

HONORING STATUTORY RESTRAINT IN CONFLICTS ANALYSIS

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At a time when much conflicts scholarship is focused on unwarranted extensions of state power beyond state borders,¹ Professor Carlos Vázquez’s *Non-extraterritoriality* makes a convincing case that a parallel issue — how to treat statutes that contain restrictions on their territorial reach — also deserves attention. Such provisions, which Vázquez calls “external scope limitation[s]” (ESLs),² raise questions that go to the heart of how we think about choice of law, implicating some of the oldest debates in conflicts doctrine. When a court chooses to apply a foreign legal rule, for example, does the court do so as a matter of domestic law or because the foreign law governs of its own force?³ What relevance, if any, should actual statutory intent have in determining whether a foreign legal rule should apply?⁴ Should courts analyzing choice-of-law questions take into account the conflicts rules of foreign jurisdictions,

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¹ See Kermit Roosevelt III & Bethan R. Jones, *The Draft Restatement (Third) of Conflict of Laws: A Response to Brilmayer & Listwa*, 128 YALE L.J.F. 293, 304 (2018) (“It is true that statutes often do not specify their multistate scope.”); Roger J. Traynor, *War and Peace in the Conflict of Laws*, 25 INT’L & COMPAR. L.Q. 121, 131 (1976) (“More often than not . . . a court confronts a statute that is silent about its application to matters that transcend State boundaries.”); see also RESTATEMENT (SECOND) OF CONFLICT OF L. § 6 cmt. c (AM. L. INST. 1971) [hereinafter R2] (observing that “[l]egislatures usually legislate, and courts usually adjudicate, only with the local situation in mind” and “rarely give thought to the extent to which the laws they enact . . . should apply to out-of-state facts”).

² Carlos M. Vázquez, *Non-extraterritoriality*, 137 HARV. L. REV. 1290, 1292 (2024).

³ See *id.* at 1353 (discussing whether a state applying foreign law does so as a matter of domestic or foreign law and suggesting that a Bangladeshi court ignoring a California ESL in deciding to apply California law would be “deciding the case pursuant to Bangladesh’s choice-of-law rules, which are a part of its law”).

⁴ See Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 399–402 (1980) (arguing that interest analysis in choice of law relies, at best, on suppositions about legislatures’ constructive intent).

and if courts generally should not (as scholars and courts have frequently concluded),⁵ why not?⁶

Although *Non-extraterritoriality* takes account of many of these concerns, the Article's ultimate goal is a more modest and focused one. Vázquez examines three possible ways of understanding ESLs, ultimately concluding that only one is appropriate in light of constitutionality, logic, and fairness considerations.⁷ Two of these views involve treating ESLs as substantive limits on the reach of state law, requiring courts either to apply the rule of a state other than the ESL-enacting state (the “one-sided substantive” approach) or a different legal rule of the same state (the “two-sided substantive” approach).⁸ Rejecting these conceptualizations of ESLs, Vázquez instead advocates for a third approach he calls the “one-sided conflicts” view, under which an ESL is treated as a choice-of-law rule that must be followed in the enacting state but that courts of other states may ignore if they choose.⁹ Vázquez compellingly points out some of the problems that would arise were courts to deviate too far from this view and usefully identifies portions of the draft *Restatement (Third) of Conflict of Laws* (“draft Third Restatement”) that appear to incorporate the substantive views in language that is either overly sweeping or imprecise.¹⁰ In so doing, Vázquez provides a valuable perspective that should, if heeded, add depth and nuance to the way in which conflicts scholars think about this problem.

At the same time, however, it is important to keep sight of the broader conflicts perspective. Questions involving the scope of ESLs in

⁵ See Lea Brilmayer & Charles Seidell, *Jurisdictional Realism: Where Modern Theories of Choice of Law Went Wrong, And What Can Be Done to Fix Them*, 86 U. CHI. L. REV. 2031, 2093 (2019) (describing renvoi — the practice of consulting “a state’s choice-of-law rule[s] to determine whether its law should be applied” — as having been “rejected by virtually all of the major theories of choice of law”). But see Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 982–83 (1991) (“To the extent that a foreign system defines the scope of the foreign state’s law, the court should accept the renvoi”); see also RESTATEMENT (THIRD) OF CONFLICT OF L. § 5.06(2) (AM. L. INST., Tentative Draft No. 3, 2022) [hereinafter R3 TD3] (approved by the American Law Institute membership on May 18, 2022) (directing states to apply each other’s choice-of-law rules “[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”).

⁶ See Kramer, *supra* note 5, at 992 (discussing the renvoi debate and explaining how it rests on a question largely unanswered by various conflicts theories — whether choice-of-law rules “define substantive rights or merely identify the jurisdiction which does”).

⁷ See Vázquez, *supra* note 2, at 1297–99.

⁸ See *id.* at 1297. For example, under the two-sided substantive approach, a state whose statute outlawed discrimination on the basis of gender identity but restricted its reach to in-state employers would be seen as having a separate legal rule *allowing* such discrimination by out-of-state employers. See *id.* at 1313.

⁹ *Id.* at 1297.

¹⁰ See *id.* at 1304–11, 1313–17.

foreign courts are uncommon.¹¹ By contrast, the degree to which state law applies extraterritorially — and, in particular, the role that choice-of-law rules should play in setting those boundaries — continues to be a recurring, contested, and, in some respects, underexplored problem.¹² Ideally, academic views about ESLs should be informed by this wider context. This Response attempts to further contextualize ESLs by making three observations about how the relationship between conflicts doctrine and the territorial scope of law more generally should affect analysis of ESLs.

First, it bears noting that, for a variety of reasons discussed in Part I, the non-extraterritoriality problem does not arise frequently.¹³ And, even in the relatively unusual circumstance that courts are faced with the core issue Vázquez addresses — a scenario in which choice-of-law principles point to a state whose law on the relevant subject contains an ESL — the way in which courts resolve this issue is often defensible and will likely continue to be so under the guidance given by the draft Third Restatement.¹⁴

Second, Vázquez contends that ESLs are choice-of-law principles and that we should therefore treat them differently — including allowing foreign courts to ignore them — than we would if ESLs constituted restrictions on substantive law.¹⁵ This argument appears to rest on a broader assumption that choice-of-law analysis is, at least to some extent, a merely procedural device, divorced from the problem of determining law's proper territorial scope.¹⁶ Descriptively, this may sometimes be true; courts have frequently treated choice-of-law issues as separate.¹⁷ There are, however, few logical reasons for doing so. A court may improperly enlarge the reach of state law by applying it to far-flung events just as a legislature may do so by passing an overreaching statute.¹⁸ In general, conflicts doctrine should take better account

¹¹ In general, that is, ESLs limit the scope of state law to activities that have certain connections to the enacting state; for example, an ESL in an employment law statute may specify that the statute applies only to employers located within the state. Because the sort of contacts required by ESLs — or the lack of contacts — are frequently taken into account in choice-of-law analysis, conflicts principles will frequently dictate in any case that the law of a state other than the ESL-enacting one should apply. See *infra* note 31.

