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Non-Extraterritoriality

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NON-EXTRATERRITORIALITY

Carlos M. Vázquez

The extraterritorial application of statutes has received a great deal of scholarly attention in recent years, but very little attention has been paid 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, who 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. Cases beyond the reach of the statute would thus be governed by another rule that state. 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 cannot be applied to cases beyond its specified scope.

Each of the competing understandings of non-extraterritoriality has prominent judicial and scholarly adherents, and each finds support in successive iterations of the Restatement of Conflict of Laws. This article considers the judicial and scholarly defenses of each of the three positions and defends the view that external scope limitations are choice-of-law rules. Limitations on external scope reflect the legislature’s deference to the legislative authority of other states. They do not reflect a legislative preference that the statute’s substantive provisions not be applied to cases beyond their 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, can be disregarded by the courts of other states. But this position poses a conundrum: if the statute does not reach cases beyond its 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.
TABLE OF CONTENTS

I. **Introduction** ..................................................................................................................... 2

II. **External Scope Provisions in the Second and Third Restatements** ..................... 9

   A. **Renvoi** ......................................................................................................................... 9
      1. R2 and the One-Sided Conflicts Theory ................................................................. 10
      2. R3 and the Two-Sided Substantive Theory ............................................................ 12
      3. R3 and the One-Sided Substantive Theory ............................................................. 14

   B. **Contractual Choice-of-Law Clauses** ................................................................. 16
      1. R2 and the One-Sided Conflicts Theory ................................................................. 16
      2. R3 and the Two-Sided Substantive Theory ............................................................ 17
      3. R3 and the One-Sided Substantive Theory ............................................................. 18
         a. Interpretation of the Choice-of-Law Clause ......................................................... 18
         b. Enforceability of the Choice-of-Law Clause ....................................................... 19

III. **The One-Sided Conflicts Theory** ............................................................................. 21

   A. External vs. Internal Scope Provisions ................................................................. 24

   B. **The Test of Alternatives** ....................................................................................... 26

   C. **ESLs as Incomplete Choice-of-Law Rules** ..................................................... 27

IV. **The Two-Sided Substantive Theory** ........................................................................ 29

   A. **The Implausibility of the Two-Sided Substantive Theory** ............................. 30

   B. **The Unconstitutionality of the Two-Sided Substantive View** ....................... 33
      1. Person-Territorial ESLs ......................................................................................... 34
      2. Act-Territorial ESLs ............................................................................................ 39

V. **The One-Sided Substantive Theory** ...................................................................... 41

   A. **The Full Faith and Credit Clause** ....................................................................... 42

   B. **The Rule of Law** ..................................................................................................... 44
      1. ESLs as Specifying the Law’s Minimum Scope ..................................................... 45
      2. Interpreting the Enacting State’s ESLs as Procedural ......................................... 48

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I. INTRODUCTION

When a state’s legislature enacts a statute and specifies that it 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, if a legislature enacts a statute prohibiting discrimination in employment but limits the reach of the statute to cases in which the employee works in the state, what is the state’s law with respect to persons employed in other states? On one view, the state with the scope-limited statute has no law for such 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. 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. The enacting state does not have a substantive law either permitting or prohibiting discrimination in the employment of persons in other states.¹

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, the enacting state’s rule for employees working in other states might be its common-law rule as it existed when the statute was enacted. Alternatively, by limiting the reach of its non-discrimination law to persons working in the state, the legislature might be understood to have implicitly established as the enacting state’s rule that discrimination against persons working in other states is permitted.

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.² Following F.A. Mann, I will call this the “one-sided conflicts”

¹ Glossary: I refer to a statutory provision limiting the external scope of the statute as an “external scope limitation” or “ESL.” (As explained below, I distinguish ESLs from “internal scope limitations” or “ISLs.”) 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 having 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.
² 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 their variations in content and wording), all of these territorial scope provisions qualify as choice-of-law rules, albeit of the unilateral type.”); Willis L.M. Reese, Statutes in Choice of Law, 35 AM.
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. Since a state’s choice-of-law rules are traditionally understood to bind only 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 another state, 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, the most widely adopted choice-of-law approach in the United States (hereinafter “R2”).

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), or 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. The two-sided substantive approach has been adopted by a number courts in the United States and has been endorsed by distinguished scholars

3 Mann, supra note 2. But cf. infra note 74 and accompanying text (noting that Mann later changed his position).
5 For an explanation of the important difference between not having a law prohibiting something and having a law permitting that thing, see infra Part IV.A.
6 See, e.g., Budget Rent-a-Car System v. Chappell, 304 F. Supp. 2d 639 (E.D. Pa. 2004), rev’d on other grounds, 407 F.3d 166 (3d Cir. 2005), and other cases discussed in Part IV.
inside and outside the United States. This approach also finds support in some parts of the Restatement (Third) of Conflict of Laws (hereinafter “R3”).

Other parts of R3 suggest that the Third Restatement project may be moving towards an intermediate position, which I will call the “one-sided substantive” understanding of ESLs. 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, if the scope restriction is clear and brought to the court’s attention.” Because the enacting state has no law for cases falling outside the statute’s external scope, the court cannot apply any 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 having 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 currently being considered at the United Nations (hereinafter the BHR treaty) 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 the law of the domicile or principal place of business of the defendant. Assume that a corporation based in California causes severe injuries to workers in Bangladesh. Suppose a suit is brought in Bangladesh, and suppose further

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7 See, e.g., ANDREW DICKINSON, THE ROME II REGULATION: THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS 138 (2010) (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 (usually more general) rule of local origin”). See also infra note 110.

8 See generally infra Part II. R3 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 ALI. See Restatement (Third) of Conflict of Law, Tentative Draft No. 3, (American Law Institute March 2022) [hereinafter R3 TD3], approved by the ALI membership on May 18, 2022); Restatement (Third) of Conflict of Law, Tentative Draft No. 2, (American Law Institute March 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.” https://ali.org/about-ali/how-institute-works/.

9 See generally infra Part II.

10 R3 TD3, § 5.02 reporters’ note 1.

11 Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Third Revised Draft August 17, 2021), art. 11.

12 This hypothetical is loosely based on the litigation following the collapse of Rana Plaza. See generally Rana Plaza Collapse: The Worst Garment Factory Disaster Ever Recorded, https://www.youtube.com/watch?v=H9hau1Ek4-s. For the Ontario Court of Appeals’
that Bangladesh has ratified 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 is by its terms limited to conduct that causes an injury 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 court would apply California’s strict liability rule, which is the only 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 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 gender identity. 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, prohibits employment discrimination on the basis of gender identity, but Title VII 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.” 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 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

13 This hypothetical closely tracks Rabé v. United Airlines, 636 F.3d 866 (7th Cir. 2011), discussed infra note 54.
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 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—a position also espoused by a number of courts and prominent scholars. The two remaining theories both accept the enacting state has no rule for cases beyond the statute’s external scope. The main difference between the two is not about the proper interpretation of the ESL, but about the obligations of the courts of other states in the face of the 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, who 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 ESLs. The one-sided substantive theory, by contrast, insists that an ESL is an inseverable apart of the enacting state’s substantive law which all courts must respect. 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, R3 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. This article argues that there is nothing in the Constitution or in the nature of law that prevents the courts of other states from disregarding the external scope limitation and applying the enacting state’s substantive rule to cases beyond the statute’s specified scope. (Whether they should do so is a separate question.)

