



1-1-2006

Constraining Opt-Outs: Shielding Local Law and Those it Protects From Adhesive Choice of Law Clauses

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Recommended Citation

40 *Loy. L.A.L. Rev.* 9

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CONSTRAINING OPT-OUTS: SHIELDING LOCAL LAW AND THOSE IT PROTECTS FROM ADHESIVE CHOICE OF LAW CLAUSES

William J. Woodward, Jr.^{*}

I.	INTRODUCTION.....	10
	A. <i>Problems in the Contract Law Context</i>	12
	B. <i>Problems in the Conflict of Laws Context</i>	14
II.	SEGREGATING THE CONTRACT AND THE CONFLICT OF LAWS PRINCIPLES: A THREE-STEP ANALYSIS.....	16
	A. <i>Step One: Using Conflicts Law to Determine Whose Contract Law to Apply</i>	18
	B. <i>Step Two: Using Contract Law to Determine Whether the Choice of Law Provision Is Enforceable</i>	20
	C. <i>Step Three: Using Conflicts Law to Determine Whether the Choice of Law Provision Should Be Enforceable</i>	21
III.	RECONCILING ADHESIVE CHOICE OF LAW PROVISIONS WITH THE COMMON LAW	21
	A. <i>Clash of Values: Autonomy, Efficiency, and Federalism</i>	21
	B. <i>Judicial Limits on Choice of Law Clauses</i>	25
	1. Limits Based in Conflict of Law Principles.....	25
	2. Limits Based in Contract Law	41
	3. Reconciling the Contracts Analysis with the Second Restatement of Conflict of Laws	55
	C. <i>The Limitations of the Common Law in Policing Choice of Law Clauses</i>	60
IV.	PROTECTING LOCAL LAWS WITH SHIELD LEGISLATION.....	61

^{*} Professor of Law, Temple University. My thanks go to Jean Braucher, Don Clifford, Jeff Dunoff, Rick Greenstein, Stewart Macaulay, Bill Whitford, and Candace Zierdt for their comments on an early draft of this paper; to my research assistants that have been involved in this project, Vinnie Gallo, Natasha Gekht, Margaret Hunsicker, Adam Kerns, Justin Rymer, Alyssa Williams, and Mary Wu; and to Temple University for its generous research support.

A.	<i>Limiting Legislation to the Appropriate Classes of Choice of Law and Forum Clauses</i>	62
1.	The Narrow Scope of “Consumers” and “Consumer Transactions”	64
2.	Expanding the Scope of “Consumer” Through Transaction Size Limitations and the “Mass-Market” Construct	66
3.	Shifting the Burden of Proof to Drafters of Choice of Law Provisions	69
4.	Subject Matter Limitations in Statutes Restricting Choice of Law Provisions	71
B.	<i>Substituting Voided Chosen Law with Protective Law</i>	73
C.	<i>Summary of Legislative Considerations for Choice of Law and Forum Limitations</i>	77
D.	<i>Closing the Back Door: Limiting Choice of Forum Clauses to Limit Choice of Law Clauses</i>	79
V.	PRACTICAL LIMITS TO STATE LAWMAKING AND SOME ALTERNATIVES	82
A.	<i>Practical Limits to State Lawmaking</i>	82
B.	<i>The Outlook for Federal Lawmaking as an Alternative</i>	82
C.	<i>The Free Market as a Limit on Choice of Law and Choice of Forum Clauses</i>	85
D.	<i>Federalism Revisited</i>	88
VI.	CONCLUSION	91

I. INTRODUCTION

When a party “contracts out” of the Uniform Commercial Code (UCC), or of any set of rules, the power of law confronts the power of private ordering. To what extent, we ask, should the law permit parties to substitute a different set of rules of their own choosing for ordinarily applicable law? The question is difficult enough when considering the effectiveness of the parties’ choice on the laws they have chosen and, by implication, bypassed. But “contracting out” does not simply involve a “private” contract question because the parties’ selection of any given set of rules implicates the power of the jurisdiction whose rules they have selected and that of the jurisdiction whose rules they have rejected.

There are many reasons why parties might wish to “contract

out” or choose other rules through their contract, such as the uncontroversial goals of reducing uncertainty or, perhaps, getting better developed rules. But there are other, more questionable reasons. The focus of this Article will be on one of these more debatable reasons—using choice of law clauses to obtain a uniform set of rules to govern all of a business’s contracts with customers without resorting to federal legislation to do so.

An age-old trade-off in our federal legal system is, on the one hand, the diversity and experimentation made possible by state lawmaking and, on the other hand, the cumbersomeness and inefficiency that this diversity presents to those multi-state traders who have to comply with the multiple regimes in place. The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) has sought to address the problem, and the UCC is NCCUSL’s most successful product.¹ While the results are mixed, in many areas we have successfully obtained what amounts to national legal uniformity without involving Congress.²

Among the places we have failed miserably to unify the law is in the protective rules different states apply to the business relationships that form between businesses and individuals. “Consumer protection” in state legislation is probably the most common form these rules take, but the legal diversity extends far beyond that to legislation regulating employment and franchises. The diversity also extends to judicially-developed views on issues ranging from contract formation and assent to the defenses of unconscionability, illegality, and so on. Efforts to adopt uniform state legislation, such as the Uniform Consumer Credit Code (UCCC), to replace this diversity have been very disappointing.³

1. Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUDIES 131, 150 (1996).

2. Widespread, prompt, and uniform enactment of Revised Article 9 of the UCC may well be the best such example. See Philip H. Ebling & Steven O. Weise, *What a Dirt Lawyer Needs to Know About New Article 9 of the UCC*, 37 REAL PROP. PROB. & TR. J. 191, 192 n.1 (2002) (“As of July 1, 2001, all fifty states and the District of Columbia have adopted Article 9. . .”).

3. Created in 1968, the UCCC has been enacted in only eleven states. UNIF. CONSUMER CREDIT CODE, 7 U.L.A. 88 (1974). The following states enacted the Code: Colorado, COLO. REV. STAT. ANN. § 5-1-101 (West 2002 & Supp. 2005); Idaho, IDAHO CODE ANN. § 28-41-101 (2005); Indiana, IND. CODE § 24-4.5-1-101 (2006); Iowa, IOWA CODE § 537.1101 (1997); Kansas, KAN. STAT. ANN. § 16-1-101 (1981); Maine, ME. REV. STAT. ANN. tit. 9, § 1-10, (2004); Oklahoma, OKLA. STAT. tit. 14A, § 1-101 (1996); South Carolina, S.C. CODE ANN. § 37-1-101 (2002); Utah, UTAH CODE ANN. § 70C-1-101 (2001); Wisconsin, WIS. STAT. § 421.101 (2005); Wyoming, WYO. STAT. ANN. § 14-40-401 (2005).

Businesses conducting interstate trade naturally wish for a unitary set of rules. If they could choose, they might also wish those rules to be minimally-constraining, permitting them the maximum freedom to hire, control, and fire employees as well as to supply goods and services however they wished in order to compete more effectively in the global market. The outlet our constitutional system has supplied for these yearnings is the Commerce Clause of the Constitution, empowering Congress to “regulate Commerce . . . among the several States.”⁴ Within a national legislative process, all those affected by the law, in theory, have an opportunity to shape it.

A. Problems in the Contract Law Context

This Article considers the emerging contract-based alternative to federal legislation and to a uniform laws process perceived to be deficient. Businesses are having consumers and others who might be protected by otherwise-applicable state law “contract out” of that law and replace it with some other system, one that applies (via a similar “contracting out” process with other customers) wherever the company does business. This elegant approach avoids the necessity of a federal solution to the legal diversity problem. It has the added advantage that the business can choose, from among many jurisdictions, those rules that suit it best. Indeed, it even raises the possibility of shaping the rules of one state and then having customers “contract in” to that set of rules.⁵ This strategy raises a myriad of questions, many of which are on the contract law side of the ledger.

First, *can* consumers and others “contract out” of consumer protection laws and other rules designed to protect them from business abuses? Put differently, will the law recognize a “waiver” by a customer of a rule designed to protect her? The answer is complicated⁶ and probably debatable as a normative matter.⁷ But

4. U.S. CONST. art. I, § 8, cl. 3.

5. See *infra* text accompanying notes 188–189.

6. An accurate answer would require a better description of a “protective rule.” For instance, an implied warranty of merchantability is a rule designed to protect buyers of products but, by statute, we permit “waiver” of that protection. U.C.C. § 2-314 (2003) (implied warranty of warrantability); *id.*, § 2-316 (waiver). For present purposes, the vague description in the text will suffice. Waivers have been addressed extensively in the literature. See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 350–96 (1996); Judith A. McMorrow, *Who Owns Rights: Waiving and Settling Private Rights of Action*, 34 VILL. L. REV. 429, 440–49 (1989); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L.

suffice it to say that at the extremes, the answer is “no.” Many protective state statutes explicitly forbid waiver of the protection they supply,⁸ and courts have read anti-waiver restrictions into many others. And no citation is needed for the assertion that an executory “waiver” of the defense of unconscionability will not resurrect an otherwise unconscionable contract.

But the phenomenon under consideration is not normally a problem of a knowing, voluntary, negotiated waiver that the law renders impermissible. Rather, the multi-state compliance problem is one that most often occurs in the mass-market setting, where vendors supply their goods and services with forms that state the terms of the deal and purport to bind the non-drafter. In this context, the presence of the form contract adds the problem of contractual assent to the already difficult problems that executory waivers of protection have given us.

But a further contract law difficulty is that the “waivers” that are the focus of this Article do not appear as “waivers” at all: they read as “choice of law” clauses. Through these terms in a vendor’s form, the recipient purports to “contract out” of her own protective legal rules and into a different set of rules, the functional equivalent of waiver without the use of the term. This obviously adds “disclosure” to the difficult list of contract law problems we now confront. Indeed, the innocuous-looking choice of law clause turns out to be the best legal “cloaking device” yet invented. Who would dream that by “choosing” Delaware law, one would lose her right to bring a

REV. 1849, 1852–55 (1987); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 110–27 (1997); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 202–03, 205–10 (1998).

7. See Ware, *supra* note 6, at 209–13 (discussing the debate between the contractual and anti-contractual approaches to arbitration law).

8. E.g., California Corporate Securities Law of 1968, CAL. CORP. CODE § 25701 (West 2006) (no waiver of securities protection); California Consumers Legal Remedies Act, CAL. CIV. CODE § 1751 (West 1998) (no waiver of consumer protection); DEL. CODE ANN. tit. 6, § 5006B(b) (LexisNexis 2005) (no waiver of consumer rights in purchase of assistive technology device); 815 ILL. COMP. STAT. ANN. 705/41 (West 1999) (no waiver of protections under Franchise Disclosure Act); MINN. STAT. ANN. § 80C.21 (West 1999 & Supp. 2006) (no waiver of statutory rights related to acquisition of a franchise); TENN. CODE ANN. § 47-18-113 (2001 & Supp. 2005) (no waiver of consumer protection provisions); TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon 2002 & Supp. 2006) (no waiver of consumer protections provided that certain conditions exist).

class action?⁹ Or that by “choosing” North Carolina law, one could possibly “waive” the right to challenge a no-compete clause as illegal under one’s home statutes?¹⁰ Or by “choosing” Wisconsin law, one would be stuck with the terms a vendor buried in a box intended to be opened long after the goods in the box were bought and paid for?¹¹ By putting the waiver into the form of a choice of law clause, vendors have clearly camouflaged its effects from customers. As an added bonus to the vendors, the complexity of the principles that control these provisions may effectively hide them from both the courts and lawyers who confront them.

B. Problems in the Conflict of Laws Context

Where the contract law problems leave off, the conflict of laws problems begin. Because the customers are “waiving” their protection through the use of choice of law clauses, conflict of laws rules and concerns are triggered. Thus, the problem implicates not simply the businesses, their customers, and the law that controls their relationship to one another; but it also concerns the relations among the different states, each of which has developed its own peculiar version of protection for those over whom they exercise jurisdiction. To what extent must (or should) courts of a chosen state defer to the legal protections another state gives its residents when a choice of law provision in the underlying contract “contracts out” of that other state’s law? What, if anything, changes if the opting out is through a mass-market form distributed not just to one contracting party, but to thousands of customers in the “unchosen” jurisdiction?

Businesses would no doubt wish for the simple answer, that the law “chosen” applies in all cases with no exceptions. Such an answer would vastly simplify the legal compliance problems businesses face, and they have pressed this position in litigation.¹² Moreover, there are traces of this same position in the legislation of some states that have attempted to project their own policy mix onto

9. See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1117–18 (Cal. 2005).

10. See *Cherry, Bekaert & Holland v. Brown*, 582 So. 2d 502, 505–06 (Ala. 1991).

11. Cf. *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997). In this near-infamous case, there was (apparently) no choice of law provision. But anyone reading that case would have no doubt that had a choice of law provision been included in the box with the computer, Judge Easterbrook would have enforced that too unless, of course, the customer sent the computer back within the thirty days Gateway specified in its form. See *infra* text accompanying notes 149–152.

12. See, e.g., *Herring Gas Co., Inc. v. Magee*, 22 F.3d 603, 607–09 (5th Cir. 1994).

residents of other states.¹³ As if to underscore the larger conflicts questions implicated by these developments, other states have begun (sometimes in response) to develop “shield legislation”—by which I mean legislation intended to protect the integrity of a jurisdiction’s own protective law from dilution through choice of law clauses.¹⁴

More than fifty years ago, Professor Albert Ehrenzweig, a leading conflicts scholar, stated that “[w]hatever the status of the principle of party autonomy in the conflicts law of contracts in general, this principle has no place in the conflicts law of adhesion contracts.”¹⁵ Whether or not that is true today, it should be apparent that understanding and developing limitations on choice of law clauses in adhesion contracts implicates a very complex array of legal principles.

This Article attempts to unravel those principles while exploring the potential for shielding our vast and rich legal diversity in state protective rules from adhesive “contracting out.” In pursuing this objective, we will consider common law principles found in conflict of laws and contract law rules, state and federal legislation, and the market itself.

As we proceed, it will be important to keep in mind that a rule that avoids a choice of law provision has no effect on the coverage, substance, or remedies of the underlying law, nor does it have any effect on the underlying conflicts question: what is the “normally applicable” law? A shield rule of the kind focused on here will only protect the underlying law (whatever it is), not change it. Indeed, shield laws simply neutralize the choice of law provision so that the normally-applicable law can operate as it would have, absent the choice of law provision.

In addition, in our federal system, conflicts rules—the rules that address (among other matters) the extraterritorial effect of each

13. Delaware, for example, requires its banks to use Delaware law in its contracts with customers in other states. DEL. CODE ANN. tit. 6, § 4-102(b) (2005). Maryland and Virginia have enacted non-uniform versions of Uniform Computer Information Transactions Act (“UCITA”) that require enforcement, in their respective courts, of choice of law clauses with very few limitations. See *infra* note 300 and accompanying text.

14. Several states have, for example, created “bomb shelter” legislation to protect their residents from the application of UCITA through choice of law clauses. See *infra* note 334 and accompanying text.

15. Albert A. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072, 1090 (1953).

state's rules—are themselves state rules, and they too are somewhat diverse. This means that the identity of the forum is inevitably a factor, and therefore consideration must also be given to forum and contractual choice of forum clauses. Thus, to the extent necessary, the discussion will also address both the effect of choice of forum clauses on choice of law (and vice versa) and strategies for addressing those effects.

Part II begins by briefly developing a methodology for segregating the conflicts and contract issues that are raised by choice of law or forum provisions,¹⁶ a process made necessary by our tendency to obscure the contract law issues with conflict of laws analysis. Part III generally explores the common law rules in place that might be brought to bear on choice of law provisions. The law is in a substantial state of flux, and we will consider the potential offered by contracts and conflicts principles to control excessive use of choice of law provisions.

It must be recognized that judicial control through common law may be effective only in individual cases. Given the nature of consumer litigation, judicial control may not be potent enough to cope with both the widespread presence of choice of law provisions and the widespread enforcement of arbitration clauses in adhesion contracts. Part IV will thus consider a range of legislative responses that might be considered in an effort to limit choice of law provisions in adhesive settings. The Article concludes by briefly considering the use of the free market or even federal legislation as alternative means of limiting these provisions.

II. SEGREGATING THE CONTRACT AND THE CONFLICT OF LAWS PRINCIPLES: A THREE-STEP ANALYSIS

In the complex analysis that often accompanies choice of law clauses, it is easy to lose sight of the fact that the enforcement of these provisions depends on plain, ordinary contract law. Whether they appear in negotiated contracts or adhesive forms, choice of law clauses are not binding unless we first conclude that they are enforceable as a matter of contract law. Every choice of law clause is a contractual provision; therefore, it is necessary to isolate the

16. This methodology will be derived from a fuller description found in William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1, 19–32, 36–39 (2006).

contract issues in order to fully understand how the law can effectively regulate these provisions.

What has generated confusion is the fact that a full understanding of choice of law clauses entails not only a contracts analysis, but also two distinct conflict of laws analyses. Together, they form a three-step analysis. In the first step, the forum court faces an initial conflict of laws question of which state's contract law governs the choice of law or choice of forum provision in the contract. In the second step, the forum court, after determining the appropriate state law, applies that contract law to the choice of law or forum clause to determine whether the provision is binding on the parties as a matter of contract law. In the last step, if the court does find the provision to be binding under applicable contract law, the court asks a second conflict of laws question: whether the forum court should recognize the contractual choice of law or choice of forum the parties collectively made or whether the forum state's policies should override the parties' agreement to the choice of law or forum.

As I have developed in greater detail elsewhere, the conflict of laws analysis at both the first and third steps is difficult and uncertain.¹⁷ The relevant conflicts rules for analyzing contractual choice of law clauses have been articulated in the Second Restatement of Conflict of Laws Section 187,¹⁸ which is recognized by a plurality of states.¹⁹ As if to underscore the analytical structure I have described, the Restatement provision *begins* with the assumption that there is a fully formed contract-for-law and then enumerates principles that might limit such an expression of party autonomy.²⁰ It provides in part:

- (2) 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

17. See generally *Id.*, at 25–32, 35–40 (suggesting the difficulty of the conflict of laws analysis in a three-step analysis and explaining conflict of laws restrictions on otherwise valid choice of law provisions).

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

19. Symeon C. Symeonides, *Choice of Law in the American Courts in 2003: Seventeenth Annual Survey*, 52 AM. J. COMP. L. 9, 28 (2004).

20. Comment A begins with the sentence: “The rule of this Section is applicable only in situations where it is established to the satisfaction of the forum that the parties have chosen the state of the applicable law.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) cmt. a.

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.²¹

In the framework set out above, this Restatement provision operates at the third step, *after* a court has found *as a matter of contract law* that the parties have made a contract-for-law.

*A. Step One: Using Conflicts Law
to Determine Whose Contract Law to Apply*

The *other* conflicts question—that is, the initial question of which state's *contract law* should be applied to determine whether the underlying contract is enforceable—is scarcely addressed anywhere. We find guidance in the Second Restatement of Conflict of Laws only in a comment to the above provision addressing contractual choice of law. That comment provides, in pertinent part:

A choice-of-law provision, like any other contractual provision, will not be given effect if the consent of one of the parties to its inclusion in the contract was obtained by improper means, such as by misrepresentation, duress, or undue influence, or by mistake. *Whether such consent was in fact obtained by improper means or by mistake will be determined by the forum in accordance with its own legal principles.*²²

To the extent that this statement addresses the initial conflicts inquiry in the first step, it deviates from the predominant conflict of laws principle with which a forum court usually begins as it seeks the

21. *Id.* § 187(2) (emphasis added).

22. *Id.* § 187(2) cmt. b (emphasis added).

appropriate law to apply to a contract.²³ Whereas Comment b directs a forum court to apply the rules of the state in which it sits, Section 188 of the Second Restatement of Conflict of Laws,²⁴ which states the dominant conflicts approach, directs a forum court to use the contract law of the jurisdiction with the “most significant relationship” in deciding most contract law questions.²⁵ This “center of gravity” approach has two underlying ideas: (1) if the parties had any law in mind at all, it was probably the law with the most substantial relationship to them and their contract (a contract or commercial law-based policy); and (2) the state with the most substantial relationship to the contract probably has the greatest interest in controlling the contract with its law (a conflicts or constitutional law-based policy).²⁶ This approach, if applied uniformly by all forum courts, would advance the policies underlying the conflicts system by reducing the significance of forum choice. At least in theory, all fora would then perceive the same “center of gravity” and would therefore apply the same substantive law to the contract. Under Section 188’s “center of gravity” approach, therefore, forum choice would be less significant.

The apparently contrary statement in the Comment b to Section 187 is curious because applying the law of the forum state to a threshold contract question opens the potential for forum shopping.²⁷ On reflection, however, it seems likely to be a good distillation of the cases and a sensible rule as well.

When a plaintiff brings an action in an “unchosen” forum, the odds are very high that it is the plaintiff’s own location,²⁸ a

23. *Id.*

24. *See Phillips v. Gen. Motors Corp.*, 995 P.2d 1002, 1007 (Mont. 2000) (noting that courts have principally used Second Restatement of Conflict of Laws analysis because it allows courts to analyze and focus on the policies that underlie the conflicting laws) (citing *In re Air Crash Disaster at Boston, Mass.* on July 31, 1973, 399 F. Supp. 1106, 1100 (D.Mass. 1975)).

25. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188.

26. *See Fricke v. Isbrandtsen Co.*, 151 F. Supp. 465, 467 (S.D.N.Y. 1957).

27. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b.

28. *See, e.g., Carnival Cruise Lines v. Shute*, 499 U.S. 585, 585 (1991) (plaintiffs brought claim in their state of residence); *Hengel, Inc. v. Hot ‘N Now, Inc.*, 825 F. Supp. 1311, 1314 (N.D. Ill. 1993) (plaintiffs chose forum where the franchise in question was located); *Cherry, Bekaert & Holland v. Brown*, 582 So. 2d 502, 504 (Ala. 1991) (plaintiff brought suit in the forum state that the agreement was made); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1103 (Cal. 2005) (plaintiff chose forum where she was a resident); *Aral v. Earthlink, Inc.*, 36 Cal. Rptr. 3d 229, 232–33 (Ct. App. 2005) (class brought claim in state of residence); *Am. Online, Inc. v. Booker*, 781 So. 2d 423, 424 (Fla. Dist. Ct. App. 2001) (class brought claim in state of residence);

jurisdiction that *at least* has a relationship with the plaintiff and probably has a reasonably strong relationship with the underlying contract. In this setting, if a forum court brings its own contract law to bear on the choice of law or forum provision found in that contract, the court is implicitly applying a form of the “center of gravity” approach to the conflicts question, perhaps weighted in favor of forum law with which the court will be most familiar. Given the fact that the forum’s own policies are often at issue in such settings, there is added reason for the forum court to begin with its own contract law to decide the threshold question whether the choice of law or forum provision is binding in the first instance.

Were a plaintiff to bring an action in an “unchosen” forum that had little or no relationship with the parties or their contract, the use of forum law for this threshold contracts question would be problematic. No such cases have been found, and none are likely to be found, for the simple reason that a plaintiff attempting to avoid a choice of law or forum provision would likely bring her action in a forum she viewed as sympathetic.²⁹ A forum with little or no relationship with the parties or their contract would not likely be such a forum.

