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The *Draft Restatement (Third) of Conflict of Laws*: A Response to Brilmayer & Listwa

Kermit Roosevelt III & Bethan R. Jones

ABSTRACT. This Essay responds to Lea Brilmayer and Dan Listwa’s criticisms of the *Draft Restatement (Third) of Conflict of Laws*. We appreciate their engagement. As a general matter, we disagree about the nature and purpose of restatements. More specifically, we disagree about the history and aims of the *Restatements of Conflict of Laws*. Brilmayer and Listwa’s main criticism – that the drafters of the *Restatement (Third)* are not authoritatively interpreting any single state’s law and therefore can be only persuasive authority as to the content of a state’s law – could apply to all restatements. But since this *Draft Restatement*, like other restatements, draws its rules from decided cases, the criticism makes little sense even on its own terms.

INTRODUCTION

In 1934, the American Law Institute (ALI) published the *Restatement (First) of Conflict of Laws*, the brainchild of Reporter Joseph Beale. From the very beginning, the *Restatement (First)* was attacked by critics – both fiercely and successfully. Its formalistic, deductive approach was out of step with the increasingly realist perspective in American law, and it was not long before the academic revolution in choice of law spread to the courts.¹ With courts increasingly rejecting the dogmas of the *Restatement (First)*, the ALI went back to work in 1953, beginning a *Restatement (Second)*.²

The Reporter of the *Restatement (Second)*, Willis Reese, was aware that choice of law was undergoing a revolution. He did not believe it possible, amid

1. See generally SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* (2006).

2. See *id.* at 31.

such tumult, to restate determinate rules of the sort that characterized the *Restatement (First)*.³ Instead, after over seventeen years of work,⁴ he offered a flexible approach that more or less told courts the relevant factors to consider and set them loose to see what they did.⁵ His hope was that judicial practice would converge on outcomes in particular categories of cases that would allow the drafting of rules that were narrower than those of the *Restatement (First)* and sensitive to state policies in a way that the earlier territorial rules of the *Restatement (First)* were not.⁶

Like the *Restatement (First)*, the *Restatement (Second)* was the target of criticism—much of it coming even before it was published in 1971.⁷ While the *Restatement (Second)* was a success in terms of adoption by states,⁸ over the years, academic criticism continued, with professors focusing on the failure of the *Restatement (Second)* to provide meaningful guidance to courts.⁹ From one perspective, this criticism is justified: the *Restatement (Second)* requires judges to do a lot of work, and the outcomes of cases are often unpredictable to parties trying to plan their activities. But from Reese's perspective, it was less justified. Reese did not, after all, intend the *Restatement (Second)* to be an approach that would be used forever.¹⁰ Instead, its framework was more of a means of collecting data

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3. See Willis L.M. Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679, 681 (1963).
 4. See, e.g., *Townsend v. Sears, Roebuck & Co.*, 879 N.E.2d 893, 900 (Ill. 2007).
 5. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW. INST. 1971) [hereinafter RESTATEMENT (SECOND)].
 6. Reese, *supra* note 3, at 699.
 7. As Reese and the American Law Institute were releasing tentative drafts of the *Restatement (Second)*, other scholars were proposing alternative methodologies to replace the *Restatement (First)*. See, e.g., Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 755 (1963) (“[D]eep-freezing seems hardly the indicated treatment for a discipline just emerging from its Ice Age What American conflict-of-laws theory needs most at this stage is a real joinder of issues by the proponents of the new methodologies.”).
 8. See SYMEONIDES, *supra* note 1, at 88 (“[T]he Second Restatement is by far the most popular among the modern methodologies.”).
 9. See Lea Brilmayer & Daniel B. Listwa, *Change and Continuity in the Draft Restatement (Third) of Conflict of Laws: One Step Forward and Two Steps Back?*, 128 YALE L.J.F. 266, 275 n.32 (2018).
 10. Reese, *supra* note 3, at 699; Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 519 (1983) [hereinafter Reese, *Second Restatement Revisited*] (describing the *Restatement (Second)* as a “transitional work”).

that would allow future reporters to write better rules.¹¹ Academics lost sight of this point, if they ever understood it.¹²

Forty-three years after the publication of the *Restatement (Second)*, the ALI commissioned a third.¹³ The aim of the *Restatement (Third)* is to complete the project Reese began with the *Restatement (Second)*: to survey the practice of courts using the *Restatement (Second)* and other modern approaches; to consider codifications in the United States and elsewhere; and to determine when practice converges sufficiently to allow the formulation of appropriately narrow and policy-sensitive rules. Like its predecessors, the *Restatement (Third)* has received criticism even before its completion. Among the critics are Professor Lea Brilmayer and Mr. Dan Listwa. We are honored by their engagement with the *Draft Restatement (Third)* and their commentary is thought-provoking. On the whole, though, we find it puzzling and unpersuasive.

Brilmayer and Listwa structure their critique around the themes of change and continuity. They suggest that the *Draft Restatement (Third)* maintains continuity with its predecessor by retaining what they call the “rules/exceptions structure” of the *Restatement (Second)*. They suggest that the *Draft Restatement* departs from the *Restatement (Second)* by endorsing “governmental interest analysis” and the modern approach to choice of law while abandoning considerations such as uniformity, predictability, and ease of application. And they suggest that these two elements – rules and policy analysis – cannot coexist.

Every part of this critique is mistaken. Brilmayer and Listwa are wrong about the structure and philosophy of the *Restatement (Second)*. They are consequently wrong about the relationship between the *Restatement (Second)* and the *Draft Restatement*. And they are independently wrong about the relationship between rules and policy analysis. Finally, they offer an analysis of the *Draft Restatement*’s escape clause that is baffling and contradicts their earlier arguments. We address these issues in turn.

11. See Reese, *supra* note 3, at 699 (“Presumably more definite and precise rules can be stated after more experience has accumulated. That will be the task of future Restatements.”).

12. Reese’s point that the *Restatement (Second)* was intended as a “transitional work” has been cited relatively rarely – a Westlaw search for ““second restatement” /p transitional” produces twelve secondary sources hits, of which only eight are relevant. Most of those come from discussions of whether a *Restatement (Third)* is a good idea: articles that criticize the *Restatement (Second)* tend to evaluate it as if it was supposed to last forever.

13. See, e.g., Thomas P. Gallanis, *The Use and Abuse of Governing-Law Clauses in Trusts: What Should the New Restatement Say?*, 103 IOWA L. REV. 1711, 1715-16 (2016).

