Functionally Restrictive Substantive Rules in American Conflicts Law

Robert A. Sedler
Wayne State University

Recommended Citation
Robert Allen Sedler, Functionally Restrictive Substantive Rules in American Conflicts Law, 50 S. Cal. L. Rev. 27, 70 (1977)
Available at: https://digitalcommons.wayne.edu/lawfrp/444

This Article is brought to you for free and open access by the Law School at DigitalCommons@WayneState. It has been accepted for inclusion in Law Faculty Research Publications by an authorized administrator of DigitalCommons@WayneState.
FUNCTIONALLY RESTRICTIVE
SUBSTANTIVE RULES IN AMERICAN
CONFLICTS LAW

ROBERT ALLEN SEDLER*

On the whole, recent American conflicts theory has been little concerned with
developments elsewhere, such as on the Continent or in England and the
Commonwealth countries. With few exceptions, American commentators
generally have not attempted to relate American conflicts doctrine to the
international dimensions of the subject. It has almost been as if foreign
conflicts doctrine is an aspect of comparative law, interesting perhaps, but
better left to those whose special interest is in that area, while the rest of us
concentrate entirely on the "veritable revolution" that has occurred on this
side of the Atlantic. The American legal community's lack of interest in
foreign conflicts doctrine and developments elsewhere, however, is not
reciprocal. Foreign conflicts scholars have paid very careful attention to what
has been happening here, although frequently viewing it with great alarm.

Much can be learned from an understanding of foreign conflicts doctrine
and from the ways that other legal systems deal with conflicts problems.
These problems, although arising in different contexts, are necessarily

* Professor of Law, University of Kentucky; Visiting Professor of Law, Cornell Law

1. The most notable exception, of course, was the late Albert Ehrenzweig. This appears
most clearly in his work, A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS (1962). His later
works, A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW: GENERAL PART (1967), and A. EHRENZ-
WEIG & E. JAYME, PRIVATE INTERNATIONAL LAW: SPECIAL PART (1973), approach the subject
from the international rather than from the American context. See also Ehrenzweig, Specific
Principles of Private Transnational Law, 2 HAGUE ACADEMY OF INTERNATIONAL LAW, RECUEIL

2. This is not meant to suggest that other commentators have not paid attention to
developments elsewhere or have not participated in the "international discourse." See, e.g., von
those who have are a distinct minority, and most writings about the conflict of laws in this country
are clearly "inward looking."

3. See, e.g., 3 E. VITTA, DIRITTO INTERNAZIONALE PRIVATO 502 et seq. (1975); G. Kegel,
The Crisis of Conflict of Laws, 1 RECUEIL DES COURS 1964, at 91, 163 et seq. (1965). See also
Juenger, Trends in European Conflicts Law, 60 CORNELL L. REV. 969, 970-72 (1975) (concerning
the interest of foreign scholars in American developments).
universal, and the theories and approaches for their solution, although again frequently developed with reference to the context in which they arise in particular legal systems, 4 may provide useful insights into the solution of conflicts problems that arise in another context. Thus, an understanding of conflicts doctrine and the approaches to the choice-of-law problem that have been developed elsewhere, particularly on the Continent and in England and the Commonwealth countries, 5 may have considerable utility in the struggle to find the "best solution" for the problems that arise here.

But precisely because the context in which American conflicts problems arise is very different from the context in which they arise on the Continent or in England and the Commonwealth countries, the utility of foreign conflicts doctrines and approaches depends on their adaptability to American problems. It appears that certain doctrines, concepts, approaches, and the like that have been developed and recognized elsewhere may be adapted for use in the American context, though perhaps serving a different function here than they do within the framework of another legal system.

In this regard, there are two very important contextual differences that constantly must be kept in mind when drawing on foreign conflicts doctrine and theory for use in the American system. 6 In the first place, the overwhelming majority of choice-of-law cases that come before American courts are interstate in character, involving a question of choice-of-law between American states 7 or between the laws of an American state and a Canadian province, which is not an appreciably different situation. 8 While there may be disagree-

---

4. As De Nova has pointed out, "[g]eneral theories on private international law may sometimes be as much induced, or at least influenced, by the peculiarities of a national legal order as the specific conflicts rules that belong to it." De Nova, Historical and Comparative Introduction to Conflict of Laws, 2 RECUEIL DES COURS 1966, at 441, 595 (1965). In De Nova's view, the "current debates" on conflicts law in this country find their roots in the legal realism movement of the 1930's. Id.


6. In the area of jurisdiction and recognition of judgments, foreign doctrine may also provide some useful insights with regard to those matters that are not controlled by constitutional considerations. See, e.g., A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS §§ 11-33 (1962); Nadelmann, Jurisdictionally Improper Fora, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 321 (K. Nadelmann, A. von Mehren & J. Hazard eds. 1961).

7. The term "state of the Union" is used to refer to an American state or territory, distinguishing it from the broader use of the term "state" for conflicts purposes.

8. This is because of the common language, similar culture, interdependent economies, and, with the exception of Quebec (which, for these purposes, can be compared to Louisiana), similar legal systems. These considerations are not present when the conflict is between the law of an American state and a Mexican state. Such cases should be, and are, viewed as truly international ones. See, e.g., Ramirez v. Autobuses Blancos Flecha Roja, S.A. de C.V., 486 F.2d 493 (5th Cir. 1973).
RESTRICTIVE RULES

ment whether truly international cases require essentially different treatment than interstate ones for choice-of-law purposes, it is clear that different treatment has not been accorded in practice. Likewise there can be little doubt that modern American theories and approaches to the choice-of-law problem have been developed almost entirely with reference to interstate choice-of-law.11

Second, a clear majority of American courts have now abandoned the traditional approach of broad, state-selecting choice-of-law rules embodied in the first Restatement of the Conflict of Laws in favor of more flexible, and to one degree or another, policy-centered approaches. Elsewhere, however, the approach, both academically and in practice, is still one of broad, state-selecting choice-of-law rules.13 Policy considerations come in only as


11. Elsewhere these are referred to as interlocal conflicts; and special doctrines have been developed to deal with them in the structure of a system that ordinarily deals with international conflicts. See, e.g., Graveson, Problems of Private International Law in Non-Unified Legal Systems, 1 RECUEIL DES COURS 1974, at 195 (1975); Kahn-Freund, General Problems of Private International Law, 3 RECUEIL DES COURS 1974, at 147, 293-329 (1975).

This is very desirable, since the problem of interstate choice-of-law between different American states is an integral part of federalism and must be approached from that perspective, see Sedler, Book Review, ___ J. LEGAL ED. ___ (1977), as well as with reference to the "realities" of interstate life. This requires a recognition that people live and act within functional, socioeconomic, and mobility areas, so that undue weight should not be given to the existence of a state line. See generally Sedler, The Territorial Imperative: Automobile Accidents and the Significance of a State Line, 9 DUQUESNE L. REV. 394 (1971). Moreover, insofar as choice-of-law decisions are made with reference to considerations of policy and fairness to the parties, proper account can be taken of the international dimension of a case when this may necessitate a different analysis of the relevant policies and considerations of fairness. See Scoles, Interstate and International Distinctions in Conflict of Laws in the United States, 54 CALIF. L. REV. 1599, 1600-02 (1966). As to its recognition in regard to the validity of forum-selection clauses, see The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 11-15 (1972).

12. The use of the term "policy-centered" refers to the making of the choice-of-law decision with reference to considerations of policy and fairness to the parties, and is intended to encompass the particular methodologies developed by various policy-centered theorists. See Sedler, Babcock v. Jackson in Kentucky, supra note 5, at 57-60. It should be added that the author does not consider the "modern rules approach" of the Restatement Second to be a "policy-centered" one. See id, at 61-63. Courts, however, often cite the Restatement Second in support of the essentially policy-centered solutions that they have adopted in the particular case. For a listing of the states that in recent years have still adhered to the traditional approach, see R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 247-48 (2d ed. 1975).

13. Not infrequently these rules are specifically contained in continental codes. And even when the rules are stated in unilateral form, i.e., when they only purport to prescribe the applicability of the forum's own law, the courts have interpreted them bilaterally to constitute general choice-of-law rules. See De Nova, Historical and Comparative Introduction to Conflict of Laws, 2 RECUEIL DES COURS 1966, at 441, 572-76 (1967); Ehrenzweig, Specific Principles of Private Transnational Law, 2 RECUEIL DES COURS 1968, at 167, 220-21 (1969).
limited exception to those rules by way of public policy, imperative laws, and the like.\textsuperscript{14} As has been observed, on the Continent the dominant attitude is still formalistic and system-minded, as opposed to the "prevalent pragmatism of the American jurisprudence and living law."\textsuperscript{15}

Recognition of these differences, however, should not obscure the fact that conflicts problems are necessarily universal, and that all legal systems deal with the same basic problem, the problem of how "the [international] legal order also involves integration of the diversity of laws of which it is composed."\textsuperscript{16} Since this is so, it would seem almost axiomatic that doctrines and theory developed within one context may, when the contextual differences are properly understood, be adapted for use in another context.\textsuperscript{17}

One concept in particular has been developed by continental, English, and Commonwealth commentators, which has received little attention here, but which can be adapted to the American context. It is a concept developed to describe a phenomenon that necessarily exists in all legal systems. Because its significance has generally been overlooked here, however, the concept has not yet received a name.\textsuperscript{18} This is the concept of \textit{functionally restrictive substantive rules}. This Article attempts to explain the phenomenon to which it refers and to demonstrate its utility in clarifying the question "Is there a conflict of laws?"


\textsuperscript{15} De Nova, \textit{Historical and Comparative Introduction to Conflict of Laws}, 2 \textit{Recueil des Cours} 1966, at 441, 595 (1967).

\textsuperscript{16} Yntema, \textit{The Historic Bases of Private International Law}, 2 \textit{Am. J. Comp. L.} 297 (1953).

\textsuperscript{17} Although I had been interested for some time in exploring this question, I did not do so in any systematic way—despite the fact that a great deal of writing on continental conflicts law is available in English—until I took a sabbatical in the fall of 1975 and went to Italy "where it all began." See Sedler, Babcock v. Jackson in Kentucky, supra note 5, at 30-33. There, thanks to the kindness of Professor Rodolfo De Nova of the University of Pavia, who has long been interested in American conflicts law and in the works of American commentators, and of his colleague, Professor Franco Mosconi, I was able to undertake at least a preliminary study of continental conflicts doctrine and theory. Because of my limited language facility, most of my research was restricted to works that were written in English. As indicated by the citations in this Article, I found particularly useful the collected courses of the Hague Academy of International Law, which are published in either English or French in the \textit{Recueil des Cours}. In addition there are numerous works published by foreign scholars in English. To use what the French would consider to be a horrible play on words, it is not inaccurate to say today that English is the \textit{lingua Franca} of private international law. During the latter part of my stay I finally was able to acquire a sufficient reading knowledge of Italian so that I could—with the help of an unabridged Italian-English dictionary—read some works in Italian. Of course, the opportunity to discuss the subject at length with Professors De Nova and Mosconi contributed greatly to my understanding. At this point I feel that I have at least a basic understanding of continental conflicts doctrine and of the approaches that are taken to the resolution of choice-of-law problems there. At the same time, I delved more deeply than I previously had into the conflicts law and doctrine of England and the Commonwealth countries.

\textsuperscript{18} It is only after a phenomenon has been given a name that it can be treated as a \textit{concept} and used for legal analysis.
I. FUNCTIONALLY RESTRICTIVE SUBSTANTIVE RULES

Professor De Nova of the University of Pavia defines functionally restrictive substantive rules as legal rules which, be it through additional, specific provisions or through construction of the rules themselves in light of their underlying policies, are endowed with a direct or indirect indication of the conflictual situations they are meant to cover.

Another definition, given by David St. L. Kelly, Reader in Law at the University of Adelaide, who has recently published a comprehensive monograph on the subject, is rules whose sole function is to limit the application of the substantive laws which they qualify to certain persons, events or transactions connected in a specified way with the State of whose law they form part.

Professor David Cavers, one of the few American commentators who has discussed the concept at all, uses the term "legislatively localized laws," which he defines as substantive laws of the enacting state which are limited by their terms either (1) to certain events or transactions within the enacting state or (2) to certain persons connected with that state in specified ways, even though the acts or events involving them occur outside the state...
While these definitions may differ somewhat, the underlying theme is that of self-limitation, and the essential characteristic of the concept of functionally restrictive substantive rules is that of limitations on the applicability of a rule of substantive law that inhere within the substantive rule itself. The concept exists totally apart from choice-of-law considerations, and the rule to which it refers is a rule of substantive law only. When it is said that a law constitutes a functionally restrictive substantive rule, it means that the law is by its own force inapplicable to certain situations containing a foreign element.

