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Choice of Law and Time, Part II: Choice of Law Clauses and Changing Law

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ABSTRACT

Modern choice of law analysis usually honors the parties' contractual choice of governing law. But what happens when the law selected by the parties changes between the time of their contracting and the time of litigation? Or what if the law of the state whose law would otherwise apply changes so that its policy is now offended by the choice of law clause although its policy was not violated when the parties contracted? These questions raise the often-overlooked temporal aspect of choice of law analysis. Should courts regard the law to be applied as fixed to the time of the transaction or as changeable over time? The answers to these problems are influenced by several factors: the proper concern for current state policy; the parties' expectations; and whether the new law invalidates a previously valid transaction or, alternatively, makes a previously invalid transaction valid.

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INTRODUCTION

The issues explored by this Article flow from a simple fact pattern. Suppose that parties from Texas and Florida enter a real estate lease in 2017, the subject matter of which is in New York. The parties use a choice of law clause selecting New York law to govern their transaction. Something goes awry and one sues the other in a Texas court in 2021. The Texas court would, in most circumstances, honor the parties' choice of law clause and apply New York law.[1] But what if after the parties entered the contract New York changes its law? The Texas court will apply New York law, but which New York law? The law subsisting at the time of the contract or the law as it exists at the time of the litigation?

Choice of law is usually concerned with geography.[2] On this fact pattern, the usual choice of law issue is whether the Texas court applies Texas, Florida, or New York law. But the hypothetical adds a time dimension to the facts, raising a temporal choice of law problem. I have previously explored the temporal dimension of choice of law when the law is determined by a choice of law rule.[3] The somewhat different context considered here is how time—or more precisely, law changing over time[4]—affects the law applied pursuant to a contractual choice of law clause.

Although it would be possible for parties to address the time issue in their contract, choice of law clauses that include a time delimiter are

1. *See* Jeffrey L. Rensberger, *Choice of Law and Time*, 89 TENN. L. REV. 419, 460 (2022) (explaining that "[u]nder the Second Restatement, [choice of law] clauses are enforced unless 'application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest . . . and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties.'" (quoting RESTATEMENT (SECOND) OF CONFLICT OF L. § 187(2)(b) (AM. L. INST. 1971)); Patrick J. Borchers, *An Essay on Predictability in Choice-of-Law Doctrine and Implications for a Third Conflicts Restatement*, 49 CREIGHTON L. REV. 495, 503 (2016) (explaining there is "a strong presumption" that the law chosen by the parties in a contract "will be applied").

2. Rensberger, *supra* note 1, at 420.

3. *See generally id.*

4. Time and change are inseparable. That is, time (a sense of temporal ordering) is embedded in the idea of change. As a famous quote sometimes (though mistakenly) attributed to Albert Einstein puts it, "Time is what keeps everything from happening at once." *Time Is What Keeps Everything from Happening at Once*, QUOTE INVESTIGATOR, https://quoteinvestigator.com/2019/07/06/time/ [https://perma.cc/ZD7L-WPE3] (Aug. 25, 2022).

rare in the general commercial contract context.[5] The necessary question, then, is how courts should address the time question in the absence of such a provision.

This Article proceeds as follows: Part I overviews the general enforceability of choice of law clauses. Parties sometimes answer the temporal question in their contract using an explicit temporal choice of law clause directing that the law as it exists at a particular time is to be applied to their agreement.[6] Part II gives examples of such contracts and concludes that courts should generally enforce them. Part III addresses what courts should do when there is no such specification and a default contract rule—one the parties could have explicitly agreed to—of the state chosen by the parties has changed. Part IV addresses the same question in the context of a mandatory contract rule—one the parties are not empowered to contract around—changing. An added wrinkle appears here. Because courts will decline to enforce a choice of law clause as to a mandatory rule if the chosen law violates a fundamental public policy of the state whose law would otherwise apply, there are now two possible states whose law might change: the state chosen by the parties and the state whose law would apply were there no choice of law clause.[7] These subcategories are considered in turn.

It is possible to reach a reasonably broad conclusion for the application of default rules. Courts should apply the law as it existed at the time of the contract. There are exceptions to this when the circumstances show that applying older law would frustrate the parties' expectations or when the new law falls in the category of curative legislation, which is designed to rectify a mistake in previous

5. John F. Coyle, *A Short History of the Choice-of-Law Clause*, 91 U. COLO. L. REV. 1147, 1202 (2020) (characterizing the number of choice of time clauses as "negligible" based on an exhaustive dataset of choice of law clauses). One innovative article also discusses the possibility of parties stipulating the time at which the law is to be ascertained. Dolly Wu, *Timing the Choice of Law by Contract*, 9 NW. J. TECH. & INTELL. PROP. 401, 403 (2011). Clauses addressing the temporal question, so-called "stabilization clauses," occur much more frequently in contracts to which a sovereign is a party. *Id.* at 404. Such clauses are discussed below. *See infra* text accompanying notes 66–74.

6. Wu, *supra* note 5.

7. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187(1) (AM. L. INST. 1971).

legislation.[8] For mandatory contract rules, the matter is more complex and nuanced. But in general, courts should apply whichever version of the law validates the transaction and upholds the parties' expectations. The countervailing concern here is to uphold current state policy even though it may conflict with the parties' desires and sometimes be of sufficient importance to override the parties' expectations.

I. THE ENFORCEABILITY OF CHOICE OF LAW CLAUSES

The Second Restatement's treatment of choice of law clauses accurately summarizes American case law.[9] Choice of law clauses are generally favored under § 187 of the Second Restatement.[10] Section 187 divides choice of law clauses into two categories depending on the nature of the underlying contract rule at issue.[11] "[I]f the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue," then, categorically, the clause "will be applied."[12] On the other hand, "if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement," the clause will still be applied subject to two exceptions.[13] The clause will not be enforced if "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice."[14] Second, even if the chosen state is connected to the parties, its law will not be applied if it is "contrary to a fundamental policy of a state which has a materially greater interest than the chosen state" as to that issue and "would be the state of the applicable law in the absence of an effective

8. Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 468 (1982) (explaining curative legislation in detail).

9. Borchers, *supra* note 1 (noting that "Section 187 [of the Second Restatement] is essentially a declaration of universal law in the United States"); *see generally* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 (AM. L. INST. 1971).

10. Borchers, *supra* note 1; *see* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 (AM. L. INST. 1971).

11. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 (AM. L. INST. 1971).

12. *Id.* § 187(1).

13. *Id.* § 187(2).

14. *Id.* § 187(2)(a).

choice of law by the parties."[15] This last exception contains a three-part test: Is the chosen law contrary to the fundamental public policy of another state? Does that state have a "materially greater" interest? And finally, would that state be the one whose law applied under normal Second Restatement analysis?[16]

The distinction between mandatory and default rules is the axis running through § 187.[17] Default contract rules—rules "which the parties could have resolved by an explicit provision"[18]—are "freely breakable"[19] in that the parties can either accept such rules by failing to express a contrary intent or can avoid them by "expressly agree[ing] on different terms in their relationships."[20] Many of the rules in the Uniform Commercial Code, for example, are default rules.[21] Mandatory rules, on the other hand, are rules that the parties "are obliged to obey, irrespective of their wishes upon the matter."[22] Laws protecting consumers, rules on capacity to contract based on age, usury limits, and the obligation of good faith are examples of mandatory rules.[23] These rules often impede the intent of the contracting parties rather than facilitate it.[24]

The Second Restatement's provision for categorical enforcement of a choice of law clause for default rules simply effectuates the parties' intentions.[25] Since the underlying rule is not mandatory, the parties could "spell out these terms in the contract" or, as an alternative, "may

15. *Id.* § 187(2)(b).

16. *Id.* § 187 cmt. g.

17. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 (AM. L. INST. 1971).

18. *Id.* § 187(1).

19. Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1032 (2004).

20. Tamar Frankel, *What Default Rules Teach Us About Corporations; What Understanding Corporations Teaches Us About Default Rules*, 33 FLA. ST. U. L. REV. 697, 702 (2006).

21. *Id.*; *see, e.g.*, U.C.C. § 2-305 (AM. L. INST. & UNIF. L. COMM'N 2021) (allowing parties, "if they so intend," to create a binding contract with an unsettled price); U.C.C. § 2-308 (AM. L. INST. & UNIF. L. COMM'N 2021) (specifying places of delivery "unless otherwise agreed"); U.C.C. § 2-310 (AM. L. INST. & UNIF. L. COMM'N 2021) (specifying time for payment "unless otherwise agreed").

22. Hirsch, *supra* note 19.

23. Christopher R. Drahozal, *Contracting Around RUAA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 PEPP. DISP. RESOL. L.J. 419, 420 (2003); Ian Ayres, *Empire or Residue: Competing Visions of the Contractual Canon*, 26 FLA. ST. U. L. REV. 897, 901 (1999).

24. *See* Ayres, *supra* note 23.

25. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. c (AM. L. INST. 1971).

incorporate into the contract by reference extrinsic material" such as "the provisions of some foreign law."[26] By selecting the law of a particular state, the parties have used a shorthand reference for the content of that law.[27] Using a choice of law clause to incorporate a state's law by reference is nicely illustrated by *Burns v. Burns*.[28] In that case, a New York decedent had contracted with an Ohio mutual aid association for life insurance, designating his "heirs" as the beneficiaries.[29] His children and his widow disputed whether the widow was entitled to share in the proceeds as an heir.[30] Under the law of New York, where the insured and all possible beneficiaries resided, the widow was not entitled to a share, but under Ohio law, she was.[31] Because the contract specified that it was to be governed by Ohio law, the court concluded that the widow was entitled to a share.[32] The court noted that "[a] person insuring his life ordinarily has the right to enter into any contract with respect to the risk that he pleases."[33] Thus, the decedent could have specified as beneficiaries his widow, his children, or any subset of them.[34] And he could have done so by description ("Children" or "Widow") or by given name ("Louise Burns").[35] Instead, he chose to use the definition of heir as found in Ohio law, which had the same effect.[36]

26. *Id.*

27. Julia Halloran McLaughlin, *Premarital Agreements and Choice of Law: "One, Two, Three, Baby, You and Me,"* 72 MO. L. REV. 793, 809 (2007); Robert Allen Sedler, *The Contracts Provisions of the Restatement (Second): An Analysis and a Critique*, 72 COLUM. L. REV. 279, 286 (1972); Erin Ann O'Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1561 (2000).

28. Burns v. Burns, 82 N.E. 1107 (N.Y. 1907).

29. *Id.* at 1107.

30. *Id.*

31. *Id.* at 1107–08.

32. *Id.* at 1108.

33. *Id.*

34. *Burns*, 82 N.E. at 1108.

35. *See id.*

36. *Id.*

II. EXPLICIT CHOICE OF TIME CLAUSES AND THEIR ENFORCEABILITY

Courts are not always faced with ambiguity regarding the temporal question. Although uncommon, one can find examples of contract clauses explicitly directing that the law of a particular time apply to a transaction.[37] These examples are explored below. In general, courts should enforce such clauses. Although not every client's interests would be served by explicitly referencing the time at which the content of the law is to be determined, many would be. Careful drafters should at least consider whether to negotiate choice of time clauses.

A. Examples of Choice of Time Clauses

First, some classification is necessary. A choice of law clause typically directs the court to apply the law of a particular sovereign.[38] But the clauses discussed below direct the court to apply the law as it exists at a particular time—a *choice of time clause*.[39] There are two types of choice of time clauses: *pure choice of time clauses* and *combined choice of law and choice of time clauses*. Parties may negotiate the question of changing law and time independently of geographic choice of law.[40] These are *pure choice of time clauses*, unmixed with geographic choice of law. Leases, for example, commonly prohibit illegal uses.[41] It is almost certainly the intent of the parties that a use violates the lease if it is illegal at the time the tenant acts, so a use lawful at the outset of the term violates the lease if it later becomes illegal. But some leases are explicit on this question in that they provide an example of a pure choice of time clause. One form

37. *E.g.*, Gimbelman v. Gimbelman, No. A-1944-17T2, 2019 WL 6650192, at *1 (N.J. Super. Ct. App. Div. Dec. 6, 2019).

38. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 (AM. LAW INST. 1971); PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS 1052 (6th ed. 2018) ("A choice-of-law clause is itself an agreement that is usually contained in the contract that the clause purports to submit to the chosen law.").

39. *See* Wu, *supra* note 5.

40. *See id.* at 426 n.205.

41. *E.g.*, Whitehouse Restaurant, Inc. v. Hoffman, 68 N.E.2d 686, 687 (Mass. 1946); 5 INDIANA PRACTICE SERIES: ESSENTIAL FORMS § 9:6.2.2, Westlaw (database updated Sept. 2021).

lease has a clause stating that "inflammable or explosive liquids or materials" must be "stored . . . and used[] in accordance with . . . statutes and ordinances now *or hereafter* in force."[42] Similarly, some forms anticipate the time and change of law problem and allow the parties to terminate the leases if a use later becomes unlawful.[43]

One finds examples of pure choice of time clauses in other contexts as well. In *Gimbelman v. Gimbelman*, the parties to a divorce action agreed to arbitrate the value of a family business.[44] The arbitration contract did not have a geographic choice of law provision but did provide "that the arbitrator should make his award in accordance with applicable principles of substantive law *in effect at the time* of decision."[45] Similarly, in *Mastrobuono v. Shearson Lehman Hutton, Inc*., the parties designated future rules to govern arbitration: Disputes were to be decided "by arbitration in accordance with the rules then in effect."[46]

Parties using a choice of time clause might also specify which state's law will apply at the selected time.[47] This presents a *combined choice of law and choice of time clause*. Such choice of time clauses are rarely encountered in private contracts in domestic cases, but there are examples.[48] In *U.S. Fidelity & Guaranty Co. v. Northwest Engineering Co*., a conditional sales contract provided that "the rights of the parties [are to be] governed by the laws of Wisconsin existing *at the time of making the contract*."[49] On the other hand, parties

42. 5 INDIANA PRACTICE SERIES: ESSENTIAL FORMS § 9:6.2.2, Westlaw (database updated Sept. 2021) (emphasis added).

43. *E.g.*, 1 JOHN FRANCIS MAJOR, ILLINOIS REAL PROPERTY SERVICE § 3:56, Westlaw (database updated Feb. 2022) ("If it is or becomes unlawful for Lessee . . . to conduct any particular operation[,] . . . Lessee shall have the right at any time to terminate this Lease . . . .").

44. Gimbelman v. Gimbelman, No. A-1944-17T2, 2019 WL 6650192, at *1 (N.J. Super. Ct. App. Div. Dec. 6, 2019).

45. *Id.* (emphasis added) (internal quotation marks omitted).

46. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 58 n.2 (1995) (quoting the parties' agreement).

47. *E.g.*, U.S. Fid. & Guar. Co. v. Nw. Eng'g Co., 112 So. 580, 581 (Miss. 1927).

48. Some of the cases discussed in this section were first uncovered by John Coyle. Coyle, *supra* note 5. Other examples are found in Wu, *supra* note 5, at 410.

49. *U.S. Fid. & Guar. Co.*, 112 So. at 581 (emphasis added).

occasionally agree to a floating choice of time clause, permitting the law to change over time.[50] For example, in *Stark v. Northwest National Life Insurance Co*., the contract provided that it was "subject to the laws of the state of Minnesota *as they now exist or as may hereafter be amended*."[51] Another floating choice of law and time clause appears in *Minary v. Citizens Fidelity Bank & Trust Co*., which involved a trust that upon termination was to be "distributed to *my* then surviving heirs, according to the laws of descent and distribution *then in force* in Kentucky."[52]

Some clauses are ambiguous. In *Wai v. Rainbow Holdings*, a collective bargaining agreement provided that Singaporean law "for the time being in force . . . shall apply to this agreement."[53] By definition, "for the time being" would appear to refer to the law existing as of the date of the contract.[54] But other clauses can be found using this phrase that surely were meant to refer to the law of the future. In *Whitehouse Restaurant v. Hoffman*, a lease provided that the tenant "would not make any use of the premises which shall be unlawful . . . or contrary to any law of the Commonwealth or ordinance or by-law *for the time being in force*."[55] This is an example of a pure choice of time clause because it does not refer to the law of

50. *E.g.*, Stark v. Nw. Nat'l Life Ins. Co., 167 F. 191, 192 (C.C.D. Minn. 1909); *see* Coyle, *supra* note 5, at 1202–03 (explaining that a "floating choice-of-law clause stipulates that the contract shall be governed by the law of State A if suit is brought in State A but that it shall be governed by the law of State B if suit is brought in State B").