Scholarship on extraterritoriality is plentiful. Most of it, however, focuses on the circumstances in which it is proper for states to exert legislative authority beyond their borders. This article focuses on how to understand non-extraterritoriality, meaning a state’s decision not to exert its legislative authority externally. Although I

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17 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
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. Some U.S. states apply a similar presumption in interpreting their own statutes. 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. 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 statutists of old, and this view is reflected in U.S. case law. 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.

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


20 This is the view of R3’s chief reporter. See Kermit Roosevelt III, Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language, 80 NOTRE DAME L. REV. 1821, 1852-53 (2005).

21 See ROXANA BANU, NINETEENTH-CENTURY PERSPECTIVES ON PRIVATE INTERNATIONAL LAW 41 et seq. (2018) (noting that the European statutory school “divided statutes into personal, real, or mixed . . . in order to determine their territorial reach” and explaining that this view made a “comeback” in the Nineteenth Century); Symeonides, supra note 17, at 47 (2016) (noting that statutists “try to determine the spatial reach of substantive laws”).

22 See, e.g., Alabama Great Southern Railroad v Carroll, 97 Ala. 126, 134 (Ala. 1892), discussed infra Part V.

23 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 (2011); Yuval Shany, The Extraterritorial Application of International Human Rights Law, 409 RÉCUEIL DES COURS 9 (2020). Conceptualization of the non-extraterritoriality of obligations imposed by international instruments may require a different analysis.
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 so contend but I argue that disregarding a state’s ESL does not violate rule-of-law values. Whether it does depends on how one conceptualizes the choice-of-law enterprise, and I offer two theories 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 of Conflict of Laws apply to cases in which the forum’s choice-of-law rules 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 to criticize the Third Restatement’s position on these questions, which has 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 scholarship of prominent scholars, and all three will in all probability continue to claim adherents regardless of how the Third Restatement ultimately comes out on this issue.

Part III explains why ESLs should generally be understood as a choice-of-law rule. It explains the difference between an ESL and what I will call an “internal scope limitation” [hereinafter “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 rule of law for included cases and another rule for excluded cases. By contrast, ESLs 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 IV looks more closely at the view that ESLs subject excluded cases to a different law of the enacting state. Part IV 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 declining to regulate a particular matter and having no law on the latter.) Part IV
argues further that, in the unlikely event that the ESL was intended to operate like an ISL, it would likely be unconstitutional, at least in the inter-state context.

Part V 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 cannot be disregarded by the courts of other states. I first explain why the Full Faith and Credit Clause does not require states to respect the ESLs in their sister states’ laws. I then consider a more fundamental objection sounding in the rule of law. Part V 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 the 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 it 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 or international law) a matter for that state to decide. Neither approach is precluded 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.

II. EXTERNAL SCOPE LIMITATIONS IN THE SECOND AND THIRD RESTATMENTS

To appreciate the significance and ramifications for excluded cases of the competing understandings of ESLs, it is useful to consider how the Second and Third Restatements diverge in their treatment of such provisions. As noted, R2 reflects the one-sided conflicts understanding of ESLs, while the R3 adopts (in different drafts concerning different sections) both the two-sided substantive and the one-sided substantive understanding. 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 understanding of non-extraterritoriality.

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 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 traditional view, mentioned above, that choice-of-law rules purport to bind only on 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. R2 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].” 24 According to R2, 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.” 25 R3 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).” 26 According to R3, the term “internal law” means “a state’s law exclusive of its choice-of-law rules.” 27 Although the restatements use different terms, R3 makes clear that “[i]nternal law is the same concept as local law.” 28 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.” 29 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.”

1. **R2 and the One-Sided Conflicts Theory**

As noted, R2 provides that, if the applicable choice-of-law rules direct application of another state’s law, the court should generally apply the state’s local law, which it defines as the state’s law exclusive of its rules of Conflict of Laws. R2’s comments and illustrations make clear that a state’s “local law” is the law that the courts of that

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24 R2 § 8(1).
25 R2 § 4(1) (emphasis added).
26 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.”
27 R3 TD2, § 1.03(1)
28 R3 TD2, § 1.03 comment b. I shall accordingly use the terms interchangeably.
29 R2 at § 4(2). *Cf.* R3 § 1.03(2) (defining “whole law” as a state’s “internal law, together with its choice-of-law rules).
state would apply to a case “involv[ing] facts purely local to it,” 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 R2 regards California’s internal law as California’s law minus its ESLs—which in turn means that ESLs are choice-of-law rules.

If further evidence were needed that the R2 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 moveables 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.

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

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30 R2, § 8, comment d.
31 See supra text accompanying note 28.
32 R2 § 8, comment d, Illustration 1 (emphasis added).
33 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 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 might 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.”); Kermit Roosevelt III, Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language, 80 NOTRE DAME L. REV. 1821, 1884 (2005) (describing 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 “the 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) (“The 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 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
restatements’ definition of a state’s internal law as its law exclusive of its choice-of-law rules, R2’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.34

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 R2, which provides that “[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.”35 For the enacting state’s courts, an ESL operates to displace any otherwise applicable general choice-of-law rule of the forum.36 The California courts would thus treat the ESL as an instruction to apply law other than California’s to cases involving injuries occurring in Bangladesh. R2’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. R3 and the Two-Sided Substantive Theory

R3 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.”37 ESLs fail that test because they do not indicate which state’s law applies. According to R3, 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 outside its specified scope.”38 The Bangladeshi court therefore may not apply California’s strict liability rule to a case in which the injury occurred outside California.

Which rule would the Bangladeshi court apply? Like R2, R3 instructs the Bangladeshi court to apply California’s “internal” law. R3’s definition of “internal law” embraces the two-sided substantive understanding of ESLs. While R2 understands California to have just one internal law—the law providing for strict liability—R3’s

34 See supra note 2 and accompanying text.
35 R2 § 6(1).
36 Accord 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 or residual character”).
37 R3 TD2, § 1.03 comment a.
38 R3 TD3, § 5.06 comment k.
definition of “internal law” explains 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 was California’s common law rule) or deny liability altogether.

Let’s see how R3’s provisions lead us to this conclusion. According to R3 black letter, a state’s internal law is “the body of law which the courts of that state applies when they have selected their own law as the rule of decision for one or more issues.” 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 apply its own law to 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 R2’s definition. But, in the comments and illustrations, R3 expressly rejects this view. Comment a insists that “[i]nternal law includes specifications of the persons who can assert rights under the law and specifications of the geographic scope of the law.” 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.” It 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. 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. According to R3, the court would apply the internal law of State X and would conclude that, because State X’s statute imposes a damage cap only for deaths caused in State X, State X’s internal law permits unlimited damages for deaths caused in State Y. In other words, State X has one internal law rule 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).

R3’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 [State X] courts would apply if they have selected [State X] law as the rule of decision” 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 choice-of-law rule, to apply

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39 This is apparently the view of Professor Dickinson. See supra note 7.
40 R3 TD2, § 1.03(1).
41 R3 § 1.03 comment a.
42 R3 TD2, § 1.03 Illustration 1. See also id. Illustration 2 (noting that “deciding the issue under State X law would result in unlimited recovery”).
California law. R3 instructs the court to apply California’s “internal law.”43 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 R2, which defines “local law” as the law that California would apply to purely local cases.

3. R3 and the One-Sided Substantive Theory

A subsequently approved section of R3 suggests that the ALI might be moving towards 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. For adherents of the one-sided conflicts understanding of ESLs, doing this would constitute prohibited renvoi. But, since the R3 denies that ESLs are choice-of-law rules, it also denies that treating the ESL as requiring the application of a law other than the law selected by the forum’s choice-of-law rule is renvoi. Under the one-sided substantive theory, therefore, R3 would require what, according to the one-sided conflicts view, is (usually) prohibited.