This Article will first consider the operation of the concept of functionally restrictive substantive rules within the context of legal systems that have adopted a rule-oriented approach to choice of law, and then discuss its utility in the American context in clarifying the question "Is there a conflict of laws?"

II. FUNCTIONALLY RESTRICTIVE SUBSTANTIVE RULES AND RULE-ORIENTED CHOICE-OF-LAW

A. OPERATION OF FUNCTIONALLY RESTRICTIVE SUBSTANTIVE RULES IN RULE-ORIENTED CHOICE-OF-LAW SYSTEMS

The significance of the concept of functionally restrictive substantive rules within the framework of a rule-oriented approach to choice-of-law is that it represents an exception to the ordinary choice-of-law process and prevents the application of a particular rule of substantive law of the state chosen by the forum’s choice-of-law rule. As De Nova describes it, "[the concept] intends to override the normal conflict of laws rules and . . . has made its own choice of law." The clearest example of a functionally restrictive substantive rule is a statute that contains a provision expressly excluding its application to certain situations containing a foreign element. For example, section 1 of the English Carriage of Goods by Sea Act of 1924 expressly provides that it shall apply only to outward shipments from a port in Great Britain or Northern Ireland to another port whether in or outside Great Britain or Northern Ireland, so that, by its own terms, it is inapplicable to inward shipments.


26. This necessarily refers to those substantive law rules that are embodied in statutes. See Prebble, Choice of Law to Determine the Validity and Effect of Contracts: A Comparison of English and American Approaches to the Conflict of Laws, 58 CORNELL L. REV. 635, 713 (1973) [hereinafter cited as Prebble].


29. This is the most obvious application of the expressio unius principle, since there are only two possible categories, inward and outward shipments, and the act refers only to outward shipments.
Thus, in a case involving an inward shipment to Great Britain or Northern Ireland, even though English law is applicable as the "proper law of the contract," the Carriage of Goods by Sea Act cannot be applied. 30 Within the framework of a rule-oriented approach to choice of law, however, the concept of functionally restrictive substantive rules is not limited to the situation where the statute expressly contains a restrictive provision. It applies wherever the court, in light of the legislative purpose behind the statute, finds such a built-in limitation. Consider three "classic" cases that commentators have used to illustrate this concept. In Mount Albert Borough Council v. Australasian T. & G. Mutual Life Assurance Society, Ltd., 31 a New Zealand borough council borrowed money for a public works project from a life insurance company, which was incorporated in Victoria, Australia, but which carried on business in both Australia and New Zealand. As security for the loan the council issued debentures, secured by a special rate on the taxable value of all taxable property of the borough, which were payable in Victoria. Subsequently the Victorian Parliament enacted the Financial Emergency Act of 1931, which provided for the compulsory reduction of interest payments on mortgages, including those due on debentures issued by local authorities. 32 When the New Zealand borough council sought to take advantage of the reduced rate provided by the statute it was unsuccessful. The Privy Council held that the provisions of the statute were inapplicable, since

a careful consideration of the terms of the sections . . . shows that, though the general definition of mortgage . . . is wide enough to cover any mortgage of any land anywhere in the world, the intention of the Acts is to limit it to Victorian mortgages. 33

Since the only way that the interest payments could have been reduced was under the provisions of the Victorian statute, once the court found it was by its own force inapplicable—that it constituted a functionally restrictive substantive rule—there was no choice-of-law problem in the case because under the common law rule, prevailing both in New Zealand and Victoria, the borrower was liable to pay the agreed-upon rate of interest. 34

In Kay's Leasing Corp. Proprietary Ltd. v. Fletcher, 35 residents of New South Wales entered into a hire-purchase agreement in Victoria with a company that was incorporated and had its principal place of business there.

---

30. See Localising Rules, supra note 21, at 257-58. As to the substantive rule of English law that does apply when England is the "proper law of the contract," see notes 45-46 and accompanying text infra. For examples of other English statutes containing such limitations, see Lipstein, Conflict of Laws 1921-1971: The Way Ahead, 31 CAMB. L.J. 67, 72 n.42 (1972).
32. Id. at 225-26.
33. Id. at 243.
34. When the statute was found to be inapplicable, Victoria's common law rule necessarily applied. See notes 45-46 and accompanying text infra.
The agreement related to a tractor which the purchasers were to use for their business in New South Wales, and contained an express choice-of-law provision in favor of Victorian law. When the purchasers defaulted, they were sued in New South Wales, and set up as defenses (1) that the transaction was usurious under the New South Wales Hire-Purchase Agreements Act and (2) that the company had not obtained a deposit as required by that statute. The agreement was also invalid under the Victoria Hire-Purchase Act, but with consequences less favorable to the purchasers. The High Court of Australia held that the New South Wales statute was inapplicable to contracts executed in another state. Thus, the purchasers could not claim its benefits, and since apparently, as in the previous example, the same result would have been reached under the Victoria statute and the rule of New South Wales that applied in the absence of the statute, it was not necessary to decide which law governed.

The third illustrative case, Sayers v. International Drilling Co. N.V., involved the validity of a clause in an employment contract executed in England by a Dutch company and an Englishman, under which the employee agreed to accept the company's death and disability compensation program in lieu of any other remedies for injury suffered during the course of employment outside the United Kingdom. The liability-limiting clause in the contract would have been invalid under English law, but the Court of Appeal held that Dutch law was the "proper law of the contract." While a provision of the Dutch Civil Code invalidated such clauses in the same manner as English law, the court accepted the testimony of an expert on Dutch law to the effect that the Dutch courts would hold this provision of the Civil Code inapplicable to contracts such as this, which were considered international contracts under Dutch law, and would treat the liability-limiting clause as valid. The Dutch code provision invalidating such clauses was, therefore, interpreted as containing a functionally restrictive limitation—it was inapplicable to international contracts—and the English court applied the rule of Dutch law that the Dutch courts would hold applicable to this case.

36. The facts are set out in id. at 131-34. The summary of the case is taken from De Nova, An Australian Case on the Application of Spatially Conditioned Internal Rules, 22 REVUE HELLÉNIQUE DE DROIT INTERNATIONAL 24, 24-25 (1969).
37. 116 Commw. L.R. at 134-35.
38. It was stipulated by the parties that this result would obtain. Id. at 134.
40. The accident occurred in Nigeria. If it had occurred in England, the contractual provisions would by their own terms have been inapplicable. Id. at 165-66.
41. Id. at 166-67.
42. De Nova questions this interpretation of Dutch law. But since there was no cross-examination and no evidence introduced by the plaintiff on this point, the trial judge had to accept the testimony of the Dutch lawyer. De Nova, Self-Limiting Rules, supra note 19, at 10-12.
As these examples indicate, in a system that follows a *rule-oriented* approach to choice-of-law, the concept of functionally restrictive substantive rules serves two functions. First, in cases such as *Mount Albert Borough* and *Kay's Leasing*, the interpretation of the purportedly applicable statute of one of the involved states as constituting a functionally restrictive substantive rule avoided the necessity for a choice-of-law decision since the law of that state which was applicable in the absence of the statute did not differ in result from the law of the other involved state. Second, in *Sayers*, where the concept of functionally restrictive substantive rules was not relevant until after the forum had made a choice-of-law decision which looked to the law of another state, recognition of that concept meant that the forum was applying the substantive rule of the state chosen by its choice-of-law rule which that state would itself have applied if the case had come before it. In that situation the concept serves the function of "finding within the 'competent' foreign law, the correct rules of decision." In regard to both functions, it constitutes an exception to the ordinary choice-of-law process, since the application of the substantive rule is restricted by limitations contained within the rule itself instead of by choice-of-law rules, and analytically, at least, apart from choice-of-law considerations.

When a purportedly applicable statute or code provision of one or both of the involved states is construed as constituting a functionally restrictive substantive rule, the general law of that state takes over to supply the rule of decision should that state's substantive law be held to govern. When a statute is inapplicable in common law countries, as in the non-conflicts situation, where the events in question occurred before the effective date of the statute, or in the conflicts situation, where the statute is construed as constituting a functionally restrictive substantive rule, the common law rule is applicable to the decision of the case. In *Mount Albert Borough*, for example, once the Victoria Financial Emergency Act was found to be inapplicable, the common law rule of Victoria, under which the borrower had to pay the agreed-upon rate of interest, was applicable. Since the same common law rule prevailed in New Zealand there was no conflict between the applicable laws of the involved states. Similarly, whenever a statute or specific provision of the

---

43. If the purportedly applicable provision of the Dutch code had not been interpreted as constituting a functionally restrictive substantive rule, however, there would have been no conflict between English and Dutch law on the question whether the contractual provision was invalid.

44. De Nova, *Conflict of Laws*, supra note 19, at 1571. It serves the same function when the forum's own substantive law is chosen under its choice-of-law rule.

45. The examples are limited to a "two-state" conflict.

46. In *Kay's Leasing*, only the New South Wales Act gave the purchasers the right to recover what they had already paid to the seller, which was the point in issue, since the parties had agreed that under either Victoria or New South Wales law the underlying transaction was invalid and would subject the borrower to no further liability.
code is held inapplicable, civil law countries look to the *lex generalis*—the
general provisions of the code—for the rule of decision. In *Sayers*, for
example, once the court held the specific provision of the code inapplicable to
international contracts, interpretation of the contract in question was gov-
erned by the general provisions of the code recognizing the validity of
contractual arrangements that were not specifically prohibited.

According to the commentators, however, there could exist a *gap* when
the law of the state chosen by the forum’s choice-of-law rules, the *lex causae*,
contains a functionally restrictive substantive rule which, if applied, would
leave “no substantive rules in the foreign law with which to dispose of the
case.”47 This will create no problem if the forum is willing to accept the
renvoi where the choice-of-law rule of the *lex causae* refers the case back to
the forum, or if it is willing to apply its own law on the basis of desistment or
“non-choice.”48 But if it is unwilling to do this, the forum must ignore the
functionally restrictive nature of the applicable rule of the *lex causae*, and
apply that state’s “domestic law,” i.e., the law which would be applicable in
a purely domestic case.49 Kelly uses the example of a state such as England (or
an American state) which refers to the *lex domicilii* to govern succession and
finds that the *lex causae*, whose own choice-of-law rule looks instead to the
*lex patriae*, also has a functionally restrictive substantive rule that limits the
provisions of its succession law only to its nationals or to foreign nationals
“habitually resident” there.50 If the deceased is domiciled in that country
under England’s concept of domicile, but is “habitually resident” elsewhere,
“there are no substantive rules in the foreign law with which to dispose of the
case.”51 If England is unwilling to apply its own law,52 it must ignore the
functionally restrictive aspect of the *lex causae*. But, as this example
indicates, such a case will be rather rare, and ordinarily when the law of the
state chosen by the forum’s choice-of-law rules contains a functionally
restrictive substantive rule, the forum can look to the other state’s general law
to avoid the *gap* problem.53

48. Id. at 268.
49. Id. at 270. De Nova, who argues that generally the forum should accept the functionally
restrictive interpretation that the *lex causae* puts upon its own law, concedes that in this situation
51. Id. at 267.
52. But under England’s “foreign court” approach to the renvoi, if the other state would
not decide the case in accordance with its own law, i.e., if it would reject the renvoi, England
would “accept” the reference back and apply English law. *In re Ross*, [1930] 1 Ch. 377.
53. It has also been a matter of some debate whether an express choice-of-law should be
construed as including the functionally restrictive aspect of the chosen law. Compare Prebble,
supra note 26, at 719, with De Nova, *Self-Limiting Rules*, supra note 19, at 4-8. See also
Finally, it is important in the context of a rule-oriented approach to choice-of-law to distinguish the concept of functionally restrictive substantive rules from the concept of the revoi. In those systems that reject the revoi,\(^{54}\) it may be asked whether recognition of the concept of functionally restrictive substantive rules puts the forum in the same position as if it were accepting the revoi, since it would be taking account of a limitation contained in the law of the state chosen by the forum’s choice-of-law rule. As De Nova points out, however, this is not so, because in recognizing the concept of functionally restrictive substantive rules the forum is not looking to the choice-of-law rules of another state—which is the essence of revoi—but is “simply applying that substantive rule of the competent legal order which does fit the facts of the given case—as those facts are seen by that legal order.”\(^{55}\) In any event, recognition of the functionally restrictive nature of a rule of substantive law does not give rise to the problem of “reference back” and similar problems associated with the revoi. Thus, structurally at least, there would be no inconsistency between a court’s rejection of the revoi and its willingness to accept the concept of functionally restrictive substantive rules.

