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CHOICE OF LAW AS GEOGRAPHIC SCOPE LIMITATION

Carlos M. Vázquez*

Among Lea Brilmayer's many seminal and lasting contributions to Conflict of Laws scholarship has been her work calling attention to "the interesting pattern of similarities and differences between the problems of the application of American law to international disputes and the problems of domestic 'conflict of laws.'" ¹ Professor Brilmayer is undoubtedly correct in observing that the doctrines have been approached by courts and scholars as "methodologically distinct."² My thesis in this chapter is that these questions are conceptually identical. The question whether state law should be applied to a case having contacts with other states or nations is conceptually identical to the question whether federal law should be applied to a dispute having contacts with other nations. Federal extraterritoriality doctrine is well understood to address the question whether federal law, properly interpreted, applies to a given dispute having links to other nations. In other words, federal extraterritoriality doctrine purports to address the geographic scope of federal law. Inter-state choice-of law doctrine has long been understood to address the same question.³ I argue here that a state's choice-of-law rules operate no less (and no more) as implicit geographic scope limitations as do the rules on federal extraterritoriality. If the latter determine the forum's law's substantive applicability to disputes having links to other states or nations, so do the former.

My claim is conceptual. I do not argue for any particular approach to answer the choice of law question. Indeed, my claim is that the choice of law issue is properly conceived as identical to the extraterritoriality issue no matter which approach to answering the question is adopted. Though conceptual, my claim also has practical doctrinal implications. These implications are best appreciated by examining the thesis of an influential

* Scott K. Ginsberg Professor of Law, Georgetown University Law Center. I am grateful for very helpful comments from Eduardo Alvarez Armas, Lea Brilmayer, Ralf Michaels, Alex Mills, Horatia Muir Watt, Kermit Roosevelt III, and Celia Wasserstein Fassberg. These reflections were inspired by Lea Brilmayer's pathbreaking work on the relationship between state choice of law and federal extraterritoriality.

¹ Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 L. & CONTEMP. PROBS. 11, 11 (1987).

² Id.

³ By using the term "geographic scope," I do not mean to suggest that the applicability of a law to disputes having connections with other states necessarily turns on the place where certain events occurred. The law's applicability may turn instead on other sorts of connections with other states or nations, such as the place of habitual residence of some of the parties.

group of scholars who have articulated a “two-step” approach to choice of law.⁴ The claims of the two-step theorists are of particular current interest because this theory supplies the theoretical foundation for the current draft of the American Law Institute’s Third Restatement of Conflict of Laws.⁵ According to the two-step theory, choice-of-law rules that function as geographic scope limitations are binding on the courts of other states. Thus, if a state has enacted a law but limits its scope to cases having a specified connection to the state—such as cases in which the injured party is a state resident or the conduct that gave rise to the injury occurred in the state—the state’s law, properly interpreted, does not extend to cases beyond the specified scope. It follows that another state purporting to apply that state’s law commits an error when it applies the law beyond its geographic scope.⁶ This is true whether the scope limitation is contained in express statutory language or is inferred through its choice-of-law rules. In other words, according to the two-step theory, the forum’s courts, in deciding whether to apply the local law of another state,⁷ must engage in *renvoi*, at least for the purpose of determining whether the law of the other state extends to the case at hand.⁸

But, according to the two-step theorists, not all choice-of-law rules function as geographic scope limitations. Some function instead as “rules of priority.” The forum’s rules of priority tell the courts which state’s law should be applied when more than one state’s laws extend to the case. The two-step theorists maintain that rules of priority do not operate as scope limitations, even when they instruct the forum’s courts to apply a law other than its own. Because rules of priority do not function as scope limitations, they do not bind the courts of other states.

This Chapter argues that all choice-of-law rules—even the rules that the two-step theorists denominate rules of priority—operate equally as geographic scope limitations when they lead to non-application of the

⁴ The principal texts are Kermit Roosevelt III, *Resolving Renvoi, The Bewitchment of Our Intelligence by Means of Language*, 80 *Notre Dame L. Rev.* 1821 (2005); Larry Kramer, *The Return of the Renvoi*, 66 *N.Y.U.L. Rev.* 979 (1991).

⁵ Professor Roosevelt is the chief reporter of the Third Restatement of Conflict of Laws.

⁶ See Larry Kramer, *The Myth of the Unprovided-For Case*, 75 *Va. L. Rev.* 1045, 1052 (1989) (“Rights that can be enforced in court do not exist in the abstract. Courts only enforce rights that are conferred by positive law.”).

⁷ A state’s “local law” is the law that a state would apply to a case lacking foreign elements—that is, a case in which all of the parties are from the state and all events occurred within the state. See Restatement (Second) of Conflict of Laws § 8, cmt. d (Am Law Inst. 1971), especially the accompanying illustration: “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....” *Id.* Thus, the term “local law” refers to a state’s law shorn of its geographic scope limitations.

⁸ On whether this constitutes *renvoi*, see *infra* note 29.

enacting state's law.⁹ Thus, if we accept the two-step theorists' claim that some choice of law rules operate as geographic scope limitations, and if we also accept their claim that choice of law rules that operate as geographic scope limitations are binding on the courts of other states, then (I argue here) the courts must apply all of the choice-of-law rules of the other relevant states in order to determine whether the other state's laws extend to the case at hand. If the enacting state's choice of law rules—even its rules of priority—would lead that state's courts not to apply its own law, then sister states would be prohibited from applying that law as well.

On the other hand, I question the two-step theorists' claim that "rules of scope" should be binding on the courts of other states. This claim rests on an unsound analogy between rules of scope (as two-step theorists understand the concept) and what I call "internal" scope limitations. Unlike internal scope limitations, what the two-step theorists call rules of scope do not necessarily reflect the enacting state's preference that its law not be applied beyond its specified scope. Rather, such rules, even if framed as geographic scope limitations, are ordinarily based on the enacting state's deference to the legislative authority of other states. To the extent the enacting state has limited the scope of its law out of deference to the legislative authority of other states, other states should be free to decline such deference if, under their own choice-of-law rules, the local law of the enacting state should be applied.

The latter conclusion, in turn, leads me to question whether choice of law rules—whether they be "rules of scope" (in the parlance of the two-step theorists) or "rules of priority"—function as scope limitations at all. If a state's choice of law rules tells us that the enacting state's local law does not extend to a particular case having foreign elements, then it does seem to follow that the courts of another state commit an error when they resolve the dispute by applying that state's local law. If other states are free to resolve disputes by using such law, then it would seem to follow that the enacting state's choice of law rules do not in fact limit the scope of that law—they do not tell us that such law simply does not extend to this case. My claim about the nature of "geographic scope limitations" thus calls into question whether choice of law rules—including the rules of federal extraterritoriality doctrine and, indeed, statutory provisions

⁹ To the extent a given state's choice-of-law rules identify which other state's law should be applied, when more than two are in contention, they do more than specify the geographic scope of that state's law. This is concededly one respect in which state's choice of law rules differ from federal extraterritoriality doctrine. But, if the state's choice of law rules identify another state's law as applicable, these rules simultaneously tell us that that state's law does not extend to the case.

expressly framed as geographic scope limitations— should be understood as scope limitations at all.

This Chapter begins by examining how the Supreme Court (“the Court”) conceptualizes federal extraterritoriality doctrine. It then shows that a state’s choice-of-law rules have long been conceptualized in the same way: as implicit limits on the territorial reach of the state’s laws. I then discuss the two-step theory’s rationale for regarding only some choice-of-law rules as geographic scope limitations and show that the rules that the two-step theorists call “rules of priority” function as geographic scope limitations just as much as do the rules that the two-step theorists call “rules of scope” (at least when they lead the enacting state’s courts to apply a law other than its own). I then argue, however, that, unlike internal scope limitations, rules of (geographic) scope (as the two-step theorists understand the term) should not always bind the courts of sister states.¹⁰ The final section of the Chapter considers whether a restriction that is binding on the enacting state’s courts but not the courts of sister states can properly be understood as a substantive limitation on the reach of the enacting state’s law—that is, as a scope limitation.

1. Federal Extraterritoriality Doctrine

Today the Supreme Court clearly understands federal extraterritoriality doctrine as determining the proper interpretation of federal law with respect to its geographic scope. The Court’s clearest recent articulation of this view came in *Morrison v. National Australia Bank, Ltd.*¹¹ The plaintiffs in *Morrison* asserted a claim for relief under section 10(b) of the Securities Exchange Act of 1934 based on conduct that occurred in part outside the territory of the United States. The Court clearly viewed the question whether the Act should be applied by the court as a question about “what conduct § 10(b) reaches,” which, the Court made clear, “is a merits question.”¹² The Court thus rejected the lower court’s conceptualization of the issue as one of jurisdiction. Before *Morrison*, the Court had sometimes treated the issue differently. In *Hartford Fire Insurance Co. v. California*, for example, the Court treated the question as whether the court should refrain from applying a concededly applicable law out of deference to the interests of other nations.¹³ Justice Scalia, the

¹⁰ To be clear, I am not arguing that state should be prohibited from considering another state’s geographic scope limitation. For example, a state that employs governmental interest analysis may reasonably regard another state’s geographic scope limitation as indicative of the strength of its interest in having its law applied to particular cases having foreign elements. I am merely arguing that states need not regard other states’ geographic scope limitations as binding.

¹¹ *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247 (2010).

¹² *Id.* at 254.

¹³ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797–98 (1993).

author of *Morrison*, had dissented in *Hartford Fire*, chiding the majority for misconceiving the issue.¹⁴ Since *Morrison*, the court has consistently understood the extraterritoriality question as determining whether the federal law involved, properly construed, extends to the case at hand.¹⁵

The Court’s conceptualization of this issue as involving the proper construction of the statute with respect to its geographic scope was not a new one (although *Hartford Fire* illustrates that the Court sometimes strayed from this understanding). The Court has long conceived of the extraterritoriality issue as requiring a determination of a statute’s geographic scope. As the Court noted in *Lauritzen v. Larsen*, Congress typically writes statutes in broad, all-encompassing terms. Read literally, such general laws would be applicable no matter where the conduct occurred or where the parties were from. Unless some limitation were read into them, generally-worded laws would apply to the conduct of every person in the world anywhere in the world—“a hand on a Chinese junk, never outside Chinese waters, would not be beyond [the law’s] literal wording.”¹⁶

The Court’s extraterritoriality doctrine instructs that generally-worded statutes are not to be read literally. This does not mean that the courts are defying Congress’ wishes. To the contrary, as stated by Judge Hand in the oft-cited *Alcoa* decision, “the only question open is whether Congress intended to impose liability and whether our own Constitution permitted it to do so: as a court of the United States we cannot look beyond our own law.”¹⁷ Thus, if Congress has clearly addressed the question of geographic scope, the courts are obligated to enforce the statute as written (subject to constitutional constraints). But, in the absence of express language addressing the question of geographic scope, the courts assume that Congress legislated with only the purely domestic case in mind, leaving the question of territorial scope to the courts. The Court has, in turn, developed a general rule to address this question. This rule operates as a “canon of construction ... whereby unexpressed congressional intent may be ascertained,”¹⁸—that is, as “a presumption about a statute’s meaning.”¹⁹ The purpose of this rule is “to protect against unintended clashes between our laws and those of other nations which could result in international discord.”²⁰ It reflects the assumption

¹⁴ See *id.* at 813–820 (Scalia, J., dissenting).

