CHOICE OF LAW AS STATUTORY INTERPRETATION: THE RISE AND DECLINE OF GOVERNMENTAL INTEREST ANALYSIS

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Governmental interest analysis revolutionized choice of law in the United States and heavily influenced the Second Restatement of the Conflict of Laws*, the most widely followed method of resolving conflicts among the 50 states. The key insight that this legal revolution was based on was that choice of law is a matter of interpreting the substantive laws in question. Proponents claimed legitimacy for the theory on the grounds that it was more faithful to legislative preferences than the then-prevailing approaches. But the theory is based on the highly purposive approach to interpreting statutes championed by the Legal Process School, whose methods dominated statutory interpretation around the time the theory was developed. Since that time, statutory interpretation has undergone a revolution of its own. The high purposivism of the Legal Process School has been mostly repudiated. Few would now maintain, as Brainerd Currie (the father of governmental interest analysis) did, that courts faced with statutory silence on a question should try to imagine how the legislature would have resolved the question.*

This Article critically examines governmental interest analysis in light of the revolution that has occurred in the field of statutory interpretation since Currie elaborated his approach. We agree that choice of law can be understood as a matter of interpreting forum law with respect to its applicability to multi-state cases. But, drawing from the textualist critique of the high purposivism of the Legal Process era, we show that Currie-style governmental interest analysis cannot claim legitimacy as more faithful to legislative preferences than other possible interpretive approaches. Consistent with its general shift away from purposivism in statutory interpretation, the U.S. Supreme Court has updated its approach to federal choice of law through the adoption of a presumption against extraterritoriality. The states, on the other hand, have lagged in bringing these lessons to bear on their choice-of-

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law methodologies, and Currie-style interest analysis survives, albeit tenuously. In the states that continue to follow Currie, governmental interest analysis is frozen in amber, persisting in an environment that has rejected its core premises.

The American Law Institute's current project of elaborating a Third Restatement of the Conflict of Laws *may accelerate the end of Currie-style governmental interest analysis. The draft* Third Restatement *endorses Currie's claim that choice of law is a matter of statutory interpretation (at least in part). At the same time, however, it dramatically revises Currie's legacy by mostly rejecting his purposivist approach to interpretation. The draft* Third Restatement*'s disavowal of an overtly purposivist approach is broadly consistent with the modern critique of purposivism. If the draft* Third Restatement *becomes as widely adopted as the* Second Restatement *was, it would hasten the demise of Currie-style interest analysis.*

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INTRODUCTION

Textualism's rise as a method of statutory interpretation has spawned an avalanche of legal commentary, much of it criticizing the value and legitimacy of purposivism.[1] But a related development has been largely overlooked: the discrediting of Legal Process-style purposivism has quietly eroded the foundations of the most influential approach to choice of law in this country. That approach, known as "governmental interest analysis," now appears to be facing the music. Federal courts have all but abandoned it, and while state courts continue to apply it, they do so haphazardly, its persistence sitting uncomfortably alongside their embrace of non-purposivist methods of statutory interpretation. To the extent it survives, governmental interest analysis is a relic of a prior age, adrift in the current jurisprudential environment. Current efforts by the American Law Institute ("ALI") to chart the future of choice of law reveal that legal commentators are forsaking governmental interest analysis in practice, even while professing fealty to its theoretical foundations. It is now clear that whatever the merits or demerits of the textualism that has largely replaced it, the broad repudiation of a certain form of purposivism is leading to a fundamental reworking of American choice of law. This Article describes and defends this development in U.S. choice of law.

Governmental interest analysis revolutionized choice of law in the United States, largely displacing the approach that had previously prevailed here and that still prevails in most of the rest of the world.[2] The key insight that this legal revolution was based on was that choice of law is a matter of interpreting the substantive laws in question.[3] As explained by Brainerd Currie, the theorist behind

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1. For defenses of textualism (constitutional and statutory), see Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 23–25 (Amy Gutmann ed., 2018); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 96–109 (2006); and Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 27–28 (2000). For critiques, see William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479–92 (1987); Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 120–22 (2009); and VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 64–68 (2016).

2. *See generally* Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983); Patrick J. Borchers, *The Choice-Of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357 (1992); SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE (2006).

3. *See, e.g.*, RESTATEMENT (THIRD) OF CONFLICT OF L. ch. 5, topic 1, intro. note (AM. L. INST., Tentative Draft No. 3, 2022) ("Professor Brainerd Currie pointed out that the process of deciding whether a state's law was relevant to a case by determining whether the policies behind it were implicated by the facts of a case was the same process used in ordinary domestic cases to decide whether a particular set of facts fell within the scope of a law. This part of choice of law, he said, could be understood as ordinary legal analysis."); Kermit Roosevelt III & Bethan R. Jones, *The* Draft Restatement (Third) of Conflict of Laws*: A Response to Brilmayer & Listwa*, 128 YALE L.J. F. 293, 303 (2018). Currie himself seemed to treat this as a novel claim. *See* Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 177–78 (1959).

governmental interest analysis, the choice-of-law process "is essentially the familiar [process] of construction or interpretation."[4] If the legislature has addressed a law's applicability to cases having foreign elements, the court follows the legislature's direction. But usually, a legislature enacts laws without addressing their multi-state applicability.[5] Even in the face of legislative silence on this question, however, the question for Currie remained one of interpretation: "Just as we determine by [the] process [of statutory interpretation] how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose."[6]

On closer examination, it turns out that Currie's true innovation was not to regard choice of law as a matter of interpretation, but rather to bring *a particular approach to interpretation* to bear on the question. The traditional choice-of-law rules already operated as substantive canons of interpretation, implicitly limiting the multi-state applicability of forum law in the absence of a contrary legislative instruction.[7] Currie's approach to interpretation differed. He adopted the approach that prevailed at the time he was writing, leading him to interpret laws as to their multi-state applicability "in order to effectuate the legislative purpose."[8] Currie

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4. Currie, *supra* note 3, at 178.

5. We use the term "multi-state applicability" to refer to a statute's applicability to cases having out-of-state elements—such as a case that involves some out-of-state conduct or an out-of-state party. We distinguish such cases from cases where all of the conduct took place in the same state and all of the parties are from the state, which we refer to as the purely internal case. We use the term "state" to include both states of the United States (New York, California) and states in the international sense (France, India).

The draft *Third Restatement* prefers to refer to a law's multi-state *scope* or *reach*. *See infra* Section V.A; RESTATEMENT (THIRD) OF CONFLICT OF L. § 5.01 cmt. B (AM. L. INST., Tentative Draft No. 3, 2023). We avoid those terms to remain agnostic about the draft *Third Restatement*'s view that the relevant question (in the first step of the analysis it proposes) is the substantive scope or reach of the law. An alternative way to understand the question is as relating to whether forum courts should *apply* a given law to a multi-state case even if the law technically reaches the case as a substantive matter. *See* Carlos M. Vázquez, *Non-Extraterritoriality*, 137 HARV. L. REV. 1290, 1347–53 (2024). This is the way the draft *Third Restatement* understands the second step of the analysis, and we think the first step can be understood this way as well. *See id.* Currie himself appears to have understood the question at the first step in this sense. *See id.* at 1320 n.133. For a discussion of the two ways of understanding the question, see *infra* Section V.B. Because we do not take a position on this question here, we use the more inclusive term "multi-state applicability."

6. Currie, *supra* note 3, at 178.

7. *See infra* note 37 and accompanying text. Indeed, the idea that choice of law is about statutory interpretation has ancient roots. *See* Hessell E. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMPAR. L. 297, 303 (1953) ("The jurists in the medieval Italian and French universities, who first elaborated conflicts law in commentaries on the lex Cunctos populos (C. 1, 1, 1), and their successors in succeeding centuries, commonly assumed that the solution of conflicts of laws was essentially a matter of statutory interpretation, of classifying statutes as real or personal with respect to their spheres of application.").

8. *See supra* text accompanying note 6. This idea goes back centuries as well. *See* Friedrich K. Juenger, *A Page of History*, 35 MERCER L. REV. 419, 433 (1984) (quoting

rejected one approach to statutory interpretation, under which a statute that is silent regarding multi-state applicability would be interpreted in the light of traditional choice-of-law rules, and replaced it with the highly purposivist approach to statutory interpretation of the Legal Process School. In his words, a court engaging in a choice-of-law analysis should "tr[y] to decide [the question] as it believes [the legislature] would have decided [it] had it foreseen the problem."[9] According to Currie, the purpose behind a given common-law rule or statute would tell us whether the enacting state had an interest in having the law applied, which would in turn lead to a determination about which state's law should be applied to a given case.[10] This approach has become known as the "governmental interest analysis" approach to choice of law.[11]

Since Currie's time, however, statutory-interpretation theory has undergone a revolution of its own.[12] In particular, the Supreme Court has forcefully challenged approaches to statutory interpretation that ask how a legislature "would have decided" a question under an enacted statute. The Court has disdained the purposivism of the Legal Process School and embraced a far more textualist approach. This statutory-interpretation revolution has influenced the Court's approach when determining the applicability of federal statutes to cases having foreign elements. Expressly disavowing an approach that seeks to "divin[e] what Congress would have wanted if it had thought of the situation before the court,"[13] the Court has adopted a "presumption against extraterritoriality."[14] Like Currie, the Supreme Court regards the issue as one of interpreting the substantive statute in question, but unlike Currie, it presumes that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[15] Focusing largely, if not exclusively, on the statute's text, federal courts now interpret federal statutes to apply only domestically unless Congress has affirmatively addressed the question of the statute's multi-state applicability.[16]

Guy de Coquille, who argued in the sixteenth century that the distinction between real and personal laws should not depend "on the mere shell of words, but on . . . the presumed and apparent purpose of those who have enacted the statute or custom." (quoting 1 A. LAINÉ, INTRODUCTION AU DROIT INTERNATIONAL PRIVÉ 303 (1888))). Juenger notes that de Coquille's belief "that it is possible to deduce the reach of a rule from the purpose or 'policy' behind it . . . has become one of the central points of modern conflict analysis" in the United States. *Id.* (citing Currie, *supra* note 3, at 183–84).

9. Brainerd Currie, *The Verdict of the Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI L. REV. 258, 277 (1961).

10. Currie, *supra* note 3, at 178.

11. *See* Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459, 460 (1985).

12. Ryan D. Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 268 (2022) (referring to the "textualist revolution").

13. Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247, 261 (2010).

14. *See generally* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020) (charting development of the presumption).

15. *Morrison*, 561 U.S. at 255. As discussed in Part IV, the presumption against extraterritoriality's operation is actually more nuanced than this quote suggests.

16. *See infra* Section IV.A.

Of course, in cases not involving federal law, choice of law in the United States is a matter of state law. For their part, the states have largely followed their federal brethren in rejecting high purposivism in statutory interpretation. In the choice-of-law context, however, although some states have followed the Supreme Court in adopting a presumption against extraterritoriality,[17] most states have retained elements of Currie's governmental-interest analysis. In the area of choice of law, the purposivism of the Legal Process School endures in weakened form. By clinging to the high purposivism of governmental interest analysis in the context of choice of law, some states perpetuate an approach to statutory interpretation that they have increasingly disfavored in other contexts.

In its current project of elaborating a *Third Restatement of Conflict of Laws*, the ALI has endorsed Currie's claim that choice of law is a matter of ordinary interpretation.[18] At the same time, the draft *Third Restatement* specifically disavows Currie's interpretive approach.[19] Indeed, the draft *Third Restatement* departs dramatically from Currie's purposivist analysis. Where the legislature has left the issue of territorial reach unaddressed, the draft *Third Restatement* does *not* instruct courts to attempt to interpret the laws in question to effectuate the legislature's purposes.[20] Instead, it adopts a presumption *of* extraterritoriality: similar in form, though not in content, to the federal presumption *against* extraterritoriality.[21] What's more, the subject-specific rules that the draft *Third Restatement* adopts for the resolution of conflicts leave little room for the sort of analysis of state "interests" that Currie favored.[22] If it becomes as widely adopted as the *Second Restatement* has been, the draft *Third Restatement*'s approach would accelerate the demise of Currie's purposivist approach to choice of law.

This Article critically examines governmental interest analysis's approach to statutory interpretation in light of the revolution that has occurred in the field of statutory interpretation since Currie elaborated his approach. Our aims are partly descriptive and partly normative. Descriptively, we show that choice of law has been conceived by adherents of both traditionalist and modern approaches as, at bottom, a matter of statutory interpretation—a matter of interpreting forum law as to its multi-state applicability. Currie's innovation was to bring a particular approach to statutory interpretation to bear on the matter: the highly purposive approach of the Legal Process School. We also describe the revolution that has taken place in

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17. *See* William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1412 (2020) (providing overview of such presumptions in state law).

18. *See* RESTATEMENT (THIRD) OF CONFLICT OF L. § 5.01 cmt. B (AM. L. INST., Tentative Draft No. 3, 2022).

19. *Id.*

20. *See id.* § 5.02 cmt. a.

21. *See id.* § 5.02 cmt. d(1) ("In the absence of an authoritative determination of the scope of a state law, courts may presume that its scope is broad, extending to all persons or events within the state's borders and to events involving the state's domiciliaries outside the state's borders, especially if the issue is one in which use of the state's law would protect or benefit a domiciliary.").

22. *See, e.g.*, RESTATEMENT (THIRD) OF CONFLICT OF L. §§ 6.06–6.07 (AM. L. INST., Tentative Draft No. 4, 2023).

statutory-interpretation theory, focusing on its critique of purposivism. We show that the U.S. Supreme Court has drawn on developments in statutory-interpretation theory in departing from overtly purposivist approaches to determining the multi-state applicability of federal statutes. The states, on the other hand, have lagged in bringing these lessons to bear on their choice-of-law methodologies. In the states that still rely on Currie's insights, governmental interest analysis is frozen in amber, persisting in an environment that has rejected its core premises. Finally, we show that the draft *Third Restatement* is largely consistent with the modern critique of purposivism. Its anticipated adoption seems poised to hasten the demise of Currie-style interest analysis.

Normatively, we draw on the insights of the modern critique of purposivism to explain the numerous ways that governmental interest analysis as developed by Currie fails to capture any actual legislative preferences as to the multi-state applicability of laws. We are not the first to point out that interest analysis does not capture legislative preferences,[23] but we contribute to this debate by bringing modern statutory-interpretation theory—in particular, the modern critique of purposivism—to bear on the question. The relationship between the choice-of-law revolution and the revolution in statutory interpretation has thus far gone largely unaddressed.[24] This Article fills that gap by showing how, *sub silentio*, insights and critiques developed within statutory-interpretation theory have shaken the foundations of the most influential school of choice of law in the United States.

This development is profoundly important. Multi-state disputes are set to multiply as a deeply interconnected national (and international) economy confronts a fractured political landscape, provoking confrontations over questions ranging from animal ethics[25] to abortion.[26] The methodology that courts use to resolve those multi-state disputes can be outcome determinative—the difference between, for example, whether Nazi-looted art remains in a Spanish museum or is returned to a Jewish family in California.[27] Or whether the victims of a terrorist attack have a viable tort claim against the foreign government that sponsored the group

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23. *See, e.g.*, Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 393, 399–403 (1980).

24. Some have remarked upon the persistence of purposivism in choice of law, in contrast to its decline elsewhere. *See, e.g.*, John David Ohlendorf, *Purposivism Outside Statutory Interpretation*, 21 TEX. REV. L. & POL. 235, 240–45, 250–54 (2016); Caleb Nelson, *State and Federal Models of the Interaction between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 690 n.130 (2013). But we are aware of no published article showing how the decline of high purposivism has drawn into question the presuppositions of most of choice of law in the United States. *Cf.* Michael S. Green, Against Interest Analysis (and Purposivism) in Choice of Law (2024) (unpublished manuscript) (on file with authors) (arguing against purposivism, and hence interest analysis, in choice of law).

25. *See, e.g.*, Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 381 (2023).

26. *See, e.g.*, Lea Brilmayer, *Abortion, Full Faith and Credit, and the "Judicial Power" Under Article III: Does Article IV of the U.S. Constitution Require Sister-State Enforcement of Anti-Abortion Damages Awards?*, 44 COLUM. J. GENDER & L. 441, 443 (2024); Joseph William Singer, *Conflict of Abortion Laws*, 16 NE. L. REV. 313, 379–426 (2024).

27. *See* Cassirer v. Thyssen-Bornemisza Collection Found., 89 F.4th 1226, 1230–32 (9th Cir. 2024).

responsible for the attack.[28] Understanding the important implications of statutory interpretation for choice of law thus has potentially huge real-world stakes.

Part I explains in greater detail how the choice-of-law process has been understood as a matter of statutory interpretation, both before and after the choice-of-law revolution. It then dives more deeply into the theory of governmental interest analysis as first elaborated by Currie, focusing on the role played by legislative purpose in the interpretive enterprise. Part II examines the revolution in federal statutory-interpretation theory since Currie's time. This Part discusses the shift from purposivism to textualism, focusing on the critiques of purposivism that underlay the shift. Part III takes a critical look at Currie's approach to choice of law in light of the critiques of purposivism that have led federal courts to disavow a strongly purposivist approach to statutory interpretation.

Part IV explores how federal and state courts have adapted their choice-of-law approaches since the statutory interpretation revolution, with a particular focus on presumptions against extraterritoriality. It first looks more closely at the Supreme Court's express abandonment of a purposivist approach to determining the multi-state applicability of federal statutes and its adoption of a presumption against extraterritoriality in its place. This Part then examines the landscape in the state courts to determine the extent to which the states have been following the purposivist approach proposed by Currie, focusing on the states that have departed from the traditional approach of the *First Restatement*. Although the picture is messy, we conclude that Currie's purposivist approach is still alive, in some form, among the states.

Finally, Part V examines the approach of the draft *Third Restatement* to the question of a statute's multi-state applicability. As noted, while the draft *Third Restatement* generally endorses Currie's view that choice of law is, at least in part, a matter of interpreting the multi-state scope of the contending laws, in practice it represents a significant departure from Currie's theory. Both in its presumption *of* extraterritoriality and in the operation of its subject-specific choice-of-law rules, the draft *Third Restatement* appears destined to accelerate the shift away from Currie-style governmental interest analysis in the states.

I. CHOICE OF LAW AS STATUTORY INTERPRETATION, PRE- AND POST-CURRIE

Choice-of-law issues arise when a dispute spans state boundaries. If everything occurred in one state and all of the parties are from that state, a court has no need to decide a choice-of-law question. The court decides the case according to the law of the only state having connections to the dispute. (We will call this the purely internal case.) A choice-of-law question arises only if the events giving rise to the dispute occurred in more than one state, or if the parties (or other interested persons) are affiliated with different states. (We will call this the multi-state case.)

28. *See* John F. Coyle, *Choice of Law in Terrorism Cases*, 101 NOTRE DAME L. REV. (forthcoming 2026) (draft on file with authors).

In enacting statutes, legislatures will sometimes address the statute's multi-state applicability by including what might be called an "external scope provision."[29] The legislature might specify that the statute's substantive provisions apply to persons domiciled in the state, or to conduct that occurs in the state. When the legislature has included such a provision in a statute, the question of the statute's multi-state applicability is straightforwardly one of statutory interpretation—it is a matter of interpreting the external scope provision.[30] Such provisions have historically been included in relatively few statutes, however.[31] Even today, most statutes lack such provisions. This Article focuses on how the courts decide the question of a law's multi-state applicability with respect to laws that do *not* include an external scope provision.

Even statutes that lack an external scope provision might be thought to have a text relevant to the issue of multi-state applicability. Statutes are often phrased in broad, all-encompassing terms. For example, § 33 of the Jones Act, addressing "recovery for injury to or death of a seaman," originally extended to "any seaman who shall suffer personal injury in the course of his employment."[32] State statutes, too, typically extend broadly to "any person."[33] The courts, however, have uniformly refused to read such statutes literally, reasoning that such literalism would produce unreasonable results. As explained by Justice Jackson in *Lauritzen v. Larsen*, if we read the Jones Act literally, we would conclude that "Congress has extended our law and opened our courts to all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation — a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal wording . . . ."[34] In rejecting a literal interpretation of such statutes, the courts—both state and federal—assume that legislatures typically enact statutes with only the purely internal case in mind and do not give any thought to the applicability of the statute to cases having foreign elements.[35] Based on that assumption, the courts treat the issue of multi-state applicability as open to interpretation. In Justice Robert Jackson's words, the issue for the courts in the face of such statutes is "a problem of statutory construction rather commonplace in a federal system by which courts often have to decide

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29. For an analysis of such provisions, see generally Vázquez, *supra* note 5.

30. For example, the courts might have to determine if the provision *requires* application of the law to cases within its scope or merely *permits* its application to such cases. The draft *Third Restatement* presumes that such provisions do not require the law's application to included cases. *See infra* Section V.B.

31. *See* Katherine Florey, *Honoring Statutory Restraint in Conflicts Analysis*, 137 HARV. L. REV. F. 271, 275–76 (2024).

32. Act of June 5, 1920, ch. 250, § 33, 41 Stat. 1007 (codified as amended at 46 U.S.C. § 30104).

33. For example, the statute at issue in the *Carroll* case, discussed immediately below, extended by its terms to the liability of "a master or employer" to "a servant or employee." 1886 ALA. CODE § 2590 (current version at ALA. CODE § 25-6-1 (1975)); *see also* LEA BRILMAYER ET AL., CONFLICT OF LAWS: CASES AND MATERIALS 22 (8th ed. 2020) (quoting statute's text).

