brilmayer, Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277 (1989).

But what about cases that do not raise fairness or reliance concerns? In such cases, if the state's legislature has framed the ESL as specifying the statute's maximum scope, should the courts of another state have any compunction about applying the first state's local law to cases lacking the specified connection to the state if, under the forum's choice-of-law rules, the law of the first state applies to the case? The forum could, of course, justifiably treat the selected state's ESL as an invitation to apply its own substantive law, or that of a third state, to the matter. In other words, the forum could authorize *renvoi*. Nevertheless, the forum state may prefer to stick to its own choice-of-law rules. It too may prefer a simpler choice-of-law rule in order to lessen the burden on its own courts and to give litigants a greater measure of certainty and predictability, and it may be confident that its own choice-of-law rules accomplish these and other broader system values more effectively. If ESLs are understood as choice-of-law rules (as argued here), then both the Second Restatement and the draft Third Restatement instruct the forum to apply the selected state's internal law, disregarding its ESLs.²⁸² But, if the substantive provisions of the selected state's statute can be applied by the forum's courts notwithstanding the ESL, is the ESL actually functioning as a limit on the external reach of the statute?

2. *Interpreting the Enacting State's ESLs as Procedural.* — Another way to resolve the conundrum would be to interpret ESLs as being addressed only *to forum courts*, instructing them not to apply the forum's law to cases lacking the specified connections to the forum state.²⁸³ So understood, an ESL functions as a sort of procedural rule, binding on forum courts but not purporting to bind the courts of other states. Characterizing such provisions as procedural would be particularly apt if the legislature's reason for making them binding was to simplify the task of the courts, as suggested above.²⁸⁴ Presumably, the legislature wanted to simplify the task of forum courts only. The traditional rejection of *renvoi* appears to reflect an understanding of all choice-of-law rules as procedural (for horizontal choice-of-law purposes).²⁸⁵ If ESLs are understood as choice-of-law rules, they should similarly be considered procedural.

²⁸² See *supra* pp. 1302–03.

²⁸³ This appears to have been Currie's view. See *supra* note 133. For an earlier, tentative defense of the ideas developed in this and the next section, see Vázquez, *supra* note 31.

²⁸⁴ As noted previously, see *supra* p. 1349, one reason a legislature might adopt a maximum scope limit without case-specific exceptions would be to reduce the burdens on the courts. This appears to be the reason the Supreme Court selected the particular scope limit it applies to the federal antitrust laws. See *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168–69 (2004).

²⁸⁵ Cf. Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CFAA and Shady Grove*, 106 NW. U. L. REV. 1, 12 (2012) (noting that a rule that applies only in forum courts is procedural).

To be sure, this interpretation is in tension with the plain text of the statute (since we are assuming here that the provision is clearly framed as specifying the statute's maximum, unqualified scope). As Professor David Cavers has written, "[e]ven to those who believe that the other state's choice-of-law rules may be ignored, the disregard of the localizing limitation on a substantive rule seems an impermissible distortion of that law which it may fairly, if metaphorically, be said does not 'want' to be applied."²⁸⁶ Even in the face of express statutory language, however, conceptualizing ESLs as procedural could be defended on the ground that, notwithstanding their language, such provisions reflect deference to the legislative authority of other states and hence do not evince the enacting legislature's preference that its local law *not* be applied by the courts of other states.

At the end of the day, the position that ESLs are binding on all courts appears to be based on the conviction that statutory text must be respected: if the provision is written as a limit on the substantive reach of the statute, then it limits the substantive reach of the statute even if the legislature's purpose was to defer to the legislative authority of other states and the legislature had no preferences as to what law should be applied to cases beyond the statute's reach. It is true that, in statutory interpretation, clear statutory text will generally trump statutory purpose.²⁸⁷ But the general rule is not the universal rule. The scholarship on whether text should always prevail over purpose is legion,²⁸⁸ and this is not the place for an extensive discussion of that question. But it is worth recalling that, in the field of conflict of laws, the effect of text on a statute's meaning has long been swamped by background assumptions. In resolving conflict of laws issues, the courts routinely (and properly) depart from the ordinary meaning of the statute's text on