¹² For some of the varied perspectives scholars have taken on this issue, see, for example, Jeffrey M. Schmitt, *Constitutional Limitations on Extraterritorial State Power: State Regulation, Choice of Law, and Slavery*, 83 *MISS. L.J.* 59, 64–65 (2014); Mark D. Rosen, Essay, *State Extraterritorial Powers Reconsidered*, 85 *NOTRE DAME L. REV.* 1133, 1153 (2010); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 *NOTRE DAME L. REV.* 1057, 1134 (2009).

¹³ See *infra* Part I, pp. 275–83.

¹⁴ For a discussion of the draft Third Restatement's treatment of this issue, see *infra* pp. 282–83.

¹⁵ See Vázquez, *supra* note 2, at 1352.

¹⁶ See *id.* at 1350. But see *id.* at 1353 (offering a substantive approach as well).

¹⁷ See Florey, *supra* note 12, at 1111–12.

¹⁸ See *id.* at 1062, 1117–18 (arguing that choice-of-law decisions and state statutes often raise similar concerns about extraterritoriality, *id.* at 1117–18).

of the role choice-of-law decisions play in defining the reach of states' territorial power. This is also the case when ESLs are implicated.

Further, by arguing courts are free in most circumstances to ignore ESLs if they choose,¹⁹ Vázquez understates the desirability of honoring ESLs. To be sure, Vázquez explicitly takes no position on whether foreign courts *should* disregard ESLs.²⁰ Presumably, however, Vázquez would not have gone to the trouble of arguing that foreign courts *may* ignore ESLs if he did not think that it was appropriate for them to do so with reasonable regularity; indeed, he suggests a few specific situations in which such disregard may be desirable.²¹

Although Vázquez is likely correct that courts may disregard another state's ESLs without constitutional consequences in most cases, courts should exercise this option only in unusual circumstances. Rather, conflicts analysis should be attentive to ESLs for two reasons. First, ESLs provide information about legislative intent that is useful to courts in other states engaging in choice-of-law analysis. Much choice-of-law analysis involves judgments about what other states hoped to achieve by enacting particular legal rules. That process is often a spectacularly uninformed one.²² In this context, ESLs provide welcome guidance. Even if states occasionally overread or otherwise misinterpret the goals of ESL-containing statutes, courts likely understand the statutes more accurately than they would in the ESL's absence.²³

In addition, attentiveness to ESLs likely improves the fairness and predictability of choice-of-law analysis in general. Vázquez suggests — no doubt accurately in many cases — that “ESLs ordinarily reflect legislative modesty and deference to the legislative authority of other states.”²⁴ But there are other important reasons why legislatures might enact ESLs — notice and fairness to potential defendants,²⁵ or an effort to better mold a regulatory scheme to the specific conditions they are trying to address. In all three scenarios — modesty, notice, and fit — ESLs serve important purposes, and courts of other states should be hesitant to ignore them.

This Response proceeds in two parts. Part I argues that the ESL problem, while a genuine one, arises relatively rarely, and that both courts and the draft Third Restatement have handled it more flexibly and nimbly than Vázquez sometimes suggests. Part II argues that a purely procedural view of ESLs is problematic at a time when

¹⁹ See Vázquez, *supra* note 2, at 1355.

²⁰ See *id.* at 1298.

²¹ See *id.* at 1301, 1316.

²² See Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 248 (1958) (noting that, in the absence of ESLs, courts must often rely on “constructs of legislative policy which are often speculative”).

²³ See *id.*

²⁴ Vázquez, *supra* note 2, at 1300.

²⁵ Vázquez discusses these concerns briefly. See *id.* at 1349.

connecting choice-of-law principles to substantive questions of a law's scope is all the more important. It goes on to make the case that, even if there is no legal obstacle to courts choosing to ignore statutory ESLs, compelling policy reasons exist as to why courts should generally heed them.

I. ESL ISSUES AS RARITIES

As an initial matter, it bears noting that — in contrast to extraterritoriality — non-extraterritoriality is a comparatively rare problem, and it is not at all clear that, when the issue of non-extraterritoriality arises, courts are incapable of addressing it.

First, consider what needs to happen for a court even to be faced with the question whether ESLs constitute substantive limitations on state law (in either the one-sided or two-sided sense). Two prerequisite events must occur: First, the legislation in question must contain an ESL. Second, the outcome of a choice-of-law analysis must be that the law of the ESL-enacting state applies to a dispute despite the ESL.²⁶ This combination of circumstances is likely to arise only rarely.

To begin with, not all conflicts decisions involve statutes in the first place; the decisional rules at stake in choice-of-law determinations are often common law ones.²⁷ And even where a statute is at issue, most state statutes do not contain ESLs.²⁸ Perhaps more important, however, the restrictions on territorial scope that ESLs impose are often consonant with commonly applied conflicts rules, simply providing an extra layer of predictability to a conclusion that courts would likely have arrived at on their own.²⁹

Consider, for example, Vázquez's hypothetical in which California has enacted an ESL-containing strict liability statute, a California corporation then causes harm in Bangladesh, and Bangladeshi choice-of-law principles direct the application of the law of the defendant's domicile (that is, California).³⁰ Such a scenario could plausibly transpire in a court outside the United States. But if the lawsuit Vázquez envisions was brought in a U.S. court, virtually all states' choice-of-law methodologies would direct that Bangladeshi law be applied in this

²⁶ To raise this issue, this analysis must also take place in the courts of a state other than the ESL-enacting one, given that, as Vázquez argues, the courts of the enacting state are in fact bound to apply the ESL. *See id.* at 1297.

²⁷ *See, e.g.,* William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1412–13 (2020) (discussing several conflicts cases involving common law decisional rules).

²⁸ *See* sources cited *supra* note 1.

²⁹ *See infra* notes 30–31 and accompanying text.

³⁰ Vázquez, *supra* note 2, at 1292.

scenario even in the absence of an ESL.³¹ Vázquez uses the example of the Bangladeshi court to stress that ignoring ESLs does not inherently violate the rule of law, given that the court would reach this result employing Bangladeshi conflicts principles that themselves constitute valid law.³² This point is difficult to dispute. But it does not make this scenario more likely to arise in the domestic context. Nor does Vázquez’s example take account of the many other issues that would bear on the treatment of this conflicts problem in a wholly domestic case within the United States, including constitutional limits and principles of federalism.³³

The relative rarity of difficult ESL issues certainly does not mean that Vázquez’s Article addresses an unimportant question. Clearly, there are numerous examples of U.S. choice-of-law decisions, particularly in the area of contractual choice of law, in which ordinary conflicts principles *do* appear to dictate application of the law of an ESL-enacting state.³⁴ Further, the way in which those cases are resolved has many broader implications for conflicts doctrine as a whole.³⁵ At the same time, it is useful to recognize that ESLs only rarely present particularly thorny issues, in large part because ESLs work *with*, not against, ordinary conflicts principles.³⁶