51. *Id.* (emphasis added). Nothing in the decision turned on this language because the law had not changed, but the case did involve a time element. *Id.* at 191–93. The dispute was about a decrease in life insurance benefits following one insurer's reincorporation and reinsurance of beneficiaries by a second insurer. *Id.* at 192–93. The new insurer had, with notice to policyholders, reduced the benefit. *Id.* at 193. The contract between the original insurer and the new provided that the policies were subject to "the articles of incorporation and the by-laws of the [new insurer] as the same now exist, or as they may hereafter be amended." *Id.* at 192. The court allowed the payment of the reduced benefit due to this agreement of changing contractual rights. *Id.* at 194.

52. Minary v. Citizens Fid. Bank & Trust Co., 419 S.W.2d 340, 341 (Ky. 1967) (second emphasis added) (quoting the will's provision regarding termination of the trust).

53. Wai v. Rainbow Holdings, 315 F. Supp. 2d 1261, 1265 (S.D. Fla. 2004).

54. *For the Time Being*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/for-the-time-being [perma.cc/MGT8-SGN4] (defining "for the time being" as "at this time").

55. Whitehouse Restaurant, Inc. v. Hoffman, 68 N.E.2d 686, 687 (Mass. 1946) (emphasis added) (internal quotation marks omitted).

any particular state. From context, the lease surely means to prohibit future uses that become illegal under a future law.[56] This understanding would mean that "for the time being" has the opposite meaning: directing application of future law. Perhaps "for the time being" means the law of the present in the future—that is, the law in place at an indeterminate future time. Formbooks provide examples of similar language, sometimes drawn from sophisticated transactions.[57]

It appears that these clauses are based on an older usage that intended "for the time being" to refer to the future. In the United Kingdom, the Foreign Jurisdiction Act of 1890 extended royal jurisdiction to "divers foreign countries" where the crown had acquired jurisdiction by "treaty, capitulation, grant, usage, [or] sufferance."[58] The Act provided that certain listed enactments "or any enactments *for the time being in force amending or substituted* for the same" apply in foreign countries in which the United Kingdom had jurisdiction.[59] Similarly, Missouri's statute adopting English common law limited the adoption to common law which is "not repugnant to or inconsistent with the Constitution of the United States, the constitution of this state, or the statute laws in force for the time being."[60] New Mexico has also used the phrase in its statutory language.[61] Additionally, similar usage appears in *Crampton v. Zabriskie*, a nineteenth-century case in which the Supreme Court referred to a New Jersey statute authorizing county tax assessments in a manner "agreeabl[e] to the law for the time being[] for the raising of money by taxation for the use of the State."[62]

56. *See id.*

57. *See, e.g.*, 2 TRANSNATIONAL JOINT VENTURES § 43:1, Westlaw (database updated Sept. 2022) (noting the agreement "shall be in accordance with the law for the time being in force in India"); 5 NEW JERSEY FORMS, LEGAL AND BUSINESS § 8:82, Westlaw (database updated July 2022) ("Lessee will not suffer . . . any use of the premises which will be . . . contrary to any law . . . for time being in force . . . .").

58. Foreign Jurisdiction Act 1890, 53 & 54 Vict. c. 37.

59. *Id.* § 5 (emphasis added).

60. MO. ANN. STAT. § 1.010 (West 2022).

61. N.M. STAT. ANN., Territorial Laws, Kearny Code of Laws § 1 (West 2020) ("All laws heretofore in force in this territory, which are not repugnant to, or inconsistent with the constitution of the United States and the laws thereof, or the statute laws in force for the time being, shall be the rule of action and decision in this territory.").

62. Crampton v. Zabriskie, 101 U.S. 601, 603–04 (1879). I am grateful to my colleagues at South Texas who teach contracts (Richard Carlson, Randy Kelso, Phillip Page, and Val Ricks) for assistance in exploring the meaning and origins of this phrase.

One can also find examples of statutory choice of law and time provisions. The Texas Business and Commerce Code upholds certain commercial choice of law clauses if "the transaction bears a reasonable relation" to the chosen jurisdiction.[63] But at what time must the transaction bear a reasonable relationship? What if one of the parties relocates or the subject matter of the contract moves to another state after the contract is entered into? The Code provides an answer:

> If a transaction bears a reasonable relation to a particular jurisdiction at the time the parties enter into the transaction, the transaction shall continue to bear a reasonable relation to that jurisdiction regardless of . . . any subsequent change in facts or circumstances with respect to the transaction, the subject matter of the transaction, or any party to the transaction . . . .[64]

This provision is a slightly different choice of time clause because it deals not with changing law but with changing facts upon which a legal rule (the reasonable relationship test) operates.[65]

While combined choice of law and time clauses are rare in domestic cases, they are commonly used in contracts between private parties and sovereigns, particularly between international oil companies and a government granting a petroleum development concession.[66] These clauses are known as "stabilization clauses."[67] They seek to minimize investors' risk of adverse legislative or executive action by the host state, such as increased taxes, imposition of export duties, or changes in nationalization, taken after the contract is entered into.[68] Stabilization clauses can take many forms, but the one most pertinent

63. TEX. BUS. & COM. CODE ANN. § 271.005(a)(2) (West 2021).
64. *Id.* § 271.004(c)(1).
65. *See id.*
66. *See* John P. Bowman, *Risk Mitigation in International Petroleum Contracts*, 50 GEO. J. INT'L L. 745, 748–49 (2019); Wu, *supra* note 5, at 419.
67. Bowman, *supra* note 66; Wu, *supra* note 5, at 419.
68. Bowman, *supra* note 66, at 751–52.

to this Article is a "free[zing]" stabilization clause.[69] In this type of stabilization clause, the host nation "agree[s] that the parties' contract will be governed by the law as in effect on the date of its signing or as of its effective date."[70] Alternatively, the investing company and the country may stipulate that a particular law of the host state, identified by citation, shall govern the contract.[71] The latter is a form of incorporating current law by reference into the contract, thereby making it a contract term.[72] In either instance, the effect is to select the forum's law as it exists at a particular time—a choice of time clause.[73] Arbitrators normally enforce such stabilization clauses.[74]

Another type of clause, which appears in both international sovereign and domestic contracts, accounts for the risk of changing law in a different way. Rather than freezing the law as it exists as of the time of the contract, parties may provide for later renegotiation of the contract if the law changes.[75] Such renegotiation clauses in the sovereign contract context identify a trigger for the renegotiation, state a procedure for the renegotiation, and call for arbitration if renegotiation fails.[76] One finds similar clauses in domestic contracts. In *Blitz Telecom Consulting, LLC v. Peerless Network, Inc*., the contract provided that "the parties could renegotiate the terms of their agreement should any change in law materially affect the ability of either party to perform their contractual obligations."[77] Similarly, in *Department of Human Resources v. Citibank F.S.B.*, the contract had a renegotiation clause "in which the parties agreed to renegotiate the

69. *Id.* at 751–52, 759–61; Wu, *supra* note 5, at 420.

70. Bowman, *supra* note 66, at 759; Wu, *supra* note 5, at 420.

71. Bowman, *supra* note 66, at 760.

72. *Id.* at 760–61.

73. *See* Wu, *supra* note 5, at 419–20. In such contracts, the geographic choice of law clause may be separate from the freezing (choice of time) clause. *See* Bowman, *supra* note 66, at 773. It is possible for the parties to select some other law to govern their contract, such as principles of international law. *See id.* at 777.

74. *See* Bowman, *supra* note 66, at 750.

75. *See id.* at 766–68; *see, e.g.*, Blitz Telecom Consulting, LLC v. Peerless Network, Inc., 212 F. Supp. 3d 1232, 1237 (M.D. Fla. 2016), *vacated*, No. 14-cv-307-Orl-40, 2016 WL 7446390 (M.D. Fla. Oct. 4, 2016), *aff'd*, 727 F. App'x 562 (11th Cir. 2018); Dep't of Hum. Res. v. Citibank F.S.B., 534 S.E.2d 433, 434 (Ga. Ct. App. 2000).

76. Bowman, *supra* note 66, at 766.

77. *Blitz Telecom Consulting*, 212 F. Supp. 3d at 1237.

[c]ontract if federal and/or state revisions of applicable law or regulations make changes in the contract necessary."[78]

B. Parties Should Use and Courts Should Enforce Choice of Time Clauses

Choice of time clauses in domestic contracts between private parties can serve a function similar to that which supports their use in international sovereign contracts.[79] A similar problem of legal instability arises in the private party context.[80] When one of the contracting parties is a sovereign, there is the risk that the sovereign will unilaterally change its law and defeat the other party's expectations.[81] In the private party context, the instability is likewise from a sovereign changing its law. The only difference is that the sovereign that changes its law is not a party to the contract. In either context, changes in law can disrupt party expectations.[82] Indeed, there may be more need for choice of time clauses in the private party context. When the sovereign that changes its law is a party to the contract, the other party may have bargaining power to dissuade the sovereign from unilaterally changing its law. And the sovereign may be restrained from changing its law by a concern for developing a poor commercial reputation, thus increasing its costs in future transactions as future contracting parties price the risk of a change in law into their

78. *Citibank*, 534 S.E.2d at 434 (internal quotation marks omitted).

79. *See* Wu, *supra* note 5, at 419–20.

80. *See id.* at 403 (explaining that choice of time clauses can promote "stability and predictability").

81. *See* Bowman, *supra* note 66, at 762–63 (providing examples of provisions that "prohibit unilateral changes of contract by the host government"); Wu, *supra* note 5, at 433 (noting that courts "balance policy concerns" such as whether enforcing a sovereign's "new law" thwarts "justified expectations of a contract" (internal quotation marks omitted)); Alisher Umirdinov, *The End of Hibernation of Stabilization Clause in Investment Arbitration: Reassessing Its Contribution to Sustainable Development*, 43 DENV. J. INT'L L. & POL'Y 455, 461 (2015) (noting one "type of stabilization clause aims to prevent one party, obviously the host states, from making unilateral changes and requires consent of both parties upon making any modification to the contract").

82. *See* P.J. Kozyris, *Justified Party Expectations in Choice-of-Law and Jurisdiction: Constitutional Significance or Bootstrapping?*, 19 SAN DIEGO L. REV. 313, 316 (1982) (discussing the importance of protecting "the justified expectations of the parties" (quoting RESTATEMENT (SECOND) OF CONFLICTS OF L. § 188 cmt. b) (AM. L. INST. 1971)); *see also* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. e (AM. L. INST. 1971).

contract. In the private party context, on the other hand, the state is a stranger to the transaction, and the parties have no leverage to dissuade the lawmaker from changing its law. If parties seek additional certainty and wish to avoid the risk of legal change, they should consider drafting choice of time as well as choice of law clauses.[83] It appears that whether one uses a choice of time clause depends upon how one assesses the risk of legal change. Does the party prefer the current law to an unknown future law, which may change either adversely or beneficially? The answer depends upon the expected arc of change in the particular area of the law and the party's desire for stability in place of a risk of gain or loss.

In the context of default rules, courts should enforce a clause that specifies not only the jurisdiction whose law governs but also the time at which that law is to be ascertained. Choice of law clauses for default rules are simply a shorthand used to express the parties' intentions.[84] They are usefully referred to as "incorporation[s] by reference."[85] Choice of time clauses should be similarly understood. Because the parties could have spelled out the solution to a particular dispute and are using a reference such as "the law of New York as it exists on the date of this contract" as a shorthand, courts should simply follow the parties' directives. There is no more reason to dishonor a combined choice of time and law clause than to dishonor a simple choice of law clause. And choice of time clauses have long been enforced in the international sovereign contract context.[86]

83. *See* Wu, *supra* note 5, at 438 (noting that "a choice of time of law clause is a useful tool that domestic contracting parties may implement to ease their minds, gain more certainty, draft workarounds to disadvantageous law, and reduce litigation").

84. *See supra* note 27 and accompanying text.

85. RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. c (AM. L. INST. 1971). Under English law, the default assumption is that incorporations by reference refer to the law as it existed at the time of the contract. *See infra* notes 99–102 and accompanying text.

86. *See generally* Bowman, *supra* note 66 (examining choice of law clauses in the international context). For a discussion of the law of England, France, and Germany on this point, see generally James R. Lowe, *Choice of Law Clauses in International Contracts: A Practical Approach*, 12 HARV. INT'L L.J. 1 (1971). Lowe reports that the courts of those countries generally apply the law selected by a choice of law clause as it exists at the time of the litigation but that England and France allow parties to select a time period for the applicable law. *See id.* at 20–22.

III. CHANGED DEFAULT CONTRACT RULES

What version of the law should apply when the parties have selected the law of a state, but a default rule of that state's law has changed? Does it matter whether the source of that law is statutory or common law? Using the same hypothetical with which we began, parties from Texas and Florida enter a contract in 2017, the subject matter of which is in New York, and their contract states that it is governed by New York law. The Texas court will enforce the choice of law clause because the issue concerns a default rule, which is one that the parties resolved by an explicit provision in their agreement.[87] But if the law of New York has changed since the contract was created, does the Texas court apply New York law as of 2017 or as of the date of the litigation? If the parties have addressed the temporal question, then, as argued above, courts should enforce their election. But what should the court do when—as will more commonly be the case—the parties have not addressed it? In general, courts should abide by the parties' intent, and this approach is best served by a default rule applying the law as it existed at the time of contracting. This result is explained below, separating out two contexts: changes in state common law and changes in statutory law.

A. Changed Common Law Rules

Preliminarily, one must consider how to characterize the law of the chosen state. When the rule is a common law rule, the "change" in the law of the state may not be a change at all. At one time, judges were not thought to make law but to discover it. When a court overruled caselaw, it did not make new law but instead "vindicate[d] the old [law] from misrepresentation."[88] Before the courts discovered the new law, it was an "outside thing to be found."[89] This is still the accepted

87. *See supra* notes 12–13 and accompanying text.

88. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *70.

89. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

view for new interpretations of the Constitution; it is indeed an "outside thing to be found."[90] When the Supreme Court announces a "new" constitutional rule, "the source of a new rule is the Constitution itself, . . . [and] the underlying right necessarily pre-exists our articulation of the new rule."[91] The same is true of new interpretations of a statute. "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."[92]

Under this view, if a state later adopts a common law rule different from that which was in place at the time of contracting, it is not changing the law, but merely uncovering the law that had been there all along, including when the parties entered the contract. This understanding would lead a court to apply the common law of the chosen state as it exists at the time of litigation. But most courts today do not hold to this view of the common law.[93] It is, moreover, an entirely abstract solution to a very practical problem. This view rests on acting as if an abstraction—the group of ideas that comprise the law—is both tangible (the rule was "there" all along) and immutable. The entire question of retroactivity, usually asked when a court changes its common law, reduces to a tension between the policy demands of the present (hence the new law) and the concerns of protecting past actions taken in reliance on the old law.[94] Treating today's law as having existed in a preincarnate form in the bosom of Wisdom awaiting its revelation leaves no room for the past and concerns of reliance and predictability.

A better approach is to keep in mind the basic policy behind § 187(1)—to uphold the parties' intentions.[95] In cases governed by this provision, the parties have the power to explicitly spell out the matter in question.[96] Because they are using the law of a

90. *Id.*
91. Danforth v. Minnesota, 552 U.S. 264, 271 (2008) (internal quotation marks omitted).
92. Rivers v. Roadway Express, Inc., 511 U.S. 298, 312–13 (1994).
93. Rensberger, *supra* note 1, at 450–51.
94. *Id.* at 447–48, 464–65.
95. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. e (AM. L. INST. 1971).
96. *Id.* § 187(1).

selected state as a shorthand for what they might have spelled out (an incorporation by reference),[97] determining whether to apply old or current law should be answered by reference to those intentions.[98] Did the parties intend to select the law of the chosen state as it existed at the time, or did they intend their obligations to change with the law?

