

## Continuity and Change in the *Draft Restatement (Third) of Conflict of Laws*: One Step Forward and Two Steps Back?

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**ABSTRACT.** A deep contradiction lies at the heart of the *Draft Restatement (Third) of Conflict of Laws*. The *Draft Restatement* embraces a novel theoretical framework—the “two-step” theory—that attempts to integrate the basic tenets of so-called “modern” choice of law theory into a coherent intellectual whole. The virtue of the “two-step” theory is that it domesticates conflict of laws, setting aside unfamiliar terms like the state’s “interests” and instead turning to the “ordinary processes of statutory construction.” Choice-of-law questions, two-step theorists say, should be resolved the same way one would answer any other statutory issue: through the particularized interpretation of the statutes in question. But there’s the rub. *Restatement* provisions are not arrived at through interpretation of the statutes—they cannot be.

The drafters have attentively surveyed conflict-of-law cases and have synthesized a body of black-letter rules reflecting the ways that courts have resolved disputes in the past. The resulting *Draft Restatement*, like prior restatements, is a synthetic representation of the laws of all fifty states, not an interpretation of the law of one particular state. Restatements simply summarize the general drift of a body of law, with due attention to progressive trends. How, then, can this restatement incorporate a methodology that professes to express the results of statutory construction? The answer is that it cannot. Continuity with past restatements, in the form of synthesized black-letter rules, cannot be joined to change—that is, the advancement of this latest choice-of-law theory—as the proposed *Draft Restatement* would have it.

### INTRODUCTION

Almost half a century has passed since the American Law Institute (ALI) last made a sustained foray into choice of law: the 1971 *Restatement (Second) of*

*Conflicts*.<sup>1</sup> The ALI is currently at work on the *Restatement (Third)*, which will take account of developments over the last five decades.<sup>2</sup> The changes are significant, but so are the continuities. Unfortunately, despite what its drafters would have us believe, the changes and continuities are not compatible.<sup>3</sup>

The central change in the *Draft Restatement (Third)* is a major theoretical realignment in favor of a school of thought once generally known as “governmental interest analysis” and now largely repackaged as “two-step” theory. That theory maintains that every choice of law problem can be settled by first determining each relevant law’s scope and then resolving any resulting conflict through the application of priority rules.<sup>4</sup> In endorsing this approach, the new *Draft Restatement* breaks rank with the *Restatement (Second)*’s traditional leanings—characterized by a consideration of factors specific to interstate disputes, such as comity, as well as issues of administrability—and surrenders enthusiastically to the mid-twentieth century, “modern,” choice of law revolution. The *Draft Restatement*’s central continuity is its retention of the *Restatement (Second)*’s “rules/exceptions” structure, providing a vast set of rules for which state’s law should apply in a given situation, while also offering the exception conditions for when the rules should not be followed. The *Draft Restatement* presents its new blend of continuity and change as a natural synthesis of fundamentally compatible principles.<sup>5</sup>

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1. The *Restatement (Second)* was published in 1971; in 1988, a small number of specific issues were revisited but nothing in the basic orientation of the *Restatement*’s analysis was altered. See *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* intro. (AM. LAW INST. 1971) [hereinafter *RESTATEMENT (SECOND)*]; see also Russell J. Weintraub, “At Least, To Do No Harm:” *Does the Second Restatement of Conflicts Meet the Hippocratic Standard?*, 56 MD. L. REV. 1284, 1301-03 (1997) (discussing the 1981 revisions).
  2. See *The American Law Institute Announces Four New Projects* (Nov. 17, 2014), <https://www.ali.org/news/articles/american-law-institute-announces-four-new-projects> [https://perma.cc/HW9M-BF6C].
  3. The current *Draft Restatement* argues that the *Restatement (Second)* was understood to be somewhat provisional all along. A comment explains that the *Restatement (Second)* “was conceived as a transitional document that would allow policymakers to accumulate the experience necessary to draft more precise rules that would serve” the dual ends of nonarbitrariness on the one hand and uniformity and predictability on the other. *RESTATEMENT (THIRD) OF CONFLICT OF LAWS* § 5.01 cmt. e (AM. LAW INST., Council Draft No. 2, Sept. 12, 2017) [hereinafter *DRAFT RESTATEMENT*]. The *Draft Restatement*, the comment continues, “provides those rules.” *Id.* If this account is accurate, the *Restatement (Third)* is not importantly inconsistent with the *Restatement (Second)* because the former is the implementation of the basic frame of reference of the latter.
  4. See *id.* § 5.01 cmt. b (describing Brainerd Currie’s governmental interest analysis theory as embodying the “two-step” model).
  5. See, e.g., *DRAFT RESTATEMENT*, *supra* note 3, at xvi (arguing that the structure of the *Restatement (Second)* is consistent with “two step” theory).

We are skeptical of this *Draft Restatement* hybrid. The “two steps” it takes towards modern choice-of-law theory seem to be headed in the wrong direction.<sup>6</sup> They are, at a minimum, headed in the opposite direction from the *Draft Restatement’s* commitment to resolving the choice-of-law disputes through a comprehensive set of rules. The desire to bring all of the various warring ideologies under a “big tent” is laudable; but “two-step” theory and a *Restatement*-based set of rules just don’t go together.

The nature of the incompatibility is simple. The “two-step” theory is rooted in the idea that every choice-of-law analysis must begin by determining the scope of the state statutes in question. For example, are torts committed outside of Alaska covered by Alaska’s Tort Reform Act? The answer to this question, “two-step” theorists say, should be arrived at in the same way one would answer any other statutory question: through the particularized interpretation of the statutes in question. But there’s the rub. *Restatement* provisions are not arrived at through interpretation of the statutes—they cannot be. They are at most recommendations to judges about what shape the law ought to take as a matter of common law.

The *Draft Restatement* is no exception in this regard. Its drafters have attentively surveyed conflict-of-law cases and have synthesized a body of rules reflecting the ways that courts have resolved disputes in the past—telling us, for example, that state tort statutes usually do not cover nondomiciliaries involved in out of state accidents. But the resulting *Restatement* is a synthetic representation of the laws of all fifty states, not an interpretation of the law of one particular state. Authentic statutory construction involves examining some particular state’s laws, their underlying policies, and the background assumptions of morality, sociology, and economics upon which they are grounded.

The purpose of this Essay is to call attention to this incompatibility, not to challenge the importance or value of the *Draft Restatement* and the efforts of its drafters. In fact, we believe that the common law rules offered by the *Restatement (Third)* will be a step forward for conflict of laws. But in order to fully realize the *Draft Restatement’s* potential, the deep rift between what a restatement is and what this restatement claims to be must be addressed. The drafters of the *Restatement (Third)* may be well-positioned to survey different jurisdictions in order to identify what common law principles prevail, but it is far from clear how such drafter-generated rules can replace statutory interpretation. “Something old, something new” may be a good approach to a wedding,<sup>7</sup> but in conflict-of-laws jurisprudence, it can spell trouble.

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6. Lea Brilmayer & Charles Seidell, *Jurisdictional Realism*, 86 U. CHI. L. REV. (forthcoming 2018).

7. See *Marriage Superstitions, and the Miseries of Bride Elect*, 28 ST. JAMES’S MAG. 549 (London, Aug. 1871).

Part I of this Essay provides an overview of the relationship between the *Draft Restatement* and the past two *Restatements of Conflict of Laws*, emphasizing both the continuities and changes. In Part II, we turn to our critique of the *Draft Restatement*, pointing out a fundamental tension between two important features of the draft: its “rules/exceptions” structure and its commitment to the “two-step” theory. Part III addresses the *Draft Restatement*’s effort to reconcile this internal conflict through its exception provision. As we explain, the exception provision falls short of providing the needed salve and instead potentially threatens to make the *Restatement (Third)*’s decision rules as amorphous as those of the *Restatement (Second)*. To avoid that fate, the rules must be integrated into an interpretive process and treated as the background presumptions against which courts engage in the particularized analysis of the implicated laws. We conclude with some comments on the potential we see in the draft to provide a *Restatement (Third)* that advances beyond the problems that have plagued conflicts of law in the past.