³¹ To be sure, because U.S. states apply an array of conflicts methodologies, it is impossible to make a conclusive pronouncement about how courts would regard this scenario. However, nine states continue to apply the *lex loci delicti* rule to torts. See John F. Coyle et al., *Choice of Law in the American Courts in 2021: Thirty-Fifth Annual Survey*, 70 AM. J. COMPAR. L. 318, 321 (2022). In those jurisdictions, there is little doubt that Bangladeshi law would apply as the law of the place of injury. Twenty-five states apply the *Restatement (Second) of Conflict of Laws*. See *id.* For a court applying the *Restatement (Second) of Conflict of Laws*, it seems likely that Bangladesh — where the plaintiffs reside, where the relevant conduct would have occurred, where the harm would have been felt, and where the parties’ relationship would be centered — would have “the most significant relationship” to the case. See R2 § 145. The remaining states apply interest analysis, significant contacts, *lex fori*, or a “Better Law” approach, either on their own or combined with other approaches. See Coyle et al., *supra*, at 321. Under an interest analysis framework, assuming that Bangladesh had a more defendant-friendly statute, this would likely be a “no-interest” or “unprovided-for” case — Bangladesh would have no interest in protecting a California defendant, and California would have no interest in affording Bangladeshi plaintiffs a more generous right of recovery or deterring bad out-of-state conduct; in such a scenario, many courts would dismiss the case or apply forum law. See Joseph William Singer, *Hobbes & Hanging: Personal Jurisdiction v. Choice of Law*, 64 ARIZ. L. REV. 809, 844 (2022).

³² Vázquez, *supra* note 2, at 1353 (arguing that a court in this scenario “is deciding the case pursuant to Bangladesh’s choice-of-law rules, which are a part of its law”).

³³ See generally Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992) (describing several constitutional provisions potentially relevant to states’ choice-of-law decisions).

³⁴ See, e.g., Vázquez, *supra* note 2, at 1328 n.166 (collecting such cases).

³⁵ As this Response argues, for example, treatment of ESLs is relevant to the more general question of whether renvoi ever has a place in conflicts analysis. The issue also raises many constitutional questions, some of which Vázquez discusses. See *id.* at 1331–41.

³⁶ Professor William Dodge comes to a similar conclusion about state presumptions against extraterritoriality, finding that they are often “superfluous” because courts would reach the same result under ordinary principles of statutory interpretation and might choose, in a conflicts analysis, to give priority to another state’s laws in any case. See Dodge, *supra* note 27, at 1431–32.

A recognition that difficult ESL questions are comparatively rare should also inform how we should think about the treatment of ESLs both by the draft Third Restatement and by courts. In the United States, cases that point to the law of a particular state notwithstanding the presence of an ESL in that state's statute are inherently unusual. In most such cases cited by Vázquez or the draft Third Restatement, one of two things is generally occurring: either the presence of the ESL is a red herring, serving only to distract from what is actually quite conventional conflicts analysis or, alternatively, the court is muddling through a genuinely novel and complex situation that admits no obvious resolution. It goes almost without saying that courts confronting the latter situation are likely to get it wrong sometimes; that does not, however, mean that the correct outcome is necessarily clear.

For an example of the first phenomenon, consider *Budget Rent-A-Car System, Inc. v. Chappell*,³⁷ an Eastern District of Pennsylvania case Vázquez cites as reflecting the two-sided substantive approach.³⁸ Vázquez characterizes this two-sided approach as the view that when a state statute contains an ESL, the state has a *different* legal rule for cases that fall outside the ESL's scope.³⁹ Yet a close examination of the *Budget Rent-A-Car* case suggests that, rather than being wedded to this position, the court considers the ESL in a way that instead reflects classic statutory interpretation and interest analysis.

The *Budget Rent-A-Car* court was confronted with a choice between New York and Michigan law on the question whether a car-rental company was vicariously liable for a driver's negligence.⁴⁰ The driver had rented the car in Michigan, driven it to New York and remained there for several days, and then "fell asleep at the wheel" while passing through Pennsylvania en route to Michigan, causing an accident.⁴¹ A New York statute creating vicarious liability for car owners who allowed their cars to be driven negligently was limited to "owner[s] of . . . vehicle[s] used or operated in this state."⁴²

The court first determined that, although the situation at hand fell within the literal terms of the statute, New York courts would, to avoid constitutional problems, read the statute to exclude incidents that involved merely a "'slight' or 'casual' connection" to the state.⁴³ As a result, the court concluded, "under New York law, Budget is not vicariously liable to Chappell."⁴⁴

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

³⁸ See Vázquez, *supra* note 2, at 1326.

³⁹ See *id.*

⁴⁰ *Budget Rent-A-Car*, 304 F. Supp. 2d at 644.

⁴¹ *Id.* at 643.

⁴² *Id.* at 645 (citing N.Y. VEH. & TRAF. LAW § 388(1) (Consol. 2003)).

⁴³ *Id.* at 646–47 (citing *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 150 (1934)).

⁴⁴ *Id.* at 648.

This phrasing is inartful and does indeed suggest at first glance that the court's conclusion was that New York law affirmatively provided that Budget was *not* vicariously liable, which would be an example of what Vázquez calls the two-sided substantive approach.⁴⁵ Later, however, applying a classic form of governmental interest analysis, the *Budget Rent-A-Car* court framed the issue differently, finding that the real issue was that, because New York law does not provide a remedy to those in the plaintiff's shoes, "New York has *no interest* in the application of its own law."⁴⁶ Although the distinction between New York law applying but providing no remedy and New York law not applying because of New York's lack of interest is a subtle one, the latter scenario is a common one in conflicts analysis and meaningfully different from the two-sided substantive approach as Vázquez frames it.⁴⁷ Most fundamentally, the conclusion that a state lacks an interest in applying a particular statute, for better or worse, does not necessarily imply a rigid duty to apply a different legal rule (foreign or domestic to that state); it is simply a step in the choice-of-law process and does not invariably rule out the application of the statute in question.⁴⁸

To be sure, the Third Circuit, in later reversing the *Budget Rent-A-Car* case largely on other grounds, suggested, as Vázquez notes,⁴⁹ that the issue of the scope of a statute as a matter of statutory interpretation is a distinct issue from the state's interest in applying the statute for the purposes of choice-of-law analysis.⁵⁰ But while many (though not all)

⁴⁵ This is how Vázquez sees the case. See Vázquez, *supra* note 2, at 1326–27.

⁴⁶ *Budget Rent-A-Car*, 304 F. Supp. 2d at 650 (emphasis added).

