

DETERMINING THE TERRITORIAL SCOPE OF STATE LAW IN INTERSTATE AND INTERNATIONAL CONFLICTS: COMMENTS ON THE DRAFT RESTATEMENT (THIRD) AND ON THE ROLE OF PARTY AUTONOMY

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INTRODUCTION

Analyzing conflicts of laws requires thinking both about the *scope* of potentially applicable law and about *priority*, or *choice*, among potentially applicable laws. The “scope” question asks whether a particular law applies

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to the relevant transaction or event. It encompasses considerations of both substantive coverage (e.g., whether the law is intended to apply to all traffic accidents, or only those caused by motorized vehicles) and spatial coverage (e.g., whether the law is intended to apply to all traffic accidents, or only those occurring within the enacting state). The “priority” question asks which among competing laws should be applied. The relationship between scope and priority is central to theoretical and methodological concerns in the conflicts field, such as the nature of unilateralism versus multilateralism.¹ It is also central to intensely practical concerns, such as the function and limitations of contractual governing-law clauses.² The Restatement (Second) of Conflict of Laws³ (“Restatement Second”), however, contains little guidance on how, or in what order, courts are to address these two inquiries. For the most part, it simply treats considerations of scope as one relevant factor in choice-of-law analysis.⁴

The draft Restatement (Third) of Conflict of Laws⁵ (“Restatement Third,” or the “draft”), in contrast, differentiates clearly the respective roles of these two analytical elements. It characterizes the resolution of a choice-of-law question as a two-step process:

First, it must be decided which states’ laws are relevant, in that they might be used as a rule of decision. This is typically a matter of discerning the scope of the various states’ internal laws: deciding to which people, in which places, under which circumstances, they extend rights or obligations. Second, if state internal laws conflict, it must be decided which law shall be given priority.⁶

1. See generally SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 366 (2006):

One of the sub-questions in the [choice-of-law] process is whether the choice of law should be based: (a) on the respective “claims” of each involved state to apply its law; or (b) on predefined neutral criteria that are indifferent to these claims. The first option is the basis of unilateralism, whereas the second is the basis of multilateralism.

2. See *infra* Part II.

3. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. LAW INST. 1971) [hereinafter RESTATEMENT SECOND].

4. RESTATEMENT SECOND § 6 (outlining choice of law principles and asking courts to consider the relevant policies of both the forum and any other interested state, thereby inviting consideration of the scope of potentially applicable law).

5. See RESTATEMENT (THIRD) OF CONFLICT OF LAWS (AM. LAW INST. Council Draft No. 1, Nov. 11, 2016) [hereinafter Council Draft].

6. *Id.* § 5.01 cmt. b. The Restatement Third aims primarily to develop more precise rules governing choice of law in various substantive areas, in the expectation that courts will generally be able to apply those rules “without any explicit consideration of scope or priority.” *Id.* at Introduction to Chapter Five, at 111 (emphasis added) (stating that “the rules are intended to stand on their own”). As the reporters explain, however, the rules “have been derived through the two-step process . . . , by positing the likely scope of state laws in light of their likely or generally accepted purposes and then attempting to determine the most appropriate law . . .” *Id.* § 5.02 cmt. c.

The first step—the scope analysis—is operationalized in two particular sections. Section 1.03(1) defines the “internal law” of a state to include “restrictions the law places on the persons who may assert rights under the law or the geographic scope of the law.”⁷ This definition explicitly distinguishes such scope restrictions from choice-of-law rules, which are excluded from the definition of “internal law.”⁸ Section 5.02 instructs a court not to apply a statute—of either its own state or a foreign state—if the transaction or event being litigated “falls outside the specified scope” of that statute.⁹ In sum, this approach means that conflicts problems may be resolved solely on the basis of scope considerations, as courts both within and outside the enacting state must defer to that state’s conclusion as to the scope of its own law.

Some laws include an explicit provision addressing their own reach; most, however, do not.¹⁰ This raises two questions that the current draft does not answer clearly. First, is the definition of internal law meant to include only express restrictions on scope? It does not appear to be so limited. Although some passages of the draft instruct courts to effectuate “express” or “specific” statements of scope as part of a state’s internal law,¹¹ in general, the draft seems to contemplate that courts of other states must follow any authoritative determination by the enacting state of a law’s scope, including a judicial determination.¹² In other words, the draft at least sometimes views *implied* restrictions on scope as part of a state’s internal law as well.

Second, absent explicit restrictions, how is the scope of a law to be determined? Overall, the draft takes the approach that “the scope of forum internal law is a question of forum law. It is determined by the same sources that are used for ordinary questions of legal interpretation.”¹³ This approach

7. *Id.* § 1.03 cmt. a.

8. *Id.* § 1.03(1).

9. *Id.* § 5.02 cmt. b. The comments suggest further that the application by a state court of another state’s statute to a set of facts “outside its specified scope” would constitute a violation of the full faith and credit clause. *Id.* § 5.02 Reporters’ Notes, cmt. b on subsection (1).

10. Such a provision can take the form of either a limitation (e.g., “this law shall apply only to conduct occurring within this State”) or an expansion (e.g., “this law shall apply to all conduct, whether occurring within or outside this State, involving a citizen of this State”).

11. On that point the draft characterizes its approach as reflecting current practice, stating that “courts generally do treat explicit limits on the scope of other states’ statutes as binding.” *Id.* § 1.03 cmt. b. In Reporters’ Notes to that comment as well as to comment b of Section 5.02, however, the draft cites only three cases, all relating to Pennsylvania law, and only as “suggesting” that statutory specifications of scope in foreign statutes are binding.

12. *Id.* § 5.01 cmt. c and associated illustrations; *see also id.* § 5.08 cmt. b (“Ordinarily, the [forum] court should aim to determine foreign law in light of how it is authoritatively interpreted and applied in the foreign state. This ordinarily requires consideration not only of the text of the foreign law itself, but also foreign court opinions, secondary sources . . .”).

13. *Id.* § 5.01 cmt. c.

incorporates Brainerd Currie's insight that determining whether or not a law applies in a multistate case can be viewed as a question of ordinary legal interpretation, drawing on the same tools courts use to construe the meaning and applicability of law in a purely domestic setting.¹⁴ Beyond this, the draft provides no specific guidance on the methods that courts should use to ascertain the scope of law when legislative intent is unclear. In particular, it does not address the role of the presumption against extraterritoriality, a canon of construction that courts frequently use in interpreting questions of scope.¹⁵

This article advocates for additional guidance regarding determinations of scope for two important reasons. First, and in my view most critically, courts addressing such restrictions must differentiate between interstate and international conflicts.¹⁶ The legal framework within which the presumption against extraterritoriality operates is very different in those two contexts, a fact not always acknowledged or reflected in the jurisprudence. Second, current judicial treatment of implied restrictions on scope in analyzing conflicts is not uniform, and will need to be addressed in forthcoming substantive provisions (particularly those addressing contract law).

