of a party's rights in a particular controversy is a matter of interpreting positive law."); Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448 (1997).

§ 5.01. Nature and Development of Choice of Law

Choice-of-law analysis is a two-step process that: (i) identifies the laws that are relevant to the determination of the rights and liabilities of persons involved in matters having connection to more than one state; and, if relevant laws conflict, (ii) selects the most appropriate relevant law to govern particular issues in such matters.

Comment:

a. Choice of law a part of the law of a state. Each state must adopt its own rules of choice-of law. To some extent, the Constitution places limits on the rules that States of the United States may adopt in choice of law and other areas of conflict of laws. See § 1.02, Comment *c*. Choice-of-law rules, when adopted, become as definitely a part of the law of a state as any other branch of the state's law.

Choice of law is largely decisional and, to that extent, its rules are as open to re-examination as other common-law rules. Formulating and re-examining these rules requires a court to consider the specific policies of the relevant internal-law rules, general policies relating to multistate occurrences, and policies relating to the predictable and efficient conduct of litigation and to the protection of the rights and justified expectations of the parties. The evolution of choice of law reflects the ongoing balance among these different policies.

b. Nature of choice of law. Resolving a choice-of-law question requires two analytically distinct steps. First, it must be decided which states' laws are relevant, meaning that they might be used to govern a particular issue. This is typically a matter of discerning the scope of the various states' internal laws, i.e., deciding to which people, in which places, and under which circumstances, they extend rights or obligations. Second, if states' internal laws overlap and conflict, it must be decided which law shall be given priority.

Contemporary approaches generally follow this two-step model. They identify relevant state laws, typically using a method similar to Professor Brainerd Currie's "interest analysis" and then, if more than one law is relevant and the laws conflict, use some other method to resolve the conflict in favor of a particular state's law. New York's *Neumeier* rules, for instance, work by adding a territorial tiebreaker. Pennsylvania and, until recently, New Jersey, use the Restatement

of the Law Second, Conflict of Laws' "most-significant relationship" analysis to resolve conflicts. California uses a "comparative impairment" analysis. All of these approaches, however, share the same basic conceptual structure.

The Restatement of the Law Second, Conflict of Laws also generally follows the two-step model. For some areas of the law, it contains rules that can spare courts the need to do the two-step analysis themselves. In other areas of the law, notably torts and contracts, for which the Reporter believed that such rules would be premature, the Restatement Second identifies relevant state laws by reference to certain connecting factors. For torts, § 145 instructs courts to consider the laws of the place of injury, the place of conduct, the domicile of the parties, and the place where the relationship, if any, between the parties was centered. For contracts without a choice-of-law clause, § 188 instructs them to consider the laws of the place of contracting, the place of negotiation, the place of performance, the location of the subject matter, and the domicile of the parties. Resolution of conflicts—the determination of which of multiple conflicting laws should be given priority—is performed by identifying the state with the most significant relationship under the multifactor analysis of § 6.

This Restatement similarly works from the two-step model. However, it gives more definite content to the idea of a relevant state law and the selection of one state's law over another's than the Restatement Second does. Doing so clarifies the analysis and describes choice of law in a way that makes it similar to and consistent with the ordinary legal analysis used in purely domestic cases and in multistate cases involving statutes. As to the first step, it deems a state's law relevant if and only if the facts of the case bring an issue within the scope of the state's law. A law is relevant, on this understanding, if it reaches the facts of the case, i.e., if the law creates rights or obligations relating to the litigated events. This tracks ordinary legal analysis: if one is attempting to decide which of several possibly relevant legal rules (different statutes, common-law doctrines, or administrative regulations) might govern in a purely domestic case, the relevant legal rules would be those that actually reached the facts of the case, i.e., those that created rights or obligations based on the facts of the case.

In ordinary legal analysis, determining whether a legal rule reaches the facts of the case is a matter of interpreting the rule. The idea that the relevant state laws are those that reach the facts of the case is therefore consistent with Professor Currie's general claim that determining whether a state is interested is simply the ordinary process of interpreting its law. To that extent, this

Restatement follows Professor Currie, as did the Restatement Second. See § 6, Comment *e* (directing courts determining the scope of state law to "interpret the statute or rule" in light of relevant factors). The precise details of Professor Currie's method of interpretation, as well as his conclusions in particular cases, are complex and contested, and this Restatement makes no attempt to describe or follow them.