⁴⁷ Although relatively few choice-of-law decisions involve ESLs, courts commonly consider whether states having contacts with a dispute have an interest in applying their law. This is not the same as applying a two-sided substantive approach — that is, courts engaged in this analysis are not suggesting that a different legal rule of the interest-lacking state should govern but that, relative to other states potentially connected to the dispute, the interest-lacking state has little or no stake in applying its law. See, e.g., *Hernandez v. Ecolab, Inc.*, No. 20-cv-1806, 2023 WL 3984815, at *18 (D. Minn. June 13, 2023) (finding that Minnesota law should not apply because any interest Minnesota had in the dispute was only "slight" (quoting *Blake Marine Grp. v. CarVal Invs. LLC*, 829 F.3d 592, 596 (8th Cir. 2016))); *Nelson v. F. Hoffmann-La Roche, Inc.*, 642 F. Supp. 3d 1115, 1135, 1138 (N.D. Cal. 2022) (finding that California law should not apply to the case at hand because California lacked "a sufficient interest in apply [sic] its law" to an out-of-state injury notwithstanding the defendants' California domicile (citing *Howe v. Diversified Builders, Inc.*, 69 Cal. Rptr. 56 (Ct. App. 1968))); *Am. Guarantee & Liab. Ins. Co. v. Law Offs. of Richard C. Weisberg*, 524 F. Supp. 3d 430, 450–51 (E.D. Pa. 2021) (concluding that neither Arizona nor Texas law should apply to a dispute in which both states lacked an interest).

⁴⁸ See, e.g., *Erwin v. Thomas*, 506 P.2d 494, 496–97 (Or. 1973) (concluding that Oregon lacked an interest in applying its law but ultimately applying Oregon law nonetheless). But see Larry Kramer, *The Myth of the "Unprovided-For" Case*, 75 VA. L. REV. 1045, 1060–63 (1989) (criticizing the *Erwin* court's reasoning).

⁴⁹ See Vázquez, *supra* note 2, at 1327 n.164.

⁵⁰ See *Budget Rent-A-Car Sys., Inc. v. Chappell*, 407 F.3d 166, 173 (3d Cir. 2005).

courts observe this distinction,⁵¹ these issues are inherently linked in many cases. For example, a finding that the legislature has limited a statute to a particular scope presumably also means that the state lacks an interest in applying its statute in situations that fall outside those boundaries.⁵²

Other instances of courts wrestling with ESLs display the second phenomenon described above — where ESLs pose a difficult problem for which the usual tools of choice-of-law analysis provide no clear answer. One such legal area that Vázquez discusses at length is contractual choice of law.⁵³ When parties contract to have their dispute resolved by the law of state *X*, for example, and state *X*'s otherwise applicable law contains an ESL, there is no obvious roadmap under most states' choice-of-law principles for how courts should handle the situation.⁵⁴ And courts have reasoned through the problem in various ways, with some methods more defensible than others: by concluding with little analysis that because “two New York [ESL-containing] regulatory schemes by their own terms do not apply to the dispute, [the state's] common law controls”;⁵⁵ by examining the ESL-containing statute in depth to determine legislative intent;⁵⁶ and by employing ordinary principles of contract interpretation to find that, even if a state's substantive rule contained an implicit territorial limit, parties could nonetheless select that state's law to govern contract disputes that would ordinarily be outside that limit.⁵⁷

⁵¹ See Dodge, *supra* note 27, at 1423 (noting that some states treat choice of law “as a two-step process: (1) determining the *scope* of the potentially applicable laws to see if more than one law applies; and (2) determining which law should be given *priority* if more than one law applies”); see also R3 TD3 § 5.01 cmt. b (discussing the two-step model in relation to statutes).

⁵² See Dodge, *supra* note 27, at 1428–29 (noting that there is a relationship, although one that takes various forms in different states, between “principles of statutory interpretation and state conflicts rules,” *id.* at 1429).

⁵³ See Vázquez, *supra* note 2, at 1311–18.

⁵⁴ R2's discussion of contractual choice of law, for example, does not address this issue. See R2 § 187.

⁵⁵ Peugeot Motors of Am., Inc. v. E. Auto Distribs., Inc., 892 F.2d 355, 358 (4th Cir. 1989).

⁵⁶ See Bimel-Walroth Co. v. Raytheon Co., 796 F.2d 840, 842–43 (6th Cir. 1986).

⁵⁷ Boatland, Inc. v. Brunswick Corp., 558 F.2d 818, 822 (6th Cir. 1977), *superseded by statute*, 1977 Wis. Sess. Laws 727, *as recognized in Bimel-Walroth*, 796 F.2d at 842. The statute at issue in *Boatland* did not contain an explicit ESL, but one party to the contract denied that the statute had extraterritorial effect; the court concluded that the legislature did not intend to enact any territorial limit, “or to prevent anyone[,], particularly a Wisconsin resident, from making Wisconsin law applicable to his contract.” *Id.* The Wisconsin legislature later amended the statute to clarify that it could not be altered by contract. See Baldewein Co. v. Tri-Clover, Inc., 606 N.W.2d 145, 150 (Wis. 2000).

The abundant case law,⁵⁸ some of which Vázquez mentions,⁵⁹ construing the ESL-containing Wisconsin Fair Dealership Law⁶⁰ (WFDL) illustrates some of the complexities attending the interaction of ESLs and contractual choice of law. The WFDL, intended “to protect dealers against unfair treatment by grantors, and to provide dealers with rights and remedies in addition to those existing by contract or common law,”⁶¹ has vexed courts for two reasons. First, the specific language of the ESL, including a phrase limiting the WFDL’s reach to “dealership[s] situated in this state,” has proven difficult to apply.⁶² Second, the WFDL explicitly provides that its terms may not be modified by contract, raising issues both when Wisconsin parties attempt to select the law of another state to govern their contract⁶³ and when non-Wisconsin parties attempt to opt in to the WFDL.⁶⁴ Interestingly, courts appear to have resolved the latter problem in a manner arguably consistent with the procedural approach to ESLs. That is, they have interpreted ESL as a specific legislative command directing Wisconsin courts to apply the WFDL to cases within the specified territorial scope of its ESL (and not to cases outside it) rather than to engage in conventional choice-of-law analysis⁶⁵ (which, under the rule applied in most states, would generally honor parties’ chosen law subject to a public policy exception).⁶⁶ Put another way, courts have treated the WFDL as establishing a legislative choice-of-law rule overriding the conflicts analysis that Wisconsin courts would otherwise apply.⁶⁷ It is worth noting that this interpretation is not the only way courts could have construed the WFDL. For example, courts could have treated it as simply establishing a strong

⁵⁸ See, e.g., *Baldewein*, 606 N.W.2d at 149–51; *Morley-Murphy Co. v. Zenith Elecs. Corp.*, 142 F.3d 373, 378–80 (7th Cir. 1998); *Bush v. Nat’l Sch. Studios, Inc.*, 407 N.W.2d 883, 887–88 (Wis. 1987); *Bimel-Walroth*, 796 F.2d at 841–43; *Swan Sales Corp. v. Jos. Schlitz Brewing Co.*, 374 N.W.2d 640, 643–45 (Wis. Ct. App. 1985).

⁵⁹ See Vázquez, *supra* note 2, at 1328 n.166.

⁶⁰ WIS. STAT. § 135 (2024).

⁶¹ *Swan Sales*, 374 N.W.2d at 643.

⁶² See *Baldewein*, 606 N.W.2d at 148 (citing WIS. STAT. § 135.02(2) (1999)) (describing this language as presenting an “interpretive challenge”). Although the problem of interpreting the language of an ESL is only tangentially related to the question whether we should regard ESLs as choice-of-law rules, the fact that ESLs are not all cut from a single cloth and are subject to varying interpretations highlights the difficulty of taking a unitary approach to them.