I. THE RESTATEMENTS AND RULES

Brilmayer and Listwa correctly note that the *Restatement (First)* contained rules intended to bind judges. Those rules were, it is now generally conceded, bad rules. Self-contained and derived from a territorialist premise,¹⁴ the *Restatement (First)* often dictated arbitrary and unsatisfying results because its rules were insensitive to the content of state laws. Consequently, choice-of-law decisions were made without regard to relevant state policies.¹⁵ When Joseph Beale offered an explanation for his rules, it tended to be that no other rules were possible. Faced with the charge of dogmatism, he responded “Does not the Bar desire dogmatic statements?”¹⁶ It is not surprising, then, that judges often employed various escape devices to avoid the *Restatement (First)*’s unwavering rigidity.¹⁷

The *Restatement (Second)* abandoned those rules. In their place, it offered what its chief Reporter, Reese, called “an approach” – a list of factors that should be considered in making a choice of law decision.¹⁸ The factors included both what might be called “right answer” factors – factors that would lead a court to the correct decision if what it was trying to do was maximize aggregate state policy satisfaction over a long series of cases – and what might be called “systemic” factors – factors that make for a good choice-of-law *system*, rather than a good individual *decision*. These factors include uniformity, predictability, simplicity, ease of application, and so on. Including both sets of factors as guidance for decisions in individual cases was a little strange, because the way to satisfy the right answer factors is to select the right law, while the way to satisfy the systemic factors is more related to selecting the right choice of law methodology.

14. According to its architect, Joseph Beale, a state’s law, “[b]y its very nature . . . must apply to everything and must exclusively apply to everything within the boundary of its jurisdiction.” 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 4.12, at 46 (1935).

15. See Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1849 (2005) (“One of the greatest defects of the territorial approach is that the axiom of territorial scope may fit poorly with the purposes behind a state law.”).

16. 1 BEALE, *supra* note 14, at xiii.

17. See, e.g., Ralph U. Whitten, *Curing the Deficiencies of the Conflicts Revolution: A Proposal for National Legislation on Choice of Law, Jurisdiction, and Judgments*, 37 WILLAMETTE L. REV. 259, 268 & n.27 (2001) (discussing escape devices); Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1133 (2010) (discussing the “subterfuge and manipulation” by judges of the *Restatement (First)* to avoid arbitrary results).

18. See Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 315 (1972) (discussing Section 6).

The best way to produce predictability, simplicity, and ease of application is probably to adopt a rule.¹⁹

This observation was not lost on Reese, however. Reese justified the *Restatement (Second)*'s "eclectic"²⁰ nature as reflecting the fluidity and change then animating American choice-of-law jurisprudence.²¹ Particularly in the areas of tort and contract, Reese considered it preferable to adopt an approach "too fluid and uncertain in application than to take one's chances with a precise and hard-and-fast rule that may be proved wrong in the future."²² This preference for standards over rules is unusual for a restatement, a text whose drafting has been described by the ALI as "the quest to determine the best rule."²³ But Reese did not expect

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19. Uniformity relates in part to simplicity—a complicated or difficult decision-making process may produce disuniformity because judges cannot apply it consistently—but it also depends in part on the content of the process: selecting forum law, for instance, produces disuniformity. See generally Kermit Roosevelt III, *Certainty vs. Flexibility in the Conflict of Laws* (Aug. 22, 2018) (unpublished manuscript) (on file with author) (discussing relationship between right answer and systemic factors).
 20. See Reese, *Second Restatement Revisited*, *supra* note 10, at 507-08 (describing the *Restatement (Second)*'s Section 6 approach as "eclectic . . . in nature" and derived from "a variety of different theories and values"). Reese admitted that these different values "likely point to different directions in all but the simplest case," see *id.* at 509, but hoped that experience would allow courts to determine appropriate solutions for particular kinds of cases. See *id.* at 513 (stating that "courts should seek to develop actual rules of choice of law").
 21. See Reese, *supra* note 3, at 680, 699 (stating that "[c]hoice of law, even now, is not ripe for restatement" and so "the more general and more flexible formulation of 'state of most significant relationship' has been resorted to"). Brilmayer and Listwa describe Brainerd Currie as "criticiz[ing] the *Restatement (Second)*'s reliance on rules." Brilmayer & Listwa, *supra* note 9, at 274 n.28. To the extent that this suggests that Currie either viewed the finished *Restatement (Second)* as rule-based or criticized it, it is misleading. Currie did argue (in 1959) against choice-of-law rules, and he did (in 1963, in words quite similar to Reese's) argue that choice of law was not ripe for restatement. But we do not think that this supports an inference that the *Restatement (Second)* as published was in fact rule-based or that Currie would have opposed it. Section 6 did not enter the *Restatement (Second)* drafts until 1967, and the ALI did not approve the final draft until 1969. See Louise Weinberg, *A Structural Revision of the Conflicts Restatement*, 75 IND. L.J. 475, 486 (2000) ("Section 6 as we know it appears out of the blue in the penultimate 1967 draft."). There is no way of knowing what Currie would have thought of its multifactor flexibility; by the time of the 1967 draft he had been dead for two years. See Herma Hill Kay, *Remembering Brainerd Currie*, 2015 U. ILL. L. REV. 1961, 1967.
 22. Reese, *supra* note 3, at 681. Twenty-six years later, Reese apparently adhered to this view. See Reese, *supra* note 18, at 9 ("At the present time, rules cannot be devised to govern large areas of choice-of-law. This is particularly true for torts and contracts in situations where the parties have not chosen a governing law.").
 23. *Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work*, AM. L. INST. 6 (2015), https://www.ali.org/media/filer_public/o8/f2/o8f2f7c7-29c7-4de1-8c02-d66f5b05a6bb/ali-style-manual.pdf [https://perma.cc/EKX9-EHWX]. The ALI describes the purpose of a restatement as to provide "clear formulations

the *Restatement (Second)* to last indefinitely. His hope, expressed in both *The Second Restatement of Conflict of Laws Revisited*²⁴ and his earlier article, *Conflict of Laws and the Restatement Second*,²⁵ was that experience applying the Section 6 factors would produce patterns of decisions that could be captured by rules. It was for this reason that he characterized the *Restatement (Second)* as a transitional work.²⁶

The *Restatement (Third)*, we submit, is best understood as an attempt to fulfill Reese's vision. The methodology of its Reporters is to look at current choice-of-law decisions under the *Restatement (Second)*, other modern approaches, foreign-country systems, and even the practice of territorial states, and identify categories of cases where the results are consistent enough to be stated in the form of rules.²⁷ When sufficient convergence exists—and often it does²⁸—a rule can deliver right answers while also satisfying the systemic factors. It may not capture all results, and in rare cases the *Restatement (Third)*'s rules may sacrifice right answers.²⁹ But as long as the number of errors is small enough, the *Draft*

of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court." *Id.* at 4. Brilmayer and Listwa suggest the *Draft Restatement (Third)* is relatively silent on the reasons for adopting a rules-based approach. Setting aside the inherent purpose of a restatement as explained by the ALL, the *Draft Restatement's* commentary clearly explains that the rules of the *Restatement* are intended to "provide sensible, rather than arbitrary, answers to choice-of-law questions" while also furthering the resolution of choice-of-law decisions "in an easy, predictable, and uniform fashion." RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.01 cmt. d (AM. LAW INST., Council Draft No. 2, 2017) [hereinafter DRAFT RESTATEMENT, COUNCIL DRAFT NO. 2]. That is, they are intended to promote both the "right answer" and the "systemic" values found in Section 6 of the *Restatement (Second)*.