34. Lauritzen v. Larsen, 345 U.S. 571, 576–77 (1953).

35. *See* Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 204 (1992) ("[M]ost laws are silent when it comes to multistate cases, because lawmakers typically work with wholly domestic situations in mind.").

whether 'any' or 'every' reaches to the limits of the enacting authority's usual scope or is to be applied to foreign events or transactions."[36]

During the era of the *First Restatement of Conflict of Laws*, the norms that addressed the "usual scope" of statutes in the absence of specific legislative guidance were the traditional rules of choice of law.[37] The courts accordingly interpreted statutes to be implicitly limited to cases that the statute properly applied to under those traditional rules. The Supreme Court of Alabama's decision in *Alabama Great Southern Railroad v. Carroll* is a good example.[38] Alabama had enacted a statute repealing the common-law fellow-servant rule, but the legislature had not addressed the statute's applicability to multi-state cases.[39] The injury in the case had occurred in Mississippi, and the Court decided that the traditional *lex loci delicti* rule called for application of the law of the place where the injury occurred.[40] The Alabama statute was phrased in all-encompassing language, but the Court assumed that the legislature had not focused on the issue of multi-state applicability. It held that the statute should be interpreted to extend only to cases in which the injury occurred in Alabama. In the Court's words:

> Section 2590 of the Code . . . is to be interpreted in the light of universally recognized principles of private international or interstate law, as if its operation had been expressly limited to this State and as if its first line read as follows: "When a personal injury is received in Alabama by a servant or employee," etc.[41]

In this way, the state's general choice-of-law rule (*lex loci delicti*) implicitly circumscribed the general language of the statute. The legislature was presumed to have instructed the Court to apply the substantive rule only to the extent it would be applicable under traditional choice-of-law rules. Traditional choice-of-law rules, in other words, functioned as a strong-form substantive canon of interpretation.[42]

These traditional rules continued to prevail in the states until the mid-twentieth century. Their defenders claimed (unconvincingly) that these rules were inherent in the nature of state sovereignty.[43] Some courts understood them to be part of the general common law.[44] The rules sometimes produced harsh and seemingly

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36. *Lauritzen*, 345 U.S. at 578–79.

37. RESTATEMENT (FIRST) OF CONFLICT OF L. § 6 (AM. L. INST. 1934).

38. 11 So. 803, 807 (Ala. 1892).

39. *See id.*

40. *See id.* at 806.

41. *Id.* at 807.

42. In this respect, they functioned much as the current federal presumption against extraterritoriality does. *See generally infra* Section IV.A.

43. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS §§ 20, 22 (Melville M. Bigelow ed., Little, Brown & Co. 8th ed. 1883) (1834).

44. *See, e.g.*, Harvey v. Richards, 11 F. Cas. 746, 759 (Story, Circuit Justice, C.C.D. Mass. 1818) ("[T]he question . . . is properly [one] of international law, dependent upon no local usages, but resting on general principles."); Nash v. Tupper, 1 Cai. 402, 412–13 (N.Y. Sup. Ct. 1803); *see generally* Mark D. Rosen, *Choice-of-Law as Non-Constitutional Federal Law*, 99 MINN. L. REV. 1017, 1026–38 (2015) (outlining the history of this approach).

arbitrary results. But this approach promised a measure of uniformity (meaning the result would be the same regardless of where suit was brought), as well as certainty and predictability.

The traditional approach was subjected to intense criticism beginning in the 1930s, largely by legal realist scholars.[45] These scholars criticized the harsh and arbitrary results the traditional approach produced, and they debunked the notion that these results were required by notions of state sovereignty.[46] The *Erie Railroad Co. v. Tompkins* decision and its progeny established that absent a federal rule, choice of law was a matter of the positive law of each state.[47] The state courts came to understand that how they approached choice of law was largely up to them, and many decided to reject the traditional approach.

The first fully formed alternative to the traditional approach was put forward in the scholarship of Brainerd Currie in the 1950s and early 1960s. His key insight was that the answer to the choice-of-law question should be found in the substantive laws vying for application. If the question was one of interpretation, as even traditionalist courts appeared to recognize, the answer should be found through application of the ordinary methods of statutory interpretation.[48] At the time Currie was writing, the prevailing approach to statutory interpretation was the highly purposivist approach of the Legal Process School.[49] Accordingly, Currie argued that in interpreting laws as to their multi-state applicability, the courts should apply an approach that interprets statutes "in order to effectuate the legislative purpose."[50]

Given the assumptions that courts make in their posing of the question, however, the task Currie had in mind was easier said than done. Recall that most statutes do not include a provision addressing the law's multi-state applicability. As we have seen, the relevant laws are typically written in all-encompassing terms—e.g., "every person." The courts decline to read the laws literally on the assumption that the legislature enacted the law with the purely internal case in mind and neglected entirely the question of the statute's multi-state applicability. The "legislative purpose" to which Currie referred could not have been the legislature's purpose with respect to the statute's multi-state applicability, as by hypothesis there was no intent on that specific question. Necessarily, Currie was referring to what we

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45. *See* Perry Dane, *Vested Rights, 'Vestedness,' and Choice of Law*, 96 YALE L.J. 1191, 1196–97 (1987).

46. *See, e.g.*, WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 42–44, 154–57, 281, 350–88 (1942).

47. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). Of course, the Constitution places some limits on a state's power to make its law applicable to multi-state cases. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981) (plurality opinion); *see also id.* at 332 (Powell, J., dissenting) (noting that the Due Process Clause invalidates a state's application of its own law "when there are no significant contacts between the state and the litigation"). But these limits are weak, and, within them, it is for the states to select their choice-of-law rules.

48. *See* Currie, *supra* note 3, at 178.

49. *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1985).

50. Currie, *supra* note 3, at 178.

might call the statute's substantive purpose—the mischief the legislature sought to address in the purely internal case. The courts' task under Currie's framework was, thus, to interpret the statute on an issue that the legislature did not give any thought to, much less memorialize in statutory text.

In an early article,[51] Currie illustrated his approach by examining a classic choice-of-law decision from the 1890s, *Milliken v. Pratt*.[52] Pratt was a married woman from Maine who entered into a contract with Milliken, who was from Massachusetts.[53] Under Massachusetts law, the contracts of married women were not enforceable.[54] Under Maine law, however, such contracts were enforceable.[55] Under the traditional approach to choice of law, the governing law was that of the place where the contract was made, which in this case was Massachusetts. The Court accordingly held that the contract was not enforceable.[56]

Currie argued that the Court should have framed the issue as whether the Massachusetts law invalidating such contracts, properly interpreted, was applicable to the contracts of married women from Maine.[57] But the statute was silent on this question. The traditional approach assumed that the Massachusetts law reached all contracts entered into in Massachusetts and no contracts entered into outside of Massachusetts.[58] Currie argued that, as a reflection of the legislature's likely preferences, this construction of the statute was not defensible: the Massachusetts legislature is unlikely to have wanted the multi-state applicability of the law it enacted to turn on the fortuity of where the contract was made.[59]

Currie proposed an alternative way to interpret the Massachusetts law on the question of its territorial applicability. At the time Currie was writing, the dominant approach to statutory interpretation counseled that a statute should be interpreted to advance its purposes.[60] Thus, Currie began by identifying the purpose of the Massachusetts statute. He concluded that the statute reflected the Massachusetts legislature's view that married women were a category needing special protection.[61] Currie went on to ask: "[Which] married women [was it Massachusetts's policy to protect]?" His answer was: "Why, those with whose welfare Massachusetts is concerned, of course—*i.e.*, Massachusetts married women."[62] For this reason, he concluded, the statute, properly construed, extends to the contracts of married women *from Massachusetts*, regardless of where the

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51. Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958).

52. 125 Mass. 374 (1878).

53. *Id.* at 374.

54. Even in Currie's day, such laws reflected archaic views, and Currie tried to distance himself from the policy he described. *See* Currie, *supra* note 51, at 234 n.17. We discuss feminist critiques of coverture laws below.

55. *Milliken*, 125 Mass. at 376.

56. *Id.* at 383.

57. *See* Currie, *supra* note 51, at 229–30.

58. *See id.* at 228.

59. *Id.* at 236.

60. *See* HART & SACKS, *supra* note 49, at 1374.

61. *See* Currie, *supra* note 51, at 233.

62. *Id.* at 234.

contract was made. The Court in *Milliken* should therefore have held that the statute should not be applied to invalidate the contracts of a married woman from Maine. In other words, the statute should have been construed to reach the contracts of married women from Massachusetts entered into in Maine but not the contracts of married women from Maine entered into in Massachusetts.[63]

Interest analysis instructs courts first to interpret the laws contending for application based on their purpose.[64] This analysis might reveal that only one state's law, properly construed, applies to the case. In *Milliken*, for example, the Massachusetts law, properly construed, did not apply because the purpose of its law was to protect Massachusetts married women, and the married woman in the case was from Maine.[65] If a similar analysis revealed that Maine law did apply to the case because its purposes would be advanced, the court should apply Maine law to the case. This type of case is what has become known as a "false conflict,"[66] and false conflicts are easy cases under Currie's analysis. Currie's identification of false conflicts was widely regarded as a breakthrough in choice-of-law theory.

If both states' laws extend to the case, and the laws differ, the case presents a "true conflict." True conflicts are hard cases. Currie originally proposed that the court always apply forum law to resolve true conflicts.[67] Other scholars have proposed alternative approaches. We examine below some of the various approaches to resolving true conflicts. For present purposes, it suffices to note that according to governmental interest analysis, the threshold question in any choice-of-law inquiry—and, for some theorists, the entire question—is to determine the multi-state applicability of the laws contending for application. This question, according to governmental interest analysis, is an ordinary question of statutory interpretation, and it is to be answered by identifying the law's purpose and asking whether that purpose would be advanced by applying it to the particular multi-state case before the court.

Beginning in the early 1960s, many U.S. states rejected the traditional approach to choice of law and embraced versions of governmental interest analysis. Although a significant minority of U.S. states (about one-fifth of them) continue to adhere to the traditional approach, the rest apply one or more of the "modern" approaches to choice of law,[68] most of which find their roots in Currie's initial

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63. *Id.* at 239–40.

64. *See id.* at 233.

65. *See id.* at 238.

66. Peter Kay Westen, *False Conflicts*, 55 CALIF. L. REV. 74, 75–76 (1967) ("The phrase 'false conflicts' which Currie himself never used, has nonetheless been consistently attributed to him by others.").

67. *See* Currie, *supra* note 51, at 261. He later suggested that, in cases presenting true conflicts, the court should take a second look to see if "a more moderate and restrained interpretation of the policy or interest of one state or the other may avoid conflict." Brainerd Currie, *Comments on* Babcock v. Jackson*, a Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1242 (1963). He did not say much about what he meant by a "moderate and restrained" interpretation. If the court's search for a moderate or restrained interpretation does not succeed in avoiding the conflict, Currie proposed that the court "apply the law of the forum." *Id.* at 1242–43.

68. *See infra* Section IV.B.

insights. In Part III, we will look more closely at these and other aspects of Currie's theory and evaluate Currie's approach, and those of his acolytes, in light of the critiques that courts and scholars have since directed to the Legal Process approach to statutory interpretation. Before assessing the choice-of-law revolution inaugurated by Currie, however, we will examine the revolution that has taken place in the field of statutory interpretation since Currie's time.

II. THE EVOLUTION OF STATUTORY INTERPRETATION IN FEDERAL AND STATE COURTS

The history of statutory interpretation in the United States is in many ways a story of the fall of a certain type of purposivism. For several decades, the U.S. Supreme Court considered its primary mission in statutory interpretation to be uncovering the purposes of the legislature, and the enacted statutory text was just one of many aids to a statute's meaning. However, the textualist revolution that began in the 1980s—which drew on critiques first made by the legal realists—subjected the assumptions upon which this type of purposivism rested to increasingly strident critique. As a result, state and federal courts have mostly abandoned the notion that the specific will of a legislature can be ascertained in the absence of clear statutory text.

This Part briefly surveys the decline of old-school purposivism, setting the stage for our examination in Part III of how Currie-style interest analysis clings to an increasingly outdated method of interpreting statutes. It also demonstrates how this history has played out in state courts. The picture that emerges is one of asymmetry: even as state courts have mostly followed their federal brethren in rejecting purposivist methods of statutory interpretation, Part IV will show that those that have imbibed Currie's methods continue to apply his anachronistic interpretive methods in the choice-of-law context.

A. Legislative Intent, Plain Meaning, and Purposive Statutory Interpretation in Federal Courts

Statutory interpretation has long wrestled with the question of legislative intent.[69] Though debates continue,[70] most have accepted the proposition that judges or others tasked with the interpretation of statutes ought to do so in order to best effectuate the will of the lawmakers.[71] But to state that consensus is immediately to refute it. What it means to "effectuate" the "will" of lawmakers, and which lawmakers' wills matter, have been problems bedeviling statutory interpretation from the very beginning.

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69. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *63.

70. *Compare* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 992–95 (2001) (arguing that early federal judges saw themselves as "partners in the enterprise of law elaboration"), *with* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 8–9 (2001) (rejecting the view that early American courts embraced this role).

71. WILLIAM N. ESKRIDGE, JR., ABBE R. GLUCK & VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 301 (2014).

An early and canonical statement in this debate arose out of an attempt by a church in New York to pay for an Englishman to come serve as its rector. The barrier this church faced was an 1885 federal law called the Alien Contract Labor Law,[72] which made it "unlawful . . . to prepay the transportation" of a foreigner "to perform labor or service of any kind in the United States."[73] After the Holy Trinity Church contracted to bring Mr. E. Walpole Warren to New York to serve as its rector and pastor, the United States brought suit, resulting in a case that eventually reached the Supreme Court as *Holy Trinity Church v. United States*.[74] The question the Court confronted was whether paying the transportation of a foreigner to come to the United States to serve as a pastor was proscribed by the Alien Contract Labor Law.[75] Justice Brewer, writing for the Court, "conceded" at the outset of his opinion that the church's action was "within the letter" of the law.[76] But he argued—in a now-infamous line—"It is a familiar rule[] that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[77] The spirit of the Alien Contract Labor Law, according to Justice Brewer, did not reach "any class [of workers] whose toil is that of the brain,"[78] such as ministers.

Justice Scalia, in his Tanner Lectures, excoriated *Holy Trinity* as "nothing but judicial lawmaking."[79] Be that as it may, the opinion is notable for its breezy deployment of the concept of legislative intent—as gleaned from the circumstances of the bill's passage and indications in the legislative history—to trump an interpretation the Court readily admitted followed from the plain text of the statute. It has been cited by Supreme Court opinions 67 times since 1885, including by Justice Brennan (approvingly) in his majority opinion upholding voluntary race-conscious affirmative action plans by employers in *United Steelworkers of America v. Weber*[80] and, more recently, by Justice Scalia (disapprovingly) in his dissent in *Zuni Public School District No. 89 v. Department of Education*.[81]

This emphasis on legislative intent came under sustained fire from legal realists. Max Radin called the attempt to "discover the intent of the legislator" on a given question of interpretation a "transparent and absurd fiction."[82] Radin argued that the intentions of the "several hundred men" who voted for or against a bill are likely so disparate that there exists no single attributable "intent" with respect to a litigated issue.[83] And even if that intent existed, Radin thought it likely to be difficult

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72. Alien Contract Labor Law, ch. 164, 23 Stat. 332 (1885).
73. *Id.* § 1.
74. 143 U.S. 457, 457–58 (1892).
75. *Id.* at 458.
76. *Id.*
77. *Id.* at 459.
78. *Id.* at 463.
79. Scalia, *supra* note 1, at 95. Conversely, William N. Eskridge Jr. has pointed out that Justice Brewer had text-based arguments available to support his interpretation. *See* William N. Eskridge, Jr., *Textualism: The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1533–35 (1998).
80. 443 U.S. 193, 201, 209 (1979).
81. 550 U.S. 81, 108 (2007) (Scalia, J., dissenting).
82. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869–70 (1930).
83. *Id.* at 870.

to determine accurately, except through (unreliable) external signs.[84] The only *governing* "intent" of the legislature, Radin argued, is the actual law it passed—not the "wills" of the legislators themselves, whose power to bind their fellow citizens is located exclusively in their capacity to legislate through written laws.[85] Modern theorists have echoed Radin's critiques.[86]

Of course, Radin's identification of legislative intent with the *subjective intent* of a legislature is not the only way to portray the task.[87] James Landis, in the same issue of the *Harvard Law Review*, argued that Radin overstated the case by understating the possibility of gleaning *collective* legislative intent from the rich body of legislative materials that Congress generates in the enactment of statutes.[88] Modern theorists have likewise emphasized the intelligibility of attributing general policy purposes to collective bodies, especially through authoritative declarations by deputized agents and subgroups[89] or via a legislature's settling upon a finalized text through an established (and documented) internal process.[90] While Radin's critique radically negated the possibility of group agency,[91] in other areas of law—such as corporate law—we readily accept that collective entities can have an intelligible intent.[92]

Nonetheless, by the middle of the century, scholars were seeking to rehabilitate statutory interpretation in light of this realist critique. The "Legal Process" movement came to the rescue, spearheaded by New Deal-era government administrators and scholars who advanced the notion that the role of courts in statutory cases was to discern the rational purposes of the legislature.[93] Rather than focus on the "intent" of the legislature in passing a statute, Legal Process theorists

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84. *Id.* at 870–71.

85. *Id.* at 871 (cleaned up).

86. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2410 n.81 (2003) (discussing Radin and listing modern adherents); JEREMY WALDRON, LAW AND DISAGREEMENT 119–46 (1999).

87. Radin also rejected intent as "purpose," arguing that a statute's purpose could be articulated at varying (and arbitrary) levels of generality. *See* Radin, *supra* note 82, at 876–77.

88. James Landis, *A Note on "Statutory Interpretation"*, 43 HARV. L. REV. 886, 888–90 (1930).

89. *See* Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 437–49 (2005).

90. *See* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation*, 122 YALE L.J. 70, 74–75 (2012); Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1637–40 (2014) [hereinafter Nourse, *Elementary Statutory Interpretation*].

91. *See* CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (2011).

92. *See, e.g.*, Daniel Harris, *Corporate Intent and the Concept of Agency*, 27 STAN. J.L. BUS. & FIN. 133, 134 (2022).

93. For a definitive introduction to the Legal Process School and its impact on statutory interpretation, see William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to* The Legal Process, *in* HART & SACKS, *supra* note 49.

spoke of a statute's "purpose."[94] Henry M. Hart and Albert M. Sacks—the fathers of the movement—famously instructed that courts "should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."[95] The "task" of interpreting, as they saw it, started with deciding "what purpose ought to be attributed to the statute" and then "interpret[ing] the words of the statute immediately in question so as to carry out the purpose as best it can."[96] This highly purposive approach to statutory interpretation was grounded in a political conviction that the legislative and administrative organs of the state should be empowered to solve society's problems through lawmaking and that it was the institutional responsibility of the courts to assist that process.[97] Thus, by 1940, the Supreme Court was again declaring that "even when the plain meaning [of a statute does] not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."[98]

Replacing "intent" with "purpose" does not clearly answer the theoretical objections of Radin and his followers. Just as a statute may be passed by legislators with multiple or indiscernible intents, a statute may serve multiple or indiscernible purposes.[99] More to the point, the realist critique was not that statutes have no purposes at all, but only that the text is the only reliable evidence of that purpose. Absent relevant statutory text, speculation as to a legislature's purposes—even through the use of extrinsic aids, like legislative history—runs into the same problems that Radin identified. Nonetheless, the success of the Legal Process School was evident: "[P]urpose-based interpretation, often drawing liberally on legislative history, dominated decision-making" during the Vinson and Warren Courts.[100]

At the same time, a slightly more aggressive form of purposivism also found converts. It came to be known as "imaginative reconstruction."[101] As Posner described it, this approach required that the interpreter of the statute "try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar."[102] Perhaps the best-known exponent of this approach was Judge Learned Hand: "According to Hand, the judge should ask what the legislature would have decided if the issue had occurred to the legislators at the time of enactment. The judge should put himself in the shoes of

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94. *See, e.g.*, Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 624 (1949) ("Every proposition of positive law . . . is to be interpreted reasonably, in light of its evident purpose.").

95. HART & SACKS, *supra* note 49, at 1378.

96. *Id.* at 1374.

97. *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Making of* The Legal Process, 107 HARV. L. REV. 2031, 2032–33 (1994).

98. United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543–44 (1940) (quoting Ozawa v. United States, 260 U.S. 178, 194 (1922)).

99. *See* Nourse, *Elementary Statutory Interpretation*, *supra* note 90, at 1624.

100. ESKRIDGE ET AL., *supra* note 71, at 350.

101. Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

102. *Id.*

legislators and try to imagine how they would have answered the question."[103] Hand himself viewed this method of interpretation as technically distinct from discerning legislative intent—because, if imaginative reconstruction is necessary, it is because there is no ascertainable intent on the specific question.[104] Rather, the judge's job was:

> [T]o imaginatively project himself back into the legislative body at the time of enactment, in an effort to grasp the "deal" that was reached. Armed with this insight, the judge can then interpret the statute to reach the result the enacting legislature would have reached, if it had anticipated the question.[105]

B. Old Textualism, New Textualism, and the Death of Classic Purposivism in the Federal Courts

Classic purposivism and "imaginative reconstruction" have for some time now represented a controversial approach to statutory interpretation. Indeed, classic purposivism's emphasis on determining legislative intent or purpose from extrinsic sources coexisted somewhat uncomfortably with an equally accepted early maxim of statutory interpretation: the plain-meaning rule. This protean form of textualism exhorted interpreters to follow the plain meaning of the statute's written terms wherever possible.[106] As the Supreme Court phrased it, "[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the final expression of the meaning intended."[107]

One contemporaneous scholar observed that the "main effect" of the plain-meaning rule was to bar "resort to otherwise admissible extrinsic aids . . . evidencing the meaning or purpose of the enacting legislators,"[108] such as committee reports—precisely the sort of materials that the search for legislative intent would require. The Supreme Court struck a compromise by permitting resort to such material "only where [the] meaning is doubtful,"[109] implying that the plain-meaning rule itself was simply a reliable method of determining legislative intent.[110] In this way, the plain-meaning rule and *Holy Trinity*-style purposivism can be seen as accepting the same baseline premise, despite the tension between their methods. That premise is that statutory interpretation is a question of determining legislative intent.