As to the second step, this Restatement describes the selection of one of several overlapping laws as giving priority to the chosen law. This description too is consistent with ordinary legal analysis in domestic cases: the reason a court will apply a statute, rather than a common-law rule, to a case that falls within the scope of both is that statutes take priority over common law. So too for conflicts between United States federal law and State law, the federal Constitution and a statute, or more recent and older statutes.

Making explicit the distinction between the two steps and describing them in terms of the scope of states' laws and the relative priority accorded those laws facilitates clear discussion of choice of law. In particular, it aids in understanding the different sorts of statutes that states have enacted. See § 5.02. It also allows for transparent explanation of the process by which the rules of this Restatement were derived. Generally speaking, the rules have been derived by surveying how contemporary approaches resolve conflicts between competing state laws in appropriately defined categories of cases and restating those results in the form of clear rules. Courts should decide whether a conflict exists by determining the scope of the laws that the parties invoke and then select the most appropriate law by following the applicable rule. Section 5.02 and Comment *f* describe more fully the process to be followed in using this Restatement for choice-of-law analysis.

c. Scope of laws. The scope of forum internal law is a matter of the content and meaning of that law. It is a question of forum law. It is determined by using the same sources that are used for ordinary questions of legal interpretation.

The scope of foreign internal law is a matter of the content and meaning of that law. It is a question of foreign law. It is determined in the same manner as any other question about the content or meaning of foreign law. See generally Topic 2. It is determined in light of how the foreign law is understood and applied in the foreign jurisdiction. See Topic 2, § 5.08(2) and Comment *b*. The forum accepts authoritative statements from foreign states as to the scope of their laws just as it does any other statements about the laws' content and meaning. See Illustrations 1–4. A foreign

state's choice-of-law approach and decisions are generally not taken to set the scope of that state's internal law. See Illustration 5.

This Restatement does not adopt a presumption against extraterritoriality with respect to the laws of States of the United States, although some States have done so. A State court following this Restatement will not apply a presumption against the extraterritorial application of its own State's laws. In determining the scope of another State's laws, a court applies a presumption against extraterritoriality only to the extent and in the manner that the other State has done so, as part of its internal law. See Illustrations 6 and 7.

Illustrations:

1. A statute of state X provides "citizens" of state X a right of access to state X public records but expressly excludes citizens of other states. Courts of all states must respect that limit on the scope of the rights created by state X. No court may grant citizens of other states rights under the statute. For the purpose of applying the statute, courts of all states must determine who is a citizen of X by using the definition of "citizen" found in X law.

2. A statute of state X imposes vicarious liability on the owner of any vehicle "used or operated in this state" for injuries caused by the negligent operation of the vehicle by any person with permission of the owner. The highest court of state X has interpreted this statute to impose liability for out-of-state injuries if the vehicle has ever been used or operated within state X. One state X domiciliary lends his car to two friends domiciled in state X. They drive into state Y, where the driver's negligence injures the passenger. Suit is brought in state Y. Y internal law does not impose vicarious liability in such circumstances. A conflict exists between X and Y law. The Y court must follow the X court's determination of the statute's scope, which extends to out-of-state injuries caused by vehicles ever used or operated in state X. If state Y choice-of-law rules select state X law to govern the issue of vicarious liability (see §§ 6.xx–6.xx), the owner will be liable.

3. Same facts as Illustration 2, except that the highest court of state X has interpreted the phrase "used or operated in this state" to create vicarious liability only for injuries that arise out of such use or operation, i.e., only injuries occurring in state X. There is no conflict between X and Y law because the issue is outside the scope of X's law. Y law is the only relevant law and it will govern.

4. A statute of state X imposes vicarious liability on the owner of any vehicle "used or operated in this state" for injuries caused by negligent operation of the vehicle by any person with the owner's permission. The highest court of state X has interpreted this statute to impose liability for out-of-state injuries if the vehicle has ever been used or operated within state X. One state X domiciliary lends his car to another state X domiciliary, who drives into state Y and negligently injures a Y domiciliary. Suit is brought in Y. The highest court of state X has recently decided a choice-of-law case involving similar facts and concluded that Y law should govern the issue of vicarious liability. The state X choice-of-law decision is based on a determination that Y law should be given priority, and the Y court need not follow it. (For the question of when one state should follow the choice-of-law rules of another state, see § 5.05.) If Y choice-of-law rules select X law, the owner will be liable under the X statute.