²⁸⁶ David F. Cavers, *An Approach to Some Persistent Conceptual Problems*, 131 RECUEIL DES COURS 122, 134 (1970). Cavers himself was not troubled by this apparent distortion, however, as he goes on to ask:

But must [the] wishes [of the enacting state's legislature] be respected? The matter, it must be remembered, is not one that is exclusively the concern of the state whose statute is in question. It is the forum that has the responsibility of resolving the case before it. If it sees the application of State X's substantive rule as achieving fairness to the parties as well as a sensible allocation of rule-making responsibility among states, why should the forum be restrained from exercising its authority by the fact that the contrary view of State X is embodied in a statutory limitation rather than in a choice-of-law rule?

Id. I would add that, for the reasons discussed in this Article, a court that applies a statute to cases lacking the specified link to the state does not disrespect the enacting legislature's wishes.

²⁸⁷ See, e.g., *United States v. Husted*, 545 F.3d 1240, 1245 (10th Cir. 2008) ("When a statute is unambiguous, however, we must apply its plain meaning except in the rarest of cases; after all, there can be no greater statement of legislative intent than an unambiguous statute itself." (citing *Holland v. Dist. Ct.*, 831 F.2d 940, 943 (10th Cir. 1987))).

²⁸⁸ See generally Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994); Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117 (2009); Tara Leigh Grove, *The Supreme Court, 2019 Term — Comment: Which Textualism?*, 134 HARV. L. REV. 265 (2020); Vázquez & Bogue, *supra* note 274.

the assumption that the legislature enacted the statute with the purely domestic case in mind.²⁸⁹ Legislatures typically frame statutes in universal, all-encompassing terms — for example, as extending to “all persons” — yet the courts disregard the all-encompassing text and interpret the statute to apply only to persons or conduct having some relationship to the enacting state.²⁹⁰ Courts thus typically *begin* their choice-of-law analyses by disregarding the text’s ordinary meaning. To revert to literalism in resolving the complex issues posed by ESLs would be paradoxical indeed.

If we do reject the rule-of-law objection by interpreting the ESL as a procedural rule binding only on forum courts, it might be objected that the law, so interpreted, exorbitantly purports to have a worldwide scope.²⁹¹ But this remains a purely theoretical concern if the courts of other states will apply the law only to the extent their choice-of-law rules so direct. Choice-of-law rules typically call for the application of another state’s law only if that state has a significant connection to the dispute.²⁹²

The courts of the enacting state will rarely have occasion to decide whether the ESL is substantive or procedural, as the provision will be binding on the enacting state’s courts either way. Whether a state’s ESL is procedural will thus mainly be a question for the courts of other states to decide without guidance from the enacting state’s courts.²⁹³ Based on the reasoning set forth above, the courts of other states could defend their application of the statute’s substantive provisions to cases lacking the specified link to the enacting state by concluding that, despite its wording, the ESL is a procedural rule meant to bind only the enacting state’s courts, instructing those courts — and only those courts — not to apply the substantive provisions in question.

²⁸⁹ See, e.g., *Oman v. Delta Air Lines, Inc.*, 466 P.3d 325, 330, 332 (Cal. 2020) (declining to read the text of a California wage and labor statute literally because the court “ordinarily presume[s] the [l]egislature drafts laws with domestic conditions in mind,” *id.* at 330, and because doing so “would raise the very sorts of conflict-of-laws problems we generally presume the [l]egislature seeks to avoid,” *id.* at 332 (citing *Ward v. United Airlines, Inc.*, 466 P.3d 309, 317 (Cal. 2020))).

