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Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy

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CONTRACTUAL CHOICE OF LAW: LEGISLATIVE CHOICE IN AN ERA OF PARTY AUTONOMY

*William J. Woodward, Jr.**

The foundation upon which our system of government rests is the possession by the states of the right, except as restricted by the Constitution, to exert their police powers as they may deem best for the happiness and welfare of those subject to their authority. The whole theory upon which the Constitution was framed, and by which alone, it seems to me, it can continue, is the recognition of the fact that different conditions may exist in the different states, rendering necessary the enactment of regulations of a particular subject in one state when such subject may not in another be deemed to require regulation; in other words, that in Massachusetts, owing to conditions which may there prevail, the legislature may deem it necessary to make police regulations on a particular subject, although like regulations may not obtain in other states.

—Mr. Justice White, dissenting, in *Fauntleroy v. Lum*,
210 U.S. 230, 240 (1908).¹

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The author is the American Bar Association's Business Law Section Representative to the UCC Article 1 Drafting Committee. The views advanced in this Article are the author's alone and should not be associated in any way to members of that Committee.

1. The case is discussed briefly *infra* note 250.

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I. INTRODUCTION

JUSTICE White's powerful Civics I statement expresses bedrock values underlying our federal system. There are countless expressions of these ideas throughout our history and that history is replete with examples of State governments exercising their legal authority in unique ways. Texas, for example, established itself as a debtors' haven by creating generous debtors' exemptions from execution on judgments. Its history includes substantial migration of debtors from the Northeast

attempting to avoid their debts.² Florida has more recently done much the same thing by creating a regime of debtors' exemptions widely perceived to be unfair by those to whom the money has been owed.³ In the less distant past, California attracted families by offering a very high quality public education,⁴ Delaware has become the choice for incorporating many businesses, and New York may be the jurisdiction of choice for litigating commercial law cases.⁵

Indeed, the perceived importance of state sovereignty and federalism is linked to the idea that one state might, through enlightened legislation or judicial decisions, create a more hospitable regime for its inhabitants and thereby create for them benefits not presently available to citizens of other states. Obviously, in its traditional form in the United States, creating hospitable or inhospitable environments is the business of State governments. An individual's desire for different limits on creditor remedies, a different public school structure, different tax statutes, or other different rules traditionally calls for political action or physical relocation.

Since at least the 1930s, however, individual choice has played a slightly larger role in determining the legal regime that would apply to some of one's activities.⁶ Since that time, individual parties to contracts have had limited power to choose from among the different governing laws that might arguably apply to their contract. The development of this power was controversial well before that;⁷ but, recently, this limited power to select applicable law has been relatively uncontroversial.

When contracting parties or the subjects of their contracts are located in different states, it is not obvious which law ought to govern their rela-

2. See, e.g., James W. Paulsen, *Introduction: The Texas Home Equity Controversy in Context*, 26 ST. MARY'S L.J. 307, 310 (1995).

3. Florida provides for 47 different exemptions available to debtors. The Florida homestead exemption, which denies creditors access to a debtor's home, is found in article X section 4 of the Florida Constitution. The exemption protects up to one half of an acre within a municipality and 160 acres outside a municipality regardless of the value. This exemption can seem particularly unfair to creditors. Donna Litman Seiden, *There's no Place Like Home(stead) in Florida – Should it Stay that Way?*, 18 NOVA L. REV. 801, 809-817, 837 (1994); see also Lawrence J. Goodrich, *How Much Debt Should Creditors Forgive? Rise in personal bankruptcies may prompt Congress to stiffen laws*, CHRISTIAN SCIENCE MONITOR, Nov. 6, 1997, at 1, available in 1997 WL 2805070 (telling the horror story of a multimillionaire who bought a mansion in Florida and then declared bankruptcy).

4. State statutes give some of the flavor of these reforms. See CAL. EDUC. CODE § 66052(a), (b) (West Supp. 1995) (providing that the Legislature intends the University of California and the California State University to adopt and enforce procedures in order to ensure that quality teaching is an essential criterion when evaluating faculty for appointment, retention, promotion, or tenure).

5. Cf. EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 18.6, at 872 (3d ed. 2000): “[Authorizing parties to select unrelated New York law was said] to afford parties the opportunity to select a sophisticated body of commercial law and a judicial system with substantial experience as well as to enhance the importance of New York as an international commercial center.”

6. JOSEPH BEALE, TREATISE ON CONFLICT OF LAWS 1173 (1935).

7. See Joseph Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 260, 260 (1910) (stating that choice of law give parties “permission to do a legislative act”).

tions. Uncertainty about applicable law creates commercial problems of predictability for those who draft contracts. To reduce that uncertainty, courts began giving parties limited power to choose from among the legal systems that the adjudicating court might have chosen in the absence of party choice. Since courts selected applicable law based on the “contacts” contending legal systems had with the contract, it naturally followed that parties could choose only from among those states.

Recently, driven by international models and by the rhetoric of party autonomy, there has developed a movement to substantially alter this established approach by deleting the limitation that parties can choose only the “related” law that an adjudicating court might otherwise have chosen in the absence of party choice. This movement started slowly, first being limited to large contracts by sophisticated parties⁸ where substantial money was at risk. The trend inched into the Uniform Commercial Code in 1989 for large contracts among specialists.⁹

The movement took a giant step when the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) promulgated the Uniform Computer Information and Transactions Act (“UCITA”). Animated by ideas that high-tech contracts really had no situs, proponents of this proposed statute¹⁰ asserted that an analysis based on pre-existing State “interests” was inappropriate.¹¹ The idea takes another big step in a pending proposal for Article 1 of the UCC that parties to commercial contracts—large and small—should be able to choose the law of any State regardless of that State’s interest in, or connection with, the parties or their contract.¹² These changes are important because, by permitting parties to choose law, whether or not “related” to the contract,

8. CAL. CIV. CODE § 1646.5 (2000); DEL. CODE ANN. tit. 6, § 2708 (1999); N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2000); TEX. BUS. & COM. CODE ANN. § 35.51 (West Supp. 2000).

9. See U.C.C. §§ 4A-507, 5-116, 8-110 (2000). UCC § 4A-507 was the first, promulgated in 1989.

10. UCITA has been adopted in Virginia and Maryland. See 68 U.S.L.W. 2532. In Virginia the legislation has delayed the effective date of the new statute until July 1, 2001, pending the outcome of a study by the Joint Commission on Technology and Science and the implementation of its recommendations. Sarah K. Wiant, *UCITA Enacted in Virginia*, 4 AALL SPECTRUM 32, 32 (May 2000). In Maryland, it was adopted with amendments extending Maryland’s consumer protection statute to UCITA contracts involving consumers. 2000 MD. LAWS CH. 11 (H.B. 19), amending MD. COM. LAW I § 13-101.1. Issues here are difficult enough without unnecessary complexity in the text. So, to make the text easier to understand, the UCITA provision will be referred to as a “proposal” since it is merely a “proposal” for enactment in all States except Maryland and Virginia.

11. The Official Comment is quoted *infra* in note 22.

12. A difficulty with this project is the changing nature of the proposed black letter and comments in the Article 1 project. The proposal changes from meeting to meeting, and the comments (which in this situation are critical to understanding the implications of the black letter) are even more unstable. The fluid nature of the process makes it virtually impossible to offer useful, *specific* commentary on a NCCUSL Proposal until the proposal has proceeded through the approval process and is offered to legislatures.

The reader should thus understand these difficulties that come with commenting on a project in development. They imply a high likelihood that parts of the Article 1 proposal will not appear in the precise form discussed in this Article at later points in time. Except as noted here, the overall thrust and implications of the proposal have not, however,

the proposals may affect at a core level the very notion that States have “interests” in (and control or “jurisdiction” over) contracts that affect their residents or the property within their borders.

It may be that the complexity of the subject has kept commentary on these changes to a minimum and, indeed, it is very difficult to unpack the potential impact of these changes. This Article hopes to fill that void by explicating the conflict of laws context within which these proposals will operate, and the impact that the changes may have both on commercial predictability and on states’ legislative and judicial power to influence contracting parties despite their contrary wishes. In so doing, this Article hopes to give State legislatures and other policy makers the information they need to make informed choices about the proposals that may come before them. Gathering and quoting many of the sources, along with efforts to make the subject accessible to non-experts has contributed to the Article’s length, and that, in turn, has made it necessary on occasion to reiterate points that have come up earlier. It is hoped, however, that by approaching the subject this way, I will have made the job less burdensome for others and thereby assisted policy makers in coming to their own judgments about the worth of the proposals.

This Article will show that State enactment of these new choice of law provisions will erode—perhaps substantially—the power States traditionally have had to enact legislation to benefit their constituents. The proposals will erode that State lawmaking power because an ordinarily applicable state statute or judicial precedent will have to be characterized “fundamental policy” before it will be recognized as effective if parties otherwise subject to it have chosen different law in their contract. The magnitude of this effect on state lawmaking is an empirical question that depends on how often contracting parties will avail themselves of the new power and, of course, on what otherwise applicable state laws are selected and deselected by party choice. Policy makers will have to forecast and balance these effects against whatever improvement they perceive these proposals will bring to commercial law.

But, because of the peculiar way the law governing contractual choice of law works, the issues are more complex than that. Enactment of the proposals in any one state can have substantial effects on persons in other jurisdictions who are ordinarily governed by the law of other states. As a result, it will not do for state legislatures simply to reject the proposed changes. States which view the proposals as unsound may need to consider positive action to neutralize the effects in non-enacting states of other states enacting the proposals.

changed substantially over time and will likely be the same (and subject to the same observations) even if the text or comments change.

While there was a December 2000 ALI Council Draft, that draft has not been made widely available. At this writing, the last publicly available draft and accompanying notes is the November 2000 draft and that draft will be used throughout unless indicated otherwise.

At their core, the proposals may substantially alter traditional views of state government and federalism, views captured by Justice White's statement in *Fauntleroy*. A full understanding of the implications of the proposals and the justifications advanced for their enactment will, one hopes, better allow legislatures to consider the magnitude of the effects they might have on a state's governing functions and make informed judgments about whether to enact them. Such an understanding will also allow non-enacting states to better understand the effects that enactment in other states can have on the citizens and governmental functions of the non-enacting states.

The approach will be primarily descriptive and will proceed as follows: Part 1 will introduce the counterintuitive way that conflict of laws principles work in the narrower context of contractual choice of law. This Part will serve as an essential foundation for the remaining Parts. Part 2 will then trace the development of contractual choice of law from the older regime of no permissible choice to the current rules permitting a limited choice of "related" law and the justifications for the movement from one to the other. Then Part 3 will sample some of the problems courts have confronted under current law and the limits courts and legislatures have imposed on parties' choices, even when their choices have been limited to "related" law. Parts 2 and 3 form a historical background for understanding the core of the Article which begins in Part 4. That Part looks at the proposals and their expected operation in detail and considers the arguments mustered to support them. Finally, Part 5 will consider, in light of these developments, the implications for legislative and judicial lawmaking of the change from the current rules to the proposed rules.

II. PART 1: CONFLICTS RULES AND CONTRACTUAL CHOICE OF LAW

Choice of law by contract is an area governed by conflict of laws principles.¹³ This is a subject that many find to be impenetrable and the discussion here will penetrate it only insofar as is necessary to understand the proposals. Conflict of laws principles tell the court hearing a case—referred to here as the "forum court" or "adjudicating court"—what substantive law it ought to apply in deciding the merits of the case. These rules can be seen as "pointers" which direct the forum court to the substantive law that the court ought to apply in the litigation before it. Conflict of laws principles are made necessary by the existence of multiple legal regimes and by the fact that, on occasion, the forum court will be faced with a dispute involving a matter where it recognizes that a different jurisdiction's rules, for one reason or another, ought to control the outcome. In the absence of a substantive law that is uniform across dif-

13. There is no intent here to explicate conflict of laws principles generally. The purpose here is to describe the legal regime governing choice of law by contract so the reader can understand the issues that will face policy makers if a change in the pre-existing legal regime comes before them.

ferent jurisdictions, a uniform conflict of laws rule can reduce forum shopping because the pointers in all courts will (theoretically) point to the same substantive law to govern a given dispute. This explains why an early project in the development of the European Union was the creation of a choice of law rule for use by all member States.¹⁴

Unfortunately, we do not have a uniform rule in the United States. Rather, it is fundamental that, at the state level,¹⁵ conflict of laws rules are matters of state law.¹⁶ As is the case with other matters of state law, states can—and do—differ in various ways in their conflict of laws rules. For purposes here, it is essential to recognize that each forum court, in effect, has its own pointer, that is, it looks to its own conflict of laws rules to point to the substantive law that will apply to a controversy before it. Thus, in a controversy between citizens of New York and California, the physical location of the litigation—California, New York or elsewhere—will define the relevant pointer and how it works in deciding which substantive law that should be applied to the dispute.

In a close case where the available fora differ on their conflict of laws rules, forum selection can become critically important and a matter of potential tactical advantage. Suppose, for example, the substantive law of states X and Y differ in a controlling way for purposes of a given controversy. In the best of worlds, the pointers in New York and California should point to state X. But in our federal system, those pointers would be irrelevant if the plaintiff could bring suit and sustain the court's jurisdiction in a different state with a pointer that directed the court to the law of state Y. State conflict of laws principles even apply in Federal Court diversity cases.¹⁷ Conflict of laws rules exhibit what we can awkwardly call "forum-centricity," that is, the content of the rules is critically dependent on the forum in which litigation takes place.

A. IMPLICATIONS OF FORUM-CENTRICITY I: "RELATED" VERSUS "UNRELATED" LAW

Forum-centricity has several implications for contractual choice of law that can make their way into the decisions. First, the power of the parties to agree to a particular jurisdiction's law can vary with the choice of law

14. See European Communities Convention on the Law Applicable to Contractual Obligations, opened for signatures June 19, 1980, art. 7, 1980 O.J. (L.266) 1 [hereinafter Rome Convention].

15. Conflicts between Federal and State law are a different matter entirely, involving, among other things, the Constitution's Supremacy Clause and the interrelationship between Federal and State law under the *Erie* doctrine. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

16. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941). This historical fact is not, however, uncontroversial. Professor Douglas Laycock has argued that conflict of laws rules ought to be federal law so as to avoid constitutional problems endemic to the current regime. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992).

17. See, e.g., *Klaxon*, 313 U.S. at 496; *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128 (7th Cir. 1990).

rules to which the court looks. In theory, at least, one state could permit no contractual choice of law while the state next door could permit unlimited choice. This potential for radical state diversity has, to date, been somewhat difficult to see because states generally do not subscribe to either extreme.

Rather, states have generally limited the parties' choices of law to jurisdictions which have some relationship either to the parties or to their transaction.¹⁸ As suggested above, to the extent that states have similar conflict of laws rules, forum shopping is a relatively small problem.¹⁹ The diversity in state conflict of laws rules has, however, changed dramatically with the recent effort to introduce UCITA into state legislatures and its enactment (in modified form) by two states.²⁰

UCITA has a very permissive choice of law provision, one that differs substantially and fundamentally from the contractual choice of law rules generally applicable throughout the rest of the United States. UCITA's provision, quoted in the margin,²¹ empowers parties to any contract within its scope to select any State's or country's law to govern their computer information contract even if they or their contract has no contact or

18. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971) (amended 1989) provides in part:

The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

- (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
- (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Similarly, U.C.C. § 1-105 provides, in part:

§ 1-105. Territorial Application of the Act; Parties' Power to Choose Applicable Law.

- (1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

U.C.C. § 1-105 (1995).

19. The potential for forum shopping is, nonetheless, recognized by conflict of laws experts as a problem. See, e.g., Russell J. Weintraub, *Comments on Roundtable Discussion of Choice of Law*, 48 MERCER L. REV. 871, 881 (1997) ("Any method of choice of law, unless uniformly applied by all possible forums, will lead to forum shopping").

20. See *supra* note 10.

21. U.C.I.T.A. § 109 (2000), provides in part:

- (a) The parties in their agreement may choose the applicable law. However, the choice is not enforceable in a consumer contract to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply under subsections (b) and (c) in the absence of the agreement.
- (b) In the absence of an enforceable agreement on choice of law, the following rules determine which jurisdiction's law governs in all respects for purposes of contract law:

relationship with the law they chose.²² The enactment of UCITA thus creates a sharp difference in conflict of laws rules between UCITA-enacting states and non-enacting states, a difference of a magnitude that may not have previously existed in the United States. [1766] UCITA's pointer directs the court solely to the parties' contractual choice. The prevalent law elsewhere may begin with the parties' choice, but the court will enforce that choice only if it has some relationship with the parties or their transaction.

A state enacting UCITA has embraced a conflict of laws rule that, like other conflict of laws rules, operates in its own state courts. This is thus not like ordinary legislation in the sense that the rule applies to the state's citizens, residents, taxpayers, or even those who do business in the enacting state. Rather, by creating a statutory choice of law rule, an enacting legislature is enacting a rule for anyone in the world who happens to appear before its courts.²³ Even if no other lawmaking jurisdiction saw the wisdom of the UCITA choice of law rule, it would apply to such "foreign" citizens in all cases litigated in the UCITA-enacting state.²⁴ Obviously the sharp difference between this rule and the rule in other jurisdictions creates new forum shopping opportunities. The potential extraterritorial effect of state conflict of laws rules also raises serious problems of federalism developed later in this Article.

(1) An access contract or a contract providing for electronic delivery of a copy is governed by the law of the jurisdiction in which the licensor was located when the agreement was entered into.

(2) A consumer contract that requires delivery of a copy on a tangible medium is governed by the law of the jurisdiction in which the copy is or should have been delivered to the consumer.

(3) In all other cases, the contract is governed by the law of the jurisdiction having the most significant relationship to the transaction.

(c) In cases governed by subsection (b), if the jurisdiction whose law governs is outside the United States, the law of that jurisdiction governs only if it provides substantially similar protections and rights to a party not located in that jurisdiction as are provided under this [Act]. Otherwise, the law of the State that has the most significant relationship to the transaction governs.

22. Official Comments to UCITA § 109 make this clear:

Subsection (a) does not follow UCC § 1-105 (1998 Official Text) which enforces contract choices only if the selected State's law has a "reasonable relationship" to the transaction. In a global information economy, limitations of that type are inappropriate, especially in cyberspace transactions where physical locations are often irrelevant or not knowable. Also, in global commerce, parties may appropriately wish to select a neutral forum because neither is familiar with the law of the other's jurisdiction. In such a case, the chosen State's law may have no relationship at all to the transaction.

U.C.I.T.A. § 109 cmt. 2a (2000).

23. Under the same principle, the enacting state's own citizens are governed by the choice of law rules in the courts of their own state or of other states in which they choose to litigate.

24. UCITA also has a very liberal choice of forum provision. Section 110 provides in part: "[t]he parties in their agreement may choose an exclusive judicial forum unless the choice is unreasonable and unjust . . ." U.C.I.T.A. § 110 (2000). This seems designed and guaranteed to bring the parties into an enacting state where, under UCITA's choice of law rule, UCITA will apply even if the contract and the parties have no connection with the forum.

B. IMPLICATIONS OF FORUM-CENTRICITY II: MANDATORY RULES AND FUNDAMENTAL POLICY

An important feature of forum-centricity is the fact that nearly all contractual choice of law rules limit the effect they will give to the contractual choice made by the parties, even when their contract is "related" to the chosen law. Most choice of law rules provide, in one way or another, that some provisions of the law that ordinarily would be applicable will continue to apply despite the parties' choice of the law of a different jurisdiction. Most obviously, parties to a contract ought not to be able to contract out of normally-applicable criminal law provisions or, more generally, out of otherwise applicable laws (like environmental regulations) that protect non-parties to the contract.²⁵

Laws that parties cannot ordinarily contract around are referred to as "mandatory rules" in international parlance²⁶ and a broad version of that term will be used here.²⁷ They are to be distinguished from "default rules," that is, rules that govern the parties contract unless they make

25. A curious exception is a recently-enacted conflict of laws statute in Texas which reads, in pertinent part:

Except as [otherwise] provided [], if the parties to a [] transaction [with an aggregate value in excess of \$1,000,000] agree in writing that the law of a particular jurisdiction governs an issue relating to the transaction, including the validity or enforceability of an agreement relating to the transaction or a provision of the agreement, and the transaction bears a reasonable relation to that jurisdiction, the law, other than conflict of laws rules, of that jurisdiction governs the issue regardless of whether the application of that law is contrary to a fundamental or public policy of this state or of any other jurisdiction.

TEX. BUS. & COM. CODE ANN. § 35.51(b) (West Supp. 2000). The Texas statute would appear to permit the parties to a covered transaction to choose one "related" state's law in order to avoid criminal or environmental limits on their conduct imposed by another "related" jurisdiction. Whether courts in Texas would enforce such a choice is unknown; if the party resisted enforcement managed to get the litigation started in a state other than Texas, the provision (being a choice of law statute) would not apply.

26. Article 7 of the 1980 Rome Convention, for example, provides:

Mandatory rules

1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Rome Convention, *supra* note 14, art. 7.

27. Apparently, there has emerged no real convention in how to make reference to rules that cannot be avoided by contract (referred to here as "mandatory rules") and the subset of those rules that survive a valid choice of a different jurisdiction's law (called here "fundamental policy" rules). Compare SCOLES ET AL., *supra* note 5, §§ 18.3-18.4 with Trevor C. Hartley, *Mandatory Rules in International Centrals: The Common Law Approach*, RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 345-49 (1997). The mandatory rules nomenclature in the text roughly follows Hartley; the use of "fundamental policy" comes from the proposals which use this idea.

different arrangements in their contract. "Mandatory rules," as the term will be used broadly here, include everything from rules appearing in a state's criminal code and environmental regulations, through direct limits on commercial activity such as usury laws,²⁸ to regulatory provisions of a state's contract law such as the Statute of Frauds,²⁹ limitations on liquidated damages,³⁰ and restrictions on unconscionable contracts.³¹ As used here, mandatory rules are those rules that parties cannot avoid by a simple provision in their contract. For example, if the state's usury law prohibits loans in excess of 25% interest, the parties cannot agree in their loan contract to "waive" that rule and set the interest rate at 30%.

Surprisingly, perhaps, many mandatory rules are avoidable by choosing a different state's law, but the power of parties to avoid this wide range of "mandatory rules" through the vehicle of a contractual choice of law is somewhat limited nearly everywhere.³² In the United States the limitation manifests itself in the rule, found in the Restatement (Second) of Conflict of Laws, that parties to a contract cannot contract around the subset of otherwise applicable mandatory rules that constitute "fundamental policy."³³ As will be developed in more detail in Part 3, many

28. *See infra* Part IV.B.2.

29. *E.g.*, U.C.C. § 2-201 (2000).

30. *E.g.*, U.C.C. § 2-719 (2000).

31. *E.g.*, U.C.C. § 2-203 (2000).

32. *See, e.g.*, 2 DICEY AND MORRIS ON THE CONFLICT OF LAWS 1161-90 (Collins ed. 1987); JOHN P. KARALIS, INTERNATIONAL JOINT VENTURES: A PRACTICAL GUIDE § 5.53 n.2 (1992) ("Other nations similarly respect the express or implied contractual choice of parties, unless application of the chosen law would violate certain other laws or regulations of the state"). Texas is an apparent exception. *See supra* note 25.

33. The sources use both "fundamental policy" and "fundamental *public* policy" to refer to this subset of mandatory rules and the former may be slightly broader than the latter. For purposes here, it makes little difference; and for consistency sake, I will refer to the idea as "fundamental policy." The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (1989) develops the fundamental policy idea extensively:

g. When application of chosen law would be contrary to fundamental public policy of the state of otherwise applicable law.

Fulfillment of the parties' expectations is not the only value in contract law; regard must also be had for state interests and for state regulation. The chosen law should not be applied without regard for the interests of the state which would be the state of the applicable law with respect to the particular issue involved in the absence of an effective choice [of law] by the parties. The forum will not refrain from applying the chosen law merely because this would lead to a different result than would be obtained under the local law of the state of the otherwise applicable law. Application of the chosen law will be refused only (1) to protect a fundamental public policy of the state which, under the rule of §188, would be the state of otherwise applicable law, provided (2) that this state has a materially greater interest than the state of the chosen law in the determination of the particular issue. The forum will apply its own legal principles in determining whether a given policy is a fundamental one within the meaning of the present rule and whether the other state has a materially greater interest than the state of the chosen law in the determination of the particular issue. The parties' power to choose the applicable law is subject to least restriction in situations where the significant contacts are so widely dispersed that the determination of the state of applicable law without regard to the parties' choice would present real difficulties.

No detailed statement can be made of the situations where a "fundamental" policy of the state of the otherwise applicable law will be found to exist.

courts use the tests provided in the Restatement when considering whether the particular mandatory rules of a non-selected state should override the law chosen by the parties.

Like all other issues of choice of law, the articulation and breadth of the public policy exception is a matter for the forum's conflict of laws principles, and therefore, of course, the degree to which a given jurisdiction will recognize another jurisdiction's "fundamental policy" can vary from state to state. No doubt, different judicial attitudes toward the appropriate breadth of the "fundamental policy" exception are reflected in states' decisions, and such diversity complicates an already difficult problem of predictability.³⁴ It is, however, of some comfort that many courts begin with the Restatement provision and, at least in that sense, are beginning with the same basic set of conflict of laws rules.

An important consideration is the extent to which the significant contacts are grouped in this state. For the forum will be more inclined to defer to the policy of a state which is closely related to the contract and the parties than to the policy of a state where few contacts are grouped but which, because of the wide dispersion of contacts among the several states, would be the state of the applicable law if effect were to be denied the choice of law provision. Another important consideration is the extent to which the contacts are grouped in the state of the chosen law. The more closely this state is related to the contract and to the parties, the more likely it is that the choice-of-law provision will be given effect. The more closely the state of the chosen law is related to the contract and the parties, the more fundamental must be the policy of the state of the otherwise applicable law to justify denying effect to the choice of law provision. To be "fundamental," a policy must in any event be a substantial one. Except perhaps in the case of contracts relating to wills, a policy of this sort will rarely be found in a requirement, such as the statute of frauds, that relates to formalities. Nor is such policy likely to be represented by a rule tending to become obsolete, such as a rule concerned with the capacity of married women, or by general rules of contract law, such as those concerned with the need for consideration. On the other hand, a fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power. Statutes involving the right of an individual insured as against an insurance company are an example of this sort. To be "fundamental" within the meaning of the present rule, a policy need not be as strong as would be required to justify the forum in refusing to entertain suit upon a foreign cause of action under rule of § 90.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (1989). This comment has been used, both implicitly and explicitly, in resolving cases involving fundamental policy. See *Warren Bros. Co. v. Cardi Corp.*, 471 F.2d 1304 (1st Cir. 1973) (stating that Massachusetts' courts would invalidate an arbitration clause which chose law that contradicted fundamental policy); *MGM Grand Hotel, Inc. v. Imperial Glass Co.*, 65 F.R.D. 624, 630-33 (D. Nev. 1974), *rev'd on other grounds*, 533 F.2d 486 (9th Cir. 1976) (applying Nevada conflicts law, the court held that the Nevada statute protecting the public from unlicensed contractors was an expression of fundamental policy invalidating the choice of another state's law); *Solman Distrib. v. Brown-Forman Corp.*, 888 F.2d 170, 172 (1st Cir. 1989) (declining to apply the law of California as chosen by the parties because Maine's public policy would be affected); *National Glass, Inc. v. J. C. Penney Prop., Inc.*, 336 Md. 606 (1994) (invalidating choice of Pennsylvania law because there was a strong public policy in Maryland against allowing parties to waive mechanics liens).

34. See Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 322 (1990) (having all of the states apply the author's canons of conflicts law, instead of different approaches in different states, would decrease forum shopping and increase predictability); Weintraub, *supra* note 19; SCOLES ET AL., *supra* note 5, § 18.4 at 864-65.

The already-hard problem of predictability will get much harder as state legislatures increasingly articulate statutory choice of law provisions for various kinds of cases.³⁵ For unless state legislatures speak in unison, diversity in choice of law rules—and therefore forum shopping—will be the result. We currently find legislative pronouncements on contractual choice of law in several of the recently-amended Articles of the Uniform Commercial Code that deal with a narrow range of specialized, sophisticated business transactions.³⁶ UCITA is quite different in that respect. In contrast with the relatively restricted scope of the current UCC provisions, UCITA states a rule, unlimited in the black letter, for a vast number of very diverse contracts that are within its scope. Given its controversial nature,³⁷ it seems unlikely that UCITA will be enacted by all States. However, enactment by some—but not all—States will vastly increase the number of situations in which the choice of law rule—and therefore the choice of the forum—may be critical.