B. INTRODUCTION OF POLICY ANALYSIS IN A RULE-ORIENTED CHOICE-OF-LAW SYSTEM

Significantly, recognition of the concept of functionally restrictive substantive rules within the framework of a rule-oriented approach to choice-of-law introduces policy considerations into the choice-of-law process by way of the “back door.” This has an impact potentially far more sweeping than any of the other “policy exceptions” that have been traditionally recognized. As Kelly has pointed out, since few statutes contain express “localising rules,”\(^{56}\)

\(^{54}\) Most European countries have declared themselves on the subject one way or another either by code provision or by consistent judicial practice. For this reason the English courts have been able to employ the “foreign court” approach, accepting the reference back only if the court of the lex causae would not do so. See In re Ross, [1930] 1 Ch. 377; In re Annesley, [1926] 1 Ch. 692.

\(^{55}\) De Nova, Conflict of Laws, supra note 19, at 1570. Prebble, to the contrary, maintains that the distinction is untenable because “[e]ach type of rule, has, as part of its function, the task of determining whether certain rules of domestic law apply to the case at hand.” Prebble, supra note 26, at 717. De Nova replies: “[b]ut this is simply not true of localizing rules: their only function is to affect domestic rules, whereas general rules of the conflict of laws—provided they are taken to act bilaterally, as Mr. Prebble also supposes—do have a further function . . . , namely to make foreign rules applicable.” De Nova, Self-Limiting Rules, supra note 19, at 6-7 n.19 (emphasis in original).

\(^{56}\) This is Kelly’s terminology.
their applicability (once the concept of functionally restrictive substantive rules is fully recognized) must be determined "either ab extra by a set of rules 'superior' to the relevant state's decisional rules, or from within the rules themselves, as a matter of their construction and interpretation." \(^{57}\) Likewise, his analysis of the criteria that must be employed to determine the territorial extension of substantive law rules looks to whether the object of the statute will thereby be significantly furthered. \(^{58}\) Thus, once localising rules of the *lex causae* \(^{59}\) are treated as part of the domestic law of the system of which they form part, a major step has been taken towards adopting a functional or interest approach towards the solution of conflict problems. \(^{60}\)

And indeed it has. The similarity between determining the functionally restrictive character of a substantive rule with reference to its underlying purpose, as a matter of construction and interpretation, and applying Brainerd Currie's methodology of interest analysis to the solution of choice-of-law problems is too obvious to be accidental, \(^{61}\) and Kelly does not suggest that it is. \(^{62}\) This similarity is further illustrated by De Nova's analysis of *Kaufman v. American Youth Hostels, Inc.* \(^{63}\) in which he explicitly draws on Currie to show how substantive rules can be given a functionally restrictive interpretation. In that case the decedent, a resident of New York, was killed in Oregon during a mountain climbing expedition conducted by the defendant, a New York eleemosynary institution which apparently was not "doing business" in Oregon. Oregon recognized charitable immunity at that time; New York did not. The New York court, applying the traditional choice-of-law rule that liability for tort was governed by the law of the "place of wrong," looked to Oregon law and sustained the defense. Currie, of course, saw the case in terms of interest analysis as presenting the classic false conflict. New York's policy was to protect victims against torts for which charitable corporations were responsible. It had an interest in applying that policy to hold a New York charity liable for the death of a New York victim notwithstanding that

---

\(^{57}\) D. St. L. Kelly, *supra* note 20, at 78.

\(^{58}\) Id. at 84-85.

\(^{59}\) This refers to the laws of the state chosen by the forum's choice-of-law rule, but, for these purposes, would include the forum itself when it is the "chosen state."

\(^{60}\) *Localising Rules, supra* note 21, at 274.


\(^{62}\) D. St. L. Kelly, *supra* note 20, at 84-95. As he notes particularly:

It is to the intrinsic policy of the latter [decisional rule] that prime importance must normally be attached for it is by reference to the object of the decisional rule that it is often possible to determine whether personal or territorial factors are the overriding ones.

*Id.* at 90-91.

the fatal accident occurred in Oregon. Since Oregon was presumably interested only in protecting charities that carried on their "good works" in Oregon, the policy behind Oregon's grant of charitable immunity would not be served by applying it to a New York charity that did not carry on "good works" in Oregon. Therefore, the law of New York, as the law of the only interested state, should have been applied, and the defense not allowed.

De Nova uses Currie's analysis and relates it to the concept of functionally restrictive substantive rules to show that the result that Currie advocates—the rejection of the defense—"is also supported by Oregon law if only it had been correctly applied." The applicable Oregon law, according to De Nova, was not its rule protecting charitable enterprises, but was its more general policy of protecting and indemnifying the victims of tortious conduct. This is because Oregon's rule of charitable immunity was not meant for the protection of foreign charities, so that as to those charities, Oregon's general policy regarding accident victims came into play. While New York was looking to Oregon law under its choice-of-law rule—the issue was liability in tort, and both the wrongful conduct and the injury occurred in Oregon—New York "either disregarded or misunderstood the interplay of Oregon's substantive rules in giving an unjustified prominence of the exceptional immunity rule over the basic policy on tortious responsibility." Since the same general policy was part of New York law, the case did not present a conflict of laws at all. It was "superfluous to choose between the substantive rules in point belonging to the legal systems concerned."

Just as Currie looks to the policy behind the Oregon rule of charitable immunity to determine whether it has an interest in applying its rule to a case containing a foreign element, and concludes that it does not, De Nova looks to the same policy to determine whether the rule should be given a functionally restrictive interpretation so as to make it inapplicable in a case containing a foreign element. De Nova concludes that it should be so restricted for the same reasons as does Currie, i.e., the rule's underlying policy will be advanced only when it is applied to corporations carrying on their "good works" in Oregon. Thus, recognition of the concept of functionally restrictive substantive rules within the framework of a rule-oriented approach to choice-of-law produces the same result here—the denial of the defense of

64. De Nova, Conflict of Laws, supra note 19, at 1572.
65. As Kelly notes, the statute should not be applied when "the object of the statute will not be significantly furthered." He refers to this as the "mischief approach." D. St. L. Kelly, supra note 20, at 84-85.
67. Id. (emphasis in original). Recognition of the concept of functionally restrictive substantive rules enabled the court to avoid such a "superfluous" choice-of-law in Mount Albert Borough and Kay's Leasing.
charitable immunity based on Oregon law to the New York charity that does not carry on its "good-works" in Oregon—as does the interest analysis approach which is premised entirely on the rejection of choice-of-law rules. 68

To the extent that the concept of functionally restrictive substantive rules becomes fully recognized within the framework of a rule-oriented approach to choice-of-law, considerations of policy will come in "by the back door," and may convert the system, in no small part, to one adopting a "functional or interest approach to the solution of conflicts problems." 69 The future development of this concept on the Continent and in England and the Commonwealth countries should be of considerable interest to American commentators.

III. FUNCTIONALLY RESTRICTIVE SUBSTANTIVE RULES IN THE AMERICAN CONTEXT: "IS THERE A CONFLICT OF LAWS?"

In light of the above discussion of the function—and potential approach-altering significance—of the concept of functionally restrictive substantive rules in legal systems that employ a rule-oriented approach to choice-of-law, what is the relevance of this concept in the American context, where a policy-centered approach has already been adopted, in one form or another, by the great majority of courts? Certainly it cannot be to bring in policy considerations "by the back door" in those jurisdictions that still adhere to the broad, state-selecting choice-of-law rules of the traditional approach. A direct attack on the traditional approach would seem to promise more success.

More importantly, precisely because the great majority of American states have abandoned the traditional approach, consideration of the policy behind the particular substantive law rules of both the forum and of the other involved states is now an integral part of the choice-of-law process, which is recognized as a choice between laws rather than as a choice between states. 70 As one commentator has stated, in the United States the question of recognition of the concept of functionally restrictive substantive rules "has been over-taken by events—namely the victory of interest analysis." 71 Nonetheless, the

68. Currie himself concluded that there was utility in a legislature's "[s]pecifying in realistic terms the cases to which its enactment is intended to apply." B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 116 (1963).
69. Localising Rules, supra note 21, at 274.
70. As Professor Reese has observed,
[a]midst the chaos and tumult of choice of law there is at least one point on which there seems to be general agreement in the United States. This is that choice of the applicable law should frequently depend upon the issue involved. The search in these instances is not for the state whose law will be applied to govern all issues in a case; rather it is for the rule of law that can most appropriately be applied to govern the particular issue.
71. Prebble, supra note 26, at 715. Strictly speaking, the victory is of the policy-centered approach in general, although in practice the emphasis is indeed on interest analysis.
essential characteristic of a functionally restrictive substantive rule is not that it brings into play considerations of policy, but that it contains within itself a limitation on its application to certain situations containing a foreign element. As has been emphasized, the concept of functionally restrictive substantive rules represents an exception to the ordinary choice-of-law process. Where a state follows a rule-oriented approach to choice-of-law, the courts, in order to determine the functionally restrictive character of a rule of substantive law, have looked to the purpose behind a statute to ascertain whether the legislature intended to impose built-in restrictions on its applicability. To that extent, application of the concept of functionally restrictive substantive rules has brought in considerations of policy "by the back door." But this occurs only because considerations of policy are not an integral part of the choice-of-law process in those states, and operate only as exceptions to the normal workings of that process. In this sense the concept of functionally restrictive substantive rules performs a function similar to that performed by other "policy" exceptions, such as public policy, imperative laws, and the like. Nevertheless, the rationale for the application of the concept is not that it represents a "policy" exception to choice-of-law rules, but that it demonstrates when a substantive law rule is limited by its own force and is thus inapplicable to certain situations containing a foreign element. Whenever such a limitation exists within a substantive rule, for whatever reason, recognition of this concept enables the court to avoid application of a law that it "does not want to apply."

This being so, the utility of recognizing and applying the concept of functionally restrictive substantive rules in states that follow a policy-centered approach to choice-of-law should be readily apparent. Functionally restrictive substantive rules necessarily exist in all legal systems, regardless of the approach that is taken to choice-of-law. They exist whenever a statute by its own terms is limited in applicability to certain situations containing a foreign element. They also exist whenever the legislature has clearly manifested its intention to the same effect, regardless of its reasons for so doing. Since they necessarily exist, they should be given a name so that they can be precisely identified and properly dealt with. The courts in this country have in practice been applying the concept of functionally restrictive substantive rules to limit a statute's applicability, although they have not described what they were doing with reference to this concept. A clear understanding of this concept will enable the courts to utilize it more effectively, and, in particular, to avoid the danger of construing a statute as containing a

73. See note 18 supra.
self-limitation contrary to legislative purpose because of seemingly territorially restrictive language contained within it.

More importantly, the concept of functionally restrictive substantive rules has considerable utility in enabling a court, at the outset, to determine whether a conflict of substantive laws in fact exists, and thus to avoid unnecessary and possibly unsound choice-of-law decisions. Therefore, the concept of functionally restrictive substantive rules, which has been developed elsewhere for use in the rule-oriented context, can be adapted for use in the American policy-centered context in relation to the important threshold question "Is there a conflict of laws?"

A. AVOIDING CHOICE-OF-LAW DECISIONS

For the purposes of this Article, a functionally restrictive substantive rule is defined as a statutory rule that, either by its own terms or as a matter of demonstrable legislative intention as determined by the courts of the enacting state, precludes itself from application to certain situations containing a foreign element. Recognition of this concept will avoid unnecessary choice-of-law decisions because almost invariably a conflict of laws question involving two American states arises either out of a purported conflict between a statute of one state designed to change the common law rule and the remaining common law rule of the other state, or in an area generally covered by statute, such as liability for wrongful death, because of material differences in the applicable statutes. Where the purported conflict is between the statute of one state and the common law rule of the other, if the statute is construed as constituting a functionally restrictive substantive rule, the conflict is thereby removed since the result reached under the residually applicable common law rule of the enacting state and the common law rule of the other state presumably will be the same. This was the situation in Mount Albert Borough. Likewise, where both states have differing statutes in an area generally covered by statute, if one is construed as constituting a functionally restrictive substantive rule, the conflict is eliminated, and the case must be decided in accordance with the only statute that is capable of application.

74. In the tort area, for example, by far the largest number of conflicts cases involve a conflict of laws on the issue of the applicability of a guest statute.

75. In second place in the tort area has been a conflict of laws on the issue of limitations on wrongful death recovery. Now that most states which have had such limits are revising them upwards or abolishing them entirely, however, this fertile source of conflicts litigation may diminish.

76. See text accompanying notes 31-34 supra.

77. For example, the wrongful death act of one state is not applicable extraterritorially to a fatal accident occurring in another state.
Where both states have statutes in an area where there is a common law-statute mix, that is, where the common law rule differs from state to state, and some states have enacted statutes on the subject, it is possible that if one of the statutes is inapplicable the result reached under that state’s residually applicable common law rule and under the common law rule or statute of the other state will be the same. This is apparently what occurred in Kay’s Leasing. In other words, in the American context, the concept of functionally restrictive substantive rules can enable a court to determine at the outset that a conflict of laws does not in fact exist because a purportedly applicable statute giving rise to the conflict is by its own force inapplicable to the situation containing a foreign element.