24. Reese, *Second Restatement Revisited*, *supra* note 10.
25. Reese, *supra* note 3.
26. Reese, *Second Restatement Revisited*, *supra* note 10, at 519 (describing the *Restatement (Second)* as "a transitional work that has roots in the past and yet strives to ease the way to an uncertain future"); *see also* Reese, *supra* note 3, at 699 ("Presumably more definite and precise rules can be stated after more experience has accumulated. That will be the task of future Restatements.").
27. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS ch. 6, intro, note 2 (AM. LAW INST., Preliminary Draft No. 3, 2017) [hereinafter DRAFT RESTATEMENT, PRELIMINARY DRAFT NO. 3] (describing "[t]he present approach").
28. *See, e.g.*, Symeon C. Symeonides, *The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning*, 2015 U. ILL. L. REV. 1847, 1904 (observing that "the case law has gradually converged into uniform and, indeed, sensible results in several patterns of tort conflicts").
29. If the error is sufficiently gross, the *Draft Restatement*, like most systems, has an escape provision designed to allow departure from its rules when following those rules would produce a manifestly inappropriate result. The *Draft Restatement* "authorizes such departure when two requirements are satisfied. First, the circumstances of a case must be exceptional. They must present factors not considered in the drafting of the otherwise-applicable *Restatement* rule.

Restatement still represents progress in choice of law. As Reese wrote, “[p]erfection is not for this world.”³⁰

Brilmayer and Listwa apparently³¹ disagree with this characterization of the *Restatement (Second)* and its relation to the *Draft Restatement (Third)*. Where we see a structural change—albeit one that Reese anticipated and hoped for—between the *Restatement (Second)* and *Draft Restatement (Third)*, they see continuity, arguing that the *Restatement (Second)* did not embody an approach but instead had a rule-based structure similar to the *Draft Restatement*. Faced with Reese’s explicit description of Section 6 as an approach, they downplay the significance of that section by calling it an escape clause.³² We find this puzzling. The universal directive of the *Restatement (Second)* is to apply the law of the state with the most significant relationship. Section 6 tells judges what to think about in deciding which state has the most significant relationship. Section 6 is, therefore, the heart of the *Restatement (Second)*, as virtually every commentator understands.³³ Indeed, Section 6 analysis controls essentially every judicial application of the *Restatement (Second)*.³⁴ To call the analysis that drives the ultimate decision in virtually every case an escape clause strikes us as quite misleading.

Second, those factors must make application of another state’s law manifestly more appropriate.” See DRAFT RESTATEMENT, COUNCIL DRAFT NO. 2, *supra* note 23, § 5.03 cmt. a. Brilmayer and Listwa’s analysis of this provision is discussed *infra* Part III.

30. Reese, *supra* note 18, at 322.

31. In a footnote, Brilmayer and Listwa note that the *Draft Restatement* describes itself in this way and comment that, “[i]f this account is accurate, the *Restatement (Third)* is not importantly inconsistent with the *Restatement (Second)* because the former is the implementation of the basic frame of reference of the latter.” Brilmayer & Listwa, *supra* note 9, at 267 n.3. We are not sure to what extent Brilmayer and Listwa disagree with this account of the development of the *Restatements* and their relation to each other, but it seems to us relatively straightforward and amply supported by the statements of their Reporters.

32. *Id.* at 273-74 n.25.

33. See, e.g., William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417, 420 (2000) (describing Section 6 as the “intellectual heart of the Second Restatement”); see also SYMEONIDES, *supra* note 1, at 31 (describing Section 6 as the “cornerstone” of the *Restatement (Second)*); Lea Brilmayer, *Hard Cases, Single Factor Theories, and a Second Look at the Restatement 2d of Conflicts*, 2015 U. ILL. L. REV. 1969, 1990 (same).

34. See Richman & Reynolds, *supra* note 33, at 424 (“Thus, whether it uses the specific sections or the general grouping-of-contacts sections, eventually the court will need to apply the section 6(2) factors.”).

It is true that some areas of the *Restatement (Second)* remained rule-governed.³⁵ But we do not take Brilmayer and Listwa to be resting their characterization of the *Restatement (Second)* on these sections. They appear to claim instead that the *Restatement (Second)* is generally structured in terms of rules and exceptions and offer a citation to Reese's article, *Choice of Law: Rules or Approach*, as support.³⁶ In fact, in the passage they cite (containing the word "usually"), Reese did not speak of rules but rather "general principles."³⁷ The *Restatement (Second)* itself repeatedly disavows the characterization of these black-letter sections as rules.³⁸ So too did Reese.³⁹

We do not mean to place too much emphasis on the use or disavowal of the word "rule," which can be used to mean different things. (While the *Restatement (Second)* itself seems to take some pains to distinguish its standards, principles, and empirical appraisals from rules, Reese himself more than once referred to "the rule of most significant relationship."⁴⁰) The general point, however, is clear and not a topic of live debate among scholars. In conflict-of-laws scholarship, rules are associated with rigidity, guidance for judges, certainty, predictability, and ease of application. Standards or approaches are associated with flexibility, judicial discretion, unpredictability, and lack of certainty. Taking that perspective, it is almost universally agreed that the *Restatement (Second)* falls on the standard/approach side.⁴¹

35. See Reese, *supra* note 3, 694 (noting that the *Restatement (Second)* provides "fairly definite choice-of-law rules . . . with respect to status, corporations, and property").

36. See Brilmayer & Listwa, *supra* note 9, at 273 n.25.

37. Reese, *supra* note 18, at 324-25.

38. See RESTATEMENT (SECOND), *supra* note 5, at vii ("The essence of that change [from the *Restatement (First)*] has been the jettisoning of a multiplicity of rigid rules in favor of standards of greater flexibility . . ."); *id.* at vii-viii ("Restatement Second supplants [the *Restatement (First)*'s] rules by the broad principle that rights and liabilities with respect to a particular issue are determined by the local law of the State which, as to that issue, has 'the most significant relationship' . . ."); *id.* at viii (describing black-letter statements about which state's law will usually govern as "empirical appraisals rather than purported rules").

39. See, e.g., Willis L.M. Reese, *A Suggested Approach to Choice-of-Law*, 14 VT. L. REV. 1, 15 (1989) (describing "areas where rules do not currently exist, primarily torts and contracts where parties have not addressed choice-of-law").

40. Reese, *supra* note 3, at 697, 699.

41. See, e.g., SYMEONIDES, *supra* note 1, at 91 (stating that "of the Restatement's 423 sections, only a handful contain anything resembling a black-letter, unqualified rule. The remaining sections allow the judge wide latitude in choosing the applicable law . . ." (footnote omitted)); Brilmayer, *supra* note 33, at 1989 ("What is uncontested is that [the *Restatement (Second)*] preserves for the judge a much greater degree of discretion than other theories — modern or traditional — ever did.").