That the ALI is moving towards this view is suggested by its recent approval of Tentative Draft #3, which includes Chapter 5’s provisions describing R3’s general approach to choice of law.44 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 application.45 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.” R3 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, that is, only injuries occurring in State X.”46 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 R3, the case is beyond the scope

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43 R3 TD3 § 5.06(1).
44 R3 TD3, Chapter 5 Introduction; § 5.01 comment b.
45 See R3 TD3 Chapter 5 Introduction at 3; § 5.01 comment b; id. comment c Illustration 6.
46 R3, TD3, § 5.01 comment c Illustration 3.
of State X’s vicarious liability statute. For this reason, according to R3, “there is no conflict between X and Y law” and “Y law is the only relevant law and it will govern.”\footnote{Id.}

This analysis reflects a shift to the two-sided substantive theory. Had TD3 adhered to the theory espoused in TD2, 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.\footnote{The statement that “there is no conflict between X and Y law” might be understood to mean that both states have a law denying vicarious liability. In light of the further statement that X has no “relevant” law, however, R3 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.} Instead, it stated that State X had no “relevant” law and that only State Y law could govern. R2’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 R3’s definition of internal law in Tentative Draft #2.

R3’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 § 1.03) the choice-of-law rule of State Y directs application of the law of State X, the result now contemplated by R3 is that State Y does not apply what it now recognizes as the only substantive law State X has on the matter (the one imposing a damage cap). The State Y court applies instead the whole law of State X, meaning the state’s law together with its choice-of-law rules. State X’s ESL operates to displace the State Y’s choice-of-law rule selecting State X law, requiring it to apply State Y law.

R3 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.”\footnote{R3 TD2 § 1.03 comment a.} This definition appears to have been driven by R3’s view that ESLs substantively limit the reach of laws and that no court may apply a law beyond its specified reach. Despite the ESL’s obvious choice-of-law function, to admit that ESLs are choice-of-law rules would mean that R3’s prohibition of \textit{renvoi} would require the courts of other states to disregard them.\footnote{R3 TD3 § 5.06(1).} 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 V. For now, the important point is that R3 now requires what R2 considered prohibited \textit{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 R2’s one-sided conflicts theory (apply California’s strict liability rule) and the result under R3’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 results through clear drafting. The divergent understandings of ESLs thus mainly affect the presumptions that courts will apply in interpreting the clauses. Both R2 and the current draft of R3 establish a presumption that a contractual choice-of-law clause selects the law of the chosen state without regard to its choice-of-law rules. But, since the restatements disagree on whether an ESL is a choice-of-law rule, the presumptions recognized by the two restatements operate differently.

1. R2 and the One-Sided Conflicts Theory

R2 provides that, when the parties to a contract agree that the contract will be governed by the law of a particular state, “in the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.” As discussed above, R2 defines “local law” as the law the state applies to purely local cases. In our Title VII hypothetical, therefore, a court following R2 would presume that the contract’s selection of United States law meant to refer to the substantive provisions of Title VII, disregarding Title VII’s ESL. Because, under the one-sided conflicts theory, the United States has no other law governing gender discrimination in employment, there is no other U.S. law the clause could have been referring to. In a case presenting this very question, the Seventh Circuit applied R2 and held that the contractual choice-of-law clause selected Title VII as the governing law without regard to its ESL.

51 See R2 § 187(3); Restatement (Third) of the Conflict of Law, Council Draft No. 5, § 8.03(2)(c) [hereinafter R3 CD5]. Unlike TD2 and TD3, CD5 (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.
52 R2 § 187(3).
53 See supra Part II.A.1.
That is not to say that R2 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 that the parties could have resolved by an explicit provision in their agreement directed to that issue.”\textsuperscript{55} This would permit the parties to select to law of a given state unless the state whose law would otherwise apply would impose a different rule and does not allow the parties to contract around it in the purely local case. In a multi-state case, though, R2 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 unless the latter state has a materially greater interest and the selected state’s local law “would be contrary to a fundamental policy of” that state.\textsuperscript{56} R2 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. \textit{R3 and the Two-Sided Substantive Theory}

The current draft of R3 provides that a contractual choice-of-law clause is presumed to refer to the selected state’s “internal law.”\textsuperscript{57} But, as discussed, its definition of “internal law” is very different from R2’s. Section 1.03 adopts the two-sided substantive understanding of ESLs. This means that the reference to U.S. law in our hypothetical would be read as a reference to Title VII \textit{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 United States’ internal law for foreign employers’ foreign operations and find that the plaintiff is not protected from discrimination on the basis of gender identity.

R3 recognizes that the parties may by contract, in certain circumstances, incorporate the selected state’s local law rule.\textsuperscript{58} But, because R3 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 R3 presumes that the clause refers to the selected state’s internal law, under the two-sided substantive theory, the contract would be presumed \textit{not} to refer to the law the selected state would apply to purely local cases. This is consistent

\textsuperscript{55} R2 § 187(1).
\textsuperscript{56} R2 § 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.” R2 § 87(2)(a).
\textsuperscript{57} R3 CD5 § 8.03(2)(c).
\textsuperscript{58} Id. § 8.04 comment d.
with the illustrations provided in R3, which seem to require affirmative evidence of an intent to incorporate a state’s local law—typically an affirmative reference to a particular statute.59

3. **R3 and the One-Sided Substantive Theory**

The current draft of R3 addressing contractual choice-of-law clauses provides further evidence that R3 is shifting from the two-sided substantive theory to the one-sided substantive theory. R3 now takes 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.60 As in the context of *renvoi*, the consequence of the ESL is to require the application of another state’s law in such cases. R3’s new position is consistent with the one-sided substantive theory, which maintains that the enacting state has no law for excluded cases. Although R3’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,61 this does not count as *renvoi* for R3 because R3 does not regard ESLs as choice-of-law rules.

a. **Interpretation of the Choice-of-Law Clause.**

R3’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. R3 recognizes that the parties might have intended to incorporate that law, but determining whether they did so is, according to R3, a matter of contract interpretation to be decided without the aid of a presumption.62 This no-presumption approach seems to follow mechanically from R3’s carrying over of R2’s presumption that the parties intended to refer to a state’s “internal law,” combined with R3’s new interpretation of “internal law” as a state’s law including its ESLs.

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59 R3 CD5 § 8.04 comment d & Illustration 4. R3 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. R3’s treatment of the enforceability of choice-of-law clauses selecting the local law of a state is discussed in the next section.

60 R3 CD5 § 8.04 comment b.

61 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).

62 R3 CD5 § 8.04 comment 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 select the law the selected state would apply to purely local cases, their choice may not be enforceable. As discussed below, R3 would uphold the parties choice of a law that does not reach the case of its own force in narrower circumstances than their choice of a law that does reach the case.
As R3 acknowledges, R3’s new definition of “internal law” does not foreclose the possibility of interpreting a contractual choice-of-law clause as selecting the law that the selected state would apply to purely internal cases—that is, the selected state’s “local law” as R2 defined it. There is, accordingly, nothing in the new definition of “internal law” that precludes the possibility of interpreting a contractual choice-of-law clause as selecting the chosen state’s “local law” disregarding its ELSs. 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.”63 R3’s apparent espousal of the one-sided substantive theory strongly support 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 only be referring 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 R3, a contract’s selection of a state whose law 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.”64 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 avert complex choice-of-law inquiries. As both R2 and R3 recognize, the “basic objective” of a choice-of-law clause is to achieve greater “certainty and predictability.”65 Yet, according to R3, 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. R3’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 question of enforceability, R3 departs from R2 by distinguishing between the enforceability of a clause selecting a law that, because of an ESL, does not

63 Gary Born & Cem Kalelioglu, *Choice of Law Agreements in International Contracts*, 50 GA. J. INT’L & COMP. L. 44, 104 (2021). See also Coyle, supra note 19, at 574 (2019) (arguing that when parties select the law of a particular state they do not intend to include that state’s presumption against extraterritoriality).