#### **I. THE *DRAFT RESTATEMENT (THIRD)*: “SOMETHING OLD, SOMETHING NEW”**

Understandably sensitive to the overwhelmingly negative public perceptions of conflicts of law—Dean William Prosser famously called the field “a dismal swamp, filled with quaking quagmires”<sup>8</sup>—the *Draft Restatement* makes determined efforts to explain and justify both its methods and its results.<sup>9</sup> A major target of its attention is the so-called “two-step” theory. This theory is the most important “something new” that the *Restatement (Third)* has to offer. While the ideas underlying the “two-step” theory have deep roots in the academic literature of choice of law, those same ideas—namely, Brainerd Currie’s government-interest analysis—were notably marginalized in the *Restatement (Second)*. For example, the *Restatement (Second)* makes no reference to “false conflicts,” one of Currie’s primary insights, and instead attempts to settle every conflict through

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8. William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953) (“The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.”).

9. As explained in the *Reporters’ Memorandum* prefacing the *Draft Restatement*, the *Draft Restatement* includes an introductory section intended “to introduce the concept of choice of law: to describe it in a way that allows users of the Restatement to understand how the Restatement’s rules were derived and to detect when they are not functioning as intended.” DRAFT RESTATEMENT, *supra* note 3, at xv. A goal of the Reporters was for the “description to be intelligible to nonspecialists and to align with the ordinary process of legal analysis.” *Id.*

the “most significant relationship test.”<sup>10</sup> What is new, then, is the appearance of this methodology front and center in a restatement.

The two steps consist first of determining the “scope” of the contending statutes through the ordinary processes of statutory construction used for deciding purely domestic cases; and second, of reconciling overlapping state scope claims through application of “priority” principles. The “two-step” theory is explained in the *Draft Restatement* as follows:

Resolving a choice-of-law question requires two analytically distinct steps. First, it must be decided which states’ laws might be used as a rule of decision. This is typically a matter of discerning the scope of the relevant state 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.<sup>11</sup>

“Two-step” theory is best exemplified by Currie’s theory of governmental interest analysis and its progeny, which commence their approach to choice-of-law problems with an analysis of the substantive policy underlying the contending laws.<sup>12</sup> At the core of Currie’s proposed approach to conflict of laws was the idea that choice-of-law questions should be resolved so as to promote state interests, that is to say, the governmental policies said to underlie the laws in question.<sup>13</sup> To take one classic example, a guest statute passed by Ontario in order “to prevent the fraudulent assertion of claims by passenger, in collusion with the drivers against insurance companies,” would have no application, Currie would argue, to a case involving a car insured in New York; Ontario’s “interest” in protecting its local insurance companies is not piqued by such a case.<sup>14</sup> According to

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10. Kermit Roosevelt has made this point in no uncertain terms, explaining that the *Restatement (Second)* is not

faithful to [Currie’s] deep insight, because it doesn’t set up the analysis as a two-step process. It has almost nothing about determining the scope of state laws; it seems to assume that all state laws have the maximum scope that is constitutionally permissible, and then it tries to resolve conflicts via the most significant relationship test.

Kermit Roosevelt III, *Brainerd Currie’s Contribution to Choice of Law: Looking Back, Looking Forward*, 65 *MERCER L. REV.* 501, 515 (2014).

11. *DRAFT RESTATEMENT*, *supra* note 3, ch. 5, intro., at 112-13.

12. *See id.* § 5.01

13. Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 *DUKE L.J.* 171, 178.

14. *Babcock v. Jackson*, 191 N.E.2d 279, 284 (N.Y. 1963).

Currie, one was to determine the state interests through the usual processes of statutory construction and interpretation.<sup>15</sup>

Rather than recasting all choice of law as the identification and promotion of state substantive policies (as Currie did), the *Restatement (Second)* defined the objective of the choice of law process as identifying the state with the most significant relationship to the dispute.<sup>16</sup> Identification of state substantive policies was only part of this multifaceted approach; there were other considerations with which substantive interests had to share the limelight, such as “certainty, predictability and uniformity of result”; “protection of justified expectations”; “the needs of the interstate and international systems”; and “ease in the determination and application of the law to be applied.”<sup>17</sup> These factors, sensitive to the uniquely interstate nature of conflict of laws, reflected the traditional approach to choice of law, as exemplified by Joseph Beale and the *Restatement (First)*.<sup>18</sup> The drafters of the *Restatement (Second)* thus made conciliatory gestures in Currie’s direction but stopped well short of a wholehearted endorsement of his theory.<sup>19</sup> Ultimately, Currie was an adamant opponent of the *Restatement (Second)*, which he saw as jurisprudentially no improvement over its predecessor, the *Restatement (First)*.<sup>20</sup>

The new *Draft Restatement* casts its predecessor’s methodological caution to the winds: it asserts that the “two-step” methodology has become the mainstream approach and that Currie’s theory of governmental interests dominates that “two-step” analysis. The *Draft Restatement* takes Currie’s theory of state “interests,” gives it some new terminology (“scope”), generalizes it, and puts it to

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15. Currie, *supra* note 13, at 178. In reality, Currie did not suggest using statutory interpretation to identify state interest, but rather a process of construction that relied on assumptions with little basis in actual legislative intent. See Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980).
  16. RESTATEMENT (SECOND), *supra* note 1, § 6(c); see David P. Earle III, *Conflict of Laws and the Interest Analysis – An Example for Illinois*, 4 JOHN MARSHALL J. PRAC. & PROC. 1, 4 (1970).
  17. RESTATEMENT (SECOND), *supra* note 1, § 6. As the comments explain, the substantive policy may be given “predominant weight.” See *id.* § 6(2) cmt. c.
  18. Joseph Beale systematized choice of law under the theory that the objective of choice of law was to enforce “vested rights”; Beale argued that the applicable law in any case was the law of the jurisdiction in which the right in question “vested,” that is where the “last act” necessary to complete the cause of action occurred. JOSEPH H. BEALE, 1 A TREATISE ON THE CONFLICT OF LAWS § 1.1 (1935). The *Restatement (First)*, of which Beale was a reporter, reflected this idea, specifying a collection of rules that were to be used to determine the location of the last act. See, e.g., RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 332-54 (AM. LAW INST., 1934) (discussing rules applicable to contract conflict of laws questions).
  19. See Alfred Hill, *For a Third Conflicts Restatement – But Stop Trying To Reinvent the Wheel*, 75 IND. L.J. 535, 538 (2000).
  20. See Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 755 (1963).

work as the unifying principle of all “modern” choice of law theories. Characterized as “widely, though not universally, accepted by scholars,” the “two-step” approach is portrayed as the common core of the various modern choice of law approaches.<sup>21</sup> The *Draft Restatement* creates the impression that in signing onto “two-step” theory, it is doing something entirely uncontroversial – that for it *not* to sign on would be anomalous. The *Draft Restatement*’s emphasis on the theoretical features that these theories share underscores this impression: the new *Draft Restatement* and the “two-step” approach have so many features in common, one is encouraged to believe, and these features are so commonsensical and so widely accepted in the choice of law world at large, that it would be almost inexplicable if their important shared heritage were not officially recognized.<sup>22</sup>

The *Draft Restatement* simultaneously downplays what it does retain from the *Restatement (Second)*. This is perhaps understandable. Change is more exciting than stability. What would be the point of writing it if the new *Restatement* were just another rehearsal of the same “significant” connecting factors, the same “interests,” the same veneration of predictability and dread of forum shopping, together with the same wistful longing for interstate harmony? But there *are* major continuities, and the reasons for them are significant and deserve attention.