5. A statute of state X provides immunity to charities for negligence. The statute contains no geographical limitation. State X courts follow a territorial approach to choice of law and for questions of charitable immunity select the law of the place of injury. A charity headquartered in state X negligently injures an X domiciliary in state Y. Suit is brought in state Y. The adoption of a territorial approach to choice of law is not considered to set a territorial limit on the scope of X law. The state X statute is available for selection, and if state Y choice-of-law analysis selects state X law for the issue of immunity, the state Y court will use the state X statute to grant immunity to the charity.

6. A statute of state X provides that no employer shall employ any workers for longer than 40 hours a week unless it pays overtime. The statute contains no geographical limitation. State X law contains a presumption against extraterritoriality in the interpretation of its statutes and X courts would conclude that the overtime statute does not reach work performed wholly outside state X. An employer headquartered in state X employs workers to perform duties entirely in state Y for more than 40 hours a week without paying overtime. An employee seeking overtime pay under the state X statute brings suit in state Y. Because a court in state X would find that work in state Y is outside the scope of the state X statute, the X statute is not relevant. There is no conflict between laws. Y law will govern.

If the employment contracts select X law and the court concludes that the parties intended to incorporate the substance of X law into their contract, it may award overtime pay as a matter of contractual right if an explicit contractual provision to that effect would be valid under Y law. See § 8.04.

7. Same facts as Illustration 6, except that state X does not apply a presumption against extraterritoriality to the interpretation of its statutes, but state Y does. Because a court in state X would find that work in state Y falls within the scope of the state X statute, a court in state Y will award overtime pay under the X statute if state Y's choice-of-law rules select the law of state X to govern overtime pay. State Y's presumption against extraterritoriality relates to scope of Y laws, not X laws.

d. Priority of laws. The relative priority of forum and foreign law is a question of forum law. Two distinct sets of considerations are relevant to the determination.

First, choice-of-law systems should generally seek to provide sensible, rather than arbitrary, answers to choice-of-law questions so that states' policies are not needlessly thwarted and parties are not subject to unfair surprise. Whether it is sensible to choose a particular state's law to govern a particular issue is affected by the policies underlying the relevant laws, the connections between the relevant states and the particular issue under consideration, and the reasonable expectations of the parties. The considerations relevant to this analysis could be called "right answer" considerations. Courts focusing on the delivery of sensible answers have adopted approaches such as selecting the law of the state whose interests would be most impaired if its law were not selected, the law of the state with the greater interest in the issue, or the law of the state that is the center of gravity with respect to that issue.

Second, choice-of-law systems should generally seek to provide answers in an easy, predictable, and uniform fashion so that the litigation process is streamlined and parties can structure their out-of-court behavior with confidence as to what law will govern. The considerations relevant to this analysis could be called "systemic" considerations. Courts focusing on certainty, predictability, uniformity, and ease of application tend to adopt simpler rules, such as a preference for the law of the state where some relevant event occurred, even if these rules do not follow a precisely calibrated analysis of state interests.

The rules of this Restatement are intended to serve both sets of considerations. They have been derived by surveying the way contemporary approaches resolve conflicts between state laws

in light of party expectations and the relative interests of the states, but also with an eye to the formulation of clear and predictable rules. These rules have also been drafted to align with the practice of courts using contemporary approaches to choice of law and with codifications both within the United States and abroad.

e. Evolution and change of choice of law. As suggested above, there is frequently some tension between the two sets of considerations that are relevant to the design of a choice-of-law system. Choice-of-law systems may begin by focusing on one category and then be changed to better serve the other. Ideally, this process will result in a progress towards choice-of-law systems that are improved in both respects.

The first Restatement of Conflict of Laws was largely composed of bright-line rules. In many instances, these rules did direct clear and predictable outcomes. However, the outcomes dictated by those rules often seemed arbitrary in terms of the appropriate allocation of regulatory authority among states.

To correct for this arbitrariness, some courts manipulated or increased the complexity of the existing rules, which allowed them to reach less arbitrary results, though with some cost to uniformity, predictability, and ease of application. Other courts adopted new approaches to choice of law that gave more weight to state policies and interests but did so in a less rule-bound manner. These new approaches did a better job of providing sensible answers to choice-of-law questions, but they also often proved indeterminate and difficult to apply, which compromised the second set of considerations.