It should be noted that English law distinguishes clauses choosing governing law and clauses that merely incorporate foreign law by reference.[99] As to the latter type of provision, English law suggests that the law as it existed at the time of the contract applies, the terms governing the transaction being fixed and frozen.[100] But when the parties have chosen a governing law (as opposed to referring to foreign law), it is a changing and living law.[101] Some have suggested that this distinction maps onto the dichotomy between mandatory and default rules in § 187, the latter being mere incorporation by reference and, if one follows the English practice, anchored at the time of contracting.[102] But while it is correct to think of chosen law as to default rules as a form of incorporation by reference, it begs the question of whether such incorporations were intended to refer to fixed and unchanging law. The parties could well have intended that the default rules would change over time. Indeed, one can find examples of contracts in which the parties chose a default rule and explicitly provided for it to change over time.[103] Whether one wishes to think of choice of law clauses for default rules as incorporations by reference, the unavoidable determinative question is intent.

While looking at the parties' intentions clarifies the question, it unfortunately does little to answer it. Seeking the parties' intentions asks the right question, but it is unlikely that there will be any

97. *See id.* § 187 cmt. c.

98. HAY ET AL., *supra* note 38, at 1058 (stating that parties' intentions should be the "starting point" of the analysis).

99. *See* D. St. L. Kelly, *Reference, Choice, Restriction, and Prohibition*, 26 INT'L & COMPAR. L.Q. 857, 858 (1977).

100. *Id.*; 2 DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS 1572–73 (Sir Lawrence Collins et al. eds., 14th ed. 2006) [hereinafter DICEY, MORRIS & COLLINS].

101. Kelly, *supra* note 99; DICEY, MORRIS & COLLINS, *supra* note 100.

102. HAY ET AL., *supra* note 38, at 1058–59.

103. *See infra* note 139 and accompanying text.

evidentiary basis for determining the intentions.[104] Any proffer or evidence of intent is likely unreliable.[105] One problem with attempting to find evidence to prove intent is that there may have never been any such intentions, and proof is therefore not to be found.[106] Parties often choose a law with little thought to its content.[107] They occasionally choose a law that invalidates their contract or a provision in it.[108] Quite likely, the parties never thought to question whether the law chosen should remain fixed or should change over time.[109] As a result, there is unlikely to be any contemporaneous evidence of intent. And any later, post-transaction testimony about what a party supposedly intended at the time is so likely influenced by litigation as to be unreliable. If one proposes a rule that looks to the parties' intentions, its application will thus frequently yield no answer. In such a circumstance, the law needs a default rule.[110] If there is in fact reliable evidence of intentions, then courts should follow those intentions.[111] But in the much more numerous cases where evidence of intention is lacking, a default rule will tell the court which version of the chosen law to use.[112]

104. Sedler, *supra* note 27, at 281 n.29 ("The forum is directed first to try to determine the actual intention of the parties."); *see* Kelly, *supra* note 99, at 869 ("[T]here can be few cases, indeed, in which it is possible to predict with any confidence that the parties would have wished to apply another law . . . .).

105. Aaron D. Goldstein, *The Public Meaning Rule: Reconciling Meaning, Intent, and Contract Interpretation*, 53 SANTA CLARA L. REV. 73, 75–76 (2013).

106. HAY ET AL., *supra* note 38, at 1058 (explaining that the parties' intentions "would be the starting point" of a choice of law analysis "if it can be proven"); *see* Kelly, *supra* note 99, at 869; *see also* Sedler, *supra* note 27, at 299 & n.130 (discussing the search for implied intent and what analysis to apply when the "intention is neither expressed nor [can] be inferred from the circumstances" (quoting DICEY AND MORRIS ON THE CONFLICT OF LAWS 561 (8th ed. 1967))).

107. John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 633 & n.7 (2017).

108. *Id.* at 633*; see, e.g.*, Kipin Indus., Inc. v. Van Deilen Int'l, Inc., 182 F.3d 490, 495 (6th Cir. 1999) (noting that where the express term of contract is voided by the law of the state selected by the parties, the court disregards the selection as a mistake). *Kipin Industries, Inc.* is in accord with the Second Restatement. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. e (AM. L. INST. 1971).

109. Coyle, *supra* note 107, at 633 n.7.

110. *See* Drahozal, *supra* note 23 ("[D]efault rules have variously been referred to as 'background, backstop, fallback, gap-filling, off-the-rack, opt-in, opt-out, preformulated, preset, presumptive, standby, standard-form[,] and suppletory rules.'" (quoting Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989)).

111. *See id.* ("If the parties do address [an] issue in their contract, their agreement overrides the default, making it inapplicable.").

112. *See id.*

The question, then, is the content of the default rule. Before assessing that, one should remember that I am proposing a default rule because there is no actual evidence of intent in the vast majority of cases. The default rule will, therefore, nearly always apply and thus becomes not merely a default to be applied on occasion but the rule by which nearly all cases are decided. If we set the default to the law at the time of contracting, then that will be the law applied in most cases.[113] Likewise, if the default is set to the law current at the time of litigation, then that will become the de facto rule.[114]

The best default rule is the law as it existed at the time of the contract. Although choice of law has moved on from vested rights, the idea that legal relations should have fixed content maintains an almost instinctive appeal.[115] Perhaps this is merely due to habits of thought. But it may also reflect an underlying commitment to "vestedness" as a matter of principle.[116] Applying the law as it existed at the time of the transaction upholds the parties' expectations.[117] Indeed, stability in the law is necessary for parties to have expectations.[118] Against the concerns of protecting expectations grounded in the past are the current policy objectives of the state.[119] The state views the new law to be an improvement (why else was the law changed?), and so societal interests would be better served by applying new law.[120] This competition between upholding expectations grounded in past norms

113. *See infra* text accompanying notes 151–174.

114. *Id.*

115. *See* Rensberger, *supra* note 1, at 479–81.

116. *See id.*, at 440, 463–64. *See generally* Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987). Dane argues for a "Norm-Based" jurisprudence, one implication of which is that the law cannot be indeterminate before litigation. *See id.* at 1229. Rights should not depend "on the manner in which they are sought to be enforced or, more specifically, on the forum in which an adjudication happens to be brought." *Id.* at 1245.

117. *Cf.* Wu, *supra* note 5, at 401 (noting that "subsequent unanticipated changes in law might defeat the very purpose of the contract" and frustrate the parties' intentions).

118. *See* Stefanie A. Lindquist & Frank C. Cross, *Stability, Predictability and the Rule of Law:* Stare Decisis *As Reciprocity Norm* 1, https://law.utexas.edu/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf [https://perma.cc/U3N3-R6PF].

119. Rensberger, *supra* note 1, at 448–49; *see* RESTATEMENT (SECOND) OF CONFLICT OF L. § 6 (AM. LAW. INST. 1971) (providing that "the choice of the applicable rule of law" must include consideration of "protection of justified expectations" and "the relevant policies" of the host state).

120. Rensberger, *supra* note 1, at 448–49.

and serving the needs of the current day runs through many temporal problems in the law, such as whether the law should be applied retroactively, whether events occurring after an event should affect a choice of law analysis, or whether limitations on the parties' presumed intent incorporate current but not new law into their contract.[121] Notably, in each of those contexts, the general rule is to adhere to the past.[122]

Statutes are presumed to have only prospective, not retroactive, operation.[123] In determining the applicable law, courts usually do not consider new facts (such as a change in domicile) that occur after the events in question.[124] And parties are generally assumed to incorporate only existing, not future, law into their contracts.[125] Contracts law provides that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into [the contract] and form a part of it, as if they were expressly referred to or incorporated in its terms."[126] But this presumption extends only to laws existing when the contract was created and not to post-transaction changes in the law.[127] There are exceptions for each of these principles, but the general rule is to uphold the past and subordinate the present.[128] This preference for preserving the parties' rights under older law can be explained using the choice of law tool of comparative impairment.[129] The state's inability to apply its law is limited to the cases in which the facts transpired in the past.[130] For all future cases,

121. *See id.* at 429.
122. *Id.* ("[G]enerally, the law of the time of the contract, not later law, applies.").
123. *Id.* at 427–28.
124. *Id.* at 479–80.
125. *Id.* at 421.
126. Von Hoffman v. City of Quincy, 71 U.S. 535, 550 (1866).
127. *See id.*; Steven W. Feldman, S*tatutes and Rules of Law as Implied Contract Terms: The Divergent Approaches and a Proposed Solution*, 19 U. PA. J. BUS. L. 809, 815 (2017).
128. *See Von Hoffman*, 71 U.S. at 550.
129. *See* William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 18 (1963). Comparative impairment calls for courts to not apply the law "of the state whose internal objective will be least impaired in general scope and impact by subordination in cases like the one at hand." *Id.*
130. *See* Rensberger, *supra* note 1, at 449–59, 465.

the state is able to pursue its interests.[131] The new version of the state's law is thus comparatively less impaired than the old.[132]

Additionally, since the aim is to have a default rule to apply in the absence of evidence of intent, one might consider what the parties likely would have agreed to had they negotiated the temporal issue. The default rule, in other words, should conform as close as possible to the parties' likely expectations.[133] There is, of course, a danger in this enterprise. What the parties would have agreed to is an empirical question, but courts crafting default rules do not study actual intentions and may simply project their own expectations or norms on the parties.[134]

Whether the parties would have agreed to a fixed or floating choice of law clause may be context specific.[135] Is the subject matter of the contract one undergoing rapid legal development (biotech patents in the 1990s, for example), or is it relatively stable?[136] If the subject matter is rapidly evolving, one could argue that the parties would not have expected the law at the time of the contract to remain the same, and therefore, they would have expected their obligations to change with the law.[137] But, on the other hand, this context may mean just the

131. *Id.* at 465.

132. *See id.*

133. Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment At-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223, 228 (2017); Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 392 (1993) (noting that "a default rule must solve a problem . . . in a way that is acceptable" to the contracting parties); Ayres & Gertner, *supra* note 110, at 90 (citing authorities who argue that default rules should conform to what the parties would have agreed to).

134. For empirical research that examines how closely some default rules mirror actual desires, see generally Franklin G. Snyder & Ann M. Mirabito, *Consumer Preferences for Performance Defaults*, 6 MICH. BUS. & ENTREPRENEURIAL L. Rev. 35 (2016). The authors note that "lawyers and scholars who are drafting default rules often seriously misunderstand what contracting parties actually want, and experience shows that important default rules are so unpopular with most contracting parties that they are routinely overridden." *Id.* at 38 (footnote omitted). *See also* Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L.Q. 1, 66 (2001) (noting default rules of corporate governance "cannot meaningfully be said to reflect what parties would have agreed to. Rather, they reflect what lawmakers believe the parties *should* have agreed to.").

135. Rensberger, *supra* note 1, at 479–80.

136. For an attempt to measure the rate of legal change, see generally Charles N. W. Keckler, *The Hazards of Precedent: A Parameterization of Legal Change*, 80 MISS. L.J. 105 (2010).

137. *See id.* at 107–08.

opposite. Since the law was uncertain, one could argue the parties sorely needed and wanted stability and would have agreed to a fixed temporal choice of law clause.[138] Additionally, parties may not want the law to be fixed regarding contractual interest rates. When a contract ties an interest rate for payments to some benchmark in state or federal law, such as a ceiling on permissible interest rates or the rate of interest charged by a specified lender, the parties likely want the rate to change over time to match then-current market rates.[139] And some parties simply prefer a gamble, hoping to benefit from the flexibility that the absence of a choice of law provision provides.[140] In *Liggett Group, Inc. v. Affiliated FM Insurance Co*., the court noted that some insurers do not include choice of law clauses in their contracts because they may desire flexibility over certainty.[141] A choice of law clause "does not mean that the law itself remains static."[142] Insurers thus "may believe that given the volatility in the law their interests are better served by the lack of a choice of law provision, which allows them to argue the application of the law of that jurisdiction most favorable to

138. For example, parties might wish to apply a specific future law. Wu, *supra* note 5, at 424 ("[T]he Patent Reform bill that is now before Congress is expected to pass and impact damage awards and patent licensing. Parties to a license can opt for this future law by contract.").

139. *See, e.g.*, 3 NATHANIEL HANSFORD, UNIFORM COMMERCIAL CODE TRANSACTION GUIDE § 28:80, Westlaw (database updated Aug. 2022) (noting the rate is to "[f]luctuate automatically with the Prime Rate of the Bank herein named as Holder, at a level of ____ percentage points above such Prime Rate"); ALAN S. GUTTERMAN, BUSINESS TRANSACTIONS SOLUTIONS § 114:146, Westlaw (database updated Aug. 2022) (noting remedies of landlord for tenant breach include "unpaid Rent" and "interest thereon at a rate per annum from the due date equal to *[amount of percentage]*% over the Prime Rate"); GUTTERMAN, *supra* at § 88:62 ("The prime rate of interest per annum then charged by *[name of bank]* plus *[amount of percentage]*%percnt [sic]; shall automatically be charged on all amounts, including additional charges, not paid by Customer when due hereunder.").

140. *See* Liggett Grp., Inc. v. Affiliated FM Ins. Co., 788 A.2d 134, 143 (Del. Super. Ct. 2001) ("The insurers may believe that given the volatility in the law their interests are better served by lack of a choice of law provision, which allows them to argue the application of the law of that jurisdiction most favorable to them at the time of suit." (quoting Nat'l Union v. Rhone-Poulenc Basic Chems. Co., No. 87C-SE-11-1-CV, 1992 Del. Super. LEXIS 571, at *16–17 (Del. Super. Ct. Aug. 17, 1992))).

141. *Id.*

142. *Id.* (quoting *Nat'l Union*, 1992 Del. Super. LEXIS 571, at *16).

them at the time of suit."[143] Thus, some parties do in fact prefer the law governing their obligation to be changeable.

Adding to the complexity of guessing what the parties would have agreed to is that people assess and value risk differently.[144] Some are more risk-averse than others, and people in general tend to favor guaranteed gains over a chance of an even greater gain even if the expected value of the risky gain exceeds the value of the guaranteed one.[145] The tendency to overvalue guaranteed gains supports the idea that parties would prefer a fixed but somewhat unfavorable law to the chance of gaining a more favorable law in the future.[146] In any event, the psychology of risk assessment makes it exceedingly difficult to state how any particular party, or even set of parties, would desire to contract regarding the uncertainty of changing law.[147]

While empirical research on contracting parties' intentions would be helpful, in its absence, the best default rule to fulfill the parties' presumed intentions is that the chosen law be fixed. The parties have,

143. *Id.* (quoting *Nat'l Union*, 1992 Del. Super. LEXIS 571, at *16). For a recent examination of the common absence of choice of law clauses in insurance contracts, see generally John F. Coyle, *The Mystery of the Missing Choice-of-Law Clause*, 56 U.C. DAVIS L. REV. 707 (2022). Coyle lists several reasons, including legislative, regulatory, and judicial hostility to insurance contract choice of law clauses, but he also notes that some insurers tactically choose not to use choice of law clauses precisely to maintain uncertainty, believing that it operates to their advantage. *See id.* at 719–21, 723–25, 728. Specifically, he notes:

> First, the lack of a choice-of-law clause creates uncertainty and, in so doing, serves to increase the costs of resolving the dispute. In many cases, the insurance company will be better positioned to bear these additional costs than the policyholder. As one lawyer explained: "If I'm representing the insurer, I would want no choice of law. I would want to introduce risk and uncertainty." Second, the lack of a choice-of-law clause gives the insurer the opportunity to shop for law by strategically filing a lawsuit seeking a declaratory judgment in a jurisdiction whose law is favorable to it.

Id. at 733 (footnotes omitted).

144. *See* Larry T. Garvin, *Disproportionality and the Law of Consequential Damages: Default Theory and Cognitive Reality*, 59 OHIO ST. L.J. 339, 406–07 (1998).

145. *Id.* at 406. To illustrate, studies show that if given a choice between "a certain gain of £3000 or an eighty percent chance of gaining £4000," people routinely opt for the former, even though the expected value of the certainty is £3000 and that of the risk is £3200. *Id.* at 407. People are thus averse to the risk, preferring certainty. *See id.* That is true as to gains, but the opposite is true of losses. *Id.* at 407–08. If the choice is between a sure loss of £3000 or an eighty percent chance of losing £4000, the vast majority chose the risk, even though it has a higher expected negative value. *Id.* As to losses, people tend to be risk-seekers. For an explanation of these phenomena of prospect theory, see *id.* at 406–10.

146. *See id.* at 367; *cf.* Coyle, *supra* note 143, at 733 (providing insurance companies as examples of parties who prefer uncertainty).