The most important of these in the present context is the reliance on rule-based judicial decision-making. The new *Restatement* operates through a comprehensive system of rules, together with a small number of (ostensibly) limited exceptions, for judges to follow in selecting the applicable law.<sup>23</sup> This “rules/exceptions” structure is carried over from the *Restatement (Second)*.<sup>24</sup> The

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21. Kermit Roosevelt et al., *Reporters’ Memorandum*, in DRAFT RESTATEMENT, *supra* note 3, at xv-xvi, xiii; *see also id.* at xiv (describing the “two-step” approach as “follow[ing] the practice of courts under the Second Restatement and other modern approaches”). By focusing on the alleged shared foundations of the various contending approaches, the *Draft Restatement* maintains a posture of neutrality between the different warring factions and keeps within its mandate to “reflect the law as it presently stands or might appropriately be stated by a court.” AM. LAW INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALL REPORTERS AND THOSE WHO REVIEW THEIR WORK 3 (rev. ed. 2015).

22. *See* DRAFT RESTATEMENT, *supra* note 3, at 111 (“This two-step model is common to most modern approaches, including the Restatement Second, Conflict of Laws.”).

23. *See infra* Part III.

24. The *Restatement (First)* offered a rigid and mechanical set of rules. Formally, the *Restatement (First)* allowed for no exceptions, a fact courts found intolerable when the rules dictated a result that seemed illogical or counterproductive. As the classic critique goes, judges were forced to resort to “subterfuge and manipulation to avoid irrational results.” Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1133 (2010). Various “escape devices,” most notably characterization – defining a dispute that appeared to be, say, a tort case as a contract case instead, in order for a different

alternative to rules would be what has sometimes been called an “approach,” meaning a loose set of principles that a court can apply on a case-by-case basis; governmental interest analysis is an example.<sup>25</sup> Most of the new *Restatement* will consist of choice-of-law rules dealing with issues such as the applicable law for conveyances of real property, which state’s punitive damages rules to apply, or the enforceability of choice-of-law clauses.<sup>26</sup> Although the theoretical

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choice of law rule to apply—came to define the application of the *Restatement (First)*. *Id.* at 1134.

25. See Willis L.M. Reese, *Choice of Law Rules or Approach*, 57 CORNELL L. REV. 315, 315 (1972) (distinguishing a “rule,” which “once applied will lead the court to a conclusion,” from an “approach” . . . which does no more than state what factor or factors should be considered in arriving at a conclusion”). Roosevelt and Bethan Jones imply that Reese characterized the *Restatement (Second)* as embodying an approach. Kermit Roosevelt III & Bethan R. Jones, *The Draft Restatement (Third) of Conflict of Laws: A Response to Brilmayer and Listwa*, 128 YALE L.J.F. 293, 296 (2018). This is not correct. Reese referred to the *Restatement (Second)*’s Section 6 as an example of an approach, see Reese, *supra*, at 315 n.1; however, he understood the *Restatement* more generally as providing rules that “usually” applied, *id.* at 325. This is essentially the same structure that Roosevelt and Jones associate with the *Draft Restatement*, that is, a system of rules but with exceptions. Roosevelt & Jones, *supra*. The primary difference is that Roosevelt and Jones see the *Draft Restatement*’s rules as having greater presumptive weight.

Roosevelt and Jones argue that it is misleading to refer to Section 6 of the *Restatement (Second)* as an “escape clause,” given that many scholars emphasize that Section’s most-significant-relationship test as the *Restatement*’s central feature. Roosevelt & Jones, *supra*, at 299–300. Respectfully, we believe that Roosevelt and Jones may have allowed scholarly characterizations of the *Restatement* to eclipse both how it is structured and how it is used. The *Restatement (Second)* does contain presumptive black-letter rules and courts do rely on them. Any exhaustive display of this fact is beyond the scope of this Essay, but simple review of recently decided cases involving choice-of-law issues supports this point. See, e.g., *Adeli v. Silverstar Auto., Inc.*, No. 5:17-CV-05224, 2018 WL 4374194, at \*3 (W.D. Ark. Sept. 13, 2018) (citing RESTATEMENT (SECOND), *supra* note 1, § 145 in support of the proposition that “[f]raudulent misrepresentation is widely considered to be tort based,” which the court then relies upon in concluding that “Arkansas’s choice of law rules for torts” apply to the case); *SPBS, Inc. v. Mobley*, No. 4:18-CV-00391, 2018 WL 4185522, at \*11 (E.D. Tex. Aug. 31, 2018) (citing RESTATEMENT (SECOND), *supra* note 1, § 187(1) for the proposition that “the law of the state chosen by the parties to govern their contractual rights and duties will be applied”); *TNR Logistics Co. v. Status Logistics Corp.*, No. 17-CV-4636 (RJD) (ST), 2018 WL 4062633, at \*5 (E.D.N.Y. Aug. 27, 2018) (citing RESTATEMENT (SECOND), *supra* note 1, § 197 for proposition that “[g]enerally, the default rule is that in a case for the transportation of goods, the origin state’s law would govern”). While it is true that many cases simply cite the “most significant relationship test” found in Section 6 without ever referring to the presumptive rules, the *Restatement (Second)* does contain both rules that “usually” apply and an escape clause, and courts do, in fact, invoke those rules as defaults.

26. See, e.g., RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 6.02 (AM. LAW INST., Council Draft No. 3, Oct. 3, 2017) (categorizing punitive damages as a “conduct-regulating issue”); *id.* § 7.01 (“The law of the state where real property is located governs.”); *id.* § 8.01 (“Contract issues are resolved by the law chosen by the parties in accordance with the rule of § 8.02.”).

assumptions of the *Restatement (Third)* are rooted in the newly formulated “two-step” approach, the cash value of the theory is all in the currency of traditional rules.<sup>27</sup>

The *Draft Restatement’s* relative silence on the reasons for retaining the rules-based method cannot be attributed to a lack of awareness of its significance. “Rules or approach?” has been a perennial question in choice-of-law debates. When the *Restatement (Second)* was written, the question of whether to retain the rules-based formulation of the *Restatement (First)*’s choice-of-law rules was very controversial;<sup>28</sup> opposition to choice-of-law rules was part of what caused Currie, for example, to reject the *Restatement (Second)* project altogether.<sup>29</sup> The *Draft Restatement’s* deliberate retention of a rules-based method is therefore noteworthy.

The *Draft Restatement* approach, in sum, is a blend of rule-based decision-making and ad hoc analysis of substantive policy. The obvious question, then, is which trend prevails when rule-based and case-by-case decision-making don’t reach the same outcome. The *Draft Restatement’s* answer is clear. If you’re a judge, what matters is the rules. The new *Restatement* explicitly provides that courts should use the rules that appear in the *Restatement* and not employ “two-step” theory directly to decide cases: “[W]e do not expect courts, except in rare cases where no Restatement rule provides guidance, to perform a “two-step” analysis themselves.”<sup>30</sup> This does not mean that the black letter will always be applied in literal fashion; the rules themselves certainly provide exceptions. But this just

27. See *infra* Part III.

28. Willis Reese, chief drafter of the *Restatement (Second)*, criticized approaches like governmental interest analysis as facilitating “a judicial masquerade.” Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 510-11 (1983). Alfred Hill, another early critic of Currie, defended the rules-based system, noting the “shallowness” of judicial reasoning when the *Restatement (Second)*’s specific rules are not applied. Hill, *supra* note 19, at 538. In contrast, other contemporaries strongly criticized the *Restatement (Second)*’s reliance on rules. See, e.g., BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 183 (1963) (“We would be better off without choice-of-law rules.”); Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230 (1965) (arguing that the entire idea of a restatement is inappropriate in the context of conflict of laws); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1584 (1966) (criticizing the *Restatement (Second)*’s “mechanical rules,” instead offering his own approach-based method).

29. CURRIE, *supra* note 28, at 52 (“A choice of law rules is an empty and bloodless thing.”); *id.* at 180 (“The rules . . . have not worked and cannot be made to work . . . . In attempting to use the rules we encounter difficulties that stem not from the fact that the particular rules are bad, . . . but rather from the fact that we have such rules at all.”); *id.* at 183 (“We would be better off without choice-of-law rules.”).