The Restatement Second directed courts to consider both sets of considerations. See Restatement of the Law Second, Conflict of Laws § 6 (including both such factors as "the relevant policies of the forum [and] other interested states" and such factors as "certainty, predictability and uniformity of result [and] ease in the determination and application of the law to be applied"). However, it gave no guidance as to their relative weight and, by suggesting that the factors must be considered anew in each case, it undermined both predictability and ease of application. The Restatement Second was conceived as a transitional document that would help courts generate the decisions necessary for future Restatements to draft more precise rules that would serve both sets of values simultaneously. This Restatement provides those rules.

REPORTERS' NOTES

Comment b. Nature of choice of law. The traditional territorial approach used only the first step of the two-step model described above. It defined all laws as territorial in scope and therefore did not need to address conflicts between them. See 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 4.12 at 46 (1935) ("By its very nature law must apply to everything and must exclusively apply to everything within the boundary of its jurisdiction."). The model emerges more clearly in Professor Brainerd Currie's interest analysis, which first sorts cases into different categories depending on which states' laws include the relevant events within their scope (which states are "interested," in Currie's terminology) and then addresses conflicts. See, e.g., Brainerd Currie, *Married Women's Contracts: a Study in Conflict-of-Laws Method*, *in* SELECTED ESSAYS ON CONFLICT OF LAWS 107–120 (1963); see also, e.g., Raflo v. United States, 157 F.Supp. 2d 1, 5 (D.D.C. 2001) (describing interest analysis as "a two-step inquiry: 1) identifying the governmental policies underlying the applicable laws; and 2) determining which state's policy would be most advanced") (D.C. choice of law); McCann v. Foster-Wheeler LLC, 225 P.3d 516 (Cal. 2010) (describing steps of government-interest analysis). The model is visible in the Restatement of the Law Second, Conflict of Laws (AM. L. INST. 1971), which explicitly listed the contacts that made states' laws relevant and resolved conflicts by giving priority to the law of the state with the most significant relationship. (The Restatement Second also invoked Professor Currie via its reference to the policies of the forum and "other interested states.") See Restatement of the Law Second, Conflict of Laws §§ 6, 145, 188 (AM. L. INST. 1971). See also Premium Freight Mgmt., LLC v. PM Engineered Sols., 906 F.3d 403, 406–407 (6th Cir. 2018) (describing "the two-step approach set forth in the Restatement (Second) of Conflict of Laws") (Ohio choice of law). It is also present in other contemporary approaches, which uniformly attempt first to identify conflicts and then to resolve them. See, e.g., Dabbs v. Silver Eagle Mfg. Co., 779 P.2d 1104, 1105 (Or. App. 1989) (setting out "a two-step analysis regarding tort choice of law issues" in which "the first step is to determine if there *is* a choice of law issue" and the second "to determine which [state] has the most significant relationship"). California, for instance, first seeks to determine whether a "true conflict" exists and then resolves such conflicts via the principle of comparative impairment. See, e.g., Kearney v. Salomon Smith Barney, 137 P.3d 914, 922 (Cal. 2006); Washington Mut. Bank, FS v. Superior Ct., 15 P.3d 1071, 1080–1081 (Cal. 2001) ("Only if the trial court determines that the laws are materially different *and* that each state has an interest in having its own law applied, thus reflecting an actual conflict, must the court take the final step and select the law of the state whose interests would be 'more impaired' if its law were not applied"). New York sorts cases into different categories based on the presence or absence of a true conflict and the parties' domicile via the rules created in Neumeier v. Kuehner, 286 N.E.2d 454 (N.Y. 1972). See, e.g., Edwards v. Erie Coach Lines Co., 952 N.E.2d 1033, 1036 (N.Y. 2011) (describing how *Neumeier* refined interest analysis to assure greater predictability and uniformity); In re Allstate Ins. Co. (Stolarz), 613 N.E.2d 936, 937 (N.Y. 1993) ("The first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved."). Pennsylvania sorts cases according to interest analysis and resolves conflicts in favor

of the state with the most significant relationship to the issue. See, e.g., Hammersmith v. TIG Ins. Co., 480 F.3d 220, 230–231 (3d Cir. 2007).