In addition to mistaking change for continuity, Brilmayer and Listwa mistake continuity for change. They suggest that the *Draft Restatement* “casts its predecessor’s methodological caution to the winds” by focusing on state substantive policies rather than other Section 6 factors such as certainty, predictability, uniformity, and ease of application.⁴² This misunderstands the relationship between what we have called the right answer factors and the systemic factors. Promoting systemic factors is chiefly a matter of the *form* of a choice-of-law system: systemic factors are advanced by the use of rules. Promoting right answer factors is chiefly a matter of *content*: content that takes state policies into account delivers sensible outcomes. Rules that are sensitive to the policies of relevant states promote both sets of factors.⁴³ The *Draft Restatement* explains this explicitly.⁴⁴

Far from abandoning those systemic considerations, then, the *Draft Restatement* promotes them better than the *Restatement (Second)* did or could. The *Restatement (Second)* lists them as among factors to consider, but a judge in an individual case, consulting Section 6 to identify the state with the most significant relationship, has very little ability to promote simplicity, predictability, uniformity, or ease of application: she is applying an approach, not creating one. Reporters writing a restatement do have that ability: they can produce a system that delivers uniform results and is simple, predictable, and easy to apply. They can do that by writing straightforward rules and framing the analysis, where possible, in ordinary legal concepts rather than choice of law esoterica. That is what the Reporters for the *Draft Restatement (Third)* are doing.

II. INTERPRETING LAW IN THE MULTISTATE CONTEXT

The main substantive issue Brilmayer and Listwa raise, however, has less to do with the *Restatement (Third)*’s structural origins and more to do with its theoretical foundation. Part II of their Essay (“Institutional Competence”) argues that the *Draft Restatement*’s commitment to a jurisprudence of rules—and therein, its commitment to traditional values of predictability, uniformity, and ease of application—creates an unavoidable disharmony with the two-step model, which they claim rests on the “authority of a state court to declare the scope of its state statute as a matter of law.”⁴⁵ We find this puzzling. Perhaps the best way to approach their criticism is to consider a few questions. First, what distinguishes modern from traditional approaches? Second, what is the standard

42. Brilmayer & Listwa, *supra* note 9, at 271.

43. See Roosevelt, *supra* note 18.

44. See DRAFT RESTATEMENT COUNCIL DRAFT NO. 2, *supra* note 23, § 5.01 & cmt. e.

45. Brilmayer & Listwa, *supra* note 9, at 276.

objection to the modern move? And third, what is the standard rejoinder to that objection?

As to the first question, the distinctive nature of modern approaches can be described in a few interrelated ways that ultimately come down to the same thing. We can start with a maximally general account of choice of law: what we have called the two-step model. The two-step model understands the choice-of-law process as a matter of first identifying relevant state laws, and second, if multiple conflicting laws are relevant, selecting one of those laws.⁴⁶ The traditional territorial approach can be described in this conceptual framework: the relevant law is the law of the state where the right to redress vested (where the tort, for instance, or the contract occurred).⁴⁷ Since only one law is relevant, there is no need to pick among competing laws, and the territorial approach ends at the first step—though it does face some difficulties in identifying a single state where a multistate tort or contract occurred.⁴⁸

One thing that distinguishes the modern approaches from the territorial approach is the modern approaches' rejection of the idea that one and only one state's law must be relevant. Instead, modern approaches generally grant that multiple states' laws may be relevant. What makes a law relevant? Interest analysis says a law is relevant if the state is interested, that is, if application of the state's law would promote the policies behind that law.⁴⁹ The *Restatement (Second)* does not offer as much explicit guidance, but it certainly includes policy analysis that sounds quite similar to interest analysis, and indeed it uses the same vocabulary: it instructs judges to consider the policies of "interested states."⁵⁰

46. See DRAFT RESTATEMENT COUNCIL DRAFT NO. 2, *supra* note 23, ch. 5, intro. note.

47. Beale believed that the law protected what he termed "primary rights," the violation of which gave rise to a "secondary right" to redress. See 1 BEALE, *supra* note 14, § 8A.25, at 83. The right to redress vested with the violation of the primary right and thereafter could be considered akin to personal property. The law of the jurisdiction in which the primary right vested was the only law, by its nature, that could apply. See *id.* § 4.12, at 46.

48. See Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 997 n.58 (1991).

49. See, e.g., BRAINERD CURRIE, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 107-20 (1963); Brainerd Currie, *The Constitution and the Choice of Law: Government Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 9-10 (1958); see also Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2467-70 (1999) (discussing conceptual structure of interest analysis).

50. See RESTATEMENT (SECOND), *supra* note 5, § 6 cmt. f ("In general, it is fitting that the state whose interests are most deeply affected should have its local law applied."); *id.* § 8 cmt. k ("The state with the dominant interest should usually have its local law applied."). It is possible that systemic factors could select the law of a state with no interest, but that seems unlikely and we are not aware of cases doing this. Accordingly it seems relatively fair to say that the *Restatement (Second)* also deems a state's law relevant if application of that law would further the policies behind it.

Other modern approaches such as California’s comparative impairment,⁵¹ Pennsylvania’s mixed approach,⁵² or New York’s *Neumeier* rules also use interest analysis as a first step.⁵³ So, generally speaking, we can say that while the territorial approach identified a single relevant state by “deduction from territorial postulates,”⁵⁴ modern approaches identify one or more by asking whether the policies behind the state’s laws are implicated by the particular facts of a multistate case.

There are two ways of developing this point a little further – again, we think they amount to much the same thing. One is to say that policies are within the state’s control. Another is to say that this process of determining whether a state’s law is relevant is simply the typical method of interpretation used to determine the scope of a law in purely domestic cases. When, in a domestic case, a court is trying to decide whether the facts of the case fall within the scope of a statute, it often asks whether application of the statute to those facts would promote the purposes behind the statute.⁵⁵ Understood this way, the first step of modern choice of law is conceptually recognizable as ordinary legal analysis.⁵⁶

There are several interesting consequences here – the main one perhaps being that everyone else must listen to state courts and legislatures when they say

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51. See, e.g., *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 922 (Cal. 2006) (resolving conflicts via the principle of comparative impairment).
 52. See, e.g., *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 230-231 (3d Cir. 2007) (demonstrating Pennsylvania’s approach to resolving conflicts in favor of the state with the most significant relationship to the issue).
 53. See, e.g., *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972) (setting out rules that use interest analysis with territorial tiebreakers); *Edwards v. Erie Coach Lines Co.*, 952 N.E.2d 1033, 1036-37 (N.Y. 2011) (applying *Neumeier*’s rules).
 54. David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 178 (1933).
 55. See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 299-301 (1990).
 56. Making clear that choice of law is intelligible according to ordinary legal concepts and principles is one of the aims of the *Draft Restatement*. What Brilmayer and Listwa call “new terminology” – the “scope” of a law, see Brilmayer & Listwa, *supra* note 9, at 271-72 – is actually a very basic legal concept: laws attach legal consequences to some events and not others. See, e.g., *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267 (1994) (discussing “limited scope” of constitutional restrictions and the “intended scope” of statutes). It is also already used in the choice-of-law context in the way the *Draft Restatement* uses it. See, e.g., *Budget Rent-A-Car System, Inc. v. Chappell*, 407 F.3d 166, 172 (3d Cir. 2005) (discussing whether an accident in Pennsylvania involving a car rented in Michigan but driven through New York “falls within the scope of [a New York law] as that statute has been construed by New York’s courts”); *Phillips v. General Motors Corp.*, 995 P.2d 1002, 1011 (Mont. 2000) (discussing whether the “scope of North Carolina products liability law” includes injuries outside North Carolina); see also Reese, *supra* note 18, at 318 (“[T]he problems posed by choice of law are similar to those found in other legal areas. Policies underlie and are responsible for all rules of law The task of defining the policy’s scope of application or of providing proper accommodation for conflicting policies bears close analogy to the choice of law problem . . .”).