30. Kermit Roosevelt et al., *Reporters’ Memorandum*, in DRAFT RESTATEMENT, *supra* note 3, at xv.

underscores the predominance of the rules, because no exception exists unless the rules so specify.

If you're not a judge—in particular, if you're an expert involved in helping to devise the rules—what matters is different. “Two-step” principles provide the theoretical basis for the choice of law project and thereby determine what the rules should say. The rules are described in the *Draft Restatement* as having been “derived” from or “generated” by the logic and values of “two-step” theory.<sup>31</sup> Although the rules have the last word—they are what is used to decide cases—they owe their content to the “two-step” method. Or so it is claimed. As we describe in the next part, what claim the *Draft Restatement's* rules have to being derived through the “two-step” method is questionable at best.

## II. INSTITUTIONAL COMPETENCE

The *Draft Restatement* purports to merge the old and new; to reconcile “two-step” thinking with decision-making based on generalized rules; and to marry the foundations of modern choice of law to traditional values of predictability, simplification of the judicial task, and uniformity. The results of the *Restatement (Second)*'s efforts to balance these competing considerations had been somewhat disappointing.<sup>32</sup> Having survived that discouraging experience, the ALI took stock and decided it was worth another try. Is the prognosis any better now? We are pessimistic. The marriage that the *Restatement (Third)* is trying to arrange between modern choice of law theory and traditional values is transparently a marriage of convenience, fraught with irreconcilable differences, and destined eventually to collapse of its own internal contradictions.

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31. The *Draft Restatement* explains that the “two-step” model allows “users of the Restatement [to] understand how the rules were derived.” *Id.*; see also *id.* at xvi (“[The “two-step” model] describes the choice-of-law process in a way that allows users of the Restatement to understand how the rules were generated and what they were intended to achieve.”).

32. Commentators have generally characterized the *Restatement (Second)*'s attempt to bring these disparate ends together as a failure. See, e.g., Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 8 (1991) (referring to the *Restatement (Second)* as a “hodgepodge of all theories”); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 321 n.149 (1990) (characterizing the result as having “no explanatory power”); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 253 (1992) (“Trying to be all things to all people, it produced mush.”); Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2466 (1999) (characterizing the *Restatement (Second)* as “synthesizing a wide range of insights into an indigestible stew”); Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 77 (1989) (arguing that the *Restatement (Second)* “mystifies rather than clarifies”).

In short, the “two-step” theory does not legitimize reliance on the decisions made by a group of outside experts, such as ALI reporters and advisory groups, on the basis of a survey of case law. The core of the “two-step” theory is that choice-of-law questions can be resolved through attention to a given law’s scope. But the drafters of a restatement are simply not well positioned to provide definitive guidance with regard to any particular statute’s scope. They lack the requisite institutional capacity. They offer neither the authority of a state court to declare the scope of its state statute as a matter of law nor the sort of particularized analysis that grounds a persuasive argument from statutory interpretation.

In this Part, we articulate our primary critique: the drafters of a conflicts restatement fundamentally lack the institutional competence to provide rules for determining the scope of a particular state statute. This argument has two elements. First, we explain that the drafters, as outside experts, do not possess the authority of state judges to make the policy decisions that are near-inevitably involved in determining the scope of a particular statute. When a state’s statute has a gap in it, the courts of that state have the authority to fill it in, much as they can engage in common law rulemaking more generally. This is an attribute that outside experts simply do not possess. As such, the gap-filling engaged in by the expert restatement drafters cannot be deferred to by third party interpreters—such as a court seeking to know the scope of a sister-state’s law—as representing the intentions of any particular state. The only authority such drafter-crafted rules can have, then, is anchored in the degree to which they effectively capture the intentions of the relevant sister state.

The *Draft Restatement*, however, does not have a strong claim to this sort of authority. In the second section of this Part, we argue that the method by which the *Draft Restatement’s* rules were crafted—through the consideration of hypothetical, prototypical statutes and the identification of dominant positions in the case law—cannot be persuasive to a judge that takes seriously the notion that particularized interpretation, utilizing standard methodologies, should determine a statute’s scope. The “two-step” theory rests on the notion that one should uncover the scope of a statute through the “ordinary” process of statutory interpretation. But, the type of “statutory interpretation” undertaken by outside experts in drafting choice-of-law rules is intrinsically different from the type of “statutory interpretation” that actual judges perform. The former does not address specific statutes but only generalizes about “statutes of this sort” through the surveying of cases on a national level. This process has little in common with the latter form of construction, in which state courts examine particular statutes, their text, their history, and their context.

To convince a judge who embraces the “two-step” theory that it is the law of State A and not State B that should apply in a given case, one would do well to offer a careful analysis of the laws of States A and B, showing how—as a matter

of statutory interpretation – the present case falls outside the scope of B’s law but within A’s. What would be less convincing would be a general statement that other courts, when presented with similar fact patterns, have applied the law of one state or another. But that is essentially what a citation to a restatement rule is: a statement not of what the particular laws in question demand, but rather what result would be consistent with national practice. We are not saying that this is not valuable information for the court. But we are saying that there is a deep incompatibility between the method of resolving conflicts of law advocated by the “two-step” theory and the very notion of a rules-based restatement.

#### A. Statutory Construction

Statutory construction requires gap-filling, especially when the question at issue is a statute’s application in multistate contexts. The first issue with the *Draft Restatement*, then, is that it relies on outside experts – the drafters of the *Restatement* themselves – to engage in this gap filling. But outsiders cannot speak with the authentic, authoritative voice of the states – at most, they can be persuasive to the court. This Section explains why that poses a sharp problem given the theoretical commitments of the *Draft Restatement*.

The *Draft Restatement* emphasizes statutory construction as the essential element in the determination of the scope of state law. The *Restatement*, in common with other modern choice-of-law theories, views the promotion of state substantive policies as the underlying purpose of the choice of law process.<sup>33</sup> Sometimes it is straightforward and obvious what these policies are and how to fulfill them, because some statutes are clear and comprehensive. But frequently statutes are neither. Frequently – according to the modern theory of statutory construction – statutes are either plagued by gaps and ambiguities or completely silent.<sup>34</sup> Statutory construction is then (it is argued) the way to determine the statute’s proper scope.<sup>35</sup>

There is general agreement that legislative intent is authoritative when intent can be determined;<sup>36</sup> the question is what to do when a diligent search of the

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33. See DRAFT RESTATEMENT, *supra* note 3, ch. 5 intro.

34. See Robert A. Katzmann, *Response to Judge Kavanaugh’s Review of Judging Statutes*, 129 HARV. L. REV. F. 388, 398 (2016).

35. Kermit Roosevelt III & Bethan Jones, *What a Third Restatement of Conflict of Laws Can Do*, 110 AJIL UNBOUND 139, 142-43 (2016); Brilmayer & Seidell, *supra* note 6.

36. See Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1343 (2018); see also Daniel B. Listwa, Comment, *Uncovering the Codifier’s Canon: How Codification Informs Interpretation*,

legislative record produces no clues. Many choice-of-law scholars today have taken the position that no amount of interpretation could find choice-of-law meaning in the typical empty statutory record.<sup>37</sup> The modernists were seeing mirages—the reflections of their own value judgments.<sup>38</sup> This standard objection was met by a standard rejoinder, based on the state court’s institutional competence. Whether the issue is domestic or multistate, modern choice of law theorists have insisted, is not important; a state court possesses the necessary authority to identify the purposes underlying a statute. For the same reasons that apply to purely domestic aspects of state policy, the multistate extension, or “scope,” of a law must be determined by statutory interpretation. This is true even when no legislative provision has been made for multistate extension; the judge is empowered to declare state policies on the state’s behalf and to determine how best to achieve them. This includes the statute’s scope.