Part I of this article analyzes the role of the presumption against extraterritoriality in supplying implied restrictions on the scope of law. It considers the role of the presumption in both international and interstate conflicts of laws, focusing on the rationales supporting its application in the different contexts. Part I concludes with a comparison of the international law and constitutional law frameworks within which the presumption operates in those respective settings. Part II examines current judicial practice regarding the analysis of scope and priority in resolving conflicts of laws. It begins by outlining the relevant provisions of the Restatement

14. See *id.* at 111 (explicitly adopting Currie's approach on this particular point); see also Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178 (1959) ("This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose."). For critiques of this view, see generally, for example, Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980) and Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1 (1984).

15. Compare the RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW (AM. LAW INST. Preliminary Draft No. 4, Aug. 17, 2016), which addresses this topic at Section 203 and in associated notes and comments. The projected table of contents for the complete Restatement Third includes a section on "extraterritorial legislation." It is grouped with other constitutional doctrines relating to the allocation of authority between states and the federal government, and does not appear to cover the interpretation of state law in cases of conflict.

16. The general position of the draft is that "[f]or the purposes of conflict of laws, the interstate and international contexts are broadly similar," and so it does not generally distinguish between the two types of conflict. Council Draft, *supra* note 5, § 1.04 cmt. c.

Second, and then turns to the distinction between explicit and implicit restrictions on scope. It analyzes that distinction through the lens of a common problem: a contract dispute involving a transaction or event that falls outside the scope of the law chosen by the parties to govern their agreement.

I. THE PRESUMPTION AGAINST EXTRATERRITORIALITY

This Part begins with a brief introduction outlining the history of the presumption against extraterritoriality. It then turns to its subsequent evolution, considering its application in the interpretation of both federal and state law. This Part's main purpose is to clarify the distinction between the extraterritorial application of state law in international conflicts, on the one hand, and in interstate conflicts, on the other. It analyzes judicial implementation of the presumption against extraterritoriality in each case, focusing on the theoretical justifications courts offer for employing the presumption.

A. Introduction

The presumption against extraterritoriality is a judicially created doctrine of statutory interpretation, designed to guide courts in ascertaining the geographic scope of federal legislation. In one leading case, the Supreme Court summarized the doctrine as follows: “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”¹⁷ It has been applied in cases dating to the early nineteenth century, although not always consistently—the Supreme Court, for instance, has applied it in many but not all of its decisions in the area of legislative jurisdiction.¹⁸

The presumption emerged at a time when laws were understood to have no force beyond the territorial borders of the enacting state. Early cases employing the presumption explicitly connected the process of construing congressional intent with that understanding. For instance, in *The Appollon*, an 1824 case addressing the reach of U.S. customs law, the Supreme Court stated:

The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the

17. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)); *see also* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW, *supra* note 15, § 203 (“U.S. courts interpret federal statutory provisions to apply only within the territorial jurisdiction of the United States unless there is a clear indication of congressional intent to the contrary.”).

18. *See generally* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85 (1998) (outlining the application and purpose of the presumption).

sovereignty or rights of any other nation, within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction . . . [I]t would be an unjust interpretation of our laws, to give them a meaning [at] variance with the independence and sovereignty of foreign nations.¹⁹

Because the classic presumption against extraterritoriality applies only to federal legislation, it has no direct application to state statutes. However, the strict understanding of territorial sovereignty in which the presumption was rooted applied equally to state law. And indeed, as in the federal context, early cases interpreting state law connected the process of statutory interpretation with that understanding. In one case decided in 1916, for instance, the Supreme Court of California, in language mirroring that of the decision in *The Appollon*, reasoned as follows:

Ordinarily, the statutes of a state have no force beyond its boundaries. Except within the domain committed to the control of the federal government, the states of the Union are “severally sovereign, independent and foreign to each other in regard to their internal and domestic affairs.” Although a state may have the power to legislate concerning the rights and obligations of its citizens with regard to transactions occurring beyond its boundaries, the presumption is that it did not intend to give its statutes any extraterritorial effect.²⁰

It is important to highlight that this particular justification for the presumption against extraterritoriality operates identically not only with respect to federal and state law, but also with respect to international and interstate conflicts. If state law has force only within the territory of the enacting state, then its application anywhere else, whether a sister state or a foreign country, is foreclosed. Thus, courts applying the presumption on this basis would have no need to distinguish between those two forms of conflict.

Over time, the strictly territorial understanding of sovereignty faded. At the federal level, forms of legislative jurisdiction—most prominently, effects-based jurisdiction—gained acceptance that permitted the application of one nation’s law to conduct occurring outside its territorial boundaries (even in cases involving non-citizens).²¹ This shift did not mean the end of

19. *The Appollon*, 22 U.S. 362, 370 (1824); *see also* *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) (following this reasoning in a case involving the conduct of a U.S. company, and stating that federal statutes should be construed as applicable only within “the territorial limits over which the lawmaker has general and legitimate power”—i.e., construed to reach only conduct within the United States).

20. *N. Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, 4 (Cal. 1916).

21. The watershed case on this point is *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945) (*Alcoa*), in which the Second Circuit, sitting for the Supreme Court, announced that “any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.” The perception that customary

the presumption against extraterritoriality—merely that the Supreme Court turned to alternative justifications in applying it.²² The most prominent justification in the case law is international comity, or the desire to “avoid the international discord that can result when U.S. law is applied to conduct in foreign countries.”²³ Several cases also offer a separation-of-powers explanation for the presumption, noting the “danger of unwarranted judicial interference in the conduct of foreign policy” inherent in the extraterritorial application of U.S. law.²⁴ Finally, many cases have emphasized the perception that “Congress ordinarily legislates with respect to domestic, not foreign matters,”²⁵ characterizing the presumption as a way to approximate congressional intent.²⁶

A similar change occurred with respect to state law. In particular, the “vested rights” theory of choice of law,²⁷ based on strict territoriality, gave way to new conflicts theories. These theories focused on the presence of contacts between particular transactions or events and the forum, and on the interest of the forum state in regulating those transactions or events.²⁸ Under these new theories, state law could reach conduct occurring outside the

international law on jurisdiction continues to impose some limits on the application of domestic law to cross-border situations anchors continuing commitment to the Charming Betsy doctrine.

22. See generally Ralf Michaels, *Empagran’s Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 533 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011) (discussing the canon’s loss of its “legal foundation in international law,” and resulting consequences for its interpretation and application). *Id.* at 540.

23. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016); see also *McCulloch v. Sociedad Nacional de Marineros de Hond.*, 372 U.S. 10, 21 (1963); *Aramco*, 499 U.S. at 248.

24. See, e.g., *Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659, 1664–65 (2013). For a discussion of this justification, see Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 506, 550–61 (1997).

25. *RJR Nabisco*, 136 S. Ct. at 2100; *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007) (“United States law governs domestically but does not rule the world . . .”).