UCITA's black letter provision on contractual choice of law provides only this explicit exception to the mechanical enforcement of the parties' choice of any law to govern their contract: "[T]he choice is not enforceable in a consumer transaction to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply under subsections (b) and (c) in the absence of the agree-

35. Until comparatively recently, conflict of laws principles were generally articulated by courts, not by legislatures.

36. See U.C.C. §§ 4A-507, 5-116, 8-110 (2000).

37. The statute began as Article 2B of the Uniform Commercial Code but, because of the controversial nature of its provisions, the UCC's co-sponsor, the American Law Institute withdrew from participation. See 1999 A.L.I. Proc. 405. UCITA has continued to engender a firestorm of controversy. See, e.g., David P. Neboyskey, *A Leap Forward: Why States Should Ratify the Uniform Computer Information and Transactions Act*, 52 FED. COMM. L.J. 793 (May 2000); Cem Kaner, *Why You Should Oppose UCITA*, 17 No. 5 COMPUTER LAW 20 (May 2000). See generally Pratik A. Shah, *The Uniform Computer Information and Transactions Act*, 15 BERKELEY TECH. L.J. 85 (Winter 2000); Pamela Samuelson & Kurt Opsahl, *How Tensions Between Intellectual Property Policy and UCITA are Likely to be Resolved*, PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 753 (1999).

ment.”³⁸ Elsewhere, as a substantive matter,³⁹ the UCITA authorizes a court to enforce fundamental policy generally without indicating which state’s fundamental policy is to be enforced.⁴⁰

Other recent statutes governing contractual choice of law do not articulate a fundamental policy exception as such.⁴¹ Courts have not begun to wrestle with the “fundamental policy” question in cases arising under these recent legislative pronouncements and one can only speculate whether they will use a traditional analysis (which, as developed in Part 3, depends heavily on the connections the chosen and non-chosen law have

38. The provision thus requires the forum court to defer to the otherwise mandatory rules in consumer contracts; it is silent with respect to the issue in other contracts. However, the Official Comment to UCITA § 109 states:

b. Limitations. Agreed choices of law [terms] are subject to [this Act’s general] limitations such as in the doctrine of unconscionability. . . . Section 105(b); Application Group, Inc. v. Hunter Group, Inc., 61 Cal. App. 4th 881, 72 Cal. Rptr. 2d 73 (Cal. Ct. App. 1998). Compare Lowry Computer Prod., Inc. v. Head, 984 F. Supp. 1111 (E.D. Mich. 1997). Subsection (a) further provides that, in a consumer contract, the agreed choice of law cannot override an otherwise applicable rule that could not be altered by agreement under the law of the state whose law would apply in the absence of the contractual choice. The policy of freedom of contract should not permit overriding the consumer rule if a state, having addressed the cost and benefits determines that the consumer rule is not variable by contract.

U.C.I.T.A. § 109 cmt. 2b (2000). The Official Comments do not otherwise elaborate the extent to which the forum state should respect the policy—fundamental or otherwise—of the state which would otherwise have an interest in the contract and related matters.

39. It is possible, although perhaps unlikely, that the forum will use UCITA’s permissive choice of law rule, but that the parties’ contract will have selected the law of a jurisdiction that did not enact UCITA (and therefore, did not enact UCITA section 105’s general public policy exception). While this possibility could supply lawyers with a statutory issue to litigate (“is there a fundamental policy exception at all”), it is likely that all courts will deny enforcement of contract terms that violate fundamental policy whether or not a statute gives them explicit authorization.

40. U.C.I.T.A. § 105(b) provides:

If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term.

U.C.I.T.A. § 105(b) (2000).

41. The Delaware and New York Statutes allow for exceptions listed in UCC § 1-105(2) but do not explicitly recognize a fundamental policy exception. 6 DEL. CODE ANN. tit. 6, § 2708 (c)(ii) (2000); N.Y. GEN. OBLIG. LAW § 5-1401(1)(c) (McKinney 2000); see also U.C.C. §§ 4A-507, 5-116, 8-110 (2000). None of these provisions contains a “fundamental policy” provision in the black letter. UCC § 4A-507 may reject the exception. In discussing parties’ choice of the law that should govern a funds transfers, comment 3 states, Subsection (b) deals with choice-of-law agreements and it gives maximum freedom of choice This broad endorsement of freedom of contract is an enhancement of the approach taken by RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(b) (1971). The Restatement recognizes the basic right of freedom of contract, but the freedom granted the parties may be more limited than the freedom granted here. Under the formulation of the Restatement, if there is no substantial relationship to the jurisdiction whose law is selected and there is no “other” reasonable basis for the parties’ choice, then the selection of the parties need not be honored by a court. Further, if the choice is violative of a fundamental policy of a state which has a materially greater interest than the chosen state, the selection could be disregarded by a court. Those limitations are not found in subsection (b). See U.C.C. § 4A-507 cmt. 3 (2000).

with the controversy) or will embark on an entirely new analysis of the problems. It seems clear that, at some point, most courts will embrace the otherwise applicable law of an unchosen state as “fundamental policy” and apply it notwithstanding the parties’ choice of different law.⁴² Whether they will narrow or broaden the exception under the proposed legislation will be considered in Part 4.

III. PART 2: DEVELOPMENT OF PARTIES’ POWER TO CHOOSE LAW BY CONTRACT

The idea that parties may choose the law that will govern their rights and obligations is often captured under the broad heading of party autonomy.⁴³ The idea of party autonomy in contractual choice of law is not a modern development.⁴⁴ However, a dominant theme in the history of choice of law—and a counterpoint to party autonomy—is one of state sovereignty and territoriality. While party autonomy to choose the applicable law for one’s contract has gained wide acceptance in the United States, this development has implicitly been balanced against state sovereignty and the power of lawmakers to make binding rules.⁴⁵

The historical development was evolutionary.⁴⁶ The French scholar Dumoulin first articulated the idea that parties’ intentions should govern the validity of their contract in the 16th century.⁴⁷ The first recognition of party autonomy in a common law country occurred in the case of *Robinson v. Bland*.⁴⁸ There, Lord Mansfield stated that there could be an exception to the traditional *lex loci* rule when the parties at the time of making the contract had a view to a different kingdom.⁴⁹ Joseph Story brought the idea of party autonomy to America in his influential treatise.⁵⁰ Story largely followed the ideas of Ulrich Huber, a Dutch commentator from the early 18th century.⁵¹ While the American conflict of

42. One can, for example, scarcely imagine a court in a chosen state enforcing a baby-selling contract where vendor, customer, and baby are in a jurisdiction that makes such contracts illegal. Perhaps, instead of wrestling with “fundamental policy,” a court would simply opine that the contract was not subject to the UCC and, therefore, the parties could not select the law of an “unrelated” state to govern their contract.

43. See, e.g., SCOLAS ET AL., *supra* note 5, at 856-77.

44. One commentator has suggested that the concept of parties choosing the law that would apply to those agreements may have been accepted in Greece as early as 120 B.C. Friedrich K. Juenger, *A Page of History*, 35 *MERCER L. REV.* 419, 421 (1981).

45. See generally Kathleen Patchel, *Choice of Law and Software Licenses: A Framework for Discussion*, 26 *BROOK. J. INT’L L.* 117 (2000).

46. This brief history is based on the treatments given the subject in Patrick J. Borchers, *The Internationalization of Contractual Conflicts Law*, 28 *VAND. J. TRANSNAT’L L.* 421 (1995); Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 *U. KAN. L. REV.* 471, 475 (1989); and Friedrich K. Juenger, *A Page of History*, 35 *MERCER L. REV.* 419 (1981).

47. See Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 *U. KAN. L. REV.* 471, 475 (1989).

48. 96 Eng. Rep. 129 (K.B. 1755), 97 Eng. Rep. 717 (K.B. 1760).

49. See *Robinson*, 96 Eng. Rep. 129 (K.B. 1755) (citing Huber).

50. See Juenger, *supra* note 44, at 443-44.

51. See *id.* at 444.

laws tradition has grown out of the work of the Dutch scholars (largely via Story), the modern European doctrine has been dominated by the work of Savigny.⁵² Although some recent scholarship has focused on the convergence of European and American conflicts doctrine in the latter half of the twentieth century,⁵³ during the early 1900s, United States scholarship was extremely divergent from that of Europe in the area of party autonomy.

In 1934, the first Restatement of Conflicts of Laws ("First Restatement") rejected the idea of party autonomy.⁵⁴ In fact, there is no mention of party intention in the entire First Restatement.⁵⁵ The courts of the day were in fact more liberal in their support for party autonomy, and the Chief Reporter, Joseph Beale has been severely criticized for not incorporating the ability of parties to choose the law that would govern their transaction into the First Restatement.⁵⁶ Despite the First Restatement's failure to recognize contractual choice of law, courts enforced choice of law clauses.⁵⁷

The current Restatement and UCC embrace party autonomy by giving contracting parties the limited ability to choose the law that will govern their contract. The driving force behind this explicit acceptance in the mid-20th century seems to be the increase in predictability of result that these provisions will create.⁵⁸ In both formulations, however, the parties' ability to choose is limited by the requirement that the chosen law relate to the transaction and, at least in the Restatement provision, that their chosen law does not contravene the fundamental public policy of the state whose law would otherwise apply.

The UCITA and UCC Article 1 proposals dramatically expand party autonomy by deleting the requirement that the chosen law bear some relation to the agreement. The idea entered the UCC in 1989⁵⁹ and is now present in other parts of the UCC in Articles that have a very narrow scope. Article 4A, governing funds transfers, permits banks to choose the law that governs a transfer "whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction."⁶⁰

52. See Friedler, *supra* note 47, at 476-77.

53. See Mathias Reimann, *Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 VA. J. INT'L L. 571, 574-79 (1999); Patrick J. Borchers, *The Internationalization of Contractual Conflicts Law*, 28 VAND. J. TRANSNAT'L L. 421 (1995).

54. In contrast, party autonomy had been accepted in France since 1864. See Friedler, *supra* note 46, at 476.

55. See Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 269 (1993).

56. Professor Juenger stated that Beale adopted a "narrower perspective from which American conflicts law has suffered ever since." Juenger, *supra* note 44, at 445.

57. See Reimann, *supra* note 53, at 575.

58. Comment *a* to the Restatement states that contractual choice of law is the best method of protecting parties' expectations. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §187 cmt. a (1971). See also SCOLES ET AL., *supra* note 5, at 857.

59. U.C.C. Article 4A, with its section 4A-507, was promulgated in 1989.

60. The full provision reads:

If the parties described in each paragraph of subsection (a) have made an agreement selecting the law of a particular jurisdiction to govern rights and

Comparable latitude is given to the parties' ability to choose the law that will govern the transaction in the sophisticated areas of investment securities⁶¹ and letters of credit.⁶² Similarly, four commercial states have mandated that their courts uphold contractual choice of "unrelated" law in large contracts.⁶³

Seen against this backdrop, UCITA and proposed UCC section 1-301 are simply the most recent efforts to "disconnect" the parties' choice of law from a jurisdiction that has some relationship with either the parties or their transaction. But, in fact, these proposals do not represent "incremental" change. Rather, owing to the broad scope of both the UCC and UCITA, these provisions will bring to most commercial transactions the vastly expanded choice of law rule that has heretofore been limited to narrow specialists usually dealing in very large transactions. Thus, while technically these proposals are not unprecedented, they represent a striking expansion of party autonomy. And, because party autonomy is balanced against legislative lawmaking power, the provisions represent a substantial shift in the balance between party autonomy and legislative power to enact mandatory rules. As will be discussed in Part 4, the justifications traditionally given for these changes are open to question.⁶⁴

The movement to give contracting parties more authority over States' legislative power is somewhat at odds with the work of the traditional party autonomy theorists. State sovereignty has always been at least an

obligations between each other, the law of that jurisdiction governs those rights and obligations, whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction.

U.C.C. § 4A-507(b) (2000) (promulgated in 1989).

61. The area of investment securities is governed by Article 8, which provides in relevant part:

"Issuer's jurisdiction" means the jurisdiction under which the issuer of the security is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer. An issuer organized under the law of this State may specify the law of another jurisdiction as the law governing the matters specified in subsection (a)(2) through (5).

U.C.C. § 8-110(d) (2000) (promulgated in 1994).

62. See U.C.C. § 5-116(a) (2000) (promulgated in 1995) ("The jurisdiction whose law is chosen need not bear any relation to the transaction.").

63. See CAL. CIV. CODE § 1646.5 (West Supp. 2000); DEL. CODE ANN. tit. 6, § 2708 (1999); N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2000); TEX. BUS. & COM. CODE ANN. § 35.51(c) (Vernon Supp. 2000) (California, Delaware, and New York allow parties to select their own law whether or not related; Texas permits parties to select any law).

64. The international agreements that have adopted superficially similar provisions are more limited, involve sovereign nations, and operate in ways that are fundamentally different from the way they would operate in the United States. Others have raised concerns over looking to international agreements for guidance. Professor Larry Kramer cautioned against relying on the Rome Convention stating that this agreement was "drafted by and for participants in the European legal systems—systems that differ from ours in terms of legal education, the nature of practice, the role of lawyers and judges, and the traditions of the profession." Borchers, *supra* note 45, at 435-36 (quoting Letter from Larry Kramer, Professor of Law, to Harry Sigman 460 (Aug. 4, 1994)). The inappropriateness of using international conflict of laws norms in the United States is developed *infra* beginning at note 230.

equally influential force in the debate over choice of law.⁶⁵ "The Dutch jurists took the idea of territorial sovereignty as the starting point of their reasoning."⁶⁶ Huber espoused the important limitation that "a sovereign may refuse to recognize 'rights acquired' abroad if they would prejudice the forum's 'power or rights.'"⁶⁷ This is recognition that the parties' ability to choose law was subordinate to the power of the state and its public policy when that court was called upon to enforce that choice. Savigny's most important contribution to choice of law was his idea that all contracts had a seat, which should govern in absence of party choice. This seat was determined by the linkage of parties to a territory through certain contacts.⁶⁸ Given these underlying ideas, the historical context seems to limit party autonomy to choices from among jurisdictions that have contacts with the parties or transaction, but not more.

The power of the parties to choose "unrelated" law was implicitly embraced by the Supreme Court in 1972 in *M/S Bremen v. Zapata Off-Shore Co.*⁶⁹ In that case, Houston-based Zapata made a contract with a German corporation for the latter to tow Zapata's drilling rig from Louisiana to a point off the coast of Italy. The contract provided "for the litigation of any dispute in the High Court of Justice in London."⁷⁰ Despite the clause, Zapata sued in Florida for damage that occurred to its rig in waters near Florida. Reversing the Circuit and District Courts and remanding for further proceedings, the Supreme Court held that the clause was presumptively enforceable unless it effectively denied Zapata "a meaningful day in court."⁷¹

While the case was technically a choice of forum case, the Court recognized that, under English law, such a choice would be construed also to be a choice of English law,⁷² and there was evidence that this was the actual intent of the parties.⁷³ In supporting the choice of an unrelated forum (and, implicitly, the choice of unrelated English law), the Court noted:

It cannot be doubted for a moment that the parties sought to provide for a neutral forum for the resolution of any disputes arising during the tow. Manifestly much uncertainty and possibly great inconve-

65. The history of the scholarship concerning State sovereignty in conflicts of law is too long to be recanted in this article. I will only discuss those parts of the theory, which have traditionally interacted with and provided the limitations on party autonomy. For a general description, see generally Juenger, *supra* note 44.

66. *Id.* at 434

67. *Id.* at 435 (citing U. HUBRIS, PRAELECTIONES JURIS ROMANI ET HOIDIERNI lib. 1, tit. 3 (app.) (2d ed. 1707), reprinted with an English translation in E. LORENZEN, SELECTED ARTICLES ON CONFLICTS OF LAWS 162-80 (1947)).

68. He considered these contracts like a string that tied the party or legal relationship to a given jurisdiction. 4 FRIEDRICH CARL VON SAVIGNY, SYSTEM DES HEUTIGEN ROMISCHEN RECHTS iv, 108 (1849).

69. 407 U.S. 1 (1972).

70. *Id.* at 1.

71. *Id.* at 19.

72. *See id.* at 14 n.15.

73. *See id.* at 13-14.

nience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place where the Bremen or Unterweser might happen to be found. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.⁷⁴

The justification, often repeated, is that when parties distrust one another's legal systems, an acceptable solution that permits business to be done is to allow them to choose the law of a third "neutral" jurisdiction. The Rome Convention, the first international treaty to give parties the power to choose unrelated law, built on that idea and it may make a great deal of sense for international business cases. As will be developed below, because of the fundamentally different contexts, international cases and treaties may have little precedential value in considering an extension of party autonomy to choice of law rules that operate within the United States. No American court to date has upheld the contractual choice of unrelated state law when the effect of the choice would be to override a mandatory rule of an unchosen state.⁷⁵

IV. PART 3: CONTRACTUAL CHOICE OF LAW IN THE COURTS: ILLUSTRATIVE AREAS

Under the rules of the Restatement, two issues arise in connection with the enforcement of contractual choice of law clauses: 1) whether the chosen jurisdiction has the requisite "relatedness" for the forum court to enforce the choice the parties made, and 2) whether notwithstanding the choice, the law of an unchosen jurisdiction ought to control an issue before the court as "fundamental policy." Perhaps owing to the conflict of laws rules that have been in place to date, the issues are related in the cases and, as will be discussed in Part 4, this connection makes it difficult to predict how courts will analyze "fundamental policy" if the chosen state has no connection with the transaction.

A. CHOICES OF "UNRELATED" LAW

Restatement (Second) of Conflict of Laws section 187(2), quoted above, provides that the parties' choice is not to be enforced if: "(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice"⁷⁶

Similarly, Uniform Commercial Code section 1-105, quoted above as well, provides, in part: "(1) [W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall

74. *Id.*

75. See Richard K. Greenstein, *Is the Proposed UCC Choice of Law Provision Unconstitutional?*, 73 *TEMPLE L. REV.* ___, ___ (forthcoming 2001).

76. See *supra* note 17, discussing *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 187(2) (1989).

govern their rights and duties”⁷⁷

Choice of law clauses are rarely invalidated.⁷⁸ Perhaps because the parties do not often choose the law of an “unrelated” jurisdiction, there are very few cases in which the parties’ choice has been rejected for the lack of a connection between the chosen law and the law that might otherwise govern.⁷⁹

Outside the area of usury,⁸⁰ most decisions that reject a contractual choice of law are based on the fact that the chosen law contravenes the public policy of the state with a materially greater interest in the parties or their contract than the chosen state. As reported by Professor Symeon Symeonides in his Annual Survey of conflict of laws cases, in 1996 only six of the more than one hundred cases that discussed contractual choice of law refused to enforce the choice of law provision and all of these decisions were based on public policy considerations.⁸¹ In 1999, he reported only one case in the reports that did not enforce a choice of law because it lacked a reasonable relation to the chosen state.⁸²

There are three related reasons for the dearth of these cases. First, under the current relatedness requirement, the enforceability of these clauses is easily predictable. An attorney drafting a contract for a client can easily know which states have a relationship to the contract. Second, it is not surprising that several of the few existing cases involve mistakes or events unforeseeable at the time the contract was drafted. One would expect these mistakes and unforeseen circumstances to be very rare in cases involving at least one party with contracting experience. Third, although the courts have disagreed as to whether the selection of a company’s state of incorporation is enough to make that state substantially related to the contract, more recent cases have upheld the selection of the business’s home state.⁸³ The selection of a corporation’s home state is

77. See *supra* note 17, discussing U.C.C. § 1-105 (2000), .

78. See Symeon C. Symeonides, *Choice of Law in the American Courts in 1996: Tenth Annual Survey*, 45 AM. J. COMP. L. 447, 488 (1997).

79. Even in cases where courts have invalidated the choice because the jurisdiction is not related to the transaction, they will alternatively state that the choice could be invalidated because of the public policy exception. See *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1255 (N.D. Iowa 1995) (stating that in alternative to the chosen state not having a substantial relation the application of its law would also contravene Iowa public policy); *First Nat’l Bank of Mitchell v. Daggett*, 497 N.W.2d 358, 363 (Neb. 1993) (stating that not only is there a lack of sufficient contact to the chosen state, but since Nebraska real estate implicated, policy requires that Nebraska law govern). See generally *Gen. Elec. Co. v. Keyser*, 275 S.E.2d 289, 293 (W. Va. 1981) (although choice of law provisions are usually not enforced for public policy reasons, “courts also hedge their bets, where facts permit, by adding language concerning the lack of a substantial relationship to the chosen jurisdiction.”)

80. Usury cases are discussed *infra* Part IV.B.2.

81. Symeonides, *supra* note 78, at 488.

82. Symeon C. Symeonides, *Choice of Law in the American Courts in 1999: One More Year*, 48 AM. J. COMP. L. 143, 159 (2000). The case was *Sentinel Industries Contracting Corp. v. Kimmins Industries Service Corp.*, 743 So. 2d 954 (Miss. 1999).

83. Older cases suggest that if the business has offices in the same state as that in which it sells, courts will consider that an intrastate transaction precluding any choice of law by the parties. See *SCOLES ET AL.*, *supra* note 5, at 874 n.11.

particularly appealing to a large company that is involved in many different contracts in many different states. It permits the corporation to limit the interpretation of its agreements to one body of law, will inevitably reduce its legal costs, and under the current approach, it will assure the enforcement of the choice of law clause in its contracts.

When courts invalidate parties' choice of law because the chosen state is unrelated to the transaction, the reason can often be traced to the occurrence of unforeseen consequences or a mistake in the contracting process. Such cases are not, as some argue, the product of uncertainty begotten by the current relatedness requirement;⁸⁴ they are the product of error. In *First National Bank of Mitchell v. Daggett*,⁸⁵ for example, the defendant, a resident of Nebraska, attempted to convey a trust in the form of real property, also located in Nebraska, to his sons in an effort to avoid debts he owed the bank. The bank alleged that this questionable conveyance was void because the defendant failed to name the beneficiaries.⁸⁶ The trust contained thirty-four separate provisions each choosing the law that would govern that provision⁸⁷ and, in all, the trust instrument named twenty-three different state jurisdictions and England to govern the provisions of the trust.⁸⁸ In one provision, the defendant selected Georgia law to determine the identity of the beneficiaries.⁸⁹ The defendant was extremely ill-informed. He admitted that he had never read any of the state laws he selected in the list and the only reason he included a choice of Georgia law was because he had been so instructed in a trusts class.⁹⁰ The Supreme Court of Nebraska held that the choice of Georgia law was unenforceable because the trust, the parties, and the property had absolutely no contact with Georgia.⁹¹ The fact that Nebraska real estate was implicated was central to the analysis. The court went on to say that "[w]ere we to resort to the laws of unconnected, outside jurisdictions to determine the ownership of Nebraska land, the certainty of title, marketability, and transferability of land in this State would be adversely impacted."⁹²

Cases like *Daggett* are freak cases which present an unlikely threat to predictability and certainty. The defendant was obviously not experienced in writing trust agreements and would have realized with minimal research that the choice of Georgia law dealing with a Nebraska trust involving Nebraska real estate would be unenforceable. Defendant conceivably might have won the point had the relatedness requirement not

84. See Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. (forthcoming Fall 2000).

85. 497 N.W.2d 358 (Neb. 1993).

86. See *id.* at 360.

87. See *id.* at 362.

88. See *id.*

89. See *id.* at 362.

90. See *id.* at 363.

91. See *id.*

92. *Id.*

been in place⁹³ but his failure to satisfy a rule of which he was unaware scarcely reveals a problem with the rule itself.

In other cases, the choice of law clause was drafted by more sophisticated parties, but unforeseen events made the choice unrelated to the chosen state.⁹⁴ The fact that these events were unforeseen by either party at the time the contract was drafted shows that unpredictability of the contract's final outcome may have been inevitable. Since the problem involves a change in circumstances after the contract is formed, unpredictable results could result from the parties' contract under any rule. In any event, if such problems imperil certainty, they can be solved by making a choice of law, valid when made, valid despite later changes in circumstances. There are ample statutory analogs for constructing such a rule.⁹⁵

When incorporation in a given state is the only connection with the contract, there is disagreement in the courts over whether that state is, on that basis alone, reasonably related to the transaction. Early courts in two usury cases invalidated such a selection because the chosen state was not naturally related to the transaction.⁹⁶ Some more recent decisions have followed the approach of these cases.⁹⁷ For example, in *Curtis 1000, Inc. v. Suess*⁹⁸ an employer sued to enforce a covenant not to compete in an employment contract. The employment agreement selected Delaware law, the state of the company's incorporation, to govern the validity of the covenant.⁹⁹ Although Judge Posner believed the application of Delaware law would not contravene Illinois' public policy, he refused to enforce the choice of law clause because there was an insufficient connection between the contract and Delaware.¹⁰⁰ The company was incorporated in Delaware, but it did no other business in the state¹⁰¹ and,

93. This is very questionable given the location of the real estate in Nebraska.

94. *E.g.*, *LaGuardia Ass'n v. Holiday Hospitality Franchising, Inc.*, 92 F. Supp. 2d 119 (E.D.N.Y. 2000) (invalidating a choice of law in a twenty year franchise agreement selecting the law of Tennessee when the defendant had its headquarters in Tennessee when the contract was signed, but later was bought out and the headquarters moved to Georgia); *Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 743 So. 2d 954 (Miss. 1999) (holding that a choice of law in a contract between a prime contractor and Exxon was not related to the chosen State when the contract between the prime and a subcontractor wanted to incorporate the terms of the contract between the prime and Exxon).

95. *See, e.g.*, U.C.C. § 9-507 (2000).

96. *See, e.g.*, *Brierley v. Commercial Credit Co.*, 43 F.2d 730, 731 (3d Cir. 1930) (holding that the stipulation of Delaware, the Defendant's state of incorporation is invalid because Delaware has no actual relation to the transaction); *United Divers Supply Co. v. Commercial Credit Co.*, 289 F. 316 (5th Cir. 1923) (rejecting the provision selecting the law of Delaware when the only relation between the state and the transaction was the defendant's incorporation there in order to avoid usury laws).

97. *See Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224 (N.D. Iowa 1995) (holding in a no-compete covenant case that the company being incorporated in Delaware is not sufficient to satisfy the requirement of RESTATEMENT (SECOND) CONFLICTS OF LAW § 187 that the chosen state be substantially related to the transaction).

98. 24 F.3d 941 (7th Cir. 1994).

99. *See id.* at 943.

100. *See id.* at 948.

101. *See id.*

consequently, Delaware was said to have no interest in the case.¹⁰²

Other courts have held that a choice of company's state of incorporation is sufficiently related to permit the choice of that state's law.¹⁰³ This split in current authority certainly undermines the certainty that the parties' choice will be enforced since, once again, the applicable rule depends on which forum gets the litigation. However, if certainty (as distinguished from seeking the most advantageous legal regime possible) is the goal, the parties can easily select the state where the company is headquartered.¹⁰⁴ In *Suess*, for example, Judge Posner said that "[i]f the choice of law provision in the covenant not to compete had designated Georgia law we assume the Illinois courts would defer to that designation, recognizing that Georgia has as much interest in regulating the out of state operations of 'its' firm as Illinois does in protecting its citizen. . . ."¹⁰⁵

There is a small scattering of cases in which courts have rejected the parties' choice of New York law because they had no substantial relationship with that state.¹⁰⁶ The effect of such decisions rejecting New York law as "unrelated" is to require those businesses to establish a presence in New York in order to take advantage of whatever New York's law has to offer.

Reasons for selecting "unrelated" New York law could vary. It could be that most—but not all—of a business's customers were located in New York. If courts took a broad view of the matter, such facts might well

102. *See id.*

103. *See* *Schroeder v. Rynel, Ltd.*, 720 A.2d 1164, 1166 (Me 1998) (enforcing the choice of law clause selecting Delaware when the corporation incorporated in Delaware six months after the employment agreement was signed); *Valley Juice Ltd., Inc. v. Evian Waters of France, Inc.*, 87 F.3d 604, 608 (2d Cir. 1996) (holding under Massachusetts conflicts rules that a choice of the law of a party's state of incorporation meets the reasonable relation requirement of RESTATEMENT (SECOND) CONFLICTS OF LAW §187); *Carlock v. Pillsbury Co.*, 719 F. Supp. 791, 807 (D. Minn. 1989) ("A party's incorporation in a state is a contact sufficient to allow the parties to choose that state's law to govern their contract.")

104. *See e.g.*, *A.G. Edwards & Sons, Inc. v. Smith*, 736 F. Supp. 1030, 1036 (D. Ariz. 1989) (following Arizona choice of law principles the court upheld the selection of Missouri law because the plaintiff having its primary place of business in Missouri made the state reasonably related to the transaction); *see also* *Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463, 1467-68 (1st Cir. 1992) (stating that the choice of the law of the state where one of the parties is incorporated and does a substantial amount of business is enforceable).

105. *Suess*, 24 F.3d at 949.