147. *See* Garvin, *supra* note 144.

after all, entered a written contract, which is itself an expression of a desire to eliminate risk. People do tend to prefer certainty over a mere chance of gain.[148] And the parties have gone to the trouble of inserting a choice of law clause, which, although today is all but boilerplate, further evinces a desire for stability.[149]

Related to upholding the parties' intentions is the value of protecting expectations. The overarching policy statement of § 6 of the Second Restatement instructs courts to consider "the protection of justified expectations," "certainty," and "predictability."[150] Upholding expectations is particularly important in contract cases.[151] As Albert Ehrenzweig observed long ago, there is a "Basic Rule of Validation" applied by courts under which "both contracts and specific contractual provisions . . . are generally held valid—both as to substance and form—by an application of the lex validitatis."[152] That is, a court will apply either foreign or forum law, whichever validates the contract.[153] To the extent the parties, or one of them, researched and relied upon the law of the chosen state at the time of contracting, they necessarily examined and relied on then-current law, not unknowable future law.[154] The relationship between current law and reliance is expressed in the general rule that the parties intend to incorporate the law existing at the time of contracting.[155] A default rule that anchors chosen law to the law at the time of contracting would therefore protect reliance interests.

Setting a default rule will also promote policy.[156] Penalty defaults, for example, are default provisions that the parties would *not* have

148. *Id.* at 406.

149. *See* Aditi Bagchi, *Risk-Averse Contract Interpretation*, 82 L. & CONTEMP. PROBS., no. 4, 2019, at 1, 9 n.28 ("[C]ontracting parties as usually risk-averse[] and motivated to contract partly for that reason."); Gregory Klass, *Boilerplate and Party Intent*, 82 L. & CONTEMP. PROBS., no. 4, 2019, at 105, 107.

150. RESTATEMENT (SECOND) OF CONFLICT OF L. § 6 (AM. L. INST. 1971).

151. *See id.* § 188 cmt. b.

152. Albert A. Ehrenzweig, *Contracts in the Conflict of Laws Part One: Validity*, 59 COLUM. L. REV. 973, 974 (1959) (internal quotation marks omitted).

153. *Id.*

154. *See supra* notes 126–27 and accompanying text; *see* Coyle, *supra* note 107, at 633 n.7.

155. *See supra* notes 126–27 and accompanying text.

156. *See* Ayers & Gertner, *supra* note 110, at 129; Feldman, *supra* note 127, at 849.

agreed to.[157] Courts should set defaults in this way, it is argued, to give one of the parties an incentive to contract around the default and thereby disclose information which would otherwise be inefficiently hidden.[158] Or consider the rule that a landlord has a duty to mitigate damages if a tenant abandons the lease.[159] According to some courts, this is a default rule which can be changed by a contract term in commercial leases.[160] Why craft the default rule to put the task of finding a substitute tenant (that is what is required of the duty to mitigate) on the landlord rather than putting a duty to find a sublessee on the tenant? One reason is that the landlord can likely find a substitute more cheaply than the tenant since the landlord is (or at least many landlords are) in the business of advertising for and selecting tenants. Landlords have experience and resources, so the cost to them of finding a new tenant is lower. Likewise, most American jurisdictions imply a duty on the landlord to deliver possession to the tenant (the landlord has a duty, in other words, to evict a holdover or other third party).[161] But this is a default rule, and the parties can contract around it so that the onus is on the tenant to evict the trespasser.[162] Efficiency justifications support placing the duty on the landlord by default since he will have greater knowledge of the potential holdover and experience in prosecuting evictions.[163]

The policy most apparent regarding choice of law clauses is that they lower the transaction costs by reducing uncertainties.[164] Contracts in general are an exercise in decreasing uncertainties since the parties specify outcomes for various contingencies or accept default rules by

157. Ayres & Gertner, *supra* note 110, at 97; *see* Drahozal, *supra* note 23, at 421 n.6.

158. *See* Ayres & Gertner, *supra* note 110, at 96–97.

159. *See* Jacqueline Sandler, Note, *Waiving the Duty to Mitigate in Commercial Leases*, 5 WM. & MARY BUS. L. REV. 647, 649 (2014).

160. *E.g.*, *id.* at 660–63; Sylva Shops Ltd. P'ship v. Hibbard, 623 S.E.2d 785, 791 (N.C. Ct. App. 2006) ("[A] clause in a commercial lease that relieves the landlord from its duty to mitigate damages is not against public policy and is enforceable.").

161. RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 6.2 (AM. L. INST. 1977).

162. *Id.* (noting a landlord is in breach if he fails to remove a third person from the leasehold at the start of the lease "[e]xcept to the extent the parties to the lease validly agree otherwise").

163. *See id.* § 6.2 cmt. a.

164. *See* Garvin, *supra* note 144, at 362–64; E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 992 (9th Cir. 2006).

their silence.[165] One contingency is the cost of enforcing the bargain or having it enforced against the party.[166] To set a boundary to such costs, parties agree, for example, to forum selection clauses, specifying that litigation shall occur in a particular state's or nation's courts or that disputes will be resolved outside the courts in arbitration.[167] Forum selection clauses lessen the transaction costs because they eliminate a party's need to research which states might have personal jurisdiction and what the litigation costs in those systems would be.[168] It also allows them to avoid having to price the transaction in a way that reflects the worst-case, highest-cost jurisdictional outcome.[169] Likewise, a choice of law clause allows the parties to save the cost of playing the three-dimensional chess game that is necessary to assess the risk of an opponent's adverse forum selection.[170] To assess the worst forum selection outcome for a transaction, one must (a) identify every state possibly having jurisdiction and assess the likelihood of jurisdiction ultimately being upheld; (b) research the often-malleable choice of law rules of each possible state; and (c) research the substantive law of each state thus identified.[171] By knowing what law applies beforehand, the parties can set some bounds on litigation exposure and price their contract more accurately.[172] Some have suggested that parties, such as franchisors or vendors of consumer goods who sell a uniform product or service contract to purchasers across the country, use choice of law clauses not because the content of the chosen law is advantageous but, instead, to have a single, uniform law apply to all such similar transactions.[173] If uniformity, not content, is what is really being chosen, then a rule that uses the law as

165. *See* Drahozal, *supra* note 23, at 420; Coyle, *supra* note 107, at 633 n.6.

166. *See E. & J. Gallo Winery*, 446 F.3d at 992; Coyle, *supra* note 107, at 633 & n.6 (explaining that adopting default rules, like a choice of law clause, "simplifies the judicial task," thereby reducing the need for costly litigation to enforce contracts).

167. *E. & J. Gallo Winery*, 446 F.3d at 992.

168. *See id.*; *see* Coyle, *supra* note 107, at 632–33.

169. *See E. & J. Gallo Winery*, 446 F.3d at 992.

170. Coyle, *supra* note 107, at 632–33, 633 n.7.

171. *See id.* at 633 n.7.

172. *Id.* at 633 & n.7; *E. & J. Gallo Winery*, 446 F.3d at 992.

173. Coyle, *supra* note 107, at 633 n.4, 688 (noting that one reason parties use choice of law clauses is to "ensure a uniform choice of law").

it existed at the time of contracting better serves the parties' needs. If, instead, the applied law depended upon when the suit was brought, allowing later arising cases to make use of later arising law, the goal of uniformity would be subverted.

The gains created by choice of law clauses would be undermined if the applicable law changed over time.[174] If the parties desire that uncertainty, they may designate that they wish the applicable law to float with the legal tides over time.[175] But absent such an indication, a default rule fixing the law to the date of the contract makes sense. Assuming an adequate sturdiness of enforcement of this default rule, the parties can insulate themselves from future retroactive legislation or changes in the common law.

Finally, a cluster of fairness reasons supports using the default rule of law anchored to the time of the contract.[176] First, if the law applied changed with the time of the litigation, then some parties to form contracts—consumers, for example—would be treated differently than others, even though they entered identical contracts at the same time.[177] Inter-party fairness thus argues for applying the same, unchanging law to all parties under the same form contract, regardless of when they sue.[178] Second, if the content of a particular obligation changes with changing law, the contract is a fundamentally different agreement than the parties reached.[179] Had a new law affecting a single

174. *See* Rensberger, *supra* note 1, at 481.

175. *Id.* at 420–21, 479–80.

176. *Id.* at 464, 479–81.

177. *Cf.* Coyle, *supra* note 143, at 724 n.55 (explaining that insurance contract forms are unfair to the public); Wu, *supra* note 5, at 412 n.105 (referencing a Supreme Court case where the Court upheld the original contract's terms "motivated partly by the unfairness to the bondholders who were powerless against the state that issued the bonds and changed the laws").

178. This assumes that the law is unchanged and, thus, uniform when form contracts are entered into. Uniformity would be lost if the law changed over a window of time when different consumers were suing at different times. The concern for equitable treatment of multiple persons having similar claims against a single defendant finds expression in the limited fund class action, in which all claimants are compulsorily represented in a class so that early claimants do not exhaust available funds leaving nothing for later claimants. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 838 (1999) (noting that limited fund class actions "justified the limit on an early feast to avoid a later famine"); 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:17 (6th ed. 2022) (noting that in limited fund class actions "individual litigation may erode the fund, paying early filers all their damages and leaving late filers with none").

179. *Cf.* Rensberger, *supra* note 1, at 469 (providing examples of what can happen with changing obligations over time).

clause of the contract been established at the time of the contract, the parties might have negotiated other terms in the contract differently. Finally, ease of use supports using the anchor approach. Calculating damages, for example, might be difficult if a party was in and out of breach of contract for time periods corresponding to the change of law. In particular, if a party was initially in breach of contract but later came into compliance with its duties under new law, would courts apportion damages to account for changing law?

On the other hand, it may be that parties use choice of law clauses to eliminate the cost of litigating choice of law should a dispute arise rather than to select a particular state's law because of its content. This desire for any certain port in a storm may explain why parties occasionally choose law that defeats a term of their contract. It was not the content of the law that attracted them; it was merely a desire to avoid choice of law at all. If this is the motivation, then such parties do not really care whether it is current or old law that is applied. The important thing to the parties is to have the matter settled without litigation over the question. If that is the motivation, then a choice of time clause and a choice of law clause should be employed to avoid litigating the temporal question. As to the default rule—whether old or new law should apply—the outcome is of no concern to such parties since they merely want the question to be answered either way. A default rule of applying the law of the time of the contract promotes the interests of other parties, and it does not harm the interests of those in this group.

Before leaving the subject, the issue of retroactivity should be addressed. Some might argue that the choice of law analysis suggested above is using a hoe to rake leaves—it is the wrong tool for the job.[180] Instead of a choice of law problem, it is simply a matter to be addressed by the law of retroactivity.[181] Additionally, some might argue that even if this is a problem properly within the sphere of choice of law, the

180. *Id.* at 459.
181. *Id.*

choice of law rule should simply be to apply the law of retroactivity of the state whose law governs.[182]

I addressed these issues in my previous foray into choice of law and time.[183] As discussed there, this problem is unavoidably a choice of law issue. If the forum decides that the issue is to be resolved by the law of retroactivity, it must then decide whether to use its own law of retroactivity or that of the chosen state.[184] That is a choice of law analysis. Using the hypothetical introduced to illustrate the problem, a Texas court would apply the New York law of retroactivity only as a result of some type of choice of law analysis. To be sure, how the other state would apply its new rule—retroactively or prospectively—in a domestic case may well be a factor for the state to consider on the temporal choice of law question. In the current context—default rules—such a factor is irrelevant since the guide should be the parties' intentions, not the law of retroactivity.[185] But the chosen state's law of retroactivity may have more salience in the context of mandatory rules—a matter to be explored below.

This is a choice of law problem and not merely a matter of the domestic law of retroactivity because a court applies another state's law of retroactivity only after it applies a choice of law rule.[186] Why else would a Texas court, for example, apply New York's law of retroactivity? Courts apply their own law absent a choice of law rule directing them to do otherwise.[187] A choice of law solution is that the

182. *See id.*
183. *Id.* at 459–66.
184. *Id.* at 459.
185. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187(1); *id.* § 187 cmt. c.
186. *See* Rensberger, *supra* note 1, at 460–61, 462.
187. *Id.* at 461. Brainerd Currie frequently invoked the presumption of forum law. *See* Brainerd Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719, 756 (1961) (noting forum law "is presumptively applicable" and should apply "simply by default"); BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 183 (1963) ("Normally, even in a case involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum."). This has been criticized as a matter of conflicts theory. *See* Kermit Roosevelt III, *Brainerd Currie's Contribution to Choice of Law: Looking Back, Looking Forward*, 65 MERCER L. REV. 501, 512 (2014); Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301, 1302–03

forum court is to use the retroactivity law of the contractually selected state.[188]

The nuance of § 187 of the Second Restatement also makes it clear that this topic is a choice of law issue.[189] Recall that, under § 187(1), the court is to absolutely apply the law of the chosen state if the particular issue is one the parties could have resolved by explicit agreement.[190] But what if the issue is regarded as a default rule under the law of the forum but is a mandatory rule under the law of the chosen state (or vice versa)? By what law does the court decide if the matter at hand is a default rule? The Second Restatement provides this answer: "Whether the parties could have determined a particular issue by explicit agreement directed to that issue is a question to be *determined by the local law of the state selected by application of the rule of § 188*."[191] Section 188 is the base rule for choice of law for contracts, directing a court to apply the law of the state of "the most significant relationship."[192] Thus, to resolve applicability issues—whether the rule in question is a default rule—under § 187, courts are to use neither the law of the chosen state nor forum law but, instead, a full-blown choice of law analysis.

(1989). But it remains descriptively accurate. As a matter of procedure, if no party raises the applicability of foreign law, the court will apply forum law. 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2443 (3d ed. 2008) ("If a party fails to give sufficient notice [of the application of foreign law], the court is not obligated to apply the relevant foreign law and ordinarily will apply the forum's law, either by assuming that foreign law has been waived or that foreign and forum law are the same."); RESTATEMENT (SECOND) OF CONFLICT OF L. § 1 cmt. a (AM. L. INST. 1971) ("Ordinarily all legally significant aspects of a case are grouped within the state of the forum and the task of the court is to determine the rights and liabilities of the parties in accordance with its own local law.").

188. For additional explanation of why a resort to the retroactivity law of the other state is unavoidably a choice of law solution, see Rensberger, *supra* note 1, at 460–63.

189. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. c (AM. L. INST. 1971).

190. *Id.* § 187(1).

191. *Id.* § 187 cmt. c (emphasis added).

192. *Id.* § 188.

Courts often follow this approach.[193] A good illustration is *Sheldon v. Munford, Inc.*[194] The contract selected Georgia law.[195] A federal court in diversity applied local (Indiana) choice of law rules to determine that Indiana law would apply absent a choice of law clause.[196] Because Indiana treated the underlying issue as a default rule, the court upheld and applied the Georgia choice of law clause.[197] The court did not determine whether the rule was a default rule under Georgia law.[198] Nor did it apply forum law to that issue as the law of the forum.[199] It used Indiana law as the state selected by normal choice of law rules.[200]

Some courts, on the other hand, miss this subtlety in the Second Restatement and use forum law to determine whether the issue is a default rule.[201] Some neglect the issue entirely, not bothering to specify under which state's law the rule in question is treated as a default rule.[202] Only a very few decide the question under the law of the chosen state.[203] To be fair, the necessary analysis can be confusing. For

193. For cases that apply § 187 comment c and do a choice of law analysis to determine the law applicable to the contract and then apply that law to determine whether the issue is a default rule, see Maricopa Cnty. v. Off. Depot Inc., No. CV-14-01372-PHX, 2020 WL 134862, at *9–10 (D. Ariz. Jan. 13, 2020); Nexus Sols. Grp., Inc. v. Parametric Tech. Corp., No. CV 04-312-S-BLW, 2005 WL 8165550, at *7–8 (D. Idaho Dec. 21, 2005); Sheldon v. Munford, Inc., 660 F. Supp. 130, 134–35 (N.D. Ind. 1987); Armstrong Bus. Servs., Inc. v. H & R Block, 96 S.W.3d 867, 872–73 (Mo. Ct. App. 2002); Ernst v. Ford Motor Co., 813 S.W.2d 910, 921–22 (Mo. Ct. App. 1991).

194. *Sheldon*, 660 F. Supp. 130.

195. *Id.* at 134.

196. *Id.*

197. *Id.* at 135.