64 R3 CD5 § 8.03 comment b.

65 R2 § 187(3) comment h. To the same effect, see R3 CD5 § 8.03 comment f. See also Rabé v. United Airlines, 636 F.3d 866, 871 n.2 (7th Cir. 2011) (relying on R2 § 187(3) and comment h in finding that choice-of-law clause selected scope limited law without regard to the ESL).
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.

R3’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 R3’s treatment of this issue 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. R3 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 selected state’s legislature regarding the content of its law. 66 The one-sided substantive theory, however, recognizes that the enacting state has no relevant preferences regarding cases beyond the statute’s specified external scope. The enacting state’s law has no content for 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, but R3’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 entirely unwarranted.

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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 very different outcomes if the case is beyond the statute’s specified external scope. R2 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

66 See R3 CD5 § 8.02 comment b (“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 is a state’s law must be respected by all courts.”).
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 R3 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 R3 suggest that R3 may be moving towards 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 that can be disregarded by the courts of other states. This 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 even 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 R2 constitutes prohibited renvoi.

III. THE ONE-SIDED CONFLICTS THEORY

The type of provision on which this Article focuses has gone by a variety of names in the Conflict of Laws literature. Arthur Nussbaum referred to such provisions as “spatially-conditioned internal rules” and he noted that “the realm of [such] rules is wide and unexplored” and that examination of such rules “should form an integral part in any complete discussion of” Conflict of Laws. Rodolfo De Nova called these provisions “self-limiting rules” and statutes containing these provisions “self-limited laws.” Nussbaum and DeNova denied that these rules are choice-of-law rules. Professor Symeonides has called them “territorial scope provisions” and “localizing

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67 Arthur Nussbaum, Principles of Private International Law 71 (1943). 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 72, 73. (“Private international law” is the term used in civil law countries to describe the field of otherwise known as Conflict of Laws. See id. at 3. I use the terms synonymously.)
69 Id. at 73.
70 Symeonides, supra note 2, at 494.
rules,” and he considers them “choice-of-law rules, albeit of the unilateral type.”

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 involved.” In 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.” Here, I use the term “external scope limitation” to contrast them with what I call “internal scope limitations.”

British scholar J.C.H. 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 governs 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.” 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. He equates the third category with what Nussbaum denominated a “spatially-conditioned internal rule,” but, as Morris’ tri-partite distinction indicates, he disagreed with Nussbaum’s view that they are not choice-of-law rules. 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 conflicts rules, and a statute with a particular choice of law [provision] is a bastard hybrid.” The treatment of ESLs by the courts and scholars that have embraced the substantive theories bears out Morris’s concern.

Lord Collins, Morris’s successor as co-author 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.” As an example of a unilateral conflict-of-laws rule, the

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72 SYMEONIDES, supra note 2, at 494.

73 Mann, supra note 2.

74 See F.A. Mann, Statutes and the Conflict of Laws, 46 BR. Y.B. INT’L L. 117, 130 (1972-73). Mann never acknowledged or explained his change of position.


76 Id. at 173. Such statutes, he says, ‘are rare.” Id. R2 makes the same point. See R2 § 6(1) comment a, discussed supra note 36.


treatise cites the Marriage (Scotland) Act, which provides that “[n]o person domiciled in Scotland may marry before he attains the age of 16.” The treatise recognizes that the limitation of the provision to persons domiciled in Scotland is a “conflict of laws” provision and thus that a court that rejects *renvoi* would disregard it. 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*.“ The distinction is also consistent with Morris’s analysis and with that of other scholars who regard ESLs as unilateral choice-of-law rules.

But, confusingly, Collins goes on to distinguish statutes that include unilateral conflicts rules from “self-limiting statutes.” 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.” Such “self-limiting” provisions, according to the treatise, “are clearly not rules of the conflict of laws whether multilateral or unilateral.” 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 rule corresponds to my distinction between ISLs and ESLs. Insofar as a provision limits the statute’s applicability to British citizens or British ships, however, Collins’

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79 *Id.,* ¶ 1-044.

80 *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.* 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 16. My analysis calls for a similar dissection of statutes containing ESLs.

81 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 that: “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.* at 73, ¶ 4-002. 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.

82 See supra note 2. Brainerd 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 being universals assigning ‘jurisdiction’ to the only competent state,” but would instead be “exercises of lawmaking power, directed to local courts, providing aids to statutory construction.” See Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 248 (1958). The fact he regarded ESLs as being “directed to local courts” indicates that he regarded ESLs as choice-of-law rules in a broader sense.

83 *Dicey,* supra note 78, p. 23, ¶ 1-049.

84 *Id.*
A. External vs. Internal Scope Limitations

Many statutes include limitations on the scope of their internal applicability. A statute that prohibits vehicles in the park applies only in parks. An antidiscrimination statute may apply only to employers having fifteen or more employees.\textsuperscript{86} 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 internal scope limitation, purely local cases falling outside of 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 of 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.\textsuperscript{87} 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

\textsuperscript{85} Id. ¶ 1-051.
\textsuperscript{86} \textit{See} 42 U.S.C. § 2000e(b) (Title VII provision 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”).
\textsuperscript{87} For example, when it embraced the two-sided substantive theory, R3 equated ESLs with “a charitable immunity statute that protects charities ‘with fewer than 100 employees.’” \textit{See} Third Restatement PD2, Reporters’ Memorandum at xx. \textit{See also id.} 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 . . . .”).
another state is bound by the statute’s limits in the domestic context (e.g., what counts as a “vehicle” that may not be used in a park), it is bound by the limits incorporated into the statute regarding its external scope.  

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 the included cases and should not apply to the 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.

The requirement of some sort of link between the dispute and the enacting state is, indeed, a requirement of international law. In order to have jurisdiction to impose its law on a given matter, a state must have certain types of ties to the matter. In addition, a state’s constitution may limit the authority of the national or sub-national 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.” An ESL will sometimes serve as the jurisdictional hook on which the state bases its legislative authority under international law or the state’s constitution.

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88 See R3 TD3, § 5.06 comment k.
89 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, 417–21 (1980).
90 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. Restatement (Fourth) of Foreign Relations Law § 402(1)(a), (b) (2018). 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. § 402(c). A state also has jurisdiction under certain circumstances over conduct outside its territory that harms its nationals, id. § 402(d), or is directed against its security or other fundamental interests. Id. § 402(e). 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. § 402(f). But, outside of that small set of cases, a connection between the state and the regulated party or conduct is required by international law.
91 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
If the state’s legislature enacted an ESL to reflect the limitations placed on its prescriptive jurisdiction imposed by the state’s constitution or by international law, 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 that may have a different substantive law on the issue that it would welcome their application of their law on the topic on the basis of the same sort of jurisdictional hook. It may have wished to avert inter-state or international friction that would result from exercising legislative authority over persons or conduct having a closer connection to other states. Or it may simply have been uncertain about the appropriateness of its substantive rule for cases lacking the specified connection to its territory.