106. *See* *Prows v. Pinpoint Retail Sys.*, 868 P.2d 809 (Utah 1993) (refusing to enforce the selection of New York law in an agreement between a Canadian company and its Utah distributor because all the relevant contacts were located in Utah and New York had no interest in the litigation); *CCR Data Sys., Inc. v. Panasonic Communications & Sys. Co.*, 1995 WL 54380, *5 (D.N.H. Jan. 31, 1995) (invalidating the selection of New York law, although the selection was reasonable because it was aimed at securing a uniform interpretation of dealership agreements, there was no significant relationship between the particular agreement and the state of New York); *see also* *Trans Meridian Trading Inc. v. Empresa Nacional De Comercializacion De Insumos*, 829 F.2d 949, 954 (9th Cir. 1987) (refusing to apply the Uniform Customs and Practice Act for Documentary Credit to the exclusion of California law because the act was not a related "jurisdiction" and California's governmental interest analysis required that its law govern the transaction).

constitute a relationship with New York law under the Restatement's permissive rule sufficient to justify a court's applying that law to the discrete contracts of individual customers not located in New York.¹⁰⁷ In an era of increasing mass marketing, it might well make sense to develop a broader view of the "relatedness" limitation to accommodate such situations and, if policy makers did so, to suitably tweak the UCC provision to permit such an approach.¹⁰⁸

On the other hand, if comparable facts were missing and New York law were selected merely because the law there was more favorable to them than the law of their own location, rejecting the choice might be justifiable as a matter of policy. History suggests that enhanced certainty (as distinguished from empowering the parties to seek some form of advantage in choosing given law) is the overwhelming reason for permitting parties to choose law in the first place. If this is so, then simple advantage-seeking offers little reason to change the relatedness rule—certainty can probably be achieved by the business choosing the law of its own location. In any event, the question for policy makers is whether this small scattering of cases presents a compelling reason for a rule change and, if so, whether the change in the choice of law rules proposed is, on balance, a satisfactory solution. Narrower solutions are, of course, possible.¹⁰⁹

107. The provision, quoted *supra* note 18, allows enforcement of a contractual choice of law unless "there is no other reasonable basis for the parties' choice."

108. The Permanent Editorial Board of the UCC could, for example, add a Comment or amend the present Comments to UCC section 1-105 stating an expansive interpretation of the current rule's "reasonable relation." The drafters could also improve certainty in this regard by creating a statutory list of situations and defining them as constituting a "reasonable relation."

Texas, for example, provides the following:

A transaction bears a reasonable relation to a particular jurisdiction if:

- (1) a party to the transaction is a resident of that jurisdiction;
- (2) a party to the transaction has its place of business or, if that party has more than one place of business, its chief executive office or an office from which it conducts a substantial part of the negotiations relating to the transaction, in that jurisdiction;
- (3) all or part of the subject matter of the transaction is located in that jurisdiction;
- (4) a party to the transaction is required to perform a substantial part of its obligations relating to the transaction, such as delivering payments, in that jurisdiction; or
- (5) a substantial part of the negotiations relating to the transaction, and the signing of an agreement relating to the transaction by a party to the transaction, occurred in that jurisdiction.

TEX. BUS & COM. CODE ANN. § 35.51(d) (Vernon 2000).

109. See *supra* note 107. In a less serious vein, statutory authorization for the parties to choose "related law or the law of New York" would also solve the problem and would yield a measure of uniformity as well, but one senses something politically unappealing about such a solution. Indeed, if the current relatedness rule has tended to physically bring businesses into New York to get New York law, New York policy makers might be well advised to oppose the idea.

B. CHOICES THAT VIOLATE “FUNDAMENTAL POLICY” OF A
NON-CHOSEN STATE

Under the Restatement’s analytical framework, courts are not to enforce a choice where:

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.¹¹⁰

There is no similar statement in the current text or Comments to UCC section 1-105.

There are several common situations in which one party has argued that the law chosen in the contract should bow to the “fundamental policy” of a state that was not chosen. Two of these situations—franchise contracts and lending contracts raising usury issues—may be within the scope of the revised Uniform Commercial Code and therefore affected by the UCC proposal.¹¹¹ A discussion of cases in these two areas should

110. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1989).

111. The scope of the provision is in flux at this time. During a meeting of the Drafting Committee in November, 2000, the suggestion was made to limit the parties to choosing only UCC rules when they choose the law of a particular jurisdiction. This idea has made its way into the Reporters’ Notes to the December 2000 ALI Council Draft. The equivocal Note reads in pertinent part:

a. *Applicability of section.* This section is neither a full Restatement of choice of law principles nor a free-standing choice of law statute. Rather, it is a provision of Article 1 of the Uniform Commercial Code. As such, it is subject to section 1-102, which states the scope of Article 1. As that section indicates, Article 1, and the rules contained therein, apply to transactions to the extent that they are governed by one of the other Articles of the Uniform Commercial Code. Thus, this section does not apply to a transaction outside the scope of the Uniform Commercial Code such as a services contract or a contract for the sale of real estate. On the other hand, if the transaction is within the scope of a substantive Article of the Uniform Commercial Code, such as in the case of a sale or lease of goods, this section does apply.

In some cases, a transaction is neither completely within the scope of the Uniform Commercial Code (as in the case of a sale or lease of goods) nor completely outside the scope of the Uniform Commercial Code (as in the case of a contract for the sale of real estate). Rather, some aspects of the transaction are within the substantive scope of the Uniform Commercial Code while other aspects are not. One example of this phenomenon is an agreement to loan money in which the borrower’s obligation to repay the loan is secured by a security interest in personal property. The security agreement, and the security interest created thereby, are clearly within the scope of Article 9. The loan agreement, on the other hand, is governed not by the Uniform Commercial Code but by the general law of contracts. Another example is provided by a real estate lease in which the lessee’s obligation to pay the stated rent is backed by a standby letter of credit issued by a bank. The lease is governed by realty law outside the Uniform Commercial Code, while the letter of credit is governed by Article 5. While this section, by its terms, only applies to the UCC aspect of such a “mixed transaction,” it is within a court’s discretion to decide in a particular case that bifurcation of the choice of law principles applicable to the transaction is inadvisable and, accordingly, to apply principles of this section to the non-UCC aspects of the transaction in order to have the law of the same State or country apply to the

suffice to illustrate the dynamics of current judicial thinking about “fundamental policy” in this context.

1. Franchise Cases

Like much else in the current case law in this general area, a starting point for the decisions is a comparison of the “contacts” of the chosen and unchosen states. Whether the court describes an unchosen state’s mandatory rules as “fundamental” seems to depend, critically, on this comparison.

The paradigm situation is quite simple.¹¹² Typically, the franchisee’s state has a “non-waivable” statute limiting how franchisers may contract with or treat in-state franchisees, but the franchise contract will choose the law of a different state that also has some connection with the contract. When the franchise relationship collapses, the franchisee asserts that the franchiser violated a provision of the local protective legislation. The franchiser responds by contending that the protective legislation is not applicable due to the contractual choice of different law. The outcome depends on whether the forum court considers the protective legislation of the unchosen state to be “fundamental policy” that will apply despite the contractual choice of law provision. If the chosen law applies in its entirety, without a fundamental policy exception, the “non-waivable” provision created by the franchisee’s legislature has been neutralized.

For example, in *Tele-Save Merchandising Co. v. Consumers Distributing Co. Ltd.*,¹¹³ the franchise contract between the Ohio franchisee and the Canadian franchiser chose the law of New Jersey (where the franchiser had an office) to govern their franchise contract. An Ohio statute required, among other things, that the franchiser make various disclosures

entire transaction. When the UCC aspects of such a “mixed transaction” predominate, such a decision may be particularly appropriate.
U.C.C. § 1-301, Reporter’s Note a (Proposed Draft, Dec. 2000).

Under current conflict of laws principles, the parties choosing the law of a given “related” jurisdiction get all the law that jurisdiction has to offer, subject of course, to the public policy exception. This comports with their likely intent and allows the adjudicating court to decide the case with one body of interrelated principles.

If, on the other hand, by selecting “unrelated” law one selects *only* “unrelated” UCC provisions, the result is a contract whose controlling law is bifurcated between two jurisdictions. This seems unlikely often to be the intent of the parties and will make contract adjudication under such a regime far more difficult and expensive than it now is. It will also raise the question of “what is a UCC rule” in some cases and provide litigation opportunities that do not now exist. It is likely that the drafters will not succeed in drafting a workable limitation or, if they can, that it will be challenged as being a rule that harms, rather than enhances, commercial certainty. It seems likely, on balance, that courts will continue to wrestle with non-UCC law being chosen by the parties and challenged as violative of fundamental policy of the unchosen state.

112. An excellent treatment of state franchise statutes and the limits on escaping them through choice of law clauses under current law is Thomas J. Collin, *State Franchise Laws and the Small Business Franchise Act of 1999: Barriers to Efficient Distribution*, 55 *BUS. LAW.* 1699 (2000). Mr. Collin does not address the effect that proposed UCC § 1-301 might have on his analysis.

113. 814 F.2d 1120 (6th Cir. 1986).

and provided that “[a]ny waiver by a purchaser [of the Act’s provisions] is contrary to public policy and is void and unenforceable.”¹¹⁴ The franchisee claimed that the Ohio statute represented “fundamental public policy” of Ohio and therefore applied notwithstanding the parties’ choice of New Jersey law. Asserting that there were no predominant contacts in Ohio, that the parties did not have unequal bargaining power, and that there would not be significant differences in the application of the law of the two states, the Sixth Circuit Court of Appeals rejected the argument that the “non-waivable” Ohio statute should be applied.¹¹⁵

In contrast with *Tele-Save*, the court in *Wright-Moore Corp. v. Ricoh Corp.*¹¹⁶ found that despite the contractual choice of New York law, provisions of Indiana’s “non-waivable” franchise law applied. The *Wright-Moore* court noted that the only connection to New York appeared to be the fact that Ricoh was incorporated there, whereas Wright-Moore was physically located in Indiana, the contract was negotiated there, and much of the performance took part there.¹¹⁷

It is important to note that in both cases, the franchisee’s state law was “mandatory” because it was “non-waivable” and was made “non-waivable” presumably to protect that State’s franchisees from perceived franchiser abuse. Rather than have the franchisee waive the “non-waivable” provision in the franchise contract, the contract simply chose different law to govern it, law that did not contain the particular provision. A simple waiver of the provision would, of course, have been unenforceable, but given that the franchise contract chose different law, the fate of the “non-waivable” provision depended instead on an out-of-state court judging whether the provision was “fundamental policy.” A finding that it was not “fundamental policy” would make the mandatory provision ineffective.

This outcome, while unsettling to some, can be understood as a consequence of the fact that different states might have interests in applying their law to the underlying relationship. Where the chosen state is as closely—or more closely—related to the contract, it is comparatively easy to justify a decision which effectively neutralizes the “non-waivable” provision: had the parties in such a case not specified the law in their contract, the state law without the protective provision might well have been applied anyway. The certainty that comes with enforcing the choice of law justifies permitting parties to agree to different law in the first place, even when their choice effectively erases a mandatory provision of the unchosen state’s law.

Forum courts can, of course, get the “fundamental policy” question wrong but, if there will be “redress” for a wrong judicial decision on the question, it must be political rather than legal. A judgment coming from

114. *Id.* at 1123.

115. *See id.* at 1124.

116. 908 F.2d 128 (7th Cir. 1990).

117. *Id.* at 133.

another state must be enforced under the Constitution's Full Faith and Credit Clause even if the result in that case is flat wrong.¹¹⁸ We can look to a final franchise case, *Modern Computer Systems, Inc. v. Modern Banking Systems, Inc.*,¹¹⁹ to underscore how the operation of our conflict of laws rules can impact the non-forum state's lawmaking. What followed the decision was, perhaps, a political response to the case by the Minnesota legislature.

Minnesota had a statute governing relationships with Minnesota franchisees and, as in other states, provided that the provisions were not waivable by contract. In the agreement with the Nebraska franchiser, the parties chose Nebraska law to govern their relationship. In litigation following the souring of the relationship, the franchisee contended that the choice of Nebraska law violated the "fundamental policy" of Minnesota as reflected in its anti-waiver provision. The Eighth Circuit, en banc, disagreed, laying considerable stress on the fact that Nebraska had at least as many "contacts" with the transaction as did Minnesota¹²⁰ and holding that it would therefore be fair to apply the law chosen by the parties—Nebraska—to the controversy.

The dissent focused more directly than the majority on the choice of law provision and whether, under the Restatement provision, Minnesota "[had] a materially greater interest than the chosen state in the determination of the particular issue."¹²¹ Finding both that Minnesota had a materially greater interest and that it had more contacts with the contract, the dissent would have rejected the choice of Nebraska law.¹²² While there is no record of the enforcing court's disposition of this case, it is clear in retrospect that the Eighth Circuit's opinion on the importance to Minnesota of its franchise protection was wrong, at least as a political matter. Following the court's decision, the Minnesota legislature amended the statute¹²³ to include a restriction on the franchisee's waiving the protection through a choice of law clause.¹²⁴ As will be developed

118. See *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908). A discussion of the implications of the Full Faith and Credit Clause in connection with international analogues to domestic choice of law principles appears *infra* in Part V.F.1.b.

119. 871 F.2d 734 (8th Cir. 1989).

120. See *id.* at 739.

121. *Id.* at 740 (quoting RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 187 (1971)).

122. See *id.* at 743.

123. The next year, Minnesota amended the law to provide:

80C.21. Waivers void

Any condition, stipulation or provision, including any choice of law provision, purporting to bind any person who, at the time of acquiring a franchise is a resident of this state, or, in the case of a partnership or corporation, organized or incorporated under the laws of this state, or purporting to bind a person acquiring any franchise to be operated in this state to waive compliance or which has the effect of waiving compliance with any provision of sections 80C.01 to 80C.22 or any rule or order thereunder is void.

MINN. STAT. § 80C.21 (1989) (emphasis added). Whether the change in the law will cause courts in other states to conclude the Minnesota law reflects "fundamental policy" remains to be seen.

124. Of course, Minnesota could have *changed* its view and made the franchisee protection policy "fundamental" following the Eighth Circuit's decision or interest groups could

later, we might anticipate that the instances in which the operation of choice of law rules cause political friction will increase, perhaps exponentially, under the proposals.

2. Usury Cases

Usury cases have a long history in this area, perhaps because lenders have clear, direct economic incentives to avoid usury restrictions if it is possible for them to do so.¹²⁵ Choice of a jurisdiction with a higher cap on interest rates gives a lender an economic benefit, if such a choice of law is sustained over a challenge that the borrower's mandatory usury restrictions apply nonetheless. Here, once again, the judicial analysis depends critically on the "contacts" between the chosen state and the contract; in this area, we find that "fundamental policy" receives far less emphasis. Whether this analysis will hold when lenders can select a state with no connections (and, presumably, no usury restrictions) will be a difficult question under the proposals.

The paradigm facts are simple. The lender chooses the law of a state with high—or no—usury limits and, when the borrower defaults, her defense is that the lender violated an otherwise-applicable usury restriction—a mandatory rule of the unchosen state.

Seeman v. Philadelphia Warehouse Co.,¹²⁶ a 1927 case antedating widespread use of contractual choice of law clauses, established the now well-established rule that a provision in a contract for the payment of interest will be held valid if it is permitted by the law of either the place of contracting, the place of performance, or any other place with which the contract has any substantial connection.¹²⁷ Many jurisdictions follow this traditional rule that sufficient contacts with a state permitting the interest charged are essential to enforcement is followed in many jurisdictions.¹²⁸ In *Seeman*, the plaintiff argued that the choice of law provision for repay-

have simply pressured the legislature for preferential treatment following the decision. If analyzed in terms of interest group politics, it is very difficult (if not impossible) to speak of legislation in terms of "public policy." Cf. O'Hara & Ribstein, *supra* note 84 ("Emphasizing states' interests and powers is misguided from this perspective because political leaders cannot be expected to maximize social welfare.").

125. Credit card companies have located in South Dakota so that the rates they charge across the United States will avoid challenges on the basis of usury. In *Smiley v. Citibank*, 517 U.S. 735 (1996), the Supreme Court held that state usury laws were preempted by the National Bank Act. Significantly, however, banks must physically locate in South Dakota to avail themselves of its law. See *id.* at 737.

126. 274 U.S. 403 (1927).

127. See *id.* at 407.

128. See, e.g., *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744 (5th Cir. 1981); *Jett Racing & Sales, Inc. v. Transamerica Commercial Fin. Corp.*, 892 F. Supp. 161 (S.D. Tex. 1995); *Superior Funding Corp. v. Big Apple Capital Corp.*, 738 F. Supp. 1468 (S.D.N.Y. 1990); *In re United States Mach. Tools, Inc. v. First Union Commercial Corp.*, 59 B.R. 470 (Bankr. D. Conn. 1985); *Evans v. Harry Robinson Pontiac-Buick, Inc.*, 983 S.W.2d 946 (Ark. 1999); *Gamer v. duPont Glore Forgan, Inc.*, 135 Cal. Rptr. 230 (Cal. Ct. App. 1976); *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So. 2d 507 (Fla. 1981); *Sheer Asset Mgmt. Partners v. Lauro Thin Films, Inc.*, 731 A.2d 708 (R.I. 1999).

ment in Pennsylvania on a loan contract by a Pennsylvania corporation was used as a way to evade New York usury laws, New York being the state where the loan was made.¹²⁹ The interest rates on the loan were usurious in both Pennsylvania and New York, but the New York legislation was more restrictive.¹³⁰ The Court sustained the Pennsylvania choice of law provision holding that there were sufficient contacts in Pennsylvania to conclude that the parties were not simply trying to evade usury laws of New York by choosing Pennsylvania law.¹³¹ The Court noted a qualification to its rule: "the parties must act in good faith, and that the form of the transaction must not 'disguise its real character.'"¹³² But this qualification was not to be read too broadly. As the Court said:

The effect of the qualification is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties' entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject.¹³³

Generally, the usury decisions that do not enforce a contractual choice of law provision deal with an individual borrower and a corporation, as opposed to two corporations.¹³⁴ The dominant rule in the cases is that a contractual choice of law provision will not be enforced where the chosen law has no reasonable relation to the transaction or where it violates a fundamental public policy of the otherwise applicable law.¹³⁵ The existence of contacts and whether the unchosen law is "fundamental policy" are often connected. In *North American Bank, Ltd. v. Schulman*,¹³⁶ the choice of Israeli law was not enforced because Israel lacked sufficient contacts with the transaction and the interest rates violated fundamental public policy of New York, the state where the agreement took place.¹³⁷

129. See *Seeman*, 274 U.S. at 404.

130. See *id.*

131. See *id.* at 409.

132. *Id.* at 408.

133. *Id.*

134. See *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So. 2d 507 (Fla. 1981).

135. See *e.g.*, *Turner v. Aldens, Inc.*, 433 A.2d 439 (N.J. Super. Ct. App. Div. 1981) (applying of Illinois choice of law provision would violate public policy of New Jersey where intent of New Jersey RISA statute is to offer New Jersey consumers the protection of RISA no matter from where the seller deals); *Trinidad Indus. Bank v. Romero*, 466 P.2d 568 (N.M. 1970) (holding that Colorado interest rates shocked the conscience of the court and contravened New Mexico public policy with regard to usury); *N. Am. Bank, Ltd. v. Schulman*, 474 N.Y.S.2d 383 (Westchester County Ct. 1984) (stating that Israel choice of law provision not enforced where policy underlying New York usury laws is fundamental and New York had the most substantial relation to loan agreement); *South Dakota ex rel. Meierhenry v. Spiegel, Inc.*, 277 N.W.2d 298 (S.D. 1979) ("permitting governing law agreement to control . . . would allow a foreign corporation the privilege of conducting its business in South Dakota upon more favorable conditions than are afforded to South Dakota corporations and would provide an effective means of circumventing legislation designed to protect citizens of South Dakota"); *General Elec. Co. v. M. Keyser*, 275 S.E.2d 289 (W. Va. 1981) (refusing to enforce New York choice of law provision because there were not enough contacts with transaction and it violated public policy of West Virginia).

136. 474 N.Y.S.2d 383 (Westchester County Ct. 1984).

137. See *id.* at 383.

In that case, plaintiff was an Israeli bank with a branch in New York, and the defendants were residents of Westchester County.¹³⁸ The interest rates on the loan were usurious in New York, but not in Israel where usury is not regulated.¹³⁹ The court found New York cases holding that usury laws are a declaration of that state's public policy, even supervening public policy.¹⁴⁰

The court in *Schulman* further held that, even if the court found no violation of fundamental public policy, it would still strike down the choice of law provision because Israel did not have a substantial relationship with the loan agreement, stating that New York, and not Israel, bears the greatest "governmental interest," or most "substantial relationship" to this loan agreement.¹⁴¹

The majority of courts dealing with usury and contractual choice of law provisions tend to enforce the choice of law, relying mainly on a finding that there is a sufficient connection between the law chosen and the transaction.¹⁴² "Sufficiency" is, of course, a litigated question. In *Continental Mortgage Investors v. Sailboat Key, Inc.*,¹⁴³ for example, the Supreme Court of Florida enforced the choice of Massachusetts law against a Florida borrower, where the interest charged was prohibited in Florida but not in Massachusetts. The court held that the plaintiff, a corporation organized under the laws of Massachusetts with its only office in Massachusetts, had a sufficient connection with Massachusetts to support a choice of Massachusetts law.¹⁴⁴ The court said that so long as the jurisdiction chosen has a "normal relation" with the transaction, Florida courts will enforce a choice of law provision.¹⁴⁵

138. *See id.* at 384.

139. *See id.* at 387.

140. *See id.* at 386.

141. *Id.* at 387.

142. *See, e.g.,* Seeman v. Philadelphia Warehouse, 274 U.S. 403 (1927); Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Dev. Co., 642 F.2d 744 (5th Cir. 1981); Jett Racing & Sales, Inc. v. Transamerica Commercial Fin. Corp., 892 F. Supp. 161 (S.D. Tex. 1995); Superior Funding Corp. v. Big Apple Capital Corp., 738 F. Supp. 1468 (S.D.N.Y. 1990); *In re* United States Mach. Tools, Inc. v. First Union Commercial Corp., 59 B.R. 470 (Bankr. D. Conn. 1985); Evans v. Harry Robinson Pontiac-Buick, Inc., 983 S.W.2d 946 (Ark. 1999); Gamer v. duPont Glove Forgan, Inc., 135 Cal. Rptr. 230 (Cal. Ct. App. 1976); Continental Mortgage Investors v. Sailboat Key, Inc., 395 So.2d 507 (Fla. 1981); Sheer Asset Mgmt. Partners v. Lauro Thin Films, Inc., 731 A.2d 708 (R.I. 1999). One also sees reference made to the low standing of usury as a defense in lending settings. *See* Walter E. Heller & Co. v. Chopp-Wincraft Printing Specialties, Inc., 587 F. Supp. 557, 560 (S.D.N.Y. 1982) (stating that Illinois law does not violate public policy of New York since usury is not a favored defense, particularly in the circumstance where a corporation rather than a helpless consumer is involved).

143. 395 So. 2d 507 (Fla. 1981).

144. *See id.* at 508.

145. *See id.* at 510. In discussing the public policy determination, the Florida court in *Burroughs Corp. v. Suntogs of Miami, Inc.*, 472 So.2d 1166, 1168 (Fla. 1985), suggested that courts look to see (1) is the statute riddled with exceptions; (2) is the statute frequently amended to demonstrate flexibility of the public policy; (3) is it fundamental to the legal system; (4) does the policy have a limited effect upon a contract insofar as it does not invalidate the contract, but merely allows the defendant to set up an affirmative defense.

Courts interpreting the UCC in usury settings hold that parties are free to avoid usury laws of some interested jurisdiction so long as they do not evade such laws “at will, capriciously or fraudulently, by selecting the law of a jurisdiction without a normal relation to the transaction.”¹⁴⁶ The requirement that the parties or their contract must bear “some relation” to the chosen state “attempts to achieve uniformity in multistate transactions through the principle of party autonomy.”¹⁴⁷

The “relatedness” analysis is so dominant in usury cases that some courts do not even discuss public policy in usury cases, but look only to whether there are substantial relations to the chosen state.¹⁴⁸ The Restatement (Second) of Conflicts of Law would reject the choice of an unrelated state in a usury case¹⁴⁹ but, of course, this is a restatement of the current law, not the law of the proposals. Once again, the current cases beg the question of how courts will analyze usury cases if lenders are authorized to select the law of unrelated jurisdictions to control their lending contracts. The difficulties that the proposals bring to this question will be explored later.¹⁵⁰

V. PART 4: PROPOSED PARTY AUTONOMY AND IMPLICATIONS FOR STATE LAWMAKING

A. THE PROPOSED RULES AND THEIR LIMITS

Against the backdrop of current law, we now return to the proposals. For convenience, UCITA’s provision, quoted earlier,¹⁵¹ reads:

SECTION 109. CHOICE OF LAW.

(a) The parties in their agreement may choose the applicable law. However, the choice is not enforceable in a consumer contract to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply under subsections (b) and (c) in the absence of the agreement.

Article 1’s provision is far more elaborate. It reads, in pertinent part: SECTION 1-301. TERRITORIAL APPLICABILITY; PARTIES’ POWER TO CHOOSE APPLICABLE LAW.

(a) Except as provided in this section, an agreement by parties to a transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State or country is effective, whether or not the transaction bears a relation to the State or country designated. In the absence of such an effective agreement, their rights and obligations are determined, except as provided

146. *Woods-Tucker*, 642 F.2d at 751.

147. *Admiral Ins. Co. v. Brinkcraft Dev., Ltd.*, 921 F.2d 591, 593 (5th Cir. 1991).

148. This focus on the connection of chosen state to the loan agreement predated both the UCC and the second restatement, instead it stems from the Supreme Court’s decision in *Seeman*. See *Superior Funding Corp. v. Big Apple Capital Corp.*, 738 F. Supp. 1468 (S.D.N.Y. 1990); *Sheer Asset Mgmt. Partners v. Lauro Thin Films, Inc.*, 731 A.2d 708 (R.I. 1999).

149. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 cmt. e (1997).

150. See *infra* Part V.E.

151. See *supra* note 21, discussing U.C.I.T.A. § 109 (2000).

in subsection (e), by the law that would be selected by application of this State's conflict of laws principles.

(b) If one of the parties to an agreement referred to in subsection (a) is a consumer, the agreement is not effective unless the State or country designated is either:

- (1) the State or country in which the consumer habitually resides at the time the transaction becomes enforceable or within 30 days thereafter; or
- (2) the State or country in which the goods, services, or other consideration flowing to the consumer are to be received or are used by the consumer or a person designated by the consumer.¹⁵²

(c) An agreement referred to in subsection (a) is not effective to the extent that the law of the State or country designated is contrary to a fundamental policy of the State or country whose law would otherwise govern. In addition, a court may decline to enforce an agreement referred to in subsection (a) to the extent that the law of the State or country designated is contrary to a fundamental policy of this State.

(d) If the transaction does not bear a reasonable relation to any country other than the United States, an agreement referred to in subsection (a) is effective only if it designates the law of a State.

(e) To the extent that the [Uniform Commercial Code] governs a transaction, where one of the following provisions of the [Uniform Commerce Code] specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of law rules) so specified:

- (1) Section 2A-xxx [subject to the drafting of Article 2A]
- (2) Section 4-102
- (3) Section 4A-507
- (4) Section 5-116
- (5) Section 6-103
- (6) Section 8-110
- (7) Sections 9-301 through 9-307

(f) For purposes of this section, a "consumer" is an individual who enters into a transaction primarily for personal, family, or household purposes. [Personal, family, or household purposes do not include

152. This version of the consumer exception was developed at a Drafting Committee meeting held November 10, 11, 2000. The text which it replaced read as follows:

(b) If one of the parties to an agreement referred to in subsection (a) is a consumer, the agreement is not effective unless the State or country designated is either:

- (1) the State or country in which the consumer habitually resides at the time the transaction becomes enforceable or within 30 days thereafter; or
- (2) the State or country in which the goods, services, or other consideration flowing to the consumer are to be received or are used by the consumer or a person designated by the consumer.

U.C.C. § 1-301 (Proposed Draft March 2000). If an "ineffective" agreement were made under this provision, the applicable law would be the law which ordinary conflict of laws principles would supply. Often that would be the vendor's location; thus consumers under this provision would not in all cases receive the protection of consumer provisions of their habitual residences.

professional or commercial purposes, including agriculture, business management, and investment management other than management of the individual's personal or family investments.]¹⁵³

There are key features common to both statutes. The most important, of course, is the authorization both statutes give for the parties to choose "unrelated" law to govern their contract. Both proposals discuss this change within their Reporter's Notes and Official Comments. These explanations may tend to understate the dramatic change the proposals represent.¹⁵⁴ In addition, both statutes address consumer issues, albeit differently. Further, the Article 1 provision makes explicit reference to the fundamental policy exception whereas UCITA makes no explicit reference but probably recognizes it implicitly. Finally, the Article 1 proposal precludes the choice of foreign law in an entirely domestic United States transaction,¹⁵⁵ UCITA's proposal is not so limited.

In discussing the proposals in the context of current domestic and international law, we will begin by considering the exceptions the proposals make in permitting a forum court to defer to some of the "mandatory rules" of another jurisdiction, and the other statutory exceptions to the broad power granted the parties to choose law. Having discussed the limitations, we will then be in a position to understand the breadth of these provisions and the impact they may have on the state lawmaking process in the United States.