¹⁵ See, e.g., *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2099–100 (2016); *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 115 (2013).

¹⁶ *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953).

¹⁷ *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 443 (2d Cir. 1945).

¹⁸ *E.E.O.C. v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

¹⁹ *Morrison*, 561 U.S. at 255.

²⁰ *Aramco*, 336 U.S. at 248.

that, unless it clearly stated otherwise, Congress did not intend to “rule the world.”²¹

In *Morrison*, the Court adopted the presumption against extraterritoriality as the rule the courts should ordinarily apply in determining the geographic scope of federal statutes. But the Court’s conceptualization of the issue as one of geographic scope is entirely independent of the particular approach the Court employs to answer the question. Thus, in *Lauritzen v. Larsen*, the Court applied a very different approach to determine the geographic scope of the Jones Act, yet it conceptualized the issue, as it did in *Morrison*, as “a question of statutory construction rather commonplace in a federal system.”²²

Thus, as understood by the Court, the rules the Court applies to determine federal extraterritoriality function as implicit geographic scope limitations. Today, the Court favors the presumption against extraterritoriality, but with respect to some statutes the Court has employed, and continues to employ, quite different approaches.²³ Regardless of the particular approach used, the relevant rules are understood to function as implicit limits on the scope of federal statutes, to be employed unless Congress has expressly addressed the issue.

2. State Choice-of-Law Rules as Geographic Scope Limitations

State choice-of-law rules have also long been understood as implicitly delineating the geographic scope of forum law. As with federal extraterritoriality doctrine, the province of choice-of-law rules has long been understood to be to define the territorial scope of a state’s law in the absence of explicit legislative guidance on the question. Judge Hand in *Alcoa* explicitly recognized the conceptual similarity when he noted, in a federal extraterritoriality case, that “we 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.’”²⁴ Unless the legislature specifically addresses the statute’s geographic scope, the courts assume that the legislature intended the law to extend only to those cases to which the law would extend under prevailing choice-of-law rules.

The famous decision of the Alabama Supreme Court in *Alabama Great Southern Railroad v. Carroll* well illustrates how the courts understood the function of choice-of-law rules under the traditional approach to

²¹ *Kiobel*, 569 U.S. at 115 (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)).

²² *Lauritzen*, 345 U.S. at 578.

²³ See, e.g., *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

²⁴ *Alcoa*, 148 F.2d at 443. See also Justice Holmes’ opinion in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), a federal extraterritoriality case that relies on such Conflict of Laws chestnuts as *Milliken v. Pratt*, 125 Mass. 374 (1878).

choice of law reflected in the First Restatement of Conflict of Laws.²⁵ *Carroll* involved an injury suffered by an employee of a railroad as a result of the negligence of another employee. Under the common-law fellow servant rule, an employer was not liable for injuries suffered by one employee as a result of the negligence of another employee. The Alabama legislature had repealed that rule by statute, but the legislature had not specified the territorial scope of the statute. The court held that the statute should be understood to incorporate the traditional *lex loci delicti* choice-of-law rule, under which tort cases are governed by the law of the state in which the injury occurred. As the court wrote, “Section 2590 of the Code . . . is to be interpreted in the light of universally recognized principles of private international or interstate law, as if its operation had been expressly limited to this State and as if its first line read as follows: ‘When a personal injury is received in Alabama by a servant or employee,’ etc.”²⁶

Alabama’s choice of law rule—*lex loci delicti*—thus functioned as an implicit limitation on the geographic scope of the Alabama statute. At the same time, the *lex loci delicti* rule instructed the Alabama courts to apply the law of the place of injury, which in this case was Mississippi. Because Mississippi’s substantive law was the fellow-servant rule, the court ruled against the plaintiff. If the Alabama legislature had instead specified that its statute repealing the fellow-servant rule applied whenever the employer-employee relationship was centered in Alabama, or when the conduct causing the injury occurred in Alabama, the court would presumably have concluded that the statute extended to the case and would have ruled the other way.²⁷ As the *Carroll* opinion appeared to recognize, the courts of a state will follow the directives of the state’s legislature regarding the territorial scope of the state’s statutes (and other laws). In the absence of such directives, however, the court will assume that the legislature did not address the statute’s territorial scope when enacting a statute. Instead, the court assumes that the statute reflects the legislature’s preferences with respect to the purely domestic case—in which all of the parties and all of the events occurred within the state—and meant to leave the question of extraterritorial scope to be governed by prevailing choice-of-law rules. The court accordingly applies the prevailing choice-of-law rules as reflecting the legislature’s (implicit)

²⁵ Alabama Great Southern Railroad v. Carroll, 97 Ala. 126 (1892).

²⁶ Id. at 134.

²⁷ I say “presumably” because the U.S. Supreme Court during that era appeared in some cases to regard the traditional choice-of-law rules reflected in the First Restatement of Conflict of Laws to be constitutionally required. See, e.g., New York Life Ins. v. Dodge, 246 U.S. 357 (1918). The Court today emphatically does not. See, e.g., Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

preferences regarding the territorial reach of the statutes it enacts (as well as of substantive common law rules).²⁸

3. The Two-Step Theory

Although the proposition that choice-of-law rules implicitly limit the geographic scope of forum law has a long pedigree, this conceptualization of choice-of-law rules has only been partially embraced by scholars. Nor has the proposition that conceptualizing choice-of-law rules as scope limitations requires the courts to engage in *renvoi* been widely embraced. But the latter proposition has been forcefully advanced recently by scholars who have developed a “two-step” approach to choice of law. The draft Third Restatement operationalizes this theory by providing that, when the forum court applies the law of another state, it must give effect to the law’s geographic scope restrictions.²⁹ Indeed, according to the draft Third Restatement, a court would be violating the Full Faith and Credit Clause of the U.S. Constitution if it applied the law of a sister state without giving effect to its geographic scope limitations.³⁰ These same scholars, however, maintain that only some choice of law rules function as geographic scope limitations.

In this Part, I examine the two foregoing claims of the two-step theorists. First, I examine the claim that “rules of scope” function as

²⁸ Mississippi at the time also adhered to the *lex loci delicti* rule, so according to Mississippi’s implicit geographic scope limitation, its law applied to the case. Under the First Restatement’s approach to *renvoi*, whether Mississippi would also apply its own law would not have mattered. Under the two-step theory, discussed below, the Alabama court would not apply Mississippi law if Mississippi had engrafted a geographic scope limitation rendering it inapplicable. Whether the Alabama courts should treat Mississippi’s geographic scope limitation as binding in this context is discussed in Part 3.2, below.

²⁹ The Third Restatement achieves this result indirectly by, first, defining “internal law” as including geographic scope limitations, see Restatement (Third) of Conflict of Laws § 1.03 cmt. a (Am. Law. Inst., Council Draft No. 2, 2017) and then providing in § 5.05(1) that, “[w]hen directed by its own choice-of-law rule to apply the law of any state, the forum applies the internal law of that state . . .” Section 5.05(2) permits the forum under limited circumstances to apply a sister state’s choice-of-law rules (defined to exclude geographic scope limitations, see *infra* note 31), but § 5.05(1) requires the forum to apply its sister states’ geographic scope limitations whenever it applies the state’s substantive law.

³⁰ See Restatement (Third) of Conflict of Laws § 5.02 Reporters’ note (Am. Law. Inst., Council Draft No. 2, 2017) (“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.”). Although this reporters’ note refers only to statutory scope restrictions, the Third Restatement’s reasoning appears to require the same conclusion for the scope restrictions read into a statute by the enacting states’ courts as well as for geographic scope limitations read into a sister state’s non-statutory law by the sister state’s courts. See § 5.01 cmt. c (“The scope of foreign internal law is a question of foreign law.... It is determined in light of how the foreign law is understood and applied in the foreign jurisdiction ... The forum accepts authoritative statements from foreign states as to the scope of their law.”).

geographic scope limitations but “rules of priority” do not. I argue that the better view is that the latter rules function no less as geographic scope limitations than do the former. Second, I examine the two-step theorists’ claim that choice-of-law rules that function as geographic scope limitations must be applied by sister states—in other words, that conceptualizing choice of law rules as scope limitations means that the courts of one state must engage in *renvoi* in order to determine that the laws of their sister states purport to apply to the case at hand.³¹ I argue

³¹ The draft Third Restatement distinguishes between geographic scope limitations and choice-of-law rules, and reserves the latter term for what its chief reporter has called “rules of priority.” See Restatement (Third) of Conflict of Laws § 1.03 (Am. Law. Inst., Council Draft No. 2, 2017) (defining “internal law” as “a state’s law exclusive of its rules of choice of law”); *id.* cmt. a (stating that “[i]nternal law, as defined here, includes restrictions the law places on the persons who may assert rights under the law or the geographic scope of the law”). Professor Kramer, for his part, understands the term “choice-of-law rule” to embrace both geographic scope limitations and rules of priority. See Kramer, *supra* note 2, at 1005 (“[B]ecause choice of law is a process of interpreting laws to determine their applicability on the facts of a particular case, the forum can never ignore other states’ choice of law systems—whether these consist of ad hoc decisions, functional rules, or jurisdiction-selecting rules of the First Restatement variety. On the contrary, the applicability of another state’s law must be determined in light of its choice-of-law system. Hence, a proper understanding of choice of law means the return of the *renvoi*.”); *id.* at 1011 (“A state’s approach to choice of law by definition establishes the state’s rules of interpretation for questions of extraterritorial scope.” (emphasis in original)); *id.* at 1012 (“Like it or not, and however foolish they may seem, traditional choice-of-law rules are intended to limit the scope and meaning of substantive law ... [T]hey reflect state’s decisions about how far to extend local law in multistate cases.”). In my view, Professor Kramer’s usage is the more conventional one and I employ it here. See also 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 localizing provisions qualify as choice-of-law rules, albeit of the unilateral type.”).