Other contemporary approaches are similar. See, e.g., Reicher v. Berkshire Life Ins. Co. of Am., 360 F.3d 1, 4 (1st Cir. 2004) ("The first step in a choice-of-law analysis is to determine whether an actual conflict exists between the substantive laws of the interested jurisdictions") (Massachusetts choice of law); Veridian Credit Union v. Eddie Bauer LLC, 295 F.Supp. 3d 1140, 1149 (W.D. Wash. 2017) (Washington choice of law) ("Washington employs a two-step approach to choice of law questions"); In re Bard IVC Filters Prod. Liab. Litig., No. MDL 15-02641-PHX, 2018 WL 3586404 at *2 (D. Ariz. July 26, 2018) (Wisconsin choice of law) ("Wisconsin employs a two-step choice-of-law analysis); Pegg v. United Servs. Auto Ass'n, No. 09–02108, 2010 WL 5317371 at *4 (D.N.J. Dec. 17, 2010) (New Jersey choice of law) ("Under New Jersey law, a choice-of-law analysis must be conducted in two steps"); New York Marine & Gen. Ins. Co. v. McDermott Int'l, No. Civ.A.04-2548, 2005 WL 1400450 at *3 (E.D. La. June 1, 2005) ("If the first step of the choice-of-law inquiry yields multiple eligible states, the second step is to identify the state with the greatest interest in the resolution of the particular issue") (federal maritime choice of law); Zurich Am. Ins. Co. v. Goodwin, 920 So. 2d 427, 432 (Miss. 2006) ("Choice-of-law analysis arises only when there is a true conflict between the laws of two states, each having an interest in the litigation); Sutherland v. Kennington Truck Serv. Ltd., 562 N.W.2d 466, 471 (Mich. 1997) ("In determining whether a rational reason to displace Michigan law exists, we undertake a two-step analysis").

The model is presented clearly in cases involving statutes, in which courts have consistently interpreted the statutes to determine their scope in order to decide whether a conflict exists. See, e.g., Munenzon v. Peters Advisors, LLC, No. 20-14644, 2021 WL 3561348 at *8 (D.N.J. Aug. 11, 2021) (finding "no 'conflict' of laws" because "*substantive New Jersey law provides* that out-of-state employees are not protected" by the statute) (New Jersey choice of law); Sullivan v. Oracle Corp., 254 P.3d 237 (Cal. 2011) (determining scope of California statutes as threshold question before choice-of-law analysis); *Kearney*, 137 P.3d at 928–933 (interpreting Georgia and California statutes to determine "whether each state's law was intended to apply" to the facts of the case and then resolving conflict between the overlapping laws); Avery v. State Farm Mut. Auto Ins. Co., 835 N.E.2d 801, 849 (Ill. 2005) (discussing "scope of the consumer fraud act" and noting that "[a] determination by this Court that the Consumer Fraud Act does not apply, by its own terms, to the out-of-state transactions at issue in this case would render it unnecessary to discuss . . . choice-of-law and constitutional arguments"); Waranka v. Wadena Ins. Co., 847 N.W.2d 324, 329 (Wis. 2014) ("no conflict exists because Wisconsin's wrongful death law applies to deaths caused only in Wisconsin"); King v. Car Rentals, 813 N.Y.S.2d 448, 456 (N.Y. App. Div. 2d Dep't. 2006) ("Before reaching the choice-of-law question, however, it is necessary to determine whether New York's vicarious liability statute even applies to this Quebec accident in a New Jersey vehicle.") In such cases, courts treat the scope of foreign law as a question of foreign law.

United States federal extraterritoriality jurisprudence also begins by determining the scope of federal statutes. See, e.g., Morrison v. Nat'l Australia Bank, Ltd., 561 U.S. 247, 255 (2010) (discussing the "scope of the Exchange Act's prohibitions"). That jurisprudence gives priority to federal law for all cases within its scope, so it does not perform the second step of domestic American choice-of-law analysis. See Restatement of the Law Fourth, The Foreign Relations Law of the United States § 402 (AM. L. INST. 2018) (discussing "geographic scope of a federal law"), § 404 (discussing presumption against extraterritoriality).

Comment c. Scope of laws. That each state has authority, within some limits, to determine the scope and content of its own law is a basic principle of international law and, in the United States, of our constitutional system of federalism. See Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941). Under the Full Faith and Credit Clause of the U.S. Constitution, each State is authoritative as to the meaning of its own law. Knowing distortion of sister State law is unconstitutional. See Sun Oil 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"). Federal courts must likewise follow a State high court's interpretations of the State's own law. See Johnson v. Fanknell, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has authority to place a construction on a state statute different from the one rendered by the highest court of the State."); see generally Restatement of the Law Fourth, The Foreign Relations Law of the United States § 404, Reporters' Note 5 (AM. L. INST. 2018) ("Subject to constraints imposed by federal law, the geographic scope of State statutes is a question of State law.").