B. The Test of Alternatives

Patrick Kinsch offers the following test for distinguishing between ISLs (which he calls self-limiting provisions) 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 law of a different legal system; if we are dealing

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92 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 E.E.O.C. v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991) (purpose of federal presumption against extraterritoriality is “to protect against unintended clashes between our laws and those of other nations which could result in international discord”).

93 Some might argue that the 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 disinterested 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. See supra Part II.B (discussing incompatibility of interest analysis with the two-sided substantive view).
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.\textsuperscript{94} Kinsch attributes this test to German scholar Klaus Schurig, who called it the test of alternatives (\textit{Alternativentest}).\textsuperscript{95} 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 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.\textsuperscript{96} These are the sorts of considerations that typically underlie choice-of-law rules.\textsuperscript{97}

C. ESLs as Incomplete Choice-of-Law Rules


\textsuperscript{96} A legislature might have more nefarious reasons for limiting the scope of its statutes. This possibility is discussed in Part IV.

\textsuperscript{97} \textit{See, e.g.}, Alex Mills, \textit{The Identities of Private International Law: Lessons From The U.S. and EU Revolutions}, 23 DUKE J. COMP. & INT’L L. 45, 472 (2013) (“[O]ne . . . fundamental value [underlying 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.”); Joseph W. Singer, \textit{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 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.”).
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 link to the enacting state, the law of some other state should govern. Professor Morris called an ESL a “hybrid,” and his characterization is apt: in outward form, it 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. 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’ 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. So understood, the provision would function in the same way as what Morris describes as a general choice-of-law provision—it would displace the state’s general choice-of-law rule for tort cases (if different). 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 in purpose and intended effect than ISLs. An ISL establishes one rule of the enacting state for included cases and a different rule

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98 See supra text accompanying note 77.
99 Accord Peter Hay, Comments on “Self-Limited Rules of Law” in Conflicts Methodology, 30 AM. J. COMP. L. SUPP. 129, 134 (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.”
100 See supra text accompanying note 76. 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 text accompanying note 102 (discussing section 388 of New York Vehicle and Traffic Law). This 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.
of the enacting state for excluded cases. 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 inter-state 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.

IV. THE TWO-SIDED SUBSTANTIVE THEORY

The courts and scholars that deny that ESLs are choice-of-law rules understand ESLs very differently. Budget Rent-a-Car System, Inc. v. Chappell is a good example. This case involved section 388 of New York’s Vehicle and Traffic Law, which established that owners of vehicles are vicariously liable to persons injured by the vehicle. This law included an ESL specifying that it applied to “[e]very owner of a vehicle used or operated in this state.” 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 not “used or operated” in New York (no vicarious liability). 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.”

The court then went on to determine whether to apply New York’s no-vicarious-liability rule for vehicles not owned or operated in New York or Michigan’s vicarious-liability rule instead. 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 vehicles not used or operated within New York—a law denying vicarious liability.

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101 Budget Rent-A-Car System v. Chappell, 304 F. Supp. 2d 639 (E.D. Pa. 2004), rev’d on other grounds, 407 F.3d 166 (3d Cir. 2005). The Third Restatement cites this case with approval. See R3 TD2, § 1.03 reporters’ note to comment b; R3 TD3 § 5.01 reporters’ note c.
102 Id. at 645.
103 Id.
104 Id. (emphasis added).
105 Michigan’s law authorizing vicarious liability was subject to a damage cap, but the damage cap was, in turn, subject to an ISP that, the court held, rendered the cap inapplicable to the case. See id. at 648-50.
106 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 System v. Chappell, 407 F.3d 166, 172 (3d Cir. 2005). But the appellate court, too, seemed to regard the ESL a bearing on whether New York law established or denied...
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. The issue is ultimately one of statutory interpretation, however, and it is certainly possible that a legislature intended to subject excluded cases to a different rule of the same state. Section B argues that, if an ESL was so intended, it would be unconstitutional in many, perhaps most, cases and, in any event, 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 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. If so, what is the content of Kansas’ law for out-of-state franchises? One possibility is that out-of-state franchises are governed by Kansas’ common law. If so, would that be Kansas’ common law frozen in time as of the date of the statute’s enactment, or would it be Kansas’ 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 vicarious liability, rather than as a choice-of-law rule. Indeed, the Third Circuit criticized the New York Court of Appeals for its “unfortunate . . . conflation [of] the substantive law question (the scope of the statute) with the choice-of-law question (the extent of New York’s interest in applying the statute).” Id. at 173.

107 This is the approach favored by Professor Sedler. See Robert Allen Sedler, Functionally Restrictive Substantive Rules in American Conflicts Law, 50 S. CAL. L. REV. 27, 35 (1976). See also DICKINSON, supra note 7. Professor Lipstein, on the other hand, concluded that “[s]uch a solution displays a touch of the unreal.” Lipstein, supra note 71, at 893.
franchises for cases having only a limited connection to Kansas. The legislature is unlikely to have intended either approach.

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 non-regulation—anything goes. 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. But this is an even less plausible interpretation of the ESL than one that leaves excluded cases to the governed by the state's common law. Statutes are usually thought to build upon the state's common law, changing it where necessary. Thus, if the legislature did intend that excluded cases be governed by

108 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 policies that arise in the context of franchises. Perhaps the court would conclude that Kansas' 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 Part V.

109 Moreover, Kansas' common law can supply Kansas' 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 Brainerd Currie and applied by the courts, was that courts should construe both statutes and common law rules to determine their applicability to multi-state cases. BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 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.”). Indeed, R3 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 of that the law is subject to an implicit external scope limitation. See R3 'TD3 Chapter 5 Introductory Note.

110 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 plaintiff 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' common law. 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). But cf. id. at 872-73 (noting that the Illinois statute was in derogation of the common law). See Dodge, supra note 19, at 1426 (criticizing this decision for “ironically applying] Illinois’ policy of non-liability extraterritorially in Iowa, leaving the injured party without a remedy,” even though Iowa law provided for liability).

111 This appears to have been R3's understanding in earlier iterations of R3's provisions on contractual choice-of-law clauses. See Third Restatement, Preliminary Draft No. 5, § 8.04 comment g (Am. L. Inst., Oct. 23, 2019) (“When the parties select a scope limited law that excludes them or their transaction, . . . the effect is not to opt in to one rather than another State's regulatory regime but rather to opt out of regulation entirely.”).

another rule of the enacting state, it would seem to follow that cases beyond the internal reach of the statute are to remain governed by the state’s common law. To conclude that Kansas’ law for out-of-state franchises is one prescribing complete freedom of action would require an interpretation of the statute as preempting the field, displacing the preexisting common law both for cases having the specified link to the enacting state and for those lacking the link, and then prescribing non-regulation as the law of Kansas for cases lacking the specified link. 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 the Kansas. It is far more likely that the legislator 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. 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, do we conclude that the U.S. 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” as a reason to conclude that legal systems are complete normative systems, having no gaps. As 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.


114 See, e.g., JOSEPH RAZ, THE AUTHORITY OF LAW 76 (1979). Raz concluded that, because of closure rules such as the one mentioned in the text, “there are not gaps when the law is silent.” Id. at 77.

115 HERSCH 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.”) 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 ISP to reflect New York’s determination to permit unfettered use of vehicles outside of parks in Connecticut. 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. 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. How courts should decide a case when faced with such lacunae is discussed further in Part V. But this 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.

B. The Unconstitutionality of the Two-Sided Substantive View

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. Consider a statute that establishes a remedy for certain types of injuries but says that it extends only to injuries suffered by domiciliaries

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116 See also RAZ, supra note 114, at 63 (noting that a legal statement, including a statement about legal “permissions, duties and powers,” “is not a statement of law in the abstract but a statement of English law or of German law, etc.”).