The *Draft Restatement* argues—correctly—that the decisions of a state’s official organs are its sole authentic voice:

The Third Restatement takes the view that . . . the scope of a state’s law is a question of the substance and meaning of that law and, subject to constitutional constraints, is within the authority of that state’s lawmakers. This position . . . follows Currie’s repeated statements that determining the scope of a state law is like any other question about interpreting that law . . . . [Additionally], it helps to align choice of law with the remainder of American law, which follows the principle that the substance and meaning of a state’s law are within the control of that state’s lawmakers. In general, whether a state’s law attaches legal consequences to certain transactions or events is deemed to be a question under that state’s law, with respect to which the courts and legislature of that state are authoritative.<sup>39</sup>

It follows from the principle of judicial competence to declare the law that it does not matter whether a determination of scope is based on convincing evidence of legislative preference, unconvincing evidence, or, indeed, no evidence at all. Regardless of the evidence or lack thereof supporting the judge’s

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127 YALE L.J. 464, 472 (2017) (discussing the role of indicators of legislative intent for textualist interpreters).

37. See, e.g., KERMIT ROOSEVELT III, *CONFLICT OF LAWS* 37 (2d ed. 2015) (“[L]egislatures tend to think exclusively about the purely domestic case. How their statutes are supposed to operate in multistate cases typically receives no consideration.”).

38. See Brilmayer, *supra* note 15, at 393.

39. RESTATEMENT (THIRD) OF CONFLICT OF LAWS ch. 1 intro. at xvii (AM. LAW INST., Preliminary Draft No. 2, Aug. 12, 2016).

interpretation of multistate scope, the court's institutional role is implicated and the decision must be respected.

This argument makes a certain amount of sense when a court is interpreting one of its own state's statutes. The institutional competence argument applies to courts, legislatures, and executive branches of state government that are empowered to exercise governmental authority to enforce substantive rules of decision. Their official lawmaking authority, based on their status as state officials, entitles them to deference.

A problem undeniably arises, however, when one attempts to merge a model of reporter-crafted rules with the methodology of statutory construction and interpretation. The logic of deference to state authority does not apply when the authors of the rules are not state officials but outside experts. Deference to the policy decisions made by official state institutions does not provide a reason for following rules published in a restatement. This institutional competence argument does not apply to decisions made by committees of legal academics, judges from other states, and members of the practicing bar.

#### *B. A Fundamentally Different Task*

The lack of institutional competence is particularly apparent when one recalls that for each substantive issue the *Draft Restatement* posits a single interpretation for an entire federal system composed of fifty individual states. If the result in a case turns on whether the forum's guest statute applies, one consults the *Restatement* rules to determine the general scope of guest statutes. The *Restatement* does not supply the scope of the Alabama guest statute, the scope of the Alaska guest statute, the scope of the Arizona guest statute, the scope of the Arkansas guest statute, and so on. Yet that is precisely what authentic statutory construction would require. Interpreting the Alabama guest statute would require consulting legislative background on the Alabama legislative process; and so on for Alaska, Arizona, and Arkansas. The Alabama, Alaska, Arizona, or Arkansas judge does not give equal credence to background materials from all fifty different states; it privileges the legislative materials underlying its own state's legislation, in a process that the *Draft Restatement* drafters obviously do not attempt.

It follows, therefore, that the drafters of the *Restatement* cannot be anything more than persuasive authority as to the meaning and scope of a particular state statute. The *Draft Restatement*, then, is no more authoritative than a law journal article, a treatise, or a precedent from another jurisdiction. The "two-step" theory demands, in principle, particularized interpretation of the statutes involved in the individual case, but the *Draft Restatement* trades in generalized conclusions

made without ever studying the particular statutes involved in the case at hand. That is not statutory construction; it does not seriously attempt to be.

Consider the position of a state court judge determining the multistate scope of her state's punitive damages law. Assume that this judge is faced with a choice between forum law – namely, the law of California – and Nevada law. The *Draft Restatement* describes the interpretive process as follows:

*c. Scope of laws.* 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*: by constitutions, treaties, and statutes, and from precedent, from considerations of ethical and social need and of public policy in general, from analogy, and from other forms of legal reasoning.<sup>40</sup>

So far, so good. The California judge interprets California law by consulting the California Constitution, statutes, and case law as well as California public policy, economic, and ethical concerns, and so forth. This is *authentic* statutory interpretation, and the *authentic* original understanding of the “two-step” approach requires this sort of inquiry.

Now consider the outside expert making a determination about the proper scope of a punitive damages law for purposes of formulating a *Restatement (Third)* choice-of-law rule. He or she is not purporting to interpret the law of California, of Nevada, or of any other specific state. If it were some particular state, what state would it be? There is no reason to pick out any particular state – at the time of writing, the California case has not even arisen. The *Draft Restatement* does not, of course, claim that the expert is interpreting California law; it describes the expert's analytical process as follows:

The rules of this Restatement have been derived through the two-step process described in Comment *b* to § 5.01, *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 by identifying the state with the dominant interest.<sup>41</sup>

This process is quite unlike the *Restatement's* description of the state judge's interpretation of his or her own state's law, quoted above.

Without any specific body of law to consult, the expert can only generalize about the “likely” scope of state laws, or hypothesize about their “likely or generally accepted purposes.” The conclusion that he or she reaches is not an

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40. DRAFT RESTATEMENT, *supra* note 39, § 5.01 cmt. c (emphasis added).

41. *Id.* § 5.02(2) cmt. c (emphasis added).

interpretation of some particular statute, but rather a “posited” interpretation based on generalized notions of what states (supposedly) usually want when they adopt legislation of a certain sort. It is not *authentic* statutory construction based on a specific state’s statutes, case law, and so forth; it is at best some form of *stylized* statutory construction.

Puzzlingly, while the *Draft Restatement* casts its net too broadly when “interpreting” the scope of a particular state statute for multistate purposes, it also restricts the judge to an overly narrow definition of the sorts of authority that should be taken into account in resolving conflicts of laws. Although most judges will generally look broadly to his or her jurisdiction’s other statutes and common law when interpreting a particular law,<sup>42</sup> the *Restatement* takes a highly restrictive view of where a judge should look in construing a statute’s scope. For example, the *Draft Restatement* states that a judge should not look to a state’s choice-of-law rules – either judicial or statutory – when seeking to determine the scope of that state’s law.<sup>43</sup> Instead, only a statutory proviso specifying the scope would justify concluding that the statute’s scope differs from that which was assumed by the *Restatement* drafters.<sup>44</sup>

The *Draft Restatement* justifies this limitation as reflecting the basic foundations of the “two-step” model. Since scope and priority are separate concepts, a statute must distinctly “address[] both steps of [the “two-step”] process: the scope of the state’s own law and the treatment of conflicting foreign law.”<sup>45</sup> Such a rule can be justified in terms of administrability – the role of the judge is simplified if she need not look beyond the face of the substantive statute to determine its scope – but there are strong jurisprudential reasons to be suspicious.<sup>46</sup>

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42. Invoking the “whole code canon,” judges frequently seek to resolve gaps in a statute by seeking coherence with other laws. See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 863, 1066 (4th ed. 2007). As Justice Scalia explained, a statute should be given the meaning “most compatible with the surrounding body of law into which the provision must be integrated – a compatibility which, by a benign fiction, we assume Congress always has in mind.” *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

43. See *DRAFT RESTATEMENT*, *supra* note 39, § 5.01 cmt. c. (“A foreign state’s choice-of-law rules and decisions are generally not taken to set the scope of that state’s internal law.”).

44. See *id.* § 5.03 cmt. b.

45. *Id.* § 5.02(1) cmt. a.