B. Step Two: Using Contract Law to Determine Whether the Choice of Law Provision Is Enforceable

Once the forum court locates the appropriate contract law through this threshold conflict of laws analysis, that contract law can

Convergys Corp. v. Keener, 582 S.E.2d 84, 84–85 (Ga. 2003) (plaintiff chose federal court in state where he was residing); *Phillips v. Gen. Motors Corp.*, 995 P.2d 1002, 1002, 1005 (Mont. 2000) (plaintiff chose forum where the deceased whom he represented had resided); *Kubis & Perszyk Assocs. v. Sun Microsystems, Inc.*, 680 A.2d 618, 618, 620 (N.J. 1996) (plaintiff franchisee brought claim in its home state); *Param Petroleum Corp. v. Commerce & Indus. Ins. Co.*, 686 A.2d 377, 377–78 (N.J. Super. Ct. App. Div. 1997) (plaintiff company brought claim in its home state); *O’Brien v. Shearson Hayden Stone, Inc.*, 586 P.2d 830, 831 (Wash. 1978) (class brought action in home state).

29. An exception that may prove the rule is *Edelist v. MBNA America Bank*, 790 A.2d 1249 (Del. Super. Ct. 2001). There, the California plaintiff sued the Delaware bank in Delaware, not in California, and pled that “Plaintiff’s claims for Breach of Contract, Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing, Fraudulent or Negligent Misrepresentation and Consumer Fraud arise under Delaware law.” *Id.* at 1255. The Delaware court found that, in accordance with the contract, Delaware law controlled and that class action waivers within arbitration agreements were not unconscionable under Delaware law, and dismissed the plaintiff’s case. *Id.* at 1260–61. Implicitly, the Delaware court applied Delaware contract law to the question whether the parties were bound to the choice of law provision. *Id.* at 1255–57. This case is discussed in Woodward, *supra* note 16, at 36–39.

then be applied to the question whether the parties contracted for a particular jurisdiction's law to apply to their agreement. The cases do not reflect a rich contract law analysis, possibly because the contract issues are overshadowed by step three of the inquiry, whether conflict of laws principles require non-recognition of the contract-for-law.³⁰ A more complete contract law analysis could bring the full range of contract law inquiries to bear on such topics as assent, capacity, deception, or pressure and could result in a court's refusal to accord legal status to the alleged contract. Without an enforceable contract-for-law, the inquiry ends, and the applicable law (found through application of the forum's conflicts principles) in the absence of a choice of law provision controls the contract.

*C. Step Three: Using Conflicts Law to Determine
Whether the Choice of Law Provision Should Be Enforceable*

Even if a contract-for-law is found at the second stage, the analysis is not over yet. Conflict of laws principles limit "party autonomy" of contracting parties to specify the law to be applied to their contract.³¹ Thus, once the contract is recognized by contract law, the step three analysis considers whether the contract, effective between the parties, should be unenforceable based on conflict of laws principles. It is this third stage inquiry that has tended to dominate the analysis of choice of law clauses in the courts.³²

III. RECONCILING ADHESIVE CHOICE OF
LAW PROVISIONS WITH THE COMMON LAW

A. Clash of Values: Autonomy, Efficiency, and Federalism

For most of the twentieth century, we witnessed expanded use of the concept of "party autonomy" to justify contractual choice of law.³³ While "party autonomy" was never unlimited, the recent trend has been to favor fewer limitations; the response has been to argue

30. See, e.g., *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 708–13 (Ct. App. 2001) (discussing the terms of the contract only insofar as they violate the no-waiver protections of California law).

31. See William J. Woodward, *Contractual Choice of Law: Legislative Choice in An Era of Party Autonomy*, 54 SMU L. REV. 697, 699–700 (2001).

32. See, e.g., *Am. Online, Inc.*, 108 Cal. Rptr. 2d at 708–13.

33. See Woodward, *supra* note 31, at 711–15.

for more.³⁴ Before considering the steps a state might take to regulate choice of law clauses, it will be useful to focus on what is at stake, especially in the unique area of mass-market transactions. Widespread enforcement of adhesive choice of law clauses can not only disadvantage customers by substituting a weaker form of customer protection for that which their own state offers, but it can also threaten the workings of our constitutional system.³⁵

In our federal system, we have diversity in our state laws that generally govern contractual relationships; even the U.C.C. has a considerable amount of “nonuniformity.”³⁶ Each state has its own peculiar balance of free market and business regulation, and each state’s residents live with the consequences of that balance. The restrictions on businesses and their practices come most obviously in the form of legislation,³⁷ but they also come from judicially-developed principles such as unconscionability, reasonable expectations, and different ways of viewing the requirements for contract formation in the first place.³⁸ Business lobbyists, pro-business commentators, and others will attempt to correlate high levels of business regulation with higher prices,³⁹ but whether or not such relationships hold, it is quite clear that under our system states can strike their own balances and should do so.

While some rules designed to protect individuals in their dealings with businesses are clearly “waivable,”⁴⁰ many are not, even with actually negotiated contracts where true assent is not at

34. *Id.*

35. Limiting choice of forum clauses is important in maintaining customer remedies for torts and contract breaches and in making the limitations on choice of law clauses effective. For the most part, contract law limitations on the use of choice of forum clauses will follow the same principles.

36. F. Stephen Knippenberg & William J. Woodward, Jr., *Uniformity and Efficiency in the Uniform Commercial Code: A Partial Research Agenda*, 45 *BUS. LAW.* 2519, 2530 (1990).

37. *See, e.g.*, California Unfair Competition Act, *CAL. BUS. & PROF. CODE* §§ 17200–17205 (West 1997 & Supp. 2006); Florida Deceptive and Unfair Trade Practices Act, *FLA. STAT. ANN.* §§ 501.201–213 (West 2006); Texas Deceptive Trade Practices-Consumer Protection Act, *TEX. BUS. & COM. CODE ANN.* §§ 17.41–17.63 (Vernon 2002 & Supp. 2006); U.C.C. §§ 2-314 to -315 (2003).

38. *See infra* Part II.B.2.

39. *See, e.g.*, Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 *WASH. & LEE L. REV.* 851, 915 (1996) (“Much of the cost of regulation will be passed on to consumers in the form of higher prices.”). If business regulation drives businesses from a state, it no doubt has an effect on the tax base as well.

40. The most obvious example is the UCC implied warranty of merchantability, which is “waivable” by statute. U.C.C. § 2-316 (2002).

issue.⁴¹ Many modern courts have sensibly concluded that protection that is not waivable through an explicit waiver does not magically become waivable through a choice of law clause.⁴²

Moreover, as a matter of tradition, contract and commercial law continue to be state law, and such consumer protection as exists is nearly all found at the state law level.⁴³ We continue to engage in the cumbersome process of enacting “uniform” commercial law at the state level, notwithstanding the very high likelihood that states will not enact it uniformly.⁴⁴ We obviously place very high value on local governance, local diversity, and local control over issues that matter to a state’s residents.⁴⁵ Widespread, insensitive enforcement of choice of law clauses in adhesion contracts can undercut the state law to which residents and taxpayers are entitled under our political system.

On the other side of the ledger, there are strong values that favor opting out. In theory, choice of law provisions fix the legal environment against which parties bargain, and in that sense, contribute value by reducing uncertainty as to which jurisdiction’s law applies. To be sure, no simple choice of law clause can eliminate later argument on a variety of “what part of that chosen

41. *E.g.*, Consumers Legal Remedies Act, CAL. CIV. CODE § 1751 (West 1998) (“Any waiver by a consumer of the provisions of this title is contrary to public policy and shall be unenforceable and void.”); Iowa Consumer Credit Code, IOWA CODE ANN. § 537.1107 (West 1997) (“Except in settlement of a bona fide dispute, a consumer may not waive or agree to forego rights or benefits under this Act.”).

42. *See, e.g.*, Hengel, Inc. v. Hot ‘N Now, Inc., 825 F. Supp. 1311, 1315–17 (N.D. Ill. 1993) (holding that the choice of Michigan law cannot excuse the parties from the anti-waiver provision of the Illinois Franchise Disclosure Act); Physicians Weight Loss Ctrs. of Am., Inc. v. McLean, No. 90-CV-2065, 1991 U.S. Dist. LEXIS 13107, at *5–*6 (N.D. Ohio June 28, 1991) (noting that the legislatures of Maine, Connecticut, and Indiana enacted anti-waiver provisions which invalidate the choice of Ohio law provisions); Instructional Sys., Inc. v. Computer Curriculum Corp., 614 A.2d 124, 126 (N.J. 1992) (stating that the New Jersey Franchise Practices Act applies even if there is a “Reseller Agreement” that provides for California law).

43. Notable exceptions are the Truth in Lending Act, 15 U.S.C. §§ 1601–1667 (2000), the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–2312 (2000), and the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (2000).

44. *See generally* Knippenberg & Woodward, *supra* note 36, at 2520 (noting that many states have different versions of the U.C.C. and that non-uniform amendments to the UCC are not uncommon).

45. *Cf.* Maureen A. O’Rourke, *Progressing Towards a Uniform Commercial Code for Electronic Commerce or Racing Towards Nonuniformity?*, 14 BERKELEY TECH. L.J. 635, 643 (1999) (noting the importance of allowing local jurisdictions to apply their own values in their own laws in international transactions).

jurisdiction's law applies,"⁴⁶ but at least it tends to reduce later argument on the broader question. Choice of law clauses in negotiated contracts are, at this point in our legal development, non-controversial as a matter of either contract law or of conflict of laws. There remain some minimal conflict of laws limitations on the clauses,⁴⁷ but for the most part, they are enforced routinely.⁴⁸

As mass-market transactions increasingly involve adhesive form contracts, however, the justification for enforcement—(collective) “party autonomy”—falls away, and the now-unilateral nature of the choice of law provision generates different dynamics. “Choice” itself is obviously different: unlike situations involving a negotiated contract, the drafter of a form contract chooses the law, and the customer is likely either unaware of the provision itself or, even if she sees it, has no idea what its implications might be. If risk is being shifted, the non-drafter will be unaware of it. Moreover, because we are dealing with many identical transactions rather than one unique one, the reasons for including a choice of law clause become different. In the mass-market setting, the business drafter has a keen interest in avoiding that major commercial downside of federalism: the compliance issues implicated by dealing with the rules of fifty different states. Federal legislation is usually the answer to this commercial problem, but if the same can be accomplished through adhesive choice of law clauses, the difficult compromises that might be required at the federal level become unnecessary.

Thus, choice of law clauses in forms promulgated to a mass-market create a strong clash of values. Against this backdrop, businesses promote choice of law clauses as a commercial answer to the inefficiency of legal diversity, diversity that is most likely to be found in the unique balance each state strikes between the free market and the limitations they place on businesses through common

46. For example, a choice of law provision would likely be ineffective to convert a sale and security interest into a true lease or a contract for the sale of goods into one for services. *See, e.g.*, U.C.C. § 1-203 (2004) (converting to a lease); *Softman Prods. Co. v. Adobe Sys., Inc.*, 171 F. Supp. 2d 1075, 1084 (C.D. Cal. 2001) (converting to services).

47. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1989).

48. *See* Symeonides, *supra* note 19, at 37–39 (noting that in only a few federal appellate court cases did the court refuse to enforce choice of law clauses); EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 18 (4th ed. 2004).

law and legislation.⁴⁹ States, on the other hand, are the primary source of commercial and consumer law, and they have a strong interest—indeed a constitutional duty—to develop a legal environment best suited and responsive to their constituents.⁵⁰ Legal diversity is part of the constitutional plan and local commercial law a strong tradition; Congress, acting through the Commerce Clause, is the antidote to that diversity when it inhibits commerce.

Moreover, once we entertain the idea that mass-market choice of law clauses can solve the commercial diversity problem, we open the possibility that businesses will select the law that is best for *them* rather than the law that is best for both parties to the contract. Whether this results in a “race to the bottom” or a “race to the top,”⁵¹ it opens the door to one state setting the free market-business regulation balance for customers everywhere, despite the fact that out-of-state customers have no say in the lawmaking process or in the benefits that the “chosen” state’s citizens derive from the chosen state’s particular balance.

B. Judicial Limits on Choice of Law Clauses

1. Limits Based in Conflict of Laws Principles

Section 187 of the Second Restatement of Conflict of Laws provides a complex test for the last step of the three-step analysis—that is, recognizing the collective party autonomy to choose applicable law after finding a contract-for-law in the contract law analysis of step two.⁵² As Section 187 states, the law “chosen by the parties” must have a “substantial relationship” with the parties or transaction, or there must be some other reasonable basis for the parties’ choice.⁵³ If that test is satisfied, the court will defer to party

49. This particular economic justification has nothing to do with actual knowing assent on the part of customers. Whether such an economic justification, devoid of recipient consent, *ought* to weigh heavily is a very debatable question. See generally Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125, 1127 (2000) (“Economic analysis, within its zone of applicability, can make a good case for enforcement of contracts without consent in specific classes of circumstances . . .”).

50. See Woodward, *supra* note 31, at 701.

51. See Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 249 (1993) (arguing that permitting the parties to determine which law is to govern will encourage the legislature to make superior laws).

52. See *supra* text accompanying note 18.

53. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1989). The classic case stated

autonomy, unless use of the chosen law would violate the “fundamental policy” of a state (1) that has a materially greater interest in the determination of the particular issue and (2) whose law would apply under Section 188 in the absence of party choice.⁵⁴ Thus, the forum state is directed by this rule to override the parties’ choice if it violates the fundamental policy of (potentially) yet a third state.⁵⁵ The theory is sound as a conflict of laws matter (if all forums use this same rule, they will all require the chosen law to yield to the fundamental policy of the same state; forum shopping will not then matter). But the complexity of the inquiry no doubt makes it extremely difficult to predict the outcome.⁵⁶ Moreover, the formulation does not take into account the real possibility that the *forum* will find the chosen law repugnant to *its own* policies, and under some theory, refuse to enforce the choice of law because of that repugnancy.⁵⁷

As if this indeterminacy in conflict of law limitations on choice of law provisions were not enough, there is also a wild card in the deck: if a given issue is perceived as “procedural,” then forum law simply controls.⁵⁸ Of course, in many cases the line separating substance and procedure is anything but crisp. In *Discover Bank v. Superior Court*, for example, at issue was the question whether a class action waiver in an adhesion contract was enforceable.⁵⁹ The California Supreme Court remanded the case to the trial court for a determination of the applicable law in light of the choice of

for the latter part of this test is a situation in which neither party trusts the law of the other’s jurisdiction, and, to make the deal viable, they settle on the law of some “neutral” jurisdiction. See U.C.C. § 1-301(e) cmt. 5 (2003). The same dynamic may underlie the choice of a “neutral” forum as in *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15–21 (1972). *Bremen* was a case where the forum was unrelated to either the parties or their transaction. Obtaining neutral law may have been a consequence of litigating in the neutral forum in that case. See Woodward, *supra* note 31, at 714–15.

54. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

55. *Id.*

56. See *Convergys Corp. v. Keener*, 582 S.E.2d 84, 85–86 (Ga. 2003) (refusing to adopt Section 187 of the Second Restatement of Conflict of Laws, in part, because of the complexity of the inquiry).

57. The drafters of the new choice of law provision in U.C.C. Section 1-301 explicitly dodged the question of whether the forum might override the parties’ choice of law because of a claimed clash with the *forum’s* own policy. U.C.C. § 1-301(e) cmt. 9; see also SCOLES ET AL., *supra* note 48, § 18.12, at 986–87.

58. See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1109 (Cal. 2005).

59. *Id.* at 1103.

Delaware law provision in the contract.⁶⁰ A possibility alluded to by both the majority and the dissent was that class actions were simply matters of procedure and that, therefore, California law (which did not recognize class action waivers) would apply even if the Delaware law provision were enforceable.⁶¹

a. Lack of a “substantial relationship”

For negotiated contracts, the substantial relationship restriction seldom invalidates a choice of law by the parties.⁶² There is, of course, a scattering of cases where the courts have invalidated a choice of law as having an insufficient relationship with the parties or their contract, but most of these cases can be understood either as freak cases or cases where superseding events effectively separated the selected law from the parties and their contract.⁶³ In mass-market form contracts, the drafter will typically select the law of its home jurisdiction.⁶⁴ Such a selection will obviously overcome a challenge under the substantial relationship test because one of the contracting parties is located or incorporated in the selected state.

b. Fundamental policy restrictions on choice of law provisions

For mass-market contracts, it is likely that the conflict of laws limitations will come from the “fundamental policy” restriction on the parties’ power to choose their own law. In the typical setting, an out-of-state vendor will specify the applicable law in the form contract, and subsequent litigation will begin in the customer’s home state. In that context, the vendor will argue that the law chosen in the

60. *Id.* at 1118.

61. *Id.* at 1109; 1121 (*Id.* at Baxter, J. dissenting). On remand, the intermediate appeals court concluded that the plaintiff had not placed the case into the “procedure” loophole of the rule saying, “the law of unconscionability is not procedural. Rather, it is part of the substantive law of contracts, and Boehr does not argue to the contrary.” *Discover Bank v. Superior Court*, 36 Cal. Rptr. 3d 456, 464 (Ct. App. 2005).

62. *See* Woodward, *supra* note 31, at 716–21.

63. *Id.*

64. This is not uniformly the case. In *CCR Data Systems, Inc. v. Panasonic Communications & System Co.*, No. CIV. 94-546-M, 1995 WL 54380 at *4 (D.N.H. Jan. 31, 1995) the drafter was incorporated in Delaware and had its offices in Illinois but chose New York law to control its contract with a New Hampshire corporation. Its argument that it chose New York law to get a uniform interpretation of its agreements in many different jurisdictions did not prevent the court from invalidating the choice as “unrelated” to New York. *Id.* at *5. *But cf.* *Schroeder v. Rynel, Ltd.*, 720 A.2d 1164 (Me. 1998) (keeping the drafter’s choice of law despite the absence of a relationship at the time the contract was made).

form contract controls all contract inquiries, from formation to unconscionability.⁶⁵ The effect of an enforceable choice of law clause in this context is to project the chosen state's view of public policy into the state of the customer's residence.⁶⁶ A potential tool for limiting this type of projection and its ability to control cases is the "fundamental policy" restriction on choice of law provisions found in Section 187 of the Restatement (Second) of Conflict of Laws.⁶⁷

A very clear example of the potentially-controlling nature of a choice of law clause in an adhesion contract is *Scheifley v. Discover Bank*,⁶⁸ an unpublished decision from the federal court in Tacoma, Washington. Plaintiff brought an action against the bank alleging violations of the Fair Credit Reporting Act and was seeking class action status for it; the bank was seeking to stay the action and send it to arbitration pursuant to the arbitration clause in the bank's documents.⁶⁹ Plaintiff challenged the arbitration provision as unconscionable because it contained a class action waiver.⁷⁰ This brought her into contact with another provision in the form, the one specifying the law of Delaware as the applicable law.⁷¹ The court's summary enforcement of the *choice of law* provision effectively decided the entire case. Contrary to the cases the plaintiff cited from Washington and other jurisdictions, Delaware courts had held that class action waivers did not render arbitration clauses unconscionable.⁷²

Potentially available to Ms. Scheifley were a contract law challenge (that we will consider later in this Article) and a conflict of laws challenge predicated on the fundamental policy exception in the

65. See, e.g., *Herring Gas Co. v. McGee*, 22 F.3d 603, 607–09 (5th Cir. 1994); *Physicians Weight Loss Ctrs. of Am., Inc. v. Creighton*, No. 90-CV-2066, 1992 U.S. Dist. LEXIS 12720, at *3, *22 (N.D. Ohio Mar. 30, 1991); *Cherry, Bekaert & Holland v. Brown*, 582 So. 2d 502, 505–08 (Ala. 1991); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1117 (Cal. 2005); *Olinick v. BMG Entm't*, 42 Cal. Rptr. 3d 268, 272, 277–78 (Ct. App. 2006); *Aral v. Earthlink, Inc.*, 36 Cal. Rptr. 3d 229, 231–33 (Ct. App. 2005).

66. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (1989).

67. *Id.*

68. No. CV 03-2801 RBL (W.D. Wash. June 25, 2004).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

Second Restatement of Conflict of Laws.⁷³ Had she raised an unconscionability challenge, might she have made a plausible case that the application of Delaware law, as specified in the choice of law provision, violated the “fundamental policy” of her home state of Washington?⁷⁴ As discussed earlier, the Second Restatement of Conflict of Laws requires that the fundamental policy come from 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 Section 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.”⁷⁵ To meet this standard, a customer would have to show that her home state’s law would have applied in the absence of a choice of law clause and that her state’s unconscionability (or other consumer-protective contract law) principles were “fundamental policy” in her own state. The cases reveal very few such challenges to choice of law clauses in the mass-market adhesion contract setting.⁷⁶ Cases from better-developed areas suggest that such a challenge, while potentially complex, may have some promise.

The most common situations raising the fundamental policy restriction are those involving no-compete clauses in employment and franchise contracts. Here, the state law chosen by the multi-state employer will typically permit the employer to engage in some practice that is forbidden in the state where the employee physically works. Enforcing the choice of law provision amounts to allowing

73. Washington appears to embrace the fundamental policy exception in its courts’ conflict of laws analysis. See *O’Brien v. Shearson Hayden Stone, Inc.*, 586 P.2d 830, 833 (Wash. 1978) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g (1971)).

74. As the case stood, Delaware law gave the court an easy way to decide the case without confronting the difficult issues that an unconscionability challenge to a class action waiver presents. A fundamental policy challenge to the choice of law provision would, at a minimum, have required the court to consider Washington law and the actual strength of any policy views that differed from Delaware’s. Compare the analysis in *Discover Bank v. Superior Court* and *Aral v. Earthlink, Inc.* which are companion cases from the California appellate courts showing the rich—and difficult—conflicts analysis raised by choice of law clauses in this context. See *infra* text accompanying notes 191–205.

75. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1989); see also *supra* text accompanying note 21.

76. This may be changing. In 2005, the California Supreme Court decided a significant arbitration case that ultimately turned on a choice of law provision in an adhesion contract. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1103 (Cal. 2005). The case on remand, *Discover Bank v. Superior Court*, 36 Cal. Rptr. 456 (Ct. App. 2005), and a companion case, *Aral v. Earthlink, Inc.*, 36 Cal. Rptr. 3d 229 (Ct. App. 2005), form the best analysis in the cases to date of these issues. See *infra* text accompanying notes 194–205.

the forbidden practice to flourish in the physical location where it is normally forbidden. Depending on the practice at issue, this outcome could be perceived as de minimus or as a serious challenge to the regulatory authority of the employee's state government. The "party autonomy" to choose law yields to superior state regulatory power when the court concludes that the matter at issue implicates "fundamental policy."

A well-developed example illustrating the complexity of the fundamental policy restriction in Section 187 of the Second Restatement of Conflict of Laws Section 187 is *Herring Gas Company v. Magee*.⁷⁷ There, the Mississippi employer included in its employment contracts a provision that restricted competition for a period of six years at any location within fifty miles of any Herring Gas location, including those in Louisiana, a state which by statute declared no-compete agreements in excess of two years "null and void."⁷⁸ Seeking a declaratory judgment in a federal district court in Mississippi to affirm the enforceability of the provision in Louisiana, the employer argued that the no-compete contract specified that it would be governed by Mississippi law, which contained no such restrictions.⁷⁹ Thus, the question before the federal district court was whether a Mississippi court would conclude that the no-compete provision violated the fundamental policy of Louisiana so as to make it unenforceable in Louisiana.⁸⁰

The employees' case foundered not on the question whether the Louisiana statute expressed that state's fundamental policy, but rather on the preceding questions under the Restatement provision: whether Louisiana had a "materially greater interest" than Mississippi in the application of its law, and whether Louisiana law would apply under Restatement Section 188 in the absence of the parties' choice.⁸¹ The employer apparently had more outlets in Mississippi than in Louisiana, the contract had been executed in Mississippi, and two of the four persons involved resided in

77. 22 F.3d 603 (5th Cir. 1994) (applying Mississippi conflict of law rules).