198. *Id.* at 134–35.

199. *Id.*

200. *Sheldon*, 660 F. Supp. at 135.

201. *See, e.g.*, Wright-Moore Corp. v. Ricoh Corp., 908 F.2d 128, 132–33 (7th Cir. 1990) (invalidating New York choice of law clause because the rule was mandatory under the law of the forum (Indiana)); Indus. Indem. Ins. Co. v. United States, 757 F.2d 982, 987–88 (9th Cir. 1985) ("The law of the forum court (Idaho) controls the determination of whether the parties to a contract have validly chosen the state law applicable."); Elec. & Magneto Serv. Co. v. AMBAC Int'l Corp., 745 F. Supp. 1501, 1504–05 (W.D. Mo. 1990), *rev'd on other grounds*, 941 F.2d 660 (8th Cir. 1991); McKeehan v. McKeehan, 355 S.W.3d 282, 291–92 (Tex. App. 2011) (finding that the rule was a default rule because "Texas law allows parties to create a joint tenancy").

202. *See, e.g.*, Baxter Int'l, Inc. v. Morris, 976 F.2d 1189, 1195–96 (8th Cir. 1992).

203. *See* Comshare, Inc. v. Execucom Sys. Corp., 593 F. Supp. 981, 988 (E.D. Mich. 1984) (analyzing whether the rule is a default rule under Texas law in a Michigan forum assessing a Texas choice of law clause).

example, in *Sherman v. PremierGarage Systems, LLC*, the court addressed an Arizona choice of law clause and correctly stated that the law of the state of most significant relationship, Arizona, applied to determine the default or mandatory nature of the rule.[204] But the court then concluded it was a default rule because "parties may contractually waive any statutory right, protection, or remedy *under the Florida statutes*" covering deceptive trade practices that were argued to apply.[205] This confusion is embedded in the structure of the Second Restatement because the court is supposed to determine whether Arizona law allows a party to waive rights under a Florida statute.[206] Because that is an unanswerable question, perhaps the better analysis is whether Arizona would allow waiver under a comparable Arizona statute, not the Florida statute.

Regardless of the solution to these cases, the point remains: To apply § 187, a court must do a preliminary choice of law analysis.[207] This is explicitly true in determining whether the rule in question is a default rule.[208] And it is necessarily true as to other questions, including the temporal question. Under § 187, for example, courts apply only the substantive law of the chosen state and use the forum's procedure.[209] If the choice of law clause is enforced, only the "local law of the chosen state and not . . . the totality of its law including its choice-of-law rules" applies.[210] Renvoi, which deals with whether a

204. Sherman v. PremierGarage Sys., LLC, No. CV 10-0269-PHX, 2010 WL 3023320, at *5–6 (D. Ariz. July 30, 2010).

205. *Id.* at *6 (emphasis added).

206. *See id.*; RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 (AM. L. INST. 1971).

207. *Sherman*, 2010 WL 3023320, at *5 ("[T]his Court will apply the same conflict of law analysis to the choice-of-law provision in the case at bar, pursuant to § 187 of the Restatement (Second) of the Conflict of Laws.").

208. *See supra* notes 189–92 and accompanying text.

209. Nexen Inc. v. Gulf Interstate Eng'g Co., 224 S.W.3d 412, 417 (Tex. Ct. App. 2006) ("Texas courts generally apply Texas procedural law even while applying the parties' contractual choice of law for substantive matters."); Patricia Youngblood Reyhan, *Choice of What? The New York Court of Appeals Defines the Parameters of Choice-of-Law Clauses in Multijurisdictional Cases*, 82 ALB. L. REV. 1241, 1279–80 (2018-2019) ("Choice-of law clauses typically are read to include substantive law only."); Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643, 655 (2015) ("[C]ourts do not normally interpret choice-of-law clauses to cover procedural matters . . . .").

210. RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. h (AM. L. INST. 1971) (internal quotation marks omitted).

court whose choice of law rule calls for application of the law of another jurisdiction should apply only the substantiative law of that sovereign or the choice of law rules of that foreign state as well, is thus rejected.[211] Similarly, in deciding whether a policy is so fundamental as to overcome the parties' choice of law under § 187, the court is to use forum law, not the law of the chosen state.[212]

All of this—the substance–procedure dichotomy, the renvoi question, and assessing whether foreign law is fundamental—is a part of the choice of law apparatus. Like procedure and renvoi, the temporal question cannot be decided without a choice of law analysis.[213] Deciding to follow the retroactivity rules of the chosen state is a choice of law decision, and choice of law policies that are used on other conflicts questions, such as implementing state interests while protecting the parties' expectations, should apply here as well.

The question here involves the *interstate* law of retroactivity.[214] This would be a true choice of law rule, meaning that it would apply regardless of the forum. Even the court whose law changed would apply the law directed by this choice of law rule rather than its own law of retroactivity. If that seems surprising, remember that in this context, the law of the chosen state applies only by the parties' election.[215] Suppose for a moment that the chosen state does not enforce choice of law clauses. That is irrelevant to the forum court, which is to apply its own choice of law rules to determine the enforceability of a choice of law clause.[216] Similarly, whether the

211. *See* Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1822–23 (2005).

212. RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. g (AM. L. INST. 1971) ("The forum will apply its own legal principles in determining whether a given policy is a fundamental one within the meaning of the present rule . . . .").

213. *See* Rensberger, *supra* note 1, at 440.

214. *Id.* at 425–29.

215. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187(3) (AM. L. INST. 1971).

216. *Id.* ("[T]he reference is to the local law of the state of the chosen law."); *id.* § 187 cmt. e ("The forum in each case selects the applicable law by application of its own choice-of-law rules."); Tanya J. Monestier, *When Forum Selection Clauses Meet Choice of Law Clauses*, 69 AM. U. L. REV. 325, 357 (2019) ("[F]orums legitimately apply forum law to determine the validity and enforceability of . . . choice of law clauses."); Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 333 (2d Cir. 2005) (a choice of law clause's validity is a "threshold question" decided under "the law of the forum").

chosen state's new law is to apply retroactively or prospectively is not determinative.[217] The forum seeks to apply the law the parties intended to apply.[218] If they intended that the law as it existed on the date of the contract was to apply, it is irrelevant whether the chosen state would apply its law retroactively in a domestic case. Likewise, if the parties intended that the chosen law should be that in existence at the time of litigation, it is irrelevant that the chosen state would normally apply its new law only prospectively. The forum is applying the law of the chosen state to give life to the parties' election, not because the chosen state has sole governance of the matter.

B. Changed Statutory Law

Much of what has been said above applies equally to new or amended statutes. Because the topic is limited here to default rules, the parties' intentions dominate the analysis. And for the reasons argued above, it is best to use an unchanging, fixed law as a default estimate of the parties' intentions. It is likely what the parties intended; it promotes a policy of lowering transaction costs, and the negative impact on chosen state's interests is limited because only a limited set of past transactions is affected.[219] Finally, fixing the contractual rights to the time of the contract is consistent with the domestic contract rule that "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into it and form a part of it," but statutes enacted after the formation of a contract are not deemed to be incorporated absent a clear showing of intent that after-enacted law is to apply.[220] There are, however, a few nuances in the statutory context that need explanation.

First, the category of curative legislation merits special consideration. Statutes are presumed to apply prospectively, but a party can overcome this presumption by express provision or other

217. *See* Rensberger, *supra* note 1, at 460.
218. *See supra* notes 104–12 and accompanying text; Monestier, *supra* note 216, at 327.
219. *See supra* notes 130–32, 164–73 and accompanying text.
220. Von Hoffman v. City of Quincy, 71 U.S. 535, 550 (1866).

showing of legislative intent.[221] Curative legislation is one category of legislation that is sometimes given retroactive effect.[222] Curative legislation refers to legislation that is designed not to change policy but to correctly reflect what the policy had always been.[223] Both the legislature and private parties were misled by the prior, erroneous statute, so curative legislation thus "affirms as proper what everyone had taken to be the law anyway."[224] One subcategory of curative legislation validates acts taken by private parties under a mistaken belief about the legal effect of their actions.[225] Transactions that were entered into in good faith but which were in fact invalid are retroactively validated by curative legislation.[226] This has been applied to rescue marriages that were discovered years later to have not complied with necessary formalities,[227] to validate deeds that were thought to be effective to transfer title but which were technically not,[228] and to affirm contracts with a governmental unit that lacked statutory authorization at the time the contract was created.[229] Curative legislation thus tends to be "legalizing" rather than newly prohibitory.[230] It brings "legal rights and relationships into conformity with what people thought they were."[231]

There should be few occasions for this type of truly validating legislation to apply in the context of default rules. New legislation that turns a void contract into a valid one will usually concern a mandatory

221. *See* Rensberger, *supra* note 1, at 427–28; Landgraf v. USI Film Prods., 511 U.S. 244, 271–72 (1994) (explaining the types of cases where the Court "applied the presumption against statutory retroactivity").

222. Munzer, *supra* note 8.

223. *Id.* at 468–69.

224. Laura Ricciardi & Michael B.W. Sinclair, *Retroactive Civil Legislation*, 27 U. TOL. L. REV. 301, 338 (1996).

225. *See id.* at 337–38; Munzer, *supra* note 8, at 469 & n.164.

226. *See, e.g.*, Ricciardi & Sinclair, *supra* note 224, at 337–38; Munzer, *supra* note 8, at 469.

227. Ricciardi & Sinclair, *supra* note 224, at 337–38.

228. Munzer, *supra* note 8, at 469.

229. State *ex rel.* Tomasic v. Kansas City, Kansas Port Auth., 636 P.2d 760, 775 (Kan. 1981) (upholding "curative legislation to ratify actions taken previously by a port authority" in entering into various contracts).

230. 2 NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 41.4, at 419 (7th ed. 2009).

231. *Id.* § 41:2, at 389.

rule.[232] The problematic interaction between curative legislation and a default rule could occur, however, when the law that would govern absent a choice of law clause would treat the matter as a default rule, but the chosen state would treat it as mandatory. It is the law of the former, it should be recalled, that governs whether an issue is one the parties could have resolved by an explicit agreement.[233] The matter could also come up when the rule in question does not void an entire contract but only a term of it.[234] A self-help remedy, for example, may have been previously thought to be prohibited but is later "cured" to reflect its validity.

If the new statute of the chosen state validates a contract or a term of it that was void under the law at the time of transaction, the forum should usually apply the updated version of the law of the chosen state. First, this better upholds the parties' expectations. Whatever else one may surmise about their expectations, it is a fair assumption that the parties intended a valid contract or clause.[235] The choice of law clause was thus a mistake at the time (because it selected law that was then invalidating), and the usual approach in such a situation is to ignore the choice of law clause.[236] Moreover, in this context, there is a double mistake. The parties chose a law that appeared to invalidate some part of their agreement, but the legislature later indicated that this was never meant to be the law. Since neither the parties nor the state ever intended to have a void contract or contract term, there is no reason to treat it as such.

Second, there is a technically separate category of a reinterpretation of an unamended statute. When a court reinterprets a statute, there is

232. *See* Matthias Lehmann, *Liberating the Individual from Battles Between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT'L L. 381, 395–96 (2008) ("[T]he invalidity of a contract is always based on mandatory law . . . .").

233. *See supra* note 191–93 and accompanying text.

234. For treatment of a choice of law clause that invalidates only a term of a contract, see Kipin Indus., Inc. v. Van Deilen Int'l, Inc., 182 F.3d 490, 495–96 (6th Cir. 1999); Lehmann, *supra* note 232, at 395 n.79.

235. *See* Lilienthal v. Kaufman, 395 P.2d 543, 546 (Or. 1964) (noting the parties "must have intended their agreement to be valid"); Lehmann, *supra* note 232, at 396 (by contracting, the parties "have shown that they want to be contractually bound").

236. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. e (AM. L. INST. 1971) ("If the parties have chosen a law that would invalidate the contract, it can be assumed that they did so by mistake.").

neither a change of a common law rule nor a legislative amendment of a statute.[237] The new interpretation does not in fact change the law at all. Like curative legislation, it corrects a misunderstanding of what the law had always been.[238] Thus, a "judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."[239] Under this understanding, one would apply the "new" interpretation since that was the actual meaning of the statute at the time of the contract. But because the issue is one which the parties could have resolved by an explicit provision, their intentions should rule. And the best estimate of their intentions is that they wanted the law as it was thought to exist at the time of their contract to apply. They could hardly have intended an interpretation that was unknown at the time of contracting.

Finally, there may be some context-specific exceptions where the likely intent was to have a floating, not fixed, law. If the parties agreed that late payments would carry an interest charged at the highest rate allowed under the law of the chosen state, they may well have intended the interest rate to change over time.

IV. CHANGED MANDATORY CONTRACT RULES

Before addressing how courts should interpret choice of law clauses when mandatory rules change, two points need to be emphasized. First, it is important to remember the basic approach to choice of law clauses in general. Under the dominant American approach, parties may choose a law to be applied to their contract even as to issues they did

237. *See* Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1076 (1999).

238. *See id.*

239. Rivers v. Roadway Express, Inc., 511 U.S. 298, 312–13 (1994). The same issue comes up in constitutional law when the Supreme Court reinterprets a constitutional provision. Danforth v. Minnesota, 552 U.S. 264, 271 (2008) ("'Retroactivity' suggests that . . . the right at issue was not in existence prior to the date the 'new rule' was announced. But this is incorrect. . . . [T]he source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule.").

not have the power to resolve by agreement.[240] That is, they are empowered to "escape prohibitions prevailing in the state which would otherwise be the state of the applicable law."[241] Allowing parties to avoid the otherwise applicable law defeats the policy choices and interests of the state whose law would normally apply under the Second Restatement. But the Second Restatement (and the case law that broadly implements it) chooses to satisfy the competing "demands of certainty, predictability[,] and convenience."[242] Thus, party autonomy remains the key policy in the context of mandatory rules. State interests, however, are not entirely neglected. The parties' choice of law will not be honored if that law contravenes a "fundamental policy" of the state whose law would apply in the absence of a choice by the parties and which has a "materially greater interest than the chosen state" concerning the issue.[243] The resolution of choice of law clauses for mandatory rules thus turns on a balancing of the competing interests of the parties and of the state whose law would otherwise apply.[244] In doing so, contract rules that are usually thought to be "mandatory" become much less so under the Second Restatement. Recognizing this framing helps solve the temporal choice of law problem.

Second, the temporal question in this context is complicated because one must now account for the possibility of *two* states having changed their laws. One temporal choice of law problem is presented when the law of the chosen state has changed. Should the choice of law clause be interpreted as referring to current or time-of-contract law? In addition, the law of the state which would otherwise apply might have changed, so its fundamental policy at the time of litigation could differ from that which held sway at the time of the transaction. If that were not enough, it is possible that the law of *both* states has changed. The

240. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. e (AM. L. INST. 1971).
241. *Id.*
242. *Id.*
243. RESTATEMENT (SECOND) OF CONFLICT OF L. § 187(2)(b) (AM. L. INST. 1971).
244. *See id.*

matrix of issues raised is complex, but breaking them down clarifies the analysis.

A. Courts Should Honor Explicit Choice of Time Clauses for Mandatory Rules

Before assessing how courts should interpret a choice of law clause in light of changing mandatory rules, one should also consider what the parties might do to address this situation. What if the parties not only selected the law of a state to govern their contract but further specified that it was to be the law of that state as it existed or exists at a specified time? Should courts honor such a choice of time clause? This matter was addressed above in the context of default rules. The question considered here is whether the analysis is different if the law in question is a mandatory rule.

A standard geographic choice of law clause will be enforced, even for a mandatory rule, if the chosen state has a "substantial relationship to the parties or the transaction" or its law is not "contrary to a fundamental policy" of the state of most significant relationship.[245] The same analysis should be applied to choice of time clauses in the context of mandatory rules. Given the choice-enabling structure of § 187 of the Second Restatement,[246] if parties choose the law of a certain time to apply to their transaction, courts should honor the choice absent some good reason not to.