The draft Third Restatement purports to be rejecting *renvoi* to the same extent as the Second Restatement (which rejected *renvoi* in most circumstances). The former provides that, when directed by their choice-of-law rules to apply the law of a given state, courts are ordinarily to apply the “internal law” of that state, whereas the latter provides that, in such circumstances, the courts are ordinarily to apply “local law” of that state. Compare Restatement (Third) of Conflict of Laws § 5.05(a) (Am. Law. Inst., Council Draft No. 2, 2017) with Restatement (Second) of Conflict of Laws § 8(a) (1977). However, the Third Restatement’s definition of “internal law” differs fundamentally from the Second Restatement’s definition of “local law”. The current draft of the Third Restatement defines the term “internal law” as a state’s substantive law as limited by the state’s geographic scope limitations. See Restatement (Third) of Conflict of Laws § 1.03 cmt. a (Am. Law. Inst., Council Draft No. 2, 2017). Thus, the Third Restatement contemplates that the forum will apply the geographic scope limitation of the other state’s law, while the Second Restatement contemplates that the forum will ordinarily apply the law a state would apply in a case having no foreign elements. See *supra* note 7. Under the Second Restatement’s conception of what counts as a “conflict of laws rule,” applying another state’s geographic scope limitation would count as *renvoi*. Professor Kramer appears to agree with the Second Restatement, and to diverge from the draft Third Restatement on this terminological point, as he argues that the two-step theory requires the courts to “accept the *renvoi*.” See Kramer, *supra* note 4, at 983, 1030.

that, because of the nature of these limitations, the courts of one state should be regarded as free to apply a sister state's substantive law even if that state's courts would not apply that law because of the geographic scope limitation.

3.1. Which Choice-of-Law Rules Function as Geographic Scope Limitations?

The two-step theory distinguishes between choice-of-law rules that function as geographic scope limitations and choice-of-law rules that function as rules of priority. According to the two-step theory, a choice-of-law rule that functions as a geographic scope limitation defines the territorial scope of a law and must be treated by the courts of other states as a binding interpretation of the reach of the underlying substantive law. Rules of priority, however, are not geographic scope limitations and sister states are not bound to give them effect. I examine the claim that geographic scope limitations must be given effect by sister state courts in section 3.1.2. First, in this section, I question the two-step theorists' claim that rules of scope function as geographic scope limitations but rules of priority do not.

3.1.1 The Distinction between Rules of Scope and Rules of Priority

The two-step theory is a refinement of governmental interest analysis. To understand the two-step theory's distinction between rules of scope and rules of priority, it is useful to begin by explaining the basic analytical approach of governmental interest analysis and certain concepts introduced by Brainerd Currie. Professor Currie's fundamental insight was that not all disputes that involve states having different substantive laws pose true conflicts.³² It may be that only one of the states has an interest in having its law applied to the dispute. If so, the dispute presents a "false conflict," and the law of the only interested state should be applied. If both states have an interest in having their law applied, the dispute presents a true conflict. For such cases, Currie initially advocated that the forum should apply its own law, on the theory that weighing the conflicting state policies to determine which state had a greater interest is not an appropriate role for courts. Currie's approach to resolving true conflicts found less favor among courts and commentators than his identification of false conflicts. As discussed below, he later modified his approach to true conflicts, and other scholars have proposed alternative approaches for resolving true conflicts.

³² See Lea Brilmayer, *Conflict of Laws: Foundations and Future Directions* 70 (1990) ("It has often been remarked that the biggest success of Currie's scheme was the identification of false conflicts."). Professor Brilmayer, I should add, does not agree with this assessment.

Of greater significance to the present discussion is Currie's approach to determining whether a state has an interest in having its law applied. Currie argued that this question should be approached as a question of statutory interpretation. In the purely domestic case, the court must interpret the statute to determine whether it applies to certain marginal domestic circumstances (for example, does a statute prohibiting vehicles in the park apply to bicycles?). Currie argued that determining whether the state has an interest in having its law applied to a case having foreign elements is basically the same problem, and it should be approached in the same way—by applying ordinary rules of statutory interpretation.³³ The court should “try[] to decide [the question of whether the state has an interest in having its law applied to a particular case] as it believes [the legislature] would have decided had it foreseen the problem.”³⁴ Thus, he argued, the courts should seek to determine the purpose of the statute and should conclude that the state has an interest in having its law applied to a case if the statute's purposes would be advanced by applying it to the case. For present purposes, Currie's purposive approach to statutory interpretation is less important than his idea that this aspect of the choice of law process should be approached as a matter of statutory interpretation aimed at determining the reach of each state's law.

As noted, Currie's solution to true conflicts has not been widely embraced by courts and commentators.³⁵ Other scholars have accepted Currie's basic insights but rejected his conclusion that the forum state should always apply its own law if the law's purposes would be advanced. Professor William Baxter, for example, argued that, in true conflict cases, courts should apply the law of the state whose policies would be most impaired if not applied.³⁶ Professor Joseph Singer has proposed that, in cases presenting real conflicts, forum law should be displaced when applying it would “significantly interfere with the ability of another state

³³ See Brainerd Currie, Comments on *Babcock v. Jackson*—A Recent Development in Conflicts of Laws, 63 Colum. L. Rev. 1233, 1242 (1963).

³⁴ Brainerd Currie, The Verdict of the Quiescent Years: Mr. Hill and the Conflict of Laws, 28 U. Chi L. Rev. 258, 277 (1961). The appropriate approach to interpreting statutes is of course contestable. Currie's purposivist approach to statutory interpretation has fallen out of favor in certain circles, and the Supreme Court expressly rejected it in the federal extraterritoriality context. See *Morrison*, 561 U.S. at 261 (rejecting an approach that seeks to “divin[e] what Congress would have wanted if it had thought of the situation before the court” as “judicial-speculation-made-law” and adopting instead the presumption against extraterritoriality).

³⁵ Currie himself later modified his view, proposing that, “[i]f the court finds an apparent conflict between the interest of the two states,” it should consider whether the conflict might be avoided through a “more moderate and restrained interpretation of the policy of interest of one state or the other.” Currie, *supra* note 33, at 1242.

³⁶ William Baxter, Choice of Law and the Federal System, 16 Stan. L. Rev. 1, 9 (1963).

to constitute itself as a normative and political community and the relationship between the forum and the dispute is such that the forum should defer to the internal norms of the foreign normative community.”³⁷ The Second Restatement adopted a different rule: application of the law of the state with the “most significant relationship” to the dispute.³⁸

The two-step theory builds upon Currie’s insights. The first step of the two-step analysis corresponds to the initial determination of whether the purposes of a state’s law would be advanced if applied to the case at hand. Like Currie, the two-step theorists conceptualize this step as a determination of the geographic scope of the state’s law, properly treated as a matter of statutory interpretation. The second step of the two-step analysis consists of the analyses the courts employ to determine which law to apply if, in the first step, the court determines that more than one states’ laws extend to the case. In the parlance of the two-step theory, the rules that courts apply in this second step are “rules of priority.”³⁹ A given state’s rule of priority might be “always apply forum law” (Currie’s initial approach) or “apply the law whose purposes would be most impaired if not applied (Baxter’s approach) or “apply the law of the state with the most significant relation to the dispute” (the Second Restatement’s approach).

Scholars have criticized Currie’s approach to both the first and the second steps.⁴⁰ Two-step theorists are agnostic as to the particular approach a court should use at both the first and the second steps.⁴¹ But

³⁷ Joseph Singer, *Real Conflicts*, 69 B.U. L. Rev. 1, 70 (1989). Professor Singer’s concept of a “real conflict” differs somewhat from Currie’s concept of a “true conflict.”

³⁸ The Second Restatement does not explicitly set forth the “most significant relationship” test as a mechanism for resolving true conflicts. Nevertheless, there is some basis in the Second Restatement for approaching the test in this manner, and some courts have done so. See, e.g., *Phillips v. Gen. Motors Corp.*, 995 P.2d 1002, 1004 (Mont. 2000). See also Restatement (Third) of Conflict of Laws, ch. 5, topic 1, intro., at 110 (Am. Law. Inst., Council Draft No. 2, 2017) (“Pennsylvania, and until recently New Jersey, use the Restatement Second’s ‘most significant relationship’ [test] to resolve [true] conflicts.”).

³⁹ See Roosevelt, *supra* note 3, at 1874–87.

⁴⁰ With respect to the first step, scholars have questioned, among other things, Currie’s assumption that a state would deem its law applicable only if it would operate in favor of a state resident or domiciliary. See, e.g., John Hart Ely, *Choice of Law and the State’s Interest in Protecting Its Own*, 23 Wm. & Mary L. Rev. 173 (1981). Indeed, scholars have questioned whether the spatial scope of statutes can be deduced by reference to their underlying policies. See T. De Boer, *Beyond Lex Loci Delicti: Conflicts Methodology and Multistate Torts in American Case Law* 426, 439 (1987); Brilmayer, *supra* note 32, at 54.

⁴¹ See Kermit Roosevelt III & Bethan Jones, *What a Third Restatement of Conflict of Laws Can Do*, 110 Am. J. Int’l L. Unbound 139, 143 n. 19 (2016) (“[W]hile we agree with Currie that determining scope is a matter of interpreting law, we do not necessarily agree with the interpretations he suggested ... The Restatement draft does not follow Currie’s assump

they insist that the choice-of-law process consists of these two steps. And, most importantly for present purposes, they insist that the point of the first step—and only the first step—is to determine the geographic scope of the relevant laws. The court in the first step is interpreting the reach of its state’s law to a case having foreign elements. A state court’s interpretation of its own law’s geographic scope is the equivalent of its interpretation of the law’s applicability to certain marginal domestic situations. Indeed, a state court’s determination in the first step that the law extends to cases having particular connections to the state is the equivalent of the state legislature’s specification that the law applies in marginal domestic cases.⁴²

According to two-step theorists, the second step—which is governed by “rules of priority”—is very different. The key difference between the rules applied in the two steps is reflected in the very different effect the enacting state’s courts’ resolution of the two steps has for the courts of other states. Because, in the first step, a state’s court determines the geographic scope of its own law, the court’s decision is binding on sister state courts to the extent the decision is that the law does not extend to the case.⁴³ But, when a state’s courts apply that state’s rules of priority and conclude that another state’s law should be applied instead of its own, they are not, in the view of the two-step theorists, determining the geographic scope of their own law. Because a rule of priority does not determine geographic scope, a state court’s application of such a rule is not binding on other states.