For a similar understanding of the concept of the scope of a law in the choice-of-law context, see Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), Chapter II, Article 9, § 1 (describing "overriding mandatory provisions" as provisions that are intended to govern "any situation falling within their scope" regardless of the otherwise-applicable choice-of-law analysis).

For cases characterizing the scope of foreign law as a question of foreign law, see, e.g., Garcia v. Plaza Oldsmobile Ltd., 421 F.3d 216, 221 (3d Cir. 2005); Budget Rent-A-Car Sys. v. Chappell, 407 F.3d 166, 171 (3d Cir. 2005); Black v. Adecco Staffing & Ventra Kansas LLC, No. 21-2180, 2021 WL 2634422 at *1 (D. Kan. June 25, 2021) (using Missouri decisions, rather than forum law, to determine scope of Missouri statute) (Kansas choice of law); Cimoli v. Alacer Corp., 546 F.Supp.3d 897 (N.D. Cal. 2021) (following Pennsylvania court interpretations of Pennsylvania statute, rather than California presumption against extraterritoriality) (California choice of law); Elzeftawy v. Pernix Grp., No. 1:18-CV-06971, 2021 WL 4264276 at *3–4 (N.D. Ill. Sept. 20, 2021) (using California presumption against extraterritoriality to determine scope of California law) (Illinois choice of law); Callen v. Daimler, A.G., No. 1:19-CV-1411, 2020 WL 10090879 at *20 (N.D. Ga. June 17, 2020) (determining the scope of South Carolina statute under South Carolina law) (Georgia choice of law); Armstrong v. Miller, 189 N.W.2d 688, 692–693 (N.D. 1971 (determining scope of vehicle owner liability statute by reference to the intention of the enacting legislature).

Illustration 1 is based on McBurney v. Young, 569 U.S. 221 (2013) (holding that Virginia's citizens-only Freedom of Information Act did not violate Article IV Privileges and Immunities Clause). Illustrations 2, 3, and 4 are based on New York Vehicle and Traffic Law § 388, which imposes liability on the owner of a vehicle "used or operated" in New York for injuries caused by negligent operation of the vehicle with the owner's permission. In a series of cases, the courts of New York and other courts have distinguished the determination of the scope of the statute from the selection of a governing law in the manner described in the Illustrations. See, e.g., Fried v. Seippel, 599 N.E.2d 651, 654 (N.Y. 1992); King v. Car Rentals, 813 N.Y.S.2d 448, 456 (N.Y. App. Div. 2006); Budget Rent-A-Car Sys. v. Chappell, 304 F. Supp. 2d 639 (E.D. Pa. 2004) (Pennsylvania choice of law), rev'd on other grounds, 407 F.3d 166 (3d Cir. 2005); Budget Rent-A-Car Sys. v. Chappell, 407 F.3d 166, 172 (3d Cir. 2005); Garcia v. Plaza Oldsmobile Ltd., 421 F.3d 216, 221 (3d Cir. 2005). Cases construing a similar Minnesota statute also distinguish the determination of scope from the selection of governing law, with the important difference that the Minnesota statute's "in this state" limit was interpreted to mean that its scope extended only to accidents in Minnesota. See, e.g., *Armstrong*, 189 N.W. 2d at 692–693.

For the proposition that a state's choice-of-law approach does not determine the scope of that state's law, see, e.g., Pfau v. Trent Aluminum Co., 263 A.2d 129, 137 (N.J. 1970) (stating that "[l]ex loci delicti was born in an effort to achieve simplicity and uniformity" and does not set the scope of a state's law). There is some authority to the contrary, see, e.g., Phillips v. General Motors Corp., 995 P.2d 1002, 1011 (Mont. 2000) (suggesting that North Carolina's adoption of lex loci delicti means that "the scope of North Carolina product liability law" is territorial). But even *Phillips* does not take a state's choice-of-law approach as necessarily determining the scope of its law in a binding way, since it failed to consider the choice-of-law rules of relevant states other than North Carolina. For more general analysis of the significance of other states' choice-of-law rules, see, e.g., Lea Brilmayer, *The Other State's Interests*, 24 CORNELL INT'L L.J. 233 (1991); Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979 (1991); Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821 (2005).