Here, unlike the standard geographic choice of law clause, the choice is not between two jurisdictions but between two times of the same jurisdiction. While parties need to be restricted from choosing states that they are unconnected to, there should be little concern of the parties choosing an unconnected time. Perhaps one could characterize an arbitrary past time as unconnected. If parties in California, for example, contract in 2022 for the law of California as of 1890 to apply to them (as to a mandatory rule), it is hard to see how that time is connected to the parties or the transaction. In contrast, if the parties, as

245. RESTATEMENT (SECOND) OF CONFLICT OF L. § 187(2) (AM. L. INST. 1971).
246. *See id.*

is more realistic, choose the present (time of contracting) or the future (at the time of litigation or lasting through the course of their executory contract), that time period would be connected since the law of that time is in existence for part of the agreement's term.

If the parties specify that the law applied is to change as the law changes, there is no reason to invalidate that choice. No argument of current state policy stands against the parties' choice, and we can fulfill their expectations by honoring it. If the parties instead specify a past time—for example, state that the law as of the date of the contract is to govern—that choice should also be upheld unless the old law is "contrary to a fundamental policy"[247] expressed in *current* law. Here, it would seem that the retroactivity law of that state would be relevant since it addresses largely the same question: Is current policy so important that it is necessary to employ it even to upset settled expectations? But the focus should remain on using § 187 to determine if the law in question is fundamental in the same way that would cause a court to not honor a geographic choice of law clause. In considering whether to uphold a choice of time clause, courts should use case law that considers whether a policy is so fundamental that it will invalidate a geographic choice of law clause.[248] The Second Restatement is helpful here, suggesting that fundamental policies are to be found in laws that make contracts illegal or protect a party "against the oppressive use of superior bargaining power."[249]

B. When the Law of the State Whose Law Would Otherwise Apply Has Changed

Using the hypothetical introduced earlier, parties from Texas and Florida enter a contract in 2017 concerning a subject matter located in New York and specify in the contract that New York law will apply to

247. *Id.*

248. *See* Patrick J. Borchers, *Categorical Exceptions to Party Autonomy in Private International Law*, 82 TUL. L. REV. 1645, 1653 (2008) ("[M]any of the cases in which the parties' choice has been defeated have involved laws that clearly involved significant externalities, such as noncompetition laws, franchisee protection laws, and fair trade rules.").

249. RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. g (AM. L. INST. 1971).

the transaction. Let us further assume that absent a choice of law clause, Florida law would apply under § 188 of the Second Restatement. Florida law changed in 2019. The litigation commences in 2021 in Texas. For clarity of discussion, let us refer to New York as the chosen state, Florida as the state of most significant relationship, and Texas as the forum state.

Under § 187, even if the contract rule in question is mandatory—one which the parties could not resolve by an explicit agreement—the court is to honor the parties' choice of New York law unless it is "contrary to a fundamental policy of a state . . . 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."[250] Whether the contract rule in question is a mandatory rule or a default rule, it is to be recalled, is determined not by the law of the chosen state (New York) nor by the law of the forum state (Texas), but by the law of the state that would have applied under § 188 absent a choice of law clause (Florida, the state of most significant relationship).[251] Because the problem assumes that Florida law would apply under § 188 absent a choice of law clause, one must address whether the law of New York as the chosen state is contrary to a fundamental policy of Florida as the state of most significant relationship reflected in a mandatory Florida rule.[252]

Four possibilities are present when the law of the chosen state is assumed to be unchanged: (1) either the agreement in question was at all times valid or it was at all times invalid under that law; (2) it is the law of the state of most significant relationship that has changed; (3) the clause or contract may initially have been enforceable under that law but became unenforceable under a new mandatory rule; or (4) the clause may have been unenforceable at the time of the contract but has since become valid. The array of these issues is set out in Table 1 for clarity:

250. *Id.* § 187(2)(b).

251. *See supra* notes 191–193 and accompanying text.

252. To be precise, one must also assume not only that Florida law would apply under § 188 but also that it has a "materially greater interest" than New York "in the particular issue." *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187(2)(b) (AM. L. INST. 1971).

Table 1.

	State of Most Significant Relationship (Florida)		*Chosen State (New York)*
Case No.	Old Law	New Law	
1	Invalid	Valid	Valid
2	Valid	Invalid	Valid
3	Invalid	Valid	Invalid
4	Valid	Invalid	Invalid

Case 1 is easily disposed of. The clause in question was valid and remains valid under the law of the chosen state. While it was void at the time of the contract under the law of the state of most significant relationship, it is now valid under that law. If the court disallows the application of the chosen law, it is doing no service to the public policy of the state of most significant relationship since that policy now *favors* this clause. Section 187 speaks in the present tense: One is to inquire whether chosen law is contrary to a fundamental policy of "a state which *has* a materially greater interest."[253] True, there is no present tense verb immediately preceding the phrase "fundamental policy," but it would be exceedingly odd of the Restatement to ask a court to examine whether a state currently "has" an interest and then to assess that interest under the state's former, not current policy. And the Restatement is correct to speak in the present tense here. Interests should be assessed based on present policy as reflected in current law.[254] Moreover, the fact that the contractual provision was at the time invalid under the law of the state of most significant relationship may be precisely the reason the parties chose another state's law. The general thrust of § 187 is to validate the parties' contractual choices, even if they are intending to "escape" otherwise applicable law, so this

253. *Id.* (emphasis added).

254. *See* Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 484 (1982) ("[T]he interests of states concerned at the time of the transaction may, as a practical matter, evaporate by the time of trial . . . ."); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1587 (1966) ("A state's total governmental interest in a case is to be . . . viewed as of the time when the question is presented."); Rensberger, *supra* note 1, at 465–66.

choice should be honored.[255] Finally, the policy driving choice of law analysis for contractual issues is the "protection of the justified expectations."[256] Choosing a law that validates a consensual transaction is preferred.[257] As the Second Restatement explains, "[w]hen two states have an approximately equal interest . . . and when the local law of one state would validate the contract and the local law of the other state would invalidate the contract, the local law of the first state should, generally speaking, be applied."[258]

It does not matter whether the new law of the state of most significant relationship has been determined to have only a prospective, not retrospective, application as a matter of its own domestic law. It must be remembered that this is a choice of law case, and the forum is another state. The forum would apply the retroactivity law of the state of most significant relationship only if a choice of law analysis leads to that result, and it is far from clear that a choice of law analysis would require the use of another state's retroactivity law.[259] Retroactivity analysis balances a lawmaker's desire to give effect to current policy against the legitimate expectations of the parties rooted in the past.[260] The former argues for retrospective application while the latter commends only prospective application.[261] But when the parties

255. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. e (AM. L. INST. 1971).

256. *Id.*; *id.* § 188 cmt. b.

257. *Id.* § 200 cmt. c ("[T]he validity of a contract should be sustained whenever this can be done by application of the local law of a state having a substantial relationship to the transaction and the parties, provided that in so doing the interests of a state with a materially greater interest are not seriously infringed.").

258. *Id.*

259. *See* Rensberger, *supra* note 1, at 459–63.

260. *See* Robinson v. Crown Cork & Seal Co., 335 S.W.3d 126, 145 (Tex. 2010) (noting retroactivity decisions balance the "nature and strength of the public interest" against the "nature of the prior right impaired by the statute; and the extent of the impairment"); Twiss v. State, Dep't of Treasury, Off. Fin. Mgmt., 591 A.2d 913, 917 (N.J. 1991) (noting statutes have "retroactive application to effectuate current policy declared by legislative body" (citing Kruvant v. Mayor of Cedar Grove, 414 A.2d 9, 11 (N.J. 1980))); *Kruvant*, 414 A.2d at 11 (noting retroactive application of the law "effectuate[s] the current policy declared by the legislative body—a policy which presumably is in the public interest"); Dowd Grain Co. v. County of Sarpy, 810 N.W.2d 182, 192 (Neb. Ct. App. 2012) ("Generally, an appellate court will apply the statute in effect at the time of its decision . . . . The purpose of the principle is to effectuate the current policy declared by the legislative body.").

261. *See Robinson*, 335 S.W.3d at 145; *Twiss*, 591 A.2d at 917; *Kruvant*, 414 A.2d at 11; *Dowd Grain Co.*, 810 N.W.2d at 192.

chose a validating law at the time of the transaction, there are no expectation interests in, and no reliance on, an old, invalidating law since it was not chosen by the parties. That is, the parties obviously did not ground their expectations in the law of the state of most significant relationship since they contractually agreed to apply another law. Because reliance and expectations are thus irrelevant, the demands of current policy stand unopposed. If that were not enough, consider that the case under consideration simply does not involve a retroactive application of the law of the state of most significant relationship. The court will apply the chosen law (New York) as it existed at all times. The law of the state of most significant relationship (Florida) is not being applied; it is relevant only in establishing a policy that may conflict with the law of the chosen state, but its current policy does not in fact conflict.

Case law supports this conclusion. In the conflicts chestnut *Milliken v. Pratt*, a Maine merchant sold goods on credit to a Massachusetts man and secured a guaranty for payment from the buyer's wife.[262] The court concluded that Maine law, as the place of making of the contract, governed.[263] At the time the guaranty was issued, Massachusetts law prevented a married woman from guarantying her husband's debts, but by the time of litigation, the law had changed to allow such contracts.[264] Although the case did not involve a choice of law clause, the court considered whether Maine law should be avoided by the Massachusetts court on the ground that it violated Massachusetts public policy.[265] The court concluded that the relevant public policy was the current, not old, Massachusetts policy and allowed the guaranty.[266] The court relied on the "tendency of modern legislation . . . to enlarge" the capacity of married women.[267] By the time of the litigation, married women were allowed to enter "all kinds

262. Milliken v. Pratt, 125 Mass. 374, 374 (1878).
263. *Id.* at 375–76.
264. *Id.* at 376–77.
265. *Id.* at 381–83.
266. *Id.* at 383.
267. *Id.*

of contracts," so the court found "no reason of public policy" to void the contract.[268]

Modern cases also support using current public policy in determining whether to apply the law of the chosen state. In *Park-Ohio Industries, Inc. v. Carter*, the plaintiff sued an ex-employee for breach of a non-competition agreement which designated Ohio law to govern its validity.[269] At the time the contract was signed, such agreements were not enforceable under Michigan law, the home of the defendant ex-employee.[270] However, by the time of the litigation, Michigan law had changed to allow such agreements.[271] Even though the Michigan validating legislation was not retroactive and pre-amendment non-compete provisions were void as a matter of domestic Michigan law, the court concluded that "Michigan's choice-of-law rules require the Court to consider Michigan's *current* public policy" and upheld the choice of Ohio law.[272] Likewise, in *Shipley Co. v. Clark*, a Massachusetts employer sued two ex-employees from Michigan to enforce a non-competition agreement governed by Massachusetts law.[273] Applying § 187 of the Second Restatement, the court addressed whether Massachusetts law (the law chosen by the parties) was contrary to Michigan public policy.[274] At the time of the agreement, Michigan law flatly banned all non-competition agreements, but the law had changed by the time of litigation to allow reasonable non-

268. *Milliken*, 125 Mass at 383.

269. Park-Ohio Indus., Inc. v. Carter, No. 06-15652, 2007 WL 470405, at *2–3 (E.D. Mich. Feb. 8, 2007).

270. *Id.* at *1, *4.

271. *Id.* at *5.

272. *Id.* at *5, *7 (emphasis added). The Sixth Circuit has articulated similar reasoning in dicta in *Monsanto Co. v. Manning*. Monsanto Co. v. Manning, No. 87-1790, 1988 WL 19169, at *5–6 (6th Cir. Mar. 8, 1988) (per curiam). That case involved no choice of law clause, but the court considered whether Missouri or Michigan law applied as a matter of choice of law rules. *Id.* at *3–4. Although the court ultimately concluded that old, invalidating Michigan law applied because the contract was entered into in Michigan, the court reasoned that had Missouri law allowing non-competition agreements applied, such law would not have been not contrary to the relevant Michigan public policy. *Id.* at *5–6. "With the Michigan Legislature's repeal of the anti-covenant statute . . . a Missouri contract containing a covenant not to compete of this sort is no longer against the public policy of Michigan." *Id.* at *5.

273. Shipley Co. v. Clark, 728 F. Supp. 818, 825, 819–20 (D. Mass. 1990).

274. *Id.* at 825–26.

competition agreements.[275] The court concluded that in light of this change, Michigan "can no longer be said to have a strong public policy against no-compete agreements."[276] The court also expressly rejected the argument that the new Michigan law should not be considered because it was not to apply retroactively.[277] That argument, the court explained, overlooked the distinction between Michigan law and Michigan policy.[278] Michigan law—if it applied—would void the agreements because the validating legislation was not retroactive.[279] But Massachusetts law, not Michigan law, applied.[280] Thus, the only question was that of Michigan policy, the content of which is to be found in the present: "Michigan has expressed its current view that it is no longer bothered by in-state restraints on competition imposed by reasonable no-compete agreements. Enforcement of the choice-of-law provision, therefore, would violate Michigan *law*, but not Michigan *policy*."[281]

A series of similar cases arose when Georgia changed its law to allow previously unenforceable non-competition agreements.[282] In *Viking Group, Inc. v. Pickvet*, the agreement chose Michigan law, which by this time allowed such agreements.[283] It was void under Georgia law in force at the time of contracting but not under current Georgia law.[284] And again, as in the Michigan cases discussed above, the validating Georgia law was not to apply retroactively.[285] The court assumed that Georgia was the state of most significant relationship but concluded that "[i]n determining whether the restrictive covenant is contrary to the fundamental policy of Georgia, this [c]ourt will look at

275. *Id.*
276. *Id.* at 826.
277. *See id.*
278. *Id.*
279. *Shipley*, 728 F. Supp. at 826.
280. *Id.*
281. *Id.*
282. *See, e.g.*, Viking Grp., Inc. v. Pickvet, No. 17-cv-103, 2017 WL 1662798, at *3–5 (W.D. Mich. May 3, 2017).
283. *Id.* at *2.
284. *Id.* at *4.
285. *Id.*

Georgia's current policy, as reflected in its existing statutes."[286] Some other Georgia cases stemming from this change in Georgia law reach the opposite conclusion, using the old Georgia law to determine whether a choice of law clause is contrary to public policy.[287] In *Lowe Electric Supply Co. v. Rexel, Inc*., a Georgia employee sought to defeat enforcement of a non-competition agreement that had a Florida choice of law clause.[288] At the time of the agreement, the clause was valid under Florida law but invalid under Georgia law.[289] The court concluded that Florida law did not apply because it contravened Georgia public policy, therefore taking the public policy to be that which stood at the time of the agreement.[290] But its analysis conflates the result that would occur under Georgia law if Georgia law applied with the result that would occur under the choice of law question of *whether* Georgia law applied. If the case had been entirely domestic to Georgia and the issue was whether to apply the old or new version of Georgia law, then the court's observation that "a provision that is 'void *ab initio* as against public policy is never in force, cannot be ratified or affirmed[,] and is not subject to being enforced by the courts'" would control and the law invalidating the clause that existed at the time of the contract would govern.[291] But the case was not wholly domestic to Georgia, and the question was whether to apply Florida law pursuant to the choice of law clause.[292] Under Georgia choice of law (consistent with the Second Restatement), the parties' choice of law is to be upheld unless it "would contravene the public policy of Georgia."[293] The question is thus not about Georgia law, which due to prospective application may be an old law, but Georgia policy. The confusion is

286. *Id.* at *4–5.
287. *See, e.g.*, Lowe Elec. Supply Co. v. Rexel, Inc., No. 14–CV–335, 2014 WL 5585857, at *5–6, *9 (M.D. Ga. Nov. 3, 2014).
288. *Id.* at *1, *9.
289. *Id.* at *2, *5–6, *9.
290. *Id.* at *9.
291. *See id.* at *6 (quoting Loney v. Primerica Life Ins. Co., 499 S.E.2d 385, 387 (Ga. Ct. App. 1998)).
292. *Id.* at *1, *9.
293. *Lowe Elec. Supply Co.*, 2014 WL 5585857, at *9; *see* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187(2)(b) (AM. L. INST. 1971).

perfectly captured by the court's conclusion that the non-competition clause was "void under old Georgia law and against public policy."[294]

Law and policy are not synonymous. This distinction between a state's law and its policy was relied on by the court in *Viking* to distinguish a prior Georgia appellate court decision, *Bunker Hill International, Ltd. v. Nationsbuilder Insurance Services, Inc*.[295] Although the court in *Bunker Hill* relied on old Georgia law to void a choice of law clause, the court in *Viking* observed that it did not address whether "the change in the law constituted a change in Georgia's public policy."[296]

The distinction between state law and state policy finds support in other cases and contexts. For example, in *Kronovet v. Lipchin*, the parties chose Maryland law to govern a commercial real estate financing agreement.[297] The borrower argued that the choice of law clause should not be enforced because the interest rate allowed under Maryland law exceeded that allowed under New York law at the time of the transaction.[298] The court, applying § 187, assumed New York was the state of most significant relationship but found that the choice of Maryland law was not prevented by New York policy because New York law changed three years after the transaction to liberalize its

294. *Lowe Elec. Supply Co.*, 2014 WL 5585857, at *9.