153. This subsection may be replaced by a general definition of "consumer" in Section 1-201. See U.C.C. § 1-201(b)(11a).

U.C.C. § 1-301 (ALI Council Draft, Nov. 2000). This provision has been in considerable flux. Its organization changed completely from the November 2000 Draft to a December 2000 Council Draft. That Draft has not been made available to the public as of this writing and, as a result, this article has used the last publicly available draft, November 2000. There is, of course, no guarantee that what is finally brought forward will resemble this text. Given a targeted approval date of Summer 2001, one wonders, as a matter of process, whether it is not too late for the Drafting Committee to be making substantial changes to the Proposal. See also *supra* note 12.

154. As should be clear, both proposed statutes make a sharp break with the past inasmuch as both are very broad and will cover many millions of daily transactions, large and small. The Reporter's Note to the Article 1 provision has this to say about current law:

b. Contractual choice of law. This section allows parties broad autonomy, with several important limitations, to select the law governing their transaction, even if the transaction does not bear a relation to the State or country whose law is selected. This recognition of party autonomy with respect to governing law has already been established in several Articles of the Uniform Commercial Code (see UCC Sections 4A-507, 5-116, and 8-110) and is consistent with international norms. See, e.g., Inter-American Convention on the Law Applicable to International Contracts, Article 7 (Mexico City 1994); Convention on the Law Applicable to Contracts for the International Sale of Goods, Article 7(1) (The Hague 1986); EC Convention on the Law Applicable to Contractual Obligations, Article 3(1) (Rome 1980).

U.C.C. § 1-301, Reporter's Note a (Proposed Draft, Nov. 2000).

155. See U.C.C. § 1-301(d); Reporter's Note b & d (Proposed Draft, Nov. 2000).

B. THE MANDATORY CONSUMER LAW EXCEPTIONS

Both provisions address consumer transactions and appear to defer to mandatory consumer law. Their operation is, however, far more complicated than one might expect.

A useful reference point for these provisions is the Rome Convention, the treaty to which the Reporter's Notes to the UCC provision have referred,¹⁵⁶ which operates in a direct, uncomplicated fashion. The Rome Convention gives greater deference to the judgments of consumers' legislatures about consumer protection than does the UCITA proposal. With its redraft in November, 2000, the Article 1 proposal now tracks the protection offered by the Rome Convention, a change in the law in the United States in favor of consumers. Article 5, paragraph 2 of the Rome Convention provides in part: "[A] choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence . . ."¹⁵⁷ The provision obviously gives effect to consumer laws that a legislature enacts for the benefit of those who "habitually reside" there, their residents.

UCITA's protection is different and less deferential to the mandatory law of the consumers' state. The mandatory consumer rules that cannot be avoided by a UCITA choice of law clause are not necessarily those of the consumer's residence but, rather, of "the jurisdiction whose law would apply under subsections (b) and (c) in the absence of the agreement."¹⁵⁸ Those latter provisions specify the consumer's jurisdiction if the "contract . . . requires delivery of a copy on a tangible medium"¹⁵⁹ and the vendor's jurisdiction if it is a "contract providing for electronic delivery of a copy."¹⁶⁰ While the Rome Convention's approach might be criticized as exposing Internet vendors to the consumer protection provisions of any jurisdiction in which they sell,¹⁶¹ UCITA's approach may encourage electronic delivery of software, and invite those who do business that way to locate themselves in jurisdictions providing little or no consumer protection—to become modern-day Liberian tankers.¹⁶²

156. See U.C.C. § 1-301 Reporter's Note b (Proposed Draft, Nov. 2000). UCITA's Official Comments have deleted all references to the Rome Convention.

157. Rome Convention, *supra* note 14, art. 5(2).

158. U.C.I.T.A., § 109(a) (2000).

159. U.C.I.T.A., § 109(b)(2).

160. U.C.I.T.A., § 109(b)(1). Because software is increasingly delivered electronically, one would expect the proportion of cases in which this provision operates to increase—perhaps exponentially—over time.

161. See Jane K. Winn & Michael R. Pullen, *Dispatches from the Front: Recent Skirmishes Along the Frontiers of Electronic Contracting Law*, 55 BUS. LAW. 455, 481 (1999).

162. Cf. Bruce H. Kobayashi & Larry E. Ribstein, *Uniformity, Choice of Law And Software Sales*, 8 GEO. MASON L. REV. 261, 301 (1999). In light of the provision, the U.C.I.T.A.'s Comment about the consumer provision is mysterious. Comment 2 to U.C.I.T.A. § 109 states, in part: "The fundamental policy of freedom of contract should not permit overriding the consumer rule if a state, having addressed the cost and benefits

Since its redraft in November 2000, the Article 1 provision appears to offer U.S. consumers the protection the Rome Convention gives consumers in the European Union. If the new provision survives further redrafting efforts, it will change the domestic conflict of laws rule in UCC consumer contracts in favor of consumers. It may do so at the expense of some commercial certainty.

The new draft provision provides that a choice of law in a consumer contract cannot override a "rule of law" that is "protective of consumers" that may not be varied by contract. The effect is to give consumers anything in either case law or statutes that is arguably "protective of consumers" regardless of the law chosen in the contract.¹⁶³ This is clearly a change in the rules as articulated in current law; whether it is a change *in fact* in the law is an empirical question.

Currently, the law will permit a vendor to select the law of the vendor's jurisdiction for all of its domestic contracts¹⁶⁴ and, if it does so, it will get *all* of the selected law except that which violates the "fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue."¹⁶⁵ As an empirical matter, it is unclear whether consumer vendors choosing their own law believe they are overriding any consumer provisions in consumers' jurisdictions or, if they think that they are overriding some of the consumer provisions, the

to all parties, determines that the consumer rule is not waivable by contract." U.C.I.T.A. § 109 cmt. 2(b) (1999).

One could easily agree with this statement if the state referred to were the consumer's own state—it would then require deference to the consumer's state law if that law were not waivable by contract. In the context of contracts involving electronic delivery, particularly from non-U.S. locations, however, the statement may be incoherent or misleading. As stated in the text, the mandatory rules will be those of the *vendor's* location if the vendor delivers electronically. Texas lawmakers, weighing the costs and benefits to all parties in Texas, will take very little comfort from another court's deference to the mandatory consumer law of Liberia when the Liberian software vendor makes a contract with the Texas consumer.

163. The earlier drafts of this exception made the choice of law "ineffective" in many consumer contracts. If a choice was "ineffective," the law of the contract would be the law chosen by the enacting jurisdiction's choice of law principles, proposed UCC § 1-301(a), which (apart from the choice of law) would likely be the jurisdiction of the vendor as the jurisdiction with the most contacts with the contract.

164. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) and UCC § 1-105 both permit vendors to choose from those jurisdictions with a relationship with the parties or transaction. The choice of the vendor's own state usually meets either test. *See* Valley Juice Ltd., Inc. v. Evian Waters of France, Inc., 87 F.3d 604, 608 (2d Cir. 1996) (stating under Massachusetts conflicts rules that a choice of the law of a party's state of incorporation meets the reasonable relation requirement of RESTATEMENT (SECOND) CONFLICT OF LAWS § 187); A.G. Edwards & Sons, Inc. v. Smith, 736 F. Supp. 1030, 1036 (D. Ariz. 1989) (following Arizona choice of law principles the court upheld the selection of Missouri law because the plaintiff having its primary place of business in Missouri made the state reasonably related to the transaction); *see also* Elgar v. Elgar, 679 A.2d 937 (Conn. 1996) (noting that one of the parties being a New York resident made the selection of that state's law in an antenuptial agreement reasonably related to the contract); Bakhsh v. JACRRC Enters., Inc., 895 P.2d 746, 747 (Okla. Ct. App. 1995) (selecting Texas as the exclusive forum for any dispute arising out of a franchise agreement was "fair and reasonable" because the franchiser had its home office in Texas and was incorporated in Texas).

165. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1989).

extent to which they believe that non-selected consumer provisions will be overridden. To the extent consumer vendors believe that a choice of law provides *any* override of other states' consumer protection provisions, the proposed change could trigger opposition from those business interests.¹⁶⁶

Whatever effect this iteration of the proposal has on applicable consumer law, one can imagine it being challenged as generating a great deal of potential commercial uncertainty. "Rule of law" and "protective of consumers" are both undefined and subject to litigation. Moreover, how will the protective rules of law operate within the context of the law chosen in the contract? Do consumers get the benefit of consumer protection provisions of the chosen jurisdiction *and* of their own habitual residence? If this is so, there might be a disincentive to choosing law in consumer contracts because by so choosing, vendors may give consumers cumulative protection that is unavailable otherwise. If the provision does not dictate a "stacking" of consumer provisions, which ones control? Presumably the "more protective" ones, but how would a court determine, for example, which line of unconscionability cases was "more protective" if the issue were contested? If the trial court applied the wrong line of cases, would that present an appealable issue under the Proposal?

The proposal, as redrafted, is clearly more protective of consumers than is current law which does not speak directly to the consumer/non-consumer dichotomy at all. Its effect may be to reduce the instances in which consumer vendors attempt to specify the applicable law in their form contracts. But one might imagine that its survival could be in doubt. It could garner opposition from consumer vendors and, despite its protective thrust, might not generate support among consumer representatives because the provision could easily be deleted in the enactment process. The fate of the drafters' nod in the direction of consumer protection remains to be seen.¹⁶⁷

C. THE FUNDAMENTAL POLICY EXCEPTIONS

As developed earlier,¹⁶⁸ conflict of laws rules typically permit the fo-

166. One belief that has been articulated is that "consumer vendors know they are stuck with consumer provisions of the states in which they sell, regardless of what is in the contract." If this is true, the revised provision merely articulates the law as vendors believe it will be applied and should trigger no opposition.

167. As will be developed later, if the pro-consumer change in the proposal is designed to garner consumer support for the entire proposal, the effort may be misguided. Because the applicable rule depends on what the forum's legislature enacts, this consumer provision—like other consumer provisions in the UCC—is subject to non-uniform change or even deletion by an enacting legislature. What is different about this provision is that it is a conflict of laws rule that will apply to all consumers whose cases are litigated in an enacting jurisdiction, whether they are citizens of the jurisdiction or not. In that sense, a non-uniform amendment has extra-territorial effect on consumers in other states which does not exist in the case of other non-uniform amendments to the UCC. No consumer can rely on the provision's protective features unless the consumer protection provision is enacted in *all* jurisdictions, something that the UCC's sponsoring organizations cannot guarantee.

168. See *supra* Part IV.B.1.

rum court to defer to those mandatory rules which qualify as the “fundamental policy” of an unchosen state or country. The 1980 Rome Convention, for example, permits deference to some of these mandatory rules if they come either from the “country with which the situation has a close connection,” or the forum.¹⁶⁹

UCITA’s deference to the “fundamental policy” of an unchosen jurisdiction (whether it is the jurisdiction that ordinarily would govern, or the forum) does not appear at all in the black letter of its choice of law provision. Official Comments to UCITA’s choice of law provision suggest only the possibility that the forum might, in an appropriate case, embrace its own public policy.¹⁷⁰ “Fundamental public policy” might be implemented through UCITA Section 105,¹⁷¹ but the drafters intend the breadth of the exception to be narrow.¹⁷²

169. Article 7 of the Rome Convention is permissive on the forum’s recognition of unchosen mandatory rules. Rome Convention, *supra* note 14, art. 7.

170. See U.C.I.T.A. § 109 (2000).

171. U.C.I.T.A. § 105(b) provides:

(b) If a term of a contract violates a fundamental public policy, the court may refuse to enforce the contract, enforce the remainder of the contract without the impermissible term, or limit the application of the impermissible term so as to avoid a result contrary to public policy, in each case to the extent that the interest in enforcement is clearly outweighed by a public policy against enforcement of the term.

U.C.I.T.A. § 105(b) (2000).

172. U.C.I.T.A. §105 comment 3 underscores the intended narrow scope of the public policy exception when weighed against other policies:

Public Policy Invalidation. Contract terms may be unenforceable because of federal preemption under subsection (a) of this section or because they are unconscionable under section 111. In addition, subsection (b) sets out the legal principle that, in certain circumstances, terms may be unenforceable because they violate a fundamental public policy that clearly overrides the policy favoring enforcement of private transactions as between the parties. The principle that courts may invalidate a term of a contract on public policy grounds is recognized at common law and in the RESTATEMENT (SECOND) OF CONTRACTS § 178. See, e.g., *Livingston v. Tapscott*, 585 So. 2d 839 (Ala. 1991); *Occidental Sav. & Loan Ass’n v. Venco Partnership*, 293 N.W.2d 843 (Neb. 1980).

Fundamental state policies are most commonly stated by the legislature. In the absence of a legislative declaration of a particular policy, courts should be reluctant to override a contract term. In evaluating a claim that a term violates fundamental public policy, courts should consider various factors, including the extent to which enforcement or invalidation of the term will adversely affect the interests of each party to the transaction or the public, the interest in protecting expectations arising from the contract, the purpose of the challenged term, the extent to which enforcement or invalidation will adversely affect other fundamental public interests, the strength and consistency of judicial decisions applying similar policies in similar contexts, the nature of any express legislative or regulatory policies, and the values of certainty of enforcement and uniformity in interpreting contractual provisions. Where parties have negotiated terms in their agreement, courts should be even more reluctant to set aside terms of the agreement. In applying these factors, courts should consider the position taken in the RESTATEMENT (SECOND) OF CONTRACTS § 178, cmt. b (“Enforcement will be denied only if the factors that argue against enforcement clearly outweigh the law’s traditional interest in protecting the expectations of the parties, its abhorrence of any unjust enrichment, and any public interest in enforcement of the particular

Proposed UCC Section 1-301, on the other hand, is explicit in authorizing a court to recognize the “fundamental policy” of “the State or country whose law would otherwise govern.”¹⁷³ By excluding “public” from the formulation, the provision may be slightly broader than that found in UCITA but, as the Reporter’s Notes to the Section make clear, the forum court is to give deference only to very few of the unchosen jurisdiction’s mandatory rules. Those Notes state, in part:

Under the fundamental policy exception, a court should not refrain from applying the chosen law merely because this would lead to a result different than would be obtained under the local law of the State or country whose law would otherwise govern. Rather, the difference must be contrary to a public policy that is so substantial that it would not only cause a court to forego application of choice of law rules that would otherwise have pointed to the state or country that has that law but also justify overriding the concerns for certainty and predictability underlying modern commercial law as well as concerns for judicial economy generally. A fundamental policy will rarely be found in a requirement, such as a statute of frauds, that relates to formalities, or in general rules of contract law, such as those concerned with the need for consideration. On the other hand, a rule that makes the selling of body parts or human embryos illegal may reflect such a policy.¹⁷⁴

The UCC Article 1 proposal has equivocated on the question whether the forum court should recognize as “fundamental policy” any of the forum’s own mandatory rules. The November 2000 Draft permits forum courts to embrace their own mandatory rules.¹⁷⁵

term.”). In light of the national and international integration of the digital economy, courts should be reluctant to invalidate terms based on purely local policies. . . . A term or contract that results from an agreement between commercial parties should be presumed to be valid and a heavy burden of proof should be imposed on the party seeking to escape the terms of the agreement under subsection (b). This Act and general contract law also recognize the commercial necessity of enforcing standard-form agreements mass market transactions. [sic.] The terms of such forms may not be available to the licensee prior to the payment of the price and typically are not subject to affirmative negotiations. In such circumstances, courts must be more vigilant in assuring that limitations on use of the informational subject matter of the license are not invalid under fundamental public policy With reference to contract law policies that regulate the bargain of the parties, this Act makes express public policy choices. Contract law issues such as contract formation, creation and disclaimer of warranties, measuring and limiting damages, basic contractual obligations, contractual background rules, the effect of contractual choice, risk of loss, and the like, including the right of parties to alter the effect of the terms of this Act by their agreement should not be invalidated under subsection (b) of this section. This subsection deals with policies that implicate the broader public interest and the balance between enforcing private transactions and the need to protect the public domain of information.

U.C.I.T.A. § 105 cmt. 3 (2000), available at <http://www.law.upenn.edu/bill/ulc>.

173. U.C.C. § 1-301, Reporter’s Note c (Proposed Draft, Nov. 2000).

174. *Id.*

175. U.C.C. § 1-301(c) (November 2000 Draft). This was added to the November 2000 Draft but, at its November 2000 meeting, the drafting committee decided to relegate the

It is very difficult to predict how the fundamental policy exception will operate in practice under either the UCITA or UCC proposals. As the discussion of cases under current choice of law rules should have made clear,¹⁷⁶ the judicial analysis of the "fundamental policy" exception rests substantially on a comparison of the connections that the chosen and unchosen state have to the controversy, independently of the parties' choice. This, of course, is a reflection of the way we have come to analyze conflicts of law in the United States: an analysis that, at its base, compares the contacts that contending states have with the underlying controversy.

The current relatedness requirement and judicial analysis built on it make it hard to predict what a forum court will do with a case where the chosen state has no contact with the controversy (other than the fact that it was chosen), and an unchosen state has obvious contacts with the controversy. The Restatement (Second) of Conflicts of Laws is ultimately based on assumptions that the chosen law will be related to the parties or their contract and thus may it not be useful for guidance under the proposals.¹⁷⁷ If applied as intended by their drafters, the effect of both the UCITA and UCC provisions would be to reject most of the mandatory rules that would ordinarily control the parties and their controversy, simply because the parties chose different law.¹⁷⁸ Whether the gains from

idea to a comment, and this exception appeared in that form in the December 2000 ALI Council Draft. At an ABA meeting on March 28, 2000, the Article 1 Reporter stated that this exception was in the black letter. If the provision is in the black letter, it creates another challenge to a contractual choice of law clause thereby, arguably, creating slightly more commercial uncertainty. If it is not in the black letter, the provision is unrealistic in failing to recognize this most fundamental challenge to a contractual choice of law clause. It is unknown at this point which version will be before the ALI and NCCUSL.

176. See discussion *supra* in Part IV.B.

177. The most obvious example may be section 203 of the Restatement which would preclude a choice of unrelated law to escape usury restrictions of a state whose law would otherwise govern. If lending contracts are subject to the UCC (some large part would clearly be covered if the lender took a security interest under UCC Article 9), the question under the Article 1 proposal would be whether usury restrictions resemble the regulatory rules referred to in the Reporter's Note. If usury restrictions more readily resemble ordinary mandatory rules governing contracts, then they will not be "fundamental policy" and the intent of the Article 1 proposal is to reverse the case law captured in Section 203 of the Restatement.

178. The effect is, of course, to undercut the lawmaking process of unchosen states in discrete situations but, as will be suggested later, it undercuts lawmaking generally, and the effect extends even to the "private legislative" process of the NCCUSL and ALI that precedes enactment of the UCC. The NCCUSL and ALI are likened to "private legislatures" in Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994).

In support of a narrow rendition of "fundamental policy," Reporters' Note f quotes extensively from Judge Cardozo's opinion in *Loucks v. Standard Oil Co. of New York*, 120 N.E. 198 (1918). The quotation talks about the diversity in state policy and the importance of deference to the law of a different state. *Loucks* supports a broad rendition of public policy in the context of the proposal, not a narrow one. Judge Cardozo, contrary to the implications of the use of his words, would not be a supporter of this proposal.

Loucks involved a fatal accident that occurred in Massachusetts. The estate's administrators brought suit in New York, under the Massachusetts wrongful death statute, a statute that had no counterpart in New York. The defendant sought dismissal on the grounds that the Massachusetts statute violated New York's policy against penal statutes. The question was whether the Massachusetts statute was to have force in the New York litigation or

the proposals are worth their costs is the question state legislatures and other policy makers will have to decide. The justifications for the changes will be considered below.

D. OTHER LIMITATIONS ON PARTY POWER TO CHOOSE:
INTERNATIONAL V. DOMESTIC V. INTRASTATE CONTRACTS

The idea that parties should have autonomy to choose the law of “unrelated” jurisdictions found its first legislative expression in the Rome Convention and, as noted above, the Rome Convention is cited as relevant policy on contractual choice of law. The Rome Convention is a treaty among sovereign nations and is, in that sense, an expression designed to deal with international business transactions. Given the diversity in the laws of the sovereign nations throughout the world and the concomitant difficulty of learning another party’s law in many international transactions, it may be sensible to permit the parties to choose a third state’s law, one that may be well-known, easy to decipher, or “neutral.”¹⁷⁹ Once a transaction is entirely “domestic,” however, the reason for permitting such an unlimited choice is no longer present.

The Rome Convention sharply distinguishes between international and domestic transactions. In domestic transactions within member states of the European Union, the Convention is far more deferential to the ordinarily-applicable mandatory rules. Article 3, Paragraph 3 provides:

The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by

whether, to the contrary, the plaintiff’s suit was to be dismissed as in violative of New York public policy. Obviously, the question in *Loucks* was whether the New York forum ought to defer to the Massachusetts law, the law that had a substantial connection to the controversy.

Loucks thus involved—and stands for—the forum’s respect for, or deference to, the policy of the state whose law had a strong connection with the dispute. Judge Cardozo, appropriately, opined that the forum’s “fundamental policy” ought to be read narrowly in deference to the sovereignty of the state whose interest in the situation was paramount. In that sense it follows the spirit of the Constitution’s Full Faith and Credit Clause requiring that “Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.”

In contrast with the facts of *Loucks*, the Article 1 proposal directs the forum to apply a chosen law which has (by hypothesis) *no* connection with the controversy *instead of* a law that ordinarily would apply. And, in constructing a narrow “fundamental policy” exception, the proposal directs courts to *disregard* most of the mandatory rules of the state whose law would otherwise control. In that sense, the proposal is inconsistent both with *Loucks* and with the spirit of the Full Faith and Credit Clause. Because *Loucks* is a case standing for judicial deference to the sovereign interests and public policy of a state with a strong interest in the dispute, in the context of the proposal it actually supports either complete deference to the law of a state whose law would otherwise govern or a very broad public policy exception, not a narrow one.

179. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 14-15 (1972); discussed briefly *supra* in the text accompanying note 69.

contract, hereinafter called 'mandatory rules.'¹⁸⁰

In addition, in Article 19, the Rome Convention does not require treaty states with a federal government to permit their citizens to choose law in their purely interstate transactions.¹⁸¹ The UCC and UCITA proposals are considerably more liberal than the Rome Convention in permitting citizens of the United States to choose unrelated law in purely domestic (US) transactions.

The only limit in either proposal that speaks to the international/domestic classifications articulated by the Rome Convention is found in the UCC Article 1 proposal. In an entirely domestic (US) transaction, it forbids the parties from choosing foreign law.¹⁸² No such limit appears in UCITA; to the contrary, its Official Comments make clear that parties can choose foreign law in any domestic, non-consumer transaction.¹⁸³ Both provisions thus permit parties to contracts within their scope to choose "unrelated law" (and, in the case of UCITA, unrelated non-US law) even when the parties and all relevant contacts are entirely within one state. To illustrate the distinction between the two provisions, the Article 1 proposal forbids two Pennsylvania citizens from choosing the unrelated law of Kenya for their wholly intrastate transaction, but they can choose the unrelated law of Arkansas to govern their Pennsylvania deal. Under UCITA, the law of Kenya (or any place else in the world) would be an effective choice by the Pennsylvanians unless it were a con-

180. Rome Convention, *supra* note 14, art. 3, para. 3.

181. Paragraph 19(2) provides: "A State within which different territorial units have their own rules of law in respect of contractual obligations shall not be bound to apply this Convention to conflicts between the laws of such units." Rome Convention, *supra* note 14, art. 19(2).

Similarly, Article 23 of the Inter-American Convention on the Law Applicable to international Contracts provides: "A State within which different territorial units have their own systems of law in regard to matters covered by this Convention shall not be obliged to apply this Convention to conflicts between the legal systems in force in such units." Inter-American Convention on the Law Applicable to International Contracts 1994, art. e 23 (Mexico City).

182. See U.C.C. § 1-301(d) (Proposed Draft, Nov. 2000); see also *supra* note 111.

183. UCITA § 109(c) provides:

In cases governed by subsection (b), if the jurisdiction whose law governs is outside the United States, the law of that jurisdiction governs only if it provides substantially similar protections and rights to a party not located in that jurisdiction as are provided under this [Act]. Otherwise, the law of the jurisdiction in the United States which has the most significant relationship to the transaction governs.

U.C.I.T.A. § 109(c) (2000). Subsection (b), referred to in § 109(e), specifies which law controls if the parties do *not* agree as to applicable law. As Comment 5 points out, "Subsection (c) does not apply if an enforceable contract term designates what law applies." U.C.I.T.A. § 109 cmt. 5 (2000). At the extreme, this means that, in an entirely *intrastate* U.S. transaction, the parties can choose the law of a foreign country that *does not* provide "similar protections and rights" as UCITA. While this is unlikely in negotiated transactions, it is clearly possible where the vendor chooses the law and the vendee "clicks to agree" in a modest sized transaction. The difficulties with both proposals in the adhesion contract setting are discussed *infra* in Part IV.F.

sumer transaction.¹⁸⁴

E. THE PROBLEMATIC SCOPE OF THE PROVISIONS

1. Overbreadth

Neither provision applies to all contracts. Each, as indicated above, has a carve-out for consumer transactions. Both of the proposed rules define consumer transactions similarly¹⁸⁵ and in the way typically found elsewhere in the Uniform Commercial Code.¹⁸⁶ By differentiating the mandatory rules governing “consumer contracts,” the drafters have typically identified an important group of mandatory rules, which attempt to regulate contracts between sophisticated “repeat players” and unsophisticated “one-shotters.”¹⁸⁷

184. Even if it was a consumer transaction, if the UCITA vendor were “located” in Kenya and delivered software electronically, it could choose Kenyan law in its transaction with a Pennsylvania consumer.

185. UCITA’s definition is:

“Consumer” means an individual who is a licensee of information or informational rights that the individual at the time of contracting intended to be used primarily for personal, family, or household purposes. The term does not include an individual who is a licensee primarily for professional, or commercial purposes, including agriculture, business management, and investment management other than management of the individual’s personal or family investments.

U.C.I.T.A. § 102(15) (2000).

The proposed UCC definition is very similar:

For purposes of this section, a “consumer” is an individual who enters into a transaction primarily for personal, family, or household purposes. Personal, family, or household purposes do not include professional or commercial purposes, including agriculture, business management, and investment management other than management of the individual’s personal or family investments.

U.C.C. § 1-301(f) (Proposed Draft, Nov. 2000).

186. See, e.g., U.C.C. § 2A-103 (Proposed Draft, Nov. 2000) which uses the following definition for a consumer lease:

(e) “Consumer lease” means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee, except an organization, who is an individual and who takes under the lease primarily for a personal, family, or household purpose, if the total payments to be made under the lease contract, excluding payments for options to renew or buy, do not exceed \$25,000.

U.C.C. § 2A-103 (Proposed Draft, Nov. 2000) (The \$25,000 figure is just a recommendation. The comment instructs states to choose whatever amount they feel is appropriate.).

U.C.C. § 9-102 (Proposed Draft, Nov. 2000) (governing secured transactions) defines a consumer transaction as: “(26) “Consumer transaction” means a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer-goods transactions.”

187. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 95, 97 (1974). While the proposals require some deference to otherwise mandatory consumer rules, the applicable consumer rules will not necessarily have been created by the legislature of the consumer’s home jurisdiction. We will have to look to the foreign vendor’s consumer protection laws to protect the U.S. consumer in UCITA contracts involving electronic delivery.

What is important to note is the negative implication of these carve-outs. Outside the consumer context, the forum court is not to defer to the mandatory rules of the unchosen "home" jurisdiction in any contract within their scope unless those mandatory rules rise to the level of "fundamental policy." Both proposals are far broader, cover far more contracts, and (by sheer force of numbers of contracts implicated) are less deferential to the ordinarily-governing law of other jurisdictions than any widely-known conflict of laws rules anywhere.

Apart from their consumer limitations, both provisions have a scope that is limited in other ways. UCITA's limited scope is "computer information transactions,"¹⁸⁸ but the Act has very complex provisions dealing with excluded contracts,¹⁸⁹ mixed contracts,¹⁹⁰ and the power of parties to opt into UCITA by contract in mixed contracts.¹⁹¹ The reach of this proposed statute has engendered great controversy and is beyond the discussion here,¹⁹² but in an increasingly information-driven economy, the provision will cover a very large number of contracts every day.

The Article 1 provision states a rule for any case subject to the Uniform Commercial Code,¹⁹³ unless displaced by a specified provision elsewhere in the UCC.¹⁹⁴ This means that all sales and leases of goods contracts will be covered, as will contracts in all the other areas covered by the Uniform Commercial Code. Thus the provision will be available for a large percentage of the staggeringly large number of commercial contracts formed in our economy every day. There are no size or value limitations. Parties

188. U.C.I.T.A. § 103(a) (2000).

189. *See id.* § 103(d).

190. *See id.* § 103(b).