26. In several recent cases, the Court has stated that the presumption will be applied *regardless* of the likelihood of actual conflict with foreign laws, placing increasing emphasis on this final justification for the presumption. See, e.g., *RJR Nabisco*, 136 S. Ct. at 2100; *Morrison*, 561 U.S. at 269 (while recognizing the “probability of incompatibility [between U.S. securities laws and] the applicable laws of other countries”); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993) (noting that “the presumption has a foundation broader than the desire to avoid conflict with the laws of other nations”).

27. See generally LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 18–20 (1991) (describing vested rights theory and its dependence on strict territorial limits of law).

28. See Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 209 (1991) (“Territoriality was abandoned and the theory of ‘interests’ emerged—not Brainerd Currie’s governmental interest analysis, which came later and built on these earlier developments, but the idea that a state may exercise authority over persons or acts that impinge on its sphere of legitimate concern.”).

borders of the enacting state.²⁹ As with respect to federal law, courts did not abandon the presumption against extraterritoriality, but simply turned to alternative explanations for its use. Here, though, a critical difference emerges: Unlike strict territorialism, the additional justifications for applying the presumption do *not* operate identically with respect to international and interstate conflicts. The following section analyzes current practice in these two settings.

B. The Presumption Against Extraterritorial Application of State Law in International Conflicts

The application of state law in international cases creates the potential for conflict between that law and the law of a foreign nation. In two critical respects, such cases present the same problems as the application of federal law in international cases. First, they create the possibility of international discord. Second, due to foreign affairs concerns, they create a potential problem regarding the allocation of power within the U.S. political system (although, as we will see, of a slightly different nature than in the federal context). Many courts applying a presumption against the application of state law in international cases acknowledge the difference between interpretation of federal and state legislation, but recognize these similarities.³⁰ In addressing the need to avoid friction with foreign sovereigns, for instance, courts invoke international comity as a reason for the presumption. In an age discrimination claim brought under Pennsylvania human rights law, for example, a federal district court stated:

[F]ederal courts will only attribute to Congress an intent to apply federal law outside the United States when Congress has very explicitly expressed such an intention. The rationale for this reluctance—respect for the sovereignty of other nations within their territories—should make courts even more reluctant to apply state law outside the boundaries of the United States.³¹

29. For excellent analysis of these developments, see generally Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992) and Kramer, *supra* note 28.

30. This is not true of all cases. Some courts seem simply to assume the existence of a presumption against applying state law in international cases, without offering a rationale. *See, e.g.*, Taylor v. E. Connection Operating, Inc., 988 N.E.2d 408, 414 n.9 (Mass. 2013). Others recite the “well-established presumption” against extraterritorial application of state law in general (often drawing on the territorialism justification), and then apply it in the international context without noting the special concerns raised in international cases. *See, e.g.*, Judkins v. Saint Joseph’s Coll. of Maine, 483 F. Supp. 2d 60, 65 (D. Me. 2007); Archut v. Ross Univ. Sch. of Veterinary Med., 2012 WL 5867148, at *12 (D. N.J. 2012) (quoting cases that had presumed New Jersey anti-discrimination law to apply only to conduct within that state, and concluding that conduct occurring in foreign countries would likewise be “beyond the reach of the statute.” *Id.* at 12).

31. Denty v. SmithKline Beecham Corp., 907 F. Supp. 879, 886 (E.D. Pa. 1995).

With respect to the allocation of authority to address matters of foreign relations, where the federal cases focus on separation of powers between the political branches and the judiciary, the state cases focus on the division of power between state and federal lawmakers. The Supreme Court has held that, as a general matter, the sovereign authority of U.S. states to regulate extraterritorially is analogous to that of the federal government.³² However, several constitutional doctrines limit the role of the states in matters of foreign affairs. Courts often invoke these limitations in justifying a presumption against the extraterritorial application of state law in international cases. In one representative case, the Fourth Circuit Court of Appeals considered the application of state tort law in an international case.³³ It noted that the classic presumption against extraterritoriality applies only to federal legislation, and reasoned that “given that the Constitution entrusts foreign affairs to the federal political branches, limits state power over foreign affairs, and establishes the supremacy of federal enactments over state law, the presumption against extraterritorial application is even stronger in the context of state tort law.”³⁴ Other cases have similarly invoked the limited role of states in matters of foreign affairs.³⁵

For similar reasons, courts addressing the applicability of state regulatory law in international cases often decide that the geographic scope of those laws is coterminous with the geographic scope of their federal counterparts. In one case, a court considered the geographic scope of the Donnelly Act, New York’s antitrust statute.³⁶ The court concluded:

It is not necessary to know precisely the extent of the Donnelly Act’s extraterritorial reach to understand that it cannot reach foreign conduct deliberately placed by Congress beyond the Sherman Act’s jurisdiction. The federal limitation upon the reach of the Sherman Act, predicated upon and an expression of the essentially federal power to regulate foreign commerce, would be undone if states remained free to authorize “little Sherman Act” claims that went beyond it. The established presumption is, of course, against the extraterritorial operation of New York law, and we do not see how it could be overcome in a situation where the analogue federal claim would be barred by congressional enactment.³⁷

32. *Skiriotes v. Florida*, 313 U.S. 69, 78–79 (1941).

33. *Al Shimari v. CACI Intern., Inc.*, 679 F.3d 205 (4th Cir. 2012).

34. *Id.* at 231 (citations omitted).

35. *See, e.g., Doricent v. Am. Airlines, Inc.*, 1993 WL 437670, at *8 (D. Mass. 1993) (noting that “although federal laws sometimes have extraterritorial reach, this feature has been attributed to Congress’s constitutional powers to conduct affairs with foreign nations”).

36. *See Global Reinsurance Corp. v. Equitas*, 969 N.E.2d 187 (N.Y. 2012).

37. *Id.* at 195 (citation omitted); *see also Hammell v. Banque Paribas*, 780 F. Supp. 196, 200 (S.D.N.Y. 1991) (in a case concerning state anti-discrimination law, concluding that “since both the [Aramco] decision and the case at bar concern the applicability of United States law abroad, an area within the special competence of the federal government, the Court believes it should defer to the

C. The Presumption Against Extraterritorial Application of State Law in Interstate Conflicts

The application of state law in interstate cases creates the potential for a different kind of conflict: a collision between the laws of sister states. As noted above, strict territorialism has been abandoned as the foundation of interstate conflicts analysis.³⁸ Some commentators argue that this shift obviated the need for a presumption against extraterritoriality in the interstate context.³⁹ On this view, rather than focus on legislative intent regarding scope, courts should simply ask whether the enacting state has an interest in applying the relevant law to the particular factual question. Constitutional limitations (specifically, the full faith and credit clause and the due process clause) would serve to restrain over-regulation, if necessary, but no general presumption against the extraterritorial application of state law would be required.