3.1.2 Rules of Priority as Rules of Scope

My claim is that, properly understood, a state’s step-two rules operate no less as geographic scope limitations than do its step-one rules. The first step of Currie’s choice-of-law inquiry asks whether the policy underlying a state’s law would be advanced if applied to the case; if it would not be, the underlying law does not extend to the case. Professor Currie took the position that, if the policies underlying the state’s law would be advanced, the state’s law does extend to the case. He was of the view that a state’s courts should always apply forum law when the state’s policies would be advanced by doing so. For courts and scholars who reject Professor Currie’s (initial) solution for true conflicts, however, the inquiry did not end there. These scholars have articulated a variety of

tions about state interests or his conclusions as to the scope of state laws, much less his views on how to resolve conflicts between them.”).

⁴² See Roosevelt, *supra* note 4, at 1860.

⁴³ To the extent the state’s geographic scope limitations establish that the state’s law does extend to the case at hand, these rules authoritatively determine the reach of the other state’s law, but other states are free to apply their own law (or the law of a third state) pursuant to its rules of priority.

alternative approaches for determining which law to apply in true conflict situations. As put forward by these scholars, these rules function no less as geographic scope limitations. When these rules yield the conclusion that another states' law should be applied to the case, they are telling us that, despite the state's apparent interest in having its law applied to the dispute, the state's law does not actually extend to the dispute.

The alternative view treating only the rules applied at the first step as scope limitations would regard a state court's decision at the second step not to apply forum law as a decision to decline to enforce a law of its own state that, properly interpreted, extends to the case at hand. This conceptualization raises questions about the proper role of courts in a legal system. Professor Currie believed that it was the role of courts in a legal system to apply that system's positive law whenever it applied; the only proper basis for declining to apply that law is that the law does not purport to apply. His views on this point have a venerable pedigree. It is widely understood that the courts of a state have an obligation to enforce legislation enacted by the state's legislature (to the extent it is valid) in cases within their jurisdiction. "There is one rule or policy which, wherever applicable, takes precedence over others ... That controlling policy, obvious as it may be, is that a court must follow the dictates of its own legislature to the extent these are constitutional."⁴⁴ The two-step theorists' claim that a court's step-two decision to apply another state's law is a decision not to enforce its own state's concededly applicable statute violates that "obvious" "controlling policy."

As noted, legislatures typically write laws in general terms; if read literally the laws would extend to conduct performed anywhere in the world by anyone in the world. Of course, forum courts do not apply these laws as written; they apply the forum's choice-of-law rules and, pursuant to such rules, they sometimes apply the substantive law of a different state instead. But, when they do so, they do not purport to be defying the will of their own legislature. Rather, as the analysis in the *Carroll* case shows, they assume that the legislature did not focus on the statute's geographic scope, and they treat the issue as subject to judicial interpretation. In First Restatement states, the courts assume that the legislature intended the statute to be consistent with traditional rules of conflict of laws. Thus, as the court stated in *Carroll*, statutes addressing tort cases should be construed to apply when the injury occurred in the state's territory. States that have rejected the First Restatement approach have adopted alternative ways of construing the statutes' geographic scope in the face

⁴⁴ Lauritzen, 345 U.S. at n. 7 (1953) (quoting Elliott E. Cheatham & Willis L.M. Reese, Choice of the Applicable Law, 52 Colum. L. Rev. 959, 961 (1952)). Judge Hand expressed a similar view in *Alcoa*; see text accompanying note 15.

of legislative silence. But, in both situations, the relevant choice-of-law rules are understood to function, for forum courts, as implicit limitations on the geographic reach of forum law. When a court determines that the forum's choice-of-law rule requires application of another state's law, either at the first or the second step, it does not refuse to apply forum law that extends to the case; rather, it decides that forum law does not extend to the case.

The analyses of Professor Currie and subsequent governmental interest analysts are consistent with this conceptualization. As discussed above, Professor Currie's initial view was that, if the policies underlying the forum state's law would be advanced if applied to the case, the forum state's courts should always apply forum law (subject to constitutional limitations). This conclusion followed from a combination of two distinct propositions embraced by Professor Currie. First, he insisted that, if the forum state's law extends to the case, it is the duty of the state's courts to apply that law (subject to constitutional limitations). There is no legitimate basis (other than constitutional limits) for a state's courts to decline to apply a law that the state's legislature has enacted and that, correctly interpreted, applies to the case. But that leaves open the second question: whether the law extends to the case.

To answer this question, Professor Currie argued that, if the legislature has not addressed it, courts should ask if the substantive purposes underlying the forum state's law would be advanced if applied to the case. An affirmative answer, in his view, means that the law, properly interpreted, extends to the case. This is the question the courts address in step one. Professor Currie concluded that Step One fully answers the question of geographic scope because he did not believe that courts could legitimately weigh the forum state's interest in advancing its policies through application of forum law against another state's interest in advancing its policies through application of its law. Thus, the forum court's determination that the policies underlying the forum's law would be advanced if the law were applied to the case ended the choice-of-law analysis because he believed both that (a) a state's courts must apply forum law if forum law extends to the case, and (b) whether forum law extends to the case depends entirely on whether the policies underlying that law would be advanced if the law were applied to the case.

The scholars who disagreed with Professor Currie's approach to resolving true conflicts did not dispute his premise that a state's courts are obligated to apply forum law if forum law, properly interpreted, extends to the case. Instead, they disagreed with Currie's conclusion that the forum's law extends to the case as long as its purposes would be advanced if applied to the case. Professor Baxter's analysis is instructive. He entirely

agreed with Currie’s analysis except for his conclusion that a law should be deemed applicable as long as any of its purposes would be advanced to any extent if applied to the case.⁴⁵ He even agreed with Currie’s view that courts should not weigh the governmental interests reflected in the contending local laws.⁴⁶ But he argued that courts could legitimately assess the extent to which each state’s law would be impaired if not applied. In his view, the interests of all states would be maximized if all states applied the law whose policies would be most impaired if not applied to a given case.⁴⁷

Most importantly for present purposes, Professor Baxter argued that, in true conflict situations, each state’s legislature should be presumed to have wanted its law to be applied only if the policies underlying its law would be more impaired if not applied.⁴⁸ Thus, Professor Baxter proposed “comparative impairment” analysis as an alternative way to determine the geographic scope of forum law in true conflict situations.

Two-step theorists regard the comparative impairment analysis as a rule of priority and not a rule of scope. But, as Baxter’s analysis shows, a comparative-impairment state’s true rule of scope is more complex than the two-step theorists recognize. The rules that state courts employ at the first and the second steps are both just parts of the courts’ approach to determining the geographic scope of forum law. For a state that adheres to Baxter’s comparative impairment approach, the state’s complete rule

⁴⁵ Baxter, *supra* note 36, at 8–10.

⁴⁶ *Id.* at 18–19.

⁴⁷ *Id.* at 21–22.

⁴⁸ *Id.* at 7–9. Professor Baxter regarded comparative impairment analysis as an extension of Currie’s approach to identifying false conflicts, and he defended it on the same grounds. “The same analysis by which Currie distinguishes real from false conflicts can resolve real conflicts cases. The question ‘Will the social objective underlying the X rule be furthered by application of the rule in cases like the present one?’ need not necessarily be answered ‘Yes’ or ‘No’; the answer will often be, ‘Yes, to some extent.’ The extent to which the purpose underlying a rule will be furthered by application or impaired by nonapplication to cases of a particular category may be regarded as the measure of the rule’s pertinence and of the state’s interest in the rule’s application to cases within that category.” Baxter argued that “if the lawmakers of [two states] assembled for interstate negotiations on the scope of application of [their] inconsistent rules,” they would agree on application of the law of the state whose law would be most impaired if not applied. Although Baxter regarded a negotiated agreement adopting comparative impairment to be the preferred solution, see *id.* at 10, he also believed that states should adopt the comparative impairment approach even without such an agreement (presumably in the hope that other states would follow suit). See *id.* at 42. See also *id.* at 10 n. 22. Indeed, he employed the thought experiment positing an imaginary assembly of lawmakers to explain the first step of Currie’s governmental interest analysis. See *id.* at 7–8. He proposed his second step—the comparative impairment analysis—as the result the hypothetical assembly of lawmakers would favor to resolve true conflicts. Baxter thus conceptualized both steps of the analysis he was proposing as aimed at delineating the geographic scope of the relevant state laws.

of scope should be understood by the state's courts to be as follows: "Our law applies if the purpose of our law would be advanced if applied to this case and if the purpose of our law would be more impaired if not applied than would the purposes of another state's law." Similarly, for a state that uses the Second Restatement's "more significant relationship" test to resolve true conflicts, the state's rule of scope should be understood as follows: "Our law applies if the purposes of our law would be advanced if applied to this case and if no other state has a more significant relation to the dispute."

According to Professor Kramer, the difference between step-one rules and step-two rules is that the former are "unilateral" rules while the latter are "multilateral."⁴⁹ The former are unilateral in that they focus only on forum law and the forum state's interests.⁵⁰ Multilateral rules, by contrast, require the courts to consider the content of other states' laws and those states' possible interests in having their law applied. Professor Kramer is (largely) correct in distinguishing step-one from step-two rules in this way. But the multilateral rules address the question of the scope of the forum state's law no less than the unilateral rules applied in the first step. Baxter did not challenge Currie's claim that a state's courts had no legitimate basis for declining to apply forum law when applicable. He merely advocated a more complex approach to determining the scope of forum law in the absence of an express legislative resolution of that question. Thus, when a court applying the "comparative impairment" approach concludes that the purposes of the forum state's law would be advanced if the law were applied to the case but nevertheless decides to

⁴⁹ See Kramer, *supra* note 4, at 1033. Some rules of priority are not multilateral, however. Currie's rule of priority (always apply forum law) is an example of a unilateral rule of priority.

⁵⁰ Even the first step is not purely unilateral, however. As discussed in the next section, all choice-of-law rules are multilateral insofar as they reflect deference to the potentially superior legislative authority of other states. Additionally, as the first step is usually applied, a state's "interest" in having its law applied depends on the content of the laws of the other states connected to the dispute. As noted, the first step in Currie's analysis is to determine if the forum and other potentially interested states have an interest in applying their laws. If only one state has an interest, then we have a false conflict and the choice of law analysis ends. In determining whether the relevant states have an interest, forum courts do not usually look at their laws in isolation. Rather, they focus on how their laws differ from the laws of the other relevant states. Thus, in *Babcock*, the court determined that New York had an interest in applying its law to the case only because the other potentially relevant law—that of Ontario—would, if applied, operate in a way that would disfavor the injured New York resident. Assume that Vermont had a guest statute providing that guests can recover against their hosts only if the host was reckless. If the injured party was from Vermont and the host was from Ontario, Vermont would have an interest in applying its law because the other option—Ontario law—would deny the injured Vermont resident any compensation. If the driver was from New York, on the other hand, Vermont would not have an interest in applying its law because the other option—New York law—would be even more favorable to the injured Vermont resident.

apply another state’s law because the policies underlying that state’s law would be more impaired if not applied, the court has determined that, despite the forum state’s apparent interest in having its law applied, the forum state’s law does not extend to this case.