²⁹⁰ See, e.g., *Lauritzen v. Larsen*, 345 U.S. 571, 576–77 (1953) (holding that a statute textually applicable to “any seaman who shall suffer personal injury in the course of his employment,” *id.* at 576, should not be read literally because “a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal wording,” *id.* at 577); *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 443 (2d Cir. 1945) (“[W]e are not to read general words [in a federal statute] without regard to the limitations . . . which generally correspond to those fixed by the ‘Conflict of Laws.’”); see also *Ala. Great S. R.R. Co. v. Carroll*, 11 So. 803, 807 (Ala. 1892) (determining that the statute at issue “is to be interpreted in the light of universally recognized principles of private[] international, or interstate law, as if its operation has been expressly limited to this state”).

²⁹¹ See Roosevelt, *supra* note 29, at 1853–54 (making this argument).

²⁹² See, e.g., R2 § 145.

²⁹³ The courts of one state can certify the question to the courts of the other state, see Michael Steven Green, *Law’s Dark Matter*, 54 WM. & MARY L. REV. 845, 846–47 (2013) (noting that choice-of-law questions can be certified to the enacting state’s courts), but of course they do not have to.

3. *Interpreting the Forum's Choice-of-Law Rules as Substantive.* — An alternative solution to the conundrum emerges if we shift our focus to how the forum's choice-of-law rules operate. When a Bangladeshi court adjudicates a case pursuant to California's local law even though the law does not extend to the case of its own force, the court *is* deciding the case according to law: it is deciding the case pursuant to Bangladesh's choice-of-law rules, which are a part of its law. Bangladesh's choice-of-law rules *might* instruct the court to apply California's substantive law only when the law would be applicable of its own force. But, if Bangladesh's choice-of-law rules reject renvoi, as most states have traditionally done (and as both restatements instruct²⁹⁴), they direct the Bangladeshi courts to apply California's substantive law even if the enacting state would not apply it to the case. If we insist that California's ESL must be read literally as limiting the substantive reach of California's law, the court in Bangladesh would be complying with its obligation to decide cases according to law if Bangladesh conceived of its own choice-of-law rules as adopting the substantive provisions of the selected state's law *as the forum's law* for the purpose of deciding the case.

There is, indeed, a long history of conceptualizing choice-of-law rules this way. According to the "local law" theory of choice of law, a court always applies forum law in deciding cases. When it resolves a case by applying a foreign substantive rule, it is not applying the foreign rule as such. Rather, it is formulating a domestic rule of law whose content is "as nearly homologous" as possible to that of the state selected by the forum's choice-of-law rules.²⁹⁵ The local law theory has a hoary pedigree. The standard citation for it is to the opinion of Judge Learned Hand in *Guinness v. Miller*.²⁹⁶ Its most famous scholarly proponent was Professor Walter Wheeler Cook,²⁹⁷ who is widely thought to have bested Professor Joseph Beale in his critique of Beale's work as reporter of the First Restatement of Conflict of Laws.²⁹⁸ Outside the United States, this view was forcefully defended by Hans Kelsen.²⁹⁹

²⁹⁴ See *supra* pp. 1302–03.

²⁹⁵ David F. Cavers, Comment, *The Two "Local Law" Theories*, 63 HARV. L. REV. 822, 824 (1950). Legal theorists who describe legal systems as open systems similarly regard a state's choice-of-law rules as "adopting" the norms of other legal systems. See RAZ, *supra* note 175, at 120.

²⁹⁶ 291 F. 769 (S.D.N.Y. 1923), *aff'd*, 299 F. 538 (2d Cir. 1924), *aff'd in part, rev'd in part sub nom. Hicks v. Guinness*, 269 U.S. 71 (1925).

²⁹⁷ See *supra* note 42 and accompanying text. See generally WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1924).

²⁹⁸ For example, Currie wrote that Cook's work had "discredited [Beale's] vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another." BRAINERD CURRIE, *On the Displacement of the Law of the Forum*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS, *supra* note 169, at 3, 6.

²⁹⁹ See Hans Kelsen, *Le Renvoi*, in 47/II ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 115, 119–20 (1957).