Some States apply a presumption against extraterritorial application of their own State law. In some cases, States adopted that presumption during the era of strict territorialism on the basis that their laws could not reach conduct occurring in other States. See, e.g., Alabama Great S. R.R. v. Carroll, 11 So. 803, 806–807 (Ala. 1892); N. Alaska Salmon Co. v. Pillsbury, 162 P. 93, 94 (Cal. 1916). This reasoning reflects a territorial understanding of the nature of law that has largely been abandoned. See Chapter 5, Topic 1, Introduction. The federal presumption against extraterritoriality recognizes that different statutes focus on different things, and it considers operation of a federal statutory provision to be domestic and thus permissible if whatever is the focus of the provision occurred in the United States. See Restatement of the Law Fourth, The Foreign Relations Law of the United States § 404, Comment *c* (AM. L. INST. 2018). In some cases, States have adopted a similar presumption that considers a broader range of factors. See, e.g., Coca-Cola Co. v. Harmor Bottling Co., 218 S.W.3d 671, 683 (Tex. 2006) (holding that conduct in

Texas "does not bring redress of the resulting injury in the other states within the [statute's] purpose"). To the extent that a state's presumption against extraterritoriality adopts a more flexible approach that takes the purpose of a statutory provision into account, of course, a court of that state interpreting its own law may reach the same result without the need to invoke a special presumption.

Other States do not use a presumption against extraterritorial scope of State law, at least with respect to its operation in other States. See, e.g., Taylor v. E. Connection Operating, Inc., 988 N.E.2d 408, 413 (Mass. 2013) ("[W]here no explicit limitation is placed on a statute's geographic reach, there is no presumption against its extraterritorial application in appropriate circumstances."); see also id. at 414 n.9 (assuming without deciding "that there is a presumption against the application of Massachusetts statutes outside the United States"). Although States may regulate extraterritorially on the same terms as the federal government, see Skiriotes v. Florida, 313 U.S. 69, 77 (1941), applying State law extraterritorially in an international context raises different concerns, and implicates different constitutional provisions, than applying State law extraterritorially in an interstate context. See Hannah L. Buxbaum, *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*, 27 DUKE J. COMP. & INT'L L. 381, 388–395 (2017) (noting differences).

This Restatement does not adopt a presumption against extraterritoriality with respect to State law. A State court following this Restatement will not apply a presumption against the extraterritorial application of its own State's laws. In States that do apply such a presumption, any resulting limitation on the scope of a State statute is considered part of the State's internal law. When selected by the forum's choice-of-law rules, foreign internal law is applied as foreign courts apply it. See Chapter 1, § 1.03, Comment *b*. Therefore, in determining the scope of another State's laws, a court applies a presumption against extraterritoriality only to the extent and in the manner that the other State has done so. For examples of a court using a State's presumption against extraterritoriality to interpret that State's law, see *Elzeftawy*, 2021 WL 4264276 at *3 (Illinois choice of law) (using California law to determine scope of California statutes); McGoveran v. Amazon Web Servs., No. 20-1399, 2021 WL 4502089 at *3–4 (D. Del. Sept. 30, 2021) (Delaware choice of law) (using Illinois law to determine scope of Illinois statute).

Illustrations 6 and 7 are based on *Sullivan* and *Taylor*.

Comment d. Priority of laws. While states are authoritative as to the scope and meaning of their own law, one state need not defer to another state's conclusion as to which state's law should be given priority in a conflict. See Pacific Emps. Ins. Co. v. Industrial Accident Comm'n of California, 306 U.S. 493, 501 (1939) (holding that when the laws of two States overlap, "the law of neither can by its own force determine the choice of law to be applied in the other"); Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), Chapter II, Article 9, §§ 2, 3 (noting that a forum will always give effect to its own overriding mandatory provisions but need not give effect to the overriding mandatory provisions of other countries). Nor does international law contain any rule

about the priority to be given different states' laws in cases of overlap. See Restatement of the Law Fourth, The Foreign Relations Law of the United States – Jurisdiction § 211, Comment *d* (AM. L. INST., Tentative Draft No. 2, 2016) ("International law recognizes no hierarchy of bases of prescriptive jurisdiction and contains no rules for assigning priority to competing jurisdictional claims."). Different approaches to choice of law contain different ways of resolving conflicts between laws. For the comparative-impairment approach, see, e.g., *Kearney*, 137 P.3d at 922 (Cal. 2006). For a balancing-of-interests approach, see, e.g., Chrysler Corp. v. Skyline Indus. Servs., Inc., 528 N.W.2d 698, 702 (Mich. 1995). For the center-of-gravity approach, see, e.g., Boardman v. United Servs. Auto. Ass'n, 470 So. 2d 1024, 1030 (Miss. 1985). For a territorial approach, see, e.g., Paul v. National Life, 352 S.E.2d 550, 555–556 (W. Va. 1986). This Restatement provides rules that capture practice under contemporary approaches in a predictable and easily administrable way, promoting both systemic and right-answer considerations. For a discussion of the relationship these sets of considerations, see Kermit Roosevelt III, *Certainty and Flexibility in the Conflict of Laws*, *in* THE CONTINUING RELEVANCE OF PRIVATE INTERNATIONAL LAW AND ITS CHALLENGES (Franco Ferrari & Diego P. Fernández Arroyo eds., 2019).