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103. Thomas W. Merrill, *Learned Hand on Statutory Interpretation: Theory and Practice*, 87 FORDHAM L. REV. 1, 3 (2018).

104. *See id.* at 3–4.

105. *Id.* at 5.

106. *See* Caminetti v. United States, 242 U.S. 470, 485 (1917).

107. United States v. Mo. Pac. R.R., 278 U.S. 269, 278 (1929).

108. Harry W. Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L.Q. 2, 5 (1939).

109. United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 83 (1932).

110. *See Caminetti*, 242 U.S. at 490 ("[W]hen words are free from doubt they must be taken as the final expression of the legislative intent . . . .").

The plain-meaning approach to textual statutory interpretation has been characterized—or, as some have argued, caricatured[111]—as "literalist" and "mechanical," abjuring use of semantic context and lacking a sophisticated theory of language.[112] At the U.S. Supreme Court, it was eclipsed in the mid-century by Legal Process purposivism, though it continued to find favor in state courts and many federal circuit courts.[113] By the late 1970s, however, the textualist methodology symbolized by the plain-meaning rule was back in vogue. William N. Eskridge Jr., Abbe R. Gluck, and Victoria F. Nourse have characterized the Burger Court as a ready deployer of the "soft" plain-meaning rule, which "focused on text but attempted to justify harsh textual results by using legislative history and statutory purposes to back them up."[114]

But even this limited resort to legislative materials was soon to come under fire. By the mid-1980s, a cohort of conservative judges and officials in the Reagan Administration's Department of Justice thought the Court's approach insufficiently textualist.[115] Led by Judge Frank Easterbrook and Justice Antonin Scalia,[116] these "new textualists"[117] argued that the prevailing interpretive paradigm relied on an incoherent notion of legislative intent, drew on unreliable and manipulable sources of evidence to reconstruct that intent, and departed from the structural assumptions of the Constitution.[118] As John F. Manning has written, the new textualists believed that "lawmaking often entails compromise among interest groups with diverse goals," leaving the words of the enacted statute as the most reliable—and potentially only—evidence of Congress's "purpose."[119] As a practical matter, the clearest interpretive shift inaugurated by the new textualists was a religious objection to any use of legislative history.[120]

Unsurprisingly, textualist scholars and judges also rejected imaginative reconstruction. Manning noted that "imaginative reconstruction of legislative intent reflects implausible assumptions about the smoothness and transparency of the

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111. *See* Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 NW. U. L. REV. 1033, 1078 (2023).

112. *See, e.g.*, Manning, *supra* note 70, at 108 ("Modern textualists . . . are not literalists. In contrast to their early-twentieth-century predecessors in the 'plain meaning' school . . . modern textualists acknowledge that language has meaning only in context."); Abigail R. Moncrieff, *Statutory Realism: The Jurisprudential Ambivalence of Interpretive Theory*, 72 RUTGERS U. L. REV. 39, 83 (2019) ("Textualism, in its old and simple form, was a mechanical and robotic methodology that asked judges to follow the plain meaning of the statutory text, relatively insensitively to context or consequence.").

113. ESKRIDGE ET AL., *supra* note 71, at 350.

114. *Id.* at 363.

115. *See id.* at 366–67; OFF. OF LEGAL POL'Y, U.S. DEP'T OF JUST., USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION (1989).

116. *See* Manning, *supra* note 70, at 7.

117. *See generally* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

118. *See id.* at 641–42.

119. Manning, *supra* note 70, at 7.

120. *See* Eskridge, *supra* note 117, at 656–57.

legislative process."[121] Judge Easterbrook wrote similarly that imaginative reconstruction "ignores the package-deal nature of legislation."[122] Indeed, "[s]tatutes are drafted by multiple persons, often with conflicting objectives. There will not be a single objective, and discretionary interpretation favors some members of the winning coalition over others."[123] Both believe that imaginative reconstruction produces outcomes that reflect the judge's preferences rather than that of the legislature. "Imaginative reconstruction, asking how an expired Congress would have answered a question had the subject been presented . . . is of course fantasy . . . , since we can imagine any answer we want when we are inventing both question and answer." [124]

Non-textualists have been equally skeptical of imaginative reconstruction. Judge Posner was initially a fan[125] but came to view the approach more critically. He came to realize that imaginative reconstruction "requires an exceedingly difficult counterfactual inquiry and in practice is likely to be a mask for decision according to contemporary policy preferences rather than according to anything that can be described . . . as the . . . purposes of the people who enacted the statute."[126] Eskridge and Frickey write similarly that imaginative reconstruction "is indeterminate" and "often asks counterfactual questions of a long-departed legislature" on issues that the legislature did not anticipate.[127] Additionally, "the theory rests upon the questionable assumption that judges will be able to recreate the historical understanding of a previous legislature. Modern historiography suggests that a present-day interpreter can never completely or accurately reconstruct past understandings."[128]

The rejection of old-school purposivism and imaginative reconstruction and embrace of the statutory text quickly won converts. In *Public Citizen v. United States Department of Justice*,[129] the Court—Justice Scalia abstaining—considered whether the American Bar Association ("ABA") fell within the terms of the Federal Advisory Committee Act ("FACA"), a federal sunshine law.[130] Justice Brennan, writing for the majority, embarked on a lengthy examination of the legislative history of FACA and concluded that although a "literalistic" reading of the statute

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121. Manning, *supra* note 86, at 2413.

122. Frank H. Easterbrook, *Judges as Honest Agents*, 33 HARV. J.L. & PUB. POL'Y 915, 919 (2010).

123. *Id.* at 922.

124. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 69 (1994); *see also* John F. Manning, *Statutory Pragmatism and Constitutional Structure*, 120 HARV. L. REV. 1161, 1168 (2007) ("'[I]maginative reconstruction' allowed the judge great flexibility to deviate from a clearly expressed statutory command while attributing his or her decisions to real or imputed legislative preferences.").

125. *See* Posner, *supra* note 101, at 817.

126. Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 445 (1989).

127. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 330 (1990).

128. *Id.*

129. 491 U.S. 440 (1989).

130. *See id.* at 445–47.

would encompass the ABA, Congress did not intend that result.[131] Justice Kennedy's sharp concurrence in the judgment, joined by Chief Justice Rehnquist and Justice O'Connor, demonstrated the influence of Justice Scalia's interpretive method. Kennedy opened with a paean to the United States' "structure of Government based on a permanent separation of powers," which he argued implicated "the rules this Court must follow in interpreting a statute passed by Congress and signed by the President."[132] According to Kennedy, both the "ready starting point" and "sufficient stopping point" of the interpretation ought to have been "the plain language of the statute."[133] The proper lesson of *Holy Trinity*, Justice Kennedy claimed, was not that plain meaning could be trumped by extrinsic evidence of a contrary legislative intent, but that federal courts could depart from the plain meaning of a text only when doing so would avoid an "absurd" result.[134] Justice Kennedy then criticized the Court's use of legislative history,[135] before ultimately concluding that though the plain meaning of FACA encompassed the ABA, that result would so trench upon the President's Article II Appointments Clause powers that it would be unconstitutional as applied.[136]

Justice Kennedy's opinion previewed many themes that would later find canonical expression in Justice Scalia's adaptation of his Tanner Lectures in *A Matter of Interpretation*. While earlier textualist critiques drew on insights from public-choice theory—emphasizing the role of interest groups in shaping legislation—Scalia grounded his version of textualism on the "democratic theory" embedded in the Constitution's separation of powers; he rejected the notion that "laws mean whatever they ought to mean, and that unelected judges decide what that is."[137] Any search for legislative intent compatible with "democratic government," Scalia argued, should be limited to "a sort of 'objectified' intent—the intent that a reasonable person would gather from the *text of the law*, placed

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131. *See id.* at 455–65.

132. *See id.* at 468 (Kennedy, J., concurring). Of course, the separation of powers at the state level does not precisely mirror the federal principle. But to the extent that it departs, it does so by delegating *more* power to the state legislature, not less. *See* G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 333–34 (2003). The Supreme Court's concerns about arrogating power from Congress through atextual readings of statutes thus apply doubly to the states.

133. *See Pub. Citizen*, 491 U.S. at 469 (Kennedy, J., concurring).

134. *See id.* at 470. The ancient carve-out for "absurd" results is a controversial one amongst textualists. Manning has argued that much that might seem absurd is, or could be, the result of a messy, unreconciled, and contradictory legislative process. *See* Manning, *supra* note 86, at 2390. Limited recourse to the so-called absurdity doctrine permits a form of purposivism to live on, insofar as it assumes that—regardless of the text of the statute—Congress could *never* have the purpose of legislating nonsense. *See* Calderon v. Atlas S.S. Co., 170 U.S. 272, 281 (1898); *see also* Manning, *supra* note 86, at 2390 ("So understood, the absurdity doctrine is merely a version of strong intentionalism . . . .").

135. *See Pub. Citizen*, 491 U.S. at 474–77 (Kennedy, J., concurring).

136. *See id.* at 482.

137. Scalia, *supra* note 1, at 22. *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 22 (Amy Gutmann ed., 1997).

alongside the remainder of the corpus juris."[138] He concluded: "It is the *law* that governs, not the intent of the lawgiver."[139] The difference between the two was written into the many procedural hurdles to federal lawmaking in the U.S. Constitution, most prominently bicameralism and presentment.[140] Legislative history, which did not pass this crucible, was simply illegitimate—not to mention unreliable.[141] Textualism, by contrast, offered the hope of greater certainty, as "usually" the textual meaning "is easy to discern and simple to apply."[142]

The new textualism quickly became a highly influential method of interpretation on the Rehnquist Court. The emphasis on text generated a host of new interpretive techniques, including frequent recourse to dictionaries to determine the meaning of statutory terms,[143] reference to similar words in other statutes in the U.S. Code,[144] and use of a statute's "structure" to resolve ambiguity.[145] Although the Rehnquist Court remained relatively ideologically balanced, "[e]ven nontextualist Justices . . . relied on legislative history less, in part to garner majorities but also because the atmospheric influence of textualism . . . had an effect."[146]

The flip side of the rise of the new textualism was the demise of classic purposivism and imaginative reconstruction as general methods of statutory interpretation. Critiques that purposivism misunderstood the realities of legislative compromise had stuck; few were willing to defend the view that judges could predict how a legislature would have resolved a problem, in the absence of clear statutory text that directly addressed the issue. Though the Supreme Court remained pluralistic in its methodological approaches to statutory interpretation through the new millennium, Hart-and-Sacks-style purposivism was increasingly on the wane. The new textualism had firmly entrenched itself at One First Street.

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138. *Id.* at 17 (emphasis added) ("[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of the law determined by what the lawgiver meant, rather than what the lawgiver promulgated.").

139. *Id.*

140. *Id.* at 25.

141. *Id.* at 29–36.

142. *Id.* at 45.

143. *See, e.g.*, MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225 (1994); Muscarello v. United States, 524 U.S. 125, 128, 130 (1998); Rapanos v. United States, 547 U.S. 715, 732–33 (2006) (plurality opinion); *see generally* James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013) (cataloguing dictionary use across the Rehnquist and Roberts Courts).

144. *See, e.g.*, Pierce v. Underwood, 487 U.S. 552, 564–65 (1988); Smith v. United States, 508 U.S. 223, 234–35 (1993); Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 530–33 (2015).

145. Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 128–32 (1989); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 701–02 (1995); *see generally* Russell C. Bogue, Note, *Statutory Structure*, 132 YALE L.J. 1528 (2023) (categorizing the types of structural argument the Court has employed).

146. ESKRIDGE ET AL., *supra* note 71, at 408.

C. The Roberts Court

Under Chief Justice John Roberts, these trends have only accelerated.[147] As has often been observed,[148] text-based interpretive techniques now reign mostly unchallenged over the pragmatic and purposive methods of the Warren Court. To be sure, the narrative of the rise of textualism and the fall of (a certain type of) purposivism masks a complex reality; and, as others have observed, textualism's so-called triumph may be greater in rhetoric than reality.[149] But our focus here is less on whether textualism in fact dominates statutory interpretation in state and federal courts than on how far the current conversation on statutory interpretation is from the high purposivism of Currie's era.

For instance, the Court's methodological debate now focuses mostly on internecine debates within a textualist universe. In *Bostock v. Clayton County*,[150] the Court confronted whether Title VII's prohibition on sex-based discrimination in employment reaches discrimination[151] on the basis of sexual orientation and gender identity.[152] The Court held, 6–3, that it does, generating three different opinions—with all writing justices professing to employ textualism. Justice Gorsuch, for the majority, exemplified what Tara Leigh Grove has called "formalistic textualism," which "instructs interpreters to carefully parse the statutory language, focusing on semantic context and downplaying policy concerns or the practical (even monumental) consequences of the case."[153] Justice Alito wrote a scathing dissent, joined by Justice Thomas, where he accused the majority of writing an opinion "like a pirate ship" that "sails under a textualist flag" while embracing an atextual and dynamic form of statutory interpretation.[154] Alito—and Justice Kavanaugh in a separate, more measured dissent—exemplified a "flexible textualism" (to again borrow Grove's terms), which took under consideration "policy and social context

147. This is not to say that some form of purposivism has not lived on at the Court, though often unacknowledged as such. *See generally* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275 (2020) (making this case). As Krishnakumar writes, "the Court, and its textualist Justices in particular, regularly employ pragmatic reasoning as well as supposedly neutral textualist tools to divine—or manufacture—congressional purpose and intent." *Id.* at 1279. Yet Krishnakumar admits, as we argue in Subsection III.C.2, that "although classic purposivism is often characterized as directing courts to privilege the spirit over the letter of the statute, modern purposivists regularly pay close attention to statutory text." *Id.* at 1283.

148. *See, e.g.*, Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 265 n.1 (2020); Diarmuid F. O'Scannlain, *"We Are All Textualists Now": The Legacy of Justice Antonin Scalia*, 91 ST. JOHN'S L. REV. 303, 304 (2017).

149. *See generally* Krishnakumar, *supra* note 147.

150. 590 U.S. 644 (2020).

151. *See* 42 U.S.C. 2000e-2(a)(1).

152. *See Bostock*, 590 U.S. at 650–51.

153. *See* Grove, *supra* note 148, at 267.

154. *See Bostock*, 590 U.S. at 685 (Alito, J., dissenting).

as well as practical consequences."[155] Other scholars have termed the differences "compositional" versus "holistic" textualism.[156]

These disagreements within textualism over both method and theoretical focus should not obscure the central point of agreement: the purpose of a piece of legislation is only what can be gleaned from its enacted text. Attempts to reconstruct the actual intent of the legislators or to apply an imagined intent to a new factual scenario would contravene both the structural underpinnings of the U.S. Constitution and most state constitutions and would utilize materials that ordinary people cannot readily access.

What this means is that under modern methods of statutory interpretation, statutory *silence* as to a particular subject matter—say, the multi-state applicability of a statute—cannot be filled with mere hypotheses about what the legislature would have wanted. Such silence is, rather, exactly what it looks like: nothing at all. Absent a statutory text that has passed the procedural hurdles and can be read by ordinary citizens, interpretation cannot go further by speculating about the legislature's ultimate purposes. As will be discussed, various presumptions (or canons) can occasionally fill that void. But importantly, those presumptions operate as consistent background rules, operating to stabilize outcomes across cases—and to alert the legislature of the consequences of their silence—rather than to faithfully embody an atextual legislative purpose.

Purposivism, too, has undergone a dramatic transformation. The death of classic purposivism is such that even those who would not identify themselves as textualists have "caught the new textualism bug."[157] Indeed, Gluck has observed that the idea that legislative history or imagined purpose can trump unambiguous text is "dead."[158] At the Supreme Court, the liberal justices—who are most comfortable with the purposivist label—readily deploy the same text-centric interpretive techniques as their conservative brethren.[159]

Of course, the use of textualism may at times be a pragmatic strategy to win votes in close cases. But modern purposivists have also taken to heart many of the criticisms leveled by textualists. Practiced irresponsibly, purposivism can be arbitrary and undemocratic, permitting judges to abuse their authority by imposing their policy preferences on open-ended legislation.[160] As Manning has observed, contemporary purposivists have accepted the proposition that "fidelity to legislative

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155. Grove, *supra* note 148, at 267.

156. *See* William N. Eskridge, Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of* Sex*: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1519–20 (2021).

157. William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in the Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1781 (2021).

158. Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 90 (2015).

159. *See, e.g.*, Yates v. United States, 574 U.S. 528 (2015) (Justice Ginsburg in the majority and Justice Kagan in the dissent, both amply employing textualist tools of interpretation); Lockhart v. United States, 577 U.S. 347, 350–51, 362 (2016) (Justice Sotomayor and Justice Kagan, joined by Justice Breyer).

160. *See* Eskridge & Nourse, *supra* note 157, at 1723.

purpose in a system of legislative supremacy requires interpreters to respect Congress's choice of means," which is cashed out in the statutory text.[161] That means accepting that Congress often does not pursue one purpose "at all costs,"[162] and that enforcing the text as written is the best way to respect that considered judgment. In short, while purposivists retain their theoretical commitment to serving as the faithful agents of a purposive legislative body, the Court as a whole "now takes its cues directly from Congress about how and to what degree to take background purpose or policy into account."[163] This focus on what Manning has called "implemental purpose" (and not just the background public policy informing the statute) has made purposivism self-consciously more text-focused.[164]

At the same time, other textualists have argued that the modern purposivism of the Roberts Court still permits legislative purpose or pragmatic considerations to play a role in determining whether a statute is textually ambiguous and, if so, how to resolve that ambiguity.[165] That is one way of saying, of course, that the narrative of the decline of classical purposivism at the Supreme Court is not straightforward. For instance, while admitting that purposivism has evolved significantly in response to the textualist revolution, Professor Anita S. Krishnakumar has carefully documented the ways in which purposivists at the Court have continued to make appeals to legislative intent,[166] while self-avowed textualists have snuck in purposivism through "backdoor" methodologies.[167] (As we shall see in Part IV, the Court has done something like this in implementing its presumption against extraterritoriality.) Yet Krishnakumar has also observed that invocations of purpose or intent are often woven together "with more text-based tools"[168]—a technique conspicuously unavailable for many choice-of-law questions. So far as this Article is concerned, then, the important point is that few now defend the high purposivism that is integral to Currie-style interest analysis, even as the practice of statutory interpretation reflects a messier reality.

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As a question of general statutory interpretation, the classical purposivism of the Legal Process era is now mostly dormant—and largely undefended—in the federal courts. To be sure, pockets of classical purposivism remain within certain areas of law,[169] including, as this Article argues, in the choice-of-law realm. But such pockets remain anomalous; and, further, it is not clear why the critiques of purposivism that have generally prevailed in statutory interpretation should not apply with equal force across all domains. As commentators who have observed

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161. John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 118 (2012).

162. Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) (per curiam).

163. Manning, *supra* note 161, at 132.

164. *Id.* at 148. Others have documented the Court's use of "structural" argument to make claims as to a statute's purpose. *See* Bogue, Note, *supra* note 145.

165. Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 409 (2015).

166. *See* Krishnakumar, *supra* note 147, at 1299.

167. *See id.* at 1304–05.

168. *See id.* at 1302.

169. *See* Ohlendorf, *supra* note 24, at 240–66 (observing that Hart-and-Sacks-style purposivism persists in prudential standing, choice of law, preemption, constitutional law, and severability).

such disjointedness have commented, that issue poses "a large . . . and perhaps insuperable problem" for statutory interpretation.[170]

As indicated above, debate remains as to the extent of classical purposivism's demise in reality, even as it has been largely abandoned in rhetoric and doctrine. But it is important here to underscore what the Court is *not* doing. It is not imagining what outcome the legislature would have wanted in a particular case, nor would it permit statutory *silence* to be filled through unrestrained judicial speculation on a legislature's purposes.[171] Yet that is precisely the strategy that Currie-style interest analysis envisions.

D. The View from the States

Before evaluating how Currie's interest analysis stacks up next to modern statutory interpretation, it is necessary to address one obvious lacuna in the above narrative: while the story told above is true enough for the U.S. Supreme Court, the vast majority of choice-of-law problems are confronted by state courts. An equally—if not more—relevant question is, then, to what extent has the abandonment of atextual legislative intent or purpose occurred for state courts applying state law?

The first comprehensive survey of state statutory interpretation was Gluck's 2010 article taking up the question.[172] Gluck found that states have followed the federal trend with a caveat, adopting what she calls "modified textualism"—a form of textualism that differs from its federal cousin only in that: (a) it permits recourse to legislative history when text is ambiguous, and (b) it provides a clear hierarchy of sources of meaning (text first, followed by legislative history, followed by substantive canons).[173] Though Gluck's analysis centers on five key states, her preliminary research revealed that many other states follow a similar text-centric—yet pragmatic—model of interpretation.[174] The conclusions are necessarily general; certain jurisdictions (notably New York and the District of Columbia) retain a more eclectic and purposive approach to statutory interpretation.[175] But Gluck notes that the Connecticut Supreme Court reached a conclusion similar to hers when it tried to abandon the plain-meaning rule, conceding that this move would "put it in the 'minority' among state courts."[176]

More recently, Austin Peters has made use of natural-language processing and machine-learning tools to code over 44,000 state court opinions according to

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170. *Id.* at 259.

171. *See* Re, *supra* note 165, at 417 ("If a reading has no textual support, then no amount of pragmatism or purpose can carry the day.").

172. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010).

173. *Id.* at 1758.

174. *See id.* at 1844 n.353.

175. *See, e.g.*, District of Columbia v. Fitzgerald, 953 A.2d 288, 300 (D.C. 2008); Samiento v. World Yacht Inc., 883 N.E.2d 990, 994 (N.Y. 2008).