That multilateral choice of law rules, no less than unilateral ones, can function as geographic scope limitations is shown further by the case-law concerning federal extraterritoriality. As discussed in Part I, there is no question that the Court conceives of federal extraterritoriality doctrine as addressing the geographic scope of federal law. The Court today favors a simple, (seemingly) unilateral rule—the presumption against extraterritoriality.⁵¹ But, with respect to some statutes, the Court has employed a multilateral approach. For example, in *Lauritzen v. Larsen*, the Court adopted a multilateral approach to determining the geographic scope of the Jones Act. The Court was very clear in conceptualizing the issue as one of geographic scope; as noted above, the Court stated that “we are simply dealing here with a question of statutory construction rather commonplace in a federal system.”⁵² Yet the approach it adopted to decide that question of statutory construction was a distinctly multilateral one, taking into account “considerations of comity, reciprocity, and long range interest” in order to “define the domain that each nation will claim as its own.”⁵³ As described in *Romero v. International Terminal Operating Co.*, the *Lauritzen* approach is based on “due recognition of our self-regarding respect for the relevant interests of foreign nations,” with “the controlling consideration [being] the interacting interests of the United States and foreign countries.”⁵⁴

The courts’ shifting approaches to the extraterritorial scope of the U.S. antitrust laws over the years further illustrate the point. In *American Banana Co. v. United Fruit Co.*, the Supreme Court interpreted the Sherman Act to apply only when the conduct on which the suit was based took place on U.S. territory.⁵⁵ In the *Alcoa* case, the U.S. Court of Appeals for the Second Circuit later interpreted the statute to apply to conduct having an actual and intended effect on U.S. commerce.⁵⁶ Because *Alcoa*’s

⁵¹ The presumption against extraterritoriality is unilateral in that it does not require courts to take into account the interests of other states in the particular case. But, as noted in Part I, the presumption against extraterritoriality can be said to be multilateral in the sense that it is based on the desire to “protect against unintended clashes between our laws and those of other nations which could result in international discord.” *Aramco*, 499 U.S. at 248. As discussed in the next section, all geographic scope limitations are multilateral in the sense that they are based on deference to the legislative authority of other states or nations.

⁵² *Lauritzen*, 345 U.S. at 578.

⁵³ *Id.* at 582.

⁵⁴ *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 383–84 (1958).

⁵⁵ *American Banana*, 213 U.S. at 357.

⁵⁶ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945) (en banc).

unilateral approach to the scope of the antitrust laws generated significant international friction, the U.S. Court of Appeals for the Ninth Circuit, in the influential *Timberlane* decision, adopted a multilateral approach (which it called the “jurisdictional rule of reason”), asking “whether the interests of, and links to, the United States—including the magnitude of the effects on American foreign commerce—are sufficiently strong vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.”⁵⁷ The Supreme Court later shifted to a hybrid approach,⁵⁸ but the important point for present purposes is that each of these approaches—the multilateral approach of *Timberlane* no less than the unilateral approaches of *American Banana* and *Alcoa*—purported to address the geographic scope of the U.S. antitrust laws.⁵⁹ Thus, even though he emphatically understood that the issue before him was the geographic scope of the antitrust laws, Justice Scalia (the author of *Morrison*) had no trouble in *Hartford Fire* adopting the multilateral approach of the Third Restatement of Foreign Relations Law as the applicable rule.⁶⁰ Justice Scalia was writing in dissent, but the majority in *Hartford Fire*, and later in *Empagran*, rejected the *Timberlane* approach not because it believed that geographic scope limitations must, by their nature, be governed by unilateral rules, but because it concluded that the *Timberlane* approach was too complex to be administrable.⁶¹

Professor Kramer has recognized that the Court has at times adopted multilateral approaches to federal extraterritoriality. In a forceful critique of the Court’s revival of the presumption against extraterritoriality, he described the earlier approaches in *Lauritzen* and *Romero* with approval.⁶² Even in the inter-state context, Professor Kramer has argued forcefully and persuasively that choice of law rules should be understood as geographic scope limitations. “[B]ecause choice of law is a process of interpreting laws to determine their applicability on the facts of a particular case, the forum can never ignore other states’ choice of law systems—whether these consist of ad hoc decisions, functional rules, or jurisdiction-selecting rules of the First Restatement variety. On the contrary, the applicability of another state’s law must be determined in

⁵⁷ *Timberlane Lumber Co. v. Bank of Am. Nat’l Trust & Savs.*, 549 F.2d 597, 613 (9th Cir. 1976).

⁵⁸ See *Empagran*, 542 U.S. at 164.

⁵⁹ The point was expressed forcefully by Justice Scalia in *Hartford Fire*, 509 U.S. at 800–821 (Scalia, J., dissenting) (endorsing a multilateral approach).

⁶⁰ *Hartford Fire*, 509 U.S. at 818–19 (Scalia, J., dissenting).

⁶¹ *Empagran*, 542 U.S. at 168.

⁶² Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 S. Ct. Rev. 179, 195–96 (1991). He also discussed the multilateral approach of *Timberlane* without suggesting that this approach did not operate as a rule of scope. See *id.* at 193.

light of its choice of law system.”⁶³ In Professor Kramer’s words “[a] state’s choice of law by definition establishes the state’s rules of interpretation for questions of extraterritorial scope.”⁶⁴

Indeed, the term coined by Professor Kramer to describe the conclusion a court reaches at step one when it determines that the state has an interest in having its law applied supports the idea that step-two choice-of-law rules operate as geographic scope limitations. He describes the step-one inquiry as aimed at determining whether the state’s law is “prima facie applicable.”⁶⁵ To say that a law is prima facie applicable is not to say that it is actually applicable.⁶⁶ Rather, the term describes a tentative conclusion concerning the law’s applicability. Professor Kramer’s terminology suggests that step one leads to a tentative conclusion that a state’s law extends to the case, but, if another state’s law is also tentatively applicable, the determination that a state’s law is actually applicable is determined by the rules the state applies at step two to resolve the true conflict. Only if the step two inquiry results in the state’s law being applied instead of the law of other states whose laws are also prima facie applicable does the court reach the conclusion that the state’s law is *actually* applicable.

When he directly addresses the nature of the choice of law rules applicable at step two, however, Professor Kramer concludes that they are not geographic scope limitations, but instead determine whether the state’s courts should decline to enforce a law of that state that is admittedly applicable to the case. This conceptualization is, of course, in conflict with the view expressed above regarding the role of a state’s courts in the legal system. As Professor Kramer himself notes, “[j]udges are, after all, agents of the states’ citizenry and law makers, and their paramount responsibility must be the implementation of the state’s own law.”⁶⁷ To be sure, Professor Kramer criticized Professor Currie’s reliance on this idea in concluding that the forum should always apply forum law in true conflict situations, but his criticism of Currie echoes Baxter’s and does not contradict the proposition that a state’s courts paramount responsibility is to resolve disputes in accordance with applicable forum law. Indeed, his critique of Professor Currie supports the conclusion that even step-two choice of law rules operate as geographic scope limitations. Thus,

⁶³ Kramer, *supra* note 4, at 1005.

⁶⁴ *Id.* at 1011 (emphasis added).

⁶⁵ See *id.* at 1014.

⁶⁶ “Prima facie” means “based on the first impression; accepted as correct until proved otherwise.” See Prima facie, Google Dictionary, <https://www.google.com/search?q=prima+facie+definition&oq=prima+facie&aqs=chrome.4.69i57j0l5.6047j0j1&sourceid=chrome&ie=UTF-8>.

⁶⁷ Kramer, *supra* note 4, at 1015.

Professor Kramer notes that “the fact that another state’s law is also *prima facie* applicable (i.e., that there is a true conflict) is itself relevant *in interpreting the law*.”⁶⁸ Indeed, “it hardly makes sense to presume that forum lawmakers want forum law enforced in every true conflict. Accordingly, absent a clear directive never to defer to other states, courts should not *interpret forum law* that way.”⁶⁹ Here, Kramer appears to be acknowledging that a state’s approach to resolving true conflicts is itself a matter of interpretation of that state’s law.

Notwithstanding these passages, Professor Kramer ultimately concludes that step-two choice of law rules are not geographic scope limitations even when they tell us that the relevant state’s courts would not apply its law in the particular case.⁷⁰ This conclusion appears to be based on his firm conviction that sister states should be free to apply another state’s law, so long as it is “*prima facie*” applicable, even if the other state’s courts would not apply its own law when faced with a true conflict. The two-step theorists maintain that sister states are required to respect sister states’ geographic scope limitations. If a state’s law is subject to a geographic scope limitation, then, as a substantive matter, the law simply does not confer a right in cases falling outside its scope. Sister states would be misinterpreting that state’s law if they applied it to cases to which it is not applicable. Professor Kramer argues persuasively that the courts of one state should not be required to apply the rules another state’s courts apply at step two to resolve true conflicts, even if they would lead that state’s courts not to apply their own law. Having reached that conclusion,

⁶⁸ Id. at 1016 (emphasis added).

⁶⁹ Id. at 1017 (emphasis added).

⁷⁰ When another state’s step-two rules lead to the conclusion that the state would apply its law to the particular case, the forum’s step-two rules function as rules of scope as well. If the forum’s step-two rules instruct the courts to apply forum law notwithstanding the fact that the other state’s law also extends to the case, it is deciding that forum law does extend to the case, and, pursuant to the principle that a state’s courts are agents of that state and are required to apply its law if applicable, the forum will apply forum law. One might argue that the forum would not be defying forum law if it entertains a cause of action under a sister state’s law under circumstances in which forum law would deny a cause of action. There is not necessarily a conflict between the absence of a cause of action under forum law and the existence of a cause of action under another state’s law. By analogy, when a plaintiff presents claims under both state and federal law, these are generally regarded as alternative causes of action, and the plaintiff is free to rely on both laws as alternative bases for relief. If a state were to take such an approach to sister state causes of action, however, it would be systematically favoring pro-recovery policies and systematically thwarting non-recovery policies. For this reason, a state may well determine that its non-recovery law should prevail over another state’s pro-recovery law. At bottom, this too is a matter of interpretation of forum law. Just as a federal law denying a cause of action might be interpreted to preempt state laws conferring a cause of action, a state might interpret its law denying a cause of action as “preempting” causes of action under the laws of other states. The forum court’s treatment of this issue can be regarded as part of the forum’s step-two analysis.