78. *Id.* at 604 (citing LA. REV. STAT. ANN. § 23:921 (Supp. 1994)).

79. *Id.* at 604.

80. *Id.* at 604–05. Because the federal district court sat in Mississippi, Mississippi conflict rules applied. *Id.* at 605. Hence, the court pursued the conflicts question through the lens of a Mississippi (not a Louisiana) court. *Id.*

81. *Id.* at 604–05 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971)).

Mississippi.⁸² The Fifth Circuit opined that the Mississippi Supreme Court would not have “split” the inquiry, a move that could have allowed the Louisiana policy to govern competitive activities in Louisiana alone.⁸³ Instead, the Fifth Circuit held that the Mississippi rule governed the agreement everywhere, including Louisiana, because Louisiana did not have a “materially greater interest” in the matter.⁸⁴ As a result, protection of the parties’ justified expectations, rather than deference to the fundamental policy of a sister state, fueled this conclusion.⁸⁵ The court also advanced the debatable contention that its unitary approach would lead to “certainty, predictability and uniformity of result.”⁸⁶

i. The importance of forum (and choice of forum clauses) to fundamental policy determinations

Herring Gas illustrates the substantial complexity—and indeterminacy—of the public policy challenge in a negotiated contract setting. It may also suggest the role that forum shopping can play in the success of a public policy challenge to a choice of law provision. Suppose the employees in *Herring Gas* had beaten the employer to the courthouse and filed suit for their own declaratory judgment (that the provision was *unenforceable*) in Louisiana. While the Louisiana and Mississippi courts should, in theory, decide the case the same way, is it really likely that a Louisiana court, applying Louisiana conflicts principles, would have concluded that its own statutory restrictions would have no effect on this no-compete contract explicitly intended to operate in Louisiana?

This sort of strategic forum shopping occurred in *Cherry, Bekaert & Holland v. Brown*⁸⁷ and may well have been central to its outcome. In that case, a no-compete provision was executed in Alabama between an employee who worked there and his employer

82. *Id.* at 606.

83. *Id.* at 608.

84. *Id.* at 609.

85. *Id.* at 608–09.

86. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 6 (1971)). Whether this last outcome will follow from this opinion is at least questionable because it underscores the role that forum shopping might have in a case like this, a central role that can be seen in *Cherry, Bekaert & Holland v. Brown*, 582 So. 2d 502 (Ala. 1991), the next case considered in the text.

87. 582 So. 2d 502.

who had its home office in North Carolina.⁸⁸ The parties agreed that the contract was to be governed by the law of North Carolina—a state that enforced no-compete contract provisions.⁸⁹ When the employee quit and began competing in Alabama, his former employer brought suit in North Carolina seeking enforcement of the provision and substantial money damages.⁹⁰ The employee responded by bringing suit in Alabama seeking a declaratory judgment that the provision was unenforceable in Alabama and by quickly filing a motion for summary judgment on his claim.⁹¹ The employee's case got to judgment first⁹² and, not surprisingly, the Alabama courts found that the provision violated Alabama's fundamental policy and was unenforceable there. Unlike the *Herring Gas* court, the Alabama court in *Cherry, Bekaert & Holland* emphasized neither the parties' expectations nor the complex conditions found in Restatement Section 187 for recognition of fundamental policy.⁹³ Rather, quoting the Restatement commentary that "[f]ulfillment of the parties' expectations is not the only value in contract law," the court summarily concluded that Alabama law would have applied in the absence of the agreement to North Carolina law and that Alabama's policy was fundamental.⁹⁴ Thus, the no-compete provision was unenforceable in its entirety.⁹⁵

While one could distinguish *Herring Gas* and *Cherry, Bekaert &*

88. *Id.* at 504.

89. *Id.*

90. *Id.*

91. The employee filed his complaint with the circuit court in Alabama on May 18, 1989, and he filed a motion for summary judgment in the North Carolina case on August 2, 1989. *Id.*

92. In cases such as this, where the same claim is pending in several courts, the judgment first entered becomes res judicata between the parties and, as such, defeats the less-developed litigation elsewhere. *Id.* at 505; see also *Galbreath v. Scott*, 433 So. 2d 454, 456 (Ala. 1983) (quoting R. LEFLAR, AMERICAN CONFLICTS LAW § 75 (3d ed. 1977) ("The mere pendency of an action in one state has no effect upon the right to bring an action in another. Whichever suit is first carried to judgment then bars the other, but it is only the rendition of judgment which has that effect. Until judgment is rendered, successive suits may be brought on the same cause of action in a dozen different states.")).

93. *Cherry, Bekaert & Holland*, 582 So. 2d at 507–08.

94. *Id.* at 507 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) cmt. g (1989)).

95. The court also refused to enforce a no-compete provision that amounted to a liquidated damages provision, payable if the plaintiff competed. *Id.* at 506. The court did not, however, go so far as to give credence to plaintiff's position that defendants' attempt to enforce the provision amounted to tortious interference with contract. *Id.* at 508.

Holland on their facts,⁹⁶ the latter underscores the likely importance of forum in cases where a contractual choice of law is challenged as violating the fundamental policy of a state with a competing statute. Ideally, of course, all courts should resolve a given state's fundamental policy questions identically, and courts of different states *ought* to trust one another to appropriately apply the others' law. But the reality is probably that, all other things being equal, a given forum would take a more hospitable view of *its own* fundamental policy than would a court in the chosen state. As unfortunate and destabilizing as it may be to our judicial system, this suggests that forum shopping, and the accompanying race to judgment, becomes an important strategy for both parties to a contract whose choice of law clause might be ripe for a fundamental policy challenge.⁹⁷

Of course, contract drafters could draft a solution to control this risk by pairing the choice of law provision with a choice of forum clause, thereby directing the litigation to a forum likely to uphold the choice of law clause in the face of a fundamental policy challenge. Because the enforceability of choice of law clauses is (at least in practical terms) partly dependent on choice of forum, and because a drafter will, for that reason, likely couple her choice of law clause with a choice of forum provision, we must briefly consider the enforceability of choice of *forum* provisions in order to better understand the dynamics of choice of law clauses and the possibility of regulating their use.

Like choice of law clauses, choice of forum clauses are, first, contracts reflecting commitment between the parties and, second, assertions of (collective) party autonomy vis-a-vis the judicial system. These provisions have not received the scrutiny they deserve under state contract law;⁹⁸ rather, courts have asked under

96. Most significantly, the contract in *Herring Gas Company v. Magee*, 22 F.3d 603, 606 (5th Cir. 1994), was executed in the chosen state, while the contract in *Cherry, Bekaert & Holland*, 582 So.2d at 504, was executed in the unchosen state that eventually became the forum.

97. *E.g.*, *Custard Ins. Adjusters, Inc. v. Nardi*, No. CV980061967S, 2000 WL 562318, at *1 (Conn. Super. Ct. Apr. 20, 2000). There the employer chose Massachusetts law in its employment agreement but sued the employee in Connecticut under a Connecticut statute. *Id.* at *3. The employer succeeded in persuading the Connecticut court that Connecticut's fundamental policy should override the plaintiff employer's own choice of Massachusetts law. *Id.* at *8.

98. *See Woodward*, *supra* note 16, at 19–32. Choice of forum clauses will be subject to the same contract law challenges as choice of law clauses. Those challenges will be considered later. *See infra* text accompanying notes 147–209.

section 80 of the Second Restatement of Conflict of Laws⁹⁹ whether a choice of forum clause in a given case is “unfair or unreasonable.”¹⁰⁰ Here again, conflict of laws rules are local (state law) rules to be applied by the forum. Therefore, there is the potential for division of opinion among jurisdictions about how the restrictions ought to operate. Accordingly, there is a vast range of views in the courts as to what these restrictions mean in the adhesion contract context.

The Supreme Court’s decision in *Carnival Cruise Lines v. Shute*, an admiralty case where the “unfair or unreasonable” restriction amounted to virtually no restriction at all, illustrates one end of the spectrum.¹⁰¹ There, the drafter embedded an adhesive choice of forum provision somewhere in a lengthy cruise line ticket and delivered the ticket after the plaintiff had both planned and paid for her trip.¹⁰² The effect of the majority’s upholding the choice of forum clause was to drag the plaintiff’s personal injury claim from the West Coast, where she lived and bought her ticket (Washington), where her cruise took place (California), and where her personal injury occurred (off the coast of Mexico), to Florida where Carnival Cruise Lines had its offices.¹⁰³ This may not have completely destroyed the plaintiff’s claim, but it surely had a very negative influence on its settlement value.

Even harsher than *Carnival Cruise Lines* was *America Online v. Booker*,¹⁰⁴ where it is likely that the plaintiff’s claim (and the claims of all customers similarly situated) was completely destroyed by the

99. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971) (amended 1989) (“The parties’ agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable.”).

100. See, e.g., *Calzavara v. Biehl & Co.*, 181 So.2d 809, 810 (4th Cir. 1966) (finding that a provision giving an Italian court exclusive jurisdiction was unreasonable as applied to a U.S. citizen residing in New Orleans and bringing action against Louisiana corporation); *Am. Online, Inc. v. Booker*, 781 So. 2d 423, 425 (Fla. Dist. Ct. App. 2001); see also discussion *infra* text accompanying 147–209.

101. 499 U.S. 585, 593–95 (1991).

102. *Id.* at 587–88. The plaintiff purchased her ticket through a Washington State travel agent and argued that but for her contract in Washington, she never would have purchased the ticket. *Id.* Therefore, she argued, the state of Washington had a material interest in the contract since the transaction had been completed in Washington; however, the Court noted that the tickets very clearly called attention to the choice of law provision in the contract with capital and boldface lettering. *Id.*

103. *Id.* at 595–96.

104. 781 So. 2d 423 (Fla. Dist. Ct. App. 2001).

court's enforcement of a choice of forum clause. There, the plaintiff brought a class action in Florida to challenge America Online's practice of charging customers for the time they spent viewing unwanted pop-up ads.¹⁰⁵ America Online moved to dismiss based on a choice of Virginia forum clause.¹⁰⁶ The plaintiff, in turn, challenged the choice of forum provision as being "unreasonable or unjust" because (while it was not, of course, mentioned in the choice of Virginia law clause itself) Virginia had no class action procedure; thus, litigation in Virginia would deny plaintiffs any class remedy.¹⁰⁷ Despite the mass-market, adhesive nature of the contract, the court concluded that the absence of a class action remedy in Virginia was not enough to render the clause "unreasonable or unjust" and dismissed the Florida class action.¹⁰⁸ But the obviously non-negotiated nature of the transaction did not keep the court from adding the rhetorical flourish that "the forum selection provision was obtained through a freely negotiated agreement which has not been shown by the plaintiffs to be either unreasonable or unjust."¹⁰⁹ It is hard to imagine how (except in theory) an individual with a tiny claim of the kind held by the plaintiff in *America Online* could have any legal remedy at all, if getting that relief also required a trip from Florida to Virginia.¹¹⁰

Carnival Cruise Lines and *America Online v. Booker* illustrate a common phenomenon in the cases where courts enforce choice of forum clauses found in adhesion contracts: courts assume that customers freely contract for a particular forum and then use that assumption to add makeweight to the conclusion that the choice of forum provision is not "unfair or unreasonable." The majority in *Carnival Cruise Lines*, for example, seized on a concession of the plaintiff's lawyer to get beyond the contract issues.¹¹¹ Similarly, the

105. *Id.* at 424.

106. *Id.*

107. *Id.* at 424–25. The plaintiffs complained that their only recourse was "to litigate individual cases in Virginia small claims court, and that to do so would be economically impractical." *Id.*

108. *Id.* at 425.

109. *Id.*

110. For an example of a court that understands this difficulty, see *Aral v. Earthlink, Inc.*, 36 Cal. Rptr. 3d 229, 231 (Ct. App. 2005) ("A forum selection clause that discourages legitimate claims by imposing unreasonable geographical barriers is unenforceable under well-settled California law.").

111. *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 595 (1991) ("[R]espondents have

America Online court apparently applied conflict of laws principles to what it assumed was an enforceable contract under applicable contract law. Because enforceable contracts were assumed in both of these cases, it seems likely that neither of these cases (nor many cases like them)¹¹² says much, if anything, about the *contract* law defenses to choice of forum contracts.¹¹³

Because restrictions on choice of forum clauses are local restrictions, *Carnival Cruise Lines* need not be followed in non-admiralty cases and *America Online* states only the Florida rule.¹¹⁴ As with choice of law, state diversity in the conflicts restrictions on choice of forum clauses invites forum shopping, parallel litigation, and races to judgment as seen in *Cherry, Bekaert & Holland* discussed above.¹¹⁵ As that case might suggest, obtaining a favorable ruling (one way or the other) on a contractual choice of *law* provision may be forum-dependent. But the same is obviously true of the enforceability of a choice of *forum* provision itself, whether it is designed to send the contract litigation to a place that will embrace more favorable law for the drafter,¹¹⁶ or merely to convenience the drafter (or to inconvenience the customer).¹¹⁷ Because of the

conceded that they were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity.”). *But see id.* at 597–605 (Stevens, J., dissenting) (dwelling on the contract issues and focusing on the implications of standard forms, the inability to bargain, and the like—concerns of contract law).

112. The exception is cases where the “forum” chosen is arbitration. In that instance, the Federal Arbitration Act, as interpreted by the Supreme Court, eliminates the conflict of laws restrictions on choosing fora by contract. *See Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996). This leaves only contract law challenges to arbitration clauses; accordingly, in that area the contract challenges are well-developed in the case law. *See, e.g., May v. Higbee Co.*, 372 F.3d 757, 763–64 (5th Cir. 2004) (stating that “arbitration is a matter of contract” and state contract law will determine whether a valid agreement to arbitrate was formed).

113. This tendency to assume a fully-formed contract is, perhaps, helped along by the Second Restatement of Conflict of Laws’ formulations that apply to *contracts* for forum, that is, to *collective* assertions of party power to choose a different court and thereby effectively foreclose the exercise of jurisdiction by the (unchosen) forum. The assumption that there is an enforceable underlying contract for forum often goes unchallenged under contract principles; the parties instead typically argue about the meaning of the vague general standard in the Second Restatement of Conflict of Laws.

114. *See* SCOLES ET AL., *supra* note 48, § 11.5.

115. *See supra* text accompanying notes 87–95.

116. *See, e.g., Herring Gas Co. v. Magee*, 22 F.3d 603, 607 (5th Cir. 1994); *Cherry, Bekaert & Holland v. Brown*, 582 So. 2d 502, 507 (Ala. 1991); *Am. Online, Inc. v. Booker*, 781 So. 2d 423, 425 (Fla. Dist. Ct. App. 2001).

117. *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991); *Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc.*, 680 A.2d 618, 627 (N.J. 1996). In *Kubis & Perszyk Assocs.*, the court noted:

consequences above, choice of law and choice of forum often come in pairs.

ii. The (growing) importance of fundamental policy to choice of forum provisions

The New Jersey Supreme Court may be staking out a position on the other end of the spectrum from *Carnival Cruise Lines* in its interpretation of the appropriate limitations on choice of forum clauses in adhesion contracts. In *Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*,¹¹⁸ Kubis & Perszyk Associates sued Sun Microsystems for terminating their relationship in violation of the New Jersey Franchise Practices Act,¹¹⁹ a statute the New Jersey Supreme Court had earlier concluded reflected “fundamental policy” of New Jersey.¹²⁰ The contract in question provided that California law applied to the contract and chose courts in California as the exclusive fora for litigating disputes.¹²¹ Sun Microsystems, the California defendant, contended that under the choice of California law provision in the contract, the relationship was not subject to the New Jersey Franchise Practices Act and, in any event, moved to dismiss on the basis of the choice of forum clause.¹²²

The New Jersey Appellate Division took the very unusual step of making its dismissal of the plaintiff’s case conditional on the California court’s applying New Jersey law to the problem, if it involved a franchise covered by the New Jersey statute.¹²³ Over a

In [a standard form contract] setting, a franchisor has little to lose by including a forum-selection clause in its standard agreement. Although such a clause directly benefits the franchisor by requiring suit to be filed in a geographically convenient state of choice where it can be defended by the franchisor’s regular litigation counsel, the indirect benefit to franchisors is to make litigation more costly and cumbersome for economically weaker franchisees that often lack the sophistication and resources to litigate effectively a long distance from home.

Id.

118. 680 A.2d 618 (N.J. 1996).

119. N.J. STAT. ANN. §§ 56:10-1 to -15 (West 2001 & Supp. 2006).

120. *Kubis & Perszyk Assocs.*, 680 A.2d at 618.

121. *Id.*

122. *Id.* at 620.

123. New Jersey had clear precedent that its franchise law reflected its own “fundamental policy.” *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 614 A.2d 124, 133, 135 (N.J. 1992). This meant that a California court would have had authority, from the New Jersey Supreme Court, that New Jersey’s franchise law reflected New Jersey’s “fundamental policy.” But California courts could apply whatever law its own conflict rules call for, and given the choice of law provision and Sun Microsystems’ location in California, those rules might well *not*

dissent, the New Jersey Supreme Court reversed, concluding that the choice of forum provision was, in these circumstances, unenforceable.¹²⁴ Rejecting any suggestion that its decision was parochial,¹²⁵ the court based its decision largely on the financial difficulties that the choice of forum clause presented to vindication of the plaintiff's rights under the statute¹²⁶ and on the substantial likelihood that the provision was adhesive.¹²⁷ In concluding, the court stated a rule for enforceability of choice of forum clauses in franchise contracts:

Accordingly, we hold that forum-selection clauses in franchise agreements are presumptively invalid, and should not be enforced unless the franchisor can satisfy the burden of proving that such a clause was not imposed on the franchisee unfairly on the basis of its superior bargaining position. Evidence that the forum-selection clause was included as part of the standard franchise agreement, without more, is insufficient to overcome the presumption of invalidity.¹²⁸

Kubis & Perszyk Associates reflects the complex interrelationship of law and forum. The determination that the franchisee protection offered by New Jersey's statute reflected New

select New Jersey law in this instance. *See also* *Herring Gas Co. v. Magee*, 22 F.3d 603, 609 (5th Cir. 1994) (upholding Mississippi's choice of law clause and concluding that Louisiana did not have a materially greater interest in the law's enforcement); *supra* text accompanying notes 77–86. The appellate division's decision underscores the fact that the New Jersey court's view of its own policy was not binding on California courts. Those courts were free to conclude otherwise; that is, they could conclude, as the court did in *Herring Gas*, that New Jersey did not have a materially greater interest than California in enforcement. They could also (at least in theory) use an entirely different choice of law rule that did not recognize New Jersey's fundamental policy at all.

That the appellate division conditioned its dismissal on California's use of New Jersey law reflects less than full confidence in another state's respect for a sister state's policy. And while the New Jersey Supreme Court stated that "parochialism play[ed] no role in [its] decision," *Kubis & Perszyk Assocs.*, 680 A.2d at 628, the majority's decision may reflect even less confidence in the California courts than did the appellate division's since the effect of the supreme court decision was to deny any role whatsoever to the California courts.

124. *Kubis & Perzyk Assocs.*, 680 A.2d at 628.

125. *Id.*; *see also supra* note 123.

126. *Kubis & Perzyk Assocs.*, 680 A.2d at 628.

127. *Id.* *But see id.* at 631–32 (Garibaldi, J., dissenting) (arguing that, by outlawing choice of forum clauses in *car dealer* franchise agreements, the legislature meant to leave those in non-car dealer franchise agreements enforceable).

128. *Id.* at 627.

Jersey's "fundamental policy" prompted the court both to expect California courts to implement New Jersey's policy (and the appellate division to condition its dismissal on assurance that this would happen) and to view the plaintiff's travel to a distant forum as particularly burdensome.¹²⁹ An obvious byproduct of the decision was that a New Jersey court (and not a California court) would be implementing New Jersey's fundamental policy. It would be doing so partly because the very expense incident to litigation in a distant forum offended the legal protection offered by its franchise law.

Fundamental state policy also fueled the decision in *Param Petroleum Corporation v. Commerce and Industry Insurance Company*.¹³⁰ The contract in *Param Petroleum* was a commercial insurance contract covering pollution risk from the insured's underground gasoline storage tanks located in New Jersey.¹³¹ The contract chose New York law and specified that litigation had to be conducted in New York where the insurance company was located.¹³² In voiding the choice of forum provision, the *Param Petroleum* court went further than the *Kubis & Perszyk Associates* court. Because the interests of third parties were potentially implicated, the court seemed to foreclose the possibility that the insurance company could ever establish enforceability on the basis that "such a clause was not imposed on the franchisee unfairly on the basis of its superior bargaining position."¹³³ The court said:

[W]e do not mean to imply that the [*Kubis & Perszyk Associates*] approach should be taken in the area of insurance. For as the Court noted in [*Howell v. Rosecliff Realty Co.*] the legitimate concerns of the State go beyond mere protection of the insured to protection for those claimants who may have suffered damages as a result of covered risks. Thus, at least when dealing with risks located wholly within this State, we are of the view that the parties to the insurance contract should not be permitted to negotiate away the protection of our courts, protection

129. *Id.*

130. 686 A.2d 377 (N.J. Super. Ct. App. Div. 1997).

131. *Id.* at 378.

132. *Id.* at 377.

133. *Id.* at 381 (quoting *Kubis & Perszyk Assocs.*, 680 A.2d at 627); see also *supra* text accompanying note 128.

which is intended for the insured, the insurance company, and for those who may suffer damages as a result of an insured risk.¹³⁴

The *Kubis & Persyk Associates* court avoided the adhesive choice of forum provision because important forum state public policy was implicated and because travel to California would itself have undercut the policies embraced by the state's franchise law. One could easily bring this variant of the conflicts analysis to a choice of law provision that attempts to replace the "unchosen" state's unconscionability precedents with those of the "chosen" state. Unconscionability precedents are often heralded as a primary form of protection from abusive contracts and form core, fundamental limitations on contracting in state contract law.¹³⁵ The challenge to the choice of (different) law clause would maintain that unconscionability precedents reflect the forum state's most fundamental policy in consumer cases, and that under the Restatement (Second) of Conflict of Laws formulation, they thereby override a contrary choice of law in an adhesion contract.¹³⁶ In

134. *Param Petroleum*, 686 A.2d at 381 (citing *Howell v. Rosecliff Realty, Co.*, 245 A.2d 318, 325–26 (N.J. 1968) (citation omitted)); see also *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1406–07 (9th Cir. 1986) (finding a choice of Cayman Islands law provision in a medical malpractice insurance contract unenforceable in California).

135. See, e.g., Robert A. Hillman & Jeffrey J. Rachlinski, *Standard Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 456–58 (2002); Erin Ann O'Hara, *Choice of Law for Internet Transactions: The Uneasy Case for Online Consumer Protection*, 153 U. PA. L. REV. 1883, 1918 (2005); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 794–95 (2004); cf. Steven J. Burton, *The New Judicial Hostility to Arbitration: Unconscionability and Agreements to Arbitrate* 31–32 (ExpressO Preprint Series, Working Paper No. 1375, 2006), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=6130&context=expresso> (noting that while unconscionability is rarely applied outside of arbitration agreements, courts are empowered to strike any unconscionable term). *But see* Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1064 (2005) (arguing that unconscionability provides insufficient protection for consumers in the electronic contracting context).