176. Gluck, *supra* note 172, at 1844 (quoting State v. Courchesne, 816 A.2d 562, 569 (Conn. 2003)). *Courchesne* was swiftly overruled by the Connecticut legislature, which re-affirmed the plain-meaning rule. *See id.* at 1794. Nonetheless, the Connecticut Supreme Court "has been very reluctant to apply the overruling statute." *Id.*

how often they use tools associated with textualism.[177] His findings are consonant with Gluck's. In particular, he notes that "the use of textualism in state supreme court opinions has risen rapidly since 1980," with a particular emphasis on invoking a statute's "plain meaning."[178] But the states are not uniform in rejecting atextual methods of statutory interpretation. According to Peters, the "textualist intensity score" of the most textualist state (New Hampshire) is ten times that of the least textualist state (Oregon).[179]

Though states have not followed the U.S. Supreme Court in complete lockstep, even the modified textualism that Gluck observed among the states is notable primarily for what it does *not* endorse. First, it permits recourse to material outside a statutory text only when that text is ambiguous—not when it is entirely silent. Second, even though the use of legislative history may be permitted to clear up ambiguity or to attempt to find the second-best source of legislative purpose, there is no indication that state courts generally permit the *invention* or *presumption* of a legislature's purposes when both statutory text and other extrinsic sources of meaning are silent. Rather, as Gluck indicates, if both text and legislative history fail to provide an answer, modified textualism resorts to the deployment of clear, consistent canons of construction—"classic" textualism's preferred tools.[180] That state courts are generally more amenable to legislative history, while the U.S. Supreme Court relies more on canons, is thus somewhat beside the point for present purposes. No predominant method of statutory interpretation, state or federal, permits a court to invent a purpose on behalf of a silent legislature.

State courts have therefore mostly abandoned the pretension that they are qualified to fill in the blanks for a silent legislature, following belatedly in the wake of the interpretive revolution that has taken place in the federal courts.[181] To be sure, out-and-out purposivism of the Legal Process variety is not entirely dead in the states.[182] Even so, when courts look for legislative intent outside the text of a statute, they typically rely on *other* texts—for instance, legislative history—as substitutes.[183] Outside the context of choice of law, the imaginative reconstruction of a legislature's intent on a specific question—e.g., whether a law should apply to a set of out-of-state facts—has become a relic of an earlier era of interpretation.

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177. Austin Peters, *Are They All Textualists Now?*, 118 NW. U. L. REV. 1201, 1205–07 (2024).

178. *Id.* at 1207.

179. *Id.* at 1238.

180. *See* Gluck, *supra* note 172, at 1839.

181. Indeed, Caleb Nelson has observed that state courts traditionally have been *less* likely than federal courts to read substantive content into an otherwise silent statute, especially for the resolution of choice-of-law questions, precisely because they have a richer body of unwritten law to draw upon. *See* Nelson, *supra* note 24, at 661–62 (2013).

182. *See, e.g.*, Kramer v. Intuit, Inc., 18 Cal. Rptr. 3d 412, 415 (Ct. App. 2004) ("The courts resist blind obedience to the putative 'plain meaning' of a statutory phrase where literal interpretation would defeat the Legislature's central objective." (quoting Leslie Salt Co. v. S.F. Bay Conservation & Dev. Comm'n, 200 Cal. Rptr. 575, 580 (Ct. App. 1984))).

183. *See id.* at 579.

III. ASSESSING GOVERNMENTAL INTEREST ANALYSIS AS STATUTORY INTERPRETATION

As discussed in Part I, Currie's innovation was not to regard choice of law as a matter of statutory interpretation; it was to bring a particular approach to statutory interpretation to bear on the matter: the high purposivism of the Legal Process School. Given the centrality of purpose to governmental interest analysis, it is past time to consider how well governmental interest analysis holds up in the harsh light that recent judicial and scholarly critiques have shone on purposivist techniques of statutory interpretation.

As discussed in Part I, choice-of-law analysis assumes that in the absence of specific evidence that the legislature addressed the question of a statute's multi-state applicability, the legislature enacted the statute with the purely domestic case in mind and gave no thought to the question of the statute's multi-state applicability. Given this assumption, it is clear that in the types of cases that concern us here, the legislature had no views—and hence no purpose—on the specific question of the statute's multi-state applicability.[184] In placing legislative purpose front and center in the courts' analysis, therefore, Currie could only have been referring to the legislature's purpose *in the purely internal case*. In Section III.A, we discuss some of the challenges a court faces in ascertaining a statute's purposes in that context.

In Section III.B, we assume for argument's sake that courts can reliably identify a statute's purposes in the purely internal case, and we consider what we take to be Currie's key claim: that a statute's multi-state applicability can be derived, as a matter of interpretation, from the purposes the legislature sought to advance in the purely internal case. Drawing upon the main insights of the modern critique of purposivism, we argue that the legislature's purposes in the purely internal case cannot straightforwardly support any particular inferences about the legislature's likely preferences with respect to the question of the statute's multi-state applicability. Under the prevailing paradigm of statutory interpretation, then, Currie's project must fail out of the starting gate. Subsequent scholarly developments of Currie's theory have sought to alleviate some of the concerns we discuss in Section III.B, but we show in Section III.C that these improvements fail to salvage governmental interest analysis from the perspective of Currie's motivating justification for the technique: fidelity to the legislature's preferences.

A. Identifying a Law's Purposes in the Purely Domestic Case

Currie argued that a court should interpret a law as to its multi-state applicability "in order to effectuate the legislative purpose."[185] Because in the cases that concerned him, the legislature did not think about the statute's multi-state applicability, and hence had no purpose on that question, Currie must have been

184. As discussed in Part II, textualists and nontextualists disagree on the propriety of considering legislative history. We will sidestep that debate by assuming that the legislative history is equally silent on the question of the statute's multi-state reach. Like Currie, we are primarily interested in the claim that a statute's multi-state applicability can be derived from the *substantive* provisions of the statute even when the legislature has left that issue unaddressed.

185. Currie, *supra* note 3, at 178; *see also supra* note 4 and accompanying text.

referring to the legislature's purpose in the purely internal case, i.e., the case with no foreign elements. Currie's approach thus rests on the view that a statute's multi-state applicability can be derived from its purpose in the purely domestic case—which we will call the law's "substantive" purpose.

We will consider in the next Section whether a law's purpose in the purely domestic context can, by itself, yield any reliable conclusions regarding the legislature's preferences on the question of the law's multi-state applicability. In this Section, we discuss some complications and uncertainties that arise in trying to identify a law's purposes even in the purely domestic setting. These complications bear out the theoretical critiques of high purposivism discussed in Part II.

The first difficulty is the contestability of attributing a particular purpose to the legislature. Consider Currie's conclusion regarding the purpose of the Massachusetts statute involved in *Milliken*. As discussed in Part I, this statute rendered the contracts of married women unenforceable. Currie concluded that the statute reflected the Massachusetts legislature's view that married women were a category needing special protection, an understanding of coverture laws that harkens back to Blackstone, who wrote that "the disabilities, which the wife lies under, are for the most part intended for her protection and benefit."[186] This conclusion is contestable (to say the least). Far from "protecting" married women, such laws had the likely effect (and purpose) of maintaining married women in a subservient relationship to their husbands.[187]

The feminist critique of coverture laws is forceful and compelling, but Currie might respond that his theory can easily withstand the critique. The critique's revised understanding of the purpose of the Massachusetts law, he might argue, does not require much of a modification of his proposed analysis. To the extent his analysis focuses on the category of persons the law protects, one can simply substitute the married women's *husbands* for the married women themselves as the benefited parties and proceed much as before.

Perhaps so, but another key insight of the textualist critique of purposivism is that a statute seldom, if ever, reflects a unitary purpose. Statutes are the outcome of a process in which numerous policies, many in conflict with each other, are considered and assessed by the legislature. The legislature weighs and balances those policies, and the statute that emerges from this process is a compromise among those policies.[188] To describe the sole purpose of the Massachusetts law as the protection of married women (or their husbands) is in tension with this insight.

Currie did not completely overlook this point. He acknowledged that the Massachusetts legislature had taken into account not just the interests of married

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186. 1 WILLIAM BLACKSTONE, COMMENTARIES *430, *433.

187. The relevant literature is extensive. *See, e.g.*, Elizabeth York Enstam, *Women and the Law*, TEX. ST. HIST. ASS'N: HANDBOOK OF TEX. (Mar. 31, 2021), https://www.tshaonline.org/handbook/online/articles/jsw02 [https://perma.cc/6KUQ-9ZLL]; MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 25–30 (1985); HENDRIK A. HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 93–167 (2000); BARBARA YOUNG WELKE, LAW AND THE BORDERS OF BELONGING IN THE LONG NINETEENTH CENTURY UNITED STATES 64–70 (2010).

188. *See supra* notes 96–99.

women but also the state's interest "in freedom of contract, in the security of commercial transactions, [and] in vindicating the reasonable expectations of promises."[189] But he concluded that by adopting a rule invalidating the contracts of married women, the legislature ultimately "subordinated its policy of security of transactions in favor of its policy of protecting married women."[190] The *relevant* policy of the Massachusetts statute was thus, for Currie, the protection of married women. The legislature's purpose in the purely internal case—the purpose that drives the court's interest analysis—is the promotion of the policy that *prevailed* in the legislative battle.

But the conclusion that the side seeking to protect married women (or their husbands) prevailed is itself contestable. Imagine that some in the legislature wanted to protect married women by invalidating their contracts *and* imposing a fine on anyone attempting to enter into a contract with a married woman. Others believed that doing so would infringe too much on freedom of contract and preferred to invalidate the contracts of married women without imposing a fine. If the outcome was a law invalidating the contracts of married women but not imposing a fine, would we say that the side seeking to protect freedom of contract prevailed? Again, the point is that legislation reflects a particular balancing of contending interests, and the resolution of that conflict does not tell us much about how the legislature would have resolved matters not addressed in the statute.

One might attempt to rescue Currie from this critique by pointing out that the other state with connections to the dispute (Maine) had emancipated married women, recognizing the enforceability of their contracts. *As compared to the law of Maine*, one might legitimately concur with Currie's claim that the law of Massachusetts benefits married women (or their husbands). But notice that this argument seeks to ascertain the *relative* purpose of a law. If this is the analysis contemplated by Currie, a law may have one purpose when compared to the law of Maine but a different purpose when compared to the law of New Hampshire. For example, assume that the law of New Hampshire not only renders the contracts of married women unenforceable but also imposes a fine on anyone who attempts to enter into a contract with a married woman. Compared to New Hampshire's law, the "purpose" of the Massachusetts statute would be to protect persons who would like to enter into contracts with married women. In sum, although the law of a given state, considered in the abstract, cannot be said to have a *general* purpose to protect one set of persons or burden another set of persons except to the extent specified, it might plausibly be said to reflect a purpose of protecting a given group more than the law of another state does.

If this is how Currie would have courts identify a statute's purpose in the choice-of-law context, however, his theory fails on its own terms. Currie presents his theory as simply the application to the question of a law's multi-state applicability of the same technique courts commonly apply to resolve issues of

189. *See* Currie, *supra* note 51, at 233.
190. *Id.*

interpretation in purely domestic cases.[191] But Currie's attribution to the Massachusetts legislature of a particular purpose to "protect" or "benefit" a particular subclass of Massachusetts citizens rests ultimately on a comparison of the content of the Massachusetts law with the content of the laws of the other states with connections to the dispute. Far from extending to the multi-state case the same method that courts use to decide interpretive questions that arise in purely internal cases, Currie's approach to identifying a law's purpose is one that, in fact, is specific to—and can be applied only to—multi-state cases. We can attribute a purpose to the law only in comparison to the laws of other states. The highly context-dependent nature of Currie's attribution of a purpose to a given law distinguishes it fundamentally from the way a court identifies a law's purpose in "marginal domestic situations."[192]

Making matters worse, Currie unjustifiably assumes that all statutes reflect the legislature's consequentialist weighing of the interests of contending domestic interest groups—an assumption suggested by the very term "interest analysis." This assumption overlooks the possibility that a given law reflects commitments of a more deontological character. The legislature may have adopted the rule based on notions of natural law or natural justice, or because it believed the rule to reflect the most just solution to the problem it was addressing. Laws enacted on these grounds do not lend themselves to Currie's approach to determining their multi-state applicability. If the legislature adopted a rule because, in its view, the rule reflects natural law or natural justice, it may well prefer that the law be applied universally. If the legislature were open to limiting the multi-state applicability of such a law, it would presumably rest any such limits on considerations very different from the ones that Currie would have had courts take into account: for instance, doubts about the appropriateness of imposing its own notions of justice on societies with different values or circumstances, or a desire to reduce the interstate friction that would result from an aggressive application of local values.[193] As discussed in the next Section, these are the types of considerations that Currie sought to banish from the choice-of-law calculus. Complicating the analysis, a given statute may reflect a combination of consequentialist and deontological purposes. Some legislators may have favored the rule that was ultimately adopted because it benefits certain of their constituents, and other legislators may have favored the rule because they considered it the most just rule.

B. Interpreting a Law as to Its Multi-State Applicability

Let's assume for argument's sake that courts are able to distinguish laws enacted for consequentialist reasons from laws that reflect the legislators'

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191. Currie, *supra* note 3, at 178 (Interest analysis "is essentially the familiar [process] of construction or interpretation. Just as we determine by [the] process [of statutory interpretation] how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.").

192. *Id.*

193. *Cf.* Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 381 (2023) (opinion of Gorsuch, J.) (describing the incommensurability of ethical and moral considerations in state policy).

deontological commitments. And let's assume further that it is possible to attribute a purpose to a law by comparing it to the laws of other interested states (in the face of Currie's claim to be simply applying to the multi-state case the same interpretive principles that courts apply to the purely internal case). Even overlooking these challenges, Currie's purposivist approach is plagued by additional—and in our view insuperable—problems. Currie assumes that courts may infer the legislature's preferences regarding the law's multi-state applicability from the purposes it sought to advance in purely internal cases. In this Section, we show that even if the legislature's substantive purpose can be reliably identified, no particular legislative preferences regarding multi-state applicability can be straightforwardly derived from that purpose.

Consider again Currie's analysis of *Milliken v. Meyer*. As discussed above, Currie concluded that the purpose of Massachusetts's law rendering the contracts of married women unenforceable was to protect married women.[194] What does that tell us about the Massachusetts legislature's preferences regarding the multi-state applicability of the law? To answer that question, Currie asked: "What married women [was it Massachusetts's policy to protect]?" His answer was: "Why, those with whose welfare Massachusetts is concerned, of course—*i.e.*, Massachusetts married women."[195] Because the statute was intended to benefit *Massachusetts* married women, he concluded, the statute should be applied to all contracts of married women from Massachusetts and no contracts of married women from Maine.

But even if we granted Currie his assumptions, we would not be able to conclude with any confidence that his analysis captures the legislature's likely preferences regarding the law's multi-state applicability. Currie assumed that the purpose of the Massachusetts legislature was to protect Massachusetts married women because these were the women "with whose welfare Massachusetts is concerned." But it is more accurate to say (if we assume a provincial legislature, as Currie does) that the Massachusetts legislature is concerned with the welfare of Massachusetts *citizens* writ large, not just Massachusetts married women. As Currie himself recognized, the Massachusetts statute reflects the legislature's balancing of competing interests. The legislature considered countervailing policies such as "freedom of contract, . . . the security of commercial transactions, [and] . . . vindicating the reasonable expectations of promises," and it subordinated these policies to the policy of protecting married women.[196] But our—and his—starting assumption is that the legislature enacted the statute with only the purely domestic case in mind. If so, all we can say is that the legislature subordinated the interests of Massachusetts creditors in favor of the perceived need to protect Massachusetts married women *only in the purely domestic context*—that is, in cases in which everyone was from Massachusetts and everything took place there. By hypothesis, the legislature did not balance the relevant interests in the multi-state case.

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194. *See* Currie, *supra* note 51, at 234.
195. *Id.*
196. *Id.* at 233.

If the legislature had considered the multi-state case, it might have balanced the interest in protecting married women and the interest in protecting freedom of contract differently, even if it was only concerned with the welfare of *Massachusetts* citizens or residents. Its decision to subordinate the interest of creditors to those of married women in the purely domestic case may have been based on its assumption that Bay Staters generally have no choice but to enter into contracts with other Bay Staters. But persons from other states have the option of doing business with Granite Staters or Down Easters instead. If the legislature had expanded its lens to include multi-state cases, it might have been concerned that giving Massachusetts married women a right to avoid contracts with out-of-staters might lead out-of-staters in general to be hesitant to enter into contracts with Bay Staters—even Bay Staters who are not married women.[197] Out-of-staters might lose faith in Massachusetts's general commitment to enforcing contracts. Had the legislature considered the multi-state case, it might have concluded that the cost *to Massachusetts citizens* wishing to do business with out-of-staters of extending its coverture rule to contracts made outside Massachusetts, when added to the general costs to Massachusetts citizens that the legislature had weighed in the purely domestic case, tips the balance against applying the coverture rule to at least some multi-state cases. The legislature might well have preferred to apply this policy of protecting married women only to Massachusetts married women entering into contracts *with other Massachusetts citizens* or entering into contracts with anyone *in Massachusetts*. It cannot be said that a rational Massachusetts legislature would have necessarily decided to extend its law invalidating married women's contracts to all multi-state cases involving the contracts of Massachusetts married women. A court cannot confidently predict that the legislature would have balanced the competing interests the same way in the multi-state case as in the purely internal case.[198]

Currie's analysis also overlooks yet another key insight of modern statutory interpretation scholarship: no statute seeks to advance a single purpose at all costs, and the legislature's choice of means reflects its views about how far any given governmental policy should be advanced at the expense of competing policies.[199] Specifically, Currie's approach fails to consider an entire category of costs that might have led a legislature to limit the multi-state applicability of its internal law if it had thought about the issue. As noted, Currie took the position that a forum statute should be construed to extend to a multi-state case whenever doing so would advance the substantive governmental policy reflected in the statute, even if another state also has an interest in applying its (different) law.[200] This approach risks

197. *Cf.* Lilienthal v. Kaufman, 395 P.2d 543, 549 (Or. 1964) (considering this possibility but mistakenly concluding that the legislature had already balanced the relevant interests).

198. This insight would not have altered Currie's proposed resolution of the *Milliken* case itself, but it would have altered his proposed resolution of the converse case—one involving a contract made in Maine involving a Massachusetts married woman. *See* Currie, *supra* note 51, at 240.

199. *See* Manning, *supra* note 86, at 2411–12; *see also supra* Part II.

200. *See* Currie, *supra* note 3, at 178 ("If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.").

retaliation. Greater interstate animosity is a *cost* of adopting Currie's policy of fully advancing the interest in protecting Massachusetts married women. Averting such hostility is almost certain to be an additional interest of the Massachusetts legislature, as it risks a tit-for-tat that could disadvantage Massachusetts citizens. It is very possible that the legislature would have found the interest in protecting married women to be outweighed by the combined interests of Massachusetts citizens in protecting security of transactions *plus* avoiding interstate animosity.

Currie was not blind to (all of) these critiques. He did consider the possibility that a Massachusetts legislature would weigh the domestically relevant interests differently in the multi-state context.[201] He described this scenario as reflecting the possibility "that local policy is relatively weak, and suitable only for home consumption."[202] But he expressly rejected an approach that would have the courts weigh the strength of the forum's policies against those of other states, and he rejected reliance on systemic, multilateral considerations, such as the need to avoid interstate friction or to avoid forum shopping. He considered some of these values—e.g., avoidance of forum shopping—to be overrated, but he mainly banished these values from the choice-of-law inquiry because he believed that it was not a proper function of courts to pass judgment on the quality or strength of the policies its legislature has enacted or to weigh those policies against those of other states.[203] For this reason, he argued that courts should play for the home team, so to speak, and always apply forum law if doing so would advance the legislature's purpose in enacting the law.[204]

Currie's reasons for banishing these considerations from the choice-of-law analysis may or may not have been sound, but the result—a single-minded focus on advancing domestic purposes—cannot in any meaningful sense be said to reflect the legislature's likely preferences, if they could even be discerned. Currie's interest analysis can therefore no more claim the mantle of fidelity to legislative preferences than any number of other approaches, including the traditional approaches.[205] He conceived of the choice-of-law issue as a matter of ordinary interpretation, and he urged courts to address the issue by "try[ing] to decide [the question] as it believes [the legislature] would have decided [it] had it foreseen the problem."[206] He sold his approach as preferable to the traditional approach because, in his view, it was more

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201. *See* Currie, *supra* note 51, at 260–61 ("When a local creditor deals with a local married woman, he is 'presumed to know the law,' or at least he cannot be heard to assert that he did not know it. But how is it when a Massachusetts woman deals with a businessman in another state, where the law imposes no such disability . . . ? Isn't it a bit unfair to 'presume' that he knows our law, or to impose on him the burden of ascertaining it? Are we really so deeply concerned about our married women as to want our protective policy pushed that far? Perhaps it should be applied only where both parties are local residents.").

202. *Id.* at 261.

203. *See id.* at 260.

204. *See* Currie, *supra* note 3, at 178.

205. Indeed, when Currie proposed his alternative, the traditional approach had a stronger claim to reflect legislative intent, since it was the settled background rule against which the legislature had acted. *Id.* at 179.