In some cases, courts have in fact asserted that there is simply no presumption against the extraterritorial application of state law in a multistate conflict.⁴⁰ However, a review of the case law in this area reveals a surprising durability of the presumption against extraterritorial application of state law (even in its most traditional incarnation). It also reveals a fair amount of confusion regarding the basis of the presumption, as well as a frequent failure to distinguish clearly between interstate and international conflicts.⁴¹ The following section lays out the rationales that courts employ when applying the presumption in multistate cases.

guidance supplied by the Supreme Court. It would be incongruous if Congress, which clearly has the power to legislate extraterritorially, was more restricted in drafting such legislation than the New York legislature.”).

38. See *supra* note 27 and accompanying text.

39. Brilmayer & Norchi, *supra* note 29, at 1230 (noting “[t]he state courts’ rejection of interpretive presumptions against extraterritoriality and their application of forum law”).

40. See, e.g., *Taylor v. E. Connection Operating, Inc.*, 988 N.E.2d 408, 414 n.9 (Mass. 2013) (emphasis added) (citations omitted):

The presumption against the extraterritorial application of Federal statutes is grounded in the assumption that Congress would indicate expressly that a statute applies extraterritorially before intruding on the “delicate field of international relations.” Such concern is inapposite in the interstate context . . . Assuming without deciding that there is a presumption against the application of Massachusetts statutes *outside* the United States, . . . we conclude that there is no corresponding presumption against the application of Massachusetts statutes to conduct occurring outside Massachusetts but *within* the United States.

See also *Dow v. Casale*, 989 N.E.2d 909, 913 n.9 (Mass. App. Ct. 2013).

41. See Brilmayer & Norchi, *supra* note 29, at 1224–25 (observing more generally that courts tend to treat extraterritoriality cases the same whether in the interstate or international context).

1. Traditional Territorialism

As discussed above, the theory of territorial sovereignty upon which this traditional justification rests has been discarded. Some cases have recognized this theoretical shift, and its implications for the presumption.⁴² However, many courts interpreting state law have failed to do so, and continue to apply the presumption on the grounds that a law has no force beyond the boundaries of the enacting state.⁴³ Such courts frequently mention the age of these early decisions—predating the abandonment of strict territorialism—as proof of the longstanding and therefore, in their view, precedential nature of the presumption.⁴⁴

2. Avoiding Conflict with the Laws of Sister States

Many of the decisions addressing the presumption against extraterritorial application of state law in interstate conflicts invoke the need to avoid conflicts with the laws of sister states. One representative opinion expressed this concern as follows:

We begin our analysis with the well-established presumption against extraterritorial operation of statutes. That is, unless a contrary intent appears within the language of the statute, we presume that the statute is meant to apply only within the territorial boundaries of the Commonwealth . . . This rule of construction helps to protect against unintended clashes of the laws of the Commonwealth with the laws of our sister states. *See McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20–22, 83 S.Ct. 671, 9 L.Ed.2d 547, 554–55 (1963)

42. *See* *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 187 (Tex. 1968) (recognizing the argument that the move to “modern concepts and approaches” challenged the “inhibition against extraterritoriality,” but ultimately applying the presumption on the basis of *stare decisis*); *see also* *Nelson v. Hall*, 684 S.W.2d 350, 355 (Mo. Ct. App. 1984) (recounting the plaintiff’s argument that the presumption against extraterritorial effect “represents the now discredited vested rights direction,” and that the shift in choice of law theory to a “most significant relationship” test meant an acceptance of extraterritorial effect).

43. *See, e.g.*, *Bernstein v. Virgin Am., Inc.*, No.15-cv-02277-JST, 2016 WL 6576621, at *7 (N.D. Cal. Nov. 7, 2016) (citing a 1916 case, and quoting the statement that “the statutes of a state have no force beyond its boundaries” to support the proposition that “California law presumptively does not apply to conduct that takes place outside of California”); *see also* *Anderson v. CRST Intern., Inc.*, 2015 WL 1487074, at *4 (C.D. Cal. 2015); *Sexton v. Ryder Truck Rental, Inc.*, 320 N.W.2d 843, 854 (Mich. 1982) (“The general rule of law is ‘that no state or nation can, by its laws, directly affect, bind, or operate upon property or persons beyond its territorial jurisdiction’. However, as populations and technology progressed and travel between countries and among the states increased to an everyday occurrence, exceptions to the general rule of extraterritoriality were created so that it is now recognized that ‘a state may have the power to legislate concerning the rights and obligations of its citizens with regard to transactions occurring beyond its boundaries’.”(quoting 73 AM. JUR. 2D *Statutes*: § 357)).

44. *See, e.g.*, *Wright v. Adventure Rolling Cross Country, Inc.*, 2012 U.S. Dist. LEXIS 104378, at *13 (N.D. Cal. May 3, 2012) (“[T]he California Supreme Court has referred to the presumption against extraterritorial application as far back as 1916.”).

....

Imposing the policy choice by the Commonwealth on the employment practices of our sister states should be done with great prudence and caution out of respect for the sovereignty of other states, and to avoid running afoul of the Commerce Clause of the United States Constitution.⁴⁵

This justification for a presumption against extraterritoriality is superficially similar to the international comity justification in the federal context, which also seeks to avoid unnecessary conflict with other sovereigns. Indeed, many of the cases interpreting state law—such as the one cited above—quote from decisions on the federal presumption against extraterritoriality to support their conclusions. They do so although the legal framework is quite different in the interstate context. It is constitutional concerns, not foreign relations concerns, that animate the presumption here. These concerns are twofold, as reflected in the passage quoted above. First, states legislate against the background of the dormant commerce clause. Second, states legislate in light of general principles of horizontal federalism, and the recognition that sister states have exclusive sovereignty over their own territories absent federal preemption. The following sections explore the role of these principles in supporting the presumption against extraterritorial application of state law in the interstate context.⁴⁶

a. Commerce Clause Concerns

States retain the authority to regulate local matters even when that regulation affects interstate commerce to some degree; however, the Supreme Court's dormant commerce clause jurisprudence places certain limits on that authority.⁴⁷ Courts generally presume that a state legislature would not intentionally enact a law that violated commerce clause limits; one way to apply this presumption is to assume that state law applies only within the territory of the enacting state unless otherwise indicated. The Fourth Circuit explained this justification for the presumption against extraterritorial application of state law in a case involving the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act:

The principle that state laws may not generally operate extraterritorially is one of constitutional magnitude. One state may not “project its legislation” into another, as the Commerce Clause “precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders,

45. *Union Underwear Co. v. Barnhart*, 50 S.W.3d 188, 190, 193 (Ky. 2001); *see also* *Judkins v. St. Joseph’s Coll. of Maine*, 483 F. Supp. 2d 60, 65 (D. Me. 2007) (“This broad presumption guards against possible conflicts with other states’ laws and violations of the Commerce Clause.”).

46. For a thorough exploration of these constitutional dimensions of the presumption, see Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1082-92 (2009).