295. Viking Grp., Inc. v. Pickvet, No. 17-cv-103, 2017 WL 1662798, at *6–7 (W.D. Mich. May 3, 2017); Bunker Hill Int'l, Ltd. v. Nationsbuilder Ins. Servs., Inc., 710 S.E.2d 662 (Ga. Ct. App. 2011) (holding that a restrictive covenant in an employment contract with a choice of law clause instructing the application of Illinois law was void under Georgia law).

296. *Bunker Hill*, 710 S.E. 2d at 665 & n.1; *Viking*, 2017 WL 1662798, at *6. *Bunker Hill*, in turn, was relied on in *Boone v. Corestaff Support Services, Inc.*, though the court did not discuss the merits of *Bunker Hill's* mechanical approach. Boone v. Corestaff Support Servs., Inc., 805 F. Supp. 2d 1362, 1369 (N.D. Ga. 2011). It was probably correct to follow *Bunker Hill* by rote since *Boone* was a diversity case in Georgia and therefore the court was bound to follow Georgia choice of law rules—for better or worse. *Id.* at 1366. Similar reasoning was employed in *Carson v. Obor Holding Co*., which dealt with a forum selection clause choosing Florida law. Carson v. Obor Holding Co., 734 S.E.2d 477, 479–81 (Ga. Ct. App. 2012). The court regarded the enforceability of a forum selection clause as a matter of procedure and therefore applied Georgia law. *Id.* at 480–81. The case is distinguishable from the issue under discussion here since it did not address the enforceability of a choice of law clause. The court did conclude, however, that the forum selection clause was unenforceable because it was in violation of old, not current, Georgia law. *Id.* at 479 n.1, 484.

297. Kronovet v. Lipchin, 415 A.2d 1096, 1098 (Md. 1980).

298. *Id.* at 1099, 1105–06.

usury restrictions.[299] The court reasoned that "[s]uch a substantial change in statutory law indicates that the New York policy [at the time of the transaction was] not a fundamental one."[300] The court thus relied on the current law, not the time-of-transaction law, to ascertain public policy.[301]

In *Case 2*, the law of the chosen state validates the contract just as the former law of the state of most significant relationship validates the contract.[302] But the new law of the state of most significant relationship invalidates the clause. As suggested in the above discussion of *Case 1*, one should use the current law of the state of most significant relationship to determine its policy. But a proper commitment to upholding expectations and validating consensual transactions leads to applying the former policy and therefore validating the transaction, even though the new policy would invalidate it. The usual rule against retroactivity supports favoring the protection of past expectations over the concerns of current policy.[303] As the Second Restatement of Contracts puts it, "[w]hether a promise is unenforceable on grounds of public policy is determined as of the time that the promise is made and is not ordinarily affected by a subsequent change of circumstances, whether of fact or law."[304] Granted, sometimes new law is applied retroactively to fulfill current public policy, but prospective application—at least as to statutory law—is the rule, and retroactivity is the exception.[305] Even as to judicial decisions, which normally apply retroactively, courts will

299. *Id.* at 1104–06.

300. *Id.* at 1106.

301. *See id.*; Blanch v. Chubb & Sons, Inc., 124 F. Supp. 3d 622, 633 (D. Md. 2015) (noting Maryland courts have "assessed the significance of a state's policy by evaluating subsequent statutory amendments").

302. *See supra* Table 1.

303. *See* Munzer, *supra* note 8, at 426–27.

304. RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. d (AM. L. INST 1981).

305. *See, e.g.*, Moran v. Harris, 182 Cal. Rptr. 519, 522 (Ct. App. 1982) (stating that, when applying former law to uphold validity of a fee agreement, one should "evaluate the legality of this type of contract as of the time of the creation of the contractual interest"); Di Giacomo v. City of New York, 397 N.Y.S.2d 632, 638 (App. Div. 1977) ("Generally, the validity of a contract depends upon the law as it existed at the time it was made, except that it may be affected by subsequent legislation in the exercise of the police power, or by a subsequent statute announcing a new public policy . . . ." (quoting 10 N.Y. Jur., Contracts § 129)), *rev'd on other grounds*, 387 N.E.2d 622 (N.Y. 1979).

decline retroactive application to protect expectations grounded in contracts created under the former law.[306]

This result finds support in the case law (although they sometimes mistakenly refer to the old law as reflecting "policy").[307] In *Eakle v. Grinnell Corp.*, the plaintiff agreed to a non-competition agreement in connection with selling his Oklahoma business to the defendant.[308] The covenant stipulated that Delaware law should govern.[309] The plaintiff sued in Oklahoma seeking a declaratory judgment that the covenant was unenforceable.[310] Although the covenant was valid under the law of the chosen state, the plaintiff argued it violated an Oklahoma statute that limited enforceability of covenants not to compete.[311] The court found that although the covenant did exceed the permitted scope of a covenant under that statute, the statute did not apply because it was enacted after the parties signed the covenant.[312] Because it is presumed "that parties contract with reference to the applicable law at the time of the contract," the disabling statute had "no application with respect to the court's analysis of the public policy

306. *See, e.g.*, Pollard v. State Farm Fire & Cas., Nat'l Union Ins. Co., 122 F. App'x 837, 840 (6th Cir. 2005) ("The general rule is that a decision . . . overruling a former decision is retrospective in its operation, . . . [except] where contractual rights have arisen or vested rights have been acquired under the prior decision." (quoting Peerless Elec. Co. v. Bowers, 129 N.E.2d 467, 468 (Ohio 1955))); Marsh v. Dixon, 707 N.E.2d 998, 1001 (Ind. Ct. App. 1999) ("[P]ronouncements of common law made in rendering judicial opinions of civil cases have retroactive effect unless such pronouncements impair contracts made or vested rights acquired in reliance on an earlier decision." (quoting Sink & Edwards, Inc. v. Huber, Hunt & Nichols, Inc., 458 N.E.2d 291, 295 (Ind. Ct. App. 1984))); S. R. Shapiro, Annotation, *Prospective or Retroactive Operation of Overruling Decision*, 10 A.L.R.3d 1371, § 5(a) (1966) (noting the general rule of retroactivity of judicial decision has an exception "where there has been justifiable reliance on decisions which are subsequently overruled and those who have so relied may be substantially harmed if retroactive effect is given to the overruling decision"); Spectrum Health Hosps. v. Farm Bureau Mut. Ins. Co. of Mich., 821 N.W.2d 117, 135–36 (Mich. 2012) ("When a 'statute law has received a given construction by the courts of last resort and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them impaired, by a change of construction made by a subsequent decision.'" (quoting Gentzler v. Constantine Village Clerk, 31 N.W.2d 668, 669 (Mich. 1948))).

307. *See* cases cited *supra* notes 305–06.

308. Eakle v. Grinnell Corp., 272 F. Supp. 2d 1304, 1306 (E.D. Okla. 2003).

309. *Id.* at 1307.

310. *Id.* at 1305. The case was filed in state court in Oklahoma and removed to federal court. *Id.* at 1307.

311. *Id.* at 1307–10.

312. *Id.* at 1310.

of Oklahoma."[313] The court thus used the law of the state of most significant relationship that was in effect at the time of the contract to assess whether the law of the chosen state was contrary to its policy.[314] This avoided the application of a new law when the later-enacted law would have upset the parties' expectations.[315]

Similar reasoning was used in *Supply & Building Co. v. Estee Lauder International, Inc.*[316] In that case, a Kuwaiti distributor sued for wrongful termination of the distributorship agreement.[317] The parties selected New York law to govern the transaction, and New York law allowed termination without cause.[318] Kuwaiti law also allowed termination without cause at the time of the contract but had changed its law to disallow it by the time of the litigation.[319] The court concluded that "application of Kuwaiti law would be inadvisable because 'it will usually be presumed that the parties to a contract contemplate the application of a law which would uphold the contract, and it cannot be presumed that they intended to submit to a jurisdiction whose law would defeat it.'"[320] The court thus protected expectations and validated the contract by using the time-of-transaction law in the state of most significant relationship.[321]

313. *Id.*

314. *See Eakle*, 272 F. Supp. 2d at 1308–10. Oklahoma choice of law followed the Second Restatement approach: parties "are free to specify by contract the rules under which [the contract will be enforced] . . . . [H]owever, the forum court will not apply the law chosen by the contracting parties should doing so violate the public policy of the forum state." *Id.* at 1308 (quoting Williams v. Shearson Lehman Bros., 917 P.2d 998, 1002 (Okla. Civ. App. 1996)).

315. *See id.* at 1310.

316. Supply & Bldg. Co. v. Estee Lauder Int'l, Inc., No. 95 CIV. 8136, 1999 WL 178783 (S.D.N.Y. Mar. 31, 1999).

317. *Id.* at *1.

318. *Id.* at *2–3.

319. *Id.* at *2 n.3.

320. *Id.* (quoting B.M. Heede, Inc. v. West India Mach. & Supply Co., 272 F. Supp. 236, 240 (S.D.N.Y. 1967)).

321. *See id.* at *2. This description requires a slight gloss. Under New York choice of law, the parties may absolutely select New York law if the transaction's value is at least $250,000. *See id.* The court therefore was not required to consider whether Kuwait was the state of most significant relationship. But the only state plausibly connected to the transaction was Kuwait, and if there were another the state of most significant relationship, it would no doubt be Kuwait as the place of performance of the contract and the location of one of the parties. *Id.* In any event, the relevance to the current point is that the court disregarded post-transaction changes in law of the state other than that chosen by the parties. *See id.* at *2 & n.3.

Cases 3 and *4* may be addressed together. In each of these cases, the law of the chosen state at all times invalidated the clause in question.[322] In *Case 3*, the law of the state of most significant relationship has changed, moving from invalidating to validating the provision.[323] In *Case 4*, the law of the state of most significant relationship moved in the opposite direction, invalidating a formerly enforceable clause.[324] In both cases, however, the parties made an apparent mistake. This is most clear in *Case 4*: In one part of their contract the parties created provisions to govern their affairs, but in another part of the contract the parties directed the application of a law that invalidates those same provisions. At the time, the law of the state of most significant relationship would have validated it.[325] Why go to the effort to choose a law that invalidates an express provision of the agreement when other available law (the law of the state of most significant relationship) validated it? The selection of a law that invalidates a clause of the contract objectively was a mistake. The Second Restatement follows this characterization of the choice of law clause being a mistake and advises that the selection of an invalidating law should be ignored.[326] This serves the goals of upholding the parties' expectations.[327]

If the reference to the law of the chosen state is mistakenly ignored, then, in *Case 3* and *Case 4*, we are left only with the law of the state of most significant relationship. The choice is then between the state's old or new law. In the discussion of choice of law clauses and default rules above, this Article generally recommends, as a default rule, using the law as it existed at the time of the contract's formation.[328] An exception to this analysis was proposed, however, for curative legislation that validates a transaction.[329]

322. *See supra* Table 1.
323. *Id.*
324. *Id.*
325. *Id.*
326. RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. e (AM. L. INST. 1971).
327. *Id.*
328. *See supra* Section III.
329. *See supra* notes 221–36 and accompanying text.

Taking *Case 3* next, the former law of the state of most significant relationship voided the contract or a clause, but that law now validates it.[330] Since the main policy of choice of law for contracts is to uphold expectations,[331] one can argue that the new, validating law should apply over the old in order to fulfill the parties' expectations. There is no current policy of the state of most significant relationship that would invalidate the provision. The only invalidating law is either defunct or is the law of the chosen state, which has been laid to one side as a product of a mistake. And as to the law of retroactivity, courts apply old law—giving new law prospective application only—to protect settled expectations.[332] But in this context, applying old (invalidating) law would frustrate expectations, not protect them. There is little ground of policy to stand against enforcing the contract.

On the other hand, it is notable that this contract or clause was not valid under any law—neither the state of most significant relationship nor the law of the chosen state—at the time of its making. Can a stillborn contract resurrect to life? There is much authority for the proposition that contracts that are void when entered into are of "no effect whatsoever"[333] and are "not contracts at all."[334] Cases stating this principle often reject an argument that an otherwise void contract has been ratified.[335] But courts also reject the argument that an initially void contract can become valid by virtue of a change in law.[336] An "agreement that is illegal by statute or on the grounds of public policy when made is not rendered legal by repeal of the statute or change in the public or legislative policy."[337] This is subject to the exception for curative legislation, discussed above, which purposefully reaches back

330. *See supra* Table 1.

331. *See supra* notes 150–51 and accompanying text.

332. *See supra* notes 303–06 and accompanying text; Rensberger, *supra* note 1, at 477–79 (discussing several cases in which courts carefully considered prior laws in order to honor parties' expectations).

333. *E.g.*, Griffin v. Coca-Cola Refreshments USA, Inc., 989 F.3d 923, 935 (11th Cir. 2021) (quoting Haggart v. Wilczinksi, 143 F. 22, 27 (5th Cir. 1906)), *cert. denied*, 142 S. Ct. 75 (2021).

334. United States v. Baird, 218 F.3d 221, 231 (3d Cir. 2000) (quoting JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 17, at 32 (3d ed. 1990)).

335. *See* cases cited *supra* notes 333–34; Yvanova v. New Century Mortg. Corp., 365 P.3d 845, 856–57 (Cal. 2016); Wilson v. HSBC Mortg. Servs., Inc., 744 F.3d 1, 9 (1st Cir. 2014).

336. *See* Palmisano v. U.S. Brewing Co., 131 F.2d 272, 273 (10th Cir. 1942).

337. *Id.*

in time to validate past transactions.[338] But that applies only when "the Legislature manifests an intention to validate the bargain."[339] Otherwise, a stillborn contract has no chance of resuscitation by a change in the law. Enforceability "on grounds of public policy is determined as of the time that the promise is made and is not ordinarily affected by a subsequent change of circumstances, whether of fact or law."[340]

Thus, while a good policy argument can be made for enforcement of an initially void but now valid contract, the weight of authority appears to preclude that result.[341] There are, however, a few possible routes for reaching a different outcome. First, it could be argued that the once-void-always-void rule applies in the domestic context, but that a different rule should apply in multistate cases. It is true that the presence of a choice of law question sometimes seems to give courts an imaginative freedom that they are hesitant to use in domestic cases.[342] But the problem considered here is barely a choice of law problem. The law of the other state comes in only by way of a choice of law clause that, it will be recalled, was set aside as the product of a mistake. Given that, the case is really a domestic case in all but formal name. Second, one might differentiate a prior law that entirely voided a contract from one that merely voided a clause, arguing that there was a contract at all times and it is only the enforceability of a particular clause that is at issue. But this remains only a (perhaps) clever argument unsupported by authority. The Second Restatement of

338. *Id.* at 274; *see supra* notes 221–31 and accompanying text.

339. Licznerski v. United States, 180 F.2d 862, 865 (3d Cir. 1950) (quoting RESTATEMENT (FIRST) OF CONTRACTS § 609 (1932)); Kopecky v. Kopecky (*In re* Estate of Kopecky), 574 N.W.2d 549, 552 (Neb. Ct. App. 1998).

340. RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. d (AM. L. INST. 1981); *see also* 8 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 19:35 (4th ed. 1990), Westlaw (database updated May 2022) ("[I]f the agreement is absolutely void at its inception because it is made so by law . . . it is not validated by a subsequent curative statute or by repeal of the prohibitory law. The legislature cannot make a contract when the parties themselves have made none." (footnotes omitted)).

341. *See, e.g.*, Palmisano, 131 F.2d at 273.

342. *See* Louise Weinberg, *Methodological Interventions and the Slavery Cases; or, Night-Thoughts of a Legal Realist*, 56 MD. L. REV. 1316, 1330 (1997) ("Conflicts cases are not essentially different from other cases in which courts cast about for a device to avoid an otherwise applicable legal rule. One of the allures of the strategy of choosing another state's law is that this device seems so unintrusive.").