206. Brainerd Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258, 277 (1961).

faithful to legislative preferences.[207] But there is little doubt that if a rational legislature *had* foreseen and attempted to address the multi-state case, it *would* have taken into account: (a) the strength of its own attachment to the solution it adopted for the domestic case and (b) the interstate friction and possible retaliation that would result from an aggressive approach to advancing the policy in the multi-state context. The legislature might, in the end, have decided to provide for a broad multi-state application of its substantive rule, as Currie favored, but it might not have. Insofar as Currie's approach categorically rules out consideration of these multilateral concerns, it cannot claim to reflect legislative preferences any more closely than any number of other possible approaches to the interpretive issue.[208]

C. Multilateral Approaches to Determining a Law's Multi-State Applicability

Some second-generation proponents of governmental interest analysis refined Currie's approach in a way that seeks to alleviate this last criticism of his theory. Currie argued for applying a forum state's law to any case in which the legislature's domestic purposes would be advanced, without regard to the existence or weight of the other states' interests, and without any consideration of interstate or international friction.[209] This aggressive approach to the application of forum law did not garner much support among courts and scholars. While like-minded courts and scholars generally viewed the identification of "false conflicts" as a huge advance in choice-of-law thinking, some sought an approach that considered multi-lateral considerations in resolving true conflicts. These approaches refined governmental interest analysis by taking into account factors that Currie excluded from the calculus in the event of a "true conflict." As techniques for ascertaining the likely preferences of the legislature with respect to the multi-state applicability of statutes, they represent an advance over Currie's original approach. But the results they produce cannot be said with much confidence to capture the actual preferences of the legislature regarding the law's multi-state applicability. In this Section, we consider two such approaches.

1. Comparative Impairment

Professor William Baxter proposed his "comparative impairment" approach as a refinement of Currie's interest analysis.[210] Baxter explicitly presented his comparative-impairment approach as an attempt to discover the likely intent of a legislature regarding whether to apply forum law in the face of a true conflict.[211]

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207. *See, e.g.*, BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 727 (1963) ("It is explicitly an attempt to determine legislative purposes . . . ."); Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 761 (1963) ("[O]ur system of government invests [legislatures] with power to make laws for the expression of governmental policy, and to define the scope of governmental interests. Even if I were convinced that courts were better equipped for the task I could not acquiesce in their assumption of it . . . .").

208. For a forceful argument that Currie was not really ascertaining the legislature's references but was instead constructing them, see Lea Brilmayer, *supra*, note 23, at 399–402.

209. *See* Currie, *supra* note 51, at 261–62.

210. *See* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 18 (1963).

211. *See id.* at 8–9.

He agreed with Currie that weighing conflicting substantive interests was not a proper role for the courts, but he thought that courts *were* capable of determining the extent to which the law's substantive policy would be impaired if not applied in a given multi-state situation. He accordingly proposed that in true-conflict cases, the court should apply the law that would be most impaired if not applied. Widespread adoption of this approach to resolving true conflicts, he argued, would maximize the overall achievement of substantive state interests.[212] The courts of California have adopted comparative impairment as their method of resolving true conflicts.[213]

Baxter's approach is more defensible as statutory interpretation than Currie's, as it recognizes that the legislature would have been concerned about the costs of an aggressive approach. But his analysis is applicable only in true-conflict situations, and he adopts Currie's approach to *identifying* true conflicts. Thus, Baxter's approach suffers from all of the problems outlined above concerning how the court identifies a statute's substantive purposes.

More importantly, even after identifying a true conflict, the comparative-impairment approach carries over Currie's admonition to treat all policies as equal. Baxter expressly disavowed the weighing of policies.[214] Like Currie, he defended this constraint on the grounds that weighing conflicting state policies is not a proper role for courts. Be that as it may, the fact remains that state legislatures *do* attach different degrees of importance to their policies. By assuming that all states give equal weight to their policies, the comparative-impairment analysis fails to capture the likely preferences of the legislature concerning the statute's multi-state applicability. Thus, as an approach that seeks to ascertain and give effect to the likely preferences of the legislature, comparative impairment is almost as problematic as Currie's approach. Currie and Baxter both missed that if they exclude from the courts' consideration factors that the legislature would have considered had it addressed the question, their methods lose their claims to superiority as methods of predicting the likely preferences of the legislature.

2. The Second Restatement

As applied by the California courts, if not as intended by Baxter, comparative impairment resembles the approach of states that use the "most significant relationship" test of the *Restatement (Second) of Conflict of Laws* as a way to resolve true conflicts.[215] The *Second Restatement* combined elements of

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212. *See id.* at 18–19.

213. *See, e.g.*, Bernhard v. Harrah's Club, 546 P.2d 719, 720–21 (Cal. 1976), *superseded by statute*, CAL. CIV. CODE § 1714 (2011)).

214. *See* Baxter, *supra* note 210, at 13.

215. The *Second Restatement* does not explicitly set forth the "most significant relationship" test as a mechanism for resolving true conflicts. Nevertheless, there is some basis in the *Second Restatement* for approaching the test in this manner, and some courts have done so. *See, e.g.*, Phillips v. Gen. Motors Corp., 995 P.2d 1002, 1005 (Mont. 2000); *see also* RESTATEMENT (THIRD) OF CONFLICT OF L. § 5.01 cmt. b (AM. L. INST., Tentative Draft No. 3, 2022) ("Pennsylvania and, until recently, New Jersey, use the Restatement of the Law Second, Conflict of Laws' 'most significant relationship' [test] to resolve [true] conflicts."). In explicating and applying comparative impairment, the California courts have departed from

governmental interest analysis with consideration of expressly multilateral factors, generally calling for courts to apply the law of the state with the "most significant relationship" to the issue in question.[216] It identifies a number of "factors" and "principles" to be taken into account in determining which state has the most significant relationship.[217] The approach has been criticized as highly indeterminate, leaving courts with largely unguided discretion. As some have derided it, the *Second Restatement* instructs courts to take all the relevant facts and state policies into account, giving those policies the weight they deserve in light of the purposes of the interstate and international system.[218] Despite (or, perhaps, because of) the wide discretion it affords to courts in the choice-of-law inquiry, the *Second Restatement* has proved to be popular among the courts. It is the most widely used choice-of-law approach in the United States today, having been adopted by roughly half of the states.[219] Some courts apply the *Second Restatement*'s approach as if it were a form of interest analysis.[220] Others apply the "most significant relationship test" as a mechanism for resolving true conflicts.[221] The *Second Restatement* effectively asks courts to replicate the process the legislature would have followed if it had addressed the issue of the statute's multi-state applicability to the case at hand.

Even so, the results reached by courts in applying the *Second Restatement* cannot confidently be said to reflect legislative preferences. Even more than Currie's original approach, the *Second Restatement* effectively calls on the courts to engage in imaginative reconstruction, and we have already discussed the objections to this approach by textualists and modern-day purposivists alike. For questions left unaddressed by the legislature, it is impossible for a court to say how the legislature would have weighed and valued all of the relevant considerations outlined in the *Second Restatement*. The legislature's all-things-considered approach to enacting statutes could produce any number of possible outcomes. Without evidence as to how the legislature would have resolved the issue—and recall again that we are assuming that the legislature passed the statute without giving thought to its multi-state applicability—it is impossible to predict how a reasonable legislature acting reasonably would have resolved it. Add to this the well-founded doubts that legislatures act reasonably, and we are left with the unfortunate but inescapable conclusion that the courts' attempt to reconstruct how the legislature would have addressed the issue of multi-state applicability, had it considered the matter, amounts to little more than conjecture. The conclusions reached by a court may well turn out

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Baxter's teachings and adopted an approach that resembles the *Second Restatement* insofar as it seeks an "accommodation of conflicting state policies" and tries to "allocate[] domains of lawmaking power in multi-state contexts." *Harrah's Club*, 546 P.2d at 723–24 (quoting Harold W. Horowitz, *The Law of Choice of Law in California—A Restatement*, 21 UCLA L. REV. 719, 753 (1974)).

216. RESTATEMENT (SECOND) OF CONFLICT OF L. §145 (AM. L. INST. 1971).

217. *See id.*; *see also id.* § 6 (generally describing the factors and principles).

218. *See, e.g.*, Paul v. Nat'l Life, 352 S.E.2d 550, 554 (W. Va. 1986) ("As Javolenus once said to Julian, *res ipsa loquitur*.").

219. *See* John F. Coyle et al., *Choice of Law in the American Courts in 2022: Thirty-Sixth Annual Survey*, 71 AM. J. COMPAR. L. 251, 263 n.45 (2023).

220. *See, e.g.*, *Phillips*, 995 P.2d at 1011.

221. *See* RESTATEMENT (THIRD) OF CONFLICT OF L. § 5.01 cmt. b (AM. L. INST., Tentative Draft No. 3, 2022).

to be reasonable, more reasonable even than the conclusions that the legislature might have reached. But whether the court's ultimate conclusions are those the legislature would have reached is unknowable.

Even if a court does fortuitously arrive at the same conclusion that the legislature would have reached on the specific facts of the case, there is another problem. Legislatures typically legislate for categories of cases, not for specific factual situations. As we have seen, however, Currie's approach to the multi-state issue is highly context-specific. It requires consideration of the domiciles of the specific parties involved in the dispute and the location of the specific conduct (and the effects of the conduct) underlying the dispute.[222] Even to specify the purpose of the contending laws, as we have seen, the court has to consider the laws in comparison with the laws of the other states having connections to the dispute.[223] The *Second Restatement* approach is, if anything, even more context-specific. Thus, while a legislature typically balances various domestic interests in order to establish a general rule or standard for courts to apply across a range of cases, Currie's approach and that of the *Second Restatement* require courts to operate on the implausible assumption that legislatures legislate for particular cases.

By excluding consideration of multilateral concerns, Currie's original proposal was more administrable by courts than some of the second-generation approaches to interest analysis and probably produced a greater degree of certainty and predictability. But in doing so, it sacrificed its claim to reflect the likely preferences of the legislature. The *Second Restatement*, consistent with its all-things-considered approach, advises courts to take into account the need for certainty and predictability as well as the needs of the interstate and international system (including judicial administrability). In taking these factors into account, a court could well decide that a more determinate general rule is preferable—but it cannot claim with confidence that the legislature would prefer a general rule or a case-specific, indeterminate, all-things-considered analysis.

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In this Part, we have drawn on the modern critique of purposivism to show that governmental interest analysis cannot claim to yield conclusions regarding a law's multi-state applicability that reliably reflect the legislature's preferences on that question. We began with the usual challenges of identifying the legislature's substantive purposes in enacting a law—its purposes in the purely internal case. These difficulties can perhaps be overcome in a given case, but the task is rife with pitfalls, and courts are as likely to err as to get it right.[224] If a court accurately identifies the purposes behind a law, interest analysis assumes that the legislature's preferences regarding the law's multi-state applicability can be inferred from its substantive purposes. But with respect to the type of law that interests us, we assume that the legislature enacted the law with the purely internal case in mind, giving no thought to the question of multi-state scope. As we have shown, the legislature's purposes in the purely internal case are consistent with any number of possible

222. *See supra* Section III.B.
223. *See supra* text accompanying note 191.
224. *See supra* Section III.A.

legislative preferences on the question of multi-state applicability. As a prediction of the legislature's likely preferences, interest analysis is thus not superior to other possible approaches to interpreting a law as to its multi-state applicability.[225]

To be clear, we do not maintain that the modern critique of purposivism rules out any particular approach to choice of law. Even if we understand the question as one of interpreting forum law as to its multi-state applicability (and we do not question this view), a state is as free to adopt the case-specific, all-things-considered approach of the *Second Restatement* as the traditional jurisdiction-selecting approach of the *First Restatement*. It is even free to adopt a Currie-style interest analysis or Baxter's comparative-impairment approach. Our point is that none of these approaches can claim the upper hand as being more faithful to legislative preferences, as Currie purported to do. Whichever approach is adopted must be defended on other grounds.

One relevant consideration in selecting a choice-of-law approach will be the need to avoid undue friction with other states having different policies while not unduly sacrificing the advancement of the substantive policies reflected in the forum's law. This balance could be struck on a case-by-case basis, such as through a *Second Restatement*-type approach. But another relevant consideration will be the need for certainty and predictability, which would cut in favor of a broader rule, one that will inevitably either over-protect the need to avoid friction with other states and under-protect the advancement of the forum's substantive policies or vice versa.

Views about the appropriateness of judicial policymaking will also affect the choice of approach. Since the outcome of a court's application of a *Second Restatement*-type analysis cannot be attributed in any meaningful sense to the legislature, an aversion to judicial policymaking might lead a court to adopt a broader presumption of some sort (such as the jurisdiction-selecting rules of the *First Restatement*, or the presumption against extraterritoriality discussed below). Of course, the court's adoption of such a presumption would itself be an act of judicial policymaking, which requires justification. One potential justification is that such a rule creates a stable background against which Congress may act with predictable effects, thus maximizing the likelihood that over time the outcomes will approximate those anticipated by the lawmaker. Of course, if the legislature does enact laws with background rules of interpretation in mind, faithfulness to legislative preferences might suggest keeping in place the *currently existing* rules, which today would favor retention of the *Second Restatement* approach in about half of the states. But the benefits of the existing rules would have to be balanced against their costs, including the difficulty of applying them and the randomness of the outcomes they produce. Working through these factors and developing the best approach to choice of law is well beyond the scope of this Article. Our point is simply that as the modern critique of purposivism in statutory interpretation has taught us, governmental interest analysis cannot be said to be superior to the other approaches from the

225. *See supra* Section III.B.

perspective of capturing legislative preferences with respect to multi-state applicability.[226]

IV. THE RISE OF INTERPRETIVE PRESUMPTIONS IN FEDERAL AND STATE COURTS

The insights of the modern critique of purposivism in statutory interpretation have prompted divergent reactions in state and federal courts. The federal courts, led by the U.S. Supreme Court, have adopted a presumption against extraterritoriality, which interprets federal statutes to not apply beyond our borders unless the statutory text (or possibly other evidence of legislative intent) clearly reflects a contrary legislative intent. In theory, at least, this presumption appears to integrate the Court's general approach to statutory interpretation with its approach to choice of law. The states, meanwhile, have developed diverse approaches: some have adopted a similar presumption; others have not; and few rationalize their approach to statutes and the common law. While the federal courts have expressly rejected Currie's teachings in determining the multi-state applicability of federal statutes, the state courts have been much slower to do so.

This narrative masks some complexity. As we discuss below, the federal presumption against extraterritoriality in practice ends up reproducing elements of the purposive analysis that it facially rejects. Even so, it is a far more constrained purposive inquiry, much closer to the modern purposivism we previously discussed[227] than to an unbounded imaginative reconstruction of legislative intent. Thus, even as some form of purposivism may well endure in federal choice of law, it differs radically from the version Currie espoused. Section IV.A discusses the Court's adoption and implementation of a presumption against extraterritoriality, and Section IV.B discusses the state courts' response to the statutory interpretation revolution.

A. The Federal Presumption Against Extraterritoriality

The revolution in statutory interpretation described in Part II was led by the U.S. Supreme Court, with Justice Scalia taking a leading role. This revolution has had a decided impact on the Court's approach to determining the multi-state applicability of federal statutes. The Court's adoption of the presumption against extraterritoriality was a classic textualist move, eschewing an inquiry into legislative intent in favor of a clear-cut, widely applicable rule of construction.[228] The

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226. Indeed, we doubt that governmental interest analysis can even reliably identify false conflicts—that is, cases in which *no* purpose of a given state's law would be advanced if applied in the case. As discussed in Section III.A, if a legislature's enactment of a given law reflects its views that a rule is more just, it may prefer that the rule be applied to all cases, no matter how unconnected to the forum.

227. *See supra* Section II.C.

228. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS xxvii–xxix (1st ed. 2012) (claiming that the canons of construction "will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law"). Whether the canons of construction constrain judicial decision-making is, of course, hotly debated. *See, e.g.*, WILLIAM N. ESKRIDGE, JR.,

difficulties the Court has encountered in giving content to the presumption, however, illustrate the challenges of discarding all reference to legislative purpose.

The Supreme Court's cases about the extraterritorial applicability of federal statutes address the same issue that state courts are confronted with in choice-of-law cases: the multi-state applicability[229] of forum (in this case, federal) law.[230] This Section will focus on the Court's adoption and application of the presumption against extraterritoriality, which is its current approach to this question. But first, we will briefly describe the Court's earlier practices, showing how its approaches to this question have generally followed developments in choice-of-law doctrine over the years.

1. Extraterritoriality and Choice of Law

Initially, the U.S. Supreme Court applied something like the traditional approach to choice of law in construing federal statutes as to their multi-state applicability: in the absence of evidence of a contrary congressional intent, the Court construed statutes to apply only to the extent the forum's law would be applicable under traditional choice-of-law rules. Thus, in reviewing the foreign applicability of the Sherman Act, the Court wrote in *American Banana Co. v. United Fruit Co.* that "[w]ords having universal scope, such as 'every contract in restraint of trade,' 'every person who shall monopolize,' etc., will be taken, as a matter of course, to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch."[231] The Court looked to choice-of-law cases to determine who was properly "subject to such legislation," noting that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[232] Accordingly, the Court held that the Sherman Act applied only if the challenged conduct occurred in the United States.[233]

As choice-of-law rules developed, so did the Court's approach to the extraterritoriality issue. In the antitrust context, the Court replaced the strict territorial approach of *American Banana* with something closer to Currie's interest analysis. In the *Alcoa* case, the Second Circuit, sitting as a court of last resort because the Supreme Court lacked a quorum, reiterated that "we are not to read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which

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INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 16–19 (2016). For present purposes, it suffices to note that such presumptions are driven by the textualist critique of purposivism and imaginative reconstruction, as Justice Scalia's opinion in *Morrison* makes clear. *See infra* notes 257–58 and accompanying text.

229. In the context of federal law, a statute's "multi-state applicability" is its applicability to cases having contacts with other nations. *See supra* note 5.

230. For an extended defense of this proposition, see Carlos M. Vázquez, *Choice of Law as Geographic Scope Limitation*, *in* RESOLVING CONFLICTS IN THE LAW: ESSAYS IN HONOUR OF LEA BRILMAYER 42, 45 (Chiara Giorgetti & Natalie Klein eds., Brill Nijhoff 2019).

231. 213 U.S. 347, 357 (1909), *overruling recognized by* W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l., 493 U.S. 400 (1990).

232. *Id.* at 356 (citing Slater v. Mexican Nat. R.R. Co., 194 U.S. 120, 126 (1904)).

233. *Id.* at 355–57.

generally correspond to those fixed by the 'Conflict of Laws.'"[234] Citing developments in the conflict of laws since the days of *American Banana* and its own assumptions about what Congress likely intended, the court held that the Sherman Act reached conduct performed abroad that was "intended to affect imports and did affect them."[235] *Alcoa* resembled Currie's interest analysis insofar as it interpreted the statute to extend to multi-state cases if Congress's purposes in enacting the statute would be furthered, without regard to the interests of other states. Although *Alcoa* was not a Supreme Court decision, it was quickly endorsed by the Court.[236]

Reflecting further developments in the conflict of laws, the Ninth Circuit, in *Timberlane Lumber Co. v. Bank of America*, developed the once-influential "jurisdictional rule of reason."[237] Citing the *Second Restatement*, the court adopted a multilateral test for ascertaining the multi-state reach of the Sherman Act, instructing courts to consider not just the existence of an effect on U.S. commerce but also "whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-à-vis those of other nations, to justify an assertion of extraterritorial authority."[238] This multilateral approach to extraterritoriality recalled the approach adopted by Justice Jackson to determine the multi-state scope of the Jones Act,[239] which, as later described by Justice Frankfurter, reflected "due recognition of our self-regarding respect for the interests of foreign nations," with "the controlling consideration [being] the interacting interests of the United States and foreign countries."[240]

As these decisions show, even if the multi-state applicability of a statute is understood as a question of statutory interpretation, it can, in principle, be assessed either through a substantive statutory presumption, a unilateral interest analysis, or a multilateral interest analysis. Indeed, in *Hartford Fire Insurance Co. v. California*, the Court's strongest textualist justice endorsed a version of *Timberlane*'s multilateral approach to extraterritorial application of the Sherman Act, even while emphasizing that the question before the Court was one of statutory interpretation.[241] Justice Scalia dissented in *Hartford Fire*—the majority's mangled analysis having been based on a misreading of the relevant *Restatement* provision.[242] In *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, the Court finally considered directly whether to endorse *Timberlane*'s case-specific, all-things-considered, multilateral approach, and it rejected it as "too complex to prove workable" in the antitrust context.[243] But

234. United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945).
235. *Id.* at 444.
236. *See* Am. Tobacco Co. v. United States, 328 U.S. 781, 811–15 (1946).
237. 549 F.2d 597, 613 (9th Cir. 1976).
238. *Id.* (citing RESTATEMENT (SECOND) OF FOREIGN RELS. L. OF THE U.S. § 40 (AM. L. INST. 1965)).
239. *See* Lauritzen v. Larsen, 345 U.S. 571, 577–79 (1953).
240. Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 382–83 (1959), *superseded by statute*, Jones. Act, Pub. L. No. 109-304, 120 Stat. 1557, *as recognized in* Miles v. Apex Marine Corp., 498 U.S. 19 (1990).
241. 509 U.S. 764, 812–15 (1993) (Scalia, J., dissenting).
242. *See id.* at 821.
243. 542 U.S. 155, 156 (2004).

Empagran does not suggest that there is anything inherent about the issue of multi-state applicability that rules out a multilateral approach. Nor did it suggest that any particular approach was required or precluded by the need to be faithful to Congress's preferences. The choice was for the Court to make, and in later cases the Court adopted the presumption against extraterritoriality as its general approach to determining the multi-state applicability of federal statutes (while grandfathering out the antitrust laws).

2. The Presumption Against Extraterritoriality's Textualism

With the advent of textualism, the Court reverted to something like Justice Holmes's original approach in *American Banana*. In *EEOC v. Arab American Oil Co.* ("*Aramco*"), the Court applied the presumption against extraterritoriality to determine the multi-state applicability of federal anti-discrimination laws as if nothing had changed since *American Banana*.[244] Like the traditional approach, and like interest analysis, the presumption against extraterritoriality is a rule for interpreting statutes as to their multi-state applicability. Insofar as it tells courts how to apply a statute in the multi-state context where the legislature has not addressed the issue, the presumption against extraterritoriality operates precisely as traditional choice-of-law rules were understood to operate in the *Carroll* case, and as Currie understood interest analysis to work—i.e., as a way to interpret the multi-state applicability of statutes in the face of legislative silence.