46. Unlike the “benign fiction” that a legislature seeks to construct its laws coherently, see *supra* note 42, it is farfetched to imagine that state legislatures understand the distinction between scope and priority as it applies to conflict of laws. In fact, as Roosevelt has written, “State legislatures seldom think about scope, and they never think about priority as a separate issue.” ROOSEVELT, *supra* note 37, at 38. Given that legislature’s do not have this conceptual distinction in mind, it would be perfectly reasonable to interpret a conflict-of-law rules directing, for

The end result is that judges are directed to engage in a more constrained form of interpretation in the multistate context than they would in the domestic sphere. Indeed, judges are instructed to defer to the generic interpretive conclusions drawn without regard to the particular statutes in question. As with the *Draft Restatement's* reliance on stylized interpretation, no effort is made to bring multistate "interpretation" into line with domestic practice.

To summarize, although the "two-step" theory is grounded in the notion that conflict-of-law questions can be resolved through the "ordinary" process of statutory interpretation, the *Draft Restatement* codifies an interpretive methodology that only vaguely resembles interpretation in the domestic context. First, the drafter derived the rules not by individually analyzing state statutes, but rather by observing national trends and positing the scope these statutes are "likely" to have. Second, the *Draft Restatement* directs judges to defer to these rules and ignore all but the more glaring of indications that the states in question might have had differing visions for how the relevant statutes would be applied. As a result, an application of the *Draft Restatement's* prescribed methodology to a particular resolution would never involve the sort of particularized statutory examination upon which the "two-step" theory relies.

Kermit Roosevelt and Bethan Jones's response to this critique does nothing to bridge the gaping methodological divide between judges deciding scope in purely domestic disputes (do bikes fall within the scope of a "no vehicles in the park" statute?), judges deciding scope in choice of law disputes (does California's tort statute cover this bike accident in Nevada?), and the *Restatement* drafters deciding scope without regard to any particular dispute (does a state's tort statute cover accidents involving domiciliaries abroad?). If anything, their attempted rehabilitation of the *Draft Restatement's* theory of statutory interpretation only reinforces our point.

Focusing on torts, Roosevelt and Jones explain that the *Draft Restatement* "tends to presume relatively broad scope."<sup>47</sup> This presumption, they say, is "supported by the cases of which [they] are aware,"<sup>48</sup> noting their methodology "is to look at current choice-of-law decisions under the *Restatement (Second)*, other modern approaches, foreign-country systems, and even the practice of territorial states."<sup>49</sup> Although they acknowledge that this broad presumption will not always be appropriate, the "error," they suggest, "will be harmless," because the second step's reliance on "territorial connecting factors" to determine priority

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example, that the state's own punitive damages law should apply in any tort dispute involving one of its citizens might have implications for both questions of priority and scope.

47. Roosevelt & Jones, *supra* note 25, at 308.

48. *Id.* at 309.

49. *Id.* at 298.

means that a state's tort law will usually not be applied extraterritorially.<sup>50</sup> This may sound all well and good, but it does *not* sound like statutory interpretation. Indeed, by this description, any correspondence between what the *Draft Restatement* dictates and the result that would be reached by a judge applying the “two-step” seems largely coincidental.<sup>51</sup>

That does not mean, however, that this sort of reasoning is an inappropriate means of arriving at presumptive rules that may be useful to courts. In fact, we endorse these sorts of rules as valuable.<sup>52</sup> But, it is clear that observing case law on a national scale is not the sort of individualistic determinization of statutory scope demanded by “two-step” theory. In deriving these rules, the drafters relied on past choice-of-law decisions as evidence of the implicated statutes' scope—despite the *Draft Restatement* explicitly directing judges not to rely on such case law when determining a statute's scope.<sup>53</sup> This fact only accentuates the stark divide between what the *Draft Restatement* characterizes as the “ordinary” legal analysis that should be used to determine a statute's scope and the methods actually used to develop the *Draft Restatement's* rules.

These differences matter because they reveal that the drafters forming the rules embodied in the *Draft Restatement* are engaged in task fundamentally different from judges individually applying the “two-step” theory to resolve choice-of-law disputes. A state's judge can exercise its authority to fill in statutory gaps in its own state's law or, when interpreting a sister-state's statute, it can engage in the close, particularized analysis that typifies statutory interpretation. The drafters of the *Restatement (Third)*, on the other hand, can do neither of these things. For this reason, the “two-step” theory, whatever its virtues more generally, cannot provide the legitimizing foundation to the *Restatement (Third)* that Roosevelt and Jones impute to it. The rules that the *Draft Restatement* promulgates are not, and (for both theoretical and practical reason) cannot be, authoritative expressions of the policies underlying the statutes implicated by a particular multistate case.<sup>54</sup> The reasons why the problem cannot be remedied through

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50. *Id.* at 309-10.

51. It also sounds very similar to the presumptions underlying the *Restatement (Second)*. See *supra* note 10.

52. See *infra* notes 78-81 and accompanying text.

53. See *supra* note 43 and accompanying text.

54. As the *Draft Restatement* acknowledges, it “is a basic principle . . . of our constitutional system of federalism” that each state is the authoritative determiner of “the scope and content of its own law.” DRAFT RESTATEMENT, *supra* note 3, § 5.01 cmt. c, reporters' notes, at 119 (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) and *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)). The *Draft Restatement* does not—by its own terms—direct the judge to ignore

creation of exceptions to the *Draft Restatement* rules is the next topic of discussion.

### III. EXCEPTIONS TO THE GENERAL RULES IN THE *DRAFT RESTATEMENT (THIRD)*

The *Draft Restatement's* use of choice-of-law rules must be assessed realistically, in light of the prior debate over “rules versus approach” and with appreciation for what the current project’s drafters hope to achieve. Roosevelt and Jones describe the *Restatement (Third)*’s major objective as curing the *Restatement (Second)*’s tendency for its exceptions to swallow its rules.<sup>55</sup> This is a laudable goal. But it is directly in tension with its desire to put choice of law on a more solid theoretical foundation through the adoption of the “two-step” method.

The *Draft Restatement* attempts to ease this tension, once again, through exceptions. In its provisions on exceptions to general *Restatement* rules, the *Draft Restatement* recognizes in theory that exceptions are warranted where the *Restatement's* rules are based on policy presumptions that do not align with the statutes and factual circumstances involved. We call this “the exception for divergent scope.” But the problem of such misalignments is so pervasive—it can, potentially, occur in any case—that relying on this exception to remedy the problem of divergent scope risks the creation of loopholes as wide as the ones that brought disrepute upon the *Restatement (Second)*. Thus, in attempting to adhere to its theoretical commitments, as exemplified by the “two-step” theory, the *Draft Restatement* risks undermining its practical goals, to provide a functional set of rules. In the following Sections, we outline the *Draft Restatement's* exception provision and discuss how these problems arise.

#### A. *Exceptions and “Exceptional Circumstances”*

The *Restatement (Third)* sets out to reduce the prevalence of exceptions; its predecessor had recognized so many loopholes that they threatened to swallow up the rules. Roosevelt, its Reporter, and Jones have explained that the creation of an amorphous and elastic escape hatch “increases judicial workload, reduces predictability and uniformity,” and potentially “produce[s] considerable error.”<sup>56</sup> Their solution, looking forward, is that “[t]he first and most obvious thing that a Third Restatement can do is to bring greater predictability to choice of law by

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what a state has said with regard to a statute’s scope; but in limiting the interpretive sources that can be invoked in construing the scope, it essentially dictates interpretive methodology.

55. Roosevelt & Jones, *supra* note 35, at 141.

56. *Id.*

providing more determinate rules, rather than open-ended balancing.”<sup>57</sup> The *Restatement (Third)* therefore puts greater emphasis on respect for its established rules than the *Restatement (Second)* did—instead of mere “presumptions,” the *Draft Restatements* offers rules applicable in all but “exceptional circumstances.”<sup>58</sup>

The *Draft Restatement*, for one thing, attaches threshold conditions that must be satisfied before creation of an exception can be considered. Section 5.03, the *Draft Restatement’s* exceptions provision, provides that the *Restatement’s* rules are to be applied unless “a case presents exceptional circumstances that make the application of a different state’s law manifestly more appropriate.”<sup>59</sup> In such a case, the latter state’s law should be applied.<sup>60</sup>

The phrase “exceptional circumstances” is defined by conditions set out in the comments.<sup>61</sup> Two examples are provided. One of these, identified in Comment b (while not entirely clear) seems to indicate that an exceptional case may exist where there are “connecting factors” that were not contemplated by the drafters of the *Restatement*.<sup>62</sup> This example illustrates the difficulties that the drafters had in identifying in advance the sorts of exceptions that would be considered warranted. The other condition is more interesting from the point of view of “two-step” methodology. To use terminology employed above, by way of this exception the *Draft Restatement* addresses the situation where the “authentic” scope and the “stylized” scope diverge.