Professor Kramer considers whether this conclusion is consistent with the view he had earlier defended that choice-of-law rules function as geographic scope limitations, and he finds no inconsistency because, whereas “most rules of interpretation are unilateral,” “[t]he rules for true conflicts are ... multilateral in the sense that they look to the interests of other states as well.”⁷¹ They “purport to reflect an accommodation that, over the run of cases, is best for all states given their differing unilateral interests.” Thus, when a state decides not to apply its *prima facie* applicable law, “rather than saying that [it] has conferred no rights in this case, it is more accurate to say that [it] is willing to forego enforcing these rights and apply [the other state’s] law because [it] assumes that this is what [the other state] prefers.”⁷²

As discussed above, however, the fact that a rule is multilateral and takes into account the potential interests of other states in having their law applied to a particular case does not make that rule any less a geographic scope limitation. The federal extraterritoriality cases demonstrate as much, as does Professor Baxter’s analysis and, indeed, Professor Kramer’s own critique of Professor Currie’s forum preference. I agree entirely that states should be free to apply a sister state’s local law even if the sister state’s own courts, pursuant to a step-two analysis, would not apply their own law, and I agree that this is because of the nature of these choice-of-law rules—in particular that they reflect the state’s attempt to accommodate the interests of other states. But I draw a different conclusion from Professor Kramer’s analysis; rather than showing that step-two choice-of-law rules operate any less as geographic scope restrictions than do step-one rules, Professor Kramer’s analysis shows why other states should not be bound by either step-one or step-two rules. Step-two rules are not “unique.” As I argue in the next section, a state’s courts should not even be bound by sister states’ step one determinations that their laws are not “*prima facie* applicable.” The features of step-two rules that lead Professor Kramer to conclude that step-two determinations of non-applicability are not binding on sister states apply equally to step-one determinations, and, indeed, to all choice-of-law rules, even geographic scope limitations expressly incorporated into substantive statutes.

The next section explains why step-one rules should not be binding on sister state courts any more than step-two rules. The final Part of this Chapter considers whether it follows from this argument, as Professor Kramer appears to believe, that neither category of rules operates to limit the substantive law’s geographic reach.

⁷¹ Kramer, *supra* note 4, at 1033.

⁷² *Id.* at 1034.

3.2 Are Step-One Limitations Binding on Other States?

If I am right in concluding that all choice of law rules function equally as geographic scope limitations, then the two-step theory would require courts to engage in *renvoi* much more broadly than the two-step theorists recognize. The forum would have to apply the other states' step-two rules, as well as any hybrid rules, to ensure that the other states' local laws extend to the case. If the laws do not extend to the case, the two-step theory insists that the courts of other states are not free to apply them to the case. The two-step theorists argue that only the step-one rules are binding on other states. According to Professor Kramer, step-two rules (and hybrid rules such as those of the First and Second Restatements) are not binding on other states because of "the unique nature of the second-order rules for solving true conflicts," by which he means that these rules are multilateral rather than unilateral and that they "purport to reflect an accommodation that, over the run of cases, is best for all states given their differing unilateral interests."⁷³ In this section, I argue that even step-one rules are "multilateral" in the relevant sense, and that both step-one and step-two rules differ from internal scope limitations in a way that warrants the conclusion that, unlike internal scope restrictions, neither rules are binding on the courts of other states.

According to the two-step theory, determining the geographic scope of a statute is no different from determining the statute's internal scope.⁷⁴ Both scope questions are a matter of statutory interpretation. A court interpreting a statute to determine its applicability to cases having connections to other states is engaged in the same enterprise as a court interpreting a statute to determine its applicability to certain marginal domestic situations. Just as a court must interpret a statute to determine whether it applies to persons under 18 years of age, a court must interpret a statute to determine if it applies to a case in which some of the relevant conduct took place in another state. Most importantly for present purposes, two-step theorists maintain that a court's determination that a statute does not apply to a dispute having certain foreign elements is an authoritative interpretation of the statute, binding on the courts of other states. It is no less of an error for the courts of a sister state to apply another state's local law to an inter-state dispute to which it does not extend than it is to apply a statute that applies only to persons over 18 years of age to a person under 18 years of age.

⁷³ Id. at 1033.

⁷⁴ I use the term "geographic scope limitation" to include limits a state places on the persons to which its law extends when those limits are based on the persons' lack of ties to the state. On the other hand, a provision limiting the scope of the law to certain categories of persons domiciled in the state (such as those under 18 years of age) is an internal scope limitation.

This analysis misses an important difference between geographic scope limitations and internal scope limitations. Internal scope limitations reflect the law-maker's determination that a particular substantive rule is appropriate for persons or conduct within the statute's scope but inappropriate for persons or conduct outside its scope. If a legislature enacts a substantive rule but limits its applicability to persons who are over 18 years of age, the scope limitation reflects the judgment that the rule is not appropriate for persons under 18. Persons under 18 years of age remain subject to a different rule or regulatory regime of that same state. Similarly, if a legislature enacts a substantive rule and specifies that it is applicable to conduct occurring in parks, the scope limitation reflects a judgment that the rule is inappropriate for conduct occurring in spaces that are not parks. Conduct outside parks is governed by different rules of that state. If another state's courts purport to be applying the enacting state's law but do not give effect to an internal scope limitation, they are misapplying the enacting state's law.

Geographic scope limitations, by contrast, do not necessarily reflect a determination that the substantive rule is inappropriate for persons or situations that fall outside the law's scope.⁷⁵ Geographic scope limitations ordinarily reflect the state's forbearance from applying its substantive rule to disputes that other states might have a stronger claim to regulate. Geographic scope limitations, in other words, ordinarily reflect comity concerns. The scope limitation may reflect the state's willingness to entertain the possibility that its local law may not be well-suited for disputes having closer connections to states having different values, traditions, social structures, levels of development, topographic characteristics, etc. Or the state may regard its substantive rule to be substantively superior and appropriate for persons or situations having substantial connections to other states but be willing to defer to another state's potentially stronger claim to legislate with respect to the particular matter.⁷⁶ In either case, the geographic scope limitation reflects, at most, agnosticism about whether its law should be applied beyond the specified scope. In the case of internal scope limitations, on the other hand, the

⁷⁵ In this section, I will assume that the rules we are discussing are geographic scope limitations. (Indeed, my analysis here applies to statutory provisions expressly framed as geographic scope limitations, as well as choice of law rules that have long been thought to function as implicit geographic scope limitations.) In the next section, I will consider whether a limitation that is binding on the enacting state's courts but not the courts of other states can properly be considered a scope limitation at all.

⁷⁶ To say that the scope limitations reflected in choice-of-law rules are based on comity concerns does not mean that states necessarily adopt them out of a sense of altruism. It is possible that states adhere to these limits in the self-interested hope that sister states will adhere to similar limitations when the shoe is on the other foot. See Romero, *supra* text accompanying note 54. My argument does not depend on the claim that states adhere to these limitations out of a sense of altruism.

legislature has plenary, uncontested legislative authority, yet it chooses to limit the statute's scope to certain types of persons or spaces or situations, leaving disputes involving other persons, places, or situations to be governed by a different law *of that state*. A geographic scope limitation does not necessarily reflect the view that cases falling outside the law's geographic scope should be governed by a different rule. Indeed, the enacting state does not provide another rule to govern such cases.

If State A enacts a substantive rule and engrafts geographic scope limitations to it for reasons of comity, it is not expressing an affirmative preference that the rule *not* be applied to disputes falling outside the rule's scope. It may indeed prefer that the rule also be applied to disputes falling outside the rule's scope. Thus, if the limitation was enacted for reasons of deference, State A would not be offended or in any way disrespected by State B if State B's courts decided that deference to State B was not necessary and went ahead and applied State A's local law.

Professor Kramer maintains that, unlike step-two rules, step-one rules do not reflect the enacting state's accommodation of the competing interests of other states or nations. If a step-one analysis reveals that the enacting state has no interest in applying its law to the case in the first place, there is no need to accommodate its own interests to those of other states. But this argument reflects a too-narrow understanding of a state's possible interest in having its law applied. A state's local law reflects that state's lawmakers' views of the optimal substantive standards for resolving disputes of the relevant type. It is presumably for that reason that the state has adopted the substantive rule to resolve disputes having no out-of-state contacts. In cases pending before its courts, the enacting state therefore may have a residual interest in having its law applied to cases having out-of-state elements: its interest, as a justice-administering state, in resolving the dispute according to the rule that its lawmakers have determined is the "best" rule for the type of case involved.⁷⁷ Applying forum law can also be expected to ease the burden on its courts, as forum law will be more familiar to forum courts than another state's law.⁷⁸

⁷⁷ Professor Singer relies on this interest in urging a presumption of forum law. See Singer, *supra* note 37, at 83. This interest is also recognized by Professor Leflar's "better law" approach. Professor Brilmayer advances a version of this argument in her critique of interest analysis. She posits a legislature controlled by consumer advocates that enacts a consumer-protective law in order to benefit consumers worldwide. See Brilmayer, *supra* note 32.

⁷⁸ See Elliott E. Cheatham and Willis L.M. Reese, *Choice of the Applicable Law*, 52 *Colum. L. Rev.* 959, 964 (1952) ("Obviously, a court is most familiar with its own local law. It should not assume the burden of ascertaining and applying that of another state without good reason. And the greater the burden involved, the more compelling must be reason for assuming it. This policy is basic to choice of law.").

Of course, that interest might be overcome in a particular case having foreign elements. To recognize that a state always has a residual interest in having the dispute resolved according to what its lawmakers regard as the “best” local law does not dictate what weight this interest should have in the choice-of-law analysis. Because all states may be said to have this interest, the enacting state’s interest in having its law applied will (arguably) always be cancelled out by the interest of other states connected to the dispute in having their laws applied, if the other state has a different substantive law. Thus, taking this interest into account in the choice-of-law process may in the end not be very helpful in resolving a choice-of-law problem.⁷⁹ For this reason, a state may well adopt a choice-of-law approach under which this sort of interest is always trumped by the sort of interest that two-step theorists would find in step one. Recognizing this interest therefore may not produce a different outcome for two-step theorists (apart from the *renvoi* question). Nevertheless, it remains true that, for a state that adopts the two-step approach and finds in the particular case that only one state has an interest in applying its law (as the two-step theorists define such interests), the step-one analysis is actually functioning as a “rule of priority” because the court is implicitly holding that the sort of interest the two-step theorists find determinative should prevail over another state’s residual interest in having the dispute resolved according to the local law with which its courts are most familiar and its lawmakers regard as best.