47. *See Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989).

whether or not the commerce has effects within the State.” This rule reflects core principles of constitutional structure. It derives in part from the structure of federalism, which is built upon “the autonomy of the individual states within their respective spheres.” It also reflects “the Constitution’s special concern” with “the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce” . . . South Carolina’s framework of statutory construction gives voice to these structural interests as surely as our constitutional framework, and by interpreting the Dealers Act in accordance with the state’s rule against extraterritorial applications, we avoid these constitutional harms.⁴⁸

In another representative case, the court cited the “doctrine of constitutional avoidance” in support of the proposition that courts will construe statutes to avoid constitutional problems “unless such construction is plainly contrary to the intent of Congress.”⁴⁹ It concluded that a construction of state labor law to exclude its extraterritorial application “avoids the potential dormant commerce clause issues” that might arise from its application to work performed outside the enacting state.⁵⁰

b. General Federalism Concerns

This concern underpins a comity-type restraint—the idea that one state would not lightly adopt a law affecting the interests of a sister state.⁵¹ Courts often refer to the need to “respect the interests of other states,” and view the presumption against extraterritoriality as a way to do so.⁵² Some explicitly analogize to international comity:

[F]ederal courts have long recognized a presumption against extraterritorial application of federal legislation. This presumption reflects a standard of comity toward other countries by precluding undue interference with the laws of foreign countries when the conduct at issue occurs outside of the United States. The same consideration would seem to preclude us from extending the reach of the [Pennsylvania Human Relations Act] to conduct that occurs in other states in the absence of clear legislative intent to the contrary.⁵³

48. *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 489–90 (4th Cir. 2007) (citations omitted).

49. *Sarviss v. General Dynamics Info. Tech., Inc.*, 663 F. Supp. 2d 883, 901 (C.D. Cal. 2009) (quoting *Edward J. DeBartolo Corp v. Florida Gulf Coast Bldg.*, 485 U.S. 568, 575 (1988)).

50. *Id.*; see also *IMS Health Inc. v. Mills*, 616 F.3d 7, 29 (1st Cir. 2010).

51. For an argument that the presumption against extraterritorial application of state law “should be regarded as an inference from the structure of our system as a whole,” see the second essay in Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1887 (1987).

52. See, e.g., *Westwind Acquisition Co. v. Univ. Weather & Aviation, Inc.*, 668 F. Supp. 2d 749, 752 (E.D. Va. 2009).

53. *Taylor v. Rodale, Inc.*, 2004 WL 1196145, at *2 (E.D. Pa. 2004) (citations omitted).

Nevertheless, courts sometimes borrow from analysis of extraterritoriality of federal legislation without acknowledging its grounding in concerns of foreign relations. In one case interpreting the reach of Texas antitrust law, the Texas Supreme Court began by stating “[a] principle of federalism is that ‘[n]o State can legislate except with reference to its own jurisdiction.’”⁵⁴ It then asked whether the Texas legislature would have intended to give that law extraterritorial reach, and thus “supplant Arkansas, Louisiana, or Oklahoma law” on consumer protection.⁵⁵ In one passage of its opinion, though, it turned to federal precedent, noting that the Supreme Court had construed the Sherman Act to reach foreign conduct only in cases where that conduct had effect within the United States. By applying a presumption against extraterritoriality to the Texas law, it concluded, it would construe the local law in a way that harmonized it with federal law.⁵⁶

3. Due Process

Some courts have mentioned another constitutional explanation for the state-level presumption: that it protects the due process rights of individuals. In a recent family law dispute, a court considered whether a Utah law that foreclosed parental rights on the basis of certain conduct applied when the conduct in question occurred in another state:⁵⁷

By following the presumption [against extraterritoriality] in interpreting the statute, moreover, we also protect the legitimate expectations and reliance interests of those who are bound by its terms. A person in Nevares’s shoes could not reasonably have anticipated that section 111 would foreclose his parental rights if a child conceived as a result of his sexual activity in Colorado were brought to Utah to be placed for adoption here. Had Nevares considered section 111, he would reasonably have understood it to apply only to sexual offenses with a jurisdictional connection to Utah. That conclusion, moreover, would doubtless have been informed by an intuitive sense of the presumption against extraterritoriality, as even non-lawyers have a sense that criminality is the domain of the separate states, and that activity wholly in one state cannot properly be subject to criminal charges in another.⁵⁸

4. Focus on Domestic Conditions

Finally, as in the case of the federal presumption, many courts have stated that legislatures act with domestic conditions in mind. As the Supreme

54. *Coca-Cola Co. v. Harmor Bottling Co.*, 218 S.W.3d 671, 680 (Tex. 2006).

55. *Id.* at 681.

56. This approach may overlook an important difference in the potential for substantive conflict: the variation in laws among U.S. states is significantly less than the variation between U.S. and foreign laws.

57. *Nevares v. M.L.S.*, 345 P.3d 719 (Utah 2015).

58. *Id.* at 727; *accord In re Adoption of J.M.S.*, 345 P.3d 709 (Utah 2015).

Court itself noted in one recent case, the idea is that “New York legislators make law with New York plaintiffs and defendants in mind, *i.e.*, as if New York were the universe.”⁵⁹

* * *

As the analysis above makes clear, courts considering interstate conflicts have frequently analogized to the presumption against extraterritorial application of federal law in international conflicts. That analogy may cause them to overlook critical differences in the legal frameworks within which the presumption operates. First, while the presumption protects comity interests in both interstate and international cases, it serves an additional function in international cases by protecting against unlawful legislative overreach. In interstate cases, this function is served by constitutional restraints, which place hard limits on the extraterritorial application of state law. Even if the intent of a state legislature to give its law extraterritorial effect is perfectly clear, that law will be invalidated if it violates the commerce clause.⁶⁰ In other words, the presumption does not serve as the only barrier to an illegitimate assertion of legislative authority. The same is not true in international conflicts, as international law does not limit the extraterritorial application of federal legislation in the same manner. If Congress expressly intends to give a federal law extraterritorial effect, courts are bound to apply it accordingly, even if the result violates international law.⁶¹ As a result, the presumption plays an additional function in the international context. By requiring a clear expression of congressional intent, it reduces the likelihood of international law violations that would not otherwise be prevented.

Second, at the federal level, the presumption operates as part of a purely unilateral form of conflicts analysis. A U.S. court will inquire whether the federal law (that is, local law) in question applies to the dispute. Under current Supreme Court jurisprudence, if the answer is “no,” the case will be dismissed, and if the answer is “yes,” the law will be applied.⁶² (For this

59. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 453 (2010) (offering this as the most likely explanation for the absence of explicit geographic limitations on a state law); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 3, § 6 cmt. c (“Legislatures usually legislate . . . only with the local situation in mind.”).

60. *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

61. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1) (AM. LAW INST. 1987).