The utility of the concept of functionally restrictive substantive rules in the American context is in avoiding choice-of-law decisions, not in contributing to their resolution. In order to avoid an unnecessary and possibly improper choice-of-law decision it is necessary to distinguish carefully between the determination of the functionally restrictive nature of a statute and the determination of a statute’s underlying policy. The underlying policy of a statute becomes relevant only after a conflict of laws is found to exist and a choice-of-law decision must be made. This is why the above definition of a functionally restrictive substantive rule looks to the express terms of the statute or to the demonstrable legislative intention as determined by the courts of the enacting state. The distinction between demonstrable legislative intention and the underlying policy of the statute is crucial in distinguishing the function that the concept of functionally restrictive substantive rules should perform in the American context, where choice-of-law is to a large extent policy-centered, from that which it performs in a system where choice-of-law is essentially rule-oriented. In deciding whether a conflict of laws exists, the forum court is not concerned with the underlying policy of the statute; it is concerned only with the manifestation of legislative intention. The determination of the legislature that the statute should not apply to certain situations containing a foreign element may have been based on factors totally apart from the statute’s underlying purpose. The intention of the legislature can be manifested by the express wording of the statute, or it can be manifested by means going to what may be called the “legislative dynamic.” The point to be emphasized is that unless the court finds such manifest intent at this stage of the process, the statute is presumed to be potentially applicable. Thus, there is considered to be a conflict of substantive laws between the involved states. When the forum is making the choice-of-

---

78. See notes 45-46 and accompanying text supra.
79. See note 46 supra.
80. See notes 115-68 and accompanying text infra.
81. This is based on the assumption that because of the “renvoi hang-up” the forum does not, before finding that there is a conflict of laws necessitating a choice-of-law decision, look to
law decision, since it has abandoned broad, state-selecting choice-of-law rules, and is basing its decision, to one degree or another, on considerations of policy and fairness, it will consider the underlying policy behind the statute of the involved state or states, and may conclude that in light of that policy the statute should not be applied to this situation containing a foreign element. But when it is looking to the functionally restrictive nature of a statute to answer the question "Is there a conflict of laws?" it is concerned only with the express wording of the statute or with demonstrable legislative intention relating to the dynamic of legislative behavior. It is very important not to confuse determining the functionally restrictive nature of a statute in order to avoid unnecessary and improper choice-of-law decisions with basing the choice-of-law decision, once a conflict has been found to exist, on considerations of policy, including the underlying policy of the statute or statutes in question. Therefore, the next focus of this Article must be to identify functionally restrictive substantive rules as they appear in American statutory law and conflicts cases.

B. IDENTIFYING FUNCTIONALLY RESTRICTIVE SUBSTANTIVE RULES

1. "Expressly contained within the statute itself"

On the whole, here as elsewhere, it is fairly rare for a statute to contain express language defining its applicability or nonapplicability to situations involving a foreign element. But there has been an increasing tendency, particularly in proposed uniform laws, to take this factor into account. Sometimes this takes the form of a directive setting forth general criteria of applicability, such as section 1-105 of the Uniform Commercial Code, which provides that where the parties have not made an effective choice of law, the Code shall be applied to all transactions "bearing an appropriate relation" to the enacting state. A different approach, however, has been taken with respect to proposed "no-fault" acts and the "no-fault" statutes that have been adopted by the

---

82. The same is true in what may be called the "non-conflicts situation." Such a situation occurs when the question is simply whether the forum's statute applies to certain situations containing a foreign element, and where there is generally no issue as to the direct application of another state's law, e.g., a question of the applicability of American regulatory legislation to activities occurring abroad or to persons connected with another state. See Trautman, The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation, 22 Ohio St. L.J. 586, 587 (1961).

RESTRICTIVE RULES

states. In what has been called a "notable departure from the usual legislative indifference to conflict-of-laws problems," these statutes almost invariably contain provisions specifically defining their applicability to particular situations involving a foreign element. Since these provisions have the effect of limiting the statute, and excluding its applicability from situations where, on the basis of relevant choice-of-law considerations, the statute might be expected to apply, they clearly illustrate the operation of functionally restrictive substantive rules by language expressly contained in the statute itself.

For example, the Uniform No-Fault Act provides that no-fault benefits are available to the insured, his resident relatives, and occupants of his vehicle when the vehicle is involved in an accident either within or without the enacting state, but that such benefits are available to other categories of victims only when the accident occurs within the borders of the enacting state. Suppose that an accident involving a driver from State A, which has enacted the Uniform Act, occurs in State B, injuring a pedestrian who resides in State A. State B does not have a no-fault statute. The injured pedestrian brings suit in State A seeking to recover no-fault benefits. There is no conflict between the laws of State A and State B on this point. State B does not have a no-fault statute, and the State A statute, by its own terms, is inapplicable to this situation containing a foreign element. By expressly providing that only the insured, his resident relatives, and the passengers in his vehicle can recover no-fault benefits for an out-of-state accident, the legislature has also, under the expressio unius principle, expressly provided that recovery shall not be available under the statute to a different category of persons who may be injured by a State A insured vehicle in an accident occurring in another state. Looking at the other side of the coin, that of exemption from tort liability, the Uniform Act provides that the exemption from tort liability for

85. For a criticism of the territorially-oriented approach that produces this result and a proposal for a "golden rule," see Kozyris, No-Fault Insurance and the Conflict of Laws—An Interim Update, 1973 DUKE L.J. 1009; Kozyris, No-Fault Automobile Insurance and the Conflict of Laws—Cutting the Gordian Knot Home-Style, 1972 DUKE L.J. 331.
86. UNIFORM MOTOR VEHICLE ACCIDENT REPARATIONS ACT §§ 1, 2.
87. Kelly draws a distinction between directive and exclusive "localising" rules, the former being treated as "directives to the courts of the forum to ensure that at least in a certain class of cases the substantive provisions of the forum must be applied," and the latter being treated as limiting the "application of the substantive provisions which they qualify to certain cases, and to those cases alone." Localising Rules, supra note 21, at 253-54 (emphasis in original). There can be no doubt, under a proper application of the expressio unius principle, that where the legislature has specifically provided that the statute apply to certain situations containing a foreign element, it has necessarily decided to exclude the other cases falling into that category, i.e., situations containing a foreign element. The functionally restrictive nature of the rule would thus have to be classified as exclusive under Kelly's definition.
the insured driver is limited to accidents occurring in the enacting state. 88
Thus, if a driver whose automobile is both registered in State A and insured
under its no-fault plan is involved in an accident in State B, which does not
have a no-fault statute, he will be unable to assert the defense. Again, there is
simply no conflict of laws on this point. State B does not recognize an
exemption from tort liability, and under the applicable substantive law of
State A—its common law rule, since the exemption provision of the State A
no-fault statute is by its own terms inapplicable to an accident that occurs
outside of State A—there is no exemption either.

Another example of a statute that contains express provisions limiting its
applicability to certain situations involving a foreign element is the Uniform
Securities Act. 89 The sections regulating offers to sell and sales of securities
are applicable only when the offer to sell or to buy is "made and accepted in
this state." 90 The sections regulating purchases and offers to buy are
applicable when the "offer to buy is made or an offer to sell is made and
accepted in this state." 91 The concepts "offer in this state" and "acceptance
in this state" are specifically defined. 92 Thus, the statute is inapplicable, for
example, when the offer to sell is made in the enacting state but accepted in
another state. As both the examples of the Uniform No-Fault Act and the
Uniform Securities Act indicate, functionally restrictive substantive rules
contained in a statute itself are likely to be part of a legislative effort to define
the statute's applicability both affirmatively and negatively. Whether it is
desirable for the legislature to attempt this may be debatable, 93 but the point to
be emphasized is that to the extent the legislature has specifically set out the
statute's applicability to certain situations, it has, under the expressio unius
principle, precluded the statute's applicability to the situations not included.
The legislature has thus enacted a statute that by its terms constitutes a
functionally restrictive substantive rule.

As regards the express language of a statute, however, the real problem
in regard to functionally restrictive substantive rules is something very
different. Precisely because it has been fairly rare that a statute will contain
express language defining its applicability or nonapplicability—and perhaps
because the concept of functionally restrictive substantive rules has not been

88. **Uniform Motor Vehicle Accident Reparations Act** § 2.
89. The background of the decision to codify conflict of laws rules in the Uniform
Securities Act is discussed in Danton, *Territorially Limited Statutes and the Choice-of-Law
90. **Uniform Securities Act** § 414(a).
91. Id. § 414(b).
92. Id. §§ 414(c), (d).
93. This appears particularly true since, as these examples indicate, the result will usually
take the form of mechanical rules. But see Danton, *Territorially Limited Statutes and the
precisely defined—there is the danger that language contained in a statute may be interpreted out of context or taken literally so as to be treated as a self-limitation on the statute's applicability, although this was not intended by the legislature and would be inconsistent with the statute's clear purpose. Consider the following examples of this problem.

In *Farber v. Smolack*, a New York automobile owner had loaned his automobile to his brother, who was taking a trip with his family to Florida. On the return trip an accident occurred in North Carolina in which the brother's wife was killed and his two children were injured. A wrongful death and personal injury action was brought against the owner in New York. Under New York law the owner would be vicariously liable for the negligence of the user on the basis of consent to use, but under North Carolina law the owner would not be vicariously liable if he derived no benefit from the driver's use of the vehicle. In terms of interest analysis, the case clearly presented a false conflict: New York was interested in applying its law allowing recovery against the insured New York defendant in favor of the New York victims and their beneficiaries while North Carolina had no interest in enabling the New York automobile owner to avoid liability. The defendant, however, argued that the New York vicarious liability statute was by its own terms inapplicable—that it constituted, although this term was not used, a functionally restrictive substantive rule—because it referred to the use and operation of a vehicle "in this state." The court gave this contention short shrift, noting that the predecessor statute had used the term "upon a public highway," and concluding that in making the change of wording to "in this state," the legislature was not concerned with extraterritorial effect, but merely wanted to make sure that the statute covered the situation of an accident that occurred on private roadways or parking lots. Since the statute, despite seemingly restrictive language, was not interpreted as constituting a functionally restrictive substantive rule, when the purpose behind the particular wording in relation to the overall purpose of the statute was considered, there was a conflict of laws between the applicable substantive rule of North Carolina and the applicable substantive rule of New York, and in this case of a false conflict, the court applied New York law.

In *Gaither v. Myers*, however, the District of Columbia Circuit

---

95. Id. at 201-02, 229 N.E.2d at 37-38, 282 N.Y.S.2d at 250-51.
98. 20 N.Y.2d at 204, 229 N.E.2d at 39, 282 N.Y.S.2d at 253.
interpreted the term "operated upon the public highways of the District of Columbia" literally so as to preclude the application of a "presumption of consent to use" provision contained in the District's financial responsibility statute\(^{100}\) to an accident in Maryland involving an automobile owned by a District resident.\(^{101}\) Considering that the primary purpose of the statute was to provide a financially responsible defendant for the benefit of a victim injured by the negligent operation of an automobile, it would have been far more reasonable to construe the provision as in \textit{Smolack}, \textit{i.e.}, applicable to accidents occurring "off the public highway" rather than being limited to accidents occurring within the boundaries of the District. This is particularly so in view of the very limited size of the District and the resultant likelihood that vehicles registered in the District would in the ordinary course of use be involved in accidents in Maryland and Virginia. As it turned out, interpreting the statute as constituting a functionally restrictive substantive rule made no real difference. Once the court found that the statute was by its own terms inapplicable to this situation containing a foreign element, it looked to the residual common law rule of the District, which, like the common law rule of Maryland, contained a presumption that an automobile involved in an accident was either operated by the owner or his agent.\(^{102}\) In any event, the court held that liability could be sustained on the alternative ground that the owner had violated the District's "leaving the keys in the car" regulation.\(^{103}\) The case does, however, point out the danger of looking to the literal language of the statute and interpreting it in a functionally restrictive way without regard to its underlying purpose.

The problem of looking to the literal language of the statute without regard to its underlying purpose is also illustrated by the provision of the New York Insurance Law\(^{104}\) that was involved in \textit{Zogg v. Penn Mutual Life Insurance Co.}\(^{105}\) That provision invalidated any clause in a life insurance policy that excluded liability for death as a result of suicide within 2 years from the date of issue of the policy, and referred to a "policy of life insurance delivered or issued for delivery in this state."\(^{106}\) In \textit{Zogg} the insured was a New York resident. Although the policy was mailed to him in New York, he had applied for it and paid the first premium to the company's office in


\(101\). The court cited a statement by the District of Columbia Court of Appeals to that effect in a case where there was no real question as to the applicability of District of Columbia substantive law. 404 F.2d at 219 n.6, \textit{citing} Knight v. Handley Motor Co., 198 A.2d 747, 750 (D.C. App. 1964).