that they are or are not interested, just as they must listen if a legislature defines “pedestrian” to include (or exclude) rollerbladers, or a state court of last resort so construes the word “pedestrian” in one of its own statutes. To put it simply, states are authoritative with respect to the scope of their laws in domestic cases, and the modern understanding of choice of law suggests that they are likewise authoritative in the multistate context. In the process of drafting the *Restatement (Third)* there has been debate about whether this is so, with some participants arguing that courts should be free to disregard the words of sister-state statutes and the interpretations of the courts of those states. This position seemed strange to us since it is inconsistent with the remainder of U.S. law, and there appears to be no support for it in the caselaw.⁵⁷ Some traces of this discussion may be found in the *Reporters’ Memoranda* accompanying *Preliminary Draft 2* and *Council Draft 2*.⁵⁸ To the extent that Brilmayer and Listwa argue that the *Draft Restatement* should not tell judges to respect sister-state specifications of scope (we cannot figure out whether they do or not), they are urging the drafters to reject uniform caselaw on the basis of a theory they have not articulated. That does not seem proper for a restatement.

Whatever Brilmayer and Listwa think about the power of judges to contradict other states about the scope of those states’ law, however, they raise a different objection here. Here, they say that the “standard objection” to this account is that statutes often say nothing about multistate scope, and therefore the process of determining scope cannot be statutory interpretation. It is true that statutes often do not specify their multistate scope. Sometimes they do, however, and the fact that courts in such cases take the statements as binding⁵⁹ suggests

57. It is a basic tenet of federalism that, within some limit, each state has authority to determine the scope and content of its own law. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); see also *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941) (holding that states are “free to determine whether a given matter is to be governed by the law of the forum or some other law”). The Full Faith and Credit Clause also directs that each state is authoritative as to the meaning of its own law. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 731 (1988) (holding that it would violate the Full Faith and Credit Clause to misconstrue another state’s law “that is clearly established and has been brought to the court’s attention”). No one has pointed us to a case in which a state court disregarded an explicit limit on the scope of a sister-state statute.

58. See *Reporters’ Memorandum in RESTATEMENT (THIRD) OF CONFLICT OF LAWS xiv–xxiv* (AM. LAW INST., Preliminary Draft No. 2, 2017); *Reporters’ Memorandum in DRAFT RESTATEMENT COUNCIL DRAFT NO. 2*, *supra* note 23, at xvii–xxiii (discussing whether states have authority to set the scope of their law).

59. See, e.g., *Garcia v. Plaza Oldsmobile Ltd.*, 421 F.3d 216, 220–221 (3d Cir. 2005) (following New York decisions on the scope of New York law); *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376, 385 (7th Cir. 2003) (surveying cases adhering to statutory restrictions on scope).

that the multistate scope of a statute is in fact a question about the content and meaning of the statute, as it obviously is in domestic cases.⁶⁰

Regardless, we simply do not see how it follows that determining scope is not interpretation.⁶¹ Statutes do not explicitly specify lots of things: that is exactly why interpretation matters. Courts or other decisionmakers often have to decide whether a law grants rights to, or imposes obligations on, a particular person in particular circumstances. If a statute grants rights to pedestrians, does it do so to a person on rollerblades? When this question is answered in the domestic context, we call it interpreting the law, and there is no reason to suppose it magically becomes something else simply because another state is involved.⁶²

Because we see no force in this objection, we are not sure what the response should be, except to say that the objection “but the statute doesn’t explicitly say that” can be applied to almost every instance of statutory interpretation.⁶³ Brilmayer and Listwa offer another response, which they call “standard”: that courts have the last word on the meaning of their own state law, so they can authoritatively interpret it even if, in doing so, they are making it.

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60. Does the reference to pedestrians include rollerbladers? Is an employer with fewer than fifteen employees subject to Title VII? Those are questions about the scope of the statute. It is worth noting that the Supreme Court has said that questions about the extraterritorial scope of federal law are questions about the content and meaning of the law in exactly the way we suggest here. See, e.g., *Morrison v. Nat’l Austl. Bank*, 561 U.S. 247, 254 (2010) (noting that “to ask what conduct [a law] reaches is to ask what conduct [it] prohibits, which is a merits question”); *id.* at 255 (describing determination of extraterritorial scope as a matter of “construction” of “a statute’s meaning”).
61. There is nothing novel about connecting choice of law and statutory scope. In the classic case of *Alabama Great Southern Railroad Co. v. Carroll*, 11 So. 803, 807 (Ala. 1892), the Alabama Supreme Court explained its territorial approach to choice of law in exactly those terms, stating that it meant that a statute had to be interpreted “as if its operation had been expressly limited to this state.”
62. See Kramer, *supra* note 55, at 290 (explaining that while “multistate contacts raises some special problems that make interpretation more difficult . . . it does not require major modifications in the analysis” and “does not change the essential nature of the interpretive problem”); see also Symeonides, *supra* note 28, at 1858 (“To the extent [Currie’s critics] deny the domestic method’s ability to ascertain state policies, at least those of the forum state, these criticisms are unjustified Ascertaining the *telos* or purpose of a law is more difficult in conflicts cases than in ordinary domestic cases, but it is both a surmountable and a worthy task.”).
63. See, e.g., Kramer, *supra* note 55, at 300–01 (noting that the objection “really amounts to a claim that courts are unable to something that they do all the time”). Technically, in fact, it is not true that statutes say nothing about their scope. The interpretive question usually comes down to deciding the meaning of a word—for instance, does “injury” mean “injury received in this state” or “injury received anywhere”? This is not different in kind from deciding whether “pedestrian” includes rollerbladers.

It is true that state courts have the power to make state common law. They do not have the power to make state statutory law, so their interpretive authority rests on a different ground there. In any case, we do not understand the relevance of this response. We have never seen it in the academic literature, so referring to it as “standard” seems odd. To the extent that it relates to Brilmayer and Listwa’s claim that the two-step model relies on “the authority of a state court to declare the scope of its state statute as a matter of law”⁶⁴ we do not understand that claim either. Judges using the two-step approach spend at least half their time (more, if more than two states are involved) interpreting the laws of other states to determine their scope. It is simply not the case, within the two-step model or more generally, that only those with the power to make a law are entitled to interpret it.