191. *See id.* § 104.

192. On this question, *see, e.g.*, David P. Neboyskey, *A Leap Forward: Why States Should Ratify the Uniform Computer Information and Transactions Act*, 52 *FED. COMM. L.J.* 793 (May 2000); Cem Kaner, *Why You Should Oppose UCITA*, *COMPUTER L.*, May 2000, at 20. *See, generally*, Pratik A. Shah, *The Uniform Computer Information and Transactions Act*, 15 *BERKELEY TECH. L.J.* 85 (2000); Pamela Samuelson & Kurt Opsahl, *How Tensions Between Intellectual Property Policy and UCITA are Likely to be Resolved*, in *PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 753* (1999) ("The essence of the issue lies in UCITA's seeming invitation for companies to construct their own intellectual property rules through contract, creating a potential for conflict with intellectual property policy.").

193. *See* U.C.C. § 1-102 (Proposed Draft, Nov. 2000).

194. Proposed UCC § 1-301(e) provides:

(e) To the extent that the [Uniform Commercial Code] governs a transaction, where one of the following provisions of the [Uniform Commercial Code] specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of law rules) so specified:

- (1) Section 2-xxx [subject to the drafting of Article 2]
- (2) Sections 2A-xxx [subject to the drafting of Article 2A]
- (3) Section 4-102
- (4) Section 4A-507
- (5) Section 5-116
- (6) Section 6-103
- (7) Section 8-110
- (8) Sections 9-301 through 9-307.

U.C.C. § 1-301(e) (Proposed Draft, Nov. 2000)

to every commercial contract from the sale to a carpenter of a screwdriver to the large-scale business liquidation sale will be able to choose unrelated law to cover their transaction.

The model on which both provisions are based, projected by the Reporters' Notes and Comments, is the "party autonomy" model. This model is, of course, based on the idea that two parties come together, negotiate a transaction, and freely agree to it. Since at least the 1930's, policymakers have recognized that this paradigm is not suited to mass produced transactions where contracts, both consumer and non-consumer, are created on forms prepared by a business for repeated use with its customers.¹⁹⁵ These forms are not designed to be read, discussed, or amended. Indeed, if customers actually took the time to read and understand the forms governing their everyday transactions, commerce would slow considerably.¹⁹⁶ The inclusion of small, everyday business transactions within the scope of both proposals' choice of law provisions is severely at odds with party autonomy in fact.

Vendors' forms function to allocate risks within a transaction. The likelihood that a given form recipient will actually understand the risk allocation performed by a given provision on the vendor's form varies with (1) the size of the transaction and (2) the complexity of the term itself. For example, we could expect a customer to see and understand a non-obscure, clearly-stated disclaimer of liability in a relatively small transaction. Similarly, we might expect a customer to understand the risk-shifting effect, if any, of a choice of law provision in a \$1 million transaction. The costs to a non-drafter of discovering the meaning of a given, non-negotiated contract term depends on the complexity of the term; the amount of resources one can rationally dedicate to learning terms in a form contract is a function of the size of the transaction. Smaller transactions can carry fewer discovery costs than larger contracts.¹⁹⁷ Because a choice of law clause incorporates the entire contract and related jurisprudence of a given jurisdiction into the contract, it is, perhaps, the most complex and obscure kind of provision one could find in a contract. Only in extremely large negotiated contracts, or in form contracts where the vendor can spread these research costs (or "legal overhead") over millions of transactions, can we expect the kind of intelligent choice envisioned by the "party autonomy" idea. There is virtually no chance that a recipient of a form contract in a small to medium-sized commercial transaction will understand what it means to the transaction that "the law of South Dakota

195. See, e.g., Frederick Kestrel, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943); Karl Llewellyn, *Book Review*, 52 HARV. L. REV. 700 (1939); Patterson, *The Delivery of a Life Insurance Policy*, 55 HARV. L. REV. 198, 222 (1919).

196. They would come to a "screeching halt," in the words of Professor Ian Macneil. Ian Macneil, *Bureaucracy and Contracts of Adhesion*, 22 OSGOODE HALL L.J. 5, 5-6 (1984).

197. See Edward L. Rubin, *Types of Contracts, Interventions of Law*, 45 WAYNE L. REV. 1903, 1910 (2000); William J. Woodward, Jr., "Sale" of Law and Forum and the Widening Gulf Between "Consumer" and "Nonconsumer" Contracts in the UCC, 75 WASH. U. L.Q. 243, 271 (1997).

governs this transaction.”¹⁹⁸

As if to reinforce the point, the enacted “unlimited choice” provisions to date (excluding UCITA)¹⁹⁹ have built-in limitations that ensure that form drafters do not take advantage of their power to specify the applicable law in the form. The least limited stand-alone provision, Delaware’s, is inapplicable “to any contract, agreement or other undertaking, (i) to the extent provided to the contrary in § 1-105(2) of [the UCC] or, (ii) involving less than \$100,000.”²⁰⁰

The recently-enacted provisions in other Articles of the UCC, also have a narrow scope. UCC Article 4A contains such a rule, but the Article involves transactions “overwhelmingly between business or financial institutions” typically “involv[ing] large amounts of money” where “[m]ultimillion dollar transactions are commonplace.”²⁰¹ UCC Article 5’s permissive rule,²⁰² dealing with letter of credit transactions, once again applies to typically large transactions among sophisticated parties. Finally, the choice of “unrelated law” by issuers of investment securities²⁰³ is limited in its effect and occurs in a context (securities trading) heavily overlaid by federal regulation. In each context, we can expect either the market (operating through sophisticated parties in large transactions) or governmental regulation of the market to limit the advantage vendors might obtain without the knowledge of their customers through a choice of law clause.

In contrast to the enacted provisions to date, the proposed choice of law provisions in UCITA and UCC Article 1 will be available in millions

198. Alan Schwartz and Louis Wilde argue that in competitive markets the market polices form contracts even if most don’t read them because it is assumed that *some* will and those who will might spread the word. This, in turn, will create competition among vendors on contract terms, to the benefit of customers. Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 660 (1979). Professor Melvin Eisenberg asserts to the contrary, that the competition will not ensue because not enough people read form contracts. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 244 (1995). Others have attacked the Schwartz and Wilde argument as unsupported. See R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother’s Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635 (1996); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583 (1990).

In the context of choice of law, Professor Eisenberg’s argument, extended slightly, seems far more plausible. Even if some customers actually read the form and detect the choice of law clause, a far smaller subgroup will discover if it has an undesirable risk-shifting effect. In smaller transactions, that number will surely approach zero. A vendor who can shift legal risk without having that risk reflected in the price customers are willing to pay gains “unearned” competitive advantage over other vendors.

199. See *supra* note 10 (states enacting UCITA).

200. 6 DEL. CODE ANN. tit. 6 § 2708 (1995). New York law says “. . . any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars. . . .” N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2000). U.C.C. § 1-105(2) has a list of U.C.C. provisions that are not to be disturbed by a contractual choice of law. An example of the proposed amended version is quoted *supra* in note 194.

201. U.C.C. art. 4A, Prefatory Note (Proposed Draft, Nov. 2000).

202. See *id.* § 5-116.

203. See *id.* § 8-110(d).

of daily, ordinary transactions conducted through vendor forms. UCITA's rule would enforce the choice of Liberian law in the sale of a \$100 software program from a Texas vendor to a Texas sole practitioner lawyer. The Article 1 provision would permit a Texas used car vendor to specify unrelated law in the sale of a used Texas pickup truck to a Texas farmer. A concrete example might make more apparent some of the difficulties in application of the "unrelated" choice of law provision in routine, day-to-day transactions.

In its Deceptive Trade Practices-Consumer Protection Act,²⁰⁴ the Texas legislature has addressed a wide range of business conduct that it considers antithetical to public policy. The statutory protection may not be waived except in limited circumstances,²⁰⁵ and provides for the award of attorneys' fees for a plaintiff who prevails in a claim under the statute.²⁰⁶ Most significantly for our purposes, the statute has a definition of "consumer" that is far broader than that found in UCITA, the proposed Article 1 provision, or common understanding:

"Consumer" means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of \$25 million or more, or that is owned or controlled by a corporation or entity with assets of \$25 million or more.²⁰⁷

The breadth of the Texas definition means, at a minimum, that the statute's "consumer" protection provision shelters many small businesses and individuals who will not be protected by "consumer" provisions in the UCC and UCITA.²⁰⁸ But because those Texas "consumers" will not be UCC or UCITA "consumers," the proposed UCC and UCITA provisions also empower them to choose non-Texas law in their UCC or UCITA contracts. What would be the effect if our Texas used car vendor chose Pennsylvania law (which has no comparable attorneys fee-shifting provision) in its used pickup contract with the Texas farmer and the farmer

204. TEX. BUS. & COM. CODE ANN. § 17.41 (Vernon 2000).

205. See TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon 2000) provides in part: § 17.42. Waivers: Public Policy

(a) Any waiver by a consumer of the provisions of this sub-chapter is contrary to public policy and is unenforceable and void; provided, however, that a waiver is valid and enforceable if:

- (1) the waiver is in writing and is signed by the consumer;
- (2) the consumer is not in a significantly disparate bargaining position;

and

- (3) the consumer is represented by legal counsel in seeking or acquiring the goods or services.

206. See *id.* § 17.50(d).

207. *Id.* § 17.45(4).

208. The standing of businesses to sue under the statute goes unquestioned in Texas cases. See, e.g., *Arthur's Garage, Inc. v. Racial-Chubb Sec. Sys., Inc.*, 997 S.W.2d 803 (Tex. App.—Dallas 1999, no pet.); *SCI Coatings Southwest, Inc. v. Drawbaugh Corp.*, 1998 WL 178643 (Tex. App.—Dallas 1998, no pet.); *G. Richard Goins Const. Co., Inc. v. S.B. McLaughlin Assoc., Inc.*, 930 S.W.2d 124 (Tex. App.—Tyler 1996, no writ).

later sought the protection of the Texas consumer provisions?²⁰⁹ It is far from clear that the Texas statute would continue to operate on this entirely Texas transaction despite the parties' choice of Pennsylvania law; the analysis would proceed roughly as follows.²¹⁰

If the litigation were conducted in state A, any state (including Texas) that enacted the Article 1 provision, the state A court would begin by consulting its choice of law provision, new UCC Section 1-301. Since the farmer was not a "consumer" under Article 1's more narrow definition, she had the power under state A's new UCC choice of law provision to choose unrelated law and the choice of Pennsylvania law would be presumptively enforceable. The hard question would be whether the Texas Deceptive Trade Practices Act (and its fee shifting provision) represented Texas "fundamental policy" so that it was enforceable by the State A court under the Article 1 fundamental policy exception, notwithstanding the choice of Pennsylvania law. The Texas statute's anti-waiver provision would suggest that it is an important statute but, as the franchise cases discussed earlier suggest, anti-waiver provisions are not determinative of the question of fundamental policy.²¹¹

209. In the example, since no other state is "related" to the parties' transaction, current law would limit their choice of law to Texas. See U.C.C. § 1-105 (1995).

210. There has been repeated discussion about limiting the kind of "unrelated" law the parties might choose. By further limiting the parties' power to choose unrelated law, the incidence of problem cases such as the one developed here might be reduced. The notion has emerged in U.C.C. § 1-301, Reporter's Note a (Proposed Draft, Nov. 2000), quoted *supra* in note 152. The idea may (1) restrict the parties to choosing another State's unrelated UCC, or (2) may limit them to choosing any kind of law, but only to cover the UCC aspects of the transaction. Such a restriction (whatever it means) creates the kinds of "underbreadth" issues discussed below in this Article. But how would such a restriction apply to the example in the text? A Texas sale of a pickup is clearly a UCC Article 2 transaction; unless a service contract were appended to it, it would not be, in any way, a "mixed" transaction.

Thus, unless the Reporter's Note is read to limit the parties to unrelated states' UCC provisions only, their choice of Pennsylvania law in this example would include their choice of Pennsylvania's limits on fraud and other misbehavior covered by the Texas statute. Under those circumstances, one would have to argue that the Texas law was "fundamental policy" to obtain more protection than that offered by Pennsylvania. Such an approach (developed below in the text) would be consistent with that taken by current law: the choice of a "related" jurisdiction gives the parties *all* the law of that jurisdiction, subject to the fundamental policy exception.

The danger of avoiding Texas' mandatory rules is reduced if the parties choosing unrelated law under the UCC proposal obtain only the unrelated UCC rules. But such an approach increases commercial uncertainty. It would mean that parties choosing unrelated law would (perhaps inevitably) get a mixture of different States' law governing their contract (since many contract defenses such as fraud and duress are matters of non-UCC law) and predicting the mixture a future court will deliver will be very difficult. Adjudication of controversies involving such contracts will be more difficult for the courts, and it will be more difficult for the parties to litigation to predict the outcome of the litigation.

211. In *Haynesworth v. The Corporation*, 121 F.3d 956 (5th Cir. 1997), the plaintiffs challenged the choice of forum and law clauses inserted into their contracts with Lloyds of London. Part of their argument was that the Texas Deceptive Trade Practices Act's anti-waiver provision meant that it would be unreasonable not to apply the Texas law to the transaction. The court never reached that question, ruling instead that the choice of forum clause was enforceable and therefore, by implication, that a different court would rule on that question. *Id.* at 966. But by noting that other Circuits had held that the choice of foreign law had displaced the federal securities laws, *id.*, the court may have hinted that the

Importantly, only if Texas enacted the Article 1 provision and the litigation occurred in Texas would a Texas court decide whether the state's own consumer statute constituted Texas fundamental policy so that it was enforceable despite the choice of Pennsylvania law.²¹² Moreover, as a strict matter of precedent, the Texas Supreme Court's opinion on that matter would not control forum courts outside Texas²¹³ nor would another state court's view on this same matter be controlling precedent, one way or the other, for a Texas court.

Finally, even if Texas wished to avoid the question by not enacting the proposed choice of law provision in Article 1, the non-action by its legislature would be beside the point because the choice of law rule is binding in state A, wherever that may be. Texas's simple refusal to enact the unrelated choice of law rule will not prevent any state A from enacting it, and will not prevent litigants from litigating their cases in those places where it has been enacted. Indeed, in a perverse way, by refusing to enact the provision, the Texas legislature may cede to the courts of other states the job of declaring Texas fundamental policy.²¹⁴

2. *Underbreadth*

The UCITA provision applies to computer information contracts. The UCC provision will apply to the very broad range of contracts covered by the Uniform Commercial Code. Together these categories will comprise a great many contracts, but not all contracts. The background conflict of laws rule—which these provisions will partially displace—requires a relationship between the contract and the chosen law. The proposed rules require no relationship. This will force courts to confront problems, not currently encountered, of choosing the correct conflict of laws rule in “mixed” contracts. The “underbreadth” problem stems from the limited scope of the proposals and the very different conflict of laws rule that they state for cases within their scope. The flavor of this problem and the uncertainty it might generate can be illustrated by the familiar franchise contract example.

Franchise contracts often include substantial sales of goods from the franchiser or its agents to the franchisee, and this set of contractual com-

Texas statute would fare no better had the court reached the question. There was no challenge to the plaintiffs' qualification to sue as “consumers” under the Texas statute.

212. If Texas did *not* enact UCC § 1-301, presumably the choice of Pennsylvania law would be unenforceable under its current UCC § 1-105, the court would apply Texas law notwithstanding the choice, and the court would never get to the “fundamental policy” question. If, on the other hand, Texas enacted proposed UCC § 1-301, that fact, no doubt, would be argued either as showing a direct legislative intent to supersede this and all earlier-enacted anti-waiver provisions or as an indication that the Texas legislature in some sense “consented” to the non-mandatory status of its non-waivable “consumer” law.

213. The Texas authority would, of course, be extremely persuasive, but not *binding*.

214. Texas' enactment of UCC § 1-301 would be argued to be legislative “consent” to Texas citizens' avoiding the anti-waiver provisions of the consumer statute by choosing a different state's law. Texas' refusal to enact § 1-301 deprives litigants of that argument and, in that sense, may have some indirect influence on the Texas fundamental policy question as viewed by other state courts.

mitments may be set out in the franchise contract. Sales of goods contracts clearly are UCC contracts and will thus be subject to the UCC's Article 1 rule. Employment, noncompete agreements, confidentiality, and many other contracts are not subject to the UCC and will continue to be controlled by the general conflict of laws rule requiring a relationship between the chosen law and the parties or their contract. Franchise contracts can mix provisions governing subjects that, alone, would be subject to the UCC and other subjects that, alone, would not be subject to the UCC. If in such a contract the franchiser chooses "unrelated" law to govern the contract and the dispute comes to a court with the new UCC rule, how will a court decide whether or not a relationship with the chosen law is required in order to make a choice of law enforceable?

Courts could use the kinds of tools they now use to decide whether given contracts should be treated by Article 2 of the UCC or by general contract law, such as looking to the "predominant purpose"²¹⁵ or the "gravamen of the action."²¹⁶ But will it make sense that the law of one place might control the UCC aspects of the complex contract and the law of a different place control the non-UCC aspects? Whether the approach is sensible or not, there will be no precedent for such an analysis at the outset and it will probably take the courts years to come to a workable solution. In the interim, lawyers will have difficulty advising clients with any certainty which jurisdiction's law will control what.

F. JUSTIFICATIONS OFFERED FOR THE PROPOSED CHANGES

1. *International Law and the Globalization of Commerce*

Globalization has clearly had its influence on contractual choice of law. This is most evident from the Comments and Reporters' Notes to the proposed changes in the choice of law rules. Comment 2 to UCITA, for example, explains:

Contract terms that choose the law applicable to the contract are routine in commercial agreements. The information economy accentuates their importance because it allows remote parties to enter and perform contracts spanning multiple jurisdictions and operating in circumstances that do not depend on physical location of either party or the information. Subsection (a) enables small companies to actively engage in multinational business; if the agreement could not designate applicable law, even the smallest business could be subject to the law of all fifty states and of all countries in the world. That would impose large costs and uncertainty on an otherwise efficient system of commerce; it would raise barriers to entry.²¹⁷

The Reporters' Notes to the Article 1 proposal state:

215. See, e.g., *Bob Neiner Farms, Inc. v. Hendrix*, 490 N.E.2d 257 (Ill. App. Ct. 1986).

216. See, e.g., *Worrell v. Barnes*, 484 P.2d 573 (Nev. 1971). See generally DANIEL KEATING, SALES: A SYSTEMS APPROACH 12-13 (1998); 1 W. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-102:04 (1982).

217. U.C.I.T.A. § 109 cmt. 2 (2000).

This recognition of party autonomy with respect to governing law has already been established in several Articles of the Uniform Commercial Code (see UCC Sections 4A-507, 5-116, and 8-110) and is consistent with international norms. See, e.g., Inter-American Convention on the Law Applicable to International Contracts, Article 7 (Mexico City 1994); Convention on the Law Applicable to Contracts for the International Sale of Goods, Article 7(1) (The Hague 1986); EC Convention on the Law Applicable to Contractual Obligations, Article 3(1) (Rome 1980).²¹⁸

Globalization and the influence of international law are related, but distinct ideas. The first focus here will be on the question of whether globalization requires policy makers to permit contracting parties to choose unrelated law, given that their choices of law will inevitably avoid some mandatory rules that, by definition, the parties cannot otherwise avoid by contract. We will then consider separately whether international conflict of laws norms are appropriately transplanted to the United States with its distinct history and its strong traditions of federalism and states' rights.

a. Globalization of Commerce

Increasingly, our goods and services are coming through distribution mechanisms that originate abroad and have at least one international contract within the chain of distribution. "Computer information," whether it's software, pictures, audio and video clips, or data, is increasingly being delivered electronically from sources that may be physically located anywhere in the world. The comments to UCITA state that "if the agreement could not designate applicable law, even the smallest business would be subject to the law of all fifty States and all countries in the world."²¹⁹

This section envisions a young, but modern-day Bill Gates in his garage creating new software for electronic distribution but being snuffed out by the legal compliance costs that he will face once he decides to distribute the software. Obviously, UCITA policy makers are projecting the judgment that it is better to allow businesses, particularly start-ups, to choose unrelated law than it is to subject them to compliance costs in all places in which they do business.²²⁰

A different approach is to regulate those who do business with one's constituents or taxpayers and to prevent the use of choice of law clauses to avoid that regulation. The European Union has done just that in the Rome Convention's choice of law provision by imposing the mandatory

218. U.C.C. art. 1, Reporter's Notes (Proposed Draft, Nov. 2000).

219. U.C.I.T.A. § 109 cmt. 2.

220. Equally obviously, what will be good for the startups will also be good for the Microsofts. Under the UCITA provision, the apparent intent is that all information companies, large and small, will not be subject to many of the mandatory rules of places whose law they do not choose to govern their contracts. The solution to compliance difficulties for small companies is to reduce compliance costs for all.

consumer law of the consumer's habitual place of residence in all contracts through which value is distributed in that jurisdiction.²²¹ Initiatives in the European Union would further specify the consumer's jurisdiction as the governing law and the appropriate forum as well.²²² While one might criticize the initiatives as imposing unreasonable compliance costs on small vendors and thereby either driving them from the market or raising prices to consumers,²²³ one can also see such regulation as a form of safety net designed to protect the less capable from the harshness of the marketplace.

Whichever side of this argument one agrees with, however, the UCITA provision has raised a straw man in this instance. As its own provisions underscore elsewhere, there is no need to permit choice of unrelated law to save a vendor the costs of complying with multiple legal regimes. As under current law, the vendor can choose its own law to govern interstate and many international contracts²²⁴ and UCITA makes this point very explicit: for UCITA contracts involving electronic delivery (the kinds of contracts likely referred to in the supporting comment)²²⁵ the applicable mandatory consumer provisions under UCITA are those where the vendor is located, not those of the vendee-consumer's jurisdiction.²²⁶

As is generally the law today, under UCITA's provision the electronic vendor will be stuck with the mandatory consumer provisions of the jurisdiction it chooses to distribute its products from. This avoids compliance with the law "of all 50 states and of all countries in the world." UCITA's comments do not make clear why the law should permit that vendor to select the law of other places to govern its contracts with non-consumers.²²⁷

Vendors in less technologically-advanced industries who sell their goods throughout the United States routinely confront differing levels of

221. See Rome Convention, *supra* note 14, art. 5, para. 2. If the strengthened Article 1 consumer exception remains in the proposal, it will have a similar effect.

222. See Winn & Pullen, *supra* note 160, at 481.

223. See *id.* at 488.

224. See *supra* Part V.D.

225. Where there is physical delivery of the product, the jurisdiction where it is delivered is the law that applies in consumer contracts in the absence of an agreement. U.C.I.T.A. § 109(b)(2) (2000). Physical delivery in multiple jurisdictions requires (at least) some sort of physical distribution system for the electronic merchandise, something a high-tech startup business is unlikely to have.

226. The choice of the vendor's jurisdiction is probably subject to the "fundamental policy" exception and, under the current cases, the operation of a non-chosen state's fundamental policy would depend in part on the relative strength of the contacts of the chosen and unchosen states. As the text emphasizes in several places, there is no judicial precedent for measuring "fundamental policy" where the chosen state has *no* contacts.

227. Since, in many cases, the vendor will not know whether it is selling to a consumer or a non-consumer, the odds are good that its forms will select one jurisdiction's law to govern both kinds of contracts. If an "unrelated" law seems more advantageous to the vendor than its own, the odds are that it will choose that law because it has nothing to lose in doing so. UCITA's provision does not invalidate the choice of unrelated law for consumer contracts; it merely injects the vendor's mandatory consumer provisions (and only those mandatory consumer provisions) into the contract. The statute provides no apparent incentive for the vendor to choose any law but that which is most beneficial to it.

state regulatory law in the states in which they operate. When the contract concerns sales or leases of goods or other contracts governed by the UCC, current law generally permits the vendor to contractually choose its own jurisdiction as the governing law of the contract. While the effect of doing so is to avoid some of the mandatory rules that might otherwise apply, a vendor seeking advantage from a particular state's law has to establish "contacts" there to avail itself of the presumably more favorable law. The proliferation in recent years of mail order businesses gives one a sense that interstate businesses are, under the current system, able to start up and cope with differing state regulation as they do business throughout the United States.

It is, of course, possible that our economic well-being will grow under the new proposals,²²⁸ but there is nothing in the supporting discussions suggesting that economic growth has suffered under the current rules governing contractual choice of law.²²⁹

b. Consistency with International Conflict of Laws Norms

The Article 1 Reporters' Notes make reference to international norms as support for the proposed change in the law.²³⁰ As should be clear by now, two of the treaties cited by the Reporter carve out non-international transactions from their provisions.²³¹ As such, they offer questionable support for a broader rule permitting contracting parties to choose unrelated law in wholly domestic (US) transactions and, *a fortiori*, they offer no support for such a rule for domestic *intrastate* transactions. International conflict of laws rules are, however, important reference points in any discussion of contractual choice of law and some have used them to advocate more party autonomy in the conflicts rules in the United

228. This is, essentially, the contention of those who bring a law and economics analysis to this problem. See discussion *infra* Part V.F.2.

229. One could easily make a case that, absent the power to create an enforceable contractual choice of law, the uncertainty in forecasting the applicable law is undesirable from an economic perspective. Indeed, some of the uncertainty in conflict of laws rules generally led to the current system permitting a choice of "related" law today. See discussion *supra* Part II.A. There is no empirical work and very little scholarly opinion, however, suggesting that the current rule of limited choice has retarded economic growth. To the contrary, the rapid process of globalization itself suggests that business has learned to live with the contractual choice of law rules currently in place.

230. See U.C.C. art. 1, Reporter's Note b (Proposed Draft, Nov. 2000).

231. The cited provision of the third treaty, Article 16 of the Convention on the Law Applicable to Contracts for the International Sale of Goods ("The Hague 1986"), states as follows: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." The Hague 1986, Oct. 30, 1985, art. 16, 24 I.L.M. 1573, 1577. The apparent intent in including this provision as supporting the proposal is that there should be uniformity in choice of law rules for international commerce to flourish. It is hard to argue with the commercial need for uniformity in choice of law rules. As will be seen, however, the proposals follow the international model only superficially and the very different domestic context within the United States strongly counsels caution in transplanting the international norm into the United States.

States.²³²

The focus of this section is on a related question: whether international conflict of laws norms are appropriately transplanted to the United States. My contention here is an obvious one: is that our Constitutional system of state and federal sovereignty is fundamentally different from the international system and the differences counsel extreme caution when using international conflict of laws rules as models for rules to govern relations within the United States.

There is a debate among conflict of laws scholars about whether there are Constitutional limitations on contractual choice of law.²³³ The general discussion here will not attempt to contribute to that debate; indeed, the mere fact that there is such a debate in the United States underscores the point that international law is a questionable model for domestic conflict of laws policy.

232. The needs of international business contracting are said to demand more party autonomy. See Patrick J. Borchers, *The Internationalization of Contractual Conflicts of Law*, 28 VAND. J. TRANSNAT'L L. 421, 437-38 (1995) (arguing that businesses from different countries may so distrust one another's national law that an inability to choose the law of a "neutral" and unconnected state could be a deal-breaker); Justin P. Fletcher, *An Argument for Ratification: Some Basic Principles of the 1994 Inter-American Convention on the Law Applicable to International Contracts*, 27 GA. J. INT'L & COMP. L. 477 (1999) (allowing parties to select law of unconnected State is supported by weight of authority, so United States should ratify the Convention); Friedrich K. Juenger, *American Conflicts Scholarship and the New Law Merchant*, 28 VAND. J. TRANSNAT'L L. 487, 491-94 (1995) (contributing factor to the evolution of a new law merchant is international arbitral practices which confer upon arbitrators wide discretion in choosing applicable law); Arthur Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, 40 AM. J. COMP. L. 683 (1992) (the engine driving harmonization of American and European conflicts of law rules in commercial law is essentially political and cultural). Cf. SCOLES ET AL., *supra* note 5, at 871-72 who, in commenting on an earlier draft of the UCC provision, refer to the influence of international norms, but state:

On balance the requirement that the chosen law be connected to the transaction is defensible if applied liberally and practically. Its complete absence might permit parties to avoid the common, but not fundamental, rules of contract law of both of their states solely because the interstate nature of their contract permits the choice of a third law.

Id. at 871-72. The current proposal is more permissive than that which generated this commentary: two parties to an intrastate transaction are permitted under the proposal to choose the law of any other state. As will be developed, arguments for the harmonization of choice of law rules with international norms have doubtful applicability in our domestic context because of the U.S. Constitution's Full Faith and Credit Clause.

233. Choice of law seems to have everything yet almost nothing to do with the United States Constitution. The Full Faith and Credit, Due Process, Equal Protection, Privileges and Immunities, and Commerce Clauses all can easily be read to protect nonforum state interests, or the interest of nonforum litigants, that are disrupted by parochial state conflicts decisions. Yet the Supreme Court rarely intervenes under the Constitution to protect these interests. See Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271 (1996); see also Robert A. Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59 (1981) (stating that the constitutional debate centers around the extent of and the respective roles of the due process and full faith and credit clauses of the Constitution); Laycock, *supra* note 15; James A. Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1976); Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982); Russell Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law*, 10 HOFSTRA L. REV. 17 (1981).