136. Unless the court engages in an analysis not dependent on the complex formulation in the Second Restatement of Conflict of Laws, the consumer will have to address the two other conditions advanced by Section 187(2): that the interests of the forum are materially greater than those of the chosen state and that the forum state's law would apply in the absence of the choice of law provision. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1989). For the full quotation, see *supra* text accompanying note 21. In so doing, the consumer also will have to overcome such drafting tricks as a clause stating that it was "the parties' agreement" and that the contract was made in the chosen state. For the credit card contract language, see *infra* note 139 and accompanying text. A direct unconscionability attack on the choice of law provision using *contract law* may avoid the presumptions that the Restatement (Second) of Conflict of Laws erects. See *infra* note 184 and accompanying text.

addition, a choice of forum provision that purported to transplant the litigation from state *A* to state *B* where travel to *B* would undercut *A*'s unconscionability protection might be successfully challenged as "unfair or unreasonable," as it was in *Kubis*.

2. Limits Based in Contract Law

The limitations discussed above proceed from a conflict of laws analysis and limit the power of the parties, acting collectively, to alter the conflict of laws rules a forum would ordinarily apply. The question *whether* the parties are acting collectively (that is, *whether* they have a contract to use a designated law or forum) logically precedes the conflicts question *whether given such an agreement*, the forum should enforce it. Once the contract at the base of choice of law clauses is disentangled from the conflict of laws principles, contract law can be brought to bear on it. *Which* contract law will be applied, as suggested earlier, is debatable.¹³⁷ Probably the best approach looks to the forum state's contract law, at least in cases where the forum jurisdiction has a substantial relationship with the parties or their contract. This threshold conflicts question matters because states have diverse views about adhesion contracts. If the applicable contract law will be that of the forum, it is obvious that there will be forum shopping incentives and that form drafters will probably try to limit forum shopping through choice of forum clauses. But the choice of forum clauses are contract provisions, and the same contract law analysis also must be brought to bear on them.

Once we have identified the appropriate contract law, a good place to begin is with the contract law that governs the formation of agreements in the adhesion contract setting. Given the assent issues raised by adhesion contracts generally, the law of contract formation has promise in limiting both choice of law and choice of forum clauses.

In the case of choice of law clauses (and to a somewhat lesser extent with choice of forum clauses), there is a central issue that may underscore the limitations in the true assent model¹³⁸ of contract law itself: there is good reason to doubt the existence of "assent" in any but the most formalistic sense, even in settings where the form's

137. See *supra* text accompanying note 22.

138. See RESTATEMENT (SECOND) OF CONTRACTS §§ 20, 201 (1989).

recipient is reasonably sophisticated. Even if customers read the forms—most do not and businesses writing forms know that they do not—customers would have no idea what the implications (intended or otherwise) of a choice of law clause would be. “Disclosure” would not be a solution: we could require specific “notice,” or even that the provision be read aloud to the customer, and it still would not matter. Why, other than settling on *some* law, does a vendor select the particular law it selected? What, for example, is the significance to a customer of a “bill stuffer” stating, “This Agreement is made in Delaware. It is governed by the laws of the State of Delaware, without regard to its conflicts of laws principles, and by any applicable federal laws.”¹³⁹

Would a product cloaked in Delaware law be, for that reason, more (or less) valuable than a product packaged in Pennsylvania’s or California’s law?¹⁴⁰ It is extremely far-fetched to believe that any consumer or small business customer can discriminate among products using choice of law clauses. Even on an economics model predicated more on product selection than real agreement,¹⁴¹ choice of law clauses probably fail the test of contractual assent. While real, meaningful disclosure might work *in theory* with choice of forum clauses,¹⁴² many have suggested that the rationality that is assumed when a customer “knowingly” agrees to a dispute resolution process that might never be called into play is simply not present.¹⁴³ The idea

139. *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1252 (Del. Super. Ct. 2001). Note the drafters’ effort to manipulate the Restatement (Second) of Conflict of Laws Section 188 factors. If a contract is “made” in Delaware, then Delaware has more “contact” with it than it otherwise would. But where a contract is “made” is normally a question for the court in applying its conflict of laws principles. Where the contract is “made” and where the drafter says it is “made” can be two different places; only the first has relevance under a Section 188 analysis.

140. It would not be impossible for vendors to actually compete for customers through use of choice of law clauses. Imagine the marketing possibilities: “We choose X law, widely regarded as most protective of consumers because our products are the best. They choose Y law to shield their low quality. Buy our products with confidence!”

Using legal terms as sales tools has not made its arrival yet, but the reverse may have begun. A group of consumer groups that opposes arbitration provisions has begun to sensitize its website visitors to the implications of those terms, urging visitors not to patronize vendors that include such terms in their forms. See Give Me Back My Rights Coalition, <http://www.givemebackmyrights.com/> (last visited Sept. 4, 2006).

141. Cf. Radin, *supra* note 49 (distinguishing between two models of contract, contract-as-consent and contract-as-product, in light of the trend of online commerce).

142. The majority in *Carnival Cruise Lines, Inc. v. Shute* seemed to believe that disclosure was important to its decision. See 499 U.S. 585, 590 (1991).

143. Customers might understand they have to travel to Florida to pursue a claim, but unless

that Ms. Shute could have rejected her cruise had she simply read the fine print in the ticket seemed to animate the majority in *Carnival Cruise Lines*.¹⁴⁴ If we connect “assent” to the economic premises behind it,¹⁴⁵ it begs the question whether she could have rationally assessed the “value” of that provision in her contract had she read it.

If contract law will be brought to bear on choice of law clauses, the problem is that the absence of meaningful assent logically leads to a broadside on choice of law clauses in consumer and small business contracts. In any adhesive contract setting, sophisticated and unsophisticated persons alike will have no true assent to a drafter’s choice of law clause even if disclosure of the provisions is mandatory. Moreover, we have by now a strong record of enforcing these clauses except in narrow (conflict of laws) circumstances because they are commercially important.¹⁴⁶ Looking too hard at the question of adhesive assent threatens to bring down the beneficial uses of choice of law clauses along with the bad uses, and it is extremely unlikely that any court would be so inclined. Thus, an attack based on lack of assent to a choice of law must be far more individualized and specific.

they are sophisticated, they might not know that this was not the “rule” anyway. *See generally* Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700 (1992) (arguing that choice of forum clauses in standard form contracts should be deemed per se invalid). Additionally, research is suggesting that the underlying assumptions about customer rationality in many contract matters are false. Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295, 296–97 (2005); *see also* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 244 (1995) (noting that consumers are only concerned with the bottom line, not necessarily how the company gets there and what legal corners they must cut). A recent Canadian proposal for a model law on jurisdiction and conflict of laws rules for consumer contracts justifies limitations on choice of forum clauses in consumer contracts because it “is considered unlikely that most consumers would turn their minds to a choice of forum clause at the time of contracting.” Organization of American States (OAS), Description of Canada’s Proposal on the Development of a Model Law on Jurisdiction and Conflict of Laws Rules for Consumer Contracts in the Context of the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) at 3, http://scm.oas.org/doc_public/English/hist_06/CP15642E04.doc.

144. *Carnival Cruise Lines*, 499 U.S. at 590.

145. *See* 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, 272–73 (1997) (arguing that the theory that purchasers have selected the law of a transaction fails because of asymmetry in information).

146. Woodward, *supra* note 16, at 20–21.

a. *Contract formation in mandatory arbitration cases: a case study*

The best examples of contract formation doctrine in action in this context are found in cases challenging mandatory arbitration clauses. These clauses form a subset of choice of forum clauses, directing the parties to a particular kind of forum, often in a particular place, for their dispute resolution.¹⁴⁷ As interpreted by the Supreme Court in a series of cases in the 1980's and 1990's, the Federal Arbitration Act has eliminated all challenges to arbitration clauses except those founded in contract law.¹⁴⁸ The result is that the arbitration cases are clearly *contract law* cases, not some confusing combination of contract and conflicts principles.

Here, there is a wide range of views as well. One end of the spectrum is anchored by the routinely criticized *Hill v. Gateway 2000, Inc.*¹⁴⁹ That case focused on the contract question whether an arbitration provision became binding when it was supplied on a form the seller packed into the box containing the computer and packing material.¹⁵⁰ The arbitration agreement (and presumably the entire sales contract) formed, said Judge Easterbrook, when the buyer failed to pack up and ship the computer back to Gateway within the thirty day time limit Gateway specified in the form that contained the

147. See Consumer and Media Alert: The Small Print That's Devastating Major Consumer Rights, <http://www.consumerlaw.org/initiatives/model/arbitration.shtml> (last visited Sept. 27, 2006).

148. See, e.g., *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 679, 686 (1996). But see *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987).

149. 105 F.3d 1147 (7th Cir. 1997). For examples of critics, see Batya Goodman, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319, 351-52 (1999) (criticizing the *Hill* court for considering provisions of the UCC rather than applying principles of adhesion contracts); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 774-75 & n.50 (2002) (noting that the court found that a consumer assented to terms added after the purchase was made); Thomas J. McCarthy et al., *Sales*, 53 BUS. LAW. 1461, 1464-67 (1998) (discussing the *Hill* court's failure to apply U.C.C. Section 2-207 even though the first official comment was specifically applicable); Jeremy Senderowicz, *Consumer Arbitration and Freedom of Contract: A Proposal to Facilitate Consumers' Informed Consent to Arbitration Clauses in Form Contracts*, 32 COLUM. J.L. & SOC. PROBS. 275, 296-99 (1999) (discussing the problems that arise when courts, in cases like *Hill*, fail to address consumer consent to arbitration clauses); Jean R. Sternlight, *Gateway Widens Doorway to Imposing Unfair Binding Arbitration on Consumers*, FLA. B.J., Nov. 1997, at 8, 10-12, available at <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/76d28aa8f2ee03e185256aa9005d8d9a/a96947ff647f657085256adb005d6181?OpenDocument> (arguing that the outcome of *Hill* is questionable based on contract law and on federal statutory, constitutional, and common law grounds).

150. *Hill*, 105 F.3d at 1148.

contract terms.¹⁵¹ It is unclear which state's law the federal court in *Hill* used to decide the case; Judge Easterbrook took the position that it did not matter.¹⁵² But it does matter: if a different judge were to decide essentially the same case under Kansas or Missouri law, the outcome would be different.¹⁵³

When dealing with "browserware"¹⁵⁴ instead of forms-sealed-in-a-box, *Specht v. Netscape Communications, Corp.*¹⁵⁵ tends to go in the other direction from *Hill*.¹⁵⁶ This was another case challenging the binding force of an arbitration provision, but this time, the provision was promulgated by the vendor through a web site's browserware.¹⁵⁷ Using California contract law, the court found the provision unenforceable.¹⁵⁸ In *Badie v. Bank of America*,¹⁵⁹ another skeptical court found that an arbitration clause, promulgated by the bank via a "bill stuffer"¹⁶⁰ long after the bank-customer relationship had formed, was not binding as a matter of California contract law.¹⁶¹

While vendors might attempt to alter such results by bundling the arbitration clause with a choice of (different) law clause (and given the diversity in state views, it is obvious why they would

151. *Id.* at 1150.

152. *Id.* at 1149. Judge Easterbrook "applic[d]" the law of *ProCD Inc., v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996), a case he had earlier decided under the law of Wisconsin. *Id.* at 1149; *see also supra* note 11.

153. For example, in *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1136-37 (D. Kan. 2000), the federal court explicitly focused on the applicable state's U.C.C. precedent and concluded that Gateway's form was likely not binding as a matter of contract law.

154. "Browserware" refers to plug-in software used to enhance the functioning of a user's browser program to download certain files. *Specht v. Netscape Commc'ns, Corp.*, 306 F.3d 17, 19 (2d Cir. 2002).

155. 306 F.3d 17.

156. *Id.* at 35 ("Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility."); *see also* Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Internet Contracting Cases 2004-2005*, 61 BUS. LAW. 433, 434-36 (2005) (analyzing the holdings and impact of *Specht* and *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004)); *cf.* *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401-02 (2d Cir. 2004) (finding that through repeated visits to Register.com, Verio had knowledge of the terms demanded).

157. *Specht*, 306 F.3d at 20.

158. *Id.* at 27, 38.

159. 79 Cal. Rptr. 2d 273 (Ct. App. 1998).

160. "Bill stuffer" refers to an insert the bank sent to its customers with their monthly account statements. *Id.* at 275.

161. *Id.* at 291.

try),¹⁶² approaches such as these remain viable as common law *contract* tools to challenge the binding force of both choice of law clauses (that the vendor will insert in an attempt to avoid results like *Specht* and *Badie*) and choice of forum clauses (through which vendors will attempt to transport the litigation to a more favorable forum) as new forms of contracting develop.

When the choice of forum provision is an arbitration clause covered by the Federal Arbitration Act, challenges to the binding force of the provision *itself* are, apparently, the only challenges courts may hear when an arbitration provision appears in an adhesion contract. In its latest foray into this area, the Supreme Court in *Buckeye Check Cashing, Inc., v. Cardegna*¹⁶³ held that, unless the challenge were to the binding effect of the arbitration provision itself, the claim that the overall contract is not valid is for the arbitrator to decide.¹⁶⁴ One effect we can expect from *Buckeye* is that litigants will more directly focus on the binding effect of the arbitration provision *itself* as a matter of contract law.¹⁶⁵

*b. Challenging lack of assent under
the reasonable expectations doctrine*

Yet another way to articulate an assent-based challenge to a choice of law or forum clause comes from the “reasonable expectations” doctrines. A relatively narrow version of this idea is captured by Section 211(3) of the Second Restatement of Contracts.¹⁶⁶ After generally validating standard form contracts, the

162. *Badie* underscores the importance of the threshold conflict of laws question that precedes a contract analysis: if Delaware law controlled the very same contract formation question, the arbitration clause (or, by analogy, a choice of forum clause) would be binding. See *id.*; *Edelist v. MBNA Am. Bank*, 720 A.2d 1249, 1255 (Del. Super. Ct. 2001); see also *supra* note 29.

163. 126 S. Ct. 1204 (2006).

164. *Id.* at 1209 (“[U]nless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.” (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967))).

165. *Winig v. Cingular Wireless*, No. C064297 MMC, 2006 WL 2766007 (N.D. Cal. Sept. 27, 2006), was such a case, decided after *Buckeye*. The court in *Winig* concluded that the arbitration provision was unconscionable and unenforceable under settled California contract law because it included a class action waiver. *Id.* at *5. *Buckeye* was nowhere found in the opinion. One can infer that because the attack was on the binding nature of the arbitration provision itself, *Buckeye* was not a bar. Many of the other California cases holding arbitration provisions containing class action waivers to be unconscionable are similar to *Winig*.

166. RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1979). The entire provision reads:
§ 211. Standardized Agreements

provision attempts to remove from the contract those clauses that a reasonable recipient would not expect, given the form.¹⁶⁷ Section 211(3) is a particular manifestation of the general assent rules stated in Sections 20 and 201 of the Second Restatement of Contracts.¹⁶⁸ Those rules generally provide that if a contracting party knows or has reason to know that the second party is mistaken or intends something different from the intent of the first party, then the first party's intent will not be binding on the second party.¹⁶⁹ While the more specific articulation of these ideas in the form contract provision has been castigated by some commentators¹⁷⁰ and was eventually dropped by the UCC Article 2 Drafting Committee,¹⁷¹ the

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.

(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.

(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

Id. § 211.

Article 2.1.20 of the UNIDROIT Principles of International Commercial Contracts is not nearly as narrow as Section 211(3) of the Second Restatement of Contracts. Article 2.1.20 provides:

(Surprising terms)

(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.

(2) In determining whether a term is of such a character regard shall be had to its content, language and presentation.

UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2004, art. 2.1.20, available at <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf>.

167. RESTATEMENT (SECOND) OF CONTRACTS § 211(3).

168. *Id.* § 211 cmt. f.

169. *Id.* §§ 20, 201.

170. See, e.g., Eric Mills Holmes & Dagmar Thürmann, *A New and Old Theory for Adjudicating Standardized Contracts*, 17 GA. J. INT'L & COMP. L. 323, 399 (1987) (criticizing the Second RESTATEMENT OF CONTRACTS for not supplying guidelines for how to deal with assent); James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L.Q. 315, 325 (1997) (describing the Restatement Section 211(3) as "obscure").

171. See Jennifer S. Martin, *An Emerging Worldwide Standard for Protections of Consumers in the Sale of Goods: Did We Miss an Opportunity with Revised UCC Article 2*, 41 TEX. INT'L L.J. 223, 234-39 (2006) (discussing the major differences between the 1999 draft and the approved version); cf. White, *supra* note 170, at 335-56 (arguing against the addition of Section

ideas behind it might yet find utility with choice of law clauses as it has with provisions in insurance contracts.

Once again, it is important to recall that choice of law clauses are thought to bring substantial economic value through increased legal certainty.¹⁷² This means that courts will have difficulty creating a judicial precedent that will broadly threaten large numbers of these clauses. Thus, a strategy that may show promise is a focus not on the choice of law or forum clause itself, but on its legal implications in an adhesion contract. For example, a promulgator of a clause specifying Virginia as the forum might (conceivably) expect a kind of assent from the customer to the economic implications of traveling a distance in order to bring or defend claims; however, it seems extremely doubtful that the drafter could imagine that the customer reasonably expects to lose her right to bring a class action via that clause.¹⁷³ That a drafter could, it would seem, easily reduce the odds of a successful Section 211(3) attack by “disclosure”—simply stating in the form that “Virginia has no class action device”—suggests one limit to a “reasonable expectations” approach in the choice of forum area.¹⁷⁴

But the lack of limits to the imaginative application of Section 211(3)—the central weakness of the provision in the eyes of critics¹⁷⁵—is a potentially more serious problem. This critique of the provision is readily apparent when we bring the Restatement’s particular expression of the “reasonable expectations” idea to bear on choice of law clauses.

Virtually *everything* that would matter to a customer is “hidden” in a choice of law clause. How would a California resident know that Delaware law validates “bill stuffers” (and California law does

2-206, a “reasonable expectations” section, which is currently not a part of the revised UCC).

172. See *supra* note 46.

173. For a case where these unforeseen circumstances did occur, see *Am. Online, Inc. v. Booker*, 781 So. 2d 423, 425 (Fla. Dist. Ct. App. 2001) (holding that choice of Virginia forum clause was not unconscionable even though Virginia law does not allow class actions and Florida law does).

174. See Arthur Allen Leff, *Unconscionability and the Crowd-Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 354–56 (1969) (suggesting that in order to distinguish a case from *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) and a finding that the agreement is unconscionable, a seller need only “make the clause clearer”).

175. E.g., White, *supra* note 170, at 324–25 (noting that Section 211(3) has been interpreted in only forty-three cases during the first fifteen years of existence).

not)?¹⁷⁶ Or that by “agreeing” that Utah law controls, the customer is probably giving up her right to challenge a class action waiver?¹⁷⁷ In any setting where the choice of law clause produced negative results that would not have been anticipated by the customer, one could plausibly argue that the drafter could not have reasonably believed that the customer would agree to the choice of law, if *that* is what it meant. Because there are no standards for application of Section 211(3) of the Second Restatement of Contracts in this context, its use would, no doubt, attract damning criticism.

Nonetheless, a successful, pointed attack of this kind might well yield a sound policy result. Such an approach to Section 211(3) in this context leads to general enforcement of the choice of law clause, except to the extent that it adversely affects the protection that a consumer or small business would have from the legal regime that would be in effect absent the choice of law clause. While most customers have few expectations about the applicable law, they probably *do* “reasonably expect” that if they live in a given state, that the state’s law will govern them and, to the extent that their local law offers protection, that it will protect them.¹⁷⁸ Indeed, prior to the developments revealed in the recent cases where courts reasoned that adhesive choice of law provisions effectively displaced otherwise applicable consumer law,¹⁷⁹ many observers probably would have thought that the law was generally in accord with the above analysis. A complicated—though far narrower—version of this same approach even made its way into the revision of the UCC Section 1-105 (later renumbered § 1-301), the UCC’s contractual choice of law rule.¹⁸⁰

176. Delaware makes “bill stuffers” binding as a matter of Delaware contract law by legislation. Compare DEL. CODE ANN. tit. 5, § 952(a) (2001) (“Any notice of an amendment sent by the bank may be included in the same envelope with a periodic statement or as part of the periodic statement or in other materials sent to the borrower.”), with *Badie v. Bank of Am.*, 79 Cal. Rptr. 2d 273, 291 (Ct. App. 1998) (finding that a “bill stuffer,” sent long after a banking relationship has formed, was not binding as a matter of law in California). For a discussion of *Badie*, see *supra* notes 159–162 and accompanying text.

177. See UTAH CODE ANN. §§ 70C-3-104, 70C-4-105 (2001 & Supp. 2006).

178. See Woodward, *supra* note 145, at 264–65 (noting “consumers in fact do not pay attention to the small print they find in boilerplate contracts, and consumers have relatively limited access to legal resources”).

179. See, e.g., *Discover Bank v. Superior Court*, 113 P.3d 1100, 1117 (Cal. 2005).

180. See U.C.C. § 1-301(e) (2003); *infra* note 223 and accompanying text.

c. Challenging choice of law provisions as unconscionable

A broad attack on a choice of law or choice of forum clause based on unconscionability and related doctrines will be limited in its effectiveness by the same concerns. Unconscionability has often been divided into “procedural” and “substantive” components,¹⁸¹ and state law sometimes requires both.¹⁸² Lack of assent to either a choice of law or a choice of forum clause could easily be framed in unconscionability rhetoric—promulgated terms buried in small print, incomprehensible to lay people, unfair in impact, etc.¹⁸³ Such challenges could be made against virtually all choice of law and most choice of forum clauses in adhesion contracts. But the perceived economic value of these provisions, and the economic implications of creating a precedent that would invalidate all or most of them, virtually assures us that such a broad challenge will not succeed. These economic considerations may explain why we have not seen *direct* challenges to choice of law or forum clauses by advocates using the contract law-based tools of unconscionability.

For choice of law provisions, there might be substantial advantage to an unconscionability approach if a successful one could be constructed.¹⁸⁴ As discussed earlier,¹⁸⁵ conflict of laws doctrine

181. See, e.g., Hillman & Rachlinski, *supra* note 135, at 456–57.

182. California law requires an unconscionability attack to have both substantive and procedural elements. Substantive unconscionability looks at the actual contract terms, where as procedural unconscionability focuses on any disparity in bargaining power between the parties. See *Wayne v. Staples, Inc.*, 37 Cal. Rptr. 3d 544, 554 (Ct. App. 2006); *Klussman v. Cross Country Bank*, 36 Cal. Rptr. 3d 728, 737 & n.12 (Cal. Ct. App. 2005) (citing *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Ct. App. 2002)). Other state courts have held that unconscionability claims must contain both substantive and procedural elements. See, e.g., *Zobrist v. Verizon Wireless*, 822 N.E.2d 531, 540 (Ill. App. Ct. 2004); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 573 (N.Y. App. Div. 1998); see also Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 488 (1967) (examining the history of drafting UCC Section 2-302 on unconscionability).

183. While the choice of forum cases demonstrate a substantial overlap between the contract law limitations, articulated through unconscionability, and the conflict of laws refusal to enforce provisions that are “unfair or unreasonable,” contract law and conflict of laws doctrines have different legal sources and, potentially, different policy determinants. To maximize imaginative thinking about the binding force of choice of forum clauses, it is useful to keep Step 2 (contract law analysis) and Step 3 (“unfair or unreasonable” conflict of laws analysis) separate. For a discussion of the three-step analysis, see *supra* Part II.