Like other interpretive questions, the question of scope has to be answered in order to decide a case, and like other interpretive questions, it is a question about the content and meaning of the law. That means that some interpreters are authoritative and others are not, but it does not mean that what nonauthoritative interpreters do is not interpretation. Courts interpret the laws of other states.⁶⁵ Scholars, too, can examine laws and argue for sensible interpretations. They can offer presumptions as to the scope of certain kinds of laws. They might consider, in the tort context, whether the primary purpose of the law is to deter wrongful conduct or to compensate injured parties. They can look to see if courts

64. Brilmayer & Listwa, *supra* note 9, at 276. Brilmayer and Listwa also suggest that the “core” of the two-step theory “is that choice-of-law questions can be resolved through attention to a given law’s scope.” *Id.* This is not true—determination of scope resolves very few questions, as we explain later in this section. See *infra* text accompanying notes 67-77. Most often, resolution requires a decision about which of two overlapping laws will be given priority. We are not sure how seriously their misunderstanding of two-step theory affects their analysis, but their persistent and erroneous suggestion that choice-of-law decisions are primarily a matter of determining scope distorts the model. See, e.g., Brilmayer & Listwa, *supra* note 9, at 277-78 (stating that “to convince a judge who embraces the ‘two-step’ theory that it is the law of State A and not State B that should apply” one needs to “show[] how—as a matter of statutory interpretation—the present case falls outside the scope of B’s law but within A’s”).

65. Take for example the “*Erie* guess,” wherein a federal court sitting in diversity must attempt to predict what a state’s highest court would decide if it were to address the issue itself. In the international context, the Supreme Court has also recently reaffirmed that federal courts should interpret another nation’s law using the same methods as in the domestic context. See *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1873 (2018) (“The ‘obvious’ purpose of the changes Rule 44.1 ordered was ‘to make the process of determining alien law identical with the method of ascertaining domestic law to the extent that it is possible to do so.’” (quoting 9A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2444, at 338-42 (3d ed. 2008))).

have given convergent interpretations of certain kinds of laws.⁶⁶ They can recommend those convergent interpretations as best practices, to be adopted by state courts that find them appealing—in fact, that is what a *Restatement* does.⁶⁷ Lots of different actors within the legal system do similar things all the time. That is not something that needs to be justified by lawmaking authority; it is a commonplace feature of our legal system.

At this point, it may also help to look at the actual issues. We will focus here on torts. What are the actual questions about the scope of state tort law? Basically, these questions distill down to what limits exist based on domicile or the location of the tort. Everyone agrees that state laws give claims to locals for things that happen inside the state. So the real questions are whether they also

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66. Brilmayer and Listwa object that the drafters of a restatement “offer neither the authority of a state court to declare the scope of its state statute as a matter of law nor the sort of particularized analysis that grounds a persuasive argument from statutory interpretation.” Brilmayer & Listwa, *supra* note 9, at 276. They announce that the *Draft Restatement* “cannot be anything more than persuasive authority as to the meaning and scope of a particular statute.” *Id.* at 279. They say the draft “is not statutory construction [and] does not seriously attempt to be.” *Id.* at 280. This appears to us to be an objection to restatements generally. The *Draft Restatement*, like restatements generally, does not attempt to declare or interpret the law of single state. It attempts to *restate* the interpretations of courts in most states, producing a set of rules that states can adopt if they are so inclined. If it is impermissible for the *Draft Restatement* to do that with respect to the scope of certain kinds of state laws, it is hard to see how any restatement could ever say anything about the content of any state law. No restatement is more than persuasive authority unless a state adopts it. No restatement is an interpretation of the law of any individual state: it is a *survey* of those states’ interpretations. Brilmayer and Listwa’s position here may be driven by their apparent belief that the specific rules of the *Draft Restatement* “owe their content to the ‘two-step’ method,” *id.* at 275, as if the drafters derived them by some process of abstract reasoning, like Joseph Beale deducing from territorialist premises. That is wrong. The two-step method is presented as a restatement of the *methodology* of modern choice of law: a description that captures what courts are doing. The specific rules are presented as a restatement of the *outcomes of reported cases* using that methodology: again, a description of what courts are doing. The content of the rules is derived from those cases.
67. It is possible that our disagreement with Brilmayer and Listwa on this point stems from different understandings of the nature and purpose of a restatement. We believe that it is appropriate for a restatement to survey judicial decisions to see if state courts (engaged in what Brilmayer and Listwa consider authentic interpretation) have interpreted similar statutes consistently. If, for example, nine out of ten jurisdictions interpret their guest statute a certain way, we believe it is appropriate for the restatement to restate that interpretation as a rule. The nine states whose interpretation is consistent with that rule are not being asked to do anything other than what they are already doing. The tenth might choose to adopt the restatement’s rule, or it might not. If it does, it will start interpreting its statute differently. But that is within its power, at least in the situation where the statute is silent as to scope. (When a statute specifies its scope, the *Draft Restatement* tells courts to honor that specification.) When a state court of last resort adopts a restatement in whole or part, it is changing the content of its own law, something it has the power to do.

give rights to nondomiciliaries for things that happen inside the state, whether they give rights to locals for things that happen outside the state, and whether they give rights to nondomiciliaries for things that happen outside the state.

The *Draft Restatement* tends to presume relatively broad scope. Presumptively—because of course states can set the scope of their own law—it takes state laws to grant rights to everyone inside their borders. After all, discrimination by withholding rights from visiting out-of-staters is constitutionally suspect.⁶⁸ It also takes state laws to create rights for domiciliaries outside the state’s borders. States probably want their domiciliaries to be able to benefit from their home law even for out-of-state events if no other law conflicts. (Importantly, that is all that the determination of scope does—it decides that the home law is relevant and available for selection as a rule of decision. If another law conflicts, then a second step, that of assigning priority, is required.⁶⁹) But states probably do not want to extend the benefits of their law to nondomiciliaries for events outside the state—this is either unconstitutional, if no domiciliary is involved, or what the Reporter for the *Restatement (Second)* dismissively called making the state’s law “manna for the entire world.”⁷⁰ These presumptions are supported by the cases of which we are aware.⁷¹ Brilmayer and Listwa express consternation that the drafters of the *Restatement (Third)* engage in “stylized” statutory construction by positing the “likely or generally accepted purposes” of particular laws and presumptively determining scope by reference to those purposes.⁷² But surveying judicial decisions to identify convergent patterns—what the *Draft Restatement* means by “generally accepted”—is exactly what a restatement is supposed

68. See generally John Hart Ely, *Choice of Law and the State’s Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981) (discussing constitutional limits on discrimination against non-residents).

69. As noted above, Brilmayer and Listwa repeatedly ignore this point. See *supra* note 64.

70. Willis L.M. Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 563 (1971).

71. For the proposition that states do not intend to give out-of-staters claims against locals for out-of-state torts, see, for example, *Neumeier v. Kuehner*, 286 N.E.2d 454, 458-59 (N.Y. 1972). For the proposition that states do extend the benefits of their tort law to visiting out-of-staters, see, for example, *Edwards v. Erie Coach Lines Co.*, 952 N.E.2d 1033, 1044 (N.Y. 2011), which determined the rights of Ontario and Pennsylvania parties under New York law for a New York accident. Punitive damages, on which Brilmayer and Listwa focus, are complicated because the purpose of a punitive damages law is to punish, making the domiciliary connecting factor significant when the law grants rights to a nondomiciliary against a domiciliary. Because of this, the *Draft Restatement* has a special section on them. See DRAFT RESTATEMENT, PRELIMINARY DRAFT NO. 3, *supra* note 27, § 6.11.