Instead, one can begin with the most obvious difference between the relations among nations and the relations among states in the United States: our state governments are not independent, sovereign nations. They are, rather, constituent sovereignties within a larger one organized by the Constitution. The implications of this are myriad and fundamental. For purposes of conflicts of law, the differences manifest themselves in the respect or deference constituent states are required to give one another under our Constitution.

The Full Faith and Credit Clause of the Constitution (hereinafter, the "FF&CC") is the most obvious Constitutional provision mandating state deference to one another's legal systems. It reads:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.²³⁴

The Clause mandates a form of "comity" among States and is designed to "bind the country together as a single nation."²³⁵ As interpreted by the courts, the Clause requires states (with very narrow exceptions) to defer to and enforce the judgments of one another's courts.²³⁶ Commentators differ on the implications of the FF&CC for conflict of laws jurisprudence. Some believe it imposes limitations on party choice of "unrelated law."²³⁷ The other side of the debate contends that the FF&CC has a very narrow role in limiting the law that a given court can apply to a controversy. One conflict of laws authority has stated that the FF&CC will not limit a court's application of given law to a controversy "unless there are cogent reasons for mandating a uniform national result under the public act, record, or judicial proceeding of another State. Rarely if ever will this standard require choice of one state's law to apply to a controversy not yet reduced to judgment."²³⁸

Obviously, if the Constitution requires that the law be "related" to the parties or contract beyond the fact of their choosing it, then it is not

234. U.S. CONST. art. IV, § 1.

235. 1 LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1247 n.50 (3d ed. 1999).

236. There is a distinction, of little importance here, between recognition and enforcement of other states' judgments. The execution state's exemption laws may, for example, limit the value of a sister state's judgment in the enforcing state. *See, e.g.,* *Caulley v. Caulley*, 777 S.W.2d 147 (Tex. App. 1989), *aff'd in part, rev'd in part*, 806 S.W.2d 795 (Tex. 1991). Recognition of foreign judgments (or judicial determinations) has different dynamics. *See, e.g.,* *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Assoc.*, 455 U.S. 691 (1982). *See generally* ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* 369-70 (1993).

237. *See* Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945); Laycock, *supra* note 16; James A. Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1976); Kirt O'Neill, *Contractual Choice of Law: The Case for a New Determination of Full Faith and Credit Limitations*, 71 TEXAS L. REV. 1019 (1993).

238. Russell Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law*, 10 HOFSTRA L. REV. 17, 25 (1981) (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 323 (1981) (Stevens, J., concurring)).

sound policy for a provision of UCITA or of the Uniform Commercial Code to reject that requirement.²³⁹ Under such an interpretation of the Constitution, international law would provide no appropriate model because there is no Constitution limiting the law that courts can apply to controversies before them.

My focus here is on the other, potentially more interesting, side of the debate—that which contends that the FF&CC imposes few or no legal restrictions on the policies states might set with respect to contractual choice of law. If the Constitution provides no limits via the FF&CC, then it effectively requires states to enforce each other's judgments (provided they meet the separate requirements of due process) against property and persons physically within their jurisdiction, regardless of the law that the adjudicating court applied to the controversy and regardless of how the adjudicating court interpreted that law. For brevity, I will refer to this interpretation as the "strong FF&CC." There is no analogy to this in international law either.

In international law there currently²⁴⁰ exists no authority that requires courts of given nations to enforce against property or persons within their jurisdiction the judgments of other sovereign nations.²⁴¹ Such enforcement usually occurs, rather, as a matter of "comity"²⁴² and this effectively means that the enforcing court need never enforce a judgment that would violate the enforcing court's public policy.²⁴³ Thus, before it acts, the enforcing court can consider the policy decisions and implications of the adjudicating court's judgment (including its decision as to choice of law and the continued applicability of mandatory rules) and decide whether they are consistent with the enforcing court's own notions of public pol-

239. My colleague, Richard Greenstein, contends that the Full Faith and Credit Clause limits a state's power to authorize parties appearing in its courts to select "unrelated" law. He maintains that the Article 1 provision will be unconstitutional unless uniformly enacted and, if uniformly enacted, will cease to be "law" in the way we understand it. Richard K. Greenstein, *Is the Proposed UCC Choice of Law Provision Unconstitutional?* 73 *TEMPLE L. REV.* ____ (forthcoming 2001); see also Richard K. Greenstein, *Critique of Draft Proposal for a New UCC Choice-of-Law Provision (§ 1-301(a))*, in *DEREGULATORY CHOICE OF LAW: THE UPS AND DOWNS OF CHANGING THE CONTRACTUAL CHOICE OF LAW ROLE IN UCC ARTICLE 1* (CLE Materials for American Bar Association Annual Meeting, New York, 2000, on file with the author). From a commercial law perspective, it would not be sound commercial policy to enact a provision of dubious Constitutional validity because the potential Constitutional challenge would result in commercial uncertainty.

240. Negotiations are underway in the Hague to create a regime of international enforcement of foreign judgments. See Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 *U. PITT. L. REV.* 661 (1999). Professor Brand has asserted that the United States could not constitutionally become a party to such a treaty. *Id.* at 704.

241. In the United States, this rule, its history, and the factors militating for and against the enforcement of foreign judgments by United States courts is amply discussed in *Hilton v. Guyot*, 159 U.S. 113 (1895). See generally Ronald A. Brand, *Enforcement of Judgments in the United States and Europe*, 13 *J.L. & COM.* 193 (1994).

242. See *Hilton*, 159 U.S. at 163-64 (1895).

243. The Brussels Convention, while requiring enforcement of member states' judgments makes this point explicitly. See *infra* note 245. The Convention is discussed in Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 *U. PITT. L. REV.* 661 (1999).

icy. If an enforcing court thought that the adjudicating court unduly disregarded the enforcing court's mandatory rules, it could on that basis (and within the discretionary limits of showing comity to the adjudicating court) refuse to enforce the judgment.

The discretion courts have to refuse to enforce foreign judgments, of course, permits the enforcing court to protect and advance important policies it (as sovereign) thinks should apply to those persons and property affected by its laws.²⁴⁴ This dynamic of international enforcement is explicit in the Brussels Convention,²⁴⁵ a treaty which adds substantial gloss to the oft-cited Rome Convention.

In Article 27 of the Brussels Convention, the European Union saw fit to retain its member states' sovereign power to refuse enforcement of judgments on the grounds that enforcement would violate the public policy of the enforcing state.²⁴⁶ A similar provision is included in the New York Arbitration Convention which requires signatories to enforce arbitration awards unless (among other reasons) they violate the public policy of the enforcing country.²⁴⁷

The public policy exception to international enforcement of judgments is an important, consistent feature of the international system. The position the EU took in the Rome Convention that (with the limitations noted) parties can select unrelated law to control their contract must be read against this earlier provision of the Brussels Convention; the latter rule is not fully understandable without the context of the former rule. Transplanting only the unrelated choice rule for domestic use within the United States can be expected to have a different effect than in the European Union.

The power to deny enforcement of a judgment or arbitral award on public policy grounds is an important attribute of the sovereignty of the enforcing state, reserving for the enforcing state the power to advance its

244. Cf. *Mitsubishi Motors v. Soler Chrysler Plymouth*, 473 U.S. 614 (1985). *Mitsubishi* is an arbitration case where the Supreme Court ordered the defendant to submit to arbitration in Japan as agreed despite the defendant's contention that the plaintiff violated U.S. antitrust laws and that a Japanese arbitration proceeding would not adequately recognize those laws. Justice Blackmun said:

Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The [New York] Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country."

Id. at 638.

245. 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1972 J.D. (L2aa) 32 [hereinafter Brussels Convention].

246. Article 27 provides that a judgment coming from another EU member state need not be recognized (or enforced under Article 34) "if such recognition is contrary to public policy in the state in which recognition is sought." As will be discussed in the text, this limitation on enforcement is critical to an understanding of the Rome Convention and of its suitability for transplantation to the United States. *Id.* at 27.

247. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V.2(b), 330 U.N.T.S. 38.

own views of appropriate public policy in an appropriate case. Moreover, the prospect of "public policy" scrutiny by an enforcing court counsels caution for parties in the foreign litigation because they know that if the result they achieve in the adjudicating court violates the enforcing court's policies or exceeds the enforcing court's relevant limits, enforcement may be denied and the litigation victory worthless.²⁴⁸ This party caution may in turn work its way through the system in a way that minimizes the frequency with which enforcing courts are confronted with judgments or awards that violate public policy as perceived by the enforcing court.²⁴⁹

There are, of course, no such dynamics among courts in the United States and no explicit public policy exceptions in the FF&CC. An enforcing court must enforce a sister state judgment (provided it meets minimum Due Process requirements) even if the judgment is based on something completely repugnant to its own public policy.²⁵⁰ In the context of contractual choice of law, if an adjudicating court concluded that the unrelated law was, in fact, agreed to, Due Process considerations of fairness would likely be met and, by hypothesis, a Constitutional challenge at trial on the basis of the strong FF&CC would be unavailable. Enforcement of the resulting judgment would be required despite the adjudicating court's disregard of unchosen mandatory rules and despite any erroneous views either finding or interpreting the fundamental policy of the enforcing court.

There is nothing new here. These critical differences between international and United States law at the judgment enforcement stage are a feature of our present conflict of laws system. Under the current rules permitting parties to choose only "related" law, the possibility exists that the FF&CC will, as happened in *Fauntleroy v. Lum*,²⁵¹ occasionally require a State to enforce a judgment that is repugnant to its own public policy. The decision in *Modern Computer Systems v. Modern Banking*

248. Cf. 9 DEBTOR CREDITOR LAW § 37.02 (Matthew Bender & Co., Inc. 2000).

249. In developing and shaping a case to be tried under law that differs substantially from that in the enforcing jurisdiction, the risk-aggressive international litigator may well flirt with what she regards as the limits of the enforcing jurisdiction's public policy. She is not likely, however, to go far over that imaginary line if she believes that coercive enforcement of the judgment may be required: to do so would invite a public policy defense that would seriously complicate eventual enforcement of the judgment. The domestic litigant need have little fear that a state judgment violating the public policy of the enforcing state will, on that account, encounter enforcement difficulties.

250. In *Fauntleroy v. Lum*, 210 U.S. 230 (1908), two Mississippi parties made a gambling contract that was performed in Mississippi at a time when such contracts were declared criminal and unenforceable in Mississippi courts. When the defendant breached, the plaintiff won an arbitration award, notwithstanding the illegal nature of their contract. He then sued to judgment on the arbitration award in Missouri, and then returned with the Missouri judgment to Mississippi for enforcement. The Mississippi Supreme Court ultimately refused enforcement on public policy grounds but was reversed by a closely divided Supreme Court. Justice Holmes, over a strong dissent by Justice White, made it clear that public policy was not an element in the enforcement of a sister state's judgment. One can see the flavor of Justice White's dissent in the opening quotation to this Article.

251. *Id.*

Systems,²⁵² the Minnesota franchise case discussed earlier,²⁵³ could have led to the Minnesota court being required to enforce a judgment predicated on a wrong view of the strength of Minnesota's franchisee protection policy. Had it been a foreign judgment, the Minnesota court could have refused to enforce it based on its view of its own public policy.

The fact that an enforcing state may be required to enforce a repugnant domestic judgment under our current system begs the question of what difference it might make if we were to transfer from international law the party autonomy model for choosing law without, at the same time, transplanting the power of the enforcing court to reject enforcement of sister state judgments on public policy grounds. The main problem is one of numbers: the change would substantially exacerbate an unfortunate by-product of the FF&CC.²⁵⁴

The numbers of cases in which enforcing courts will be faced with judgments where the adjudicating court has disregarded the enforcing state's mandatory rules (whether "fundamental" or not) will rise dramatically under the proposals.²⁵⁵ Our current system is one in which the choice of law rule permits advantage-seeking within the narrow limits imposed by its relatedness requirement. Removing the relatedness requirement makes advantage-seeking a much larger enterprise because, with a far greater number of permissible jurisdictions to choose from, the chances are far better that there will be more advantageous rules to select. One would predict that choosing the "best" law will be much more central to transactional practice than it is today. We should also find far more choice of law clauses which choose law that deviates from the law that would otherwise apply (because the advantages will lie elsewhere). This will be particularly true if the system works the way Professor Larry Ribstein and colleagues project through economic analysis²⁵⁶ and jurisdictions begin "competing" with one another to produce favorable law that more parties will select.

252. 871 F.2d 734 (8th Cir. 1988).

253. The discussion appears *supra* in Part IV.B.1.

254. The political thrust of the FF&CC, embracing a principle of "comity" among the states, is arguably violated by both the UCITA and Article 1 proposals. As will be developed, this political principle is violated because, in essence, forum State legislatures will be authorizing citizens of unchosen states to disregard many of the ordinarily-applicable mandatory rules of their own jurisdictions by choosing unrelated law. This is far from the idea that "Full Faith and Credit shall be given in each State to the *public Acts*, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1 (emphasis supplied); see also Richard K. Greenstein, *Is the Proposed UCC Choice of Law Provision Unconstitutional?* (Manuscript on file with the author). Uniform enactment reduces the Constitutional problems the proposals bring to our federal system but they then unravel the political vision articulated by Justice White in *Fauntleroy*. See *id.*

255. The situation is actually still more complex than this because the enforcing court is *not necessarily* the court whose law would have applied and whose public policy may have been disregarded. The enforcing court will be in whichever jurisdiction the defendant or her property are located. But the existence of the defendant or her property in the enforcing jurisdiction raises the odds that, in any given case, it will be the enforcing jurisdiction's law which would have applied absent the contractual choice of law.

256. See *infra* Part V.F.2.

We would thus expect to find more instances in which the law used in arriving at the underlying judgment differed from the enforcing state on a matter of fundamental policy, but the enforcing court was required to enforce the judgment anyway. To give a simple example, in a purely local New York private lending contract, today's parties are subject to New York's usury restrictions.²⁵⁷ Why, if it were possible, would not the well-counseled New York lender select the law of a place with no such restrictions? If that choice were authorized by the UCC²⁵⁸ and sustained by an adjudicating court, and no New York "fundamental policy" were found,²⁵⁹ New York would be required to enforce the judgment even if it considered its own usury restrictions to be fundamental policy. The same would be true for a similar New York-New Jersey lending contract where both states had usury restrictions and South Dakota had none. Today the law of South Dakota is not an option; New York's usury restrictions have some teeth because banks and other lenders must expend the resources to establish a presence in South Dakota to avail themselves of its different attitude to usury.²⁶⁰ If the UCC provision will apply to such a transaction, nothing more than a contract clause would be required to obtain the same result, and enforcement of a judgment containing usurious interest in New York or New Jersey would be required under the FF&CC.²⁶¹

257. See N.Y. BANKING LAW § 173 (McKinney 2000).

258. It is unclear whether this will be a UCC transaction due to the limited scope of the UCC. If the transaction itself is subject to the UCC, it is unclear (because of underbreadth) whether the parties may select an unrelated state law to govern the interest fees charged. See *infra* Part V.F.4.

259. Most courts are reluctant to declare usury to be fundamental policy under the current cases so the situation in the text is a distinct possibility. As will become clear later in the discussion, however, it will become extremely hard to predict outcomes on fundamental policy issues under the proposals because we have neither precedent nor legal tradition for doing so.

260. National credit card companies have, in fact, done that and persuaded the Supreme Court that the usury restrictions that other states had enacted for their citizens were preempted by the National Bank Act in *Smiley v. Citibank*, 517 U.S. 735 (1996). *Smiley* permits lenders operating out of South Dakota to avail themselves of that state's lenient attitude to usury when dealing with customers in other states. Note, however, that lenders do have to establish a presence in South Dakota in order to take advantage of South Dakota's laws. That expense of avoiding the New York law will ensure that there is some non-negligible level of compliance with it. See generally Lawrence Friedman, *Two Faces of Law*, 1984 Wis. L. REV. 13 (1984). Allowing parties to avoid the law with a contract provision will reduce compliance (at least among the legally informed) to nearly zero.

261. Some might argue that, since larger companies can establish offices or subsidiaries almost anywhere and thereby take advantage of the law of the satellite location (since it then may be "related"), the law ought to allow businesses to do by contract what they now have to do through the expense of relocation. A populist variant of the argument is that changing the law would allow the smaller companies to do what the large companies can already do (but at some expense) now. Stating the argument in somewhat more negative terms, one might argue that since some businesses can now avoid regulation that would otherwise apply by setting up satellites, we should permit all businesses to avoid regulation by contract so as not to disadvantage the smaller businesses.

Whether the argument persuades depends on whether one thinks that businesses ought to be able to choose law in order to gain the advantages of "more favorable law" as distinguished from simply eliminating uncertainty. The possibility of obtaining advantage through a choice of law clause is, in my view, an unfortunate but unavoidable implication

By authorizing choice of unrelated law in all contracts, large and small, domestic and international, the proposals substantially increase the frequency that this byproduct of the FF&CC will occur. At the political level of the FF&CC, these proposals will probably increase dramatically the instances in which otherwise-applicable mandatory rules will be rendered ineffective by the acts of will of parties to contracts. The frequency of these occurrences could be correspondingly reduced by reducing the number of contracts in which choice of unrelated law were authorized. Limiting the change to international contracts would likely reduce the numbers substantially.²⁶²

2. *Economic Well-Being*

A relatively recent arrival in the debate about contractual choice of law is that of Professor Larry Ribstein and his colleagues who argue that economic efficiency requires the “deregulation” of contractual choice of law. For UCITA, their argument is that free choice of law will encourage individual states to be more responsive to the needs of high-technology.²⁶³ This will come about as parties “choose” the law most beneficial to their transaction and as states compete for the resulting legal business.²⁶⁴ Eventually, the law may gravitate to one form, effectively in use by all transactors, and thereby avoid the problems of lack of uniformity that usually come with state commercial legislation.²⁶⁵

of our current conflict of laws rule which is based primarily on the need to remove uncertainty. The fact that some businesses have found ways to avoid regulation through choice of law rules does not justify extending the “privilege” to all businesses or making the avoidance process any easier than it now is. To shelter income from creditors, the wealthy have developed offshore trusts. *See, e.g., F.T.C. v. Affordable Media*, 179 F.3d 1228 (9th Cir. 1999). It does not follow that policy makers should create a low-cost way to accomplish the same thing so that, in the interests of equality, everyone can enjoy the “privilege.” Doing so will simply reduce the level of compliance with given legal regulations which, if one is rich or determined enough, one can nearly always avoid. *See generally* Friedman, *supra* note 260.

Obviously, if one thinks that businesses *ought* to be able to gain advantage—to compete, as it were—through choice of law clauses, one comes to the opposite conclusion. *See O’Hara & Ribstein, supra* note 84.

262. Limiting the change to international contracts does not *solve* the problem because our domestic courts are bound to enforce sister-states’ judgments regardless of the law used by the state court to reach its judgment. Thus if the parties chose unrelated Albanian law in an international contract, and a U.S. court decided the case using that law, its judgment would be entitled to full faith and credit if enforcement were requested in another state. It is not the law used by the forum, but the identity of the forum (state or foreign country) that determines whether or not the judgment is entitled to full faith and credit.

263. *See* Bruce H. Kobayashi & Larry E. Ribstein, *Uniformity, Choice of Law And Software Sales*, 8 *GEO. MASON L. REV.* 261 (1999).

264. Although somewhat obscure, the economic benefits that states presumably will compete for are those that come with the legal litigation business. That business will come as parties choose a *forum* which will enforce the choice of law. Under the proposals, parties may well tend to choose the same law and forum although neither UCITA nor the UCC proposal requires that.

265. Kobayashi & Ribstein state:

As long as at least one state adopts a UCITA-type law—perhaps a state seeking to attract software manufacturers—software sellers and their customers can contract for application of this law. The law might thereby be-

Professor Ribstein and his colleagues have reiterated their argument in many versions.²⁶⁶ It is founded on the proposition that legislators are often motivated to create “inefficient” laws and the best viable solution, given this political inevitability, is to permit contracting parties to choose their own laws to govern their contracts.²⁶⁷ This idea, in turn, relies heavily on “public choice theory,” which holds, among other things, that legislators are driven largely by campaign contributions and other economic motivators supplied by various interest groups.²⁶⁸ Ribstein and his colleagues argue that such interest groups can induce legislators to “expropriate” wealth from those outside the jurisdiction even when it is economically inefficient (in a larger sense) to do so.²⁶⁹ Because, under these circumstances, it is impossible to determine whether a given law will be “efficient” or “inefficient,” they claim that greater economic benefits will come from permitting the market to decide, by allowing the parties to contracts to decide for themselves.²⁷⁰ In advancing these arguments, Ribstein and colleagues have clearly opted for an individualist, market-centered approach to lawmaking that is largely at odds with traditional, fundamental notions of sovereignty and lawmaking, as ex-

come a standard even if only one state adopts it, just as Delaware law serves as a standard for corporate law.

Kobayashi & Ribstein, *supra* note 263, at 294.

Contrary to Kobayashi & Ribstein’s suggestion, it should be clear that non-litigation economic benefits (such as the influx of high-tech businesses) do not necessarily flow to a state by its enacting UCITA. Companies need not be located in a UCITA state to take advantage of any of its provisions. Rather, they need merely to choose UCITA and then get their litigation into a state whose courts will validate their choice of law. The proposals operate very differently from Delaware Corporation law which extracts fees from corporations that elect to become Delaware corporations. No fees will be owing a state whose law is chosen by the parties under these proposals.

266. Kobayashi & Ribstein, *supra* note 262; O’Hara & Larry E. Ribstein, *Interest Groups, Contracts and Interest Analysis*, 48 *MERCER L. REV.* 765 (1997); O’Hara & Ribstein, *supra* note 83; Larry E. Ribstein, *Choosing Law by Contract*, 18 *J. CORP. L.* 245 (1995); Larry E. Ribstein, *Delaware, Lawyers, and Contractual Choice of Law*, 19 *DEL. J. CORP. L.* 999 (1994); 1 Francesco Parisi & Larry E. Ribstein, *Choice of Law*, *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 236 (Peter Newman ed., 1998).

267. See O’Hara & Ribstein, *supra* note 84.

268. See, e.g., Robert D. Tollison, *Public Choice and Legislation*, 74 *VA. L. REV.* 339 (1988). For full descriptions and critiques of public choice, see Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 *VA. L. REV.* 199 (1988); Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism and Democratic Politics*, 90 *COLUM. L. REV.* 2121 (1990).

269. O’Hara and Ribstein, for example, state:

[L]egislators can increase their campaign contributions and other perks by brokering wealth transfers that end up favoring the members of some interest groups at the expense of others. The winning interest groups are typically those who can organize most cheaply and effectively to raise and spend money, or to mobilize votes and other political resources. Successful interest groups tend to be those that are best able to prevent some members from free riding off of expenditures and other political efforts by others. Because relatively small, homogeneous groups often can more effectively contain free riding, resulting legislation may fail to serve the interests of even a majority of voters.

O’Hara & Ribstein, *supra* note 84.

270. See *id.*

pressed by Justice White in *Fauntleroy*.²⁷¹

There are some obvious points to make that one might characterize as political. First, if choice of unrelated law is a solution to the lack of state law uniformity, it may be a perverse one, proceeding from a view of state lawmakers as venal and almost exclusively focused on their own material well-being. Second, as Ribstein and colleagues imply,²⁷² their approach makes the entire uniform state laws process unnecessary (and perhaps incoherent) because, as long as parties can choose the “best” law, some legislature will be there to produce it and contracting parties will eventually gravitate towards it.²⁷³ Third, state legislatures are elected by their constituents, but under this analysis, voters will not be the real constituency. Rather, legislators will be legislating for those who bring their litigation or other business to the enacting state. At the same time, they will be permitting their own constituents to opt out (by choosing other states’ law) of the legal regimes they create to govern those over whom they have jurisdiction. The discussion that follows will not focus on the political points, rather, the focus here will be on the economic assumptions and implications of these theories if they are implemented in the real world.

Ultimately, these theories hope for the production of better state laws (and at least some drift in the direction of uniformity) as states respond to individual decisions to choose their law to the exclusion of other “competing” law. Millions of daily individual decisions will supposedly produce a “market” for law that will influence what is produced, much as buying decisions influence the size of cars or the color of beer. Whether the market will work or not work to create efficient laws depends on whether enough of the actors in the market are making relatively informed choices, that is, whether they are fairly evaluating the alternative legal regimes and choosing the law that is “best.” It is here that these economic theories begin to take on water.

As suggested below,²⁷⁴ forming even a partially-informed view of a

271. They admit as much. They state:

Instead of a choice-of-law system that allocates political power among the states, this article proposes a system based on principles of wealth-maximization and individual choice. Emphasizing states’ interests and powers is misguided from this perspective because political leaders cannot be expected to maximize social welfare. Rather, political decision-making is infected by the agency costs that inevitably follow delegation of power.

Id.

272. Kobayashi & Ribstein, *supra* note 263, at 296.

273. Thus, under the proposals, any state’s non-uniform commercial code could become the de facto standard for the United States if enough drafters chose that law rather than the UCC of other States. This non-uniform commercial code need not have been subjected to the approval process of the UCC’s sponsoring organizations, the American Law Institute and the National Conference of Commissioners on Uniform State Laws. The possibility that *any* commercial code could become *the* UCC will reduce the importance of that approval process and, ultimately, the influence of participants in that process on the “official” UCC thereby promulgated. The possibility that some small state could be “captured” by special interests and, de facto, produce the commercial law for the entire United States could generate a movement for the federalization of commercial law.

274. See *infra* Part VI.B.

particular state's law could be an enormously complex project. Deciding whether a given legal regime is "better" than another requires at least some comparisons of legislation, judicial decisions, civil procedure, and the quality of the judiciary. Today, with respect to ordinary contracts,²⁷⁵ this legal problem may be manageable because contracting parties in ordinary cases have a menu of only a few choices of "related" law from which to choose. Given these limits to choice, many contracting parties today may well make their choices primarily to eliminate later litigation on the choice of law point (a primary reason for permitting the parties to choose law in the first place),²⁷⁶ not necessarily to acquire the advantages that one state's substantive law may have over another's.²⁷⁷ With today's limitations, choice of law clauses may well be an afterthought, included not so much for the advantages of the substantive law chosen, as for the elimination of a troublesome litigation issue.

However difficult the legal problem of selecting law is regarded today, it will become far more difficult when contracting parties have fifty or more jurisdictions to choose from. The change may bring choice of law clauses to the forefront in contract drafting and, if Ribstein and col-

275. The United States and the United Kingdom differ from the rest of the world by permitting a corporation to choose where to incorporate without actually locating there. See Francene M. Augustyn, *A Primer for Incorporating Under the Income Tax Laws of France, Germany, or the United Kingdom*, 7 NW. J. INT'L L. & BUS. 267, 279 (1985) (explaining that in the United Kingdom the place of incorporation does not need be where the corporation is located); Terence L. Blackburn, *The Unification of Corporate Laws: The United States, the European Community and the Race to Laxity*, 3 GEO. MASON INDEP. L. REV. 1, 57 (1994) (explaining that in the United States the place of incorporation does not need be where the corporation is located); Roberta Romano, *Corporate Law as the Paradigm for Contractual Choice of Law*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 371 (1999).

While this feature of domestic corporate law has been the paradigm for Ribstein and his collaborators, the incorporation decision is normally a one-time momentous decision, usually involves enough projected value to support the costs of performing research into competing corporate law regimes, and usually affects widely-scattered investors who are affected by the choice. Forming a corporation is very unlike making a contract; there are very few contracts whose dynamics are even remotely comparable. See Romano, *supra*.

276. See Mark J. Kelsen, *Choice-of-Law, Venue, and Consent-to-Jurisdiction Provisions in California Commercial Lending Agreements: Can Good Draftsmanship Overcome Bad Choice-of-Law Doctrine?*, 23 LOY. L.A. L. REV. 1337, 1338 (1990) ("By their nature, contractual choice-of-law provisions are intended to prevent litigation of conflicts-of-law questions.").

277. To acquire the benefits of a given jurisdiction's substantive law, a contracting party under today's rules may have to locate there. Given the expense of relocation, the differences in the law of two states must be significant enough to support both the research and the costs of relocation. See Bernard S. Black, *Is Corporate Law Trivial?: A Political & Economic Analysis*, 84 NW. U. L. REV. 542, 542-60 (1990) (describing the willingness of corporations through history to both relocate or reincorporate in another state in order to take advantage of the other state's laws). It may well be that many corporations physically locate in New York today in part to take advantage of its well-developed commercial law. Cf. SCOLES, *supra* note 5, at 872.

Under the proposals, the incentive to physically locate in a given jurisdiction is lost because the benefits of that place's law could be acquired by simply choosing that place's law in the contract; locating there would be unnecessary. Under the new incentive structure of the proposals, New York might receive litigation business (if the contracts chose New York as the forum as well as the law), but whatever legal incentives its substantive law now provides to locate there would be lost.

leagues are correct, will motivate state legislatures to differentiate their law from the other states (and advertise it) in order to compete.