117 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 190 and accompanying text.

118 See RAZ, supra note 114 (noting that a legal permission closes the legal gap).

119 But cf. infra Part V (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).
of the state. 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 non-domiciliaries to be denied a remedy. Maybe the legislature meant to favor domiciliaries and to disfavor non-domiciliaries. We might call this a protectionist law.

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. Some courts embracing the two-sided substantive theory have candidly recognized that the legislature intended to limit the statute’s benefits to residents or domiciliaries. If the legislature did mean to enact a protectionist ESL, however, the resulting legislative regime is very likely unconstitutional in most cases, at least in the inter-state context. This section first considers constitutional problems with ESLs specifying that a statute applies only to persons having certain affiliations with the enacting state. It then considers constitutional problems with ESLs specifying that the law extends only to conduct occurring within the state.

1. Person-Territorial ESLs.

120 See NUSSBAUM, supra note 67, at 72 (citing, as an example of a spatially-conditioned internal rule, “an exemption statute [that] reserve[s] its benefits to local residents”)
122 See Kermit Roosevelt, 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.”).
123 See, e.g., Highway Equip. Co. v. Caterpillar, Inc., 908 F.2d 60, 63 (6th Cir. 1990) (“When it reenacted the [Illinois Franchise Disclosure] Act, the Illinois legislature ‘confirmed that the statute is intended to protect Illinois residents only.’”); Bimel-Waloth Co. v. Raytheon Co., 796 F.2d 840, 842-43 (6th Cir. 1986) (“[T]he legislative history of [amendment to Wisconsin Franchise statute] makes it abundantly clear that 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 Service Co. v. Ambac Intern. Corp., 961 F.2d 635, 638 (7th Cir. 1992) (discussing legislative history of Wisconsin Franchise Dealer Act), overruled on other grounds by Generac Corp. v. Caterpillar Inc., 172 F.3d 971, 976 (7th Cir. 1999).
124 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 could legitimately be resisted by other states as an unfriendly act. See infra note 161.
125 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 generally Perry Dane, Conflict of Laws, in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 209, 211, 214 (Dennis Patterson ed. 1996) (explaining this terminology).
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. If the statute is read to enact one rule for domiciliaries of the state and a different, less favorable rule of that state for non-domiciliaries, the resulting regime will in most cases be unconstitutional. Support for this conclusion comes from an unlikely source: Brainerd Currie. The source is unlikely because Professor Currie’s interest analysis has been criticized precisely on the ground that it discriminates against non-domiciliaries. Currie generally assumed that a state was interested in having its law applied in a case if the policy advanced by the law would operate in favor of a domiciliary. Thus, if the purpose of a law is to protect injured guests, the state has an interest in having its law applied if the injured guest is a domiciliary. For Currie, then, such a law would effectively extend to domiciliaries but not to non-domiciliaries. This disparate treatment of non-domiciliaries 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.

The most persuasive rebuttal to this constitutional objection begins by denying that the enacting state has, through its ESL, enacted a law denying non-domiciliaries 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 non-domiciliaries. Even if so understood, Currie’s interest analysis might still be vulnerable to the objection that it discriminates against non-domiciliaries 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, anti-formalists would surely be unconvinced that interest analysis is constitutional because it does not establish that the

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126 See Nussbaum, supra note 67, at 72 (citing, as an example of a spatially-conditioned internal rule, “an exemption statute [that] reserve[s] its benefits to local residents?”)
127 Of course, 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. Cf. International Covenant on Civil and Political Rights, art. 25, 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).
129 Even if so understood, Currie’s interest analysis might still be vulnerable to the objection that it discriminates against non-domiciliaries because it relegates them to their home state’s law only when doing so disadvantages them.
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.\(^\text{130}\)

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

\[\text{[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 towards 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.}\(^\text{131}\)

Professor 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.”\(^\text{132}\) But distinctions based on state residency are not problematic when they serve a “substantial nonprotectionist objective.”\(^\text{133}\) ESLs that limit the benefit of state laws to residents are generally permissible when “the justification for limiting the scope of [such] laws . . . is comity.”\(^\text{134}\) In such cases, the scope limitation “is a means of accommodating the interests of other states,”\(^\text{135}\) which is permissible because “reducing interstate friction is the central purpose of the privileges and immunities clause.”\(^\text{136}\) “A state may withhold the benefits of its law [from nonresidents] in order

\(^{\text{130}}\) See Currie & Schreter, Privileges and Immunities, supra note 128, at 1324.

\(^{\text{131}}\) Id. at 1391.


\(^{\text{133}}\) Id. at 1067.

\(^{\text{134}}\) Id.

\(^{\text{135}}\) Id.

\(^{\text{136}}\) Id. at 1067–68.
to apply the law of another interested state, but not otherwise.”

Thus, Kramer, like Currie, concludes that states do not violate the Constitution when they restrict the scope of their laws to domiciliaries if they do so 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 non-domiciliaries 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.

The Supreme Court’s decision in Franchise Tax Board of California v. Hyatt 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. California law gave tax authorities absolute immunity from these intentional tort claims. Nevada law permitted these claims but subjected them to a $50,000 damage cap. In Hyatt I, the Supreme Court upheld the Nevada court’s decision not to apply California’s absolute immunity rule.

On remand, the Nevada courts declined to give California’s tax authorities the benefit of the $50,000 damage cap provided by Nevada law. This damage cap, the Nevada court held, was applicable only to Nevada tax authorities. This time, the U.S. Supreme Court held that Nevada had violated the Full Faith and Credit Clause. 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 applied 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 (i.e., a rule allowing recovery against California tax authorities without a damage cap). Establishing a special rule for out-of-state cases, the Court concluded, violates the Full Faith and Credit Clause:

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 “conflict” with California law, for both laws would grant immunity. . . . Similarly, in respect to such amounts, the “policies” 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

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137 Id. at 1068.
139 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. California v. Hyatt, 139 S. Ct. 1485 (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 II.
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.\footnote{141}

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,”\footnote{142} the Court concluded that it violated 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,” by which it meant the principles that Nevada applies to local cases. The Court also recognized that a court may apply its sister’s state’s local law (meaning, in this case, California’s law of absolute immunity). But it may not fashion a special rule to cover only out-of-state cases.\footnote{143} 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,\footnote{144} but it gave no clue as to what such policy considerations would look like. Presumably, a special rule for multi-state cases of the sort proposed by Professor Von Mehren,\footnote{145} carefully tailored to account for the special characteristics of such cases, would pass muster.\footnote{146} But, in light of the above analysis, it is difficult to conceive of valid policy reasons that would justify a statute that establishes a different substantive law of that state solely for out-of-state cases when that law consists of the common-law rules that the state has

\footnote{141}{136 S. Ct. at 1282.}
\footnote{142}{Id.}
\footnote{143}{See also infra note 157.}
\footnote{144}{Id.}
\footnote{145}{Arthur Taylor von Mehren, \textit{Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology}, 88 HARV. L. REV. 347 (1974). Professor Von Mehren encouraged states to enact special substantive rules for multi-state situations to address problems that arise in such contexts that do not arise in a purely local case. Some scholars have lumped this type of law in the same category as laws having an ESL, see, e.g., Lipstein, \textit{supra} note 71, and accompanying text, 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 multi-state cases. Indeed, even a special rule for multi-state cases will usually be applicable only if the multi-state case has some link to the enacting state. The provision limiting application of the special rule for multi-state cases to cases having specified links to the enacting state would be an ESL and a choice-of-law rule under the test of alternatives.}
\footnote{146}{In encouraging development of special rules for multistate problems, Professor 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.” \textit{See} Von Mehren, \textit{supra} note 136, at 357.
abandoned for in-state cases or when the law simply prescribes non-regulation for out-of-state cases.