⁶³ See *Bush*, 407 N.W.2d at 886–88.

⁶⁴ See *Baldewein*, 606 N.W.2d at 147.

⁶⁵ See *Ferguson-Kubly Indus. Servs., Inc. v. Circle Env’t, Inc.*, 409 F. Supp. 2d 1072, 1076 n.1 (E.D. Wis. 2006).

⁶⁶ Most states implement this principle by means of R2 § 187, which directs courts to enforce parties’ reasonable choice of law unless it violates a “fundamental policy” of a state that “has a materially greater interest” in the dispute and whose law would apply in the absence of the contractual provision. R2 § 187(2); see also Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1260 n.96 (1997) (describing § 187 as having “almost universal appeal among courts”).

⁶⁷ See *Ferguson-Kubly*, 409 F. Supp. 2d at 1076 n.1 (noting that the WFDL is designed to displace otherwise applicable choice-of-law principles and suggesting that the reach of this provision is limited to Wisconsin state courts and federal courts sitting in diversity in Wisconsin).

Wisconsin public policy in favor of its application — which, under the conflicts approach followed by most courts, would be relevant only to those contract disputes to which Wisconsin law would apply in the absence of a contractual choice-of-law provision.⁶⁸ Instead, however, courts have construed the WFDL as in itself containing a choice-of-law directive, applicable in Wisconsin but not the courts of other states, requiring them to disregard the parties' choice-of-law clause in particular circumstances.⁶⁹ Although this interpretation raises some issues of its own,⁷⁰ it is seemingly more aligned with Vázquez's preferred approach to ESLs than with the two-sided substantive approach.

The ways in which the courts have resolved the WFDL cases and cases presenting similar issues are certainly not beyond criticism. But it is worth keeping in mind that this specific ESL issue is both narrowly confined and genuinely difficult. The issue is narrow because, as discussed, ordinary choice-of-law principles will seldom select the law of an ESL-containing state; thus, contractual choice of law is the only area in which this problem is likely to arise more than occasionally (and even here, the number of reported cases addressing this problem does not appear to be vast⁷¹). The issue is difficult because it is likely to raise knotty questions of statutory construction of the sort present in the WFDL cases. Further, even apart from such interpretive issues, questions of the contracting parties' intent are also likely to present difficulties. For example, with regard to intent, there are at least three possibilities: (1) the parties intended to incorporate the chosen law subject to any ESLs, (2) the parties intended the choice-of-law provision to override any ESLs, or (3) the parties were caught unaware by the ESL

⁶⁸ See *supra* note 66.

⁶⁹ The point that the WFDL's restriction on contractual choice of law is specifically directed to Wisconsin courts is reinforced by the fact that courts outside Wisconsin have felt free to disregard it, with the apparent endorsement of courts construing Wisconsin law. See *Ferguson-Kubly*, 409 F. Supp. 2d at 1076 n.1 (implying that, if the case at hand had been brought in South Carolina, the state of the parties' chosen law, rather than Wisconsin, it might be proper for a court to enforce the choice-of-law clause); *ACD Distrib. LLC v. Wizards of the Coast LLC*, Nos. 20-35828 & 20-35986, 2021 WL 4027805, at *2 (9th Cir. Sept. 3, 2021) (declining to apply the WFDL to a contract containing a Washington choice-of-law clause).

⁷⁰ For example, the Wisconsin legislature's special rule might be seen as inappropriate protectionism for Wisconsin-based dealerships. See *Baldewein Co. v. Tri-Clover, Inc.*, 606 N.W.2d 145, 151–53 (Wis. 2000) (suggesting that the WFDL is intended to protect dealers only if they have some tie to Wisconsin). Vázquez argues that a naked desire to limit protections to state residents and “disfavor” nonresidents would raise constitutional problems. See Vázquez, *supra* note 2, at 1331–35. Even accepting this view, however, the WFDL cases seem to show a procedural construction of ESLs will not prevent such protectionist efforts; rather, a legislature can also pursue protectionist goals through a choice-of-law rule directed at courts within the state. Note as well that some courts have also seen constitutional perils in applying an ESL-containing statute too broadly. See *Morley-Murphy Co. v. Zenith Elecs. Corp.*, 142 F.3d 373, 379 (7th Cir. 1998) (“We agree . . . that the extra-territorial application of the WFDL would, at the very least, raise significant questions under the Commerce Clause.”).

⁷¹ Most of the cases the Article cites, for example, are older cases that specifically address the “franchise or fair-dealership” law context. Vázquez, *supra* note 2, at 1328 n.166.

and had no particular intent to rely or not rely on it. Given the array of possibilities that both ESLs and particular contractual clauses present, the resolution of specific cases will and should vary.⁷²

In short, how to resolve contractual choice-of-law issues in the face of ESLs is a difficult question. As the preceding discussion of the WFDL cases suggests, courts have not always gotten it right. But the reason courts sometimes fumble is because they fail to recognize the problem or give sufficient consideration to what the contracting parties actually agreed upon. This does not seem to be a situation for which the substantive views on ESLs are particularly to blame.

In addition to his criticisms of judicial reasoning in particular cases, Vázquez suggests that the draft Third Restatement's treatment of ESLs in general is problematic because it endorses, at times, both the one-sided and two-sided substantive approaches.⁷³ But while a full discussion of the draft Third Restatement's position is beyond the scope of this Response, a few examples suggest that the sections of the draft Third Restatement Vázquez cites are somewhat more nuanced than he at times appears to argue.

For example, in its discussion of *renvoi*, the draft Third Restatement gives the example of a hypothetical state X damages cap “that by its terms applies to deaths ‘caused in this state,’” and then suggests that, for an accident in state Y giving rise to a wrongful-death action, “[s]tate X’s damages cap does not operate to limit recovery because the death was caused outside of state X.”⁷⁴ Vázquez sees this as an example of the two-sided substantive approach — a suggestion by the draft Third Restatement that a *different* state X rule, one authorizing unlimited damages, should apply in this scenario.⁷⁵ But a second example clarifies that although “state X does not have a policy of limiting damages for deaths caused out of state,” the state also “does not have a policy of imposing unlimited damages in such cases, since it provides no cause of action for such deaths.”⁷⁶ Although this distinction could be spelled out more clearly, I read these examples as ultimately premised on the view

⁷² Vázquez favors “a presumption that a contractual choice-of-law clause selects the chosen state’s local law disregarding its ESLs.” *Id.* at 1315. Vázquez justifies this presumption on the basis that the parties would generally not choose a nonexistent or ineffective law. *See id.* But this ignores the likelihood of Option #3 in many cases. Parties choosing the law of a given jurisdiction simply because it is neutral or enhances predictability are unlikely to be familiar with every one of its particulars. *See* Florey, *supra* note 12, at 1060, 1108–10 (suggesting that parties often include choice-of-law clauses for such reasons, *id.* at 1108–10).