It is, however, very difficult to conceive of a more complex legal judgment than whether one legal regime will be “better” for a given transaction than another. Coming to a beneficial decision of which law to select (if it is possible to do so at all) will be the province of experts handling very large transactions or creating forms that may be used across millions of mass market transactions which, together, can carry the “cognitive load.”²⁷⁸ Smaller contracts simply will not “carry” the transaction costs of learning the law of many jurisdictions that would make a sensible comparison of them possible. Given that some comparison of legal regimes and a reasoned choice among them is essential to obtain the eventual benefits of the economic model, the law ultimately produced (because most often selected) will be responsive to the choices made by parties to transactions that can carry the substantial costs of law-comparison: those parties who engage in discrete large transactions and those parties who create form contracts for use by customers without amendment in mass transactions.²⁷⁹

As if responding to the economic analysis underlying Professor Ribstein’s theory,²⁸⁰ all current rules that permit the choice of “unrelated” law effectively carve out consumer transactions from the rule.²⁸¹ Professor Ribstein, on the other hand, considers any such carve-out to be bad policy.²⁸² And, indeed, restrictions on choice of law will mean, under his theory, that “efficient” law will be produced more slowly.²⁸³ But, because “efficient” outcomes require informed choices by *both* contracting parties, it seems more likely that the consumer exception is far too narrow to permit the eventual production of truly “efficient” law.

Given the impossibility that parties to small transactions will understand the implications of the drafter’s selection of a given law to control the contract, the question becomes whether there are constraints coming from the market that will limit drafter choices. Some scholars have argued that because *some* people read form contracts, suppliers are constrained by the market from producing “inefficient” terms in their forms.²⁸⁴ Whatever the merits of that argument when the contract terms

278. This colorful term is used in Karen Eggleston, et al., *The Design and Interpretation of Contracts: Why Complexity Matters*, 95 Nw. U. L. REV. 91 (2000).

279. Cf. Romano, *supra* note 274 (which considers the extension of Professor Ribstein’s choice of law analysis to securities and franchise contracts).

280. There is no evidence that the drafters or others involved in the UCC revision process are familiar with Professor Ribstein’s theories.

281. The “stand-alone” statutes apply to transactions of at least \$100,000, *see supra* note 200; the current UCC provisions apply to funds transfers, securities transactions, and letters of credit, *see supra* text accompanying notes 200-02; and the UCITA and Article 1 proposals have explicit consumer exceptions.

282. *See Kobayashi & Ribstein, supra* note 263, at 301.

283. *See id.* at 302.

284. *See* authorities cited *supra* in notes 195-96.

are disclaimers or other risk-shifting provisions,²⁸⁵ it seems completely out of place in the context of choice of law. Choice of law clauses are fundamentally different from any other contract provisions because of the amount of information they carry that is inaccessible to non-drafters. The nature and inherent complexity of choice of law clauses make it hard to believe that any non-drafters will understand such clauses adequately to discriminate among them in any but very large transactions. Even if a party receiving a form contract choosing the law of, say, Arkansas took the time to read the form,²⁸⁶ the odds are extremely remote that the recipient would expend resources to determine the meaning of the clause. There are no consumer groups or other services that give parties to form contracts meaningful information through which they can easily compare the terms of the form contracts.²⁸⁷ If customers are unable to discriminate among choice of law clauses, then they will be unable to make choices on the basis of them, an essential ingredient to market constraint.²⁸⁸

If, as Professor Ribstein and colleagues argue, legislatures will produce law to attract business via choice of law clauses, their law production will likely be responsive to the selections made by parties to very large contracts and to vendors or drafters of form contracts in mass market transactions. Thus, if Professor Ribstein's theory holds, jurisdictions will compete for vendor business by producing vendor-friendly law. There is no reason to believe that laws written by massmarket vendors will neces-

285. The argument in that context depends on how many people actually read form contracts, which is an empirical question, and there is disagreement that enough actually do. See Melvin Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 244 (1995); R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635, 635-36 (1996); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583 (1990). There is very little empirical data available on the question.

286. Simply reading a form contract may well be economically irrational. See Edward L. Rubin, *Types of Contracts, Interventions of Law*, 45 WAYNE L. REV. 1903 (2000).

287. In the nearly infamous recent case of *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 575 (1998), the court held that a particularly onerous arbitration provision that essentially foreclosed all relief for buyers of Gateway computers was substantively unconscionable.

While this was a substantial victory for consumers, it is worth noting that Gateway was willing to permit its clause to find its way into a published judicial decision that one could anticipate would be widely disseminated. Moreover, Gateway operates in one of the most intensely competitive markets in the United States and its population of would-be buyers are sophisticated and extremely communicative.

If the market constrains suppliers' use of onerous terms, one would expect such clauses not to appear in form contracts in competitive industries with highly competitive customers or, at minimum, that those who use them will avoid the publicity that accompanies published judicial decisions. While this writer is unlikely ever to purchase a Gateway computer, there is little evidence that the *Brower* case has had any impact on Gateway's sales. Gateway's willingness to risk letting the case go to judgment suggests its own belief that there would be little impact.

288. Choice of law clauses presumably affect a vendor's bottom line but there will be no reason for vendors to reflect the economic differences in choice of law clauses in their prices because customers will not, by hypothesis, be able to connect a lower price with a more customer-hostile law.

sarily be “efficient.” Whatever the “true” efficiency of vendor warranty protection and concomitant limits on disclaimers,²⁸⁹ unconscionability limits, restraints on penalty clauses, and the like, strong provisions of this kind seem unlikely in jurisdictions in which mass market vendors indirectly “capture” the lawmakers through choice of law clauses in their form contracts.

In our current political process, the effect of having the provisions work as this economic theory predicts, is simply to eliminate non-repeat players as an influence on state legislation because non-repeat players will have little or no influence on the choices of law that vendors make in their form contracts. This is not only implicit political disenfranchisement,²⁹⁰ it is an “inefficient” outcome.

There is one final problem with the economic account. Paradoxically, Professor Ribstein and colleagues do not explain why those with organization, wealth, or power will exert any less influence on lawmaking under their theories than heretofore. That is, they do not explain why their system will be any less “political” (in their venal sense) than the system we have today. Indeed, the perverse nature of the political system they describe may get worse rather than better under their economic model.

They envision state legislatures making their law more “efficient” in order to draw those who draft contracts to their law. But why would those with power and influence wait until “better” laws indirectly worked their way into such a system? There is nothing in these economic theories which will keep interest groups from approaching a state directly with campaign contributions, effectively “bribing” a state’s lawmakers to construct a legal system more to their liking, and then subjecting others to that legal system through choice of law clauses.²⁹¹ This economic analysis is built on the view that such lawmaking is both prevalent in state legislatures and inefficient, but the theories contain little that will constrain the lobbying and campaign contribution activity that produces “inefficient” law. The possibility that the legislature of some state, whose legislators may work only part time, will effectively create the “uniform” commercial law for the rest of the United States is an unsettling prospect.

3. Uniformity

It seems clear that if the provisions work the way Professor Ribstein and his colleagues envision,²⁹² the law of one state—the state offering the

289. See, e.g., U.C.C. § 2-316 (2000).

290. Buyers may “vote” in the market by making their purchases, but if they are unable to understand vendors’ different choice of law clauses, they will be unable to discriminate among them and therefore cannot “vote” on them in any way that will influence those who make the laws. The choice of Arkansas law in a Pennsylvania form contract makes Florida’s “butterfly ballot” appear lucid by comparison.

291. Their influence could be exerted in more subtle ways. One author has described a process where he asserts that the interests of financial institutions effectively “captured” the ALI/NCCUSL process of developing a redraft of Article 9 of the UCC. See Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994).

292. See discussion *supra* in Part V.F.2.

most “efficient law”—will be selected in many contracts and the indirect result of this will be de facto uniformity of the law nationally.²⁹³ If one pursues this aspect of their analysis, the development of uniform State legislation is, at best, an ineffectual way to obtain uniformity. Indeed, their analysis makes lawmaking as we know it somewhat incoherent since, if contracting parties can choose the applicable law, lawmakers will no longer be responsive to voting constituents but, rather, to those persons everywhere in the world who draft (or influence the drafting of) contracts.

An example may make this more clear. Non-uniform amendments to the UCC, an implication of the fact that our commercial law is state law, present a problem of non-uniformity that many think is undesirable in the Uniform Commercial Code.²⁹⁴ Permitting the choice of unrelated law could solve the non-uniform amendment problem, at least for non-consumers. Under the Article 1 proposal, for example, if one state saw fit to create a particular non-uniform amendment that made sense to contracting parties (or to those who draft form contracts), those parties would select that state’s law and the non-uniform amendment would become the de facto norm nationally. By the same token, a state enacting a non-uniform amendment unliked by contracting parties or those who draft form contracts would be, essentially, dead letter for non-consumers because parties would simply choose a state’s Uniform Commercial Code that did not contain the non-uniform amendment and thereby avoid it.

Ironically, this potential consequence substantially reduces the effectiveness (and perhaps the very meaning) of the Uniform Laws process itself. As a simple example, the UCC Article 2 Drafting Committee has vacillated sharply with respect to the Statute of Frauds. This mandatory rule was absent from early drafts,²⁹⁵ presumably following recommendations from an ABA Study Committee “that the Drafting Committee carefully consider whether to repeal the statute of frauds.”²⁹⁶ The most recent draft includes the mandatory rule that sales contracts over a particular value must be reflected in a writing.²⁹⁷

If the Article 1 proposal remains, then all the hand-wringing about the Statute of Frauds will have been a substantially wasted effort.²⁹⁸ Judging by the Reporter’s Note, the Article 1 drafters do not consider the Statute

293. See generally Kobayashi & Ribstein, *supra* note 263, at 301.

294. See generally F. Stephen Knippenberg & William J. Woodward, Jr., *Uniformity and Efficiency in the Uniform Commercial Code: A Partial Research Agenda*, 45 *BUS. LAW.* 2519 (1990); Robert E. Scott, *The Uniformity Norm in Commercial Law: A Comparative Analysis of Common Law and Code Methodologies*, in *JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW* (Judy S. Krauss & Steven D. Walt eds., 2000).

295. See, e.g., U.C.C. § 2-201 (Proposed Draft, June 1996).

296. PERMANENT EDITORIAL BD. FOR THE UNIF. COMMERCIAL CODE, P.E.B. STUDY GROUP, *UNIFORM COMMERCIAL CODE ARTICLE 2, PRELIMINARY REPORT* 52 (1990).

297. See U.C.C. § 2-201 (Proposed Draft, June 2000). The contract must involve goods for a price in excess of \$5,000 for the requirement to be applicable.

298. The consumer exception in the Article 1 proposal means that avoidance by consumers and those who do business with consumers will be more difficult. In that sense, UCC mandatory rules will have some bite.

of Frauds to be “fundamental policy.”²⁹⁹ This means that if the parties can find and select the law of some state which has enacted a version of Article 2 without the Statute of Frauds, they will have effectively avoided whatever policy the drafters had in mind when they included the mandatory rule within Article 2. The same will probably be true of nearly all of the now-mandatory rules within the UCC.³⁰⁰ With the Article 1 proposal in place, none of those rules, even if *nearly* uniformly enacted, will necessarily become the uniform law within the United States. Rather, non-uniform substitutes for those provisions enacted by one or more states could become the de facto uniform standard if parties widely chose those versions (rather than the uniform version) in their contracts.

This could result in a form of uniformity for non-consumers and others permitted to choose unrelated law, but one that would be very difficult to manage. Reporting services and other publicly-available legal materials report the laws that are enacted, not those actually used by parties to contracts. If, say, the Utah “non-uniform” rule on some point became dominant through use, how would others learn that it was the de facto standard? Which rule (unused Official UCC rule or dominant Utah rule) would the law schools teach? Which should the bar examiners test? Law that is dependent not on widespread public enactment and reporting but, rather, on widespread private use could be called “uniform” but one wonders if it can be called “law” in the sense we now understand it.³⁰¹

4. Certainty

One of the primary reasons advanced for making these substantial changes in the choice of law rules is achieving more “certainty” in con-

299. See U.C.C. § 1-301, Reporter’s Note f (Proposed Draft, Nov. 2000); see also *supra* text following note 173.

300. The proposal specifies those rules of the UCC that may not be avoided through a choice of law clause. U.C.C. § 1-301(f) (Proposed Draft, Nov. 2000); see also *supra* note 195. The Reporter’s Note describing “fundamental policy” was redrafted for the December 2000 Draft. It stated one example of “fundamental policy”:

On the other hand, this Article imposes on parties a non-waivable duty of good faith in the performance and enforcement of contracts. If the parties designate the law of a State or country that does not impose a similar obligation of good faith but, in the absence of such designation, this Article would apply, a court could conclude that application of the law of that State or country so as to avoid imposing an obligation of good faith would be contrary to a fundamental policy of the State or country whose law would otherwise govern.

U.C.C. § 1-301, Reporter’s Note 3 (Proposed Draft, Dec. 2000). If deleting the good faith requirement in its entirety *might* violate “fundamental policy,” what about either deleting “commercial reasonableness” from its definition, *cf.* U.C.C. § 1-201(22) (Proposed Draft, Nov. 2000), or permitting the parties to the contract to define the standards for its implementation? Given the narrow intended ambit of “fundamental policy” specified in the Reporter’s Notes, and the statutory breakout of these particular rules, it is likely that few of the other now-mandatory rules will be binding on parties who choose other law that does not have such rules.

301. This is, of course, a direct implication of the economic theories that see lawmakers as appropriately responsive to the desires of private business interests rather than the will of political constituents—“the public.”

tracting. It is said that by deleting the "reasonable relationship" requirement, we will eliminate one source of uncertainty and thereby achieve some economic gains.

If uncertainty in contracting had been generated by the question of whether the law chosen in a contract was "related" to the contract or the parties, we would expect to see substantial case law parsing when selected law was—and was not—related to given contracts. Yet, as developed earlier,³⁰² there are comparatively few cases. If there is other evidence that the "relatedness" question is a serious source of uncertainty, it is not evident in the Official Comments to the UCITA rule or Reporters' Notes to the Article 1 Proposal.

What is worse, contrary to drafters' hopes for enhanced certainty, there is good reason to think that certainty and predictability will actually decrease under the proposals, at least for the foreseeable future.

Eliminating the requirement that chosen law be "related" to the parties or transaction may increase certainty by removing that issue from the analysis. But the sharpness of the break from the conflict of laws rule operable in non-UCITA and non-UCC contracts will create uncertain scope issues that do not currently exist.³⁰³ Equally disturbing, the lack of relevant precedent or legal tradition will probably make it very difficult for lawyers to predict whether one provision or another of an unchosen state's mandatory rules will continue to operate despite the choice of a different state's law.

As discussed above,³⁰⁴ the determination of whether otherwise mandatory rules will continue to operate, despite the choice of different law, is currently a complex analysis, the outcome of which is difficult to predict even when parties are limited to selecting "related" law.³⁰⁵ Owing in part to the test laid out in the Restatement, the current judicial analysis depends in part on a comparison of the connections that the "related" states have to the parties and their transaction. Under the test, if the selected state has few contacts, it is more likely a court will find the other state's mandatory rule to be "fundamental policy" than it will if the contacts of the two states are evenly divided.³⁰⁶

This analysis may be connected at an intuitive level to how we have come to think about law, jurisdiction, and conflict of laws. Absent a contractual choice of law, the effect a given state's law ought to have on a given contractual relationship, we think, depends on the connections between that state and the parties or their transaction.³⁰⁷ A state having

302. See *supra* Part IV.A.

303. See *supra* Part IV.A for a discussion of this aspect of the scope problem.

304. See discussion of fundamental policy restriction *supra* Part IV.B.

305. See John Benard Corr, *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes*, 39 U. MIAMI L. REV. 647 (1985) (arguing that the modern expectation for public policy in choice of law has done little to create a balance between predictable and fair outcomes).

306. This analysis is evident in the franchise cases discussed *supra* Part IV.B.1.

307. Cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1969).

little “interest” in a given contract or its parties ought to have relatively less influence on them and their transaction than should a state with a substantial “interest” in them.

What will a court do with a case where the unchosen state has substantial contacts and the chosen state none? The intuitive pull will be in the direction of enforcing the unchosen mandatory rule (whatever its character) in such a case and current judicial analysis which interrelates fundamental policy with a comparison of state contacts might well validate that intuition. Yet the intent of the two proposals is clearly contrary to such a judicial analysis: both are clear that the unchosen state’s mandatory provisions should have little play even if the unchosen state has an intense “interest” in the parties or their transaction and the chosen state has none.

The Comments to the UCITA rule suggest that few mandatory rules of unchosen states should be operable if the parties have chosen a different state’s unrelated law: the relatedness of the unchosen state’s law or the unrelatedness of the chosen state’s law are to have nothing to do with it. Comments to its choice of law rule refer to the UCITA’s more general provision permitting courts to invalidate terms based on “public policy.”³⁰⁸ Those comments, in turn, discourage courts from enforcing “purely local policies” and further state that

“[c]ontract law issues such as contract formation, creation and disclaimer of warranties, measuring and limiting damages, basic contractual obligations, contractual background rules, the effect of contractual choice, risk of loss, and the like, including the right of parties to alter the effect of the terms of this Act by their agreement should not be invalidated under subsection (b) of this section.”³⁰⁹

The intent, clearly, is to leave little room for the mandatory rules of the unchosen state to operate. The kind of constructive local experimentation envisioned by Justice White in *Fauntleroy* is effectively condemned (unless, of course, contracting non-consumers “choose” to be bound by them) because forum courts are directed by the proposal to disregard unchosen local rules. Clearly, while UCITA is state law, the enacting state’s forum is to disregard most *other* state rules if they are not chosen by the parties. Put differently, one state’s law authorizes parties to disregard the law of the other states.

The Reporters’ Notes to the Article 1 Proposal suggest the same outcome. They state only: “A fundamental public policy will rarely be found in a requirement, such as a statute of frauds, that relates to formalities, or in general rules of contract law, such as those concerned with the need for consideration. On the other hand, a rule that makes the selling of body parts or human embryos illegal may reflect such a policy.”³¹⁰

308. U.C.I.T.A. § 109 cmt. 2b (2000).

309. *Id.* § 105 cmt. 3.

310. U.C.C. § 1-301, Reporter’s Note c (Proposed Draft, Nov. 2000).

The lack of both judicial precedent or United States legal tradition for approaching the fundamental policy issue in this way begs the question of whether courts will break with the strong intuition expressed by Justice White at the outset of this Article and approach the matter as the provisions' drafters seem to intend, or whether they will find ways to permit the mandatory provisions to operate, notwithstanding the parties' choice of unrelated law.

Once again, we can expect substantial uncertainty for lawyers advising their clients on the continued operation of mandatory rules despite the choice of unrelated law in the contract. If, for example, a New York private banker wishes to make a loan secured by personal property to a New York borrower for a New York project and selects the law of South Dakota to control their contract, can a lawyer for either party confidently advise her client that the mandatory usury provisions of New York will no longer apply?³¹¹ Since UCC Article 9 governs secured lending, this contract is governed (at least in part) by the UCC. Will that fact permit the parties to select unrelated law to govern the contract more generally, and the usury restrictions particularly? Assuming that the choice of unrelated law were permitted by the UCC proposal, would a court enforcing the choice of South Dakota law also hold that New York's elaborate regulation of such relationships was not "fundamental policy" of New York? As suggested earlier,³¹² courts seem generally hostile to usury restrictions outside the consumer context but their analysis is heavily centered on the relationship between the chosen law and the contract. The Restatement provision dealing with usury would forbid the choice of unrelated law to avoid usury restrictions.³¹³ Under the Article 1 proposal, where do usury laws fit in the Reporter's spectrum between rules requiring consideration, and those prohibiting the selling of human embryos? Lawyers will have great difficulty giving their clients answers to such questions. Yet clients will expect answers if they are being charged the legal expenses necessary to uncover the supposed advantage a choice of particular law was to bring them.³¹⁴

VI. POLICY IMPLICATIONS OF THE PROPOSALS

The UCITA and UCC Proposals confront policy makers with complex choices. As this Article goes to press, UCITA has been promulgated as a stand-alone statute by the National Conference of Commissioners on

311. New York limits the interest that may be charged in such transactions and imposes penalties if the contract sets a higher rate. N.Y. BANKING LAW § 173 (McKinney 2000).

312. See *supra* Part IV.B.2.

313. RESTATEMENT (SECOND) CONFLICTS OF LAW § 203 cmt. e (1969).

314. Certainty in predicting outcomes may also be imperiled once the parties get closer to a dispute resolution process. Both provisions increase the odds that the forum court will decide cases using the law of a different jurisdiction, including in many more cases, jurisdictions without U.S. legal traditions. However unpredictable litigation may be at present, matters will get worse as courts attempt to decide cases using unfamiliar law and legal traditions. Moreover, such decisions will lack the force of precedent and thereby reduce whatever predictability common law precedent adds to the law.

Uniform State Laws (“NCCUSL”); it could not garner adequate support from the American Law Institute to retain its status as part of the Uniform Commercial Code in the form of Article 2B.³¹⁵ The Article 1 proposal, on the other hand, remains a proposal which will require approval by both the NCCUSL and ALI before it can become a part of the UCC.

State legislatures will be asked to enact UCITA and, of course, can choose not to enact it. But as should be clear, all persons in all states (and countries) can be subjected to UCITA’s choice of law provisions if vendors specify a UCITA forum in their contracts and then litigate in a UCITA state. States that oppose UCITA may have to do more than simply refuse to enact it.

The NCCUSL and ALI will be asked to endorse the Article 1 proposal and, if they do, state legislatures will then be asked to enact it as part of the revisions to Article 1 of the UCC. If the proposal survives scrutiny by both organizations, state legislatures will, again, have the choice not to enact it, but the extra-territorial effects of other states’ enacting it will be similar to those brought by UCITA.

For policy makers in the NCCUSL and ALI, the important commercial law question is whether an adequate case has been made to change a conflict of laws rule when the change represents a sharp break with both current law and longstanding legal tradition and will create conflicts in the conflict of laws rules that do not currently exist. Even if uniform enactment can be obtained, will there be net gains in certainty or, given the legal traditions and judicial analysis now in place, net losses? If rapid, uniform enactment proves elusive either in the short or longer term, the result will be an unprecedented diversity in the state conflict of laws rules that will be applicable to the vast bulk of commercial contracts involving people in the United States. Will the commercial consequences of any such diversity be large or small, tolerable or intolerable? At a different level, policymakers must confront the question whether the new provision will undercut the commercial and related lawmaking powers of the states.

Commercial law consists of thousands of rules that structure the relations between many contracting parties. Most of those rules are so-called “default rules”—rules that the parties can alter with a suitable provision in their contract. But there are also many rules that can be implicated in commercial contracts that are mandatory rules, that is, rules that the parties cannot contract around and which express some of the regulatory

315. Several motions that were critical of parts of UCC Article 2B were presented at the American Law Institute’s Annual Meeting in May 1998. The first, critical of Article 2B’s assent issues, passed. *See* A.L.I. PROC. 459-72 (1998). A second, dealing with preemption issues raised by Article 2B failed. A.L.I. PROC. 482-85 (1998). A third dealing with Article 2B’s scope was withdrawn. A.L.I. PROC. 494 (1998). And the fourth, to delete Article 2B’s choice of law provision “split the house.” A.L.I. PROC. 494-505 (1998). The ALI’s attitude towards these parts of Article 2B may have contributed to the proposal’s loss of ALI support.

goals of contract law.³¹⁶ One can find myriad examples simply leafing through the UCC, including the requirements that some contracts be in writing,³¹⁷ that contracts not include unconscionable provisions,³¹⁸ that “good faith” includes an element of commercial reasonableness,³¹⁹ that penalty clauses are impermissible,³²⁰ and so on. Mandatory rules of this sort express legislative intent that the parties subject to a jurisdiction’s rules not be able to contract around them.³²¹

For state legislatures, one can thus add to the questions of commercial certainty those that go directly to a state’s lawmaking power, either through state legislation or through judicial precedent. Because both proposals envision an adjudicating court’s enforcing only narrowly drawn “fundamental policy” of a state whose law would otherwise apply, they potentially convert to non-mandatory status all of the state’s mandatory rules that do not rise to the level of “fundamental policy.” Does the Statute of Frauds fit the category? Is a state’s particular definition of “good faith” an expression of “fundamental policy” so that it will adhere to the parties’ contract no matter what law they choose? Will a state court’s liberal precedent on unconscionability count so it cannot be displaced through the choice of a different jurisdiction’s law expressing a different judicial view of the matter? Reporters’ notes to the provision provide inadequate guidance or suggest a negative answer to all these questions. Importantly, whatever new power these proposals give to contracting parties, it will be available only to those parties sophisticated enough to insist on a different jurisdiction’s law in their contracts. One can anticipate that this will privilege those with the legal knowledge or bargaining power to take advantage of the complexities of choice of law rules leaving the less sophisticated subject to all of “their” state’s mandatory rules.

The difficulty with discussing the policy implications of these proposals is that they are conflict of laws rules and therefore do not operate in the same way as ordinary legislation. Thus, to make the text more manageable, the discussion will begin by considering the problems presented by the proposals in the abstract, without the complications that partial enactment of the proposals bring in our federal system. After that, the focus will be on the proposals under conditions of partial enactment and on the additional issues that partial enactment raises.

316. See generally Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990).

317. *Id.* § 2-201.

318. *Id.* § 2-302.

319. *Id.* § 2-103(b).

320. U.C.C. § 2-718(1) (2000).

321. The Supreme Court’s statement in *Seeman* is worth emphasizing here:

The effect of the [good faith] qualification is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties’ entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject.

Seeman v. Philadelphia Warehouse, 274 U.S. 403, 408 (1927).

A. POLICY IMPLICATIONS WITHOUT THE COMPLICATIONS OF
PARTIAL ENACTMENT

We have considered two discrete problems that the proposals generate: uncertainty produced by the limited scope of the provisions, and uncertainty that may come from the absence of relevant precedent or legal tradition when evaluating “fundamental policy” questions. As discussed earlier,³²² enactment of either provision in some or all states will set into place a conflict of laws rule that will have limited application to contracts within the scope of the provision and will have no applicability outside of that scope. Outside, parties will confront the current law requiring a relationship between the law chosen and the parties or contract. It will be uncertain in many cases whether a given contract is—or is not—within the scope of the given provision and, therefore, whether the parties may choose unrelated law. Is, for example, a usurious loan contract a “UCC contract” and therefore subject to the Article 1 proposal? Would it matter if the borrower granted a security interest in her goods? Further, even if the contract is within the scope of the provision, it may also be uncertain whether the particular legal issue is one that is encompassed by the choice of law clause, and the power the parties have been given by the legislation to choose unrelated law. If a particular franchise contract involves substantial sales of goods, for example, and parties choose unrelated law, will that choice avoid the unchosen jurisdiction’s limitation on franchisee termination?

The earlier discussion also suggested that uncertainty may be generated by the lack of precedent for judicial analysis of the fundamental policy question where the chosen state has no connection with the transaction and the contending state has substantial connections.³²³ The current judicial approach is predicated on a view of law as an expression of governing power by given jurisdictions with perceived interests to advance. This view is reflected in the current fundamental policy analysis which is, of necessity, a comparative one, resting in part on a comparison of the contacts of the chosen and unchosen states. The proposals call for “fundamental policy” decisions necessarily omitting any comparison of the contacts the contending states have with the contract. Given our legal traditions and intuitions, so vividly expressed by Justice White in *Fauntleroy*, whether our courts will have the ability or willingness to disregard ordinarily applicable mandatory rules simply because the parties desired that outcome is a question on which one can only speculate.

These issues of uncertain applicability and predictability are relatively minor, however, compared with the larger conceptual issues that these proposals bring, even if they were uniformly enacted by all states. At their core, these issues concern the impact of the provisions on states’ power to engage in lawmaking as we have traditionally understood it.

322. See *supra* Part V.E., Part V.F.4.

323. See *supra* Part V.F.4.

Giving parties the power to choose unrelated law clearly increases party autonomy by extending to contracting parties a range of choices in making their contracts that they do not currently have. Within their respective scopes, both proposals permit non-consumer parties to choose the law (including the relevant mandatory rules) of any jurisdiction in the United States or, in many cases, the world. If courts are not required to engage in a relatedness analysis, one consequence may be somewhat enhanced certainty³²⁴ that the contractually chosen law will be the law that a court will apply. In addition, if the economic analysis discussed earlier is sound, there may be economic benefits from moving to a system where the parties (not their legislatures) choose the law to govern their contracts.³²⁵ Finally, the proposals might remove some impediments to globalization and international business.