62. There are two explanations for this approach. First, the court’s subject-matter jurisdiction in some such cases is predicated on the existence of a federal question. If the statute does not apply, then no federal question is presented, and the case must be dismissed. *See Brillmayer & Norchi, supra* note 29, at 1232. This does not explain all dismissals, however, as judicial jurisdiction in international disputes is often predicated on the basis of diversity. The second and more powerful explanation is the traditional “public law taboo”: U.S. courts will not apply foreign penal or regulatory law.

reason, it is important that courts observe reasonableness limitations in determining the reach of forum law, in order to minimize conflicts with foreign law.⁶³) The court will neither inquire into the scope of potentially applicable foreign law nor engage in an analysis of priority.⁶⁴ This kind of analysis, in other words, turns entirely on scope. Multistate conflicts, in contrast, are typically resolved through a multilateral (or at least mixed) form of analysis. In such conflicts, the court's task is to consider multiple potentially applicable laws and ultimately to select one to resolve the case. On that approach, legislative intent regarding the scope of law is not necessarily determinative, as courts will have the opportunity to weigh the relative interests of states before applying their law to a particular transaction or event.

II. THE APPLICATION OF GEOGRAPHIC RESTRICTIONS IN MULTISTATE CONTRACT DISPUTES

The previous Part explored the draft Restatement Third's definition of internal law, noting that it appears to include not only explicit but also implicit restrictions on a law's scope. It then focused on one of the most important sources of implicit scope restrictions—the presumption against extraterritoriality. It suggested that courts often ignore important distinctions between international and interstate conflicts of law in applying the presumption, leading to its potential overuse in the multistate context. This Part seeks to explain why all this matters. What are the consequences of categorizing a scope restriction as part of a law's substance rather than as a choice-of-law rule? I address that question through the lens of an issue that presents particularly clearly the interplay between scope and priority: the treatment of governing-law clauses in multistate contract disputes.

Quite frequently, a contract dispute will involve a transaction or event that falls outside the scope of the law chosen by the parties to govern their agreement. Consider the following example:

An employer headquartered in state A contracts with an employee, a resident of state B, to provide services in state B. The contract selects the law of state A to govern all issues or disputes arising out of the employment relationship. State A's wage law includes a provision stating that it applies to wage disputes relating to work performed within state A.

63. See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW, *supra* note 15 § 204; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 61, § 403.

64. While Section 403(3) of the Restatement (Third) of Foreign Relations Law invited courts to evaluate and balance the interests advanced in forum and foreign law, the Supreme Court has rejected that approach.

Let's assume that the employee sues to recover unpaid wages. Whether the lawsuit were initiated in state A or in state B, one would expect the court to apply state A's law, in accordance with the parties' agreement. This is the consequence of a *choice-of-law* rule stating that (with some limitations) where the parties to a contract have chosen applicable law, that law governs their agreement.⁶⁵ The question is how that rule interacts with the *scope* of the chosen law. Should the court give effect to the scope restriction⁶⁶ in A's law as part of the substance of that law, in which case the plaintiff's claim would fail? Or should it apply the substantive provisions of A's law exclusive of the scope restriction?⁶⁷ A further question is how to handle *implicit* restrictions on scope. If a statute is silent as to its own geographic reach (and thus potentially subject to a presumption against extraterritorial application), can it be applied beyond the territory of the enacting state by operation of party agreement?

The first section below discusses current practice regarding contracts disputes like these. It begins with the relevant provisions of the Restatement Second and then turns to case law, noting the emergence of competing approaches to the treatment of scope restrictions. The second section analyzes the potential impact of the draft Restatement's definition of "internal law," evaluating whether the resulting approach adequately accounts for certain conflicts values.

A. Current Practice

The Restatement Second uses the phrase "local law" rather than "internal law." It defines a state's local law as "the body of standards, principles and rules, exclusive of its rules of Conflict of Laws, which the courts of that state apply in the decision of controversies brought before them."⁶⁸ Unlike the draft Restatement Third's definition of "internal law,"

65. The relevant provision of the Restatement Second lays out two different tests. If the issue in question is one that the parties *could* have resolved by an explicit provision in the contract, then the choice of a foreign law will be upheld. If the issue in question is one that the parties could *not* so have resolved, then it will be upheld unless (a) the chosen state has no relationship to the parties, or (2) application of the chosen law would be contrary to a fundamental policy of the state whose law would apply in the absence of choice. RESTATEMENT SECOND, *supra* note 3, § 187.

66. It is important to highlight that characterizing a statute like the one described above as containing a "scope restriction" raises a threshold issue. A statute that "applies to wage disputes relating to work performed within state A" creates a local cause of action only for claims relating to work within A. But does such a statement indicate the intent of the legislature affirmatively to foreclose application of the law in multistate cases? We return to this point *infra* at Part II.B.

67. Section 187(3) provides that in the absence of indication to the contrary, the law chosen by the parties is the "local law" of the state of the chosen law. It is the ambiguity in Section 4's definition of "local law" that leaves these questions open.

68. RESTATEMENT SECOND, *supra* note 3, § 4(1).

this definition does not explicitly classify limitations on scope either as part of “local law” or as a form of conflict-of-laws rule. I am aware of only one decision addressing this question directly, and it favored the former interpretation. In that case, the Seventh Circuit Court of Appeals considered whether the Illinois Franchise Disclosure Act applied to dealers located outside the state of Illinois.⁶⁹ The court determined that under the Restatement Second, geographic limitations were to be treated as part of the relevant law: “The Restatement excludes from ‘local law’ only the choice-of-law rules of the state, not any territorial limitations contained in the statute . . . [If] Illinois law applies, then we must look to the law of Illinois to determine the scope of application.”⁷⁰

Other cases, while not directly addressing the black-letter definition of “local law,” describe geographic scope restrictions in ways that favor the latter interpretation. In another Seventh Circuit case, for example, the court stated that by limiting particular legislation to in-state dealers, the Wisconsin legislature had “announc[ed] a particular choice of law rule for dealership cases in duly enacted legislation.”⁷¹ Moreover, some of the comments and illustrations included elsewhere in the Restatement Second support the view that “local law” was intended to encompass only the rules that would apply in the enacting state to a purely domestic case, thus excluding geographic scope limitations.⁷² This characterization accords with the view of many conflicts scholars that geographic restrictions, even when contained in the text of a statute itself, are most accurately viewed as unilateral choice-of-law rules.⁷³

The Restatement Second also provides little guidance on how courts should treat scope limitations in cases of conflict. It directs them to observe the geographic restrictions included in a domestic statute, including implicit as well as explicit restrictions.⁷⁴ But it does not address the treatment of scope restrictions in the laws of *other* states.

69. *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376, 385 (7th Cir. 2003).

70. *Id.* at 386.

71. *Generac Corp. v. Caterpillar Inc.*, 172 F.3d 971, 976 (7th Cir. 1999). However, the court went on to distinguish this kind of choice of law rule from “general” choice of law principles, and may have believed that only the latter were excluded from the definition of “local law.”