\(102\). \textit{Id.} at 219-20.

\(103\). \textit{Id.} at 220-24.

\(104\). N.Y. Ins. Law § 155 (McKinney 1966).

\(105\). 276 F.2d 861 (2d Cir. 1960).

Massachusetts. The company argued that Massachusetts law, which would uphold the clause, applied as the law of the "place of making." The Second Circuit, sitting as a New York court and applying a "center of gravity" approach, rejected that contention and held that New York law applied. The insurer had also contended that the New York statute was by its own terms inapplicable when the underlying insurance contract had been entered into in another state. To the contrary, said the court, it was irrelevant where the contract was made since, as it noted, "the primary purpose of the enactment was to protect residents of the state . . . and the tests of delivery or issuance for delivery in the state were adopted as a practical means of achieving such protection." 108

Cavers, who somewhat resists the concept of functionally restrictive substantive rules insofar as it would limit the forum's power to choose the applicable law, 109 discusses the New York statute involved in Zogg and posits the examples of (1) an insurance policy mailed to a Massachusetts resident who was temporarily in New York after the binder had been executed in Massachusetts and (2) a policy mailed to a New York resident temporarily in Massachusetts. He asks whether in those cases the statute should be interpreted as containing a localizing rule, so as to preclude its application in the second example, and conversely, as containing a directive as to its application which would require that it be applied in the first example. 110 He contends that it should not be so interpreted, but rather that the court should hold that the legislature did not intend to preclude the use of choice-of-law principles to deal with cases that failed to satisfy the statute's express conditions for its applicability. 111

It seems that Cavers misses the point, for he attaches too much significance to the localizing or territorially restrictive language contained in the statute without relating that language to the statute's clearly demonstrated purpose. It seems clear, considering the fact that the statute dealt with life insurance contracts, which have always been heavily regulated by the states, 112 that the legislature was trying to define specifically the situations in which the statute would and would not be applicable. As the court pointed out

---

107. The New York court first adopted this approach for contract cases in Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954). As regards life insurance contracts, the state of the most significant relationship is considered to be the state of the insured's domicile. Restatement (Second) of Conflict of Laws § 192 (1971).
108. 276 F.2d at 865.
110. Whenever the forum's statute contains a specific directive that it be applied, the forum court must do so, assuming, of course, that the application is constitutional.
111. Cavers, supra note 23, at 230-31 ("The internal rule is not spatially-conditioned, but its application is subject to a statutory directive.").
112. See Restatement (Second) of Conflict of Laws, Explanatory Notes § 192 (1971).
in *Zogg*, the primary purpose of the statute was to protect New York residents who entered into life insurance contracts and their beneficiaries from what the state considered to be overreaching on the part of life insurance companies, and its strong interest in doing so cannot be doubted. 113 By the same token, New York has no real interest in protecting residents of other states from such overreaching regardless of the factual contacts that the transaction may have had with New York. The language used in the statute must be interpreted in light of the clearly demonstrated legislative purpose. It is obvious, as the court noted in *Zogg*, that when the legislature used the term "delivered or issued for delivery in this state," it was trying to protect New York residents. 114 When the statutory language is interpreted functionally in light of the clearly demonstrated legislative purpose, rather than literally or spatially, the only reasonable interpretation is that it is referring to an insurance policy issued on the life of a New York resident—and only to such policies—regardless of where the policy was physically delivered or where the contract was executed. So interpreted, the statute, like the Uniform No-Fault Act and the Uniform Securities Act, contains both a directive as to when it shall be applied—when the policy is issued on the life of a New York resident—and a functionally restrictive limitation precluding its application when the policy is not issued on the life of a New York resident.

In summary, it is clear in more recently enacted statutes, such as the no-fault acts, that the legislature has prescribed the statute’s applicability to situations containing a foreign element, both affirmatively and negatively. To the extent that its application is specifically prescribed, the statute may be said to constitute a functionally restrictive substantive rule. In the case of other statutes, however, the courts should not be misled by seemingly restrictive language, usually of the territorial variety, into giving the statute a functionally restrictive interpretation when this would be inconsistent with the statute’s clearly demonstrated purpose. On the other hand, when the language contained in a statute is interpreted in light of the clearly demonstrated legislative purpose, it may be clear that the legislature was trying to define the scope of the statute’s application, as in the case of the provision of the New York insurance law involved in *Zogg*. Recognition of the concept of functionally restrictive substantive rules will serve to assist the courts in determining when the legislature was specifically trying to restrict the scope of the statute’s application and when it was not.

113. *Id.*
114. 276 F.2d at 865.
2. "As a matter of demonstrable legislative intention"

The second situation in which a statute may be found to constitute a functionally restrictive substantive rule is where, as a matter of demonstrable legislative intention as determined by the courts of the enacting state, the statute is construed as being inapplicable to certain situations containing a foreign element. As pointed out previously, the use of the term "demonstrable legislative intention" and the qualification of "as determined by the courts of the enacting state" are very important to the definition of functionally restrictive substantive rules. Both features are integral to an understanding of the utility of the functionally restrictive limitation concept in the American context. Demonstrable legislative intention refers to a determination on the basis of legislative history and behavior—what is here termed the legislative dynamic—which only the courts of the enacting state, which are engaged in an ongoing relationship with their own legislature and are thus in the best position to understand its intention and behavior, can realistically determine.

Again, it must be emphasized that the reference to demonstrable legislative intention is a reference to something very different from the underlying policy of a statute. In the American context, where choice-of-law is generally policy-centered, consideration of the underlying policy of a statute is an integral part of the choice-of-law process. But this process does not properly come into play until a conflict of laws is found to exist. When a court is dealing with the threshold question "Is there a conflict of laws?" it is not concerned with the underlying policy of the statute. The court is concerned only with the legislative history of the particular statute and of the behavior of the legislature with respect to the enactment or reenactment of that particular statute insofar as such legislative history and behavior indicates whether the legislature intended to preclude the application of the statute to the situation containing a foreign element. The legislature may have made the determination, for reasons which it considered valid, that the statute should not be applicable to this situation, even though such application would advance the statute's underlying policy. Once it is clear that the legislature has made that determination, the courts of the enacting state are bound as a matter of court-legislature relations to respect it, and so should the courts of another state whenever the legislature's intention has been authoritatively declared by the courts of the enacting state. The matter of demonstrable legislative intention is illustrated most clearly in the matter of extraterritorial application of statutes.

Although, in this country as elsewhere, most legislation has been enacted without reference to its applicability to situations containing a foreign
element, historically, because of American acceptance of the territorial principle,\textsuperscript{115} there was a presumption that legislation was not applicable extraterritorially.\textsuperscript{116} This presumption operated as a sort of built-in functional restriction. Unless the contrary intention appeared, a statute was not applicable when all of the legally significant facts calling the statutory provisions into play did not occur within the enacting state. For example, wrongful death acts were early interpreted as being inapplicable when the fatal accident occurred outside of the enacting state, even though both the victim and the defendant resided in the enacting state.\textsuperscript{117} In practice, however, the principle that legislation was presumed inapplicable extraterritorially was swallowed up by the territorially oriented choice-of-law rules of the traditional approach\textsuperscript{118} which produced the same result. For example, in the classic tort case of \textit{Alabama & Great Southern R.R. v. Carroll},\textsuperscript{119} the allegedly negligent act occurred in Alabama while the accident resulting from that act occurred in Mississippi. The plaintiff was an Alabama resident and the railroad was incorporated in Alabama. Under the common law rule, as it existed in both Alabama and Mississippi at that time, the plaintiff could not recover in a tort action because of the "fellow servant" doctrine. Under the newly enacted Alabama Employer's Liability Act, however, strict liability was imposed on the employer for employee injuries. Since the plaintiff asserted that an Alabama statute was applicable in a proceeding brought in an Alabama court, the proper question for the Alabama court was whether the legislature intended the statute to be applicable extraterritorially to this situation containing a foreign element. But the court did not approach the question in terms of legislative intention. Instead it applied the traditional choice-of-law rule that liability for tort was determined by the law of the "place of the wrong," which it characterized as Mississippi, since the last act—the suffering of the injury—occurred there.\textsuperscript{120} Even if the court had approached the question in terms of legislative intention, it probably would have reached the same result. Given the presumption existing at that time against extraterritorial application of statutes, buttressed in this case by the fact that the Alabama statute was designed to abrogate the existing common law rule, it could have properly concluded that the legislature intended that the statute apply only to accidents occurring in Alabama. If it had interpreted

\begin{itemize}
\item \textsuperscript{115} See Sedler, Babcock v. Jackson in Kentucky, supra note 5, at 35-38.
\item \textsuperscript{116} "All legislation is \textit{prima facie} territorial." American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909).
\item \textsuperscript{117} See, e.g., Murray's Adm'x v. Louisville & N.R.R., 132 Ky. 336, 110 S.W. 334 (1908); Whitford v. Panama R.R., 23 N.Y. 465 (1861).
\item \textsuperscript{118} Concerning the relationship between the territoriality principle as developed by Story and the theory of vested rights that was the basis of the traditional approach, see Sedler, Babcock v. Jackson in Kentucky, supra note 5, at 38-39.
\item \textsuperscript{119} 97 Ala. 126, 11 So. 803 (1892).
\item \textsuperscript{120} \textit{Restatement of the Conflict of Laws} § 377 (1934).
\end{itemize}
the statute in this manner—if it had interpreted it, in other words, as constituting a functionally restrictive substantive rule, inapplicable to accidents occurring outside of Alabama—there would not have been a conflict of laws between Alabama and Mississippi. Thus, a choice-of-law decision would have been unnecessary, since under the common law rule of Alabama, applicable residually in cases not covered by the statute,121 as well as under the common law rule of Mississippi, the plaintiff would be barred from recovery by the "fellow servant" doctrine. Be that as it may, the same result was reached under the "place of the wrong" rule, and application of that rule operated to restrict the application of a state's tort liability statutes to the situation where the accident occurred within the borders of the enacting state.122

The coincidence in result produced by the tort choice-of-law rule that the law of the state where the injury occurred governed and by the principle that legislation was presumed not to apply extraterritorially also obscured recognition of the functionally restrictive nature of wrongful death acts. In terms of the availability of a cause of action for wrongful death, this did not really matter, since all states have wrongful death acts,123 and the beneficiaries could sue under the wrongful death act of the state where the fatal accident occurred. Problems arose, however, in regard to whether the forum, which was usually the decedent's and beneficiaries' home state, would refuse to entertain an action under a foreign wrongful death act on "public policy" grounds,124 or whether it could entertain such an action because of legislative restrictions on hearing cases brought under foreign acts.125 Even more significant was the fact that many states had limitations on the amount recoverable in a wrongful death action. If the accident occurred in such a state, the plaintiff was limited to the amount recoverable under the state's statute.126 Until Kilberg v. Northeast Airlines, Inc.,127 that is, when the New York Court of Appeals, by the manipulative techniques of procedural

121. See notes 45-46 and accompanying text supra.
122. Similarly, in the classic contracts case of Milliken v. Pratt, 125 Mass. 374 (1878), the court could have held that in the absence of an affirmative indication of extraterritorial application, the Massachusetts legislature did not intend that its statute should apply when all of the dealings did not occur in Massachusetts. As these examples indicate, the presumption against extraterritorial application of statutes, like the rules of the traditional approach, would frequently result in the failure to apply the forum's statute, although, in light of the statute's underlying policy, it should be applied to the particular situation containing a foreign element.
characterization and public policy, succeeded in holding that while suit had to be brought under the Massachusetts wrongful death act, the measure of recovery would in effect be determined by New York law.\textsuperscript{128} It should be noted that in \textit{Kilberg}, not only did Massachusetts law apply as the law of the "place of the wrong" under New York's then-existing choice-of-law rule, but that even apart from choice-of-law considerations, New York's own wrongful death act had been previously construed as being inapplicable to fatal accidents occurring outside New York.\textsuperscript{129}

\textit{Kilberg}, followed 2 years later by \textit{Babcock v. Jackson},\textsuperscript{130} heralded the demise of the traditional approach to choice-of-law in this country. But the abandonment of the traditional approach as such did not affect the matter of extraterritorial application of statutes. In \textit{Kilberg}, for example, even if the New York court had repudiated the traditional approach to choice-of-law, it would have still been left with its earlier holding that, as a matter of legislative intention, the New York wrongful death act was not applicable to fatal accidents occurring in another state. This problem, it should be noted, was not present in \textit{Babcock}. There the New York law that the court applied was its common law rule allowing recovery against a negligent defendant by an injured plaintiff even if the plaintiff was a guest passenger in the defendant's automobile.\textsuperscript{131} But after abandoning the territorially oriented choice-of-law rules of the traditional approach, the court did not want to revert to territoriality when dealing with a death case. Thus, in \textit{Farber v. Smolack}\textsuperscript{132} it removed the territorially—in effect functionally—restrictive character of the New York wrongful death act, holding that it could be applied to fatal accidents occurring outside of New York.\textsuperscript{133}

By the same token, today most courts committed to a policy-centered or any other modern approach to choice-of-law,\textsuperscript{134} do not distinguish between statutes and common law rules, and the historical presumption against

\textsuperscript{128} The decision can be explained theoretically by saying that New York fashioned a rule of decision for the case, using Massachusetts law as a model in part, \textit{i.e.}, insofar as it created a cause of action for wrongful death, and New York law as the law of the forum for the remainder, \textit{i.e.}, insofar as it allowed full recovery. See Sedler, Babcock v. Jackson in Kentucky, supra note 5, at 130-32. That this was what New York was doing was confirmed in Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 560-61 (2d Cir. 1962), cert. denied, 372 U.S. 912 (1963), holding that New York was not precluded by the full faith and credit clause from so proceeding.