⁷³ *See* Vázquez, *supra* note 2, at 1304–11, 1313–17.

⁷⁴ RESTATEMENT (THIRD) OF CONFLICT OF L. § 1.03 cmt. c, illus. 1 (AM. L. INST., Tentative Draft No. 2, 2021) [hereinafter R3 TD2] (approved by the ALI membership on June 10, 2021).

⁷⁵ *See* Vázquez, *supra* note 2, at 1305–06.

⁷⁶ R3 TD2 § 1.03 cmt. c, illus. 2.

that state *X*'s law is simply silent on the subject at issue, a common finding in choice-of-law analysis.⁷⁷

Likewise, Vázquez reads the draft Third Restatement as characterizing *any* application of a state statute “beyond the statute’s external scope as specified by an ESL” as a violation of the Full Faith and Credit Clause.⁷⁸ But the draft Third Restatement’s treatment of this issue rests largely on the uncontroversial principles that “each State is authoritative as to the meaning of its own law” and that “[k]nowing distortion of sister State law is unconstitutional.”⁷⁹ Again, the draft Third Restatement could be clearer on this point.⁸⁰ But it does not appear to stake out a position quite as rigid as Vázquez suggests. Rather, the draft Third Restatement’s language suggests that a state court would violate the Full Faith and Credit Clause only by *willfully* ignoring an *unambiguous* statutory limitation. This prohibition would leave room for interpreting ESLs in appropriate circumstances as simply not applying to the conflicts dispute at hand. Indeed, even commentators suggesting that courts should heed ESLs as a general rule have noted that “skepticism about whether the [ESL] is meant to have extrajurisdictional effect is possible.”⁸¹ In other words, treating ESLs as in some way substantive — or at least meaningfully different than other conflicts rules — does not necessarily preclude flexibility in how ESLs are applied.

All this is to say that, while many of Vázquez’s critiques are valid, the situation is not so dire as he sometimes suggests. Few conflicts problems pose the sorts of questions his Article addresses; of those that do, courts are often capable of resolving the issues in a nuanced way. Although some concern is justified, this is not an area in which choice of law is likely to go seriously askew.

II. SUBSTANTIVE IMPLICATIONS OF ESLs

The preceding Part has argued both that conflicts problems involving ESLs are relatively rare and that, rather than rigidly applying the one-sided or two-sided substantive approaches, courts and the draft Third Restatement treat ESLs with more nuance than Vázquez’s

⁷⁷ See Kramer, *supra* note 48, at 1063–64 (noting that sometimes plaintiffs may lack a cause of action because no relevant state’s law provides for one). Vázquez discusses the existence of legal gaps and argues that they are different from the two-sided substantive approach. See Vázquez, *supra* note 2, at 1330–31.

⁷⁸ Vázquez, *supra* note 2, at 1297.

⁷⁹ See R3 TD3 § 5.01 cmt. c.

⁸⁰ The Notes, for example, rely on *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), for the proposition that applying state law “outside its specified scope” is unconstitutional “if the scope restriction is clear and has been brought to the court’s attention.” See R3 TD3 § 5.02 cmt. a (citing *Sun Oil*, 486 U.S. at 731). But the Notes omit context from *Sun Oil* stressing the Court’s main point is that the Full Faith and Credit Clause is not violated when a court, without intent to do so, simply “misconstrue[s] the law of another State.” *Sun Oil*, 486 U.S. at 730–31.

⁸¹ Michael Steven Green, *Law’s Dark Matter*, 54 WM. & MARY L. REV. 845, 880 n.137 (2013) (emphasis omitted).

arguments sometimes allow. Yet even if ESLs occupy relatively little space in the choice-of-law landscape, they are sufficiently intertwined with larger conflicts issues that it is worth asking how we should treat them and why. This Part argues that, while strict adherence to substantive views would cause problems in conflicts analysis, regarding ESLs as mere procedural conflicts rules in all situations would *also* create difficulties. Whether or not ESLs are, in some sense, substantive, they are clearly distinct in many respects from standard choice-of-law rules. That is, ESLs reflect a recognition that conflicts decisions and the substantive reach of state law are entangled, thereby bringing to the fore an issue that conflicts doctrine has too often ignored. In consequence, they provide useful information to courts making conflicts decisions, meaning that even if courts *may* ignore ESLs should they desire, compelling reasons exist for them to refrain from doing so.

As a preliminary question, it is worth asking what is at stake when we treat ESLs as conflicts rules rather than substantive limits. In the similar context of renvoi, scholars have long debated the issue.⁸² Most conflicts systems, that is, reject the practice of renvoi, under which the court considers the choice-of-law rules as well as the “internal” law of a potentially interested state.⁸³ Yet scholars have struggled to agree upon a justification for why choice-of-law rules should be ignored;⁸⁴ a common explanation is that such “generalized choice-of-law schemes do not reflect the policies underlying particular laws” and thus do not provide meaningful information about those policies.⁸⁵ When an ESL is attached to a specific statute, however, this justification seems to fail whether one calls the ESL a choice-of-law rule or not; the ESL is not a general rule of practice but one specifically geared to a particular substantive legal rule. Given that, why should merely denominating it as a choice-of-law rule suddenly render an ESL unenforceable in other states?

Ultimately, however ESLs are classified, they provide welcome guidance to courts about what a foreign state’s legislature intended a statute to accomplish and the territorial scope in which the legislature expected

⁸² See, e.g., Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1836–37 (2005) (presenting, while critiquing, the perspective that choice-of-law rules “are directed to courts and not parties” and “have nothing to do with substantive rights,” *id.* at 1837); Kramer, *supra* note 5, at 983–84 (noting that the renvoi debate “turns” on whether “localizing rules are part of the substantive law that defines the parties’ rights or simply a jurisdictional device for choosing a substantive law that does”); Erwin N. Griswold, *Renvoi Revisited*, 51 HARV. L. REV. 1165, 1167–69 (1938) (highlighting several ways of approaching the renvoi problem, noting that courts can treat choice-of-law rules either as not part of a country’s “law” or, alternatively, as imposing substantive limits on its law).

⁸³ See Kramer, *supra* note 5, at 979–81.

⁸⁴ See *id.* at 1003–05.

⁸⁵ *Id.* at 1003; see also *id.* at 1003–04. Another reason for rejecting renvoi is the “endless cycle” problem created when the choice-of-law rules of state *X* call for the application of the law of state *Y* while state *Y*’s choice-of-law rules direct the court to apply state *X* law. See *id.* at 980.

it to operate.⁸⁶ This information helps bridge the strange disjunction between the legislative process and choice-of-law principles, which are generally common law rules developed by state courts.⁸⁷ Too often, that is, choice of law is treated as merely procedural, concerned with creating an orderly process for resolving disputes rather than delineating the substantive scope of legal rules across territory.⁸⁸ But whether courts intend them to or not, choice-of-law decisions have important implications for how state regulatory authority is allocated. It is because of conflicts decisions, for example, that Georgia citizens must follow California privacy rules in some circumstances⁸⁹ and that, in other situations, South Carolina law would govern the conduct of a New Jersey corporation even if its conduct had been undertaken in its home state.⁹⁰ Judicial deference to ESLs better aligns such choice-of-law decisions with the intended scope of the law in question, ideally making the process both more orderly and less likely to cause interstate friction.