72. See RESTATEMENT SECOND, *supra* note 3, § 8 cmt. d.

73. See SYMEON SYMEONIDES, CHOICE OF LAW 494 (2016).

74. A comment to Section 6 provides in part that

[t]he court should give a local statute the range of application intended by the legislature when these intentions can be ascertained and can constitutionally be given effect . . . Sometimes a statute’s intended range of application will be apparent on its face . . . When the statute is silent as to its range of application, the intentions of the legislature on the subject can sometimes be ascertained by a process of interpretation and construction. Provided that it is constitutional to do so, the court will apply a local statute in the manner intended by the legislature even when the local law of another state would be applicable under usual choice-of-law principles.

In applying domestic law, courts do routinely give effect to explicit scope restrictions included in that law. As a result, in contract disputes, they will decline to apply a domestic statute “to parties falling outside [the stated] limitations, even if the parties stipulate that the law should apply.”⁷⁵ Furthermore, and consistent with the Restatement Second’s guidance, they give effect to *implicit* scope restrictions in domestic statutes when they conclude such restrictions exist.⁷⁶ That conclusion in turn generally rests on whether or not they apply the presumption against extraterritorial application of state law. One representative decision described the treatment of explicit scope restrictions, and then explained its extension of that treatment to implicit scope restrictions as follows:

[T]here is no logical reason to reach a different result where that limitation is implicit, especially when the California Supreme Court has made clear that such limitations are *presumed to be present* unless the legislature’s contrary intention “is clearly expressed or reasonably to be inferred from the language of the act or from its purpose, subject matter or history.” Moreover, a contractual choice of law provision that incorporates California law presumably incorporates *all* of California law—including California’s presumption against extraterritorial application of its law.⁷⁷

Another decision giving effect to this form of implicit restriction foreshadows the draft Restatement Third’s conception of a two-step approach:

But most importantly, by jumping straight to a conflict of laws analysis, the plaintiffs skip an important analytical step. A court conducts a conflict of laws analysis only where the laws of multiple states could conceivably apply to the same claim. Where only one state’s law applies, no such analysis is necessary. And as explained below, [due to application of a presumption against extraterritorial effect,] the California wage and hour laws asserted here simply do not apply to employees who work exclusively in another state.⁷⁸

If the presumption against extraterritoriality were not applied in such cases, there would be no reason to foreclose the application of the chosen law pursuant to the choice-of-law rule favoring party autonomy. A few courts have followed this reasoning in interpreting the reach of domestic law. In one recent case, a Massachusetts court considered a wage claim brought by an out-of-state employee under Massachusetts law, pursuant to a choice-

RESTATEMENT SECOND, *supra* note 3, § 6 cmt. b.

75. *Gravquick A/S v. Trimble Navigation Int’l Ltd.*, 323 F.3d 1219, 1223 (9th Cir. 2003).

76. *See, e.g., Wright v. Adventures Rolling Cross Country, Inc.*, 2012 U.S. Dist. LEXIS 104378; *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059, 1065 (N.D. Cal. 2014); *Sawyer v. Market Am., Inc.*, 661 S.E.2d 750, 754 (Ct. App. NC 2008). This approach is consistent with the guidance included in RESTATEMENT SECOND § 6 cmt. b; *see supra* note 74 and accompanying text.

77. *O’Connor v. Uber Techs.*, 58 F. Supp. 3d 989 (2014).

78. *Cotter*, 60 F. Supp. 3d at 1061.

of-law clause in his employment agreement.⁷⁹ The relevant statute contained no express geographic restriction. Invoking the presumption against extraterritoriality, the employer argued that the statute did not reach work performed outside of the state, and therefore could not be applied “regardless of choice-of-law principles.”⁸⁰ The court disagreed. Noting the differences between interstate and international conflicts, it concluded there was no presumption against the extraterritorial application of Massachusetts law to conduct occurring elsewhere within the United States, and therefore no implicit limitation on the law’s reach.⁸¹ Absent an express limitation, it stated, a court should look “to all the relevant choice of law considerations.” That approach led it to apply the chosen law to the plaintiff’s claim.⁸²

As noted above, the Restatement Second does not instruct courts how to treat scope restrictions in *foreign* law. Unsurprisingly, practice on that point is far less uniform. Here, courts disagree even as to the treatment of express restrictions on scope. Some courts do consider such restrictions in foreign law to be binding.⁸³ The *Cromeens* case discussed above⁸⁴ illustrates this approach:

[E]ach contract contained a choice-of-law clause specifying that the contracts would be construed and interpreted in accordance with the law of the State of Illinois. The IFDA is a provision of Illinois law but, by its own terms, the IFDA applies only to franchises located within the State of Illinois . . . If . . . Illinois law applies, then we must look to the law of Illinois to determine the scope of application.⁸⁵

Other courts, however, take a different approach. They characterize the matter not as effectuating the intent of a legislature regarding the application of its law, but as effectuating the intent of the contract parties to bind themselves to certain substantive provisions.⁸⁶ Consider the following analysis:

79. *Taylor v. E. Connection Operating Inc.*, 988 N.E.2d 408 (Mass. 2013).

80. *Id.* at 413.

81. *Id.* at 414 n.9.

82. Which had the effect, as the court noted, of holding the employer to the choice-of-law clause it had drafted. *Id.* at 411 n.8.

83. *See, e.g.*, *Peugeot Motors of Am., Inc. v. E. Auto Distribs., Inc.*, 892 F.2d 355 (4th Cir. 1989); *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376, 376 (7th Cir. 2003); *Bimel-Walroth Co. v. Raytheon Co.*, 796 F.2d 840, 842-43 (6th Cir. 1986); *Highway Equip. Co. v. Caterpillar Inc.*, 908 F.2d 60 (6th Cir. 1990).

84. *See supra* note 69.

85. *Cromeens*, 349 F.3d at 384–86. The court was considering the relevant statute as a matter of foreign law, since the case had been transferred from a district court in Arkansas and therefore required application of Arkansas choice-of-law rules. *Id.* at 383.