\textsuperscript{129} Whitford v. Panama R.R., 23 N.Y. 465 (1861).


\textsuperscript{131} \textit{Id.} at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.


\textsuperscript{133} Note that in \textit{Farber} there was no conflict of laws with respect to wrongful death liability, since the North Carolina statute did not contain any limit on the amount recoverable.

\textsuperscript{134} Included in this definition is the "modern rules" approach of the Restatement. See \textit{Restatement (Second) of Conflict of Laws} § 6 (1971).
extraterritorial application of statutes has been virtually abandoned for choice-of-law purposes. Absent an affirmative indication, relating to the legislative dynamic, that the forum's statute is not to be applied extraterritorially to the situation containing a foreign element, when the forum is making a choice-of-law decision, it does not treat statutes differently from common law rules. The forum will assume that its statute, or the statute of the other involved state, is potentially applicable to this situation containing a foreign element in the same manner as it makes this assumption with respect to common law rules. And whether a particular statute or common law rule will be applied is determined with reference both to considerations of the policy underlying the statute or the common law rule and to fairness to the parties. The traditional presumption against extraterritorial application of statutes, therefore, has been effectively removed from the choice-of-law process, along with the traditional, territorially-oriented approach to choice-of-law itself.

What is significant, however, is that in certain cases, totally apart from choice-of-law considerations, and indeed even in contradiction to them, the forum court has concluded that there is an affirmative indication relating to the legislative dynamic that the forum's statute is not to be applied extraterritorially. In such a case, the statute, as a matter of demonstrable legislative intention, constitutes a functionally restrictive substantive rule. Once this is recognized there generally will be no conflict between the applicable substantive law of the forum and that of the other involved state. The best example of this is the holding of the Illinois Supreme Court with respect to the

---

135. Similarly, the presumption against extraterritorial application of regulatory legislation is not very strong, and often considerations relevant to determining the application of the forum's law to conflicts situations are also relevant to determining the application of regulatory legislation to situations containing a foreign element. See, e.g., State ex rel. Bailey v. Krise, 18 Ohio St. 2d 191, 249 N.E.2d 55, 47 Ohio Op. 2d 432 (1969). See generally Trautman, The Role of Conflicts Thinking in Defining the International Reach of American Regulatory Legislation, 22 Ohio St. L.J. 586 (1961).


137. See, e.g., Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974), where the court held that the Rhode Island wrongful death act, allowing unlimited recovery, and its common law rule, imposing strict liability for harm resulting from a defective product, applied to a claim arising out of a fatal accident involving a Rhode Island decedent that occurred in Massachusetts. In an earlier case, a federal district court had held that the Rhode Island wrongful death act did not apply extraterritorially to allow suit under that act by the beneficiaries of a Rhode Island resident killed while working in Massachusetts, and that Rhode Island would not allow suit under the Massachusetts wrongful death act on "public policy" grounds. Thayer v. Perini Corp., 303 F. Supp. 683 (D.R.I. 1969). Holding to the contrary and allowing suit under the Rhode Island wrongful death act for the death of a Rhode Island resident that occurred in Massachusetts was Tiernan v. Westext Transp., Inc., 295 F. Supp. 1256 (D.R.I. 1969).
Illinois Dram Shop Act\textsuperscript{138} in \textit{Graham v. General U.S. Grant Post}.\textsuperscript{139} In that case the plaintiff, a resident of Illinois, was injured in Wisconsin when he was struck by an intoxicated driver, also a resident of Illinois. The driver's intoxication resulted at least in part from liquor furnished to him by the defendant in Illinois. Suit was brought in Illinois. The plaintiff contended that the defendant was liable under the Illinois Dram Shop Act. Earlier Illinois appellate court decisions had held in identical situations that the Illinois Dram Shop Act was inapplicable, both on the ground that liability in tort was governed by the law of the "place of the wrong,"\textsuperscript{140} and on the ground that the Illinois Dram Shop Act was not susceptible of extraterritorial application.\textsuperscript{141} In the meantime, however, the Illinois Supreme Court had abandoned the traditional approach to choice-of-law in favor of a "center of gravity" approach.\textsuperscript{142} In \textit{Graham}, the appellate court, using the latter approach, held that Illinois was the "center of gravity," so that the Dram Shop Act was applicable.\textsuperscript{143}

The Illinois Supreme Court reversed. Pointing out that ""[t]he problem here is not one of conflict of choice of laws in the usual sense,"\textsuperscript{144} it noted that since Wisconsin did not have a dram shop act, the plaintiff could only recover under the Illinois act, and that, ""[t]he answer depends on whether the Illinois act may be given extraterritorial effect."\textsuperscript{145} The court held that it could not, because the legislature, by its behavior in regard to the statute, clearly demonstrated its intention that the statute should not apply to a situation containing a foreign element.\textsuperscript{146} The court noted that after it had held that the Illinois Workmen's Compensation Act did not have extraterritorial effect, the legislature expressly amended the statute to provide that it applied to injuries occurring outside the state when the contract of employment was made in Illinois.\textsuperscript{147} On the other hand, after the court had held that the Occupational Diseases Act was not applicable extraterritorially, there was no similar amendment of that statute.\textsuperscript{148} Likewise, the legislature had never amended the Dram Shop Act to give it extraterritorial effect, although it had amended it a number of times since the Illinois appellate courts had first held that it was not applicable extraterritorially, and in fact had reenacted the entire act without

\textsuperscript{138} ILL. REV. STAT. ch. 43, § 135 (1976).
\textsuperscript{139} 43 Ill. 2d 1, 248 N.E.2d 657 (1969).
\textsuperscript{142} Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966).
\textsuperscript{143} 97 Ill. App. 2d 139, 239 N.E.2d 856 (1968).
\textsuperscript{144} 43 Ill. 2d at 5, 248 N.E.2d at 659.
\textsuperscript{145} \textit{Id}. at 6, 248 N.E.2d at 659.
\textsuperscript{146} \textit{Id}. at 6-7, 248 N.E.2d at 660-61.
\textsuperscript{147} \textit{Id}.
\textsuperscript{148} \textit{Id}. at 6, 248 N.E.2d at 660.
including a provision for its extraterritorial effect.\textsuperscript{149} Observing that the Illinois Dram Shop Act was "particularly severe,"\textsuperscript{150} the court went on to say that

the legislature's failure to enact a provision giving the Dram Shop Act extraterritorial effect may have been prompted by a variety of reasonable policy considerations. Whatever those considerations may have been, the question was uniquely one for the legislature, not the courts, to ponder and decide.\textsuperscript{151}

In other words, the court looked to the behavior of the legislature with respect to statutes that previously had been judicially held to be without extraterritorial effect and concluded that when the legislature wanted the statute to be applicable extraterritorially, it would expressly amend it to say so. Since it had not done this to the Dram Shop Act, the court felt compelled to hold that the legislature did not want the statute to have extraterritorial effect—that it constituted a functionally restrictive substantive rule limited to accidents occurring in Illinois.\textsuperscript{152} Once the court made that determination, it also found that there was no conflict of laws, since under the residually applicable common law rule of Illinois and the common law rule of Wisconsin, the plaintiff was not entitled to recover.

While one may agree or disagree with the Illinois court's interpretation of legislative intention, what is significant is that the case most clearly demonstrates how the court of the enacting state, interpreting the legislative dynamic and the behavior of its legislature, can conclude that a statute constitutes a functionally restrictive substantive rule. The result is usually that there is no conflict of laws between the involved states, since most often the forum's residually applicable common law rule, and the common law rule of the other involved state, do not differ.

A similar result was reached by the Texas Supreme Court with respect to the Texas wrongful death act in \textit{Marmon v. Mustang Aviation Inc.}\textsuperscript{153} The fatal accident occurred in Colorado, but most of the victims were Texas residents. The defendant was a Texas corporation, and the trip had originated in Texas and was to end there. Under the Colorado wrongful death act there was a limitation on the amount recoverable; the Texas act contained no such

\begin{footnotesize}
\begin{enumerate}
\item[149.] Id.
\item[150.] Id. at 7, 248 N.E.2d at 660.
\item[151.] Id., 248 N.E.2d at 660-61.
\item[152.] Since the criteria concerning applicability were expressed in territorial terms, the statute would not by its own force be inapplicable to other situations containing a foreign element, such as, for instance, a nonresident plaintiff injured in Illinois as a result of intoxication produced there. In such a case, apart from any interest in allowing the nonresident plaintiff to recover in order to implement the act's compensatory policy, there would be a clear interest in allowing recovery in order to implement its admonitory policy.
\item[153.] 430 S.W.2d 182 (Tex. 1968).
\end{enumerate}
\end{footnotesize}
limitation. The court held that the Texas wrongful death act did not apply to a fatal accident occurring in another state, thus requiring the plaintiffs to bring suit under the Colorado act with its limitation on the amount recoverable.\textsuperscript{154} The court implicitly assumed the possibility of an extraterritorial application of the act in the absence of legislative preclusion of such an application. Nevertheless, the court, relying upon earlier interpretations of the statute and the failure of the legislature in reenactments of the statute subsequent to those interpretations to revise it, held that the legislature had not intended the statute to operate extraterritorially.\textsuperscript{155} As Professor Ehrenzweig points out in commenting on the case, once the court interpreted legislative intent in this manner, it had no alternative but to limit the statute's application, despite the forum's interest in applying its law here.\textsuperscript{156} And, as in \textit{Graham}, the court emphasized that it was not deciding a choice-of-law question, noting that courts which had applied the forum's wrongful death act in similar circumstances "were not faced with prior holdings limiting the statute's extraterritorial applicability."\textsuperscript{157} Since the Texas wrongful death act was, as a matter of demonstrable legislative intention, inapplicable to this situation containing a foreign element, it constituted a functionally restrictive substantive rule as that concept has been defined in this Article. The court did not have a choice between allowing unlimited recovery under the Texas act or limited recovery under the Colorado act.

Sometimes the question whether a statute constitutes a functionally restrictive substantive rule arises in an either-or posture. The statute in question may represent a strong regulatory policy of the forum, so that unless as a matter of demonstrable legislative intention it is inapplicable to this situation containing a foreign element, the court must apply it. In such a case, no choice-of-law question is presented. If the statute, however, is construed as constituting a functionally restrictive substantive rule, there will generally be no conflict between the law of the forum applicable in the absence of the statute and the law of the other involved state. For example, in \textit{Lee v. Great Northern Nekoosa Corp.}\textsuperscript{158} a lease contract involving Alabama land was executed in Georgia. At the time of execution the lessee was a foreign

\textsuperscript{154} Unlike the New York court in \textit{Kilberg}, the Texas court was unwilling to disregard the Colorado limitation by the use of "manipulative techniques" or otherwise. \textit{Id.} at 194.

\textsuperscript{155} Another legislative provision authorized suit for wrongful death occurring in another state under the wrongful death act of that state. The court was unwilling to construe this as demonstrating an intention to remove the territorially restrictive nature of the Texas wrongful death act. \textit{Id.} at 185.


\textsuperscript{157} 430 S.W.2d at 194. In \textit{Farber v. Smolack}, 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967), the New York court was faced with such prior holdings, but ignored them.

\textsuperscript{158} 465 F.2d 1132 (5th Cir. 1972).
corporation which had not qualified to do business in Alabama. Subsequently, the lessee's interest passed to another foreign corporation which had qualified. The plaintiff lessor brought suit to cancel the lease on the ground that it was void from its inception, relying on a statute which provided:

No corporation, its agents, officers or servants shall transact any business for or in the name of such corporation within the state of Alabama without having first procured said permit and all contracts, engagements or undertakings or agreements with, by or to such corporations made without obtaining such permit shall be null and void.\(^{159}\)

If this statute were found to have been applicable to the lease in question the contract would have been void from its inception. The Fifth Circuit found, however, that the Alabama courts had construed this statute \textit{in pari materia} with two similar statutes that expressly referred to "contracts made in this state."\(^{160}\) This being so, the statute was, as a matter of demonstrable legislative intention, inapplicable to this contract made by a nonqualifying foreign corporation and the Georgia plaintiff.\(^{161}\) Again, the question was not one of choice-of-law. If the Alabama statute was applicable to this situation containing a foreign element, the court had to apply it and void the contract. If it was not applicable—if it was construed as constituting a functionally restrictive substantive rule—the contract was valid under the general law of contracts of both Alabama and Georgia.