If we take into account that states have these residual interests, then every decision not to extend that law to an inter-state or international case reflects the state’s subordination of these residual interests. If the state’s geographic scope limitations reflect a subordination of the state’s interest in resolving the dispute according to the best or most familiar law (as well as other interests the state may have) out of deference to the potential interest of other states in regulating the matter, then the scope limitation does not reflect an affirmative preference that other states not apply its substantive law. The situation thus fits Professor Kramer’s description of the type of case in which he thinks it is not necessary for a state’s courts to follow a sister state’s decision not apply its own law: As he describes it, the step-two analysis calls to mind

Dean Griswold’s image of Alphonse and Gaston politely deferring to each other and never getting through the door. Like the two comic characters, [the two states] defer to each other not because neither wants to enter (i.e., not because they have no interest), but

⁷⁹ Some scholars would give this interest considerable weight, however. See Singer, *supra* note 37; Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 *Calif. L. Rev.* 1584, 1585 (1966).

because each believes the other would or should prefer to go first. Once Alphonse makes sure that Gaston is wrong and that he (Alphonse) genuinely prefers to see Gaston go first, he should escort Gaston through the door.⁸⁰

Similarly, if the forum state is convinced that, under the preferable choice of law rule, its sister state's law should be applied, it should not be deterred from applying it out of deference to its sister state's deference-based scope limitation.

I have so far been assuming that a state's geographic scope limitations are based on comity. It is, of course, possible that a given state's scope limitation is not based on comity. A state might instead choose to limit the scope of its law in order to restrict the benefit of its better law to domiciliaries, or to externalize the costs of its law to out-of-staters. (We might call these "protectionist" interests.) If the geographic scope limitation reflects these sorts of interests, the enacting state may well prefer that its law not be applied beyond its specified scope.⁸¹ But geographic scope limitations motivated by such aims are not ones that other states or nations should feel obligated to respect. Ordinarily, another country would simply decide to apply its own law instead or would decline to entertain a cause of action designed to disadvantage its own nationals. In the inter-state context, scope limitations of this sort would in many cases be unconstitutional. As Professor Kramer has recognized, if a state has limited the benefits of its own law to state residents or domiciliaries, the restriction is valid when it serves a "substantial nonprotectionist objective."⁸² In his view, scope restrictions that limit the benefit of state laws to residents are generally permissible when "the justification for limiting the scope of [such] laws ... is comity."⁸³ In such cases, the scope limitation "is a means of accommodating the interests of other states,"⁸⁴ which is permissible because "reducing interstate friction is the central purpose of the privileges and immunities clause."⁸⁵ Thus, "[a] state may withhold the benefits of its law [from nonresidents] in order to apply the

⁸⁰ Kramer, *supra* note 4, at 1034 (footnote omitted).

⁸¹ Even this is questionable, however, as the enacting state does not purport to be enacting a different rule for disputes beyond the local law's specified scope. Instead, it leaves disputes beyond the law's geographic scope to be addressed under the laws of other states, which might indeed adopt the same substantive law for the case at hand. Presumably, the enacting state does not provide a different law to govern disputes beyond its local law's scope because it doubts its legislative authority over such cases. Thus, even here, the geographic scope limitation may be said to reflect comity concerns.

⁸² Kramer, *supra* note 6, at 1067.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 1067–68.

law of another interested state, but not otherwise.”⁸⁶ If comity is the only legitimate reason for limiting the geographic reach of a state’s local law, states would be warranted in presuming that a sister state’s geographic scope limitations do not reflect a preference that the enacting state’s local law not be applied beyond the specified scope.⁸⁷

It is also possible that a state’s geographic scope limitation is not entirely based on comity or entirely based on protectionism or discrimination against out-of-staters or other illegitimate purposes. For example, a state might decide to limit the scope of its law primarily for reasons of deference to other states, but its selection of a particular scope limitation might reflect other legitimate purposes as well. If a state’s sole purpose in limiting the scope of its law is deference to other states’ superior legislative authority, one might expect it to adopt a scope limitation along the lines of the Second Restatement’s “more significant relationship” test or *Timberlane*’s jurisdictional rule of reason. In other words, the state’s choice-of-law rule might provide in open-ended terms that its substantive law applies to cases having foreign elements unless, in light of the facts of the case and other relevant considerations, another state has a stronger claim to having its law applied. But the state might also be concerned that such an approach is too complex for judicial administration, and for this reason it might choose a more streamlined rule. (This was, indeed, the reason the Court gave in *Empagran* for rejecting the *Timberlane* approach.)⁸⁸ If so, then the state’s reasons for selecting the

⁸⁶ *Id.* at 1068. This analysis leads Professor Kramer to conclude that scope limitations that limit the benefits of a state’s law to residents are constitutional in true and false conflict situations. In both of those contexts, if the forum decides not to apply its law to benefit nonresidents, it is doing so in order to defer to another state’s interest in applying its own law to its residents. See *id.* at 1068–72. In unprovided-for cases, however, such a scope limitation would violate the Privileges and Immunities Clause because the comity-based justification for denying the nonresident the benefit of the law would be inapplicable. As Professor Kramer argues, “[t]o the extent that the reason for treating nonresidents differently is comity, there must be another state that wants to treat the nonresident differently.” *Id.* at 1068. In unprovided-for cases, by hypothesis, the other interested states do not have an interest in having their law applied.

⁸⁷ My analysis in this essay suggests that Professor Kramer’s view of when another state has an interest in having its law applied may be too narrow. If, as I argued above, a state always has a residual interest in resolving the dispute according to the law its lawmakers have determined is best, then a state having a different substantive law than the forum’s will always be an interested state. But the point here is that, to the extent such a state declines nevertheless to extend its law to cases having foreign elements, its only legitimate reason for doing so is deference to the legislative authority of another state. If deference is the reason for the limitation, then the limitation does not reflect an affirmative preference that the law not be applied. Other states should not feel constrained to accept the other state’s deference to it.

⁸⁸ The Court said the *Timberlane* approach was “too complex to prove workable.” *Empagran*, 542 U.S. at 168. As the Court explained, “[t]he legally and economically technical nature of that enterprise means lengthier proceedings, appeals, and more proceedings to

particular scope limitation it selected would reflect a combination of its desire to defer to other states' lawmaking authorities in appropriate cases and a desire to simplify the judicial task.

If a state's scope limitation reflects this combination of interests, however, it is unlikely to reflect an affirmative desire that other states apply the scope limitation. A state that adopts such a scope limitation (even if it expressly incorporates it into the substantive statute) would likely have preferred to apply its substantive law more broadly, but it declined to do so for comity reasons. It could have accomplished its comity goals by adopting an all-things-considered balancing test, but it declined to do so in order to ease the administrative burden on the courts. This ease-of-administration goal would appear to be implicated only when the dispute is being adjudicated in that state's courts. If another state is not similarly concerned about burdening its courts with a complex, all-things-considered balancing process and consequently adopts a Second Restatement-type approach, it may well conclude that the enacting state has the most significant relationship to the dispute and that its law should therefore be applied even if the enacting state's courts would not apply it. It seems to follow that, if the forum were to apply its sister state's local law but disregard its hybrid geographic scope limitation, it would not be disrespecting the enacting state's preferences. We can assume that the enacting state's preference was that its local law be applied whenever it had the superior claim to regulate the matter, but that it subordinated that preference to a desire to simplify the job of its own courts.⁸⁹

A geographic scope limitation might also reflect a combination of comity concerns and a desire to provide regulated parties with a greater degree of certainty and predictability about the applicable law than would be provided by an all-things-considered approach such as that of the Second Restatement. (This appears to be the aim of the draft Third Restatement.) Whether a sister state would be disrespecting such a state's preferences were it to apply its substantive law to disputes falling outside the scope of the law, as determined by the terms of the scope limitation, presents a more complex question—one beyond the scope of this Chapter.⁹⁰ My analysis so far should suffice to establish that a geographic

the point where procedural costs and delays could themselves threaten interference with a foreign nations' ability to maintain the integrity of its own antitrust enforcement system." *Id.* at 168–69.

⁸⁹ The judicial administration concern underlying the scope limitation is thus akin to a procedural concern. Like other procedural rules, it should apply only if the adjudication is pending in the enacting state's courts.

⁹⁰ My tentative view is that this sort of hybrid scope limitation should also not be binding on sister state courts. The interest in certainty and predictability may, of course, be relevant to the constitutional analysis. Thus, to apply a criminal statute beyond its geographic scope as reflected in an express statutory scope limitation is likely unconstitutional. Even in civil

scope limitation (even an express geographic scope limitation incorporated into the text of a statute) should not always bind the courts of sister states. Some such limitations will be unconstitutional (in the interstate context) or in any event undeserving of the respect of sister states or foreign nations because they are discriminatory or protectionist. If based on comity, scope limitations do not express a preference that other states adhere to them. If they reflect a combination of deference to other states and another valid concern, the other valid concern may not extend to cases being litigated in the courts of other states.

4 Choice-of-Law Rules as Geographic Scope Limitations Redux

Does the conclusion that a choice-of-law rule is not binding on the courts of other states mean that the rule is not really a geographic scope limitation? Professor Kramer concluded that step-two rules were not geographic scope limitations because they are not binding on the courts of other states. In his view, to say that a given state's law does not extend to this case because of a geographic scope limitation means that the law "confer[s] no rights in this case."⁹¹ If a law confers no rights, then it cannot be the basis for a judicial decision in favor of the plaintiff. Thus, if another state has determined that the enacting state's law governs the case, it would be required to dismiss on the ground that the law does not confer a right on the plaintiff. If sister states are free to apply the underlying local law without regard to step-two rules (and, if my argument in section 3 is right, at least some step-one limitations), then such rules do not in fact operate as geographic scope limitations.

There is some appeal to that view. To say that these rules limit the geographic scope of a law does seem to mean that the law simply does not extend to disputes beyond its scope, which in turn seems to mean that, regardless of the forum, the law does not confer substantive rights to the parties or otherwise apply to such cases. If so, then my claim that sister states may properly apply that law to disputes beyond its scope seems tantamount to a conclusion that these provisions do not really function as geographic scope limitations. If my analysis is correct, then even express statutory language purporting to limit the geographic reach

cases, constitutional doctrine requires consideration of whether application of a state's law would be "arbitrary [or] fundamentally unfair," see *Allstate Ins. Co.*, 449 U.S. at 312, which in turn makes relevant whether the parties could have anticipated application of that state's law. See *id.* at 317 (noting that defendant "can hardly claim unfamiliarity with the laws of the host jurisdiction and surprise that the state courts might apply forum law ...") Within these constitutional limits, however, a state should be free to weigh the interest in certainty and predictability differently than do their sister states and accordingly to apply their sister states' laws beyond their geographic scope as specified in a scope limitation or inferred from the enacting states' choice of law rules.