As with state statutes, there will frequently be text in federal statutes that will bear upon the statute's multi-state applicability. Just as some state statutes will purport to apply to "any person," federal statutes will often be broadly phrased as to their applicability. Indeed, federal statutes will often have language that bears even more relevance to the question of multi-state applicability. The Sherman Act, for example, purports to apply to "[e]very contract [or] conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[245] As discussed above, courts routinely disregard statutory text that purports to extend a statute to "any person," presuming that the legislature passed the statute with only the purely domestic case in mind.

For the same reason, in applying the presumption against extraterritoriality, the Court disregards statutory text providing that the statute applies to cases that affect "interstate or foreign commerce," presuming that this language was adopted to address Congress's constitutional authority to legislate over the subject matter.[246] The Court has thus held that language of this sort, and other "boilerplate" language, is insufficient to rebut the presumption against extraterritoriality.[247] As is true with choice of law generally, the Court has explained that it "presume[s] [Congress] 'is

244. 499 U.S. 244, 248, 259 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Arbaugh v. Y&H Corp., 546 U.S. 500 (2006).

245. 15 U.S.C. § 1. For a recent argument that this language is actually strongly reflective of Congress's intent regarding the multi-state applicability of the Sherman Act, see generally Herbert Hovenkamp, *The Antitrust Text*, 99 IND. L.J. 1063 (2024).

246. *See Aramco*, 499 U.S. at 248–51.

247. *Id.* at 250–51.

primarily concerned with domestic conditions.'"[248] In the state choice-of-law context, this assumption is thought to leave the question of multi-state applicability to the courts to resolve, and the courts decide the question by applying either traditional choice-of-law rules or, for states following Currie, through a purposive interpretive approach. In the context of the presumption against extraterritoriality, this assumption does heavier lifting—it serves to justify the Court's conclusion that the statute does not apply beyond our borders.[249]

In sum, like other approaches to choice of law, the presumption against extraterritoriality restricts the multi-state applicability of federal statutes not just in the absence of text, but in the face of text suggesting the contrary. In this respect, it is a strong-form substantive canon, designed primarily to protect the extra-textual interest in guarding against "unintended clashes between our laws and those of other nations which could result in international discord."[250] Scholars and judges have debated whether substantive canons are consistent with the tenets of textualism. For example, Justice Barrett has asserted, in both her judicial and scholarly writings, that strong-form substantive canons "are 'in significant tension with textualism' insofar as they instruct a court to adopt something other than the statute's most natural meaning."[251] On the other hand, Barrett recognizes that a statute's text must be read in context; that "context includes common sense;" and that, from the perspective of common sense, "literalism—the antithesis of context-driven interpretation—falls short."[252] Justice Barrett's argument that such canons can be understood as based on contextual or "common-sense" readings of the text is echoed in the cases on the presumption against extraterritoriality, where the Court has described the presumption as based in part on the "commonsense notion that Congress generally legislates with domestic concerns in mind."[253] Although some scholars have claimed that this approach to substantive canons is actually a form of purposivism,[254] we view the presumption as aligned with the commitments of textualists to the extent it disavows an open-ended search for legislative purpose and seeks the simplification of the judicial task and a measure of certainty and predictability in judicial outcomes. As we will see in the next Subsection, however, the Court's application of the presumption against extraterritoriality has not completely banished all reference to legislative purposes.

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248. *Id.* at 248 (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).

249. *See also* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S 247, 255 (2010) (citing *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993), for the proposition that "Congress ordinarily legislates with respect to domestic, not foreign, matters").

250. *Aramco*, 499 U.S. at 248.

251. Biden v. Nebraska, 600 U.S. 477, 509 (2023) (Barrett, J., concurring) (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 123–24 (2010)).

252. *Id.* at 512 (Barrett, J., concurring).

253. RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 336 (2016) (quoting *Smith*, 507 U.S. at 204 n.5).

254. *See* Jed Shugerman (@jedshug), X (July 4, 2023, 5:16 AM), https://x.com/jedshug/status/1676203386121625601 [https://perma.cc/N26R-23N2]; *cf.* Richard M. Re (@RichardMRe), X (Sept. 3, 2023, 11:25 AM), https://x.com/RichardMRe/status/1698401967020618064?s=20 [https://perma.cc/6A7C-7UP9] ("[D]oing what feels to you like 'common sense' isn't textualism.").

3. The Presumption Against Extraterritoriality's Purposivism

The Court has expressly contrasted the presumption against extraterritoriality with Currie's purposivist approach. In *Morrison v. National Australia Bank*,[255] Justice Scalia's description of the lower courts' then-prevailing approach to determining the multi-state applicability of § 10(b) of the Securities Exchange Act reads like a direct rebuke of Currie and of imaginative reconstruction in general:

> Commentators have criticized the unpredictable and inconsistent application of § 10(b) to transnational cases. . . . The criticisms seem to us justified. The results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court—demonstrate the wisdom of the presumption against extraterritoriality.[256]

As we shall see, however, the Court's approach is, in application, less distinct from Currie's than Justice Scalia's quip suggests—largely because of Justice Scalia's own adoption, in the same case, of a "focus" test to determine the multi-state applicability of a statute in the face of insufficient legislative guidance on the question.

The Court adopted the presumption against extraterritoriality as a "principle of interpretation" that "preserv[es] a stable background against which Congress can legislate with predictable effects."[257] As the Court described it, the presumption tells us that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[258] But—as befits an ancient topic of jurisprudence—the question of multi-state applicability resists such easy domestication. The Court's statement in *Morrison* would be true if in the absence of congressional guidance on the question of multi-state scope, the Court interpreted statutes to apply only to cases having *no* connections to other countries. But such a rule would impose presumptive limits on the multi-state applicability of federal statutes that would be intolerable in today's globally integrated economy. While maintaining that in the face of congressional silence, federal statutes lack all extraterritorial force, the Court's clarification of the distinction between an extraterritorial application of a statute and a domestic application makes it clear that "non-extraterritorial" statutes do apply to some multi-state cases.

Morrison involved a claim under § 10(b) of the Securities Exchange Act of 1934. The defendant had engaged in certain acts of fraud in the United States in connection with the sale of securities outside the United States.[259] The Court concluded that the statutory language did not evince clearly enough a legislative intent to reach foreign securities fraud.[260] The statute was therefore applicable only domestically. But because some of the fraud on which the suit was based took place in the United States, the Court had to address whether the case before it presented a domestic application of the statute. Notably, the Court did not entertain the

255. 561 U.S. 247 (2010).
256. *Id.* at 260–61.
257. *Id.* at 255, 261.
258. *Id.* at 255.
259. *See id.* at 251–52.
260. *Id.* at 267.

possibility that a non-extraterritorial federal statute reaches only cases having *no* foreign connections. If it had, the Court could have ruled against the plaintiffs because *some* of the relevant conduct had occurred outside the United States. The Court did not even discuss this possibility.[261]

Instead, the Court held that where the case involves some foreign and some domestic connections, the case presents a domestic application of the statute if whatever was the "focus" of Congress's concern occurred in the United States.[262] In enacting the Securities Exchange Act, the Court held that the focus of Congress's concern was "purchases and sales of securities."[263] Therefore, the Court concluded that "it is . . . only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies."[264] Because Congress's focus in enacting the Act was *not* the prevention of fraud, the fact that some of the fraud had taken place in the United States did not mean that the case before it was a domestic application of the statute.

It is clear from the Court's analysis that the adjectives "domestic" and "extraterritorial" are terms of art, not descriptive terms. A case might present an "extraterritorial" application of the statute even if it has some connections to the United States, such as fraudulent acts that occurred in the United States. More importantly, a case can present a "domestic" application of the Act even if it has some connections to other countries, such as fraudulent acts in other countries in connection with the sale of a security in the United States. The Court's analysis makes clear that the latter case is a "domestic" case falling within the scope of the Securities Exchange Act. The terms "extraterritorial" and "domestic" thus turn out to lack any inherent content. Instead, they are given content by the Court's application of the "focus" test, which labels as a "domestic application" any case where the law may be permissibly applied.

The Supreme Court's concept of "focus" therefore reflects its approach to the question we have been discussing throughout this Article: how to determine a law's multi-state applicability in the face of legislative silence on that question. The first step of the analysis (examining whether there is sufficient evidence of legislative intent to rebut the presumption against extraterritoriality) is analogous to the courts' resolution of the choice-of-law question when the legislature has included an external scope provision in the statute. The second step (the "focus" inquiry) addresses the more difficult question—which arises more frequently—of how the courts are to answer the question in the absence of legislative guidance.[265]

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261. *Cf.* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 126–27 (2013) (Alito, J., concurring) (stating that a dispute presents a domestic application of the federal common law cause of action implied from the Alien Tort Statute for violations of international law only if conduct in the United States "is sufficient to violate an international law norm").

262. *Morrison*, 561 U.S. at 266–68.

263. *Id.* at 266.

264. *Id.* at 267.

265. Since the courts reach the focus issue only if the legislature has provided insufficient guidance on the question of multi-state scope, it would seem that the "focus" of the statute, in this context, has to be its focus in the purely domestic case, just as a law's

But the Supreme Court's concept of "focus" was undertheorized, to say the least. In holding that the statute's focus was the sale of securities rather than combatting fraud, the Court in *Morrison* reasoned that "[s]ection 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase and sale of any security registered on a national securities exchange or any security not so registered.'"[266] It is equally true, however, that the statute does not penalize all purchases or sales of securities, but only purchases or sales of securities involving deceptive conduct.[267] It is unclear why the statute's focus was one of the conditions the statute establishes for liability but not the other.

Other parts of the Court's analysis in *Morrison* seem to associate a statute's "focus" with its purpose. For example, the Court noted that "purchase-and-sale transactions are the objects of the statute's solicitude," and that "it is parties or prospective parties to those transactions that the statute seeks to 'protect.'"[268] The difference between the statute's "object of . . . solicitude" and its purpose is elusive. The identification of the "parties" the statute "seeks to protect" seems like an inquiry into the statute's purpose. Indeed, the identification of the class of persons the statute seeks to protect calls to mind Currie's approach to identifying statutory purpose, as discussed in Part III.

Subsequent decisions also suggest that the Court understands a statute's "focus" as its purpose. In *WesternGeco LLC v. Ion Geophysical Corp.*, for example, the Court concluded that "the infringement is the focus of" § 284 of the Patent Act because its "overriding *purpose*" is "to 'affor[d] patent owners complete compensation' for infringements."[269] Thus, if the infringement occurred in the United States, the case involves a domestic application of the statute even if the injury was suffered abroad. In rejecting the argument that *the damages* were the focus of the statute, the Court stated that "focus" "can turn on the 'conduct,' 'parties,' or interests that it regulates or protects"[270]—all, again, common watchwords for purpose (particularly the reference to interests). Even more suggestive was the Court's conclusion that "[h]ere, the damages themselves are merely the means by which the statute achieves its *end* of remedying infringements."[271] The "infringement" is the "focus," in other words, because it is the "end" the statute seeks to achieve. "End" is, of course, a synonym for "purpose."

The apparent association of a statute's "focus" with its "purpose" in these cases is somewhat surprising. *Morrison*'s author—the source of the "focus" test—was one of the fiercest critics of purposivism. Indeed, as noted, *Morrison* itself

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"purpose" under Currie's analysis has to be its purpose in the purely domestic case. In both contexts, the court assumes that the legislature acted with only the purely domestic case in mind.

266. *Morrison*, 561 U.S. at 266.

267. *See id.* at 262 (quoting the statute).

268. *Id.* at 267.

269. 585 U.S. 407, 414–15 (2018) (quoting Gen. Motors Corp. v. Devex Corp., 461 U.S. 648, 655 (1983) (emphasis added)).

270. *Id.* at 416.

271. *Id.* (emphasis added). Justice Sotomayor's opinion in *Abitron*, discussed below, quotes and endorses the language from *WesternGeco* equating a statute's focus with its "end." *See infra* notes 281–84 and accompanying text.

includes a pointed rejection of Currie-style purposivism.[272] An approach that determines what is a "domestic" application by reference to the statute's purpose would appear to resurrect Currie's approach to some extent. Understanding "focus" as "purpose" also leaves the Court's test for determining the multi-state scope of federal statutes vulnerable to one of the key textualist criticisms of purposivism: that statutes do not have a unitary purpose. The Supreme Court's "focus" test appears to require the lower courts to identify a single focus. The purpose of the Securities Exchange Act was in part to regulate sales of securities, but it was also in part to regulate deceptive conduct.[273] The Supreme Court chose the former as the statute's focus without really explaining why the other was not. Yet the Court also failed to provide a convincing alternative understanding of the concept of "focus" that would clarify why one but not the other was the statute's focus.

Finally, a purposive analysis also risks undermining the presumption's goal of providing a clear rule against which Congress can legislate with predictable effects. As we have seen, Currie-style purposivism can be highly indeterminate.[274] This was, indeed, Justice Alito's criticism of the majority's recent holding in *Yegiazaryan v. Smagin*.[275] In *RJR Nabisco v. European Community*, the Court had held (dubiously[276]) that because of the presumption against extraterritoriality, the Racketeer Influenced and Corrupt Organizations Act ("RICO") authorizes private recovery only for domestic injuries.[277] In *Smagin*, the majority held that determining whether an injury was domestic or foreign involved a "contextual . . . inquiry" and noted that "no set of factors can capture the relevant considerations for all cases."[278] Justice Alito noted in dissent that the Court had, in prior cases, "placed a premium on workability in our extraterritorial-application cases."[279] He criticized the *Smagin* majority's highly "nuanced" approach, quoting Justice Scalia's criticism of the approach the Court had rejected in *Morrison*: "There is no more damning indictment of the [Second Circuit's] 'conduct' and 'effects' tests than the Second Circuit's own declaration that 'the presence or absence of any single factor which was considered significant in other cases . . . is not necessarily dispositive in future cases.'"[280]

Just a week later, in *Abitron Austria GmbH v. Hetronic International Inc.*, the Court took a sharp turn toward stripping the presumption against extraterritoriality of its remaining vestiges of purposivism.[281] The issue was whether the Lanham Act—which the Court unanimously concluded did not apply extraterritorially—reached conduct abroad that is likely to produce confusion in the

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272. *See supra* text accompanying note 256.

273. *See* 15 U.S.C. § 78j(b) (section 10(b) of the Securities Exchange Act of 1934) (forbidding the use of "any manipulative or deceptive device or contrivance" in connection with the sale of securities).

274. *See supra* Section III.C.

275. *See* 599 U.S. 533, 550–53 (2023) (Alito, J., dissenting).

276. *See generally* Carlos M. Vázquez, *Out-Beale-ing Beale*, 110 AM J. INT'L L. UNBOUND 68 (2016).

277. RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 340–44, 351–54 (2016).

278. *Smagin*, 599 U.S. at 545.

279. *Id.* at 553 (Alito, J., dissenting).

280. *Id.* (quoting Morrison v. Nat'l Austl. Bank, 561 U.S 247, 258–59 (2010)).

281. 600 U.S. 412, 415 (2023).

United States relating to the plaintiff's trademark.[282] Under the *Morrison* test, the answer would have turned on whether the "focus" of the Lanham Act was the infringing conduct or the resulting confusion. Justice Sotomayor, relying heavily on *WesternGeco*'s language equating a statute's "focus" with its "end," reasoned that the Lanham Act's end is "protecting consumers from confusion" and would have held that application of the Act would be "domestic" if the likely confusion would occur in the United States.[283] Because the courts below did not apply that test, she would have vacated and remanded for its application in the first instance.[284] But this time it was Justice Sotomayor who was in the minority. The majority, in an opinion by Justice Alito, significantly revised the Court's approach to determining when a case involves a domestic application of a statute.

The majority quoted and purported to accept *WesternGeco*'s statement that "[t]he focus of a statute is 'the object of its solicitude,' which can include the conduct it 'seeks to "regulate,"' as well as the parties and interests it 'seeks to "protect"' or vindicate."[285] But the Court held that a statute's "focus" is only *sometimes* determinative of whether a case involves a domestic application of the statute. Quoting language from some prior cases, the Court held that what matters is the "*conduct* relevant to the focus" of the statute.[286] The Court read this language as requiring that the thing that has to occur in the United States for a case to involve a domestic application of the statute is always conduct.[287] In other words, even if the statute's focus is "persons" or "interests," as contemplated by *WesternGeco*, and those persons or interests are in the United States, the case does not involve a domestic application of the statute if the case did not involve any *conduct* in the United States. Similarly, even if the *effect* of the conduct is in the United States, as it admittedly was in *Abitron* (because the confusion resulting from the infringement would occur in the United States), the statute does not involve a domestic application of the statute if no conduct occurred in the United States.

Abitron appears to significantly rewrite the case law on when a case involves a domestic application of a statute. The holding is in substantial tension with Justice Alito's own opinion for the Court in *RJR Nabisco*, where the Court held that RICO involved a domestic application of the statute when the *injury* occurred in the United States, regardless of where the conduct causing the injury occurred.[288] While in earlier decisions the Court had stressed the importance of the "focus" of the statute in determining when a case involves a domestic application of a statute, it now appears that "focus" is relevant in only some cases—namely, cases that involve some conduct in the United States and some conduct outside the United States (as in *Morrison*). When the case involves conduct outside the United States and a connection to the United States other than conduct (such as the domicile of a

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282. *See id.*
283. *Id.* at 437 (Sotomayor, J., concurring).
284. *Id.* at 446.
285. *Id.* at 418 (majority opinion) (internal quotation marks omitted) (quoting WesternGeco LLC v. ION Geophysical Corp., 585 U.S. 407, 413–14 (2018)).
286. *Id.* (emphasis partially omitted).
287. *Id.* at 417–19.
288. *See* RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 354 (2016).

party or the effect of the conduct), the "focus" test apparently does not come into play.

It is unclear if *Abitron*, coming just a week after *Smagin*, reflects a new approach to extraterritoriality. The quick succession of these two decisions suggests that the Court has not fully worked out its approach to extraterritoriality. The *Abitron* approach, if followed in later cases, would reduce the range of cases where there might be a need to identify the statute's purposes. (Within this range of cases, however, the uncertainties of determining the *operative* purpose remain.) The Court's emphasis on the place of the conduct, irrespective of purpose, adds to the predictability of the test and strengthens the presumption's status as a strong-form substantive canon. At least to the extent the case involves no conduct in the United States, the applicability of the statute would apparently not depend on the nature of the substantive obligations the statute imposes.

However, by insisting that the relevant connection be the *conduct* that the suit is based on, the Court may have selected the wrong category of domestic connection. The traditional choice-of-law rule for torts focused on the place of *injury* rather than the place of conduct.[289] And the Court's rule may be too blunt—traditional choice-of-law rules calibrated the required type of connection with the forum to the type of statute involved (place of injury for statutes sounding in tort; situs for statutes involving property; domicile for statutes involving questions of personal status). In future cases, the Court may well develop the law in that direction. If so, it will have stumbled onto an approach to the question of multi-state applicability that mirrors the approach that prevailed in the states before the advent of interest analysis, which in turn would mark a dramatic reversal from the purposivism it once embraced in this area. On the other hand, if the Court adheres to this "conduct" test, it will have adopted a strong-form substantive canon that significantly *over*protects the interest in avoiding conflict with other nations.

Even if *Abitron* turns out to be a one-off, and the approach of *Morrison* and *WesternGeco* continues to prevail, the Court's adoption of the presumption against extraterritoriality would reflect a significant departure from an approach like Currie's—and from the pre-*Morrison* approach to construing securities laws as to their multi-state applicability. Even though the pre-*Abitron* cases on "focus" determine whether a case is domestic or extraterritorial by reference to a concept that might be understood as its purpose, they apparently contemplate the identification of a statute's purpose at a very high level of generality. Thus, Justice Sotomayor described the "end" of the Lanham Act as the avoidance of confusion.[290] Rather than licensing courts to imagine how broadly the legislature would have wanted the statute to be applied, the courts merely ask whether the contact identified by reference to the statute's generalized purpose took place within the United States. The approach bears scant resemblance to the imaginative reconstruction that Currie called for and that Scalia ridiculed. The kind of "purpose" the "focus" test makes

289. *See* RESTATEMENT (FIRST) OF CONFLICT OF L. § 377 (AM. L. INST. 1934).

290. *See* Abitron Austria GmbH v. Hetronic Int'l, Inc., 600 U.S. 412, 436–38 (2023) (Sotomayor, J., concurring).

relevant is, instead, akin to the objectified general purpose that both textualists and modern-day purposivists endorse.

B. The Diversity of State Approaches

While the U.S. Supreme Court seems to have brought its approach to choice of law increasingly in line with its textualist approach to statutory interpretation, the states have only fitfully—and inconsistently—followed its lead. Even as some states have been more willing to follow the Court's lead in rejecting the free-form purposivism of the mid-century, many have insulated their choice-of-law approaches from that transformation.

Most states seem to follow some version of Currie's interest analysis in resolving choice-of-law problems. In the most recent survey of the choice-of-law methodologies used in the 51 jurisdictions of the United States, well over half of the states use either interest analysis, the *Second Restatement*, or some combination of the two to resolve choice-of-law problems in tort and contracts.[291] As mentioned previously, the *Second Restatement* was influenced by Currie's work. It generally selects the law of the state having the most significant relationship to the issue, as measured by factors including the "relevant policies of the forum" and the "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue."[292] Commentary on those factors reveals that a deeply purposive approach is envisioned to ascertain what "policies" and "interests" are at play.[293]

Such old-school purposivist approaches to choice of law are in vogue even in states that have otherwise adopted textualist methods of statutory interpretation. Take Texas. A 1984 Texas case adopted the *Second Restatement*'s approach with a distinct interest-analysis flavor,[294] an approach that persists to this day.[295] But both of Texas's high courts (the Court of Criminal Appeals and the Supreme Court of Texas) have adopted a modified form of textualism as the basic method of statutory interpretation, even in the face of a legislative directive to more readily consider extrinsic sources of statutory meaning.[296] No effort seems to have been made to explain the discrepancy between Texas's general approach to statutory interpretation and its choice-of-law methodology.