184. The conflict of laws limitations on choice of forum clauses—that they are not enforceable if “unfair or unreasonable” (see *supra* note 99)—are quite similar to those that contract unconscionability would impose. The effects (and intent) of a choice of forum provision are discernable by customers, and if the effect of a choice of forum provision is to deprive the plaintiff of her claim, a court may find the provision unenforceable. See, e.g., *Discover Bank v. Superior Court*, 113 P.3d 1100, 1107 (Cal. 2005) (noting that a provision that purports to waive

takes choice of law provisions, assumes that they are valid contractually, and then subjects them to the complex “fundamental policy” analysis found in the Second Restatement of Conflict of Laws. But because, eventually, the court must consider whether the unchosen state has a “materially greater interest” in the outcome and conclude that the competing policy is “fundamental,”¹⁸⁶ the analysis may give such adhesive choice of law clauses a presumption of greater validity than they deserve in this particular context. This inertia that the Second Restatement of Conflicts of Law attaches to a choice of law provision is directly related to the assumption that the parties *agreed, in more than a strictly formal sense*, to the chosen law. As suggested here, that is a false assumption in the adhesion contract setting.¹⁸⁷ Thus, it is inappropriate in this setting to allow a choice of law clause in an adhesion contract to insulate another provision in the contract from an unconscionability attack under normally applicable law.

Vendors’ efforts to displace the “undesirable” consumer law of other states have boldly moved out of drafters’ offices and into state legislatures. Consider, for example, a new Utah statute that explicitly makes class action waivers in consumer credit contracts enforceable.¹⁸⁸ In celebrating the enactment, one of the new law’s champions stated: “With the enactment of Chapter 172, Utah-based banks and other financial services companies will now be able to argue forcefully that courts in other states, like California, should enforce class action waivers contained in arbitration agreements to which Utah financial services companies are partners.”¹⁸⁹ California law, however, considers class action waivers to be unconscionable, at

class action rights is unconscionable). Elements of unreasonableness and unfairness—the distance to be traveled to the “chosen” forum, availability of counsel there, procedural limitations of the designated forum, and the size of the plaintiff’s claim relative to these other considerations—would also be elements in an unconscionability challenge. *See, e.g., Carnival Cruise Lines, Inc. v. Shane*, 499 U.S. 585, 597–600 (1991) (Stevens, J., dissenting) (recognizing that Shute would have to travel from her home state of Washington to Florida to bring a suit).

185. *See supra* text accompanying notes 18–21.

186. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971); *see also supra* text accompanying note 21.

187. *See supra* Part III.A (discussing how unsophisticated parties often do not truly assent to choice of law clauses).

188. UTAH CODE ANN. §§ 70C-3-104, 70C-4-105 (2001 & Supp. 2006).

189. R. Christian Bruce, *New Utah Law That Upholds Class Waivers May Have Nationwide Application*, *Firm Says*, BANKING REPORT, Mar. 27, 2006, at 593.

least in some settings.¹⁹⁰ Thus, the Utah legislation raises the question whether a choice of law provision choosing Utah law in a California customer's form actually could alter that result.

Two California cases that followed the California Supreme Court's important 2005 decision in *Discover Bank v. Superior Court*¹⁹¹ make clear the power of a choice of law clause, as viewed by California courts.¹⁹² While the courts in those cases assumed the clauses were binding contractually and proceeded with the complicated conflict of laws analysis described earlier,¹⁹³ the decisions can inform a discussion of how contract law's unconscionability doctrine might offer similar protection, and how the specific articulation of the legal argument might matter.

The first of these cases, *Discover Bank v. Superior Court (Discover Bank II)*,¹⁹⁴ was the decision on remand from the California Supreme Court. The court on remand assumed for purposes of the opinion that class action waivers under the circumstances before it were unenforceable under California law and that this rule reflected "fundamental policy" of California.¹⁹⁵ The court also concluded from Delaware precedent that Delaware law considers class action waivers to be enforceable.¹⁹⁶ Thus, for the court, the outcome rested squarely on the conflicts question: which law applied to that portion of the agreement.¹⁹⁷ In many ways this part of the case was easiest: because the plaintiff had gathered a nationwide class for the class action, and (related to that decision) had placed his claims exclusively on Delaware substantive law, the court concluded under Section 187(2) of the Second Restatement of Conflict of Laws that

California does not have a materially greater interest in determination of the issue than Delaware. . . . because (1) Delaware is home to the sole defendant, not just (like

190. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1103, 1110 (Cal. 2005).

191. *Id.*

192. *Discover Bank v. Superior Court*, 36 Cal. Rptr. 3d 456 (Ct. App. 2006); *Aral v. Earthlink*, 36 Cal. Rptr. 3d 229 (Ct. App. 2006).

193. *See supra* text accompanying note 20.

194. 36 Cal. Rptr. 3d 456.

195. *Id.* at 461.

196. *Id.* at 459–60 (citing *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1260–61 (Del. Super. Ct. 2001)).

197. *Id.* at 458.

California) home to some portion of the putative class, (2) Delaware has demonstrated by statute its concern that Delaware law should apply to claims between Delaware banks and their cardholders, and (3) Boehr is asserting claims under Delaware law alone.¹⁹⁸

*Aral v. Earthlink*¹⁹⁹ may be seen as the companion case to *Discover Bank II*. *Aral* was another class action, this time challenging Earthlink's practice of charging customers usage fees from the time of initial enrollment in its service even though Earthlink did not deliver the modem, necessary to use its service, until weeks later.²⁰⁰ Earthlink's contract prohibited class actions, called for the application of Georgia law, and specified that litigation be conducted in Georgia.²⁰¹

Once again, the court determined that California law and Georgia law differed on the enforceability of class action waivers; the case thus came down to which state's law—California or Georgia—controlled the question.²⁰² The *Aral* court held that California law controlled.²⁰³ Critical to its decision was the fact that *Aral* was a *California* class action consisting only of California residents and was brought under California's Unfair Competition Law, not the law of some other state.²⁰⁴ Quoting the same provision within the Restatement (Second) of Conflict of Law as the *Discover Bank II* court, the California court of appeal had no difficulty concluding that "California has a 'materially greater interest than [Georgia] in the determination of [this] particular issue . . .'"²⁰⁵

The outcomes in these cases would probably have been the same with or without the choice of law clauses.²⁰⁶ Without enforceable

198. *Id.* at 461–62.

199. 36 Cal. Rptr. 3d 229 (Ct. App. 2005).

200. *Id.* at 232–33.

201. *Id.* at 232. It should be obvious that together these provisions offered Earthlink near-complete insulation from any legal liability to California customers: only an economically irrational Californian would travel to Georgia to assert such an individual claim against Earthlink.

202. *Id.* at 242–44.

203. *Id.* at 243–44.

204. *Id.* at 244.

205. *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(c) (1971)).

206. The reasoning of these cases suggests that the new Utah legislation validating class action waivers likely would not have altered the results in *Aral* or *Discover Bank II* had Utah law been at issue in the California fora. See *supra* text accompanying note 188. Banking interests may have achieved the intended extraterritorial effect somewhere, but California courts are not

choice of law clauses, the question for the California courts would be “what law governs the contract between the drafter and the customers under California’s general conflict of laws principles.” The California rule points to the law of the state which, with respect to that issue, “has the most significant relationship to the transaction and the parties.”²⁰⁷ Given the reliance on Delaware law, the Delaware domicile of the only defendant, and the nationwide class of plaintiffs in *Discover Bank II*, there seems little doubt that Delaware law could have been applicable in that case and that, therefore, the class action waiver would have been enforceable. Similarly, given the invocation of the California Unfair Competition Law and the class of California plaintiffs in *Aral*, there seems little doubt that California law should govern, and the class action waiver in that case would be unconscionable and invalid. In both settings, then, the adhesive choice of law provision was, essentially, superfluous.

Viewed in this way, an unconscionability challenge to the binding effect of the choice of law provision itself—the assertion that the choice of law provision *itself* is unconscionable and unenforceable because it would undermine otherwise applicable protective law—would preserve the outcomes of cases like *Discover Bank II* and *Aral* and, at the same time, be far more direct and transparent than a complex challenge using conflict of laws principles. As a contract law challenge, the underlying premise is that a conflict of laws analysis should not proceed until we reach the legal conclusion that the customer is bound contractually to the choice of law.

For the same reasons discussed in connection with the reasonable expectations doctrine, an unconscionability challenge, of

likely to recognize the statute as changing anything in local class actions. In national class actions such as the one involved in *Discover Bank II* (where Delaware law was held to control), the Utah legislature may have achieved clarity in Utah’s view on the matter. This might be useful in cases like *Discover II* where the court concludes, despite a well-articulated challenge, that Utah law controls the issues in a different state’s forum.

207. *ABF Capital Corp. v. Berglass*, 30 Cal. Rptr. 3d 588, 596 (Ct. App. 2005) (referring to RESTATEMENT (SECOND) OF CONFLICT OF LAWS Section 188 (1971)); *see also Henderson v. Superior Court*, 142 Cal. Rptr. 478, 485 (Ct. App. 1978) (discussing how “(1) the relationship of defendant’s forum-related activity to plaintiff’s cause of action, (2) the relative burden of litigation on the parties, and (3) the forum state’s interest in exercising jurisdiction” are helpful in determining the appropriate choice of forum); *Int’l Serv. Ins. Co. v. Gonzales*, 239 Cal. Rptr. 341, 344 n.4 (Ct. App. 1987) (“A contract is to be interpreted according to the law and usage of the place where it is to be performed”) (quoting CAL. CIV. CODE § 1646 (West Supp. 2005)).

necessity, would be very narrow and fact-specific.²⁰⁸ As both *Discover Bank* and *Aral* show, choice of law provisions become critical (and themselves arguably unconscionable) only when they produce a result (here, the waiver of an important right) that the ordinarily applicable law maintains is unconscionable or otherwise invalid. The analysis therefore looks *through* the choice of law clause to the underlying offensive provision. If that underlying substantive provision would be unenforceable *under otherwise applicable law*, then a choice of law provision attempting to alter that result should fall away (as itself unconscionable and unenforceable) and the analysis of the offensive provision should proceed as if there were no choice of law provision.

Accordingly, the analysis should initially ignore the binding effect of the choice of law provision in an adhesion contract. Without the choice of law provision, the unconscionability challenge to the offensive provision should be analyzed under the unconscionability law that would otherwise apply to the contract under the forum's ordinarily applicable choice of law rules. Thus, in *Discover Bank II*, the ordinarily applicable law would likely have been Delaware law, and Delaware law would have enforced the class action waiver.²⁰⁹ The choice of law provision embracing Delaware law would not have been unconscionable in California if for no other reason than that it would not have prejudiced the customers. Similarly, in *Aral*, California law would have applied and found the waiver unenforceable and, thus, a choice of law provision intended to "waive" that result would also have been unenforceable.

3. Reconciling the Contracts Analysis with the Second Restatement of Conflict of Laws

Both the reasonable expectations and the unconscionability attacks suggested above result in general enforcement of the choice of law provision *except* when those clauses interfere with the law that would ordinarily protect the customer. As suggested above, these approaches may offer advantages to customers over the conflicts formulation in Section 187 of the Second Restatement of

208. See *supra* text accompanying notes 166–180 (discussing the reasonable expectations doctrine).

209. *Discover Bank v. Superior Court*, 36 Cal. Rptr. 3d 456, 459 (Cal. Ct. App. 2005).

Conflict of Laws, discussed earlier.²¹⁰ This is because they effectively relax the Restatement's strong presumption that the "chosen" law be applied. Since the decisions in most cases suggest that the Second Restatement of Conflict of Laws offers the *only* limitations on choice of law provisions (and have therefore embraced the presumed enforceability articulated in the Restatement),²¹¹ we consider here whether the more aggressive contract law-centered approaches articulated above are sound as a policy matter.

The conflicts provision (which I have argued applies only *after* applicable contract law finds a contractual bond) expresses a very rigorous—and narrow—test for overriding a choice of law clause. The choice of law provision must embrace a rule that is against the fundamental policy of a state: (1) with a materially greater interest in the issue, and (2) whose law would control under applicable conflicts principles absent the choice of law clause.²¹² One would justify the narrowness of the Restatement's exception with recognition of the commercial importance of contractual choice of law clauses (commercial or contract law and free market economics policies) and of the policies of accommodating and deferring to the law of sister states with a stronger stake in a given controversy (conflict of laws policies).²¹³ That there may be differences between the outcomes suggested by the Second Restatement of Conflict of Laws and contract law underscores that an approach that treats the contract issues separately must, inevitably, take account of conflict of laws policy and vice versa.

The question brought into focus by the apparent conflict between the reasonable expectations and unconscionability doctrines in contract law and the Second Restatement of Conflict of Laws is this: is it sounder (as a matter of some policy) to refuse to enforce the choice of law clause insofar as it adversely affects the unwitting customer (the relatively-broader Section 211(3) or unconscionability

210. *See supra* text accompanying notes 18–21.

211. *See supra* text accompanying note 166.

212. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1989).

213. *Cf.* U.C.C. § 1-301 cmt. 6 (2003) (stating that the provision's "fundamental policy" exception requires policy "so substantial that it justifies overriding the concerns for certainty and predictability underlying modern commercial law as well as concerns for judicial economy generally"). No State has enacted the provision in its promulgated form. Jack M. Graves, *Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. § 1-301 and a Proposal for Broader Reform*, 26 SETON HALL L. REV. 59, 62 (2005).

approaches) or, more narrowly, to refuse to enforce the choice of law clause only insofar as we can call the competing consumer protection “fundamental policy” and meet the other restrictive criteria of the Restatement? Both the “reasonable expectations” approach and the unconscionability approaches, as outlined above, will have fewer limitations and will likely create a larger carve-out from the chosen law than would a “fundamental policy” analysis offered by conflict of laws doctrine. Would that be a sensible choice?

Most indicators suggest that the contract methodology should be dominant and that, therefore, a broader insulation of the choice of law provision from the conflict of laws analysis is appropriate in the context of adhesive forms.

Parties, of course, need an enforceable contractual choice of law provision before courts can determine whether it should be disregarded in whole or in part as a matter of conflicts policy. So the logic of the situation calls for contract law dominance. More to the point, this logic underpins Section 187 of the Second Restatement of Conflict of Laws itself. That provision’s approach to the problem rests, in part, on the assumption that both parties freely chose the law specified by the choice of law clause.²¹⁴ “Party autonomy” is what justifies a strong presumption of enforceability, reflected in the Restatement’s test.²¹⁵ However, if the underlying “party autonomy” is weak (or non-existent) as it is in the adhesion contract setting, the justification for a strong presumption is weak as well.

Indeed, commentary to the Second Restatement Conflict of Laws provision suggests that the binding force of a choice of law clause might properly be different in an adhesion contract setting than otherwise.²¹⁶ The Restatement provision was approved almost

214. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, cmt. b (1971).

215. See *supra* text accompanying note 22.

216. Comment b to Section 187 of the Second Restatement of Conflict of Laws provides in part:

A factor which the forum may consider is whether the choice-of-law provision is contained in an “adhesion” contract, namely one that is drafted unilaterally by the dominant party and then presented on a “take-it-or-leave-it” basis to the weaker party who has no real opportunity to bargain about its terms. Such contracts are usually prepared in printed form, and frequently at least some of their provisions are in extremely small print. Common examples are tickets of various kinds and insurance policies. Choice-of-law provisions contained in such contracts are usually respected. Nevertheless, the forum will scrutinize such contracts with care and will refuse to apply any choice-of-law provision they may contain if to do so would result in substantial injustice to the adherent.

thirty years after Professor Kessler warned that “[f]reedom of contract enables enterprisers to legislate . . . in a substantially authoritarian manner without using the appearance of authoritarian forms,”²¹⁷ twenty years after Professor Ehrenzweig said that party autonomy “ha[d] no place in the conflicts law of adhesion contracts,”²¹⁸ and perhaps thirty years *before* the appearance of the cases and statutes considered here. The Restatement’s reservations become all the more salient if, as the evidence seems to suggest, the recent cases represent a far wider phenomenon.

A second indicator that may suggest that a full range of contract law defenses is consistent with the narrow exceptions to party autonomy contemplated in Section 187 is the ill-fated redrafted choice of law provision for Article 1 of the UCC promulgated in 2001 by NCCUSL. For the cases it covers,²¹⁹ this provision provides both a very broad consumer protection provision *and* a very narrow fundamental policy provision.²²⁰ Many believed at the time that the innovative consumer provision merely stated, in a statutory form, what nearly all courts would do anyway, if given the chance.²²¹ Choice of law clauses have never been thought to yield an escape from *all* otherwise-applicable business regulation.²²²

Revised UCC Section 1-301’s consumer protection provision requires the operation of ordinarily applicable consumer law despite a contrary choice of law provision if that rule is a non-waivable rule that is “protective of consumers.”²²³ This is a contract law-based

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b.

217. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943).

218. Ehrenzweig, *supra* note 15.

219. The complexity of the provision is driven in part by the drafters’ efforts to keep the protection to cases within the scope of the UCC U.C.C. § 1-301 cmt. 1 (2003).

220. See U.C.C. §§ 1-301(e)–(f). The provision has been rejected by every state that has considered it. John Krahmer, *Annual Survey of Texas Law: Commercial Transaction*, 57 SMU L. REV. 699, 718 n.8 (2004). The rejection is probably the result of opposition to its provision permitting contracting parties to select *any* law (including the law of states that had enacted UCITA) and of its explicit carve-outs for both consumers and for fundamental policy.

221. See Kathleen Patchel & Boris Auerbach, *The Article 1 Revision Process*, 54 SMU L. REV. 603, 612–13 (2001).

222. Even die-hard contractarians concede (reluctantly) that much of consumer law is mandatory and “inalienable” by contract. See Ware, *supra* note 6, at 207–12.

223. UCC Section 1-301(e)(2) applies only to a narrowly-defined “consumer” and reads:

(2) Application of the law of the State or country determined pursuant to subsection (c) or (d) may not deprive the consumer of the protection of any rule of law governing a

provision recognizing the low quality of party autonomy in the adhesion contract context. By contrast, the provision's "fundamental policy" exception²²⁴—a conflict of laws-based policy—is quite different and, as the Official Comment makes clear, applies only in the narrowest of circumstances.²²⁵ The policy inference one draws from the juxtaposition of these provisions is that the conflict of laws policy of "party autonomy" is very important *when one can be confident it actually exists*. If it does not exist (as it cannot in "consumer contracts" at minimum),²²⁶ there is no policy reason to enforce a choice of law provision in a form to the disadvantage of the non-drafter.

While the UCC provision remains unenacted for (probably) many reasons,²²⁷ it was approved by the American Law Institute and NCCUSL and reflects the most recent effort to resolve the tension between the commercial benefits of choice of law clauses and the perceived importance of state law protecting consumers.²²⁸ The UCC's resolution of the issues is consistent with the dominance of a contract analysis in the context of adhesion contracts.

In the broader context, both the reasonable expectations and unconscionability analyses also coincide with a rule in force for over

matter within the scope of this section, which both is protective of consumers and may not be varied by agreement:

(A) of the State or country in which the consumer principally resides, unless subparagraph (B) applies; or

(B) if the transaction is a sale of goods, of the State or country in which the consumer both makes the contract and takes delivery of those goods, if such State or country is not the State or country in which the consumer principally resides.

U.C.C. §1-103 (e)(2).

224. *Id.* § 1-301(f).

225. *Id.* § 1-301, cmt. 6.

226. "Consumer" is too narrow a group to protect from adhesive choice of law or forum clauses; adhesive choice of law or forum clauses also adversely affect small businesses. *See infra* text beginning at note 245.

227. UCC Section 1-301 has been enacted only in the Virgin Islands and has been rejected by every state that has considered it. Krahmer, *supra* note 220. A coalition of insurance companies and libraries has opposed it because it permits parties to choose "unrelated" law. *See, e.g.*, Letter from Americans for Fair Electronic Commerce Transactions (AFFECT) to John A. Hart, Jr., Mass. State Senator (Mar. 28, 2003) (on file with author). The American Bankers' Association has opposed it because of the consumer provision quoted above. Memorandum from L.H. Wilson, Assoc. Gen. Counsel, Am. Bankers Assoc. to Members of Drafting Committee to Revise U.C.C. Article 1 and Interested Persons (May 3, 2001) (on file with the author).

228. *See* U.C.C. § 1-301.

twenty-five years in the European Union.²²⁹ Some states have achieved similar results in discrete areas through direct legislation that will be considered below.

*C. The Limitations of the Common Law
in Policing Choice of Law Clauses*

Any realist who looked at the system-wide implications of widespread adhesive choice of law clauses, and at the aggressive attempts to gain their enforcement, would realize that the potential for effective policing through the judiciary is not good. The offer and acceptance doctrines as reflected in cases like *Hill v. Gateway 2000* and *Specht v. Netscape* will be useful in only a handful of cases. Successful attacks based on unconscionability would have to be fact-specific and would not likely create broad rules usable by other courts. Choice of forum clauses that “hide” important procedural features, such as the lack of a class action device, are easily correctable by drafters and are unlikely to affect the vendor’s sales.²³⁰ The Second Restatement of Contracts Section 211(3), a doctrine as well-suited to police choice of law clauses as it is to police insurance contracts, will have the additional problems of judicial hostility and critiques that have claimed it is intolerably vague and unworkable.²³¹ The conflict of laws limitations are no better—they are either very fact-specific (“unfair or unreasonable”) or extraordinarily complex (Section 187(2) of Restatement (Second) of Conflict of Laws).²³²

In short, the “covert tools,” such as interpretation and contract formation doctrines, invite corrections by the vendors and thus are short lived. Direct judicial policing via reasonable expectations, unconscionability, and related doctrines, in this context particularly,

229. The treaty is known as the Rome Convention. Convention on the Law Applicable to Contractual Obligations, art. 5, ¶ 2, opened for signature June 19, 1980, 1980 O.J. (L 266) [hereinafter Rome Convention] (“[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 . . .”).

230. See Woodward, *supra* note 16, at 43–44 (discussing how easily drafters can fix choice of forum clauses to sway any given direction).

231. Amy D. Cabbage, *The Interaction of the Doctrine of Reasonable Expectations and Ambiguity in Drafting: The Development of the Kentucky Formulation*, 85 KY. L.J. 435, 444–45 (1997) (noting that Arizona is the only state to expressly adopt the Restatement version of the reasonable expectations doctrine).

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

tends to be very fact-specific and complex. Moreover, pursuing grievances through court can be very costly for litigants, which makes that solution largely inaccessible as a practical matter in the typically-small transactions where it is needed.²³³

But beyond all this is an overriding fact: if contract law development proceeds as it has for the past twenty years, nearly all of these cases will be decided by arbitrators under arbitration agreements contained in the very same contracts that contain the choice of law clauses.²³⁴ Such cases produce no precedent or public record of decisions and, absent class actions, are unlikely to be large enough for sophisticated attacks on the choice of law or forum clauses to make economic sense.²³⁵ We might hope that policing takes place in the arbitration hearing room, but we have no way to find out what the decisions are on a system-wide basis, much less to understand the reasoning behind them. A reliable base of case law is not likely to develop given the current phenomenon of near-universal displacement of the common law system by private arbitration systems. Without strong, accessible, and reported case law, appeals based on precedent, even to potentially-sympathetic arbitrators, cannot be developed. A potential alternative is legislation; fortunately, there are some models.

IV. PROTECTING LOCAL LAWS WITH SHIELD LEGISLATION

Even if cases are brought that can support the expense involved in common law attacks on these clauses, even if they survive the a motion to compel arbitration, and even if they generate judicial precedent,²³⁶ the precedent is likely to be narrow and distinguishable

233. See generally Leff, *supra* note 174 (arguing that the common law tradition of regulating the quality of transactions on a case-by-case basis is inefficient and expensive when the costs of cases are taken in the aggregate).