⁹¹ Kramer, *supra* note 4, at 1033.

of a statute does not actually operate to limit the reach of the statute (to the extent the provision is based on comity). The statutory text binds the enacting state's courts, but it does not purport to bind other states, which remain free to apply the substantive law more broadly.

Admittedly, the idea of a limitation on the substantive scope of a law that varies depending on the forum is elusive. There would appear to be (at least) two other possible conceptualizations compatible with my thesis that the courts of other states are free to apply such laws even when the courts of the enacting state would not. First, one can understand a state's local law as conferring a right even when that state's courts would not apply it because of step-one or step-two rules, or, indeed, because of express statutory restrictions on the scope of a state's law. On this view, the step-one and step-two rules, as well as express statutory scope limitations, would operate as instructions to the local courts to forego application of otherwise applicable law in order to accommodate the interests of other states. These rules would still be binding on the enacting state's courts, but they would not operate as substantive limits on the scope of the state's law. They would operate instead as a sort of procedural instruction to the courts of the enacting states, but would not purport to bind the courts of other states. So conceptualized, the rules would not function as scope limitations at all.

This would appear to be a natural way to conceptualize choice of law rules enacted by the legislature in a general choice-of-law statute. Such statutes are rare in the United States, but are common in the rest of the world, where choice of law rules form part of the Civil Code.⁹² Such rules do not purport to be limitations on the substantive scope of the enacting state's laws, and can easily be understood as instructions from the state's legislature to the state's courts regarding the circumstances in which it is

⁹² See, e.g., CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 105(I) (Braz.), Zhonghua Renmin Gongheguo Minshi Susong Fa (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by Order of the President Aug. 31, 2012, effective Jan. 1, 2013) NPCSC Official Gazette May 2012, at 525, 525-560 (China), Zhonghua Renmin Gongheguo Shewai Mishi Guanxi Falv Shiyong Fa (中华人民共和国涉外民事关系法律适用法) [Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relations] (promulgated by Order of the President Oct. 28, 2010, effective Apr. 1, 2011) NPCSC Official Gazette July 2010, at 640, 640-643 (China), CODE CIVIL [C. CIV.] [CIVIL CODE] art. 311-14 – 311-17, 370-3 – 370-5 (Fr.), CODE DE LA CONSOMMATION [C. CONSUM.] [CONSUMER CODE] art. L135-1 (Fr.), Einführungsgesetz zum Bürgerlichen Gesetzbuche [EGBGB] [Civil Code Introduction Act], Sep. 21, 1994, BGBI 1 at 2494 (Ger.), Legge 31 maggio 1995, n. 218, G.U. Jun 3, 1995, Suppl. Ordinario n. 68 (It.), Hō no tekiyō ni kansuru tsūsokuhō [Act on the general rules for application of laws], Act no. 78 of 2006 (Japan), Constitución política de los Estados Unidos Mexicanos [CP], Tit. III, chap. IV art. 104, Tit. IV art. 121, Diario Oficial de la Federación [DOF] 01-31-1917, últimas reformas DOF 10-02-2014 (Mex.).

proper for forum courts to refrain from applying forum law. This conceptualization is also more consistent with another aspect of such statutes: they not only instruct the state's courts not to apply forum law in some cases, but they also instruct the court to apply the local law of another state or nation. For example, the Rome II regulations of the European Union instructs member states to apply the law of the place of injury to tort cases (subject to certain exceptions) and expressly prohibit *renvoi*.⁹³ By requiring application of another state's law without regard to whether the other state's law would be applicable under its choice of law rules, the regulations appear to conceptualize choice-of-law rules as something other than limitations on the law's substantive scope.

To be sure, this conceptualization is in tension with how choice-of-law rules have been thought to operate in common law systems lacking general choice-of-law statutes. As the *Carroll* case illustrates, the courts have generally reconciled the application of such rules with the judicial obligation to apply statutes enacted by the legislature by conceptualizing such rules as implicit limitations on geographic scope. Federal extraterritoriality doctrine is similarly well understood to be "a matter of statutory construction" regarding the territorial reach of federal law. As discussed, this conceptualization has been the basis for reconciling such rules with the court's obligation to resolve disputes in accordance with applicable forum state law. The court assumes that the legislature did not mean to resolve the geographic scope question.

But the latter problem can be addressed through a slight reconceptualization of the issue. The courts can assume instead that the legislature meant to leave open a slightly different question: not whether the law extends to cases having foreign elements, but whether the forum's courts should apply it to such cases. Choice-of-law rules can be understood as a presumptive caveat to the forum courts about their obligation to apply forum law to cases having foreign elements. The reasons that have been thought to justify the court's articulation and application of these "background rules of interpretation" to determine the statute's geographic scope equally justify their articulation and application as presumptive instructions to forum courts not to apply otherwise applicable law to cases having foreign elements.

The proposed reconceptualization of choice of law rules as merely instructions to the forum courts to refrain from applying laws that are in principle universally applicable is perhaps most difficult to accept with respect to statutory provisions expressly written as geographic scope

⁹³ Commission Regulation 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 40, arts. 4, 24 (EC).

limitations.⁹⁴ If my analysis in Part 3 is sound, these limitations too should be no more binding on the courts of other states than are other choice-of-law rules (at least to the extent they are based on comity concerns). The reconceptualization is justified because, to the extent the limitations are based on comity, they do not reflect the enacting state's affirmative desire that other states not apply its law. The reconceptualization would admittedly be in tension with the text of these laws, but if the courts are justified in reading a scope limitation into a law that is written in universal terms, then they would seem to be justified in reading a clause that is written as a geographic limit as instead an instruction to forum courts to decline to enforce the substance of the law to the specified cases.⁹⁵ Admittedly, however, asking the courts to treat an express geographic scope limitation as something other than a geographic scope limitation may be a bridge too far.

The other possible conceptualization would treat all of these rules as geographic scope limitations but reconceptualize what the courts of other states are doing when they apply the local law of another state to cases beyond that law's geographic scope. On this view, the enacting state's law does not apply *ex proprio vigore* to cases beyond its geographic scope as specified in an express statutory scope limitation as or inferred from step-one or step-two rules, but other states would be free to resolve cases according to the local law of the enacting state even when the law does not reach the dispute of its own force. When it does this, we might say that the court is incorporating the substantive rule of another state's local law as its own for purposes of deciding the case. This conceptualization resembles the once fashionable but now much derided "local law" theory of choice of law, under which a state that decides to resolve a dispute under the law of another state is understood to have

⁹⁴ As discussed above, such statutory provisions are themselves a type of choice of law rule. See Symeonides, *supra* note 31.

⁹⁵ There is another possible problem with State B applying a State A statute containing an express geographic scope limitation beyond its specified scope: it could result in the application of the law to persons who may have reasonably assumed (based on the text) that the statute did not reach their conduct. In the penal context, doing so could be in violation of constitutional due process principles or even of international human rights norms. This problem may also apply where the "geographic scope" issue has been authoritatively determined through judicial decisions, even in the absence of an express statutory provision. This is not a reason to reject the proposed reconceptualization of geographic scope limitations as instructions to the forum courts to refrain from applying laws that are in principle of universal reach. State B's courts are of course constrained by State B constitutional principles and applicable international law. Beyond that, State B can, and should, take the protection of justified expectations into account pursuant to its own non-constitutional choice of law rules. Cf. Second Restatement of Conflict of Laws, § 6(2)(c). State B's courts thus can and should consider the role of statutory provisions (and judicial decisions) written as geographic scope limitations in giving rise to justified expectations in appropriate cases as part of its own choice-of-law analysis.

incorporated that law as its own law for purposes of that case.⁹⁶ But the conceptualization being considered here does not go that far. The “local law” theory posits that the forum is always incorporating another state’s law as its own. The reconceptualization being considered here would require this understanding of what a court is doing when it applies another state’s law only when the enacting state’s law does not purport to apply. If the enacting state’s courts would apply its own law, then a sister state that decides to resolve the case according to the enacting state’s law could be said to be applying that law qua sister state law.

In the inter-state context, a constitutional issue might arise if the forum does not have enough contacts to the dispute to permit it to apply its own law. By hypothesis, the enacting state’s law does not reach the case because of the geographic scope limitation. If the forum does not have enough contacts to apply its own law, can it apply its sister state’s (by hypothesis inapplicable) local law qua its own law? A full analysis of this issue is beyond the scope of this Chapter, but the analysis in Part 3 suggests that doing so should not be deemed a violation of the Full Faith and Credit Clause. If I am right that geographic scope limitations do not reflect the enacting state’s affirmative desire that the dispute not be resolved according to its local law, then the forum would not be disrespecting the enacting state’s wishes if it resolve the case according to its local law even if the enacting state’s courts would not. But perhaps it would be a violation of the Due Process Clause, which imposes similar limits on a state’s ability to extend its own law extraterritorially.

As between these two alternative conceptualizations, the first would involve a greater departure from current understandings of the choice-of-law process and federal extraterritoriality doctrine, and it would require a radical departure from the text of comity-based statutory scope limitations. But it would accord with the rationale for these limitations (which would no longer be understood as scope limitations). It would also bring the U.S. conceptualization of the choice of law rules closer to how these rules are understood in the civil law world. And it would more elegantly avoid the constitutional issues just discussed.

In any event, whether we regard these provisions as a special type of scope limitation or as not geographic scope limitations at all, this Chapter’s analysis, if correct, establishes that the characterization applies to all choice-of-law rules, not just those that are applied to resolve true conflicts. Indeed, the characterization also applies to express statutory provisions purporting to limit the applicability of the enacting state’s substantive law to cases having certain connections to the enacting state

⁹⁶ See, e.g., *Grant v. McAuliffe*, 41 Cal. 2d 859, 862 (Cal. 1953).

(to the extent that they reflect comity concerns). Insofar as these provisions call for non-application of the enacting state's substantive law, they are binding on the enacting state's courts, but they are not binding on the courts of other states. The two-step theorists, and the current draft of the Third Restatement, are right to conclude that step-two rules are not binding on the courts of other states, but they are wrong to insist that step-one rules are binding on other states. Even express statutory limitations on a statute's geographic scope may be disregarded by the courts of sister states to the extent they are based on deference to other states (or if they reflect protectionist or discriminatory purposes).