Yet that observation does not tell the full story. Currently, as William S. Dodge has demonstrated, at least 22 states have adopted presumptions against extraterritoriality when construing their own statutes.[297] Such presumptions would seem to cut against the dominance of Currie-influenced approaches to choice of law, as they operate as (ostensibly) clear interpretive rules that can often determine the choice-of-law question without resort to considering state purposes or interests. That

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291. *See* Coyle et al., *supra* note 219.

292. RESTATEMENT (SECOND) OF CONFLICT OF L. §§ 6, 145 (AM. L. INST. 1971).

293. *See id.* § 6 cmts. e–f.

294. Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 419–22 (Tex. 1984).

295. *See, e.g.*, Vandeventer v. All. Am. Life & Cas. Co., 101 S.W.3d 703, 711–12 (Tex. App. 2003); Vinson v. Am. Bureau of Shipping, 318 S.W.3d 34, 45–52 (Tex. Ct. App. 2010).

296. *See* Gluck, *supra* note 172, at 1788–91.

297. Coyle et al., *supra* note 219.

approach is congenial to a textualist, who favors such clear rules in the interpretation of statutes. Texas, for instance, has adopted a presumption against extraterritoriality.[298] Thus, when it comes to statutes at least, Texas would seem to adopt a consistent methodological line, avoiding boundless inquiries into state interests or purposes.

Unlike the federal courts, however, no state court appears to have applied this presumption to common-law claims.[299] When it comes to common-law claims, courts may choose to engage in a state-interest or purpose-driven inquiry in order to determine extraterritorial application. (Texas, again, would be a ready example.) There may be good reasons to separate the treatment of statutes and the common law in this way.[300] But both the U.S. Supreme Court and Currie envisioned the same regime to apply to both.[301] In addition, among the states, the presumption appears to be inconsistently applied or—in some cases—entirely overlooked.[302] And there is no necessary correlation between the dominant choice-of-law approach in a given state and the likelihood that it has adopted a presumption against extraterritoriality.[303] The two operate independently, remaining both practically and theoretically unreconciled.

Portraying the state landscape with regard to the adoption of Currie's insights thus requires consideration of several axes. One preliminary consideration is whether the state conceives of the choice-of-law analysis as a two-step process: the determination of the "scope" of a given law, followed (if necessary) by application of rules of priority.[304] Another consideration is the state's dominant approach to choice of law—which, for over half of all states, involves some consideration of state interests or the purpose of a given law.[305] Then there are state presumptions against extraterritoriality in statutory cases. Finally, operating in the background, there is the state's approach to statutory interpretation generally, as measured against a purposivism-to-textualism axis.

One might expect at least some of these axes to align. For instance, one might anticipate that a state with a generally textualist methodology would favor presumptions against extraterritoriality (in lieu of open-ended purposive inquiries)

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298. *See* Dodge, *supra* note 17, at 1403–04 tbl.1.

299. *Id.* at 1412. The Supreme Court, in contrast, has applied the presumption against extraterritoriality to determine the multi-state applicability of federal common law causes of action. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013); *see also* Carlos M. Vázquez, *Things We Do with Presumptions: Reflections on* Kiobel v. Royal Dutch Petroleum, 89 NOTRE DAME L. REV. 1719, 1725 (2014).

300. *See, e.g.*, Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 GEO. L.J. 301, 306–07 (2014).

301. *See Kiobel*, 569 U.S. at 124; BRAINERD CURRIE, *The Verdict of Quiescent Years*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 584, 627 (1963) ("[T]he method I advocate is the method of statutory construction, and of interpretation of common-law rules, to determine their applicability to mixed cases.").

302. *See* Dodge, *supra* note 17, at 1405–06.

303. *See id.* at 1420.

304. *See, e.g.*, Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 922 (Cal. 2006).

305. *See supra* note 291 and accompanying text.

while also eschewing interest analysis in resolving common-law choice-of-law issues. Such consistency is not to be found, however. Instead, the cases reflect a wide variety of approaches—reflecting differing combinations of the above. The rejection of Currie-style purposivism among the states has been at best partial. Currie's interest analysis and the methodological commitments that sustain it live on in pockets throughout the country.

Consider California. One of the last states continuing to use pure interest analysis—at least in tort[306]—California has also adopted a presumption against extraterritoriality.[307] The presumption turns "solely on the location of the conduct,"[308] much like the U.S. Supreme Court's latest ruling in *Abitron*. This combination means that where out-of-state conduct is addressed by both common-law tort and statute, only the tort action typically may be sustained. For instance, in *Bernhard v. Harrah's Club*,[309] the California Supreme Court accepted that a California dram-shop act could not apply extraterritorially because it was a criminal statute, and such statutes generally do not apply extraterritorially.[310] Yet the Court engaged in a lengthy analysis of the relevant state interests to determine that the plaintiff could still sue under an extraterritorial application of California's negligence law.[311] More recently, the California Supreme Court has indicated that it follows the two-step process in resolving conflicts between statutory provisions: first, it determines the geographic scope of the relevant statutes, and second, if necessary, it resolves conflicts between applicable statutes through its choice-of-law principles.[312] When what is at issue is the extraterritorial application of a California statute, the presumption against extraterritoriality comes into play at the first step, and often that is where the analysis ends.[313] If the statute does apply extraterritorially, or if the conduct occurred in California, the analysis centers on step two, where interest analysis plays the dominant role.[314] The presumption sometimes operates to cut off interest analysis before it can get off the ground—but only in the specific situation where the California courts are called upon to apply a state statute in a multi-state case. Otherwise, a free-form inquiry into "state interest" rules the day.

Some states follow a similar model—the *Second Restatement* or interest analysis, coupled with a presumption against extraterritoriality for statutory cases—but without the formality of the two-step process. For instance, Iowa courts have adopted a presumption against extraterritoriality.[315] The Iowa Supreme Court, in *Powell v. Khodari-Intergreen Co.*, limited the presumption to statutory cases, holding that ordinary choice-of-law principles—which, in Iowa, means the *Second Restatement*—determine whether tort or contract with connections to other states

306. *See* Coyle et al., *supra* note 219, at 4.
307. Dodge, *supra* note 17, at 1403–04 tbl.1.
308. *Id.* at 1410.
309. 546 P.2d 719 (Cal. 1976).
310. *See id.* at 726.
311. *See id.* at 722–24, 726–27.
312. Sullivan v. Oracle Corp., 254 P.3d 237, 240 (Cal. 2011).
313. *See id.* at 248.
314. *See id.* at 244–45.
315. *See* Powell v. Khodari-Intergreen Co., 334 N.W.2d 127, 131 (Iowa 1983).

can be adjudicated under Iowa's common law.[316] The Court undertook this analysis without first determining the "scope" of the statute. Rather, it simply applied the presumption against extraterritoriality to preclude application of the statute while permitting the extraterritorial application of state tort law through evaluation of state interests.[317]

Conversely, Michigan couples a presumption against extraterritoriality for statutes with a similarly clear-cut *lex fori* approach to resolving conflicts in tort (though the state has adopted the approach of the *Second Restatement* for contracts).[318] That combination produces the seeming anomaly of regularly permitting extraterritorial application of the state's common law while presuming that its statutes are cabined within its borders.[319]

At least 17 states have declined to adopt a presumption against extraterritoriality at all.[320] In such states, out-and-out purposive reasoning to determine the extraterritorial reach of state statutes is still used. In *Burnside v. Simpson Paper Co.*,[321] for example, the Washington Supreme Court applied the state's age-discrimination statute to the employee of a Washington company who resided in California. The Court observed that "limiting the statute's application to Washington inhabitants would effectively allow Washington employers to discriminate freely against non-Washington inhabitants, thus undermining the fundamental purpose of the act, deterring discrimination."[322] After quoting extensively from Currie, the Court examined the purposes of the relevant state policies, concluding that "[i]t can hardly be said that California and Washington law are in conflict of purpose."[323] It then examined and dismissed California's interest in administrative resolution of age-discrimination claims.[324] The Washington Supreme Court thus engaged in a deeply purposive exercise to justify the extraterritorial application of its age-discrimination statute. Notably, however, that Court's general approach to statutory interpretation is to seek the "plain meaning" of the statutory terms, including "the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole"[325]—and not to start with an expansive consideration of the relevant state policies at issue.

Other states without a presumption against extraterritoriality evaluate both statutes and common law under the same choice-of-law analysis where state interests and policies play a prominent role. For instance, in *Taylor v. Eastern*

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316. *See id.* at 131–32.
317. *See id.*
318. *See* Dodge, *supra* note 17, at 1403–04 tbl.1; Coyle et al., *supra* note 219, at 7.
319. *See supra* note 301 and accompanying text (noting that Currie believed that the same approach should apply in the two contexts); *supra* note 299 and accompanying text (noting that the U.S. Supreme Court applies the presumption against extraterritoriality to both federal statutes and federal common law).
320. *See* Dodge, *supra* note 17, at 1403–04 tbl.1.
321. 864 P.2d 937 (Wash. 1994).
322. *Id.* at 940.
323. *Id.* at 941.
324. *See id.* at 941–42.
325. Christensen v. Ellsworth, 173 P.3d 228, 232 (Wash. 2007).

Connection Operating, Inc.,[326] the Massachusetts Supreme Judicial Court confronted whether to apply a Massachusetts independent-contractor statute extraterritorially.[327] To resolve the question, the Court directly applied Massachusetts's "functional" choice-of-law analysis (a modified version of the analysis recommended by the *Second Restatement*), which required weighing the interests and "fundamental polic[ies]" of New York against those of Massachusetts.[328] The Court did not appear to see the question as one of statutory interpretation at all.[329] In like fashion, the Montana Supreme Court in *Burchett v. MasTec North America, Inc.* applied the principles of the *Second Restatement* to determine the multi-state applicability of the state's wrongful-discharge statute, offhandedly rejecting any presumption against extraterritoriality in the process.[330]

What should we make of the above? One clear lesson is that national diversity in the approaches to choice of law extends in multiple directions. States differ from each other in their general approaches to statutory interpretation (despite a clear trend toward modified textualism), in their adoption of a presumption against extraterritoriality for statutes (as well as in their application of the presumption once adopted), and in their general choice-of-law methodology. While the U.S. Supreme Court has moved toward some version of methodological consistency—adopting a presumption against extraterritoriality for both federal statutes and federal common law—the states have not. And even as Currie's purposivist approach to statutory interpretation and choice of law appears increasingly anachronistic, it limps on in various forms in most states.

Nonetheless, that diversity should not obscure an equally important observation: unbridled interest analysis is on the decline, even as Currie-style purposivism lives on—in some form—in many states' non-statutory (and sometimes in their statutory) choice of law. Perhaps this is because states have implicitly recognized the inconsistency between Currie's approach and their own rejection of the purposivism upon which it rests.[331] If so, then their rejection of purposivism remains incomplete. As this Section has demonstrated, states often still weigh state policies and interests in the absence of an operative statutory text, engaging in an analysis that they otherwise eschew. This Currie-inspired approach endures even when states have adopted presumptions against extraterritoriality for their own statutes.

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326. 988 N.E.2d 408 (Mass. 2013).

327. *See id.* at 411.

328. *Id.* at 412.

329. *See also* Hodas v. Morin, 814 N.E.2d 320, 324 (Mass. 2004) (weighing competing states' interests to determine the extraterritorial application of Massachusetts's law authorizing judgments of paternity and maternity).

330. *See* 93 P.3d 1247, 1252 (Mont. 2004) ("We conclude it would be appropriate to apply Montana's WDEA to this case, regardless of the fact that it does not expressly provide for extraterritorial application.").

331. *See* Nelson, *supra* note 24, at 690 n.130.

V. THE *THIRD RESTATEMENT* AND THE FUTURE OF GOVERNMENTAL INTEREST ANALYSIS

The ALI's current project of elaborating a *Third Restatement of Conflict of Laws* may accelerate the decline of Currie-style interest analysis. The draft *Third Restatement* endorses Currie's claim that choice of law is a matter of interpreting the contending laws as to their multi-state applicability, but it conspicuously declines to endorse Currie's distinctive contribution to choice of law—the purposivist approach he brought to bear on the interpretive question.[332] Indeed, the approach the draft *Third Restatement* proposes to this question is decidedly non-purposivist.

According to the draft *Third Restatement*, the choice-of-law inquiry consists of two steps. The first requires determining the geographic scope of the contending laws; the second requires, if necessary, application of rules of priority to determine which of the potentially relevant laws should be applied. According to the draft *Third Restatement*, only the first step is about interpreting the contending laws as to their multi-state reach. Section V.A of this Article discusses the draft *Third Restatement*'s approach to this step and shows that its departure from Currie's purposivism at this step is almost as stark as the Supreme Court's. Indeed, the draft *Third Restatement* adopts a presumption that is similar in form, if not in content, to the presumption against extraterritoriality the Supreme Court has adopted for federal statutes: a presumption *of* extraterritoriality.

The draft *Third Restatement* denies that the second step of its proposed analysis involves an interpretation of the relevant laws as to their multi-state reach. At the second step, the courts should simply select "one of several overlapping laws" once they have already been interpreted to reach the facts of the case.[333] In Section V.B, we dispute the draft *Third Restatement*'s claim that only the first step of its analysis is about interpreting the contending laws. We maintain that the second step is also a matter of interpretation of the substantive law. If we are correct about that, then assessing the extent to which the draft *Third Restatement* departs from Currie's purposivism requires us to examine how it instructs courts to perform the second step. We do so in Section V.C and show that step two of the draft *Third Restatement*'s analysis is also distinctly—though less starkly—non-purposivist in its orientation. Thus, if widely followed, the draft *Third Restatement* will hasten the decline of governmental interest analysis.

A. Step One: The Draft Third Restatement*'s Presumption of Extraterritoriality*

According to the draft *Third Restatement*, the choice-of-law process, by its nature, consists of 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

332. *See infra* text accompanying note 342.

333. RESTATEMENT (THIRD) OF CONFLICT OF L. § 5.01 cmt. b (AM. L. INST., Tentative Draft No. 3, 2022).

> circumstances, they extend rights or obligations. Second, if states' internal laws overlap and conflict, it must be decided which law shall be given priority.[334]

Giving credit to Currie, the draft *Third Restatement* notes that the first step—determining the multi-state scope of a law—is an ordinary issue of interpretation.[335] If two or more states' laws reach the case, and the laws differ—in the parlance of governmental interest analysis, if the case presents a true conflict—the courts proceed to the second step: selecting the applicable law. This step involves application of "rules of priority." According to the draft *Third Restatement*, this second step, unlike the first, is not about interpreting the contending laws as to their multi-state applicability.[336] Since the draft *Third Restatement* regards only the first step as being a matter of interpretation of the laws in question as to their multi-state applicability, we begin by assessing to what extent the draft *Third Restatement*'s approach to this first question carries forward the interpretive approach championed by Currie. The answer is: not at all.

The draft *Third Restatement* draws several conclusions that in its view, follow from the recognition that the judicial task at this step relates to the determination of the contending laws' multi-state reach. First, the courts must look to the law of the state whose law is in question. Therefore, if a state's law has an external scope provision rendering the law inapplicable to the case, then this provision is binding on all courts.[337] If the law does not extend to the case—for example, because the external scope provision specifies that the law reaches cases where the conduct occurred in the state and the conduct in the case at bar did not occur in the state—the law is not "relevant" and may not be applied to the case.[338] The same conclusion would follow if the state's courts had adopted a presumption against extraterritoriality, and the presumption, as developed by the enacting state's courts, renders the law inapplicable to the case at hand. In this case, the law is not relevant, and again the forum courts may not apply it.[339] If, based on this analysis, only one state's law reaches the case at hand, then there is a false conflict, and the court should apply the only law that reaches the case.[340]

So far, the analysis is consistent with Currie's approach. But how is the forum to interpret the contending laws as to their multi-state applicability in the absence of a statutory scope provision or an authoritative judicial holding? Regarding the manner of interpretation, the draft *Third Restatement* appears to have internalized the modern critique of purposivism. It notably declines to endorse Currie's approach to interpretation, noting that "[t]he 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

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334. *Id.*
335. *Id.* Ch. 5, Topic 1, Introductory Note; *id.* § 5.01 cmt. b.
336. *Id.* § 5.01 cmt. b.
337. *Id.* § 5.01 cmt. c; *id.* § 5.02 cmt. a.
338. *Id.* § 5.01.
339. *Id.* § 5.01 cmt. c.
340. *Id.* § 5.01 cmt. c, illus. 3.

them."[341] This statement understates the extent to which the draft *Third Restatement* rejects Currie's approach to interpreting the contending laws as to their multi-state applicability.

Far from being a matter of "precise details," the draft *Third Restatement* has adopted a "broad presumption" that statutes are applicable to multi-state cases.[342] Indeed, it is fair to say that the draft *Third Restatement* adopts a presumption *in favor of* extraterritoriality:

> In the absence of an authoritative determination of the scope of a state law, courts may presume that its scope is broad, extending to all persons or events within the state's borders and to events involving the state's domiciliaries outside the state's borders, especially if the issue is one in which use of the state's law would protect or benefit a domiciliary.[343]

Importantly, there is no indication that the multi-state applicability of the law turns on a case-specific analysis of the purposes of the law.[344] Though the presumption is not unbounded, it is conceded to be "broad" and rebuttable only through express statutory language or by a limiting interpretation from "[c]ourts of the enacting state."[345] This is the rule that the forum's courts are expected to apply to determine the multi-state scope of forum law.[346] And it is the rule that the forum is to apply to determine the multi-state reach of the laws of other states except "to the extent and in the manner that the other State has [adopted a different presumption]."[347]

In sum, the approach to interpreting statutes as to their multi-state scope that the draft *Third Restatement* adopts bears no resemblance to the purposivist approach that Currie contemplated. In interpreting their own laws as to their multi-state reach, courts following the draft *Third Restatement* are to presume that the laws apply to all conduct within the state's territory and to all persons domiciled in the state. The presumption is the opposite of the federal presumption against extraterritoriality in content, but it is similar to that presumption in form, as it can be rebutted only through a textual directive in the statute. Its applicability does not turn on the content of the law or the legislature's purposes in enacting it. The draft *Third Restatement*'s approach thus appears to reflect the lessons of the modern critique of purposivism in statutory interpretation.

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341. *Id.* § 5.01 cmt. b.

342. *Id.* § 5.02 cmt. a ("Broad presumption of scope is appropriate . . . .").

343. *Id.* § 5.02 cmt. d.

344. True, the statement that a state's law is presumed to apply to the state's domiciliaries acting outside the state's borders "especially if the issue is one in which the use of the state's law would protect or benefit a domiciliary" appears to import Currie's assumption that states laws are generally intended to benefit domiciliaries of the state. However, this latter phrase does not appear to have any operative effect. *Id.* State laws are presumed to apply to domiciliaries of the state acting outside the state even if the laws do not protect or benefit the domiciliary.

345. *Id.* § 5.02 cmt. a.

346. The draft *Third Restatement* expressly disavows a presumption against extraterritoriality for interpreting forum law. *Id.* § 5.01 cmt. c.

347. *Id.*

B. Step Two, Part One: Priority as Interpretation

As noted in Part I, for Currie, forum law would always be applied when, properly interpreted, the law reaches the case before the court. But the draft *Third Restatement*, like the approaches to interest analysis discussed in Section III.D, contemplates a second step in the analysis in the event the step-one analysis reveals a true conflict. If more than one state's law extends to the case, the draft *Third Restatement* contemplates the application of "rules of priority" to determine which state's law is to give way. But the draft *Third Restatement* does not regard this inquiry as a matter of interpreting the contending substantive laws as to their multi-state applicability. In the view of the draft *Third Restatement*, the first step exhausts the interpretive exercise. Once having determined that two or more laws reach the case at hand, the second step tells the courts what law to apply, if the laws differ.[348] As to this step, the forum's courts always apply *the forum's* "rules of priority." Step two is an instruction to the forum's courts about what law is to be prioritized.[349]

We think the second step is better understood as *also* a matter of interpreting the forum's substantive law. Here, it is important to disentangle two related but distinct claims made by the draft *Third Restatement*. The first has to do with its claims about whether the first and second steps are about the respective state laws' external reach. The draft *Third Restatement* claims that the first step concerns the spatial reach of the substantive laws in question, a question governed by the law of the state that enacted the law.[350] It follows that if the enacting state has a presumption against extraterritoriality, the forum must apply that presumption, and if the presumption leads to the conclusion that the substantive law does not reach the case, the forum court may not apply the law. On the other hand, the draft *Third Restatement* claims that step two is *not* about the substantive laws' spatial reach, but about choosing between two (or more) laws that do reach the case.[351] In answering this question, the forum court applies *the forum's* test—its own rules of priority, which (on this view) are merely instructions to *the forum's* courts (and only the forum's courts) about when to apply another state's law.[352] The draft *Third Restatement*'s claim that the first step is about the laws' spatial reach while the second step is not can be questioned.[353] For instance, the first step could also be seen as an instruction to the forum's courts about when to *apply* another state's law and when not to, and the second step can also be understood as being about the spatial reach of the forum's law.[354] For purposes of our analysis, however, we shall accept the draft *Third Restatement*'s understanding that the first step is about spatial reach,

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348. *Id.* cmt. b.

349. *Id.* cmt. d.

350. *Id.* cmt. b.