2. *Ad-Territorial* ESLs

The Privilege and Immunities and Equal Protection Clauses are less directly relevant to the validity of ESLs drawing distinctions based on the place where certain events occurred. The *Hyatt* Court’s holding 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* itself concerned an ESL based on the out-of-state affiliation of the regulated entity.

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 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.”\(^{147}\) 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.\(^{148}\)

Of course, there will be cases in which the injury did not occur in Minnesota but the state still has sufficient contacts to make its law applicable consistent with the Due Process Clause.\(^ {149}\) But for such cases, there is a lingering Due Process problem: the scope limitation would be arbitrary or irrational.\(^ {150}\) The state would be establishing a law for the entire world consisting of either the antiquated common law rules that it has rejected domestically or simply non-regulation. 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

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\(^{147}\) 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”).

\(^{148}\) The district court in *Budget Rent-a-Car* noted the Due Process problems with extending New York’s vicarious liability law to a case having scant connections with New York, 304 F. Supp. 2d at 647. 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.

\(^{149}\) Perhaps the injury did not occur in Minnesota but the conduct causing the injury did.

\(^{150}\) *See* Nebbia v. New York, 291 U.S. 502, 536–37 (1934) (listing cases where “the requirements of due process were not met because the laws were found arbitrary in their operation and effect”).

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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. More generally, a state
might validly decide to establish a special substantive rule for multi-state situations to
address special problems that arise in such contexts that do not arise in a purely local
case. But a state that establishes as its special rule for conduct occurring outside the
state an anachronistic common law rule that it has displaced for local cases, or
prescribes “non-regulation” for such cases, would very likely be acting arbitrarily or
irrationally.

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.” This so-called extraterritoriality branch of Dormant Commerce Clause
doctrine has been criticized by judges and scholars. The claim that the Constitution
forbids all extraterritorial regulation is clearly implausible. States will often, and
uncontroversially, extend their laws to “conduct occurring wholly outside the state” if
the dispute has other connections with the state. But the two-sided substantive
understanding of ESLs presents perhaps the strongest case for objecting to legislation
on the ground that it operates extraterritorially. The Supreme Court’s Dormant
Commerce Clause cases invalidate state legislation as impermissibly extraterritorial
under certain circumstances when the state “projects its legislation” onto other States.
If an ESL were understood to operate like an ISL, however, the state would not be
regulating out-of-state conduct through the extraterritorial “projection” of the same
substantive law that the state applies to in-state conduct. Instead, it would be creating
a special rule applicable only to out-of-state conduct. 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 (to quote the Supreme

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151 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 67,
at 71 (giving as an example of a spacially-limited substantive rule “a statute of limitation . . .
provid[ing] special periods for action on documents executed abroad.” (citing Val Platz
Brewing Co. v. Industrial Comm’n, 201 Wis. 474, 230 N.W. 622 (Wis. 1930)).
152 See von Mehren, supra note 146 and accompanying text.
(quoting United States Brewers Ass’n v. Healy, 692 F.2d 275, 279 (2d Cir. 1982)).
154 See Energy & Envt. 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,
979 990 (2013).
155 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).
(emphasis added).
157 This was precisely the Supreme Court’s objection to the Nevada law in Hyatt. See supra text
accompanying note 143. The Full Faith and Credit Clause thus dovetails with the Dormant
Commerce Clause in repudiating this sort of law.
Court’s test) “conduct occurring wholly outside the state.” Even the courts that have regarded the extraterritoriality branch of the Dormant Commerce Clause as moribund have acknowledged that the clause invalidates laws that “directly regulate conduct that is wholly out of state.”

* * *

In sum, it is unlikely that the legislature that enacted the ESL understood 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 “non-regulation.” If the legislature did have such an intent, the resulting legal regime would pose severe constitutional problems in inter-state cases. Some statutes distinguishing among the types of affiliations a person might have with the enacting state might be valid in certain circumstances, as might a statute establishing a special rule for multi-state cases that addresses legitimate differences between such cases and purely local cases. But if a statute specifying that it extends to persons or conduct having specified links to the enacting state without specifying 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.

V. THE ONE-SIDED SUBSTANTIVE THEORY

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159 See supra note 127.
160 See supra text accompanying note 146.
161 The Privileges and Immunities, Full Faith and Credit, and Dormant Commerce Clause objections would apply only in the inter-state context (that is, New York versus California). The Due Process objections, on the other hand, would potentially also apply to international cases (e.g., New York versus France). In addition, a state law that affirmatively establishes a different substantive rule for non-domiciliaries than for domiciliaries might, in an international case, violate treaties of friendship, commerce, and navigation, which typically include a national treatment provision. See Herman Jr. Walker, Modern Treaties of Friendship, Commerce and Navigation, 42 MINN. L. REV. 805, 811 (1958). Korea FCN Treaty, 1956, T.I.A.S. No. 3947, art. XXII, Para. 1. 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 non-domiciliaries, 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 another nation, confronted with a law that discriminates so blatantly against its own domiciliaries, would be under no constitutional obligation to give effect to another 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.
Having rejected the view that states with statutes having 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 in most cases—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.162

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. It may well be wise policy to authorize renvoi for cases in which the enacting state has a statute with an ESL rendering the statute inapplicable. 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 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. In the inter-state context, according to R3, this option is foreclosed by the Full Faith and Credit Clause.

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

R3 maintains that a U.S. state violates the Full Faith and Credit Clause163 when it applies a sister state’s statute “to a set of facts outside its specified scope . . . if the scope restriction is clear and brought to the court’s attention.”164 Supreme Court dicta suggests that the clause is violated if the court misconstrues its sister state’s law and its misconstruction “contradicts law of that other State that is clearly established and that

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162 See supra Part II.A.2.
163 U.S. CONST., art. IV, § 1.
164 R3 TD3, § 5.02 reporters’ note 1.
has been brought to the court’s attention.” But R3 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 itself 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 by applying its substantive rule is highly implausible.

The Supreme Court has not directly addressed this question. 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. But such provisions purport to reserve judicial jurisdiction to the enacting state’s courts rather than limit the external reach of the substantive law. Whether the Court’s reasoning in these cases extends to ESLs is debatable.

166 Hughes v. Fetter, 341 U.S. 609 (1951), involved an ESL but sheds little light on the question. Hughes involved a Wisconsin wrongful death statute with an ESL limiting its applicability to “deaths caused in this state.” 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. at 610. The Wisconsin Supreme Court’s treatment of the ESP 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 also suggests that it applied Wisconsin law and interpreted it in the two-sided substantive sense—i.e., 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 Court held that a policy of refusing to entertain actions based on sister state law violates the Full Faith and Credit Clause. 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 it 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 does not address that issue.
168 The Court in George 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 inhere
Despite the lack of definitive precedents, rejection of R3’s claim regarding the Full Faith and Credit Clause is required 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 R3 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 that 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.169

This formalist analysis accords with the legislature’s purposes in adopting the ESL. As discussed, and as R3 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 legislation. 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, but rather on the notion that a court cannot decide a case in the absence of law.170 If a state that has enacted a statute with a 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

in the cause of action or which name conditions on which the right to sue depend.” 233 U.S. at 360. This dictum is unproblematic insofar as the Court was referring to ISPs. It is not clear whether the Court meant to refer to ESLs as well.