234. See Knapp, *supra* note 149, at 778–80 (arguing that arbitration deprives the legal system of valuable precedent through which the common law grows)

235. *Id.* at 784–85.

236. It is curious that many of the cases in this general area are “withdrawn” or “unpublished.” See, e.g., *Alejandro v. L.S. Holding Inc.*, 130 F. App’x 544 (3d Cir. 2005); *Dambrosio v. Comcast Corp.*, 142 F. App’x 87 (3d Cir. 2005); *Lloyd v. MBNA Am. Bank, N.A.*, 27 F. App’x 82 (3d Cir. 2002); *McLemore v. Circuit City Stores, Inc.*, No. A106373, 2005 WL 1634981 (Cal. Ct. App. July 13, 2005); *Wilson v. Mike Steven Motors, Inc.*, 111 P.3d 1076 (Kan. Ct. App. 2005); *Talgo LRC., LLC v. Livingston Rebuild Ctr., Inc.*, 77 P.3d 553 (Mont. 2003). How they come to be withdrawn, whether there is any pattern to the would-be precedents that become non-precedents, and what this means for the common law system is the subject of an emerging literature. See Richard B. Cappalli, *The Common Law’s Case Against Non-Precedential*

in the next case. Moreover, that precedent will be frozen in time. Its next readers will likely be arbitrators who will leave no record of whether they followed, distinguished, or rejected the precedential case. Arbitrators are, however, typically obligated to follow the law.²³⁷ We can probably have more confidence that they will follow a clear statute restricting choice of law clauses than that they will follow a precedential case with inevitably different facts. We are in a legal environment where legislative action, though difficult to achieve, may be more effective.

The efforts of businesses to displace local regulation through contractual choice of law clauses, or to reduce their legal exposure to claims through choice of forum clauses are not new phenomena.²³⁸ Some legislatures have attempted to limit these efforts; consequently, there are now many models for legislative constraints on both choice of law and forum clauses.²³⁹ The focus of this Part will be primarily on limitations to choice of law clauses through legislative alternatives; inevitably, choice of forum clauses will be implicated. The discussion will begin with coverage issues and proceed to some of the key questions that a legislature must address in order to craft appropriate shield legislation.

A. Limiting Legislation to the Appropriate Classes of Choice of Law and Forum Clauses

Widespread recognition of the value of choice of law clauses has no doubt fueled the legal transition from a regime of widespread judicial rejection to one of widespread acceptance and legislative approval.²⁴⁰ There is little doubt that these provisions add value in

Opinions, 76 S. CAL. L. REV. 755, 788–93 (2003) (describing the criteria and method used by judges in designating cases as non-precedential and examining the patterns behind withdrawal of cases for precedential value); Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 45–46 (2004) (examining the negative ramifications that nonpublication has on the common law); Donald R. Songer, Danna Smith & Reginald S. Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963, 984 (1989) (presenting an empirical study on the patterns followed by the Eleventh Circuit regarding nonpublication).

237. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636–37 (1985).

238. See, e.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519–20 (1974) (finding that an arbitration agreement's Illinois choice of law clause, stipulated by an American manufacturer, was binding against a German company).

239. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1989).

240. Cf. *Sherck*, 417 U.S. at 516 (“A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable

negotiated transactions,²⁴¹ and they likely add value for the drafter in the adhesion contract setting as well.²⁴² As a practical matter, then, restrictions on the operation of choice of law clauses will necessarily be limited. If legislative restrictions are appropriate, to which contracts and terms should the legislation apply? State legislation and proposals for legislation developed over the past twenty years illustrate the many variables to consider.²⁴³

A first cut at narrowing the scope of protective legislation is to separate adhesion contracts from other contracts and to limit the regulation to the former. Despite the freedom of contract rhetoric that often accompanies support for choice of law and forum clauses,²⁴⁴ these clauses have relatively weak justification because true assent is often absent. How might one categorize situations lacking true assent to protect non-drafters in those settings?

At the outset, it is important to recognize that scope restrictions will operate differently here than in other kinds of state legislation. Restrictions on the operation of some subset of choice of law clauses will have no substantive effect on the underlying law; they will simply preserve it from ouster by choice of law clauses. As a result, the underlying rules will retain their own scope; if those rules protect a narrow set of beneficiaries, the range of protection will not change. Thus, an initial question for policy makers is whether to preserve all

precondition to achievement of the orderliness and predictability essential to any international business transaction.”).

241. By simply eliminating argument about what law applies in a given case, choice of law provisions achieve economic benefits for the parties making the contract. See O'Rourke, *supra* note 45, at 654 (noting that choice of law clauses should decrease transaction costs). Determinate conflict of laws rules could, in theory, perform this same service, but they have never come close to doing so. See John Linarelli, *The Economics of Uniform Laws and Uniform Lawmaking*, 48 WAYNE L. REV. 1387, 1407–08 (2003) (discussing how conflict of law rules often do not cut transaction costs).

242. The drafter gets value in (1) the reduced legal uncertainty about what law *generally* will apply to its contract or what forum will hear controversies and (2) the legal advantages for the drafter (e.g., different standards for unconscionability) that the selected law has over the otherwise applicable law. See Rourke, *supra* note 241; Woodward, *supra* note 145, at 255, 264. The value in reduced uncertainty does not necessarily come at the expense of the customer; the value in shifted advantage does. See Woodward, *supra* note 144, at 255, 264. Whether the customer shares in any of the value depends on the general competition, competition in contract terms, and a host of other factors. See *Id.* at 264. Not surprisingly, it is thus an open question for which there is no empirical evidence.

243. See, e.g., CAL. CIV. CODE § 1646.5 (West Supp. 2005); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2).

244. E.g., *Discover Bank v. Superior Court*, 113 P.3d 1100, 1118, 1124 (Cal. 2005) (Baxter, J., dissenting).

or most of a state's protective rules (whatever they may be and whomever they may protect) or some subset of them. Any shield law with a scope narrower than the broadest scope found in protective state law has the potential for *uninsulating* the rules (and beneficiaries) not covered by the shield. Advocates will argue that a rule insulating only "consumer protection" from choice of law clauses carries with it the legislative intent that rules outside the shield's scope—protective rules applicable to non-consumers—may now be waived by choice of law clauses.²⁴⁵

1. The Narrow Scope of "Consumers" and "Consumer Transactions"

It should be obvious that for choice of law clauses the quality of the assent of consumers and small business people in day-to-day adhesive transactions is likely to be very similar.²⁴⁶ Neither will likely read choice of law clauses; neither will likely understand the implications even if the clauses are read; neither will have any opportunity to negotiate their terms; and neither will, in the run of transactions, be able to justify devoting economic resources to a higher level of awareness.²⁴⁷ Nonetheless, perhaps out of habit, the most common limitations we find in statutory efforts to limit choice of law and forum clauses are those that limit the protection to a class of "consumers."²⁴⁸ "Consumer" is, in turn, very narrowly defined in the UCC as "an individual who enters into a transaction primarily for personal, family, or household purposes."²⁴⁹

This was the class of transactions that was protected from choice

245. Franchisee protection and rules limiting no compete provisions in employment contracts are two examples of non-consumer rules that states commonly consider non-waivable. *See, e.g.*, LA. REV. STAT. ANN. § 23:921A(2) (1998 & Supp. 2006) (expressly prohibiting choice of law provisions in employment contracts); MINN. STAT. § 80C.21 (West 1999 & Supp. 2006) (expressly prohibiting choice of law provisions in franchisee contracts).

246. Some would argue that true assent is not the test but that only "manifestation" of assent should be required. *See, e.g.*, Ware, *supra* note 6, at 204. *See generally* Radin, *supra* note 49, at 1160–61 (arguing that online contracts have attenuated the traditional notion of consent). Advocates of the "manifestation of assent" school have not explained how customers discriminate among competing liability-limiting or choice of law/forum clauses without reading or understanding them and, if they do not so discriminate, how the "manifestation of assent" analysis squares even with classical Chicago School economic analysis. *See* Woodward, *supra* note 145, at 272–73.

247. *See* Woodward, *supra* note 145, at 248, 264–65.

248. *Id.* at 284.

249. U.C.C. § 1-201(b)(11) (2003).

of law clauses in the UCC's innovative Revised Section 1-301.²⁵⁰ It is the class of transactions protected from adhesive choice of law and forum clauses in the first UCC provision to address the issue, UCC Section 2A-106 dealing with consumer leases.²⁵¹ Only one state—Louisiana—has enacted legislation restricting both choice of law and choice of forum provisions generally, again limited to this construct of “consumer.” Louisiana’s Unfair Trade Practices and Consumer Protection Law provides that “[t]he following terms of a writing executed by a consumer are invalid with respect to consumer transactions or modifications thereof: (1) that the law of another state will apply; (2) that the consumer consents to the jurisdiction of another state; or (3) any term that fixes venue.”²⁵² This narrow definition is also similar to that of the Federal Truth in Lending Act.²⁵³ It has even migrated to the international arena as a limit to applicability of the choice of forum enforcement in the draft *Hague Conference on Private International Law*.²⁵⁴ As defined, the restriction identifies this group of essentially personal transactions for protection.

The problem with protecting only these narrowly-defined “consumers” is, of course, that the restriction does not protect individuals entering transactions for their small businesses, even if they are no more sophisticated than the hypothetical “consumer” and even if the transaction itself is too small to carry the costs of

250. *See id.* § 1-301(e).

251. Section 2A-106 governs “Limitation on Power of Parties to Consumer Lease to Choose Applicable Law and Judicial Forum,” and provides:

(1) If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within 30 days thereafter or in which the goods are to be used, the choice is not enforceable.

(2) If the judicial forum chosen by the parties to a consumer lease is a forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable.

U.C.C. § 2A-106 (2003).

252. LA. REV. STAT. ANN. § 51:1418 (2006). The Louisiana Supreme Court recently decided an arbitration case, resolving a split in its circuits in favor of arbitration. *Aguillard v. Auction Mgmt. Corp.*, 2004-2804, p. 25 (La. 6/29/2005); 908 So. 2d 1, 18. The arbitration provision specified that arbitration would take place in Dallas, Texas. *Id.* at 13 n.12. At issue was the binding effect of the arbitration clause itself, not its location. *Id.* at 7. The applicability of the statute to this arguable “change in venue” was not raised by the parties nor mentioned by the court. *See id.*

253. *See* 12 C.F.R. § 226.2(a)(11)–(12) (2006).

254. Special Commission on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (Work. Doc. No. 110, 2004).

understanding the choice of law or forum clause, of reading it, or of negotiating about it. It would not protect the dentist buying a toothbrush for the office, the doctor buying a scalpel, or the lawyer buying a UCC text. The rough cut made by the “consumer” category is, in short, under-inclusive in most contexts, and particularly in this one.²⁵⁵

If the term “consumer” is to be a limitation, it need not be such a narrow category. The European approach has been to define a “consumer” by exclusion, as someone *not* acting in his or her professional capacity.²⁵⁶ Even broader is the definition of “consumer” found in the Texas Deceptive Trade Practices-Consumer Protection Act.²⁵⁷ The fundamental obscurity of choice of law clauses, their capacity to hide important implications of an adherent’s “agreement” to them, and the particular irrationality of adherents’ acceptance of them even when they are perceived²⁵⁸ supports either a substantially expanded definition of “consumer” or an entirely different form of classification in this context. The latter is a more straightforward approach. One way to reclassify could be based on the level of interaction between the parties or, more specifically, the size of their transaction.

2. Expanding the Scope of “Consumer” Through Transaction Size Limitations and the “Mass-Market” Construct

To target statutes that limit the enforceability of choice of law clauses, a relatively simple approach might be to discriminate on the basis of transaction size. At the core of our problem is the fact that consumers and small businesses cannot, in the run of ordinary transactions, understand the consequences of a choice of law

255. See Woodward, *supra* note 145, at 265; see also Garvin, *supra* note 143, at 296–97.

256. Rome Convention, *supra* note 229, art. Para. 1.

257. That act defines “consumer” as:

[A]n 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.

TEX. BUS. & COM. CODE ANN. § 17.45 (Vernon 2002).

258. See generally David A. Hoffman, *The “Duty” To Be a Rational Shareholder*, 90 MINN. L. REV. 537 (2006) (looking at rationality in the decision making process). But see Garvin, *supra* note 143, at 308 (noting that when consumers make decisions without full information, they act “intendedly rational, but only limitedly so”).

provision on the value exchanged through their contract. Is a form choosing the law of New York a more valuable one to the customer than one choosing the law of Ireland?²⁵⁹ Most routine transactions are simply not large enough to support the resources required for the customer to become an “informed shopper” for a controlling legal system. Even if the drafter were amenable to negotiation, the customer could not assess the relative values of competing choices of law and, as a result, would be incapable of rational negotiation. Perhaps more important, without adequate information, a customer cannot even make an informed decision whether to go forward with a given transaction or, instead, forego the given choice of law provision for a “better deal.”

Such market failure is less likely to occur in a large transaction because the transaction size could carry the information costs entailed in an informed customer choice of law. Perhaps recognizing this, several state statutes *expanding* rights under choice of law clauses have limited the expanded rights to parties engaged in large transactions exceeding specified dollar amounts.²⁶⁰ The apparent implication is that, with the assurance of true assent that comes with a large transaction, the dangers of abuse are minimized.

The same idea could lead to a corollary. For example, a statute that differentiates between large and small contracts, and regulates only the smaller ones, would correspond to the dynamics of true choice implicated in the economics of the situation. In other words, a legislature could create a subset of *small* transactions, those *below* a given dollar amount, for protection *from* choice of law or forum clauses (or from specified effects of such clauses). Tying protection to the size of the transaction treats consumers and small businesses alike in situations where the transaction itself cannot bear the cost either of ascertaining the economic implications of the clauses or of considering alternatives.

There is a practical problem with this sort of statutory limitation. Since *any* dollar limitation would be an arbitrary number, agreeing to

259. Cf. William J. Woodward, Jr., *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971, 989–90 n.75 (2001) (arguing that where the transaction is small and the contract term is obscure or complex, the non-drafting party likely does not truly understand the writing he or she is “assenting” to).

260. E.g., CAL. CIV. CODE § 1646.5 (West Supp. 2005); DEL. CODE ANN. tit. 6, § 2708 (2005); N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2006); TEX. BUS. & COM. CODE ANN. § 35.51 (Vernon 2005 & Supp. 2006).

an appropriate number could be difficult for legislatures to achieve. One might imagine that only transactions of considerable size could support a reasonable opportunity for the non-drafter to consider the implications of a choice of law provision.²⁶¹ On the other hand, limiting protection to contracts where the value exchanged is, say, less than \$5,000 would severely limit the impact of choice of law clauses in adhesive settings.²⁶²

Limiting protection to “mass-market contracts” is an entirely different approach. The drafters of the Uniform Consumer Information Transactions Act (UCITA) deserve credit for developing the innovative (though in context very unwieldy) idea of a “mass-market transaction,” a category that includes both transactions with consumers as well as certain adhesion contract transactions with large and small businesses.²⁶³ While the idea had great promise, its statutory context undercut the usefulness of the protection UCITA purported to offer. Moreover, it suffered from underbreadth²⁶⁴ and

261. Cf. Woodward, *supra* note 259, at 990 (arguing that where the transaction is small and the contract term is obscure or complex, the rational non-drafting party is very unlikely to understand the writing he or she is “assenting” to or, more to the point, take the time to do so).

262. *Id.*

263. See U.C.I.T.A. § 102(a)(45) (2002). Not a model of simplicity, it provides:

(45) “Mass-market transaction” means a transaction that is:

(A) a consumer contract; or

(B) any other transaction with an end-user licensee if:

(i) the transaction is for information or informational rights directed to the general public as a whole, including consumers, under substantially the same terms for the same information;

(ii) the licensee acquires the information or informational rights in a retail transaction under terms and in a quantity consistent with an ordinary transaction in a retail market; and

(iii) the transaction is not:

(I) a contract for redistribution or for public performance or public display of a copyrighted work;

(II) a transaction in which the information is customized or otherwise specially prepared by the licensor for the licensee, other than minor customization using a capability of the information intended for that purpose;

(III) a site license; or

(IV) an access contract.

Id. See generally Holly K. Towle, *Mass-market Transactions in the Uniform Computer Information Transactions Act*, 38 DUQ. L. REV. 371 (2000) (explaining the broadened scope of consumer protection laws in “mass-market transactions” under UCITA).

264. Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and Its Lessons for Policing of Standard Form Contracts*, 7 J. SMALL & EMERGING BUS. L. 393, 402–03 (2003).

ultimately was not widely adopted.²⁶⁵ Regulation that is complex advantages the sophisticated user and, in that sense, disadvantages the very individuals it is purporting to protect. Professor Jean Braucher has distilled several features of form contracts identified in UCITA's mass-market construct that could prove useful in narrowing a policing provision: terms are contained in a standard form issued by the drafter; there is the lack of a possibility of negotiating the terms at issue; and there is weak market policing.²⁶⁶ Choice of law and forum clauses, of course, share these characteristics in all non-negotiated, standard form contracts.

The latest edition of the mass-market construct is found in an innovative extension of the idea in a draft of *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes*,²⁶⁷ an ongoing project of the American Law Institute (ALI). This effort is especially relevant to our project here because both choice of law and choice of forum clauses are specially limited in "mass-market contracts."²⁶⁸ Most significant for our purposes here is the elegant definition of the construct found in Section 101(2), which provides that "[a] 'Mass-market contract' is one that is (a) prepared by one party for repeated use; (b) presented to the other party (the "non-drafting party") by the first party; and (c) accepted without the nondrafting party having a meaningful opportunity to negotiate its terms."²⁶⁹ This scope provision is a substantial improvement over what has come before: it is not nearly so narrow as the more common "consumer contract," it lacks the complexity of UCITA's version, and it is directly related to the core of the problem—the lack of a reasonable opportunity to negotiate terms.

3. Shifting the Burden of Proof to Drafters of Choice of Law Provisions

A potentially more restrictive, but far more flexible, approach would erect broad protection yet allow the drafter to avoid

265. See *infra* note 300 and accompanying text.

266. Braucher, *supra* note 264.

267. INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES (Discussion Draft, 2006).

268. *Id.* §§ 202, 302.

269. *Id.* § 101.

restrictions by proving that the provision was actually negotiated, not unfairly imposed, or fair. In *Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*²⁷⁰ a franchise case, the New Jersey court required the drafter to establish that a choice of forum provision was not unfairly imposed on the New Jersey franchisee.²⁷¹ Analogously, an earlier draft of ALI's *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes* offered special protection to recipients of choice of forum or law clauses in "non-negotiated contracts."²⁷² In both choice of law and choice of forum contexts, the contract provision could be enforced if it was "reasonable" in light of enumerated factors.²⁷³

A third example of this approach is found in an innovative proposal from a private consortium of software buyers called Americans for Fair Electronic Commerce Transactions (AFFECT).²⁷⁴ AFFECT developed the proposal to protect customers from application of the UCITA through choice of law and forum clauses in software contracts.²⁷⁵ It limits choice of law and forum clauses in all such contracts regardless of their size, but permits vendors to avoid the restriction by a showing of clear and convincing evidence that the choice of law or forum clause was *actually* negotiated.²⁷⁶

270. 680 A.2d 618 (N.J. 1996); *see also supra* text accompanying notes 118–129.

271. For a quote of the court's rule, *see supra* text accompanying note 128. Under its rule, a choice of forum provision in a New Jersey franchise contract is presumptively invalid unless the franchisor can make the required showing. *Kubis & Perszyk Assocs.*, 680 A.2d at 627.

272. INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES §§ 202, 302 (Council Draft No. 1, 2005) (forum and law respectively) [hereinafter INTELLECTUAL PROPERTY]. While the term was undefined in the black letter, Comment d to Section 202 says: "These are contracts in which the terms are entirely prepackaged. They are common in transactions involving information products, appearing in products delivered in physical form as so-called 'shrinkwrap' licenses, and in products delivered digitally as 'clickwrap' licenses." *Id.* § 202, cmt. d.

273. *Id.* §§ 202(4)(a), 302(5)(a). The draft was not explicit about who had the burden of bringing a situation into the "non-negotiated" category; one would imagine it was the non-drafter's initial burden.

274. Americans for Fair Electronic Transactions, UCITA "Bomb Shelter" Legislation, <http://affect.ucita.com/pdf/UCITABombShelter.pdf> (last visited Oct. 22, 2006).

275. *Id.*

276. Section 3 of the Model UCITA Bomb Shelter Legislation and Commentary proposed by AFFECT provides:

SECTION 3. Exceptions. The provisions of Section 2 [making choice of law and forum clauses in defined "computer information agreements" voidable] will not apply to transactions where the law chosen bears a reasonable relation to the parties or their transaction and it is established by clear and convincing evidence that (a) both the choice of law and choice of forum provisions were specifically bargained for by the

By making the choice of law and forum clauses presumptively invalid and placing the burden of proof on a vendor to avoid the effects of the protective provision, all three variations solve the arbitrariness problem of dollar limitations and offer substantial protection.

In the three examples just discussed, the limitation on subject matter confines what otherwise might be broadsides on choice of law or forum clauses. The rule announced by the New Jersey court is limited to franchise contracts;²⁷⁷ the UCITA bomb-shelter provision is limited to contracts within the scope of UCITA;²⁷⁸ the ALI project is limited to transnational intellectual property situations.²⁷⁹ The narrow foci of these efforts reflect the settings in which they have been developed.

4. Subject Matter Limitations in Statutes Restricting Choice of Law Provisions

The limited subject matter addressed in the last three examples is emblematic of a broader phenomenon: most statutory efforts to limit the impact of choice of law or forum clauses confine themselves to a specific class of adherents or contracts (typically, “consumer contracts”) and to a limited subject matter. For example, Article 2A of the UCC, the first widely-enacted statutory restriction on choice of law and forum provisions in adhesive situations, denied enforceability of such provisions for “consumer leases” in Section 2A-106.²⁸⁰ Various legislative provisions designed to structure business relationships with residents often contain “anti-waiver” provisions that courts can interpret to forbid “waiver” through choice

parties and (b) the contract’s provisions stating choice of law and choice of forum were the product of fully informed choice of both parties. Language to this effect in a written agreement is, without additional evidence, insufficient to satisfy this Section.

Id.

277. *Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc.*, 680 A.2d 618, 627 (N.J. 1996).

278. The provision is limited to “computer information agreements,” which it defines as “a contract or agreement that falls within the scope of the Uniform Computer Information Transactions Act, whether or not that act actually applies . . .” Americans for Fair Electronic Transactions UCITA “Bomb Shelter” Legislation, <http://affect.ucita.com/pdf/UCITABombShelter.pdf> (last visited Oct. 22, 2006).

279. Section 102(1) states: “These Principles apply to civil disputes involving copyrights, neighboring rights, patents, trade secrets, trademarks, domain names, and related intellectual property rights, that are connected to more than one State.” INTELLECTUAL PROPERTY, *supra* note 272, § 102.

280. *See supra* note 251.

of law clauses.²⁸¹ They obviously only have effect where that particular legislation is operable.