72. See Brilmayer & Listwa, *supra* note 9, at 281.

to do.⁷³ The idea that different kinds of laws have different purposes – in particular, the idea that some are predominantly concerned with regulating conduct and others with allocating losses – is one of the major advances of the last century of choice of law.⁷⁴

It is possible, of course, that these presumptions will not always accord with the interpretations of state courts. When they do not, the error that the *Draft Restatement* would make with respect to scope would be extending scope too far. That error will be harmless if it ended up not choosing the law whose scope it has misconstrued. And because the *Draft Restatement* almost always resolves conflicts via territorial connecting factors, most such errors should in fact be rendered harmless at the second step: the *Draft Restatement* will choose the law of the place of the tort, which will include the case within its scope, rather than the law mistakenly presumed to extend extraterritorially. We can think of one significant category of cases in which that will not happen: cases where co-domiciliaries are involved in a tort outside their home state and the issue is one of loss-allocation. In such cases, the *Draft Restatement* selects domiciliary law.⁷⁵ This will be an error if the scope of the state's law is territorially limited.

Of course, if the law is a statute with an express limitation, the *Draft Restatement* directs courts that this limitation on scope must be respected and the statute cannot be used to govern extraterritorial torts, so that error will be avoided.⁷⁶ The remaining possibility is that the scope is limited because the state's courts have adopted a territorialist approach to choice of law and intended thereby to indicate that the state's law is territorially limited.

Such cases will probably be relatively rare, but they may well arise. The error may present clearly enough for application of the *Draft Restatement's* escape provision – the draft gives selection of a state's law to govern matters outside its

73. The point of having experts survey the whole landscape of complex and sometimes inconsistent decisions and create simple rules that capture the best and most widely adopted practices is that judges then do not have to engage in that task themselves: they can follow the *Restatement's* rules. Thus, we are confused by Brilmayer and Listwa's suggestion that there is something untoward about not telling judges to repeat the work of the reporters and advisers. They announce that "the drafters forming the rules embodied in the *Draft Restatement* are engaged in a task fundamentally different from judges individually applying the 'two-step' theory to resolve choice-of-law disputes." Brilmayer & Listwa, *supra* note 9, at 283. Of course they are! Judges using modern methodologies are applying some form of the two-step model. Reporters drafting a restatement are reporting what those judges have done.

74. See, e.g., SYMEONIDES, *supra* note 1, at 123-137 (discussing distinction).

75. See DRAFT RESTATEMENT, PRELIMINARY DRAFT NO. 3, *supra* note 27, § 6.06.

76. See DRAFT RESTATEMENT, COUNCIL DRAFT NO. 2, *supra* note 23, §§ 1.03 cmts. a, b, 5.01 cmt. c ("The scope of foreign internal law as a question of foreign law.").

scope as an example of manifest inappropriateness sufficient to trigger the exception.⁷⁷ Even if it does not, we have resolved these cases this way (selecting codomiciliary law despite the possibility of territorial scope) for two main reasons. First, absent explicit statement from the state's courts, it is not possible to determine whether the territorial approach to choice of law means that the state's law is territorially limited (a question of scope) or simply that conflicts are resolved by reference to territorial connecting factors (a question of priority). Second, it is not the practice of courts using modern approaches to take other states' adoption of territoriality to indicate a binding restriction on the scope of their law.⁷⁸ A restatement is, after all, supposed to restate, and so we have taken the practice of courts as our primary source of guidance. We seek primarily to explain what courts are doing and to allow them to continue to reach the same results more simply, easily, and consistently. This is, fundamentally, what the ALI handbook tells reporters to do.⁷⁹

III. THE DRAFT RESTATEMENT'S ESCAPE CLAUSE

Last, Brilmayer and Listwa criticize the escape provision of the *Draft Restatement* in light of the draft's view that states must respect other states' statements about the scope of those other states' laws. Their claim, as best we understand it, is that by suggesting that judges may depart from the *Restatement's* rules if those rules select a law that by its terms excludes the parties or events, the escape provision creates "a time-consuming and error-prone process."⁸⁰

There are, we think, three points to be made in response. First, the inclusion of some kind of escape provision is an almost uniform feature of modern codifications.⁸¹ To the extent that Brilmayer and Listwa object to the existence of such a clause in general, they are going against virtually uniform practice. The form

77. See *id.* § 5.03, cmt. b and illus. 1.

78. See, e.g., *Pfau v. Trent Aluminum Co.*, 263 A.2d 129, 137 (N.J. 1970) (stating that "[I]ex loci delicti was born in an effort to achieve simplicity and uniformity" and does not set the scope of state law).

79. See A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 5-6 (AM. LAW INST. 2015). Strikingly, Brilmayer and Listwa develop a theoretical argument for their skepticism about the Reporters' "optimism" that choice of law can be captured in rules but make absolutely no attempt to determine whether the *Draft Restatement's* rules do in fact track the practice of courts. Symeonides has investigated the degree to which the cases support the *Draft Restatement's* rules. See Symeon C. Symeonides, *The Third Conflicts Restatement's First Draft on Tort Conflicts*, 92 TUL. L. REV. 1, 48-49 (2017) (praising the draft for "accurately capturing the decisional patterns emerging from the majority of the cases").

80. Brilmayer & Listwa, *supra* note 9, at 288.

81. See SYMEON C. SYMEONIDES, *CODIFYING CHOICE OF LAW AROUND THE WORLD* 190-203 (2014) (discussing escape clauses).

of such clauses varies; the *Draft Restatement's* version has been drafted with care based on the experiences with other codifications and it gives guidance to users derived from those experiences.⁸²

Second, if Brilmayer and Listwa's concern is with the suggestion that divergent scope warrants invocation of the escape clause as a theoretical matter, they are taking the position that judges should be able to disregard express limitations on the scope of their own or sister-state law. As noted above,⁸³ this position is contrary to every case of which we are aware, and Brilmayer and Listwa make no normative or theoretical argument in support of it. Rejecting uniform authority on the basis of nothing is not an appropriate approach for a restatement.

Third, if Brilmayer and Listwa object only that determining whether the scope of a state's law excludes a particular case is too difficult,⁸⁴ we think their concern is overblown. First, while it might be difficult to determine the scope of a state statute by looking at the state's choice-of-law decisions, the *Draft Restatement* does not tell courts to do so, in part for the reason that such decisions may be ambiguous or unclear.⁸⁵ Second, however difficult it might be to determine the scope of a state statute by reading the statute and perhaps some decisions interpreting it, courts have proven themselves capable of doing so.⁸⁶ There are plenty of cases out there in which courts interpret sister-state law to determine its scope, distinguishing that enterprise from choice of law and noting that they cannot use a state's law to attach legal consequences to persons or events outside its scope.⁸⁷ What the *Draft Restatement* directs with respect to divergent scope is

82. See *id.* at 201-03 (discussing desirable features of escape clauses).

83. See *supra* text accompanying notes 59-60.

84. It is at this moment that Brilmayer and Listwa seem to contradict themselves: in Part II they argue that state courts should look to sister-state choice of law decisions to determine the scope of sister-state law; in Part III they argue that this is too difficult and time-consuming to do. See Brilmayer & Listwa, *supra* note 9, at 288.