In other words, characterizing choice-of-law rules as procedural or explicitly nonsubstantive ignores an important dimension of conflicts doctrine itself. And ESLs have an even stronger claim than standard choice-of-law rules to be bound up with the substantive allocation of power among states. Unlike most choice-of-law rules, ESLs are both enacted through the democratic process and specifically directed to a particular legal context.⁹¹ Therefore, much more than ordinary choice-of-law rules, ESLs have value for courts trying to ascertain the boundaries between one state's proper territorial sphere of interest and those of other states.

Importantly, recognizing that ESLs are connected to the territorial scope of substantive rights does not mean that courts of other states are bound to apply them precisely as a domestic court would. To be sure, so-called "local law" theories — that is, the idea that a Nevada court applying California's substantive rules does so as a matter of Nevada law, not California law — are, as Vázquez acknowledges, mostly disfavored.⁹² At the same time, many conflicts decisions are *de facto*

⁸⁶ Indeed, courts have occasionally made use of a dash of *renvoi* for similar purposes — that is, treating a state's choice-of-law rules as relevant to the state's interest in having its law applied externally. See, e.g., *Am. Motorists Ins. Co. v. ARTRA Grp., Inc.*, 659 A.2d 1295, 1302–04 (Md. 1995) ("adopt[ing] a limited form of *renvoi*," *id.* at 1302); see also Kramer, *supra* note 5, at 1028 (arguing that foreign choice-of-law rules that "defin[e] the scope of foreign law . . . are fully determinative and ought simply to be followed").

⁸⁷ See Dodge, *supra* note 27, at 1423 ("Conflicts rules are generally rules of state common law.").

⁸⁸ See Katherine Florey, *Big Conflicts Little Conflicts*, 47 ARIZ. ST. L.J. 683, 688–90 (2015) (noting that certain choice-of-law decisions raise territoriality and comity issues, not merely procedural ones).

⁸⁹ See, e.g., *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 937 (Cal. 2006).

⁹⁰ See *Maniscalco v. Brother Int'l Corp. (USA)*, 793 F. Supp. 2d 696, 710 (D.N.J. 2011).

⁹¹ Indeed, Vázquez appears to allow for the possibility that an ESL could explicitly provide that it is *not* to be understood as a choice-of-law rule. See Vázquez, *supra* note 2, at 1297 (suggesting that which interpretation courts should follow is ultimately a matter of legislative intent).

⁹² See *id.* at 1353.

grounded in local law alone, in the sense that courts making such decisions face little accountability for how they interpret (or whether they choose to ignore) foreign states' laws. The Full Faith and Credit Clause may constrain courts at the margins, but the obligations it imposes are minimal.⁹³ Further, they are almost impossible to enforce: if a California court misinterprets Nevada law, Nevada is unlikely to have an easy recourse.⁹⁴ If a Minnesota court applies forum law to Wisconsin events simply on the ground that Minnesota's legal rule is "better," this choice apparently raises no constitutional problems provided there are at least minimal connections between the dispute and the forum state.⁹⁵ Further, courts engaged in choice-of-law analysis frequently produce results that would be impossible in a wholly domestic case in either their own or the forum state — whether through *dépeçage*, the practice of applying different states' laws to different issues in the case,⁹⁶ or by creating a cause of action where one would not otherwise exist.⁹⁷

As a result, it does not seem necessary to categorize ESLs as nonsubstantive choice-of-law rules in order to allow the courts of other states some flexibility in handling them. True, courts are under modest, largely unenforceable obligations not to willfully distort another state's law.⁹⁸ But courts have few, if any, obligations to apply foreign law in the first place.⁹⁹ Nor are courts obliged to refrain from dicing foreign law into constituent parts, extending the length of a claim that would otherwise be time barred, or — as long as courts do not engage in deliberate fraud — misconstruing foreign law entirely. Given this inherent flexibility, and given the great diversity both of ESLs and of the situations

⁹³ See *supra* note 80.

⁹⁴ See Michael H. Hoffheimer, *California's Territorial Turn in Choice of Law*, 67 RUTGERS U. L. REV. 167, 176–77, 177 n.47 (2015) (noting that, in *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal. 1976), a California court relied on a Nevada statute, *id.* at 725, that it did not realize had been repealed).

⁹⁵ See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 306–07, 313 (1981) (approving the application of Minnesota law despite only modest contacts between Minnesota and the dispute at hand).

⁹⁶ Professor Brainerd Currie famously critiqued this practice for precisely this reason; he argued that it allowed a plaintiff to combine "half a donkey and half a camel, and then ride to victory on the synthetic hybrid." DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 39 (1965) (quoting Currie).

⁹⁷ See *Ferens v. John Deere Co.*, 494 U.S. 516, 519–20 (1990) (describing use of Mississippi choice-of-law principles to allow the application of Mississippi's six-year statute of limitations to a Pennsylvania cause of action that would have been time-barred after two years under Pennsylvania law); see also Kramer, *supra* note 48, at 1060–63 (criticizing the court in *Erwin v. Thomas*, 506 P.2d 494 (Or. 1973), for failing to dismiss a case by a Washington plaintiff who, he argues, had no right to recover under the law of either potentially applicable jurisdiction (that is, Oregon or Washington)).

⁹⁸ See *supra* p. 283.

⁹⁹ As Justice Stevens lamented in concurrence, the constitutional limits on choice-of-law decisions look only at the connections between the dispute and the law applied but do not consider whether a *different* state might have a superior claim to have its law applied. See *Hague*, 449 U.S. at 321–23 (Stevens, J., concurring in the judgment) (advocating for an approach under which state courts might violate the Full Faith and Credit Clause by failing to apply the law of a particular state when their choice of law "unjustifiably infring[es] upon the legitimate interests of another state," *id.* at 323).

to which ESLs may possibly apply, it seems unwise to subject ESLs to a single characterization.¹⁰⁰

* * *

A final observation follows from the preceding analysis of ESLs. That is, even if one accepts Vázquez's argument that the courts of one state *may* disregard another state's ESLs, there are strong normative reasons why — at least in the vast majority of cases — courts should choose not to exercise that power. ESLs often represent important attempts by legislatures both to grapple with the question of law's proper territorial scope and fit and to communicate with courts making choice-of-law decisions. As ESLs' comparative rarity¹⁰¹ indicates, such legislative guidance is uncommon, providing all the more reason to take it seriously.