But this power to choose one body of law is also, by implication, the power to reject a contending body of law. In the context of these proposals, and of conflict of law rules generally, the ordinary mandatory rules of the unchosen jurisdiction cease to operate if the choice of different law is enforced. Only those unchosen mandatory rules that rise to the level of “fundamental policy” will continue to be binding notwithstanding the choice of different law. From a policy perspective, this makes much state lawmaking very non-traditional in the sense that, once these conflict of laws provisions are in place, state legislatures will not be creating ordinary mandatory rules for the usual subjects of their lawmaking—their constituents.

If one focuses on a jurisdiction’s normal constituents—defined very loosely as those who inhabit the jurisdiction’s physical boundaries, or are its citizens, or who pay taxes to the jurisdiction—ordinary mandatory rules that are now intended to restrict, channel, or simply govern the commercial activities of those persons will, under the proposals, have less influence over the state’s constituents.³²⁶ They have potential effect only if the given person did not choose a different law to control her contract. For any given mandatory rule—for example, that various contracts must be in writing³²⁷—a given constituent can avoid the rule by choosing the

324. The extent that certainty is enhanced depends on the amount of uncertainty removed by the proposals. As developed earlier, there is little evidence that the relatedness requirement has been a significant impediment to certainty.

325. See *supra* Part V.F.2.

326. Clearly, the proposals do not render *all* state lawmaking ineffective. The only mandatory rules that might be avoided are those arguably implicated by commercial activity. Yet, there are no clear boundaries to the mandatory rules that parties might argue are avoided by their choice of a different jurisdiction’s law.

It is difficult to know the range of mandatory rules that could be implicated in any given contract. One would hope, for example, that if a state made some prohibited commercial activity criminal, that another state’s court would take the rule out of the “ordinary” category either by construing it to be “fundamental policy” or by holding it not implicated by the choice of law. Yet one might be reluctant to forecast such an outcome. Usury restrictions are often backed up with penalties for their violation, yet courts analyzing the problem under current law typically consider usury restrictions not to be “fundamental policy.”

327. *E.g.*, U.C.C. §§ 2-201, 2A-201 (2000).

law of a jurisdiction without the rule,³²⁸ provided an adjudicating court does not call the rejected rule “fundamental policy.”

Thus, the proposals convert ordinary mandatory rules (i.e., those that do not rise to the “fundamental policy” level) into non-mandatory rules that non-consumer parties can “waive” by choosing other law. If the proposals produce the effect projected by the economic analysis discussed earlier, there will be competitive advantages in choosing one jurisdiction’s law rather than another’s, and we can expect those who have the capacity and power to make informed, competitive choices to do so. Indeed, the proposals open the way to business competition through choice of law clauses, and one might well expect such competition to be widespread, even vigorous. Yet the power to choose (and correlative power to avoid) is not universal in the black letter of either proposal: consumers will not be able to choose unrelated law in their dealings with one another, nor will they be able to choose unrelated law in their dealings with businesses. In addition, those business persons who do not engage in either very large or mass market transactions will lack the resources to make informed choice of law decisions. They will have their law-selection decisions made for them by the businesses drafting the contracts.

If lawmaking today is a process of creating rules to shape the activities of a determinable constituency whose core population is within the jurisdiction,³²⁹ the lawmaking process changes under the proposals because the rules produced will not necessarily govern the jurisdiction’s constituency in the way we now understand it. Rather, a given jurisdiction’s ordinary mandatory rules will predictably govern very different groups: 1) those non-consumers, both within and outside the jurisdiction, who affirmatively choose to be governed by them and 2) those consumers and other constituents who lack the sophistication to choose a different jurisdiction’s law and therefore make no choices at all.

328. In the context of the Uniform Commercial Code, a contracting party attempting to avoid the Statute of Frauds will seek a jurisdiction that has enacted a non-uniform amendment deleting the Statute of Frauds. Curiously, the Article 1 proposal does *not* require the choice of law clause to be in writing.

This opens the possibility (unlikely as it may be) that, in answer to a summary judgment motion based on the Statute of Frauds (UCC § 2-201), the plaintiff will allege that the parties, in fact, orally agreed to a law without the Statute of Frauds. Whether an affidavit to that effect will block a summary judgment under the Article 1 proposal is unpredictable at this point.

329. Professor Ribstein and colleagues, who use corporate law as a paradigm, do not subscribe to this model but, rather, to the lawmaking model whereby a state creates a law which it hopes business will find desirable and use. Delaware has prospered economically under this system, in part, because using Delaware law to incorporate requires incorporating in Delaware and becoming a “Delaware corporation.” Incorporating in Delaware is not free and the proceeds of Delaware incorporation can “motivate” Delaware to “compete” in its substantive corporation law.

While these proposals may draw litigation to the state to get the choice of law rule; they will not necessarily provide economic motivation for a state to shape its substantive law to the liking of parties who “choose” it. Under the proposals, one need not establish a presence or even litigate in state B to choose its law. It is sufficient merely to litigate in a state A that permits one to make the choice of state B’s law.

One answer to the possibility of reduced state lawmaking power is available, but only if all states enact the proposals. This “reciprocity” notion is that, by enacting the proposals, each legislature gives up its authority to subject its own constituents to ordinary mandatory rules. In exchange, each enacting state gets the certainty that comes with deleting the relatedness requirement, and the prospect that, just as state A’s constituents will be governed by state B’s mandatory rules if they so choose, so state B’s constituents will be governed by state A’s rules if they so choose.³³⁰ In the same vein, state A would defer to other state courts in determinations of which of state A’s mandatory rules constituted A’s fundamental policy, and other states would defer to state A’s courts on the same questions about their laws. All states, being in it together, would share the benefits and burdens of expanded party choice.

Under this idea, although there might not, in the aggregate, be any substantial reduction in state lawmaking power, its distribution might change. Because legislatures would create rules not for their constituents but for those who chose their law, the legislatures with the most “power” (in the sense of affecting the affairs of individual people or businesses) would not necessarily be the most populous or richest states, but would be those whose law was chosen most often—the ones that were most “competitive.”

Approached in this way, it is obvious that the proposals effectively transfer political power over ordinary mandatory rules implicated in commercial contracts from those who now exercise it—the voters or constituents or interest groups in a given locale—to those who will choose the “best” law through their contracts.³³¹ Instead of creating mandatory rules that benefit constituents directly through enlightened policy translated into law (the viewpoint expressed by Justice White in *Fauntleroy*), lawmakers will benefit constituents indirectly by creating laws that contracting parties everywhere will find “best” and therefore choose in their contracts. If the system works this way, it transfers ultimate lawmaking power in the areas within the scope of the proposals from the political entity’s voting populace to contracting parties throughout the world who choose a jurisdiction’s law in their contracts. The benefits predicted to come from more certainty in contracting are purchased through this reallocation of power in the political system.

But, to be sure, this transfer of political power over these areas is unlikely to give us a more “democratic” system even in the loosest sense of the word: because only those with large or mass transactions can intelli-

330. This expression is obviously overbroad. The only constituents who get this power *in fact* are non-consumers who have the sophistication and bargaining power to influence the choice of law clause in the contract. The remaining non-consumer parties will get whatever ordinary mandatory rules are specified by those who can make such choices. The text is using the overbroad statement to keep the text from getting too cumbersome.

331. The economic theory described *supra* Part V.F.2. contends that the transfer of political power over mandatory rules to contract-makers is desirable because the current political system cannot be trusted to produce efficient laws.

gently choose from the wide array of law that will become available under the proposals, political power to influence legislatures will likely be shifted from those who now have it to those with the power to choose law, rather than to the contracting population more broadly.³³²

The proposals also alter states' lawmaking powers vis-a-vis those individuals and businesses within a given jurisdiction who have the power to choose a different state's law. To some extent, the very idea of "law" involves a projection of power intended to bind individuals whether they wish to be bound or not.³³³ Today, all mandatory rules are clear examples of the projection of this sort of power in intrastate cases. In interstate cases, the power to substitute one set of mandatory rules for another is severely limited (or made costly) by the relatedness requirement in our conflict of laws rules. Under the new proposals, this will change because it will become, essentially, cost free for a contract drafter in a covered transaction to avoid most of a jurisdiction's mandatory rules. In essence, the proposals authorize many constituents to easily avoid compliance with most mandatory rules they find undesirable, thereby reducing the effect of those rules, and correspondingly, reducing the power of any given legislature to influence the behavior of a population targeted by the legislation.

For policymakers concerned with governmental function and sound legislative policy generally, the question is whether these changes in the function and power of state lawmakers are desirable or undesirable and, if undesirable, whether other gains promised under these provisions will offset any undesirable side effects. Since participation in international

332. Moreover, as discussed earlier in the text, *supra* Part VI.A, if legislation is simply the product of interest group pressure, the political power those groups currently have may be amplified by the proposals. The proposals make it possible for those who draft contracts, or influence the drafting, to concentrate interest group pressure on the lawmaking processes of one or a small group of state legislatures and, once the resulting law is to their liking, to choose that law in their contracts. Such direct, concentrated interest group pressure would likely be much cheaper and potentially more effective than the same lobbying effort in Congress.

333. Whether or not a rule *actually* achieves its intended effect depends, in part, on the costs the law imposes on those who would try to avoid it. Businesses, of course, often find ways around various mandatory rules, but legislatures can make avoidance expensive and thereby increase the level of compliance with the rules. A jail term will produce more compliance with usury restrictions than will a nominal fine. *See generally* Lawrence M. Friedman, *Two Faces of Law*, 1984 WIS. L. REV. 13. Conversely, if legislatures make the avoidance of a given mandatory rule less expensive, the level of compliance will likely go down.

In the context of choice of law, clearly businesses today can avoid a whole array of undesirable mandatory rules by relocating or establishing offices in a more desirable jurisdiction. The relatedness requirement essentially imposes this relocation expense on those who would avoid mandatory rules through choice of law clauses. This expense of avoiding compliance with ordinary mandatory rules ensures that those rules maintain a given level of influence within the jurisdiction that created the rules. Reducing the difficulty of avoiding mandatory rules by liberating choice of law will, predictably, reduce the level of compliance with the many mandatory rules that can be implicated in a given commercial transaction. The fact that some businesses can avoid the rules, if they are determined enough, does not seem to justify extending the "privilege" of avoidance to all who can draft contracts.

trade is often cited as a reason for these proposals, a further question might be whether a narrower form of the provisions, perhaps applicable to international contracts (or international contracts larger than a given size) will be a sounder solution to the perceived problems.³³⁴

B. PROBLEMS OF PARTIAL ENACTMENT: FORUM SHOPPING AND COMITY

It may be more important in the conflict of laws area than elsewhere for the uniform laws process to produce proposals that have high prospects of uniform enactment. For if all states do not enact the proposals, the situation becomes far more complex (and probably far worse than it is today) owing, again, to the nature of conflict of laws rules.

From a commercial law perspective, the central problem with less than universal enactment of either proposal is substantially-increased forum shopping and the attendant uncertainty that comes when litigants encounter law that varies with the forum. As discussed earlier, because conflict of laws rules are state law in the United States, there has always been the possibility of forum shopping to the extent that the conflict of laws rules in one state have differed from those in others. Yet, with the narrow exceptions outlined earlier, all states begin with the same basic idea: that parties to a contract may not select law that is "unrelated" to them or their contract. These proposals remove that limitation entirely, but will do so only in those states that adopt the proposals. With less than full uniform enactment, the gains the drafters may desire in commercial certainty will be lost and the partially-enacted proposals will usher in forum shopping opportunities that have not existed before. With partial enactment there is the danger that, in any given case, the litigation will be brought in the "wrong" jurisdiction and the choice of unrelated law will become unenforceable in the forum state without the new rule.³³⁵ With partial enactment, contracting parties will find the new rule unreliable because its application will depend on where the litigation arises, something that cannot be guaranteed when making a contract.

This undesirable situation might be mitigated, to some extent, by inevitable contractual choice of forum clauses which select fora of jurisdictions that have enacted the provisions. But while the Supreme Court has gone some distance in making such clauses enforceable even for adhesion contracts,³³⁶ the prospects for enforcement in all cases is probably not as high

334. Such a solution does not solve the problem of avoidance of mandatory rules through a choice of law clause—that problem already exists in the present system, albeit to a lesser degree. While enacting narrowed proposals that would extend only to international transactions will make the avoidance of mandatory rules somewhat easier than it is today, the "privilege" of avoidance will be extended only to those in international contracts, a far smaller number of contracts than the number potentially affected by the proposals as written.

335. State courts in states which have not enacted the proposal are likely to retain their current approach to conflict of laws questions inasmuch as their state legislature has, by hypothesis, rejected the proposed changes in the law.

336. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

as businesses would like.³³⁷ From the international business perspective, partial enactment and the resulting uncertainty in the applicable choice of law rule will make a situation that is already perceived to be a problem for foreign contracting parties far worse.³³⁸

But partial enactment does not simply create undesirable uncertainty through the diversity (and concomitant forum shopping possibilities) that partial enactment would bring to conflict of laws rules. Partial enactment also raises the prospect of souring interstate relations because the state A's legislatures will permit the state Bs' constituents to avoid most of the state Bs' mandatory rules while the state B's legislatures will not permit them to avoid the rules. Even if these problems are only political,³³⁹ they may be at least as severe as those that partial enactment would bring to the desirable commercial certainty in the contracting process. It is useful first to consider the effect that partial enactment will have on an enacting state.

1. For Enacting States

To begin with, partial enactment and the forum shopping that will result suggest that litigation could move from non-enacting to enacting states (or vice versa) to take advantage of the preferable choice of law rule.³⁴⁰ While we cannot predict the magnitude of such a change, if litigation moves to an enacting state, its courts' caseload will increase. This could have state budget implications (offset, perhaps, by increases in its lawyer-taxpayer's business), to the extent that public support underwrites part of the civil justice system.³⁴¹

As the caseload grows, so will the related litigation business, but any increase in the litigation business will depend on how "competitive" the state is with its choice of law rule. That, in turn, will depend in part on how many other states have the same rule and on whether the state takes an active role in "selling" itself as a desirable place for litigation. Migration to a single enacting state will occur to the extent that forum shoppers find the rule permitting the choice of unrelated law desirable and have

337. Cf. *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998) (holding that arbitration clause "chosen" by the parties was unenforceable because it was substantively unconscionable).

338. One positive consequence of partial enactment could be pressure on Congress to federalize conflict of law rules, at least for international business cases. Several commentators have suggested federal intervention in this area to solve the federalism problems that our current system brings with it. See authorities cited *supra* note 232.

339. We continue here with the assumption that the provisions are not unconstitutional.

340. It is, for example, widely known that much of the Chapter 11 bankruptcy business has migrated to Delaware to take advantage of its hospitable climate for those who file Chapter 11 petitions. See, e.g., Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom"* 4 (manuscript on file with the Author).

341. It is worth noting that, while the litigation business might grow, other kinds of businesses will not necessarily relocate to an enacting state to take advantage of the new rule. They can obtain the advantages of the state's rule by conducting their litigation there, and there is no need to physically move the business to the enacting state in order to litigate there.

the power to bring and keep the litigation in the enacting state. We can, however, expect far more contentiousness on forum selection because, with the rules so different, there will be greater strategic advantage in forum shopping for both new and old rules.

A state's courts are most directly affected by enactment—a choice of law rule is a rule for courts. By removing the relatedness issue from choice of law determinations, the legislature will have somewhat simplified contractual choice of law disputes and this could save some judicial effort. Moreover, it seems that contracts may more likely have choice of law clauses because there will be more competitive advantage in carefully choosing applicable law from the many available jurisdictions. This, in turn, could relieve courts from making difficult choice of law decisions in the absence of such clauses.

Such gains in the work of adjudication may be offset by increases in the complexity of the individual litigated cases. Litigants will be choosing the enacting state's forum to obtain its choice of law rule, not necessarily to obtain the forum's substantive law. If, for example, software vendors find a more favorable law than UCITA, they will choose that law in their contracts and bring their litigation to Maryland to avail themselves only of UCITA's choice of law provision. If parties choose to litigate in an enacting state simply for the power to choose yet a third state's law, then enacting state courts will be called on to decide cases using law that is different (maybe far different) than their own. The use of a different state or nation's law in litigation can add complexity to the litigation. For example, it will be harder for a Maryland state court to decide a case where the parties chose Liberian law than if they had chosen the law of Maryland. Moreover, the quality of the judicial decisions may suffer for the court's lack of familiarity with the law the parties have required them to apply. Finally, judicial decisions predicated on a different state or nation's law will lack precedential value either in the forum or in the State whose law was applied. To the extent these sorts of results follow adoption of the provisions, the lawmaking power of common law judges, and the predictability of their decisions, will be reduced.

The magnitude of these effects on an enacting state's judicial system and litigation business cannot be predicted because they depend critically on how many parties litigate their cases in the state that would not have done so without the choice of law rule. These effects cannot be known (or even estimated) in advance.

But enactment could have a slightly more direct effect on a state's constituents by signaling the enacting state's preference for party autonomy over its own ordinary mandatory rules. If state A's legislature understands the proposals and enacts them, it may thereby signal a belief that a state's ordinary mandatory rules ought not apply if the parties choose a different state's law.³⁴² Thus, if enacting state A's own constituents

342. State A is saying nothing directly about the binding nature of its own mandatory rules on its own constituents since only those who litigate in state A's courts get state A's

choose state B's law and litigate in state A, state A's courts could read state A's enactment as embracing a narrow construction of "fundamental policy." They should probably conclude that very few of state A's mandatory rules constitute state A's fundamental policy under the new rule when parties ordinarily subject to A's rules have chosen the law of state B. When state A's constituents litigate the same claim in enacting state C, state C's courts should probably also conclude that state A's legislature regards most mandatory rules to be waivable via a choice of law clause and, therefore, should read few of state A's mandatory rules as constituting state A's fundamental policy.

Enacting states will presumably weigh the benefits and problems of the proposals and, if its constituents avoid the enacting state's ordinary mandatory rules, that is a consequence that, in some sense, an enacting state's legislature embraced. More troubling consequences will visit non-enacting states in the partial enactment setting.

2. *For Non-enacting States*

Once again, whether a given state's constituent can avoid that state's ordinary mandatory rules by selecting the unrelated law of a different state depends not on what the constituent's legislature decides, but what the legislature of the eventual forum state decides. Thus, if New York refuses to enact the proposals but Delaware does, New York constituents can avail themselves of the Delaware choice of law rule by going there to litigate. So, to repeat an earlier example, if a New York private banker wishes to make a secured loan to a New York borrower for a New York project at an interest rate that is usurious in New York but not in South Dakota, it can (if the Article 1 proposal applies)³⁴³ choose South Dakota law in its loan contract and take its loan default claim to Delaware for adjudication. If the Delaware court concluded that the New York usury laws were displaced by the choice of South Dakota law, and not fundamental New York policy and entered judgment under South Dakota law for the loan plus usurious interest, that judgment would be entitled to full faith and credit in New York, whatever New York may have thought about its own usury regulation or choice of law rule.³⁴⁴

rule. Rather, the state A legislature will be signaling that very few of *any* unchosen state's rules should rise to the level of "fundamental policy" when contracting parties choose other law and litigate their claims in state A. Other states will likely read a form of reciprocity into this. They likely will read state A's enactment as a signal for how state A wishes its own mandatory rules to be interpreted by other states' courts.

343. It may or may not apply to the usury aspects of a secured loan transaction. See *supra* Part V.F.4.

344. As this example might suggest, an implication of non-enactment could be that the litigation business will go elsewhere, but that may not necessarily be the case. The sharp difference between New York and Delaware in this conflict of laws rule means that forum shopping will be important to *both* parties and will, in many lawsuits, become a more contentious matter than it is now. One can imagine the borrower in this example considering a preemptive New York declaratory judgment action that the choice of South Dakota law was unenforceable under the New York choice of law rule, and that the amount of the lender's claim was not owing on account of usury.

Thus, enacting states will have created a rule that governs those constituents of the non-enacting states who go to (or are brought to) enacting states to litigate their claims. Once the litigation is in the enacting state, the ordinary (i.e., non-fundamental) mandatory rules of the non-enacting state become inoperable on the substantive claims in the enacting state's court. The resulting judgment then can return for unconditional enforcement in the non-enacting state under the Full Faith and Credit Clause. While we have assumed throughout that these provisions are constitutional, this outcome would seem to violate the spirit of the Full Faith and Credit Clause which guarantees full faith and credit to "the public Acts, Records, and judicial Proceedings of every other state."³⁴⁵ Thus, while under the assumptions of constitutionality made here the outcome may present no legal problems, it may present severe political problems.

3. *Other Alternatives to Enactment*

States have various reasons for creating mandatory rules to regulate the contracting process and matters related to it and, however one might regard the quality of such rules, a political entity with the power to create such rules and make them mandatory did so. But if other states enact these choice of law proposals, mandatory rules of enacting and non-enacting states acquire an uncertain future, one that depends on whether an enacting state's court with different traditions, and (perhaps) competing for litigation business,³⁴⁶ considers the non-enacting state's rules "fundamental policy."³⁴⁷ How might a non-enacting state maintain the integrity of its own mandatory rules in the face of sister-state enactments of the proposals? There is no foolproof solution because, ultimately, one state's legislature cannot control what another state's courts do with the first state's mandatory rules.

One possibility is suggested by recent developments in two states which have reacted to this phenomenon, one responding under current law and one reacting to the enactment of UCITA.

As discussed earlier,³⁴⁸ following the Eighth Circuit's decision in *Modern Computer Systems v. Modern Banking Systems*,³⁴⁹ the Minnesota legislature amended the anti-waiver provision in its franchisee protection statute to make it clear that franchisee waivers through choice of law provisions were void.³⁵⁰ The apparent intent was to reduce the chances that

345. See *supra* note 234 and accompanying text (quoting the provision in its entirety).

346. If courts are involved in competing for litigation business, it could affect their rulings. In this case, for example, one could imagine litigants more readily choosing for embracing a very narrow view of fundamental policy rather than a broad view. To the extent courts are motivated by self-interest, the prospect of more business could influence the direction of the decisions.

347. Once again, this is a feature of current law. The proposals do not create new problems here; they merely multiply (perhaps by many factors) a problem already present in our federal system, owing to the peculiar development of our conflict of laws tradition.

348. See *supra* Part IV.B.1.

349. 871 F.2d 734 (8th Cir. 1989).

350. The amended Minnesota statute is quoted *supra* note 123.

another court would hold Minnesota's mandatory franchisee protection to be other than the fundamental policy of Minnesota.

Developments in Iowa are more recent. Referred to as the "bomb shelter" provision,³⁵¹ an Iowa statute makes unenforceable a choice of UCITA by any citizen of Iowa.³⁵² The obvious intent is to reject the substantive provisions of UCITA for Iowa's constituents and to prevent Iowans from nonetheless being governed by UCITA's provisions through a choice of law clause.

But the mandatory Iowa provision (as well as Minnesota's) is, of course, merely one state's mandatory law. What becomes of that law if an Iowa resident "chooses" UCITA through clickwrap in a software contract and the litigation arises in Maryland which has enacted UCITA? UCITA's conflict of laws rule permits those who litigate in Maryland to choose the law of any state or country, including state law that contains UCITA. By enacting UCITA, Maryland's legislature has mandated that its courts recognize a contracting party's choice of unrelated law and, consequently, UCITA—not the law of Iowa—will be applicable to the controversy in this example. Would the Maryland court consider the Iowa enactment to be "fundamental policy"? UCITA's choice of law provision, it will be recalled, has no explicit fundamental policy exception in the black letter,³⁵³ and the intended breadth of any fundamental policy exception that a court might recognize is very narrow.³⁵⁴ It is thus very unclear whether a Maryland court strictly following this legislative mandate would reject an Iowan's "choice" of UCITA in a computer information contract: the Maryland legislature may have directed its own courts not to reject such a choice. Those courts are part of the governmental apparatus of Maryland, not Iowa.

Thus, neither these nor any other "bomb shelter" provisions can be guaranteed to succeed because they are, ultimately, dependent on the deference the enacting state's court gives to them. Perhaps enacting state courts will infer fundamental policy from the directness of these provisions but, if they do not, there is little that the other states can do about it.

The odds of deference by an adjudicating court might be slightly improved, however, if the fundamental nature of a state's mandatory rules were stated in just those terms.³⁵⁵ Thus, for example, Minnesota could

351. See Memorandum from Jean Braucher, *The Uniform Computer Information Transactions Act (UCITA): Objections From The Consumer Perspective* (Aug. 15, 2000) (on file with the author).

352. See 2000 Iowa Legis. Serv. H.F. 2205 (West).

353. See *supra* Part II.B.

354. The Official Comment to that effect is quoted *supra* note 38.

355. Cf. *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.*, 871 F.2d 734 (8th Cir. 1989). The *Modern Computer* dissent said:

There exists no clear statement from the Minnesota Legislature indicating how "fundamental" the public policy set forth in the Minnesota Franchise Act is. As the majority's decision is merely a matter of statutory interpretation, it would be subject to reversal if the state legislature were to clearly indicate that the Minnesota Franchise Act overrides choice of law clauses if they operate as waivers under Minn. Stat. § 80C.21.

paraphrase its statute to provide:

It is the fundamental policy of this state that any condition, stipulation or provision, including any choice of law provision, purporting to bind any person . . . to waive compliance or which has the effect of waiving compliance with any provision of [the franchise law] or any rule or order thereunder is void.³⁵⁶

A state's amendment of only some of its mandatory rules to declare them "fundamental policy," however, carries dangers. Selective amendment arguably could show a legislative intent that the mandatory rules not so treated are not to be considered by other courts as "fundamental policy." Moreover, it might be politically difficult for a state to embark on a process of deciding which of its many mandatory rules are "fundamental policy" and which are not. Finally, it seems very unlikely that any selective amendment process would actually catch all the "important" mandatory rules.

In many ways, however, states may have already decided such matters of relative importance by making some rules that operate on commercial contracts mandatory in the first place. Legislators know full well how to permit parties to change rules or waive them contractually, and the fact they have not done so might well be regarded as an indicator that mandatory rules as a class are particularly important (relative to all of a state's rules) in advancing state policy. If this is a plausible view, then it might be worthwhile for a state to declare that all of its mandatory rules constitute "fundamental policy," at least in cases where the chosen law has no relationship with the parties or their contract.³⁵⁷

If a state labeled its mandatory rules as a class as "fundamental policy," such a labeling would flatly contradict the narrow range contemplated by the proposals. The non-enacting state B's legislature would have declared state B's fundamental policy very broadly while the enacting state A's new rule directs its courts to a very narrow view of the ambit of state B's fundamental policy. Nonetheless, state courts routinely look to the declarations of sister state courts and legislatures for guidance on sister state law, and might well be persuaded that the better policy would be to do so under the new conflicts rule as well. Certainly, including "fundamental policy" in non-enacting state B's formulation will make it more

Id. at 743.

356. MINN. STAT. § 80C.21 (1989) (emphasis added); *see also supra* note 123.

357. One can distinguish cases where the chosen law has some relationship with the contract as calling for appropriate deference to the policymaking of the related state, which had contacts with the parties or their contract and, therefore, whose law might have applied even if it had not been chosen. The case for deference by state B's legislature to enacting state A's rulings on state B's mandatory rules is far harder to make when the chosen law interpreted by state A's court has nothing to do either with the State B parties or their contract. Put differently, State B's mandatory rules could be "fundamental policy" when compared to State D's whose rules had nothing to do with the parties or their contract. State B's same mandatory rules could be less "fundamental" when compared to the mandatory rules of State C with which the parties or their contract had contacts. Such an approach would replicate the judicial analysis under current conflict of laws rules which, at its core, is a comparative analysis.

difficult for enacting state A's court to declare something different about the fundamental nature of state B's rules.

In the final analysis, however, none of the available solutions will reliably protect the mandatory rules of states whose constituents go to enacting states to conduct their litigation. In the partial enactment setting, the proposals can easily be seen as enacting states' trading of a measure of the lawmaking power of non-enacting sister states (and themselves) for the commercial certainty that a narrow interpretation of fundamental policy is promised to bring.

VII. CONCLUSION

The attempt here has been to illuminate two choice of law proposals that, due to the complexity of the subject, have received scant attention. They change the law sharply and fundamentally and, at their core level, could change the way we view our federal system from the traditional vision articulated by Justice White in *Fauntleroy* to something quite different. There are many implications of the proposals that policy makers might find objectionable and these objections could result in less than one-hundred percent enactment within the United States. This prospect of partial enactment brings undesirable consequences that dwarf the other objections. Apart from substantial commercial uncertainty, the prospect of partial enactment creates a potential threat to interstate comity embraced in the Constitution's Full Faith and Credit Clause.

If these proposals become law, enacting state legislatures will have given their courts very difficult choices in many cases: deference to most mandatory rules of sister state lawmakers—that is, reading “fundamental policy” very broadly and thereby exhibiting the kind of traditional comity that underlies our federal system as expressed in the Full and Faith and Credit Clause—or non-deference through a narrow reading of “fundamental policy” in the interest of the claimed commercial certainty. Given the status of the proposals and the complete absence of judicial precedent for such a situation, it is very difficult at this stage to know which road those courts will take.

Proposed Revised Article 2