Similarly, in \textit{Ore-Ida Potato Products, Inc. v. United Pacific Insurance Co.},\(^{162}\) it was argued that the Idaho statute governing the issuance of produce dealers' bonds applied to all transactions of a produce dealer licensed and bonded in Idaho, although the sale and delivery of the produce occurred entirely in Oregon. Under any approach to choice-of-law, it would seem that Oregon law should apply to determine the rights and liabilities of the parties to the Oregon transactions. The court took the position that precisely because a strong regulatory policy was involved the statute would not be applied to transactions occurring entirely in another state unless the contrary intention affirmatively appeared.\(^{163}\) Thus, the statute was construed as constituting a functionally restrictive substantive rule, inapplicable to bonds covering the sale and delivery of produce in another state.

In certain cases, although a statute is not by its terms functionally restricted, it may be given a functionally restrictive interpretation by the courts of the enacting state when they have concluded that based on demonstra-

\(^{159}\) \textit{ALA. CODE}, tit. 51, § 345 (1973).

\(^{160}\) 465 F.2d at 1135.

\(^{161}\) \textit{Id.}

\(^{162}\) 392 P.2d 191 (Idaho 1964).

\(^{163}\) \textit{Id.} at 195-96.
ble legislative intention—for reasons relating to what is here termed the legislative dynamic—the statute should not be applicable to this particular situation containing a foreign element. This determination is made totally apart from considerations of the policy underlying the statute. Policy considerations do not become relevant until the court is satisfied that the statute does not constitute a functionally restrictive substantive rule, where a conflict of laws exists requiring a choice-of-law decision. As a practical matter, the question whether a statute, as a matter of demonstrable legislative intention, will be interpreted as constituting a functionally restrictive substantive rule ties in with the traditional presumption against the extraterritorial application of statutes. If the court of the enacting state concludes that its legislature still follows that presumption, either generally or, more likely, with reference to a particular statute, the court must adhere to the legislative directive and give the statute a functionally restrictive interpretation.

In summary, when a statute of the forum is in issue in a case, there are three possibilities with regard to the legislature’s indication of its applicability. The legislature may have directed either expressly or as a matter of demonstrable legislative intention that the statute shall be applied to a situation containing a foreign element. Assuming that such application is constitutional, the forum court must apply it totally apart from choice-of-law considerations. Conversely, where the statute, by its own terms or as a matter of demonstrable legislative intention, is inapplicable to a situation containing a foreign element, that is, when it constitutes a functionally restrictive substantive rule, the forum cannot apply it. In such a case, there is usually no conflict of laws since the preexisting common law rule of the forum, which takes over when the statute is inapplicable, will usually produce the same result as the law of the other state. Or if the case involves an area regulated by statute, such as recovery for wrongful death, the plaintiff must proceed under the statute of the other state, which, as a practical matter, is likely to be applicable when the forum’s statute is not. The more common situation is where the applicability of a statute to a situation containing a foreign element is neither expressly defined nor clear as a matter of demonstrable legislative intention. There is then a conflict between the law of the

164. The no fault statutes provide a good example of this possibility. See text accompanying notes 84-88 supra.

165. There will usually be no serious question concerning this under the Supreme Court’s present “interest and fairness” approach to constitutional limitations on choice-of-law. Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964).

166. If, however, the other state has an applicable statute which would produce a result different from that which would be produced under the common law rule of the forum, a conflict could exist.

forum and the law of the other involved state (assuming that a conflict of laws issue will be raised only when the applicable law of the other state would produce a different result than would the forum's statute\(^{168}\)) which the forum must resolve by a consideration of (1) the policies behind its statute and behind the law of the other state and (2) fairness to the parties. But recognition of the concept of functionally restrictive substantive rules will avoid the necessity of a choice-of-law decision in those situations where the forum's statute is by its own terms or as a matter of demonstrable legislative intention inapplicable so that no conflict of laws in fact exists. This, it is submitted, is a very useful function that the concept of functionally restrictive substantive rules can be adapted to perform in the American context.

IV. "FOREIGN" FUNCTIONALLY RESTRICTIVE SUBSTANTIVE RULES

This Article has thus far approached the matter of functionally restrictive substantive rules only from the perspective of the forum determining the functionally restrictive nature of statutes enacted by its own legislature. Consider now the matter of the forum construing the functionally restrictive nature of the statute of another state. The courts of the enacting state are bound, of course, as a matter of their internal law of court-legislature relations, to recognize the functionally restrictive nature of the statutes enacted by their own legislature, just as they are bound to apply those statutes when directed to do so either expressly or as a matter of demonstrable legislative intention, regardless of choice-of-law considerations. The courts, however, are equally free to disregard the functionally restrictive nature of another state's statute,\(^{169}\) just as they are free to refuse to recognize a directive of another state that its law be applied.\(^{170}\) And since courts have long been accustomed to ignoring another state's limitation on the applicability of its own law by its choice-of-law rules—what is here called the "renvoi hang-up"\(^{171}\)—it may be asked whether they will be willing to accept the functionally restrictive nature of a statute of another state.

It has been argued that they should not do so, or at least that they should not consider themselves bound by another state's determination that its law is functionally restricted. Cavers asks why, if the forum concludes that the case before it should be resolved with reference to the law of another state, "... should the forum be restrained from exercising its authority by the fact that the contrary view of [the other state] is embodied in a statutory limitation rather

---

168. See note 81 supra.
171. See note 81 supra.
than in a choice-of-law rule?"172 Another commentator insists that since both
general conflicts rules and localizing rules perform the function of determin-
ing whether certain rules of domestic law apply in a particular case, they
should be treated the same; to the extent that the forum does not pay attention
to the other state's choice-of-law rules, it should not pay attention to the
localizing or functionally restrictive interpretation that the other state puts on
its own law either.173

De Nova, on the other hand, sees a crucial distinction between rejection
of the renvoi in the context of a rule-oriented approach to choice-of-law and
the failure to recognize the functionally restrictive character of another state's
substantive rule. According to De Nova,

Applying a foreign "self-limiting" substantive rule on its own
terms—namely, only when the case at hand perfectly fits its
schema—is not paying obeisance to foreign rules of private interna-
tional law, which is the essence of renvoi. It is simply applying that
substantive rule of the competent legal order which does fit the
facts of a given case—as those facts are seen by that legal order.174

De Nova's analysis is clearly correct insofar as the concept of functionally
restrictive substantive rules operates within the framework of a rule-oriented
approach to choice of law. The forum applies its choice-of-law rule without
regard to the choice-of-law rule of the chosen state, and once the choice is
made, it applies "within the 'competent' foreign law the correct rules of
decision."175

In the American context, however, the problem is not one of applying
"within the 'competent' foreign law the correct rules of decision," but of
deciding whether, based on considerations of policy and fairness to the
parties, the law of the forum should be displaced and the law of another state
used as a model for the rule of decision in the particular case. Here, the
question for the forum court would be whether it should find the existence of a
conflict of laws and make a choice-of-law decision where the law of the other
state that is sought to be used as a model is by its own force inapplicable to this
situation containing a foreign element. Consider as an example the following
fact situation based on Graham v. General U.S. Grant Post.176 An Illinois
tavernkeeper serves liquor to an intoxicated patron in Illinois, and an accident

172. American Perspective, supra note 20, at 134.
173. See Prebble, supra note 26, at 717. Concerning the gap problem that can result within a
framework of a rules-oriented approach to choice-of-law when the forum looks to the function-
ally restrictive character of the law of the lex causae, see notes 47-53 and accompanying text
supra.
175. Id. at 1571.
176. 43 Ill. 2d 1, 248 N.E.2d 657 (1969).
resulting from such intoxication occurs in Wisconsin, injuring an Illinois plaintiff. The tavern is part of a chain that also does business in Wisconsin, and the plaintiff brings suit there. In terms of interest analysis, this is the case of a false conflict brought in the state that has no interest in applying its own substantive law on the point in issue. Illinois has a real interest in applying its dram shop act in favor of an Illinois victim injured as a result of an Illinois tavernkeeper's liquor sale, notwithstanding that the accident occurred in Wisconsin. The application of Illinois law will advance both the admonitory and compensatory policies reflected in that law, and, conversely, no policy of Wisconsin will be impaired by allowing the Illinois victim to recover against the Illinois tavernkeeper. Clearly this is the situation where, to quote Cavers, Wisconsin should see the application of Illinois substantive law as "achieving fairness to the parties as well as a sensible allocation of rule-making responsibility among the states," and an instance where Cavers would ask, "[w]hy should the forum be restrained from exercising its authority by the fact that the contrary view of [Illinois] is embodied in a statutory limitation rather than in a choice-of-law rule?"

The short answer to this question is that the Illinois Legislature, for reasons sufficient to it, has determined that its statute allowing recovery should not apply to this situation containing a foreign element. Wisconsin law does not allow recovery and it would be the height of "officious meddling" for Wisconsin, which has no interest in applying its law here—and so, in Cavers' view should be looking to Illinois law because Illinois does have such an interest—to apply an Illinois statute to a situation where the Illinois Legislature has determined that the statute should not be applied. And, as regards the sensible allocation of rulemaking responsibility among the states, once the Wisconsin court has determined that this case is the

177. See Schmidt v. Driscoll Hotel Co., 249 Minn. 376, 82 N.W.2d 365 (1957).
179. If the injured plaintiff were a Wisconsin resident, a false conflict would still be presented, because Illinois, as the "place of acting," would be interested in implementing the admonitory policy reflected in its law. See notes 99-101 and accompanying text supra. Presumably only the chain's taverns in Illinois would be insured against this kind of liability, and in any event, the liability here would be charged to the chain's Illinois loss experience.
180. American Perspective, supra note 20, at 134.
181. Id.
182. In the author's view, the forum should look to the other state's choice-of-law rules as well. See Sedler, Babcock v. Jackson in Kentucky, supra note 5, at 95-102.
184. If it did, it would probably apply it in favor of an Illinois resident injured there, Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968), assuming, as is likely, that the tavern's operations were conducted close enough to the Wisconsin border so that the application of Wisconsin law was foreseeable and insurable. See Bernhard v. Harrah's Club, 16 Cal. 3d 215, 546 P.2d 719, 128 Cal. Rptr. 215 (1976), cert. denied, 45 U.S.L.W. 3253 (U.S. Oct. 5, 1976).
185. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 246 (1971).
responsibility of Illinois, it is utterly incongruous for it to apply an Illinois statute which the Illinois Legislature has directed shall not apply to this case that is within Illinois rulemaking responsibility.