86. *See, e.g.*, *Hall v. Sprint Spectrum L.P.*, 876 N.E.2d 1036, 1042 (Ill. App. Ct. 2007) (“[T]he issue is not the territorial application of [another state’s consumer protection statute] but whether the parties chose to apply [that state’s] law to govern the validity of the provisions in their contract.”); *accord*

[Cases effectuating scope limitations despite contractual choice of law] treat the parties' contractual choice of law as a legislative act rather than a contractual incorporation of "extrinsic material." [They] consider the intent of the chosen laws' state legislature dispositive—as if the parties' choice somehow effects [sic] the chosen state's interests. Choosing Illinois' laws as a short-hand means of incorporating numerous contractual terms does not affect any interest of the State of Illinois. The parties are not availing themselves of the Illinois court system. Any issues resolved by our court "under the law of Illinois" has, of course, no binding effect on Illinois courts, nor does it effect [sic] the interests of Illinois residents. Finally, enforcing the parties' choice of law does not in any way give "extraterritorial" effect to the laws of Illinois: the contract, not the law of Illinois, is enforced in Iowa.⁸⁷

On this view, the critical question is what the *parties* intended when they selected the law of a particular state to govern their contract. Focusing on the legitimate expectations of parties to multistate contracts, courts adopting this approach typically conclude that the law selected by parties to govern a contract includes only the operative provisions of that law, exclusive of any territorial restrictions.⁸⁸

B. Geographic Scope Restrictions Under the Restatement Third

As the previous section reflects, current practice regarding the treatment of scope restrictions in multistate contract cases is divided. The Restatement Third, by explicitly defining such restrictions as part of "internal law," appears to endorse the approach under which parties to a multistate contract would be unable to opt in to a substantive statutory regime that did not by its terms cover their eventual dispute. In my view, this outcome would sacrifice some of the conflicts values reflected in priority rules favoring party autonomy. Business relationships that cross territorial borders—whether interstate or international—present legal uncertainties that can be avoided through the use of governing-law clauses. Ordinarily, where such clauses are used, the expectation of the parties is that it is the substantive provisions of the selected law that will be applied.⁸⁹ Furthermore, in certain types of

Rabé v. United Air Lines, Inc., 636 F.3d 866, 871 (7th Cir. 2011) (an international case concluding that "an employer may agree by contract to extend statutory legal protections to an employee who might not be covered by the statute itself").

87. *Infomax Office Sys., Inc. v. MBO Binder & Co. of Am.*, 976 F. Supp. 1247, 1254 (S.D. Iowa 1997).

88. For an illustrative characterization of this issue, see *Rabé*, 636 F.3d at 868 (concluding that the contract "had the effect of applying the *substantive* provisions of United States and Illinois employment discrimination laws," thus differentiating those provisions from scope provisions) (emphasis added).

89. See, e.g., *id.* at 871–72 (describing the "serious complications and uncertainties" attending the employment status of an international flight attendant, and stating that "[t]he most reasonable interpretation of this employment agreement is that United [Airlines] agreed to application of the substance of United States [and Illinois] law notwithstanding provisions that would otherwise point

contract, there is an interest in ensuring that the more powerful party does not use a contract of adhesion to select a law that affords no remedy to the weaker party. For instance, several of the decisions discussed above expressed discomfort with the idea that an employer could bind an employee to a choice of law that did not cover the latter's employment.⁹⁰

At the same time, it is not clear that this approach would meaningfully advance any competing choice-of-law values in multistate contract disputes. It is true that one such value is effectuating the state interests reflected in the particular laws at issue.⁹¹ Statutory law often contains some indication of a state's interest in this regard; for instance, a provision extending a statute's reach to certain forms of out-of-state conduct clearly articulates the enacting state's interest in regulating that conduct. If courts in other states failed to apply the law in accordance with that mandate, the state interest would be adversely affected.⁹² It is far less clear, however, that provisions *limiting* a statute's reach articulate any cogent interest in ensuring that the law confer rights and obligations exclusively in connection with in-state activity or persons. When a statute addresses itself only to in-state persons or activity (for example, in a law protecting automobile dealers that defines "dealer" to mean "a person who is a grantee of a dealership situated in this state"),⁹³ the legislature may simply have been agnostic as to its application to other persons or activity.⁹⁴ And in the case of implicit restrictions, a state's interest

against its coverage because of [plaintiff]'s status as an alien and the changing locations of her work"). It is an unsatisfactory alternative to this to require parties to spell out their rights and obligations individually.

90. See, e.g., *Taylor v. E. Connection Operating Inc.*, 988 N.E.2d 408, 411 n.8 (Mass. 2013). For an analysis of this dynamic in the context of franchise agreements, see George F. Carpinello, *Testing the Limits of Choice of Law Clauses: Franchise Contracts as a Case Study*, 74 MARQ. L. REV. 57, 59 (1990). Carpinello notes that standard-form franchise agreements often select the law of a state other than that in which the franchisee is located, thus depriving the franchisee of local protective legislation. Although the chosen law might include similar protection, if it is interpreted to lack extraterritorial effect, then the franchisee is left without recourse. Such situations might be addressed through an escape device of some kind, but that is an unsatisfactory fallback. Cf. Council Draft, *supra* note 5, § 5.03.

91. See generally RESTATEMENT SECOND, *supra* note 3, § 6.

92. See SYMEONIDES, *supra* note 1, at 372.

93. See *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376, 386 (7th Cir. 2003).

94. As Carlos Vázquez has argued, even when a statute does include a clear restriction on its scope (for instance, stating that it applies *only* to in-state persons or activity), it may be that such a restriction is motivated by a sense of comity—a willingness to yield to the different laws of other interested states. In this sense, he suggests, geographic scope restrictions are unlike substantive scope restrictions that limit a statute's application to particular categories of persons or events:

Geographic scope limitations . . . do not necessarily reflect a determination that the substantive rule is inappropriate for persons or situations that fall outside the law's scope. [They] ordinarily reflect the state's forbearance from applying the substantive rule to disputes that other states might have stronger claim to regulate.

Carlos M. Vázquez, *Choice of Law Step Zero 9* (unpublished manuscript) (on file with author); see also SYMEONIDES, *supra* note 1, at 377 (describing such rules as "delineat[ing] the minimum spatial reach of

in preventing the application of its law in multistate cases may be entirely absent, given the questionable foundations of the presumption against extraterritorial application of state law in that context.⁹⁵

It is important to emphasize that the part of the draft Restatement Third containing specific priority rules governing conflicts of contract law has not yet been published. In my view, that part should include rules particular to multistate contract disputes that address the problem analyzed above. For instance, the successor to Section 187 of the current Restatement—a priority rule in favor of the law of the state chosen by the parties—could simply state that ordinarily, and consistent with legitimate expectations, the law to be applied is not the “internal law” of the state as defined in Section 1.03, but rather the substantive law of that state. Such an approach would negate the effect of Section 1.03 in this particular type of conflict.

CONCLUSION

This paper has used choice of law in one particular area—contracts—in order to assess the implications of the draft Restatement Third’s approach to questions of legislative scope. There are doubtless other areas of law in which the categorical treatment of legislative scope underpinning the two-step principle may affect courts’ ability to balance particular conflicts values. For that reason, it might be preferable to await the drafting of the remainder of the new Restatement before committing to that treatment. In any event, and more generally, it would be helpful for the reporters (1) to distinguish explicitly between express and implicit limitations on geographic scope, and (2) to provide courts with guidance as to the foundation and parameters of any general presumption against extraterritorial application of state law.

the statute that contains them, *without* pre-judging the more difficult question of defining its *maximum* reach”) (emphasis in original).

95. See Brilmayer & Norchi, *supra* note 29, at 1230 (“Modern theory denies that state legislatures would prefer that their statutes be limited to local occurrences.”).