169 The claim that the Full Faith and Credit Clause requires courts to give effect to sister states’ ESPs thus depends on acceptance of the 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 III, this understanding of ESLs misunderstands their purpose and intended effect and, in any event, renders the enacting state’s law unconstitutional.

170 This principle might itself have constitutional status. If so, its home would probably be the Due Process Clause.
enforced in court do not exist in the abstract. Courts only enforce rights that are conferred by positive law.” 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 III, a state that limits the external scope of its law generally does so out of a sense of inter-state 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.

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. Yet it has long been understood that the choice-of-law rules of one state are not binding on the courts of other states. 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 regards its choice-of-law rules as implicitly limiting the scope of its laws. It is, of course, possible that the courts have long been overlooking a problem to which R3 has now drawn our attention. But 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’s 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. This solution will be

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171 See Kramer, supra note 132, at 1052; see also Roosevelt, supra note 20, at 1871 (“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.”).

172 See supra text accompanying note 22 (citing the Carroll case).

173 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. Comp. L. 227, 244 (2010) (noting that, rather than interpret a provision as expressing statute’s maximum scope, “[i]t would have been equally plausible to hold that the statute merely delineated the minimum reach of Nebraska law” (emphasis in original)); see also SYMEONIDES, supra note 2, at 495. This approach has also been favored by DAVID F. CAVERS, CHOICE-OF-LAW PROCESS, 245–46 (1965), and KELLY, supra note 71, at 31 (“Express localising rules are normally concerned with the minimum application sought to be ensured for certain decisional [i.e., substantive] rules by the legislator, rather than with setting the outer limits of the relevance of
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 (e.g., 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 III, 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 other appropriate circumstances. 174

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.”175 In the face of clear statutory language, the courts of the enacting state would likely feel constrained to apply the statute as written. 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. R2 and R3 both provide that the courts of a state will follow a choice-of-law directive of its own legislature.176 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.177 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.

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174 R3 adopts a presumption that an ESL does not mandate application of statutes to cases that fall within its scope. Thus, even if the statute reaches the case, the courts of the enacting state can disapply it if it concludes 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.


176 See R2, § 6(1); R3 TD3 § 5.06(1).

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.\textsuperscript{178} 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.\textsuperscript{179} 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.\textsuperscript{180} If the case implicates 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.\textsuperscript{181}

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 remvoi. 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 R2 and R3 instruct the forum to apply the selected state’s internal law, disregarding its ESLs.\textsuperscript{182} But, if the substantive provisions of the selected state’s statute can be applied by the forum courts

\textsuperscript{178} See, e.g., Chicago v. Morales, 527 U.S. 41, 51 (1998) (invalidating a loitering ordinance for being unconstitutionally vague); Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972) (striking down a vagrancy ordinance because its language failed to “give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden”); Coates v. Cincinnati, 402 U.S. 611, 612–13 (1971) (holding that a city ordinance banning conduct “annoying to persons passing by” was unconstitutionally vague).

\textsuperscript{179} See generally BRILMAYER ET AL., supra note 91, at 156–63.

\textsuperscript{180} See R2 § 6 comment 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., 65 N.Y.2d 189, 198 (1985).

\textsuperscript{181} 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).

\textsuperscript{182} See supra text accompanying notes 24-29.
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 is 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. 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. 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. If ESLs are understood as choice-of-law rules, they should similarly be considered 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 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.” But even in the face of express statutory language, 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.

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183 This appears to have been Currie’s view. See supra note 82.
184 As noted supra at 177, a legislature that adopts a maximum scope limit without case-specific exceptions likely did so in order 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 Empagran, 542 U.S. at 168.
186 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?” 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.
At the end of the day, the position that ESLs are binding on all courts appears to be based on its 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. But the general rule is not the universal rule. The scholarship on whether text should always prevail over purpose is legion, 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 the assumption that the legislature enacted the statute with the purely domestic case in mind. Legislatures typically frame statutes in universal, all-encompassing terms—for example, as extending to “all contracts in restraint of trade”—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.187 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.188 But this remains a purely theoretical concern if the courts of other states will only apply the law to the extent its choice-of-law rules so direct. Choice-of-law rules typically call for the application of another states law only if that state has a significant connection to the dispute.

Presumably, 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. 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 on the enacting state’s courts, instructing those courts—and only those courts—not

187 See, e.g., Lauritzen v. Larsen, 345 U.S. 571, 576-77 (1953 (statute textually applicable to “any seaman who shall receive a personal injury in the course of his employment” should not be read literally because “a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal wording”); 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 Alabama Great Southern Railroad v. Carroll, supra text accompanying note 22.

188 See Roosevelt, supra note 20, at 1853-54 (making this argument).
to apply the substantive provisions of the law to cases lacking the specified link to the enacting state. 189

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 instruct), 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 chosen 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. 190 The local law theory has a hoary pedigree. The standard citation for it is to an opinion by Judge Learned Hand, Guinness v. Miller. 191 Its most famous scholarly proponent was Walter Wheeler Cook, 192 who is widely thought to have bested Joseph Beale in his critique of Beale’s work as reporter of the

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189 The courts of one state can certify the question to the courts of the other state, see Michael S. Green, Law’s Dark Matter, 54 William & Mary L. Rev. 845 (2013) (noting that choice-of-law questions can be certified to the enacting state’s courts), but of course they do not have to.

190 Cavers, supra note 107, at 824. 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 114, at 120.


First Restatement of Conflict of Laws. Outside the United States, it has been forcefully defended by such scholars as Hans Kelsen and A.V. Dicey.

The “local law” theory has few contemporary champions. 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. 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 it has, 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. 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. 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 “[l]ong established and still subsisting choice of law practices that come to be thought, by modern scholars, unwise, do not thereby become unconstitutional,” 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

[193] Brainerd Currie wrote that Cook’s work had “discredited the [Beale’s] vested rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another.” CURRIE, supra note 109, at 6.
[195] See DICEY, supra.
[196] See Roosevelt, supra note 20, at 1842-49 (critically discussing the local law theory).
[197] See R2 § 5 comment b (“A court applies the law of its own state, as it understands it, including its own conception of Conflict of Laws.”).
[199] See Roosevelt, supra note 20, at 1887–88 (making this argument).
incorporating via its choice-of-law rules the local law of 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. 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).\textsuperscript{201}

VI. 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 territorial 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 territorial scope provisions.

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 enacting 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 contractual and non-contractual settings for good reasons. But R3 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. Our conclusion that comity-based ESLs are choice-of-law rules leads

\textsuperscript{201} In the interstate context, the “local law” theory might be thought to violate the nondiscrimination principle discussed in Part IV. 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. But, because Bangladesh is merely subjecting California defendants to the substantive rule that California itself subjects California defendants causing injuries in California, the rule might plausibly be defended on comity grounds. Alternatively, Bangladesh might defend the discrimination as a legitimate response to California’s discriminatory decision to limit the benefits of its rule to those suffering injuries in California.
to the conclusion 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, and to enforce clauses
selecting the local law in the same circumstances as other 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, whether or not they are considered choice-of-law rules.

In non-contractual 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 cases 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, at least in certain
circumstances, to the traditional view that such clauses may be disregarded. Or, as
David Cavers predicted (though not approvingly), they may find the disregard of such
provisions to be an impermissible distortion of the law.202 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 does not follow from
anything inherent in the Constitution or the “nature of choice of law.”203

202 See supra text accompanying note 186.
203 Cf. R3 TD3 § 5.01 comment b (describing its approach as flowing from “the nature of
choice of law”).