85. The other reason, as noted above, is that we are trying to track the practice of courts, and courts do not generally take sister-state choice of law decisions to set the scope of sister-state law. See *supra* text accompanying note 78.

86. We do not see why this should be so difficult: statutes that specify their scope generally do so with an explicit "in this state" limitation. See, e.g., *Diamond Multimedia Sys., Inc. v. Superior Court*, 968 P.2d 539, 549-50 (Cal. 1999) (discussing legislative use of "in this state" restrictions). In any case, courts do perform this analysis. See, e.g., *Gravquick A/S v. Trimble Navigation Int'l Ltd.*, 323 F.3d 1219, 1223 (9th Cir. 2003).

87. See, e.g., *Budget Rent-A-Car Sys. v. Chappell*, 407 F.3d 166, 172-74, 176 (3d Cir. 2005) ("In sum, the District Court's choice-of-law ruling rested on its limiting interpretations of New York and Michigan substantive law. Before turning to the choice-of-law inquiry, we address the propriety of those legal interpretations."). Brilmayer and Listwa suggest that the *Draft Restatement* contemplates "applying state law[s] to fact patterns that do not fall within their scope." Brilmayer & Listwa, *supra* note 9, at 287 n.70. That is simply wrong. The illustration

not some new and impossibly difficult task; it is a fairly simple process that courts already perform. Again, we do not see how ignoring that uniform practice would be appropriate for a restatement.

CONCLUSION

Brilmayer and Listwa's commentary is thought-provoking but in the end it leaves us somewhat puzzled. They claim that the *Draft Restatement* has the same form as the *Restatement (Second)* (the continuity of the alleged rules/exceptions structure) but different content (outcomes derived from policy analysis without regard for systemic values). This is exactly backwards: the *Draft Restatement* has the same content (its rules direct the results on which courts using the *Restatement (Second)* have converged) but a different form (it has rules rather than standards).

Brilmayer and Listwa also suggest some inconsistency between the use of rules and the *Restatement (Third)*'s overarching theoretical framework and goals. We see no such inconsistency. What we are trying to do with the *Restatement (Third)* is two things. First, to bring greater predictability to choice of law through the more determinate rules. Second, to explain how choice of law generally works so that the commonalities between different approaches can be discerned and the field made more intelligible, particularly to nonspecialists. The theoretical perspective adopted for this purpose, the two-step model, is sufficiently abstract to accommodate all approaches of which we are aware (which is why it is appropriate for a restatement), and it aligns with ordinary legal practice. It says that courts must first figure out which states are trying to regulate (which

they cite (Illustration 3 to Section 5.02) involves a state following a choice-of-law statute. The *Draft Restatement* does say, as did the *Restatement (Second)*, that state courts must follow choice-of-law statutes of their own state, provided those statutes are constitutional. See DRAFT RESTATEMENT, COUNCIL DRAFT NO. 2, *supra* note 23, § 5.02; RESTATEMENT (SECOND), *supra* note 5, § 6(1). We cannot imagine that Brilmayer and Listwa mean to question this rule. It is possible, we suppose, that a state could direct a court to use forum law to decide an issue while at the same time writing that law to exclude the case from its scope. It could say “wrongful death claims between domiciliaries of this state shall be governed only by the law of this state, any other law to the contrary notwithstanding” and also “spouses shall be immune from interspousal suit for all claims arising in this state.” Now if an interspousal wrongful death claim arises outside the state, the first statute directs the state to apply its own law (and not that of any other state), while the second excludes the suit from its rule of interspousal immunity. The result there, however, is simply that the immunity is not available. One could call this “applying” the immunity statute, but it is “applying” it only in the sense that one could “apply” Title VII to an employer with only three employees: a court “applies” the law in such cases by recognizing that it does not attach legal consequences because the case is outside its scope. The difficulty in making clear what the word “apply” means is one reason we find the ordinary legal concept of scope appealing in choice-of-law analysis. Vocabulary that makes significant differences apparent is better than vocabulary that obscures them.

states include the facts of the case within the scope of their law), and then, if conflicts exist, resolve them. The two-step model by itself does not direct any particular results; instead, those results are drawn from *judicial decisions applying the model*.⁸⁸ The results the *Draft Restatement* sets out in rule form respect state policies (the modern insight) while also serving the systemic values of uniformity, simplicity, and predictability (the benefit of rules). If the cases did not converge, this would not be possible, but they do converge.

Admittedly, the *Restatement (Third)*'s Reporters are not imbued with the authority to *make* the scope of state laws. But this does not mean the *Restatement (Third)* cannot suggest rules based on presumptive interpretations, particularly when these interpretations are derived from patterns of decided cases.⁸⁹ When the courts converge on particular answers in particular categories of cases, as our research thus far suggests, we believe we are doing a great service by encapsulating those answers in a rule that can be applied easily, cheaply, predictably, and consistently. In short, we believe the *Draft Restatement (Third)* already has successes to write about.⁹⁰

88. We stress this point because we think that a failure to grasp it is at the root of the main Brilmayer and Listwa objection. The two-step model is presented as a restatement of the *methodology* of modern choice of law. The specific rules are presented as a restatement of the *outcomes of reported cases* using that methodology. Their content is derived from those cases.

89. If states are already using these interpretations, which should often be the case since the *Draft Restatement's* rules are derived from reported decisions, the *Draft Restatement* simply gives them an easier way to do what they are already doing. If not, they can change their practice by adopting the *Restatement*—a change that is not within the power of the ALI to direct but is within the power of the state to effect. The drafters do not possess “the authority of state judges to make the policy decisions that are near-inevitably involved in determining the scope of a particular statute.” Brilmayer & Listwa, *supra* note 9, at 276. But no restatement drafters ever possess that authority, and they do not purport to be making policy decisions: they are reporting the policy decisions that states have made.

90. These successes have, in fact, already been recognized in the academic literature. See Symeonides, *supra* note 79, at 48-49 (explaining that “the Draft makes good use of the lessons of the American conflicts experience” by “(1) accurately capturing the decisional patterns emerging from the majority of the cases . . . ; (2) expressing those patterns in a ‘new form’ that is clear, concise, and, at the same time, sufficiently flexible; and (3) providing logical and persuasive reasons for each of the proposed rules,” and further noting the “reporters deserve our collective thanks and congratulations for a job well done”); see also Patrick J. Borchers, *How “International” Should a Third Conflicts Restatement Be in Tort and Contract?*, 27 DUKE J. COMP. & INT’L L. 461, 477 (2017) (calling the *Draft Restatement* “a vast improvement from the *Second Restatement* in terms of predictability” because it posits “reasonably concrete rules without the endless qualification of the *Second Restatement*” (footnote omitted)).

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