The innovative (though unenacted) provision in Proposed Article 1 of the U.C.C.²⁸² provided its broader protection to consumers only for those transactions that were “within the scope of this Section.”²⁸³ This meant all transactions within the scope of the entire U.C.C., but, still, a subset of all consumer contracts. In this instance, in particular, the limited scope brought with it complexity that may have contributed to its defeat in the state legislatures. The section applied, and therefore the consumer protection provisions kicked in, only “to the extent that” the transaction was governed by another U.C.C. provision.²⁸⁴ As if to reiterate this limitation (or to appease opponents by showing that the provision would not affect *their* clients’ businesses), the consumer protection provision itself was prefaced by the “to the extent” language.²⁸⁵

As a statutory drafting matter, it is difficult to know whether the provision’s language led to its overall defeat or whether that same language made the provision more politically sellable than it otherwise might have been. While litigation over the scope and coverage of a given statute is nothing new and is an implication of any statute covering limited subject matter, here it potentially undercut the statutory protection available to individuals who would use it.²⁸⁶ The language also created commercial uncertainty that was

281. See, e.g., *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 712 (Ct. App. 2001) (refusing to enforce choice of Virginia law provision because it would amount to waiver of plaintiff’s unwaivable right to bring a class action); see also *supra* text accompanying notes 118–129 (discussing *Kubis & Perszyk Assocs., Inc.*, 680 A.2d at 618); cf. *supra* text accompanying notes 104–110 (discussing *America Online, Inc. v. Booker*, 781 So. 2d 423, 424–25 (Fla. Dist. Ct. App. 2001)).

Sometimes the legislature itself makes an explicit connection between choice of law or forum provisions and adhesive contracts as did Minnesota which added “including any choice of law provision” to the anti-waiver provision of its franchise protection statute. MINN. STAT. § 80C.21 (West 1999).

282. U.C.C. § 1-301(e)(2) (2003). For a quote, see *supra* note 223.

283. *Id.* § 1-301(e). Comments to the provision make it abundantly clear that the U.C.C. is a statute of limited scope. Both the liberality in choosing law (choice was not limited to a “related” jurisdiction) and the protection offered to consumers were limited to transactions within the scope of the UCC. See *id.* § 1-301 cmt. 1. If ever enacted anywhere, these scope issues promise great uncertainty in the application of the provisions. Woodward, *supra* note 31, at 739–46.

284. U.C.C. § 1-301(b).

285. U.C.C. §§ 1-301(e)–(f).

286. The UCC drafters may have had no alternatives. Their expertise and delegated power extended only to the UCC, not to other subject areas that might have been covered by legislation.

used by opponents to battle enactment.²⁸⁷ Clear, determinate, easy to apply provisions should be the goal, both for enhanced commercial certainty and for ease of use by the beneficiaries who lack the resources to litigate complex scope issues.²⁸⁸

Ease of use, and therefore effectiveness, counsels against subject matter limitations in this context. More importantly, state rules of one kind or another designed to protect a state's residents from contractual overreaching are scattered through every state's legislation and case law.²⁸⁹ A statute intended to shield only some of a state's protective rules from adhesive choice of law clauses will likely be underinclusive. On the other hand, a broad statute intended to protect residents from loss of any of their state's legal protection through adhesive choice of law clauses may well attract far more opposition from business groups than will legislation that affects only a subset of adhesive choice of law provisions. As a political matter, it might be sensible to begin modestly, with limited subject matter, rather than invite opposition from many business groups at once. Even then, the political task will be formidable.²⁹⁰

B. Substituting Voided Chosen Law with Protective Law

When a court uses a conflict of laws or contract law principle to avoid a choice of law provision in an adhesion contract, it does so in a particular context that has been put in issue by the claimant. The adherent's contention is that the contractual choice of law provision in the underlying agreement has had no effect on the particular

Each of the UCC Articles has its own subject matter scope and Article 1, stating general principles for the entire code is, logically, limited to the scope of the other Articles.

287. Woodward, *supra* note 31, at 735–37 & n.175.

288. While the statute may have been difficult to use, on the long view, it could have been very influential (as was its predecessor, UCC Section 1-105) in establishing norms that might have applied outside its limited ambit. This may explain why the American Bankers' Association so vigorously opposed the consumer provision notwithstanding the strong likelihood that it would not have affected the consumer credit contracts that were the focus of the Association's concern. See Memorandum from L.H. Wilson, Assoc. Gen. Counsel, Am. Bankers Assoc. to Members of Drafting Committee to Revise U.C.C. Article 1 and Interested Persons (May 3, 2001) (on file with the author).

289. See, e.g., *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 712 (Ct. App. 2001); *Kubis & Perszyk Assocs., Inc. v. Sun Microsystems, Inc.*, 680 A.2d 618, 618 (N.J. 1996); *Am. Online, Inc. v. Booker*, 781 So. 2d 423, 425 (Fla. Dist. Ct. App. 2001).

290. The difficulty in getting state enactment of the UCITA "bomb shelter," legislation intended to shield residents from the application of UCITA through adhesive choice of law clauses, suggests just how hard the job might be. See *infra* text accompanying note 334.

underlying state law protection the claimant asserts is applicable. If the court agrees with the claimant, the breadth or narrowness of the resulting precedent set by the opinion will be a matter of argument. Such a precedent, whatever its scope, will give planners relatively little pause concerning their power to choose law outside the protected area that was the focus of the court's decision. Legislators, on the other hand, have to concern themselves with the effect shield legislation will have on planning that does not implicate the state's protective law. To formulate the legislation in such a way that a choice of law provision is "void" or "unenforceable" under given circumstances is probably to paint too broad of a brush. Our earliest widely-enacted state legislation of this type in the United States did paint with a broad brush. UCC Section 2A-106 provided simply that a choice of law provision that fit its criteria was "not enforceable."²⁹¹ This would seem to require the drafter to take account not only of the protective consumer rules of the customer's jurisdiction but also of the jurisdiction's default rules, rules of interpretation, and the like. Interstate businesses, of course, claim a preference for one jurisdiction's set of rules in their transactions with customers everywhere. Outside the area of protective legislation, this may be non-controversial. It is probably more sensible—and more in accord with current views on the matter—that a choice of law provision in an adhesion contract be effective except where it will adversely affect those to be protected by the legislation. Corrective legislation thus should shield adherents from the effects of a choice of law provision only to the extent they are deprived of the State law protection to which they otherwise would be entitled.

Since it simply voided the choice of law in a consumer lease, UCC Article 2A's formulation did not address the question of what law *would* apply.²⁹² A formulation that voids only the adverse parts of a choice of law provision probably should address the question. Fortunately, there are several legislative models to which we might

291. U.C.C. § 2A-106(1) (2002). For a full quotation of Section 2A-106, see *supra* note 251.

292. Presumably that question was left to the forum's conflict of laws principles. Similarly, UCC Section 2A-106(2), in avoiding choice of forum provisions, only avoided them if the jurisdiction chosen would not otherwise have jurisdiction over the consumer. See U.C.C. § 2A-106(2); quoted *supra* in note 251. This means that a choice of forum provision selecting the (distant) vendor's forum would be enforceable if that forum could get non-consensual jurisdiction over the customer through a long arm statute or because the contract was "made" in the (distant) forum.

look for guidance.

The granddaddy of legislation protecting customers from adhesive choice of law provisions is the 1980 Rome Convention.²⁹³ Its Article 5, Paragraph 2 provides: “[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 . . .”²⁹⁴ The contracts with “consumers” that are covered include “contract[s] the object of which is the supply of goods or services to a person (‘the consumer’) for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.”²⁹⁵ The provision avoids only the effect of a choice of law provision on the “mandatory rules” of a claimant’s residence, leaving the remainder in place.²⁹⁶

The UCITA drafters proposed what might be regarded as a narrower American version of the Rome Convention’s rule, but went in a different direction to insulate the protective law. Section 109 of UCITA provides:

- (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.²⁹⁷

UCITA’s formulation, by using the term “consumer contract,” delivers protection to a narrower class of customers than would either the Rome Convention or UCITA’s own “mass-market” construct.²⁹⁸ Moreover, instead of locating the unvariable law in the place where the customer has his or her “habitual residence,” UCITA’s cross-reference imports the law of the place of delivery of a tangible product, the place of the vendor in the case of online delivery, or the place with the most significant relationship to the

293. Rome Convention, *supra* note 229, art. 5, para. 2.

294. *Id.*

295. *Id.* art. 5, para. 1.

296. *See id.* art. 5, para. 2.

297. U.C.I.T.A. § 109(a)(2002).

298. *See id.* § 102(a)(45) cmt. 39 (discussing the application of its new term “mass-market transaction”).

transaction in “all other cases.”²⁹⁹ As complex and narrow as this protection may have been, it was apparently too much: both Virginia and Maryland (the only states that enacted UCITA) changed the wording to further narrow or eliminate the protection.³⁰⁰

Section 1-301 of the UCC provides another statutory model for insulating a state’s protective law from the effects of choice of law clauses in adhesion contracts. Like UCITA, the provision, already limited to “consumers” and to transactions within the scope of the UCC,³⁰¹ was a little narrower than the Rome Convention, declaring that a choice of law provision “may not deprive the consumer of the protection of any rule of law governing a matter within the scope of this section, which both is protective of consumers and may not be varied by agreement”³⁰² Like the protection offered by the Rome Convention, the invariable law was that of the state where the consumer “principally resides” unless the consumer both made the contract and took delivery of goods in a different jurisdiction.³⁰³ The Official Comments make clear that “rule of law” refers to case law and administrative regulations as well as to statutes.³⁰⁴

If the legislative objective is to protect one’s residents from losing their consumer or small business protection through adhesive choice of law clauses, then the law to be protected should be that of the jurisdiction within which they live or, as the Rome Convention and UCC require, principally reside.³⁰⁵ That is the jurisdiction where they participate in the political process, pay taxes, and, in effect, choose their level of protection from business practices (and the corresponding level of business regulation).

299. *Id.* § 109(b).

300. Virginia law provides that “[t]he 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 statute, administrative rule, or regulation that may not be varied by agreement under the law of Virginia.” VA. CODE ANN. § 59.1-501.9(a) (2001). Virginia law applies in all other cases (apparently regardless of the location of vendor, vendee, delivery, use, etc.). *See id.* § 59.1-501.9(b).

Maryland law provides only that “[t]he parties in their agreement may choose the applicable law.” MD. CODE ANN., COM. LAW § 22-109(a) (LexisNexis 2005).

301. *See supra* note 283.

302. U.C.C. § 1-301(e)(2) (2003).

303. *Id.* § 1-301(e)(2)(b).

304. *Id.* § 1-301(e)(2) cmt. 3.

305. Rome Convention, *supra* note 229, art. 5, para. 2 (“habitual residence”); U.C.C. § 1-301(e)(2)(A) (“principally resides”).

This approach converts into legislation the limited voidability that would be effected in litigation through judicial use of either unconscionability or the reasonable expectations doctrines discussed earlier.³⁰⁶ If, as seems likely, a court views a state's consumer protection legislation and unconscionability decisions to be "fundamental policy," this approach would also resemble a finding under the dominant conflicts rule that a choice of law clause cannot overcome a relevant state's "fundamental policy."³⁰⁷

*C. Summary of Legislative Considerations
for Choice of Law and Forum Limitations*

Choice of law clauses have sufficient economic value in negotiated contract settings so that no state would want to outlaw them altogether—such action could impede economic activity and would probably trigger corrective federal legislation.³⁰⁸ Ideas of party autonomy, together with the certainty that comes with choice of law clauses, support enforcement of these clauses in settings where there is *true* assent.³⁰⁹ While choice of law clauses in adhesion contracts have been lumped in with negotiated contracts by many courts,³¹⁰ they are different in nearly all respects and, indeed, do not carry a strong normative justification for widespread enforcement. The problem is how to regulate one without harming the other. Restricting protection to "non-negotiated" contracts would track the economic rationale underlying contractual assent. But it would be difficult to develop a workable definition to capture the parameters of such a category.

The common method for delivering protection in other adhesive settings has been to limit the protection to "consumers," narrowly defined as they are in the UCC.³¹¹ In the context of shield legislation, such a restriction is very under-inclusive. It could also signal a legislative willingness to permit businesses to displace through

306. See *supra* text accompanying notes 166–209.

307. For a discussion of the "fundamental policy" doctrine in conflicts law, see *supra* text accompanying notes 65–86.

308. For a discussion of the economic value of choice of law clauses, see *supra* note 241.

309. For a discussion of party autonomy, see *supra* text accompanying notes 18–21. For a discussion of the certainty that comes with choice of law clauses, see *supra* notes 241–242.

310. For an example, see *supra* text accompanying note 109.

311. See U.C.C. § 1-201(b)(11) (2003) (defining "consumer" as "an individual who enters into a transaction primarily for personal, family, or household purposes").

adhesive choice of law provisions the protection a state affords to its non-consumers. The best of the alternatives to this overly-narrow restriction is the mass-market contract, developed by the drafters of UCITA³¹² and substantially improved by the Reporters in the ALI Project discussed above.³¹³

Most states have many years of legislation and case law in place that works to protect consumers and small businesses; little of that was developed in an era of aggressive enforcement of choice of law clauses in consumer settings.³¹⁴ It is probably not enough to rely on anti-waiver provisions that may be in some of that legislation: indeed, even specific anti-waiver provisions have been neutralized by choice of law clauses.³¹⁵ Protecting this older state law will probably require special legislation that is not limited to a particular type of transaction, such as Louisiana's legislation quoted earlier.³¹⁶ For states now considering new or updated substantive legislation designed to protect consumers or small business people from perceived abuses within the economic system, it seems more important than ever that the legislation contain a provision preventing waiver either directly or indirectly through a choice of law clause.³¹⁷ Indeed, one commentator has suggested that, by not including anti-choice of law provisions in the legislation itself, state

312. See *supra* notes 263–266 and accompanying text.

313. See *supra* text accompanying notes 272–279.

314. 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, 589 (1999) (discussing the historical evolution of enforcement of choice of law clauses); Teresa M. Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 34 n.2 (1982) (citing S. REP. NO. 749, 92d Cong., 2d Sess. 3 (1972)) (noting that the 1960s is known as the "Consumer Decade").

315. See *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.*, 871 F.2d 734, 738–40 (8th Cir. 1989).

316. See *supra* text accompanying note 252.

317. In the wake of *Modern Computer Systems*, 871 F.2d 734, the Minnesota legislature amended its franchise statute to make clear that a choice of law clause counted as a "waiver." *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128, 133 (7th Cir. 1990). The provision now provides:

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 (West 1999) (emphasis added).

legislatures may actually *intend* that the protective legislation may be displaced through choice of law clauses.³¹⁸ If a legislature does not want a future court reading its legislation as implicitly authorizing an opt-out through a vendor's adhesive choice of law clause, a provision making the contrary intent clear will be imperative.

D. Closing the Back Door: Limiting Choice of Forum Clauses to Limit Choice of Law Clauses

State legislation that limits the effectiveness of choice of *forum* clauses is most obviously important to combat the direct effect that a distant forum will have on the value of a consumer's or small business's claim or defense. For example, traveling great distances, potentially unfriendly fora, and out-of-state counsel could all negatively affect the settlement value of any claim. But legislation limiting choice of forum clauses is important for another, less obvious, reason: it improves the odds that local courts (not the courts of other jurisdictions) interpret their own jurisdiction's legislation or precedents limiting choice of law provisions.

Any jurisdiction's rule constraining a choice of law clause will have limited effectiveness outside the enacting state's courts. If construed as a choice of law rule, only the enacting state's courts would be duty bound to follow it;³¹⁹ if considered a contract law rule, non-enacting state courts would follow it only if they concluded that the enacting state's law applied to the contract-for-law clause under review.³²⁰ The shield rule might apply outside the enacting state in either case if the forum embraced it as the "fundamental policy" of the enacting state, but there is no way for the state enacting a shield law to guarantee such a result. Inevitably, then, shield laws bring with them forum shopping incentives,³²¹ and the enacting state's

318. Erin Ann O'Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1580 (2000).

319. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1989) ("A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.")

320. See *id.*; see also *supra* text accompanying notes 25–28 (discussing how courts conclude whether the enacting state's law applies).

321. Because a shield law is predominantly a forum rule, such legislation makes forum shopping worthwhile for those seeking the protection of some state's local rules. But the problem may be *de minimis*. An enacting state's residents are likely to bring suit in its own courts, and the legislation could even limit protection to state residents so that out-of-state residents could not avail themselves of the shield rule by seeking refuge in the enacting state's courts. Of course, if a state wished to bring litigation into its courts for the economic advantages that such litigation

beneficiaries might lose protection if they find themselves litigating their contracts in other jurisdictions.

There are two ways for the enacting state to reduce those risks. The less obvious of the two is to craft the shield legislation to maximize its extraterritorial effect. Recall that the Restatement's conflicts analysis of contractual choice of law requires the forum court to defer to the (1) "fundamental policy" of another state with (2) a materially greater interest in the controversy than the forum state.³²²

It will be difficult for the enacting state to control both legs of this test, particularly when the drafter will declare that the contract is "made" in the chosen state.³²³ But surely it is worthwhile for the enacting state's legislature to proclaim that its rule limiting choice of law provisions in the class of cases defined by the legislation is the "fundamental policy" of the enacting state. A shield law that protects a state's consumers and small businesses from dilution through adhesive choice of law clauses could plausibly be viewed as the enacting state's "fundamental policy," whether or not the legislation itself proclaimed that to be true. But a declaration to that effect surely improves the odds that it will be recognized by non-enacting states as such.

The more direct way to reduce the risks that a state's consumers and small businesses will lose their local protection through enforcement of adhesive choice of law clauses by out-of-state courts is to limit choice of *forum* clauses for the same classes of claims and claimants that the choice of law legislation is intended to protect.

might bring with it, the state could enact such a rule for the forum and *not* limit the protection to state residents. Enacting "litigation seeking" rules would not be a new development. *See, e.g.*, CAL. CIV. CODE § 1646.5 (West 2000 & Supp. 2005) (allowing the parties to contracts or agreements worth \$250,000 or greater to be governed by the laws of California as opposed to the state where the usage is performed); DEL. CODE ANN. tit. 6, § 2708 (1999) (allowing parties to contracts worth \$100,000 or greater to agree in writing that the agreements be governed by the laws of Delaware, notwithstanding any conflict of laws rules); N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2001) (allowing parties to contracts worth \$250,000 or greater to agree to be governed by the laws of New York, notwithstanding that the contract is to be performed outside of the state); TEX. BUS. & COM. CODE ANN. § 35.51 (Vernon 2002) (allowing parties to contracts worth \$1,000,000 or greater to agree to any jurisdiction to govern the transaction so long as the transaction bears a "reasonable relation" to that jurisdiction). The statutes cited above are designed to attract large disputes; one suspects that a rule aimed at attracting consumer lawsuits would generate more public costs than it would generate private revenues.

322. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187; *see also supra* text accompanying notes 18–21.

323. *See supra* note 139 and accompanying text.

Legislation limiting choice of forum clauses in some group of adhesion contracts will, once again, be binding on the forum's own courts as a legislative statement going to the court's own exercise of jurisdiction.³²⁴ If suitably drafted,³²⁵ such legislation can also be viewed as a general rule of the jurisdiction's contract law, applicable across-the-board to all forms of dispute resolution. A provision that limits the geographical location of a judicial forum *or other forum for dispute resolution* in a specified class of contracts could treat arbitration and judicial dispute resolution similarly, directly impact contract remedies (and, by extension, the value of the contracts) entered into by the state's residents, and, in that respect, appear to operate within the boundaries of the Federal Arbitration Act.³²⁶

324. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(1) (1971).

325. The Federal Arbitration Act complicates matters here. See Bryan L. Quick, *Keystone, Inc. v. Trial Systems Corporation: Is the Montana Supreme Court Undermining the Federal Arbitration Act?*, 63 MONTANA L. REV. 445, 454 (2002) (noting that the U.S. Supreme Court has interpreted the Federal Arbitration Act to preempt state courts from interpreting state statutes that invalidate arbitration agreements). Restrictions on choice of forum clauses that do not extend to arbitration, such as Section 2A-106(2) of the UCC, will (in our era of near universal customer arbitration) be ineffective. See U.C.C. § 2A-106(2) (2003), quoted *supra* note 251. The state of Washington has corrected this gap in UCC Article 2A's coverage (and substantially improved the effectiveness of its wording) by providing:

If the judicial forum *or the forum for dispute resolution* chosen by the parties to a consumer lease is a jurisdiction other than a jurisdiction (a) in which the lessee resides at the time the lease agreement becomes enforceable or within thirty days thereafter, (b) in which the goods are to be used, or (c) in which the lease is executed by the lessee, the choice is not enforceable.

WASH. REV. CODE ANN. § 62A.2A-106(2) (West 2003) (emphasis added). Presumably, the effect of this provision is to mandate that all dispute resolution involving consumer leases with Washington residents occur in Washington. It obviously affects arbitration proceedings, but it is also an across-the-board contract rule and thereby should be shielded from challenge under Section 2 of the Federal Arbitration Act which provides, in part, that contract provisions choosing arbitration "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*" 9 U.S.C. § 2 (2000) (emphasis added).

326. See WASH. REV. CODE ANN. § 62A.2A-106; discussion *supra* note 325; see also *Keystone, Inc. v. Triad Sys. Corp.*, 971 P.2d 1240, 1244-45 (Mont. 1998) (noting that the FAA does not preempt Montana's state statute because the statute governs all contract law, not just arbitration). *Contra*, Quick, *supra* note 325, at 462 (discussing how the Montana Supreme Court in *Keystone* seemed to ignore the U.S. Supreme Court's ruling in *Doctor's Associates*, which stated that courts may not interpret a state statute to invalidate an arbitration agreement because such an interpretation would violate the FAA).

V. PRACTICAL LIMITS TO STATE LAWMAKING AND SOME ALTERNATIVES

A. *Practical Limits to State Lawmaking*

This Article has suggested that judicial limits to choice of law and forum clauses by state courts are likely to be ineffective in preserving the legal protections a state provides to its consumers and small businesses. State legislation is more promising for effective limitations *provided* a state considers this to be a worthwhile effort. That will certainly be an open question in many jurisdictions, particularly those (like Delaware, Maryland, Virginia, Utah, and other states) that have created a legal environment favorable to businesses at the likely expense of some consumers.³²⁷ Moreover, it could be, as one commentator suggested, that states have not heretofore limited such clauses in order to achieve the political compromise necessary to pass protective consumer legislation in the first place.³²⁸ If this is true, then state legislatures are enacting protective legislation that businesses can simply choose to ignore (by inserting into their adhesion contracts) a choice of law provision that chooses another state's law. If this slight-of-hand is actually taking place, then efforts to create and move forward shield legislation will be doomed.

B. *The Outlook for Federal Lawmaking as an Alternative*

States that might otherwise be inclined towards protective legislation can expect pointed, heavy lobbying against legislation that will preserve the local rules and remedies favoring consumers and small businesses. The current political scene suggests that businesses have found a panacea in limiting or altering their customers' legal environment through adhesion contracts and will not easily relinquish this newly-found approach to managing

327. States like Delaware derive substantial state revenue by creating a legal environment favorable to businesses. Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 240-42 (1985) (noting that Delaware derives 16.9% of its revenue from corporate franchise taxes, whereas the closest state, Pennsylvania, derives only 9.8%). This revenue likely benefits the state's resident consumers and small businesses in a general way. *Id.* at 240-41. However that may be, it is clear that the public revenue generated at the state level does *not* benefit the consumers and small businesses of other states to which Delaware law might be exported.

328. See O'Hara, *supra* note 318, at 1572.

compliance with multi-state regulation.