#### B. The “Divergent Scope” Exception

The second exception acknowledges that if “a state specifies the scope of its law in a way that diverges from the scope posited for the purposes of creating a rule in this *Restatement*, that *Restatement* rule may produce an arbitrary result.”<sup>63</sup> This identification of a type of “exceptional circumstance” seems tailor-made to deal with problem we identified in Part II: where the drafters of a general rule simply posit or hypothesize what the policy might be in the substantive area in question, and use it to determine choice of law results for all fifty states. This

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57. *Id.*

58. In contrast to the rules of the *Restatement (Second)*, which were “presumptions . . . not intended to bear any weight,” *id.*, the *Draft Restatement* only allows diverging from the rules in “exceptional circumstances,” see DRAFT RESTATEMENT, *supra* note 3, § 5.03.

59. DRAFT RESTATEMENT, *supra* note 3, § 5.03.

60. *Id.*

61. *Id.* § 5.03 cmts. a-b.

62. *Id.* § 5.03 cmt. b.

63. *Id.* § 5.02(2) cmt. c.

provision deals specifically with what to do when the *Restatement* rule relies on an assumption about underlying policies different from the policies that actually motivated the relevant state legislature. The problem can be illustrated concretely.

We gave an example above of a California judge who must choose between Nevada and California law. Assume that the case involves a California bar owner who negligently serves a drink to an intoxicated Californian driver, leading to an accident in Nevada. California law (let us assume) provides for punitive damages while Nevada law does not. Under Section 6.05 of the *Draft Restatement*, “[w]hen conduct in one state causes injury in another, the law of the state of conduct will govern an issue of conduct regulation.”<sup>64</sup> Since the availability of punitive damages is conduct regulating, according to the *Draft Restatement*, California’s law applies to the hypothetical suit.<sup>65</sup>

The decision to apply California’s punitive damages law involves a judgment about the relevant statute’s scope. And yet in the simple rule-based analysis of the *Draft Restatement*, choice of California law is made without either the judge who is charged with deciding the case or the drafters of Section 6.05 ever so much as having looked at the statute. The need to produce a uniform rule, and to do so long before any particular litigation arises, necessitates a stylized assessment of legislative purposes and scope that will match the states’ actual purposes and scopes in at most some fraction of the actual disputes.

Now assume that the California judge, recognizing the potential importance of California policy on the matter of punitive damages in dram shop act cases, examines all of the relevant sources of California legal authority and determines that the intended scope of California law is limited to injuries occurring in the state. The authentic and the stylized scope diverge. This is hardly an implausible scenario; there will be times that exactly this situation eventuates. How frequently it arises will depend on whether most of the fifty states are agreed on scope, and whether the *Restatement* drafters have successfully anticipated their views.

If the *Draft Restatement* rule is applicable as written (that is, bereft of exceptions) the California judge is obliged to apply California law to the Nevada injury *even if he or she can tell that the Restatement’s stylized rule is different from what the California legislature had in mind*. The requirement that the judge apply a rule based on an inaccurate generalization is particularly galling because it is California’s own substantive law and policies that are at stake. It is one thing for the rule to rely on a stylized interpretation of the law of other states; the California judge would perhaps welcome the opportunity to simplify its inquiry into the

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64. *Id.* § 6.05.

65. *Id.*

law of Nevada. But the *Draft Restatement* rule (as written, without exceptions) apparently requires the California court to apply a rule based on a simplified version of its own law as well.<sup>66</sup>

Apparently with precisely this problem in mind, Comment c to Section 5.02 comes to the rescue. Comment c states that it may count as an “exceptional circumstance” warranting creation of an exception to the general rule if “a state specifies the scope of its law in a way that diverges from the scope posited for the purposes of creating a rule in this Restatement, that Restatement rule may produce an arbitrary result.”<sup>67</sup>

However, Comment c’s example of divergent scope as an “exceptional circumstance” does not solve the problem of stylized statutory interpretation. The first reason is that, in creating an exception to a *Restatement* rule, the existence of exceptional circumstances is only the first hurdle. Once “exceptional circumstances” have been shown, Section 5.03 imposes a second requirement for granting an exception. It must also be the case that the inappropriateness of the assumptions “make[s] application of another state’s law manifestly more appropriate.”<sup>68</sup> Comment c elaborates on the meaning of the phrase by listing a set of factors that ought to be considered by a court when judging whether any given law is “manifestly more appropriate.” There may or may not be such a law; the “manifestly more appropriate” standard was designed to require more than a showing that application of some other state’s law would be “more sensible.”<sup>69</sup> For example, it is possible (and may be the case in our hypothetical example) that neither state deems the fact pattern to be within the scope of its laws.<sup>70</sup> Even though the stylized and authentic scope diverge, the *Restatement* black-letter rule must still be applied. The implication is that the *Draft Restatement* directs court

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66. Although the *Draft Restatement* recognizes that a “statutory specification of scope is part of the state’s internal law,” and thus amendable to a state court’s independent interpretation, *see id.* § 5.02(1) cmt. b, the *Restatement* signals that state courts are discouraged from diverging from its generic rules. For example, by including language in the comments emphasizing that exceptions are reserved for cases in which the “application of a rule produces a significantly arbitrary result,” the court is likely to be left with the impression that it should be reserved in looking beyond the face of the statute for evidence that the scope differs from what the drafters assumed. *See id.* § 5.03 cmt. c.

67. *Id.* § 5.02(2) cmt. c.

68. *Id.* § 5.03 cmt. a.

69. *Id.*

70. Interestingly, the *Restatement* rules seem to contemplate applying state law to fact patterns that do not fall within their scope; this is true even though it categorically claims that a state’s law cannot be applied to such cases. *See, e.g., id.* § 5.02 illus. 3 (“If suit is brought in state X, the X court must follow the directive and cannot select state Y law, even if its choice-of-law analysis would otherwise do so.”)

to place the convenience of its rules over fidelity to substantive law – a troubling result.

Second, this exception is too easy to invoke and too difficult to dispose of. In every case, it is possible that the *Restatement* rule, generated through stylized statutory interpretation, might diverge from what authentic statutory interpretation would demand. Importantly, this potentiality is enough to complicate the litigation even if the authentic statutory scope and the stylized scope are found, on examination, to converge. The reason that proliferation of exceptions is so problematic relates not to the frequency with which exceptions are granted, but to the frequency with which exceptions are raised and therefore must be litigated. Where, as here, the potential for error exists in every case, the party who is dissatisfied with the result required by a rule can always invoke the exception and require determination of the exception's availability.

Determination of whether a threshold condition is satisfied is itself a time-consuming and error-prone process, demanding what amounts to de novo investigation of the relevant laws, which might obviate any savings of time and cost that would result from having rules in the first place.<sup>71</sup> In fact, the situation may be even more complicated than under the *Restatement (Second)*. While the *Restatement (Second)* demanded complicated and unpredictable litigation over the proper balancing of various factors, the *Draft Restatement* not only calls for litigants to argue over the proper balancing, but also requires that they argue how the outcome of that balancing should be weighed against the rule provided by the *Restatement*.<sup>72</sup>

Consider the hypothetical California/Nevada case described above, the party who opposes application of California law can, by citing the “divergent scope” exception,<sup>73</sup> compel litigation to determine both the authentic and the stylized

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71. It is possible to argue, however, that *Draft Restatement* Section 5.03 is not so expansive. As written, the operative word is *may*: if “a state specifies the scope of its law in a way that diverges from the scope posited for the purposes of creating a rule in this Restatement, that Restatement rule *may* produce an arbitrary result.” *Id.* § 5.03 (emphasis added). This solution restricts the availability of exceptions to the general rule, but it does so at a cost of complete uncertainty.