The local law theory has few contemporary champions.³⁰⁰ Our discussion suggests that there may be more to local law theory than contemporary scholars recognize. In any event, to solve our conundrum, we need not accept every aspect of the local law theory or conclude that this is the best way to understand all choice-of-law rules. In the absence of a treaty or other binding higher law, choice-of-law rules are a creature of each state's positive law. This means that, within such limits, it is for each state to determine how it conceives of its choice-of-law rules.³⁰¹ If a state rejects *renvoi*, it instructs its courts to apply the substantive law of another state even to cases to which the enacting state would not regard its law to be applicable. This it may do if it regards the enacting state's ESLs (like its choice-of-law rules in general) as procedural rules addressed only to the enacting state's courts. This possibility may be foreclosed if the enacting state's courts have clearly held that the ESL is a substantive limit on the reach of the statute *and* binding on all courts. If they have, a forum court that applies the selected state's law beyond its specified external scope would be complying with its obligation to decide cases according to law if it understood *its own* choice-of-law rules as incorporating the other state's substantive law as its own for purposes of cases such as the one before it.

One sort of higher law to which U.S. states are bound is the U.S. Constitution, which, as we have seen, allows a state to apply its own law to a case only if it has sufficient contacts to the dispute.³⁰² It might be argued that the Constitution prevents a wholly disinterested forum (that is, one lacking sufficient contacts with the dispute) from applying the substantive law of a sister state qua the law of the forum, incorporated via the forum's choice-of-law rules.³⁰³ But the constitutional limits on a state's ability to apply its own law are weak and would affect few cases. Moreover, the long history of treating choice-of-law rules as implicit limits on the external scope of forum law, combined with the traditional rejection of *renvoi*, support the contrary conclusion. If "long established and still subsisting choice-of-law practices that come to be thought, by modern scholars, unwise, do not thereby become unconstitutional,"³⁰⁴ then the better view is that the Constitution prohibits a wholly disinterested forum from applying its own *local* law but does not prohibit it from incorporating via its choice-of-law rules the local law of

³⁰⁰ See, e.g., Roosevelt, *supra* note 29, at 1842-49 (critically discussing the local law theory). *But cf.* Roosevelt, *supra* note 285, at 15 (noting that, when a federal court applies a state law rule that the enacting state characterizes as procedural and hence applicable only in state court, the federal court "is not giving state-created rights an effect that their creator disclaimed, because it lacks the power to do this. Rather, it is creating federal law that incorporates the substance of the state rule" (footnote omitted)).

³⁰¹ See R2 § 5 cmt. b ("A court applies the law of its own state, as it understands it, including its own conception of Conflict of Laws.")

³⁰² See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981).

³⁰³ See Roosevelt, *supra* note 29, at 1887-88 (making this argument).

³⁰⁴ *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728-29 (1988).

a state that does have sufficient contacts to the dispute, even if the enacting state would not consider its law applicable. Doing so would not violate the Full Faith and Credit Clause because the state whose law is being applied *has no law* that extends to the dispute of its own force.³⁰⁵ And doing so would not violate the due process limits on choice of law because the state whose substantive law is being applied does have sufficient contacts with the dispute. (It might violate the Due Process Clause because of reliance or fairness interests, but this problem will affect only a subset of cases.³⁰⁶)

CONCLUSION

This Article has shown that a legislature that has limited the external scope of a law has most likely done so out of deference to the legislative authority of other states. It follows that a law with an ESL most likely reflects the legislature's intent to have no law at all for cases outside the law's specified external scope. Interpreting such laws as leaving excluded cases to be governed by a different rule of the same state misunderstands the function and intended purpose of ESLs.