Comment e. Evolution and change of choice of law. As of early 2015, the traditional approach to choice of law endorsed by the Restatement of the Law, Conflict of Laws (AM. L. INST. 1934) had been rejected in 42 American jurisdictions with respect to torts and 40 with respect to contracts. See Symeon Symeonides, *The Choice-of-Law Revolution Fifty Years After Currie: An End and a Beginning*, 2015 U. ILL. L. REV. 1847, 1867–1882 (2015). Among the states that have adopted modern approaches, the Restatement of the Law Second, Conflict of Laws (AM. L. INST. 1971) has proved the most popular, with 24 adherents in torts and 23 in contracts. Id. Some states, however, have specifically rejected the Restatement Second because of its complexity and indeterminacy. See, e.g., Dowis v. Mud Slingers, 621 S.E.2d 413, 417 n.8 (Ga. 2005) (describing the Restatement Second as "dominating the field while bewildering its users"); *Paul*, 352 S.E.2d at 555 (describing the Restatement Second as "sound[ing] pretty intellectual" but concluding "we still prefer a rule").

Statutory choice-of-law rules have long existed in particular areas of law, perhaps most notably the Uniform Commercial Code. Recent years have seen a number of important enactments of statutory choice-of-law rules more generally. In the United States, Louisiana and Oregon have enacted choice-of-law codes and Puerto Rico is in the process of considering one. See Book IV of the Louisiana Civil Code (Arts. 3515–3549) (1991); Or. Rev. Stat. §§ 15.300–15.380 (2001); Symeon C. Symeonides, *Codifying Choice of Law for Contracts: The Puerto Rico Project*, *in* LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 419, 422–424 (James Nafziger & Symeon Symeonides eds., 2002). Outside the United States, there have been notable codifications by the European Union, see Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6 (EU) (concerning contractual obligations in civil and commercial matters); Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L

199) 40 (EU) (concerning noncontractual obligations in civil and commercial matters), and other jurisdictions. See generally SYMEON SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS (2014).

For an assessment of the Restatement of the Law, Conflict of Laws (AM. L. INST. 1934) and the process leading to the drafting of the Restatement of the Law Second, Conflict of Laws (AM. L. INST. 1971), see Willis L.M. Reese, *Conflict of Laws and the Restatement, Second*, 28 LAW & CONTEMP. PROBS. 679, 679–681 (1963). In the same article, Reese, the Reporter for the Restatement Second, described it as a transitional document, voicing his hope that "more definite and precise rules can be stated after more experience has accumulated. That will be the task of future Restatements." Id. at 699. For an assessment of the Restatement Second and the development of American choice of law, see Kermit Roosevelt III, *Certainty and Flexibility in the Conflict of Laws*, *in* THE CONTINUING RELEVANCE OF PRIVATE INTERNATIONAL LAW AND ITS CHALLENGES (Franco Ferrari & Diego P. Fernández Arroyo eds., 2019).

§ 5.02. Choice-of-Law Analysis

(a) A court will decide a choice-of-law issue by determining whether there exists a material difference among relevant laws and, if so, deciding which of the conflicting laws will be given priority.

(b) A court, subject to constitutional limitations, will follow a local statute that identifies the law to be given priority.

(c) In the absence of such a statute, a court will use the rules of this Restatement to identify the law to be given priority.

Comment:

a. Material difference among relevant laws, scope of laws. As set forth in this Restatement, choice-of-law analysis requires a court first to determine whether a conflict exists. That determination is performed by ascertaining whether there is a material difference among two or more relevant laws.

A difference is material if the laws direct different outcomes with respect to a particular issue. A law is relevant if the facts of the case bring the issue within the scope of that law. In the absence of specification by the courts or legislature of another state, a court may presume that the scope of that state's law is broad. The Restatement of the Law Second, Conflict of Laws provides nonexhaustive lists of contacts that will bring an issue within the scope of a state's law for tort issues (§ 145) and contract issues (§ 188). For the purposes of applying this Restatement, any of