For example, the American Bankers Association opposed (with apparent success) the consumer protection provision of the innovative U.C.C. Section 1-301(e)³²⁹ and has also pressed courts to enforce choice of law, arbitration, and class action waiver clauses in litigation involving credit card issuers.³³⁰ It has pressed a strong economic argument³³¹ against local regulation and in favor of a national standard. There may well be merit in such an argument: individual state regulation of commercial law arguably makes no sense in a national economy. In addition, national standards and rules may well be more sensible as an economic and commercial matter.³³²

But there is a critical difference between a national set of rules, emanating from Congress, and the implications of developments discussed here. Creating what amounts to a national standard through aggressive enforcement of choice of law clauses is still single-state regulation; it is not federal regulation through the Office of the Comptroller of the Currency or other nationally-accountable body. Allowing one state's legislature to legislate for and bind the citizens of all other states is a perversion of the constitutional system

329. Memorandum from L.H. Wilson, Assoc. Gen. Counsel, Am. Bankers Ass'n, to Members of Drafting Comm. to Revise U.C.C. Article 1 and Interested Persons (May 3, 2001) (on file with the author).

330. *E.g.*, Brief for American Bankers Ass'n et al. as Amici Curiae in Support of Petition for Writ of Certiorari at 3-4, *Discover Bank v. Szetela*, 537 U.S. 1226 (2002) (No. 02-829), 2002 WL 32133743 (arguing the lower court erred in refusing to enforce the bank's "no class action" clause from the contract due to unconscionability); Brief of Amici Curiae Florida Bankers Ass'n and American Bankers Ass'n in Support of Petitioner at 8, *Buckeye Check Cashing, Inc. v. Cardegna*, 125 S.Ct. 2937 (2005) (No. 04-1264), 2005 WL 1254196 (arguing that the lower court's refusal to enforce arbitration clause was motivated by impermissible hostility towards arbitration).

331. In its letter to the Article 1 Drafting Committee, the American Bankers Association said:

Financial institutions with customers residing in another state will need to become experts on the consumer protection laws of the other jurisdiction. Companies serving customers in multiple states will be forced to contend with a patchwork of state laws. This new "safeguard" will have a negative impact on the efficiency, competition, and use of standard procedures. It ignores the national and global nature of our economy.

Memorandum from L.H. Wilson, Assoc. Gen. Counsel, Am. Bankers Ass'n, to Members of Drafting Committee to Revise U.C.C. Article 1 and Interested Persons (May 3, 2001) (on file with the author).

332. Scholars have made calls for a national commercial code since nearly the beginning of the UCC enactment process. *See, e.g.*, Robert Braucher, *Federal Enactment of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 100, 104 (1951); William A. Schnader, *The Uniform Commercial Code—Today and Tomorrow*, 22 BUS. LAW. 229, 231 (1966).

we have in place and the democratic ideals that underpin it.

Some states have created shield rules specifically designed to inhibit the displacement of their law through choice of law clauses.³³³ But they have typically done so in narrow, specific contexts. One recent effort is that of several states to build legal “bomb shelters” to protect their citizens from the application of Virginia’s or Maryland’s UCITA. Four states thus far have constructed these “bomb shelters,”³³⁴ but recent efforts to pass such narrow, protective legislation in other states have not been successful. Efforts to outlaw class action waivers in adhesion contracts are meeting very substantial resistance from business groups.³³⁵ Limitations on arbitration may well have to proceed at the federal level,³³⁶ but efforts there have been strongly opposed by industry.³³⁷ Both class action waivers and UCITA provisions are far easier to demonize than are choice of law and, to a lesser extent, choice of forum clauses. Without UCITA or some other rhetorical bogeyman, getting state

333. See *supra* text accompanying notes 244–245 (discussing shield laws in the context of consumer protection).

334. IOWA CODE ANN. §§ 554D.104, 554D.125 (West 2001 & Supp. 2006); N.C. GEN. STAT. § 66-329 (2005); VT. STAT. ANN. tit. 9, § 2463a (Supp. 2005); W. VA. CODE ANN. § 55-8-15 (LexisNexis 2006).

335. In 2005, Rhode Island legislature passed H. 5985, a bill that would forbid enforcement of class action waivers in consumer contracts. H. 5985, 2005 Leg., Jan. Sess. (R.I. 2005). The bill was vetoed by the governor after an intense lobbying campaign led by the Chamber of Commerce on one side and a substantial consortium of consumer groups on the other. See Press Release, Public Citizen, National Public Interest Organizations Urge Rhode Island’s Governor to Sign Consumer Protection Bill, (July 12, 2005) <http://www.citizen.org/pressroom/release.cfm?ID=1986>. California has accomplished the same outcome through its courts in cases such as *Aral v. Earthlink, Inc.*, 36 Cal. Rptr. 3d 229 (Ct. App. 2005). Utah, of course, has gone in the opposite direction. See *supra* text accompanying notes 188–189.

336. If enacted as a broad limitation on contractual provisions governing forum, state restrictions that also governed the location of arbitration might survive a challenge as being valid as a general contract restriction under Section 2 of the FAA. Cf. *supra* note 325 (discussing how state actions that restrict arbitration clauses may be federally pre-empted by the FAA but that general restrictions on contract provisions are permissible).

337. The Fairness and Voluntary Arbitration Act (FVAA) would have given each party to a “sales and service contract” the option of rejecting arbitration after a controversy arose but before arbitration proceedings began. H.R. 534, 106th Cong. § 2 (1999). Under the FVAA, “the term ‘sales and service contract’ means a contract under which any person (including any manufacturer, importer or distributor) sells any product to any other person for resale to an ultimate purchaser and authorizes such other person to repair and service such product.” *Id.* This legislation was never enacted and was strongly opposed by industry groups, such as the U.S. Chamber Institute for Legal Reform and the U.S. Chamber of Commerce. See *Fairness and Voluntary Arbitration Act: Hearing on H.R. 534 Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 106th Cong. 54–59 (1999) (statement of James Wooton, President, U.S. Chamber Inst. for Legal Reform).

legislators interested in limiting these more esoteric provisions will likely be very difficult. A first step in such an agenda will be a clearer understanding of how the law governing those provisions works and the effects the clauses can have on a state's own efforts to protect its consumers and small businesses.

*C. The Free Market as a Limit on
Choice of Law and Choice of Forum Clauses*

Before considering whether there might be a less direct federal response to these developments, it is worth considering whether the power of the market might be harnessed, making other kinds of solutions unnecessary. Perhaps the dominant (though empirically untested) economic theory for enforcing adhesion contracts as written is the notion that *some* adherents actually read the forms and react to them by purchasing elsewhere.³³⁸ In a very competitive mass-market, even a few altered purchase decisions could be important to a vendor and so, the story goes, vendors have reasons to self-regulate what they put into their adhesion contracts.³³⁹

It is arguably something of an anomaly that class action waivers, binding mandatory arbitration clauses, choice of forum clauses, and, to a lesser extent (because no adherent can know what they mean), choice of law clauses persist in the marketplace despite the near uniform condemnation of such provisions by consumer advocacy groups.³⁴⁰ There are several ways to interpret these apparently conflicting facts: that virtually no consumers read or understand the vendors' forms and, therefore, do not react to them through their purchase decisions;³⁴¹ that they *do* read the forms but think nothing

338. 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). *Contra* Eisenberg, *supra* note 143, at 244.

339. *See* Schwartz & Wilde, *supra* note 338, at 660.

340. For example, a group of self-styled "National Public Interest Organizations" issued a press release on July 12, 2005, urging the governor of Rhode Island to sign the legislation limiting class action waivers. Press Release, Public Citizen, *supra* note 335. The coalition included: ACORN, Alliance for Justice, American Association for People with Disabilities, Center for Auto Safety, Center for Responsible Lending, Consumer Action, Consumer Federation of America, Consumer Task Force for Automotive Issues, Consumers for Auto Reliability and Safety, Consumers Union, National Association of Consumer Advocates, Lawyers' Committee for Civil Rights Under Law, National Community Reinvestment Coalition, National Consumer Law Center, National Employment Lawyers Association, Public Citizen, Rhode Island Public Interest Research Group, USAction, and Workplace Fairness. *Id.*

341. A relatively recent newspaper article described a software vendor's experiment to

of the provisions;³⁴² that *some* adherents read and understand the forms and react to them but not enough to offset the perceived benefits to the businesses; that there is no competition in the market on these terms, and the adherents therefore have no choices anyway; and/or that the consumer advocates are hopelessly out of touch.

Expanded communications and “connectivity” might offer a chance at more direct market control of these provisions, provided that there is room among the vendors for competition on the terms of their agreements. In February 2005, StopBMA, a coalition of consumer groups, created a website with the provocative address “Givemebackmyrights.com” to educate consumers about binding mandatory arbitration clauses (“BMA’s”) and give consumers the tools to resist them.³⁴³ Among those tools is information about which vendors do *not* require BMA for dispute resolution, as well as forms consumers can mail back to vendors that purport to reject the BMA’s.³⁴⁴

It is impossible to know how effective this effort has been, but one must be skeptical. After a burst of news stories and related publicity,³⁴⁵ the media seemed to have lost interest in adhesive arbitration issues, at least until very recently.³⁴⁶ If consumers have

discover the extent to which adherents actually read the forms. See Jeff Gelles, *Don't Ignore Those Click-and-Agree Contracts*, PHILA. INQUIRER, July 11, 2005, at C01. They buried a \$1000 reward in 900 words of boilerplate. *Id.* It took over four months and 3000 downloads of the product before someone discovered the offer and claimed it. *Id.*

342. This, in turn, could mean that the adherents are exercising a rational cost-benefit choice. See generally Ware, *supra* note 6, at 212 (arguing that sellers might charge more for goods if consumers insisted on altering the terms). Alternatively, it could mean that because customers overvalue immediate consumption, they may not be rationally choosing. Cf. *id.* at 220–21 n.97 (arguing that some consumers undervalue their procedural rights and too readily alienate them).

343. See Give Me Back My Rights Coalition, About Us & Contact, <http://www.givemebackmyrights.com/bma-about.htm> (last visited Sept. 30, 2006).

344. *Id.*

345. Give Me Back My Rights Coalirion, Take Action!, <http://www.givemebackmyrights.com/bma-takeaction.htm> (last visited Sept. 30, 2006).

346. On October 26, 2006, *Los Angeles Times Magazine* ran a feature story that was very negative about many different forms of arbitration, emphasizing in particular consumer arbitration. Eric Berkowitz, *Is Justice Served?*, LOS ANGELES TIMES MAGAZINE, Oct. 22, 2006, at 20, available at <http://www.latimes.com/features/printedition/magazine/la-tm-arbitrate43oct22,1,6981618.story?ctrack=1&cset=true>. Another potential harbinger of change is the John Warner National Defense Authorization Act for Fiscal Year 2007, the enrolled version of H.R. 5122, signed by the President on October 17, 2006. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006). This act provides that in lending agreements covering servicemen,

Notwithstanding section 2 of [the Federal Arbitration Act], or any other Federal or

begun reading the boilerplate or are becoming resistant to mandatory arbitration, then such scenarios have not been reported. The Utah legislature's embrace of adhesive class action waivers at the behest of the banks suggests that neither has much to fear from consumer pushback on arbitration.³⁴⁷ Once again, the lack of consumer market pressure could signal market success (everyone is being rational and no one cares³⁴⁸) or market failure (consumers are irrational about dispute resolution clauses or lack the means with which to value them³⁴⁹).

However one might interpret the relative quiet about adhesive arbitration, the odds that the market can work for the choice of law clauses considered here are abysmally low.³⁵⁰ The problem is simply too abstract and difficult. Whether a given state's law is "better" or "worse" for consumers depends on specifics that might well be too difficult to include in a website's menu system without making it unwieldy.³⁵¹ Legislators that are otherwise inclined to shield local law protecting their consumers and small business people ought not

State law, rule or regulation, no agreement to arbitrate any dispute involving the extension of consumer credit shall be enforceable against any covered member or dependent of such a member, or any person who was a covered member or dependent of that member when the agreement was made.

Id. at § 697(f)(4). Consumer advocates have for years believed that if Congress could be made to understand the problems with consumer arbitration in *any* context, it would be a first step in getting Congressional attention to the issues more generally. This may have been a first step.

347. *See supra* text accompanying notes 188–189.

348. *Cf. Schwartz & Wilde, supra* note 338 (arguing that if consumers comparison shop, firms will compete on terms).

349. *Id.* (arguing that if consumers are unaware of terms, the market price will reflect a higher price and therefore a welfare loss to consumers).

350. *See supra* note 140.

351. An indirect form of market control of adhesive arbitration provisions may have come from Freddie Mac and Fannie Mae, large buyers of residential mortgages. Perhaps influenced by pressure from consumer groups, these entities announced in December 2003 and February 2004 (respectively) that they would no longer purchase residential mortgages containing binding mandatory arbitration clauses in them. *Fannie Mae No Longer Investing in Mandatory-Arbitration Loans*, PHILA. INQUIRER, Feb. 5, 2004, at C3. That was followed by a decision by CitiFinancial that it would no longer include such clauses in its real estate loans. Erick Bergquist, *CitiFinancial Changes Loan Practices*, AM. BANKER (USA), May 20, 2005, at 20. The decisions by Freddie Mac and Fannie Mae made mortgages containing binding mandatory arbitration clauses less marketable (and therefore less valuable) and in that respect could be expected to influence the behavior of mortgage lenders as, perhaps, illustrated by CitiFinancial's decision that followed. Whether other lenders will follow suit, and to what extent, remains to be seen. A public decision by JAMS, an arbitration provider, to refuse to recognize class action waivers in arbitration clauses was reversed shortly thereafter owing, no doubt, to pressure from businesses. *See Gipson v. Cross Country Bank*, 354 F. Supp. 2d 1278, 1289 (M.D. Ala. 2005).

wait for the imagined market to do their work for them.

D. Federalism Revisited

While the focus has been on the dilution of state protective law through adhesive choice of law clauses, the real problem we have been examining here is, at its core, a problem of federalism. How should our constitutional system best accommodate the fact that we have multiple legal regimes that can legitimately claim some interest in governing the transactions at issue? Businesses have an understandable desire for certainty and, perhaps, for a single set of consumer and small business rules with which to comply. Their use of choice of law and forum clauses can be seen as an imaginative attempt to obtain a single set of rules. But those rules are the rules of only one state, a regulatory balance that (inevitably) will not be shared by other states.

If a single set of standards is the objective, federal legislation that provides uniform consumer and small business protection for the entire United States is the obvious solution. But this solution is not likely to appear anytime soon. We have always left nearly all lawmaking in the commercial and consumer law areas to the states,³⁵² our UCC is the current compromise that attempts to reconcile the need for uniform standards with this very strong tradition of state lawmaking.

But however one views the success of the UCC, the uniform laws approach to *consumer* law has not been nearly so successful. The showpiece, the Uniform Consumer Credit Code, created in 1968, has been enacted in only eleven states.³⁵³ There remains substantial diversity among states in how best to accommodate business needs with consumer and small business protection, and this diversity—a central and generally positive feature of our federal system—makes effective federal (or uniform state) legislation both difficult and unlikely. If Congress is unwilling to completely take over the job of consumer and small business protection, we will probably be stuck with this state diversity in protective rules for the foreseeable future.

352. See Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code 1949–1954*, 49 BUFFALO L. REV. 359, 368 (2001).

353. See *supra* note 3; see also Kathleen Patchel, *Interest Group Politics, Federalism and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 125 n.193 (1993) (noting that seven states and Guam enacted the 1968 version, while four states enacted the 1974 version).

There is a positive role for Congress here, however, even if it falls far short of a very unlikely federalization of consumer law.³⁵⁴ The current situation is an uneasy one—aggressive interstate projection of state law via choice of law clauses, on the one hand, and defensive measures by other states via judicial decisions and “bomb shelter”-type legislation, on the other. This tug-of-war and its underlying contract and conflict of law issues create substantial legal uncertainty. Will a given choice of law clause be recognized in other state courts and to what extent? What state’s contract law will be applicable? Will “bomb shelter” and similar legislation be recognized by non-enacting states? Will parties use forum shopping to jockey for strategic advantage on these issues? A central problem with the current system is that the limitations on contracts-for-law, both from the contracts and conflicts cases and statutes, can vary with the forum.³⁵⁵ Because no business can completely limit where a claim may be brought, no business can achieve the planning certainty it desires in its mass-market transactions.

This legal uncertainty is, of course, harmful as a commercial matter. What may be worse, the attempted solution described here—aggressive projection of one state’s policy into other states and the defensive responses to those efforts by other states—is antithetical to the interstate cooperation and comity that is necessary in our federal system. The resulting friction does no one any good.

Europe faced similar issues in its early efforts at economic integration, and its solution, memorialized in the Rome Convention, was to create a European choice of law rule applicable in all the member states—a rule that both eliminated diversity in member states’ conflicts rules and, at the same time, preserved member state diversity in consumer protection and other strongly held, normally-applicable mandatory rules.³⁵⁶ Congress could do the same thing with legislation that sets forth the circumstances under which a state’s consumer and small business law will survive despite a choice of law clause in a contract. Such legislation would, in effect, create a

354. Thanks to my colleague Rick Greenstein for initially pointing out this possibility. A somewhat different approach to the analogous problem of diverse state rules for payment systems is found in Mark E. Budnitz, *Consumer Payment Products and Systems: The Need for Uniformity and the Risk of Political Defeat*, 24 ANN. REV. BANKING & FIN. L. 247, 277–80 (2005).

355. See *supra* text accompanying note 352.

356. See Rome Convention, *supra*, note 229.

federal choice of law rule for the limited circumstances and classes of cases defined in the legislation. In its narrowest form, such a rule could validate choice of law clauses in contracts and then track the protective language set forth in the promulgated version of U.C.C. Section 1-301(e)(2).³⁵⁷ A better version, one desirable given the similarities between small business and consumer adhesion contracts, could define “consumer” more broadly or create a class of “mass-market contracts” for protection.³⁵⁸

Such an effort would effectively alter and unify state conflict of laws rules for these limited purposes. While it would preserve rather than destroy state diversity, it would also reduce forum shopping that results from diverse conflict of laws rules at the state level.³⁵⁹ More ambitious³⁶⁰ federal legislation might explicitly require that federal, not state, law control the underlying contract questions as well.³⁶¹ By providing a federal rule for the contract analysis, such legislation would, by its nature, eliminate the threshold conflict of laws questions and would eliminate much of the diversity in contract law analysis otherwise found in state contract law. The result would be an even more predictable business environment, but also one that preserved our state diversity in consumer protection.

To be sure, federal legislation of the kind described here would not reduce the costs businesses must sustain in their exposure to the protective laws of fifty different states. We have had a national economy for many years, and compliance with diverse state law has been an unavoidable side effect of developing commercial and consumer law at the state level. The contention here is that those compliance costs can be reduced only by federal legislation establishing national norms for such consumer protection—

357. The provision, applicable only to the UCC’s “consumer,” is quoted *supra* note 223.

358. See *supra* text accompanying notes 259–268 (discussing the similarities between small businesses and consumers in the context of state legislation).

359. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 310–11 (1992).

360. There is probably more state diversity on the contract law issues involving adhesion contracts than there is on the conflict of laws issues. Reaching an appropriate compromise on the “best” rule to craft out of that diversity will be very difficult.

361. See Stephen Burbank, *Federalism And Private International Law: Implementing The Hague Choice of Court Convention in the United States* 20–22 (Univ. of Pa. L. Sch. Public Law, Working Paper No. 06-27, 2006), available at <http://papers.ssrn.com/abstract=921200> (last visited Sept. 30, 2006) (discussing uniform federal conflicts law in reference to the Hague Convention).

legislation Congress is not likely to develop.

The end-run around state-to-state legal diversity that has been the primary focus of this Article—using choice of law clauses to embrace the norms of a single state—is illegitimate and inherently unstable; we can expect retaliation by states that believe their residents are entitled to local protection. Nonetheless, were Congress to clarify the extent to which consumers and small businesses retained their state law protection in the marketplace, it would add predictability and reduce the incentives that now exist for forum shopping. In the meantime, protective state legislation of the kind described earlier—a proliferation, as it were, of state “bomb shelters”—may provide the added benefit of getting Congress’s attention.

VI. CONCLUSION

Every state limits “contracting out” to some extent. Most would hold that parties cannot “contract out” of law that represents the “fundamental policy” of another state under at least limited circumstances. But courts of different states can come to different conclusions about what is “fundamental,” and, what is worse, the conflicts rules themselves are not uniform to begin with. To exacerbate the situation, the contract law that underpins enforceability of a choice of law clause is widely divergent. Finally, the State conflicts rules that decide which contract law should apply in the first instance are widely divergent as well.

One premise of this Article has been that the diverse state laws protecting residents from business excesses is part of our federal scheme—that we seem to believe that the diversity is a good thing, and that it is a perversion of that scheme when one state’s legislature sets protection standards that are imposed on customers everywhere through choice of law clauses in mass-market contracts.³⁶² A second premise is that “unwaivable” rules should not become “waivable” through choice of law clauses in mass-market adhesion contracts.³⁶³ Some recent judicial decisions have sensitively addressed the

362. In this respect, this author believes that *Marquette National Bank of Minnesota v. First of Omaha*, 439 U.S. 299 (1978), which led to the prospect of one state’s legislature effectively neutralizing the usury standards for the rest of the country, was a very unfortunate decision. Luckily, there are not many examples of this phenomenon to date.

363. See *supra* text accompanying notes 44–46.

underlying issues, others have simply assumed the problems away in part, no doubt, because they were hidden beneath difficult legal principles.³⁶⁴ It is hoped that advocates will begin to utilize the rich tools that conflict of laws and contract law supply for dealing with choice of law clauses when they displace the state law protection to which their clients are normally entitled.

But small disputes will not carry the legal costs of this sort of legal argument and the arbitrators who will likely hear most of the smaller cases may have few reasons to entertain elaborate legal discourse on questions that seem to be on the periphery. In any event, no one will likely know whether arbitrators have listened since their decisions typically leave no record. While it will be difficult politically, a state can have more confidence in the controls over its own protective law if it develops legislation that shields its important protections from waiver through choice of law clauses. This Article has attempted to develop some of the issues that states will have to face if they embark on this task. It seems quite clear that depending on “market control” in this area will not suffice.

But both the projection of one state’s law into other states through choice of law clauses and the defensive strategies outlined here create a larger problem of interstate relations in our federal system. Ultimately, it is the responsibility of Congress to “regulate Commerce . . . among the several States.”³⁶⁵ Federal unification of state consumer protection and other protective law would likely be impossible. The range and diversity of state law, after more than two centuries of development, is too vast.

As I have suggested, however, Congress could greatly improve commercial certainty, yet preserve the state diversity that is a hallmark of our system, with a federal choice of law rule that uniformly shields the rich diversity of state protective law. Federalizing the contract law underlying choice of law clauses would be an extension of such an effort, but, again, state diversity in the adhesion contract law area will make the job formidable.

In our current political climate, it seems extremely dubious that either a federal conflicts rule for this purpose, or a federal contracts rule for choice of law clauses, will have a great deal of political

364. See *supra* text accompanying notes 42–43.

365. U.S. CONST., art. I, § 8, cl. 3.

appeal. The issues are abstruse and there are no obvious beneficiaries. But perhaps the pressure of globalization will provide political fuel. The recent Hague Convention on Choice of Court Agreements,³⁶⁶ the ALI's intellectual property project mentioned earlier,³⁶⁷ and the ALI's *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute*³⁶⁸ are only three examples of contemporary projects designed, in part, to address diversity in conflict of laws-related rules. Maybe the time has finally come to address these arcane issues at the core of our federal system. Until we do, legitimate state efforts to protect state lawmaking prerogatives, and the resulting state-to-state friction and inefficiency, may be our fate.

366. Hague Conference on Private International Law, Convention on Choice of Court Agreements, June 30, 2005,

http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98 (last visited Sept. 30, 2006).

367. See *supra* text accompanying note 267.

368. AM. L. INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE, PROPOSED FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT § 5(b) cmt. f, at 61 (Proposed Final Draft 2005).