If an ESL is enacted out of deference to the legislative authority of other states, it is best understood as a choice-of-law rule. It reflects the legislature's judgment that cases beyond the statute's territorial scope should be governed by the law of another state. Since the forum's courts are bound to follow a statutory directive of their own legislature on choice of law, the enacting state's courts will give effect to ESLs in statutes enacted by their own legislatures (if constitutional). But the courts of other states are not required to give effect to the choice-of-law rules of other states. The courts of one state may therefore disregard ESLs in the laws of other states and apply the statute's substantive provisions to cases lacking the specified link to the enacting state. The courts of other states do have the option of giving effect to an ESL in a sister state statute, but giving effect to the ESL means applying the law of a state other than the enacting state. In other words, to give effect to the ESL is to engage in *renvoi*.

This Article has not focused on whether a state *should* embrace *renvoi*. Both Restatements reject *renvoi* for most cases in both the

³⁰⁵ See *supra* section IV.A, pp. 1343–46.

³⁰⁶ In the interstate context, the local law theory might be thought to violate the nondiscrimination principle discussed in Part III. If Bangladesh incorporates California law as its own law when the defendant is from California, then it has enacted a rule for California defendants that differs from its rule for Bangladeshi defendants. Of course, the courts of Bangladesh are not bound by the U.S. constitutional provisions discussed in Part III. In any event, because Bangladesh is merely subjecting California defendants to the substantive rule to which California itself subjects California defendants causing injuries in California, Bangladesh might seek to defend its choice-of-law rule on comity grounds. Alternatively, Bangladesh might attempt to defend the discrimination as a legitimate response to California's discriminatory decision to deny the benefits of its rule to those suffering injuries outside California.

contractual and noncontractual settings, and for good reasons. The draft Third Restatement does not consider a state's application of another state's ESL to be renvoi, even though its effect is to require application of the law of another state. My conclusion that comity-based ESLs are choice-of-law rules means that applying an ESL in this manner does constitute renvoi. But it does not require the conclusion that states *should* be instructed to disregard the ESL. There may be good reasons to encourage states to authorize renvoi for cases involving ESLs even if they do not authorize it for other cases.

In the contractual setting, there are very strong reasons to presume that the choice-of-law clause refers to the selected state's local law disregarding ESLs, and to enforce clauses selecting the local law in the same circumstances as other choice-of-law clauses. Indeed, as discussed, this can and should be done as long as it is recognized that states with ESLs have no law for excluded cases (as the most recent sections of the draft Third Restatement do), whether or not ESLs are considered choice-of-law rules.

In noncontractual cases, permitting renvoi with respect to statutes having an ESL may be defensible. The legislature enacted the ESL out of deference to the legislative authority of other states, but it framed the provision as a substantive limit on the statute's reach. Even though the enacting legislature would not likely object if the courts of other states decided to apply the statute's substantive provisions to cases lacking the specified link to the enacting state, the enacting state can hardly complain if other states' courts give effect to the ESL as written. Whether a state should permit renvoi in these limited circumstances is a complex question beyond the scope of this Article. It is apparent that some courts are strongly disinclined to apply statutes beyond their specified territorial scope. Some of those courts erroneously understand the enacting state to have a different rule for excluded cases, ignoring the constitutional problems with such a view. If such courts understood that legitimate ESLs do not prescribe any law for excluded cases, they may be more receptive to the traditional view that such clauses may be disregarded, at least in certain circumstances. On the other hand, as Cavers predicted (though not approvingly), they may find the disregard of such provisions to be an "impermissible distortion of [the] law."³⁰⁷ This Article has tried to explain why the traditional view does not in fact distort the law's intended purpose and effect. But the existence of ingrained misconceptions might legitimately be taken into account in balancing the pros and cons of authorizing renvoi with respect to ESLs. In any event, this Article has shown that the decision is for each state to make based on its own assessment of the relevant policies. The answer

³⁰⁷ See Cavers, *supra* note 286, at 134.

does not follow from anything inherent in the Constitution or the “nature of choice of law.”³⁰⁸

³⁰⁸ Cf. R3 TD3 § 5.01 cmt. b (describing its approach as flowing from the “[n]ature of choice of law”).