Vázquez argues that “ESLs ordinarily reflect legislative modesty and deference to the legislative authority of other states”¹⁰² — a plausible hypothesis, though one that is difficult to test. As a result, he suggests that applying the law beyond the scope of the ESL would likely be consistent with the legislature's wishes — that indeed, “[m]ost 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.”¹⁰³

Undoubtedly, ESLs are sometimes enacted out of modesty, or at least from fear of constitutional overreach. It is puzzling, however, that this should be a compelling reason to take ESLs less seriously. In a federalist system, finding some way of mediating conflicts between states and differences in state law is both difficult and important. This process works best when states refrain from efforts to extend their law beyond its appropriate territorial scope. To the extent a legislature would be “delighted” to extend state law to conduct or people with minimal connections to the state, this is an illegitimate wish that other states have

¹⁰⁰ It bears noting that ESLs themselves vary significantly in ways that may and should influence their interpretation. Some are relatively broad and have no specifically restrictive language. For example, the New York statute at issue in the *Budget Rent-a-Car* case discussed earlier established vicarious liability for negligence for “owner[s] of a vehicle used or operated in this state.” N.Y. VEH. & TRAF. LAW § 388(1) (Consol. 2003); see also Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning*, 2015 U. ILL. L. REV. 1847, 1855–57 (providing several examples of scope specifications in state statutes, some of which are ambiguous in the sense that they could be read as either limiting or extending the reach of state law). Others may be more clearly intended to limit the applicability of state law or even to provide a more favorable rule for state domiciliaries. See Vázquez, *supra* note 2, at 1331–32.

¹⁰¹ See *supra* Part 1, pp. 275–83.

¹⁰² Vázquez, *supra* note 2, at 1300.

¹⁰³ *Id.* at 1324.

no reason to, and should not, honor.¹⁰⁴ By contrast, statutes that clearly articulate and limit their geographic scope help facilitate the orderly allocation of state authority to respective territorial spheres.¹⁰⁵

Further, ESLs serve purposes other than legislative restraint. To begin with, an important function of ESLs is to provide people and corporations with notice of which laws will or will not apply to particular activities. Vázquez nods to this purpose by suggesting that, at least in some circumstances, there may be constitutional or fairness issues with applying a state’s ESL-containing statute in situations “where private parties may have reasonably relied on the” ESL’s nonapplicability.¹⁰⁶ If a court’s decision to disregard a previously enacted ESL can raise notice concerns, however, it is reasonable to assume that providing such notice in the first place is part of the ESL’s function. If California enacts an employee-protective law that applies specifically to California employers, for example, the law puts in-state employers on notice that they must comply with its provisions. The law likewise reassures non-California employers that, despite other connections they may have with the state, they do not need to adhere to the statute’s requirements. Providing such notice is likely part of the legislature’s goal, but even if it is not, the ESL will serve that purpose in practice.

Choice-of-law determinations in the United States are notoriously forum dependent and unpredictable.¹⁰⁷ Widespread conflicts uncertainty harms individual actors, who lack information about what substantive standards will be applied to their conduct should they find themselves in litigation. It also creates the potential for friction between states — not merely as a result of states’ territorial overreaching, but because state regulatory schemes are more likely to interfere with each other if the boundaries of such schemes are not clearly defined.¹⁰⁸ ESLs provide a welcome measure of relative predictability on both counts.

A second important purpose of ESLs has to do with questions of *fit*. An ESL may reflect the legislature’s choice to limit the operation of a

¹⁰⁴ See *Nat’l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1156 (2023) (noting that the limits on states’ powers to regulate conduct unconnected to their citizens or territory are a key “feature of [the] constitutional order” and enable “‘different communities’ to live ‘with different local standards’” (citation omitted) (quoting *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989))); see also *Morley-Murphy Co. v. Zenith Elecs. Corp.*, 142 F.3d 373, 379 (7th Cir. 1998) (noting that, while Wisconsin is entitled to protect Wisconsin dealers in a way that may raise costs for consumers within the state, “[i]t is much more difficult to see why Wisconsin is entitled to insist that other states adhere to the same economic policy it has chosen”).

¹⁰⁵ Of course, ESLs do not completely eliminate the many difficult questions that arise when more than one state has an interest in a multijurisdictional dispute. They do, however, frequently make resolving them easier.

¹⁰⁶ Vázquez, *supra* note 2, at 1349.

¹⁰⁷ See Erin O’Hara O’Connor & Larry E. Ribstein, *Preemption and Choice-of-Law Coordination*, 111 MICH. L. REV. 647, 661 (2013) (“U.S. choice of law is generally understood to be a mess, with the states applying varied and unpredictable choice-of-law standards.” (footnote omitted)).

¹⁰⁸ In other words, a legislature may enact an ESL not so much in the spirit of legislative modesty as of legislative clarity.

statute to the jurisdiction or geographical area for which the statute is most appropriate. As Vázquez observes, some statutory mandates have inherent spatial limitations: a law regulating conduct in parks has no relevance to what happens outside of parks.¹⁰⁹ Similarly, laws may be tailored to the particular conditions or legal backdrop of a particular state in a way that makes them inappropriate or even nonsensical elsewhere. Legislatures in a high-cost-of-living state may require in-state employers to pay a minimum wage that might be overly generous elsewhere. A northern state might choose to create strict liability for accidents for drivers who fail to use snow tires in winter, but limit its reach to in-state driving. In these cases, the ESLs do not reflect so much modesty in the face of competing policies by other states as recognition that different conditions might make a particular rule unsuitable elsewhere. A state might likewise limit a law's reach because the law contributes to a comprehensive statutory scheme that the state already has in place and would make little sense in a different context.

Again, Vázquez allows for the possibility that an ESL may be enacted with questions of fit in mind, noting that in some cases a legislature may enact an ESL not purely out of modesty but because it is “agnostic about the proper rule to govern cases beyond the statute’s specified scope” or “unsure about the suitability of the rule for states with different traditions, different values, or different characteristics.”¹¹⁰ Nonetheless, he argues: “These are the sorts of considerations that typically underlie choice-of-law rules” and thus counsel in favor of treating ESLs as such.¹¹¹ To the extent that denominating ESLs this way implies that courts of other jurisdictions can feel free to ignore them, this characterization seems practically unwise. Such statute-specific rules — whether classified as choice-of-law rules or not — are likely to reflect far more considered and particularized views of appropriate statutory scope than a state’s all-purpose conflicts principles. Absent highly unusual circumstances, courts of other states should be reluctant to override ESLs.

CONCLUSION

Modern conflicts doctrine has often done an inadequate job of grappling with questions of territoriality and the proper geographic scope of state law, a legal area that includes ESLs. Vázquez’s Article carefully delineates possible approaches to this problem and rigorously articulates the assumptions that underlie those approaches. Many of his critiques could be valuably incorporated into future drafts of the draft Third Restatement. At the same time, his Article’s endorsement of the proce-

¹⁰⁹ Vázquez, *supra* note 2, at 1321.

¹¹⁰ *Id.* at 1324.

¹¹¹ *Id.*

dual conflicts view of ESLs is overly restrictive and overlooks some of the nuance both in the questions ESLs raise and the way in which courts have treated these provisions. Moreover, in the Article's emphasis on categorizing ESLs so narrowly, some of the Article's arguments ignore other important questions of when, why, and how courts should apply these provisions. Ultimately, whether one categorizes ESLs as choice-of-law rules or not, foreign courts would do well to honor these provisions in many situations in which they are present.