72. The set of factors highlighted in the *Draft Restatement* for determining whether a given law is “manifestly more appropriate” parallels the multi-factor balancing test that characterized Section 6 of the *Restatement (Second)*: “the relevant policies of the forum and other interested states, the relative interests of those states in the particular issue (determined in light of the strength and relevance of the contacts between the states and the issue), and the protection of justified expectations.” *Id.* § 5.03 cmt. c. In this sense, there is reason to believe that the *Draft Restatement's* exception clause will function similarly to that of the *Restatement (Second)*.

73. *Id.* § 5.03 cmt. b. (allowing a possible exception where “a state specifies the scope of its law in a way that diverges from the scope posited for the purpose of creating a rule in this Restatement”).

scope of the two states' legislation. But it may not be obvious what scope the rule's drafters posited when they drafted the rule in the first place, and it may not be clear what the state considered the proper scope to be. If assessment of the availability of the defense requires determination of both the statute's authentic scope and the stylized policies that the *Restatement* drafters imputed to the state law, the *Restatement* imposes precisely the extra costs and uncertainty that it sought to avoid.

It is unclear what response Roosevelt and Jones offer to assuage these concerns. They acknowledge that the rules are merely "sensible interpretations."<sup>74</sup> Further, they argue that the cases in which these presumptions will not apply are "relatively rare."<sup>75</sup> But, if that is the case, the *Restatement (Third)* will find itself in much the same position as the *Restatement (Second)*, offering rules to be applied "usually,"<sup>76</sup> but with the specter of an exception around every corner. This is a recipe for ensuring that the "rules" are relitigated at every turn. Any litigant who finds it to his or her advantage will argue that the *Restatement's* rule should not apply – a fate which befell the *Restatement (Second)* and has led to discussion of the escape clause featuring prominently in many opinions. Yes, the judge will weigh these arguments against the *Restatement's* rule, but what weight should such a rule have? The *Draft Restatement* leaves us only with a phrase – "manifestly more appropriate" – providing no substantive guidance on the issue.<sup>77</sup>

Under the "two-step" theory, what makes a determination of scope authoritative is, as Roosevelt and Jones note, "ordinary legal analysis."<sup>78</sup> But a convincing analysis, especially when statutory interpretation is implicated, is not one that appeals to broad generalizations about what policies states are typically seeking to forward. Rather, the winning argument is often the one that is particularized, with due consideration to such things as the text and legislative history. The *Restatement (Third)* drafters cannot offer such particularized argumentation – it is not within their institutional competence. Thus, at most, the *Restatement's* "rule" will be treated as one factor to be considered in determining which law to apply, but it will not truly be applied in a rule-like fashion. That does not mean the *Restatement (Third)* will lack value – far from it. But it does mean that the *Restatement (Third)* will be more like the *Restatement (Second)* than the drafters may care to admit.

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74. Roosevelt & Jones, *supra* note 25, at 307.

75. *Id.* at 310.

76. Reese, *supra* note 25, at 325.

77. DRAFT RESTATEMENT, *supra* note 3, § 5.03. Roosevelt and Jones's suggestion that an exception is for when the error is "sufficiently gross" is no better. Roosevelt & Jones, *supra* note 25, at 299 n.29.

78. Roosevelt & Jones, *supra* note 25, at 304.

In fact, it is in this kinship with the *Restatement (Second)* that the *Restatement (Third)* offers the most promise. As Roosevelt and Jones say, the drafters of the *Restatement (Third)* are trying “to fulfil Reese’s vision,” looking at past decisions applying the *Restatement (Second)*, as well as other approaches, and deriving from them presumptive rules that courts can adopt when they are themselves confronted with conflicts of law.<sup>79</sup> The *Restatement (Second)* offers a great number of factors to consider, of which the substantive content of the law in question is one, and directs the court to balance those factors. Case law applying the *Restatement (Second)* thus provides insight into how courts have, in their considered judgment, engaged in that balancing; and the *Restatement (Third)* can serve as a source of persuasive authority by synthesizing that insightful case law. In fact, such synthesis is exactly what makes restatements valuable.

We do not deny that the *Restatement (Third)*, by providing that synthesis, will be an advance in the jurisprudence of conflict of laws. What we are concerned with, however, is the theoretical approach that the *Draft Restatement* has embraced and the problematic implications it would have for judges in applying its rules. Judges should look at the *Restatement (Third)*’s rules for helpful guidance on how other courts have balanced the relevant factors. They should then give those rules some weight as they engage in their own context specific analysis. This is a familiar methodology in resolving disputes involving statutory interpretation—it is the same sort of attention to background norms that typifies many canons of statutory interpretation, such as the presumption “in favor of following the common law.”<sup>80</sup>

But what judges cannot do is simply defer to the *Restatement* and accept as the result of “statutory construction” a decision rule derived without attention to the particular laws of the states involved, diverging only when the specific threshold conditions identified by the *Draft Restatement*’s exception provision is met. Based on Roosevelt and Jones’s thoughtful and helpful comments,<sup>81</sup> that is not what they expect or want judges to do—but it is what the *Draft Restatement* suggests. That, we believe, is an issue holding the *Restatement (Third)* back from fully realizing its promise and in need of correction.

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79. *Id.* at 297.

80. WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 431 (2016); see also Daniel B. Listwa & Charles Seidell, Note, *Penalties in Equity: Disgorgement After Kokesh v. SEC*, 35 YALE J. ON REG. 667, 687-89 (2018) (discussing a similar presumption in favor of background norms derived from equity).

81. Roosevelt & Jones, *supra* note 25, at 307-08.

## CONCLUSION

The virtue of the “two-step” theory is that it domesticates conflict of law, setting aside unfamiliar terms like the state’s “interests” and instead relying on the ordinary processes of statutory construction. But while statutory construction might properly explain what an individual court applying the “two-step” would do, the same cannot be said of the *Restatement (Third)* drafters. The drafters cannot be thought to be engaged in the careful state-by-state analysis of individual laws. Rather, they are building upon a set of presumptions about the scope of various types of laws. While a court may have authority to create and defer to such presumptions, the *Restatement (Third)* drafters do not—they lack the institutional competence to create law.

Restatements sometimes set out to be “all things to all people” and that is certainly the case with the present drafting project. The new *Draft Restatement* aspires to achieve both the predictability of rules and the sensitivity to state substantive policy of an ad hoc method. But these goals are fundamentally irreconcilable. The drafters seek to accurately determine “interests” or “scope” and embody them in a general rule; to keep exceptions to the general rule to an absolute minimum; and to do this at a time that it cannot even be known what states will be involved in a particular case and what their laws are. This optimism is surely attractive, but ironically, by promising to retain what was best about the *Restatement (Second)*—its aspirations to a fairly uniform and predictable system of choice of law decision-making—the new *Draft Restatement* simultaneously undercuts its own best argument for adopting the “two-step” method: the claim that state decisions about the multistate scope of their rules of law should be respected.

Roosevelt and Jones have highlighted the “two-step” approach as providing the “theoretical perspective” necessary to form “intelligible” foundation to the *Restatement’s* rules.<sup>82</sup> The virtues of providing such a theory are clear. Judges, practitioners, and academics are more likely to embrace a set of rules that is recommended by the coherency and plausibility of its underlying theory than one that claims authority merely based on the imprimatur of the American Law Institute. In what ways has the project been successful? Our next article, perhaps, will focus on the *Restatement (Third)*’s many successes.<sup>83</sup> We can’t wait.

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82. *Id.* at 311.

83. A current work in progress examines the reasons that a “two-step” methodology might be attractive, and examines whether anything can be done to cure the problems outlined above.

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