There is little doubt that Wisconsin would not apply the Illinois statute in the circumstances here presented, or that an American court, once the concept of functionally restrictive substantive rules is properly understood, would respect a functionally restrictive limitation contained in a statute of another state. The American court will do so, notwithstanding a general reluctance to take into account another state's conflicts law. But why, it may be asked, would there be this difference? In the first place, too much significance should not be attached to the forum's failure to look to the conflicts law of the other involved state. Its failure to do so may simply be because it has been conditioned by the "renvoi hang-up" not to look to another state's conflicts law. More specifically, the only effect of its failure to do so will be that it must make a choice-of-law decision. Where the forum has an interest in applying its own law, experience indicates that it will usually do so. This assumes that the other state is following a policy-centered approach, which would be the only circumstance in which it conflicts law would look to the substantive law of the forum. One will search in vain for a case in which a court, committed to a policy-centered approach, has applied the law of another state in preference to its own when there was a clear indication that if the case had been brought in the courts of another state, those courts would have decided the case in accordance with the substantive law of the forum. In short, among policy-centered courts, the practical effect of the failure to take account of the other state's conflicts law has not resulted in the application of that state's substantive law in preference to the law of the forum, where, if the case had been brought in the courts of the other state, those courts themselves would have looked to the substantive law of the forum. This failure has merely resulted in needless choice-of-law decisions in cases where, if the forum had

186. Research has uncovered no cases in which this question was squarely presented. In Griggs v. Riley, 489 S.W.2d 469 (Mo. App. 1972), two residents of Illinois, a guest statute state, were involved in an accident in Missouri. Missouri did not have a guest statute. In holding that the Illinois guest statute should not be applied, the Missouri court found that Illinois, if the case had been brought there, would not have applied the Illinois guest statute. The court decided, perhaps questionably, that the older cases applying the law of the "place of the wrong" would still be followed, notwithstanding the abandonment of that rule in other tort cases. Id. at 474. It concluded: "We are not constrained to afford Illinois hosts greater protection than Illinois courts would afford them, particularly when to do so conflicts with the policy of this state." Id. For criticism of the Missouri court's interpretation of Illinois conflicts law with respect to the application of its guest statute to situations containing a foreign element, see Haworth, The Mirror Image Conflicts Case, 1974 WASH. U.L.Q. 1, 16-17. In any event, the Missouri court was not treating the Illinois guest statute as containing a functionally restrictive limitation, but was apparently surmounting the "renvoi hang-up" and looking to Illinois conflicts law to determine how the courts of Illinois would have decided this case if it had been brought there.

looked to the "whole law" of the other state, 188 it would have found that no conflict of laws actually existed. 189 Second, while courts may have been conditioned by the "renvoi hang-up" to ignore the conflicts law of another state, looking to those conflicts laws is, as De Nova has pointed out, very different from looking to limitations imposed by the legislature when enacting the law in question. 190 While a court of one state may be willing to ignore the conflicts law that has been made by the courts of another state, since it has been conditioned as a matter of its internal law of court-legislature relations to take account of functionally substantive restrictions contained in statutes enacted by its own legislature, it is also likely to show respect for a similar restriction contained in statutes enacted by the legislature of another state. It will not be "more Roman than the Romans," at least where a legislative determination is involved, and will not apply foreign law that does not "want" to be applied. Thus, it seems fairly clear that the forum will take account of a functionally restrictive substantive limitation contained in the statute of another state. When it does so, it may find as a result that there is no conflict of laws, just as there will not be a conflict of laws when the purportedly applicable statute of the forum is found to contain such a restriction. 191

At the same time it is highly unlikely that, for the purpose of determining whether a conflict of laws actually exists, the forum court would construe a statute of another state as constituting a functionally restrictive substantive rule, unless the functionally restrictive limitation was expressly contained in the statute itself, or, as in the Illinois-Wisconsin dram shop example, the functionally restrictive nature of the statute has already been determined by the courts of the enacting state as a matter of demonstrable legislative intention. In other words, it does not seem probable that the forum court would find that, as a matter of demonstrable legislative intention, the statute of another state constitutes a functionally restrictive substantive rule inapplicable to the situation containing a foreign element. 192 Since such a finding

188. That is, if the forum had looked to the other state's conflicts law as well as its substantive law. See generally Cook, The Logical and Legal Bases of the Conflict of Laws, 33 Yale L.J. 457 (1924).

189. See, e.g., Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959). The court held in Haumschild that Wisconsin law would apply as the law of the marital domicile on the issue of spousal immunity where spouses domiciled in Wisconsin, which did not recognize spousal immunity, were involved in an accident in California, which at that time did. Id. at 131-37, 95 N.W.2d at 815-18. Two justices, concurring in the result, argued that under California conflicts law, a California court would look to Wisconsin substantive law on the question. Id. at 142-45, 95 N.W.2d at 820-22.

190. See notes 174-75 and accompanying text supra.

191. See notes 166-68 and accompanying text supra.

192. In his discussion of the Kaufman example, Professor De Nova maintains that the New York court should hold that the Oregon rule of charitable immunity is not applicable to a case involving a New York victim and a New York charity, carrying on its "good works" there,
depends on the legislative dynamic of the particular legislature, only the courts of the enacting state, which must regularly respond to that dynamic, are in a position to say how it operated with respect to the statute in question.\textsuperscript{193}

This point, however, again illustrates the clear difference between the operation of the concept of functionally restrictive substantive rules in a system that is more or less policy-centered—where the concept is relevant only for the purpose of determining at the outset whether a conflict of laws actually exists—and its operation within the framework of a \textit{rule-oriented} approach—where the concept is relied upon to find "within the ‘competent’ foreign law the correct rules of decision."\textsuperscript{194} In a \textit{rule-oriented} system the court must determine the intent of the legislature of the enacting state in regard to the application of the statute or code provision to the situation containing a foreign element. Since the court is not in a position to determine the legislative dynamic, it must make the determination with reference to the underlying policy of the statute.\textsuperscript{195} In the American context the consideration of whether, in light of the policy behind the statute, the legislature intended for it to apply to a particular situation containing a foreign element is an integral part of the choice-of-law process, which comes into play only after a notwithstanding that the accident occurred in Oregon. \textit{See} notes 63-69 and accompanying text \textit{supra}. Presumably, however, the New York court, for the purpose of determining whether a conflict of laws actually exists, would not thus interpret the statute, unless the Oregon courts have already done so. Nevertheless, when making the choice-of-law decision, on the assumption that the Oregon rule of charitable immunity is not by its own force inapplicable here, the court would look to the absence of Oregon's interest in protecting the New York charity, and, in light of New York's interest in protecting the New York plaintiff, find that there was a false conflict and apply New York law, as in \textit{Babcock}.\textsuperscript{193} This principle was illustrated in \textit{Graham and Marmon}. If the application of the substantive law of the other state would be unconstitutional in the factual situation presented, however, the forum of course must determine the constitutional question for itself. For example, in \textit{Erwin v. Thomas}, 264 Ore. 454, 506 P.2d 494 (1973), a Washington husband was injured in Washington due to the negligent driving of an employee of an Oregon corporation. His wife brought suit against the defendant in Oregon, seeking to recover for loss of her husband's consortium. Such an action was allowed under Oregon law, but not under Washington law. The court concluded that neither state had a real interest in applying its law on this question and then applied Oregon law as the law of the forum. \textit{Id.} at 459-61, 506 P.2d at 496-97. The Washington law allowing only the husband to recover for loss of the spouse's consortium was, however, probably violative of the fourteenth amendment's equal protection clause as constituting an irrational sex-based distinction. \textit{Cf.} \textit{Frontiero v. Richardson}, 411 U.S. 677 (1973); \textit{Reed v. Reed}, 404 U.S. 71 (1971). Since the practice of the courts, where a benefit is given to one sex but not the other in circumstances making the sex-based distinction unconstitutional, is generally to extend the benefit to the members of the other sex, \textit{see}, \textit{e.g.}, \textit{Frontiero v. Richardson}, \textit{supra}, the Oregon court could have held that under Washington law, as constitutionally construed, the wife did have a cause of action for loss of the husband's consortium, so that there was in reality no conflict between Oregon and Washington law on this point. \textit{Cf.} \textit{Gates v. Foley}, 247 So. 2d 40 (Fla. 1971).\textsuperscript{193}

\textit{De Nova, Conflict of Laws, supra} note 19, at 1571.

\textsuperscript{195} English courts, for example, do not generally look to legislative history in determining questions of statutory construction, and it is apparently of limited significance in the process of code interpretation in most European countries.
conflict of laws is found to exist. In any event, an American court should only find that a statute of another state constitutes a functionally restrictive substantive rule when this appears by the express terms of the statute, or where the statute has been so construed by the courts of the enacting state.

Since both the potentially applicable statute of the forum and the potentially applicable statute of the other involved state must be examined to determine whether they constitute functionally restrictive substantive rules, there is theoretically the possibility of a gap. This might occur in a situation where the matter in question is regulated by statute, and both the statute of the forum and of the other involved state are found to constitute functionally restrictive substantive rules, inapplicable to this particular case. In practice, however, this is highly unlikely to occur. For example, where the wrongful death act of either or both the victim’s or defendant’s home state is construed as not being applicable extraterritorially, suit can always be brought under the wrongful death act of the state of injury. The statute of the state of the injury will not, and probably constitutionally cannot, be construed as being inapplicable by its own force where one or both parties are nonresidents. But a gap could occur where both the statute of the forum and of the other involved state create substantially similar substantive rights, but because of strictures against extraterritorial application, both are inapplicable unless all the legally significant facts giving rise to the plaintiff’s claim occurred within the borders of the enacting state. This was the problem in Waynick v. Chicago’s Last Department Store, which again involved the extraterritorial application of dram shop acts. The liquor was sold to the intoxicated driver in Illinois and the resulting accident occurred in Michigan, injuring Michigan plaintiffs. Suit was brought against the tavern in Illinois. Both statutes were construed as being inapplicable unless both the sale of liquor and the resulting harm occurred within the borders of the enacting state, and thus both constituted functionally restrictive substantive rules, inapplicable to this situation containing a foreign element. Observing that the law, like nature, “abhors a vacuum,” the court found that in Michigan, the place of injury, there was a common law right to recovery. In this kind of case, commentators operating within a rule-oriented framework have argued that the forum cannot accept the functionally restrictive nature of the law of the state chosen by its choice-of-law rule. Instead, it must apply the law that the courts of that

196. To deny recovery under the forum’s wrongful death act to a nonresident injured in the forum solely because of the fact of nonresidency (as opposed to holding, for example, that recovery must be under the statute of the party’s home state, if it is applicable), would probably be a denial of equal protection as well as being violative of the comity clause, U.S. Const. art. IV, § 2.
197. 269 F.2d 322 (7th Cir. 1959), cert. denied, 362 U.S. 903 (1960).
198. The dissent found this conclusion unsupported by Michigan case law. Id. at 326-27.
state would apply to a purely domestic case, i.e., a case containing no foreign elements. Thus, here they would argue that Illinois should apply the dram shop act of Michigan, since Michigan was the "place of the wrong" within the meaning of Illinois' then-existing choice-of-law rule. But, from the standpoint of a policy-centered court, the proper approach would be simply to hold that the plaintiff is entitled to recover because there is no conflict of policies between the laws of the two involved states. Consequently, the forum can fashion a rule of decision for this case based on the laws of both states. Both states have an interest in seeing that the plaintiff recovers here. Illinois desires to regulate the conduct of the tavernkeeper within its borders, while Michigan wants to provide compensation for its residents injured by the negligence of an intoxicated driver in Michigan, and the substantive laws of both states provide for such recovery. Since the defendant would be liable under the dram shop act if both the sale and injury occurred in either state, the result should be no different where the sale occurred in one and the injury occurred in another. In theoretical terms, looking to both Illinois and Michigan law is explained by Cook's theory of the local law, under which the forum, since it is using foreign law only as a model for the rule of decision in the case, can look to foreign law in part. Here, the forum state, Illinois, would fashion a rule of decision for the case using Illinois law as a model insofar as it made the sale of liquor resulting in intoxication wrongful and actionable, and Michigan law as a model insofar as it made the seller responsible in damages to the injured party for the harm resulting from the intoxication. As this example indicates, the gap problem will rarely occur, if at all, and can be easily surmounted by fashioning a rule of decision looking to both statutes and to the common policy that they reflect.

CONCLUSION

The concept of functionally restrictive substantive rules has been developed on the Continent and elsewhere as a means of "finding within the 'competent' foreign law the correct rules of decision." While introducing considerations of policy into the framework of a rule-oriented approach to choice-of-law "by the back door," it does so, in theory at least, only for the purpose of giving full effect to the forum's choice-of-law rule, that is, to insure that the forum is applying the properly applicable law of the system that it has chosen.

199. See notes 47-53 and accompanying text supra.
201. See note 188 supra.
203. See text accompanying note 194 supra.
204. See text accompanying notes 56-69 supra.
Within this framework, however, recognition of the concept of functionally restrictive substantive rules may result in the absence of a conflict of laws: when the purportedly applicable rule of one state is functionally restricted so as to be inapplicable to a situation containing a foreign element, there will be no conflict of laws if the residually applicable rule of that state and the applicable rule of the other state do not produce a different result.\textsuperscript{205}

It is the matter of the absence of a conflict of laws that indicates the utility of this concept in the American context, where choice-of-law is by and large policy-centered rather than rule-oriented. Functionally restrictive substantive rules necessarily do exist, even if they are not recognized by the name, and the concept of functionally restrictive substantive rules, as developed on the Continent and elsewhere, can be adapted for use in the American context to point up the absence of conflict between the substantive laws of the involved states. This will avoid unnecessary and possibly even unsound choice-of-law decisions.\textsuperscript{206} For these purposes, a functionally restrictive substantive rule has been defined in this Article as a statutory rule that within itself, either by its own terms, or as a matter of demonstrable legislative intention, as determined by the courts of the enacting state, precludes its application to certain situations containing a foreign element. Where a purportedly applicable statute is construed as constituting a functionally restrictive substantive rule, there will frequently be no conflict of laws because the residually applicable rule of that state and the applicable rule of the other state do not produce a different result, or because, in an area generally regulated by statute, only one of the statutes can be applicable. This Article has attempted to illustrate the operation of this concept, as adapted for use in the American context, and to show that the concept may have considerable utility in answering the threshold question "Is there a conflict of laws?"

\textsuperscript{205.} See text accompanying notes 43-46 supra.

\textsuperscript{206.} For example, Wisconsin, which did not have a dram shop act, would allow suit under the Illinois dram shop act, which the Illinois court held was by its own force inapplicable to accidents occurring outside of Illinois.