351. *Id.*

352. *Id.* § 5.01 Reporters' Notes to cmt. d ("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."); *id.* § 5.02(b) ("A court, subject to constitutional limitations, will follow a local statute that identifies the law to be given priority.").

353. One of us has questioned this claim in other work. *See* Vázquez, *supra* note 5, at 1307–11; Vázquez, *supra* note 230.

354. *See* Vázquez, *supra* note 230, at 44–46.

and the second step is an instruction to forum courts about when to apply a forum law that concededly reaches the case.[355]

Even if we do not regard the second step as being about the law's spatial reach, however, step two can and should still be understood as an interpretation of the forum's substantive law on the matter in question.[356] In the typical case presenting a true conflict, the forum will have a law on the matter and the court will have determined at step one that the forum's law reaches this case. If so, then by what authority do the forum state's courts decide to resolve the case under the law of another state having a different content? The answer must be that forum law contains an implicit permission to forum courts not to apply forum substantive law if, under the forum's rules of priority, the other state's law deserves priority. In other words, the forum courts' authority to do so is conferred by a permission found in the forum's *substantive law itself*.[357]

This is, indeed, the analysis the draft *Third Restatement* itself implicitly endorses. It does so in its analysis of how external scope provisions are to be interpreted. The draft *Third Restatement* makes clear that in the absence of a clear statement to the contrary, an external scope provision specifying that a statute extends to a certain category of case—say, cases where the conduct occurred in the state—does not *require* application of the law to such cases. If the conduct did occur within the state, the statute is "relevant" to the case,[358] meaning that if another state's law is also relevant to the case, the court must go on to determine which of the two laws is to be given priority. The draft *Third Restatement* thus presumes that such

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355. As we noted at the outset, that is why we are using the term "multi-state applicability" rather than "multi-state reach" to describe the matter in question. *See* Vázquez, *supra* note 5, at 1318. The term "multi-state applicability" refers broadly to the forum's decision to apply a law (or not) whether because it does (or does not) reach the case or because it reaches the case but should (or should not) be given priority. *Id.* at 1336 n.217. Our analysis in this Article does not turn on which way of understanding the question is the right one.

356. Because we are assuming arguendo that the choice-of-law rules the courts apply at step two are merely instructions to the forum's courts, we do not consider here how the forum's courts should treat the step-two rules of other states. If the step-two rules were regarded as a matter of the substantive laws' external reach, *cf. supra* text accompanying note 353–354, it might be argued that the step-two rules of other states should be binding on forum's courts. We do not pursue that question here. Because we are accepting for purposes of analysis the draft *Third Restatement*'s claim that step-two rules are addressed solely to forum courts, we focus in this and the following Section on the step-two rules' status as presumptions for interpreting *the forum's* substantive law.

357. In unusual cases, the forum's law will not reach the case, and the forum will have to decide between the laws of two other states that do reach the case. In such cases, the forum's rules of priority do not have to be understood as a permission found in the forum's substantive law; they can be understood instead as free-standing common law rules of the forum state. *See* RESTATEMENT (THIRD) OF THE CONFLICT OF L. § 5.01 cmt. c (AM. L. INST., Tentative Draft No. 3, 2022). In light of the draft *Third Restatement*'s presumption of extraterritoriality, however, such cases should be rare. In cases in which the forum's substantive law *does* apply—which is the mine run of true-conflict cases—the permission not to apply forum law and to apply another state's law instead is best understood as being implicit in the substantive law itself. *Id.*

358. *See id.* § 5.02 cmt. d ("Relevant laws are those that include the issue within their scope.").

provisions permit the court, at step two, to decline to apply forum law, even to cases where the conduct occurred in the state, if the state's rules of priority dictate application of another state's law. In other words, when an external scope provision specifies that the forum's law does extend to the case, the provision is presumed not to mandate application of forum law.[359] But if the external scope provision goes further and specifies that the forum's law *must* be applied to cases within the law's specified scope, the forum's courts must apply the law even if another state's law would be applicable under the forum's general rules of priority.[360] This means that the forum's authority to apply the forum's rules of priority comes from the substantive law itself. The draft *Third Restatement* not only (implicitly) recognizes that the forum court's freedom to apply rules of priority is a matter of interpreting the forum's substantive law, it appears to adopt an interpretive presumption: only a substantive law that "directs" application of forum law forecloses application of the forum state's rules of priority.[361] At bottom, therefore, the forum court's authority not to apply forum law in the face of an external scope provision specifying that forum law reaches the case comes from the forum's substantive law, as interpreted pursuant to the presumptions set forth in the draft *Third Restatement*. Forum law is, according to the logic of the draft *Third Restatement*, presumed to contain an implicit permission to decline to apply forum law if the forum's rules of priority so dictate.

The draft *Third Restatement*'s rationale for the forum court's authority to decline to apply forum law applies equally to cases where forum law does not contain an external scope provision. For states that adopt the draft *Third Restatement*, the multi-state reach of their laws will, in the absence of an external scope provision, be determined through a different presumption. As discussed in Section V.A, states that adopt the draft *Third Restatement* will presume a broad multi-state scope for their own statutes. If forum law, interpreted through this presumption, does extend to the case at step one, one must ask again, by what authority does the forum court decline to apply this law and apply instead the different law of another state? The answer to this question is the same as for cases involving an external scope provision: the authority to do so is found in the substantive law itself. The presumption in favor of exterritoriality is qualified by an

359. *See, e.g.*, *id.* § 5.02 cmt. d ("[A] choice of law issue exists . . . [when] there are material differences among relevant laws. . . . If a choice-of-law issue exists, [courts must] decide to which law it is most appropriate to give priority.").

360. *See, e.g.*, *id.* § 5.02 cmt. d ("If a local statute directs the selection of a particular law, the court must follow that statute unless it is unconstitutional."). Although the draft *Third Restatement* here may be referring to a general choice-of-law rule mandating application of a particular state's law to particular types of cases, the same conclusion would appear to follow if an external scope provision mandates application of the substantive law in question to particular types of cases. Mandatory language in an external scope provision would rebut the presumption that the scope provision extends the reach of the statute to cases having particular connections to the forum but does not mandate its application to such cases and therefore does not foreclose application of rules of priority.

361. *See id.*

additional presumption—a presumption allowing the nonapplication of forum law if rules of priority so dictate.[362]

In sum, choice of law is pervasively about the interpretation of the forum's substantive law on the subject matter of the dispute, and most of the work is done by presumptions. As we have shown, the various choice-of-law approaches differ as to *how* they interpret the forum's substantive laws as to their multi-state applicability. They do not differ in regarding the choice-of-law question as being a matter of interpretation.

C. Step Two, Part Two: Ignoring State Interests, Selecting the Jurisdiction

If we are right that even step two is about interpreting the forum's substantive laws as to their multi-state applicability, then we must look at the draft *Third Restatement*'s step-two choice-of-law rules to determine the extent to which it carries forward or rejects Currie's legacy. We look in detail at the sections addressing choice of law in tort. Although the draft *Third Restatement* is still being developed, its current provisions for tort cases indicate that it does not contemplate a choice-of-law approach that turns on the type of purposivist analysis that Currie championed. Rather, the draft *Third Restatement* sets forth a set of jurisdiction-selecting rules that leave little room for judicial consideration of state purposes or interests in passing statutes or developing common-law rules governing tort liability. The only trace of Currie-style purposivism comes in the application of a narrow escape clause allowing the draft *Third Restatement*'s presumptive rules to be overridden when application of a different state's law is "manifestly more appropriate."[363]

Chapter six of the draft *Third Restatement* provides rules for resolving conflicts in the application of tort law. It instructs that in the absence of a valid choice-of-law agreement by the parties, "a tort issue is governed by the law of the state with the dominant interest in the issue."[364] Lest that language suggest a Currie-style analysis, however, the draft *Third Restatement* goes on to explain that the state with a "dominant interest" will be determined by one of two sets of rules: either (1) a tort- or issue-specific set of rules or (2) a set of rules applicable depending upon whether "the issue in question relates to conduct or to persons."[365] The draft *Third*

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362. If the forum's law on the matter is a common-law rule, the authority to decline to apply the rule even though the rule by hypothesis extends to the case must be found in an interpretive presumption allowing for the nonapplication of forum common-law if rules of priority so dictate. Of course, if the forum's law is a common law rule, the "legislators" are the courts themselves. But this does not alter the analysis. Even for statutory cases, the "legislators" of the two presumptions (if the statute does not contain an external scope provision)—the presumption that the law extends broadly to all cases involving conduct in the state and domiciliaries of the state acting abroad, and the presumption that the court is authorized not to apply the law if rules of priority so dictate—are the courts as well.

363. *See id.* § 5.03.

364. RESTATEMENT (THIRD) OF CONFLICT OF L. § 6.01 (AM. L. INST., Tentative Draft No. 4, 2023).

365. *Id.*

Restatement expressly instructs courts *not* to perform an interest analysis themselves, as it has performed the analysis for them.[366]

The first set currently provides jurisdiction-selecting rules for products-liability actions[367] and awarding punitive damages.[368] For our purposes, the details of the rules are not significant. What matters is what they *don't* contemplate: a determination of the multi-state applicability of the relevant law through judicial examination of the purposes behind a state's products-liability or punitive-damages policies. Indeed, the content of the relevant rule appears to be irrelevant. Instead, the draft *Third Restatement* selects the appropriate jurisdiction's law depending on a number of objective factors—e.g., "the state where the product was delivered"[369] or "the place of conduct."[370]

Outside of these specific areas, the same picture emerges. Gone are the purposive inquiries prescribed by Currie and encouraged by the *Second Restatement*'s "most significant relationship" test. In their place, we find rules that operate by selecting the relevant jurisdiction's law on the basis of some objective set of factors. The draft *Third Restatement* first divides the universe of potentially relevant issues or connecting factors into two groups: (a) "[i]ssues relating to conduct," where "territorial connecting factors such as the location of the conduct or injury are of primary importance";[371] and (b) "[i]ssues relating to persons," where "personal connecting factors such as the parties' domicile are of primary importance."[372] As the draft *Third Restatement* notes, this division is a familiar one in choice of law, commonly referred to as the distinction between "conduct regulation" and "loss allocation."[373] Conduct-regulating rules, as the *Second Restatement* explains, were commonly thought to be designed "to punish the tortfeasor and thus to deter others," while loss-allocation rules were "designed primarily to compensate the victim."[374] The draft *Third Restatement* observes that the *Second Restatement* made this distinction "as part of [its] analysis of state policies and interests," and thus the distinction "is present in, or at least consistent with, any modern policy-based approach to choice of law."[375]

But the draft *Third Restatement*'s deployment of this distinction is notably different. For instance, it first elaborates a set of "[i]ssues relating to conduct," which include "standards of conduct or safety," "prerequisites for liability," various duties or defenses, and the "scope of liability," among others.[376] For such issues, the draft *Third Restatement* provides a set of jurisdiction-selecting rules to determine the appropriate law. One such rule is that "[w]hen the injurious conduct and resulting

366. *Id.* cmt. b.
367. *See id.* § 6.11.
368. *See id.* § 6.12.
369. *Id.* § 6.11(a)(1).
370. *Id.* § 6.12.
371. *Id.* § 6.03(a).
372. *Id.* § 6.03(b).
373. *Id.* § 6.03 cmt. a.
374. RESTATEMENT (SECOND) OF CONFLICT OF L. § 146 cmt. e (AM. L. INST. 1971).
375. RESTATEMENT (THIRD) OF CONFLICT OF L. § 6.03 Reporters' Notes to cmt. a (AM. L. INST., Tentative Draft No. 4, 2023).
376. *Id.* § 6.04.

injury occur in the same state, the law of that state governs issues relating to conduct."[377] Another is that "[w]hen conduct in one state causes injury in another, the law of the state of conduct governs both issues related to conduct and issues related to persons," subject to some exceptions.[378] The net result is that the state with the "dominant interest," with respect to laws regulating conduct, is largely determined by application of the draft *Third Restatement*'s own jurisdiction-selecting rules.

So too with "issues relating to persons." The draft *Third Restatement* sets forth a list of types of legal issues that are presumed to fall into this category, ranging from various types of immunities to indemnity, joint and several liability, and survival statutes.[379] For such issues, the draft *Third Restatement* also provides relevant rules. When the parties share a common domicile, "that state's law governs an issue relating to persons."[380] Indeed, underlining the shift away from Currie, the draft *Third Restatement* explicitly notes that "the rule of this Section does not depend on the claim that no other state has a contrary policy or interest."[381] Rather, the rule is presented as "a sensible and widely accepted resolution of this conflict."[382] Conversely, if the "relevant parties are domiciled in states whose laws are in material conflict," but the "conduct and injury occur in a single state," then "that state's law governs an issue relating to persons."[383] (Recall that if conduct and injury occur in different states, the law of the state of conduct governs issues relating both to persons and to conduct.[384]) Thus, for the range of issues that are considered "loss-allocation" issues—or issues relating to persons—the draft *Third Restatement* again provides a set of fairly comprehensive jurisdiction-selecting rules.

As should be apparent, the vast majority of factual scenarios presented by a tort action are covered by the draft *Third Restatement*'s rules.[385] Our point is not

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377. *Id.* § 6.06. In commentary, the draft *Third Restatement* presents this rule as "perhaps the best-accepted choice-of-law rule" and a "bright-line 'exception' to interest-based analysis." *Id.* § 6.06, Reporters' Notes cmt. a. But it does not clarify what role interest-based analysis is supposed otherwise to play.

378. *Id.* § 6.09.

379. *Id.* § 6.05 (listing ten issues).

380. *Id.* § 6.07.

381. *Id.* § 6.07 cmt. a.

382. *Id.* § 6.07 cmt. a. In the notes, the reporters cite approvingly to the Rome II Regulation—a European choice-of-law codification that largely rejects Currie-style purposivist analysis in favor of a jurisdiction-selecting approach. *See id.* § 6.07 Reporters' Notes to cmt. a.

383. *Id.* § 6.08.

384. *See supra* note 377 and accompanying text.

385. The draft *Third Restatement* itself acknowledges this. *See* RESTATEMENT (THIRD) OF CONFLICT OF L. Reporters' Memorandum xvii (AM. L. INST., Tentative Draft No. 4, 2023) (noting that the chapter on torts "contains general rules that select the governing law for *most* torts" (emphasis added)). If the particular rule involved in a given case does not appear on the draft *Third Restatement*'s list of rules deemed conduct-regulating or loss-allocating, the court would presumably have to apply a form of purposive analysis to determine if the rule falls into one category or the other, but this would seem to involve a generalized purposive analysis very different from the sort of imaginative reconstruction contemplated by Currie.

that these rules are not sensible. (Indeed, we are broadly supportive of the draft *Third Restatement*'s shift away from Currie-style purposivism and towards more determinate rules.[386]) As the draft *Third Restatement* notes in many places, the rules were formulated as distillations of majority practices across many jurisdictions. Our point is, rather, that the draft *Third Restatement*'s articulation of jurisdiction-selecting rules to govern the mine run of tort actions has mostly foreclosed any interest-based analysis that would otherwise have been conducted under the *Second Restatement* or other Currie-inspired approaches to choice of law. Drafts of sections addressing property and contract issues reveal a similar approach.[387]

There is one interesting caveat to this picture. The draft *Third Restatement* contains an escape hatch, permitting states to decline to use "[t]he law selected by the rules of this Restatement" if "a case presents exceptional and unaccounted-for circumstances that make the use of a different state's law manifestly more appropriate."[388] As an example of an "unaccounted-for" issue, the commentary to this section suggests the connecting factor of a "pre-existing relationship between the parties" to a tort action that is "of overwhelming importance."[389] This escape hatch from the otherwise highly prescriptive rules of the draft *Third Restatement* suggests the possibility of a continuing role for purposive—or at least interest-based—analysis of state laws and policies. The illustrations in the section suggest that such an analysis is contemplated.[390] But the draft *Third Restatement* cautions that there is meant to be a "high bar" for invocation of the exception.[391] Thus, to the extent that the "manifestly more appropriate" exception preserves any role for Currie-style purposive analysis, it appears to be a small one.

With the exception of that escape hatch, the subject-area-specific rules of the draft *Third Restatement* are meant to govern the choice of relevant state laws. The draft *Third Restatement* presents its rules as a working through of the relevant state interests that "courts are currently reaching under labor-intensive multifactor balancing tests."[392] That is, the draft *Third Restatement* is meant to be the finished product of a well-executed interest analysis. But if that's so, what it has worked through seems very different from what Currie had in mind. The presumptive rules apply to whole categories of cases without regard to the content or case-specific purposes of the relevant statutes or legal rules. As noted above, because state laws are presumed to have a broad multi-state applicability, most disputes involving

386. *Cf.* Green, *supra* note 24, at 39 n.118 (claiming that we are "too charitable" in describing the draft *Third Restatement*'s rejection of purposivism).

387. *See* RESTATEMENT (THIRD) OF CONFLICT OF L. §§ 7.01–7.18 (AM. L. INST., Tentative Draft No. 3, 2022) (property); *id.* § 8.01 (describing the approach to contracts).

388. *Id.* § 5.03.

389. *Id.* § 5.03 cmt. b.

390. *See, e.g.*, *id.* § 5.03 cmt. b, illus. 1 (employing interest analysis to determine that the law of a state not selected by the draft *Third Restatement*'s default rules is "manifestly more appropriate").

391. *Id.* § 5.03 cmt. c. The draft *Third Restatement* also distinguishes this maneuver from declining to apply a law that is offensive to a forum's public policy. *Id.* § 5.03 cmt. d.

392. RESTATEMENT (THIRD) OF THE CONFLICT OF L. § Reporters' Memorandum xvii (AM. L. INST., Tentative Draft No. 4, 2023).

states with different laws will be true conflicts.[393] The heart of the analytical action under the draft *Third Restatement* will therefore come at step two, where conflicts between laws are resolved through the application of rules of priority. And as we've seen, the rules of priority that the draft *Third Restatement* recommends—in the absence of statutory or contractual specifications to the contrary—leave little room at all for the purposive analysis that was central to Currie's resolution of these issues.

The result is striking. The draft *Third Restatement* has constructed a choice-of-law framework where the selection of the appropriate state law is largely determined by a set of jurisdiction-selecting rules that apply regardless of the purposes or interests of the relevant states. Despite repeated hat tips to Currie, the draft *Third Restatement* in practice largely turns its back on him. The only directly acknowledged influence of Currie in the draft *Third Restatement* is the idea that choice of law is a matter of interpretation—an idea that, as we've noted, long predates Currie. When it comes to Currie's central contribution—the application of a purposive method of interpretation to state laws and policies—the draft *Third Restatement* has replicated in form, if not in substance, the rejection that has already taken place in the federal courts. If the draft *Third Restatement* is widely adopted by states in the same manner that the *Second Restatement* has been, it would hasten the demise of governmental interest analysis, Currie's central contribution to choice of law.

CONCLUSION

Our aims in this Article have been both descriptive and normative. Descriptively, we have shown that choice of law has been conceived by adherents of both traditional and modern approaches as, at bottom, a matter of statutory interpretation—a matter of interpreting forum law as to its multi-state applicability. The innovation of the adherents of governmental interest analysis was to bring a particular approach to statutory interpretation to bear on the matter: the highly purposive approach of the Legal Process School. We have also described the revolution that has taken place in statutory-interpretation theory, focusing on its critique of purposivism. The Supreme Court that has led that revolution has also departed from the purposivist approach to determining the multi-state applicability of federal laws that prevailed earlier. The response of state courts has been murkier. But the current draft of the *Third Restatement* proposes an approach to choice of law that mirrors in form the approach the Supreme Court has taken in the federal sphere. If it is widely adopted by states, as its predecessor has been, the draft *Third Restatement* can be expected to accelerate the decline of governmental interest analysis.

Normatively, we have argued that the insights of the modern critique of purposivism deprive Currie-style interest analysis—and related approaches, such as the multi-factor, open-ended, all-things-considered balancing process of the *Second Restatement*—of their claim to superiority from the perspective of legislative supremacy. In the cases that mainly concern us, the legislature has given no thought to the multi-state applicability of the laws it enacts. The legislature's substantive purposes—i.e., its purposes in the purely internal case—do not yield reliable

393. *See supra* Section V.A.

conclusions regarding the legislature's preferences with respect to the law's multi-state applicability. Any approach that claims reliably to implement those preferences is, we have argued, premised on a series of misapprehensions.

This is not to say that the modern critique of governmental interest analysis precludes an approach resembling the one Currie proposed, or the one adopted by the *Second Restatement*. It means that the state's courts (or their legislatures, if they enact general choice-of-law rules) must take responsibility for the adoption of whichever approach they adopt. None is required by the need to be faithful to legislative preferences. Judicial lawmaking—in the form of the establishment of an approach that applies in the absence of legislative direction on the question of multi-state applicability—is inevitable, and the courts (or legislatures) must justify their choice of interpretive rule.

A court could articulate one of an almost infinite variety of determinate presumptions for or against extraterritoriality, as both the U.S. Supreme Court and the draft *Third Restatement* have done. Or it could devise a test whereby the applicability of forum law for certain categories of cases would turn on whether the regulated party is from the state, and for other categories on whether particular acts or events happened in the state, as traditional choice-of-law rules have generally done. At the other extreme, it could adopt a case- and context-specific, multi-factor, all-things-considered balancing test of the sort contemplated by the *Second Restatement*. Our critique of purposivism shows that the choice among these approaches will have to be justified based on considerations other than reflecting legislative preferences, such as how well the test identifies the types of disputes that another state has a greater claim to regulating while promoting an appropriate degree of certainty and predictability, among many other considerations. This is not the place to assess the costs and benefits of the various contending approaches. Our claim is merely that these are the considerations on which the choice should rest.

Almost 70 years after the revolution Currie initiated, the field of choice of law appears poised for a counterrevolution in light of the revolution that has occurred in the field of statutory interpretation.