Contracts does not differentiate in its public policy discussion between contracts and terms of a contract.[343]

Case 4 differs in that the law of the state of most significant relationship has shifted in the opposite direction, from validating to invalidating.[344] In this case, the proper question is whether to give effect to the parties' expectations—which were validated by the only law applicable at the time they contracted—or the current policy of the state of most significant relationship.[345] The result should probably turn on the purposes of the new, invalidating rule. If it is a sufficiently strong expression of public policy, then the expectations of the parties must yield to the current demands of the state.[346] Contract doctrine states that parties are presumed to have contracted in reliance on the law as it existed at the time they contracted: "[T]he laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."[347] But this is tempered by a corollary that the parties also must recognize that the state "continues to possess authority to safeguard the vital interests of its people."[348] Therefore, in addition to existing laws being read into a contract, "the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."[349] These doctrines nicely balance the competing concerns present here: party expectations versus the state's power to act for the public good.

In the end, *Case 4* presents a straightforward issue of retroactivity. The competing policies discussed above that underlie the presumed incorporation of current law into contracts—balancing current policy against past reliance—also animates the question of retroactivity. In

343. *See* RESTATEMENT (SECOND) OF CONTRACTS § 179 (AM. L. INST. 1981) (discussing the effect of public policy on "enforcement of promises or other *terms*" (emphasis added)).

344. *See supra* Table 1.

345. *See* Rensberger, supra note 1, at 430 (noting choice of law is characterized by "the tug between the settled expectations of the past and the policy demands of the current").

346. RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. g (AM. L. INST. 1971).

347. Von Hoffman v. City of Quincy, 71 U.S. 535, 550 (1866).

348. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434 (1934) (discussing this issue in the context of the Contract Clause of the U.S. Constitution).

349. *Id.* at 435.

Case 4, the choice of law issue has been driven out of the analysis by the disregard of the mistaken reference to the law of another state that would invalidate the provision. We are then left with only the law of the state of most significant relationship—current and past. If the state's normal rules of retroactivity would protect the parties from a change in the law, then the new law should not apply. If current public policy demands a change despite reliance interests, then the new law applies retroactively.

C. When the Law of the Chosen State Has Changed

The topic now shifts to the result when the law of the state chosen by the parties changes. The analysis here is much the same as above when the law of the state of most significant relationship changes.[350] There are differences, however. One type of analysis examines the law and policy of the state of most significant relationship to determine whether that policy is violated by the law of the chosen state.[351] In the present context—examining changing law in the state whose law the parties chose—one is not seeking to determine the policy of that state. Instead, one looks to the law that the parties intended to apply. Stated differently, the question in examining changes in law of the state of most significant relationship is whether to honor the parties' choice of law. In the present context, the question is not *whether* to apply the law of the chosen state but *what* the law of the chosen state is. Accordingly, in this context, the parties' intent assumes even greater importance. Indeed, one approach to the problems in this section may simply be to ask what the parties intended. Table 2 shows the array of possible cases.

350. *See supra* Section IV.B.
351. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 188 (AM. L. INST. 1971).

Table 2.

	State of Most Significant Relationship (Florida)	*Chosen State (New York)*	
Case No.		Old Law	New Law
5	Valid	Invalid	Valid
6	Valid	Valid	Invalid
7	Invalid	Invalid	Valid
8	Invalid	Valid	Invalid

Case 5 is structurally identical to *Case 1* discussed above.[352] At all times, the contract provision has been valid under the law of the state of most significant relationship. It is now valid under the law of the chosen state, although it was not at the time of the contract. If the court applies the old, invalidating law of the chosen state, it is serving neither state's policy ends. The expectations of the parties are better served by applying the new law of the chosen state because it validates the clause they agreed to.[353] If that is not convincing enough, an even simpler solution is to treat the choice of an invalidating law as a mistake and ignore it for that reason.[354] If one does so, then the law left is that of the state of most significant relationship which has always validated the provision in question.

In an analogous situation, courts may apply the law of a state other than the state chosen by the parties when the legal issue has not been decided by that state's courts. In other words, the law of the selected state is a blank. For example, in *Waldron v. Armstrong Rubber Co*., a Michigan court was applying the Indiana statute of limitations pursuant to a Michigan borrowing statute.[355] But two different statutes of limitation were arguably applicable, and Indiana courts had yet to decide which one applied.[356] The Michigan court chose to apply

352. *See supra* Table 1.

353. *See supra* notes 150–55 and accompanying text. Under English law, the court is to apply new law—that existing at the time of the litigation—when a choice of law clause is addressing mandatory terms. *See* Kelly, *supra* note 99; DICEY, MORRIS & COLLINS, *supra* note 100.

354. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. e (AM. L. INST. 1971).

355. Waldron v. Armstrong Rubber Co., 236 N.W.2d 722, 723 (Mich. Ct. App. 1975).

356. *Id.*

Indiana law based on its prediction of how Indiana courts would rule.[357] Alternatively, the court noted, it "could simply state that, since Indiana's highest court has not decided this issue, *there is no Indiana law to apply* and that, as a result, Michigan law will apply."[358] While it found this approach had "merit," the court felt constrained by the terms of the remand it was operating under to use the predictive approach instead.[359]

Courts, alas, do not always apply the newer law validating the transaction, sometimes because of overreliance on the law of retroactivity. In *In re Mickler*, the court addressed a loan with an interest rate that exceeded that permitted by the law chosen by the parties at the time of the transaction but which had become lawful by the time of the litigation.[360] The court noted the "principle of validation," which argues for courts upholding "the parties[']express designation of the validating law" to fulfill the expectations of the parties who have contracted "with a view toward the validity of the contract and its provisions."[361] A long pedigree supports the court's reliance upon the principle of validation. In *Pritchard v. Norton*, the Supreme Court described the choice of law inquiry in contract cases as a search for the law "which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation."[362] And this quest for presumed intent leads to the law of a state that validates the transaction because the "parties cannot be presumed to have contemplated a law which would defeat their engagements."[363] So the court in *In re Mickler* began on solid footing but concluded that, under the state's domestic law of retroactivity, the

357. *Id.* at 723–24.
358. *Id.* at 723 (emphasis added).
359. *See id.* at 723–24.
360. Mickler v. Maranatha Realty Assocs., Inc. (*In re* Mickler), 20 B.R. 346, 347–48 (Bankr. M.D. Fla. 1982).
361. *Id.* at 348.
362. Pritchard v. Norton, 106 U.S. 124, 136 (1882).
363. *Id.* at 137 (quoting 4 ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 470, 471).

new statute did not apply to the transaction.[364] Instead, the old, invalidating provision applied.[365]

This analysis goes astray at two points. First, it overweighs the law of retroactivity of the state chosen by the parties. It is true that there is less flexibility to disregard the chosen state's law when it changes and more flexibility when the changed law is of the state of most significant relationship. In the latter context, the state of most significant relationship is relevant when another law is chosen in that it may have a *policy* at odds with the chosen state's law. As such, there is some room to maneuver and argue that current policy is not reflected in an older law of the state of most significant relationship, even when the new law of that state is not to be applied retroactively. But when the question is what effect a change in the law of the chosen state has, one is not asked to consider the chosen state's policy, only its *law*. And a rule of only prospective application is a part of that law. Thus, there is a greater argument here for using the law of retroactivity of the chosen state.

Increased reliance on the chosen state's law of retroactivity appears in some cases. In *Foulger-Pratt Residential Contracting, LLC v. Madrigal Condominiums, LLC*, the parties' arbitration agreement provided that it was to be interpreted and enforced under the laws of the District of Columbia.[366] But the District's laws had changed since the agreement to arbitrate; the Revised Uniform Arbitration Act (Revised Act) replaced the former Uniform Arbitration Act.[367] The Revised Act was explicitly retroactive.[368] The court ruled that judicial review was therefore covered by the Revised Act, not the old.[369] Although it is unclear from the opinion what was at stake between the two versions of the Act, the Revised Act has some key differences

364. *In re Mickler*, 20 B.R. at 349–50.

365. *See id.* There was an express provision in the statute that liberalized usury that disallowed its retroactive application. *Id.* at 349.

366. Foulger-Pratt Residential Contracting, LLC v. Madrigal Condos., LLC, 779 F. Supp. 2d 100, 108 (D.D.C. 2011).

367. *Id.* at 111.

368. *Id.* ("[A]ny arbitration agreement entered into before or after that date, as well as any pending arbitration hearing, would be governed by the [new legislation].").

369. *See id.* at 111–12.

including an allowance of attorney's fees and explicit authority to award punitive damages.[370] Regardless, the decision to use new, not old, law was based entirely on the law of retroactivity of the chosen state.[371]

Likewise in *Sun v. Advanced China Healthcare, Inc*., the court mechanically relied on the non-retroactivity under the chosen state's law to use that state's old law.[372] The plaintiffs sued in Washington under Washington law for securities fraud occurring there, but a forum selection clause required suit in California, and a choice of law clause selected California law.[373] The lower court enforced the forum section clause by dismissing the case.[374] The plaintiffs argued against enforcement of the forum selection clause on the ground that they would receive no remedy in California, the chosen forum.[375] California, it was argued, would not apply Washington law because of the choice of law clause and would not apply California law because, at the time of the transaction, it limited the statutory remedy to sales of securities in that state.[376] But at the time of the litigation, the in-state limitation had been deleted.[377] The court rejected the argument that California would not be an adequate forum, in part, because the lower court had conditioned dismissal on the defendant assenting to the application of California law.[378] But it also concluded that "the law in effect at the time of the transaction applies," so the older, disabling law would apply were it not for the condition imposed on the defendant.[379]

370. *See* Bruce E. Meyerson, *The Revised Uniform Arbitration Act*: *15 Years Later*, 71 DISP. RESOL. J., no. 1, 2016, at 1, 33 ("In a significant change from the UAA, the RUAA authorizes an arbitrator to award attorneys' fees . . . .").

371. *See Foulger-Pratt*, 779 F. Supp. 2d at 112 ("[W]here the legislature has made clear that a law shall apply retroactively, the court shall uphold such effect . . . .").

372. *See* Sun v. Advanced China Healthcare, Inc., 901 F.3d 1081, 1092 & n.10 (9th Cir. 2018).

373. *Id.* at 1085 & n.1.

374. *Id.* at 1085.

375. *Id.* at 1086.

376. *See id.* at 1088–89, 1092 & n.10.

377. *See* Appellants' Opening Brief at 14 & n.1, Sun v. Advanced China Healthcare, Inc., 901 F.3d 1081 (9th Cir. 2018) (No.16-35277).

378. *Sun*, 901 F.3d at 1092–93.

379. *Id.* at 1092 n.10.

The court based its conclusion that the chosen state's older law applied entirely on the law of retroactivity of that state.[380]

But using the chosen state's law of retroactivity, as in *In re Mickler*, *Foulger-Pratt*, and *Advanced China Healthcare*,[381] overlooks the fact that the law of the chosen state is applying as a result of it being *chosen* by the parties rather than applying because of its own force. Indeed, another state is the state of most significant relationship, and that state's law would apply were it not for the choice of law clause.[382] Because the law is chosen by the parties and does not apply of its own force, one is not bound by the temporal restrictions on the law of the chosen state.[383] The policy underlying § 187 instructs courts to uphold the parties' expectations,[384] and applying the former law of the chosen state to invalidate their agreement does not advance that goal.

Moreover, under § 187, absent "contrary indication of intention, the reference is to the local law of the state of the chosen law."[385] While this is clearly meant to exclude the choice of law rules of the chosen state,[386] the Second Restatement's reasoning would extend to the law of retroactivity. The parties "almost certainly have the local law, rather than the law, of that state in mind."[387] And using the chosen state's retroactivity law would, as is the case with choice of law rules, "introduce the uncertainties . . . into the proceedings and would serve to defeat the basic objectives, namely those of certainty and predictability, which the choice-of-law provision was designed to achieve."[388] Indeed, one may conceive of retroactivity rules as choice of law rules since they serve to decide which law applies—they are

380. *See id.* at 1092–93.

381. *Id.* at 1092; Mickler v. Maranatha Realty Assocs., Inc. (*In re* Mickler), 20 B.R. 346, 348 (Bankr. M.D. Fla. 1982); Foulger-Pratt Residential Contracting, LLC v. Madrigal Condos., LLC, 779 F. Supp. 2d 100, 108, 112 (D.D.C. 2011).

382. *See In re Mickler*, 20 B.R. at 348.

383. *See id.* at 347; *Sun*, 901 F.3d at 1085.

384. RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. e (AM. L. INST. 1971).

385. *Id.* § 187(3).

386. *See id.* § 187 cmt. h (the reference does not include "choice-of-law rules" of the chosen state).

387. *Id.* (internal quotation marks omitted).

388. *Id.*

rules about the applicability of rules.[389] And in the related context of federal law borrowing state law, courts use the federal law of retroactivity—forum law—not the retroactivity law of the borrowed state.[390]

This observation leads to the second problem with applying the new, invalidating law: it frustrates the parties' intentions. If the parties chose a state's law that at the time invalidated their transaction, the normally recommended solution is to disregard this choice as a mistake.[391] If one sets aside the choice as a mistake, then the only law left is the law of the other state. And that state, it will be recalled, is the state of most significant relationship, whose law is normally applicable and validates the transaction.[392] *In re Mickler*, a usury case, provides a good illustration.[393] The law of the state *not* chosen (which had substantial connections to the parties and the transaction) allowed the contractual interest rate, but the rate was invalid under the law of the chosen state as that law stood at the time of the transaction.[394] The Second Restatement's general provision on usury provides that

> [t]he validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188.[395]

389. *See* Rensberger, *supra* note 1 at 425–26; *see Retroactivity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

390. *See* TwoRivers v. Lewis, 174 F.3d 987, 993 (9th Cir. 1999) ("[W]e apply federal law, not state law, in deciding whether to apply the amended [state law] retroactively."); Hemmings v. Barian, 822 F.2d 688, 691 (7th Cir. 1987) ("[T]he six-year statute of limitations [under federal law] is applicable to this case despite Wisconsin's law [denying] retroactive application of statutes of limitations.").

391. RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. e (AM. L. INST. 1971).

392. *See id.*

393. Mickler v. Maranatha Realty Assocs., Inc. (*In re* Mickler), 20 B.R. 346 (Bankr. M.D. Fla. 1982).

394. *See id.* at 347–48.

395. RESTATEMENT (SECOND) OF CONFLICT OF L. § 203 (AM. L. INST. 1971).

Thus, if the parties had not utilized any choice of law clause, the contract likely would have been upheld.[396] This makes the choice of law clause a clear mistake. In contrast to the recommendation of the Second Restatement to ignore such mistakes,[397] the court seemed eager to punish the lender for it: "The mere fact that the Defendants' Georgia attorney failed to apprise himself and his clients of controlling Florida law cannot change the lenders' unambiguous expression of Florida law in the promissory note."[398]

Case 6 may be handled in much the same way. The agreement has been valid under the law of the state of most significant relationship at all times and was valid under the law of the chosen state at the time of the transaction. It is now invalid under the law of the chosen state. The basic thrust of § 187 is to allow parties to enable their transactions by choosing a validating law.[399] The parties' expectations are best served by applying the law of the chosen state as it existed at the time of their contract or, alternatively, the law of the state of most significant relationship.[400] It is extremely unlikely that the parties intended that later-created law should apply to invalidate the very agreement they entered into.[401]

MSF Holding Ltd. v. Fiduciary Trust Co. International illustrates this analysis.[402] The case involved a purported assignment of a letter of credit.[403] The parties chose the International Chamber of Commerce's Uniform Customs and Practice for Documentary Credits to govern, supplemented by New York law for matters not covered by the Uniform Customs and Practices.[404] The court concluded that New York law as it existed at the time of the transaction applied.[405] The

396. *See id.*; *In re Mickler*, 20 B.R. at 348.
397. RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. e (AM. L. INST. 1971).
398. *In re Mickler*, 20 B.R. at 348.
399. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. a (AM. L. INST. 1971).
400. *Id.*
401. *See id.* § 187 cmt. e.
402. MSF Holding Ltd. v. Fiduciary Tr. Co. Int'l, 435 F. Supp. 2d 285 (S.D.N.Y 2006), *aff'd on other grounds*, 235 F. App'x 827 (2d Cir. 2007).
403. *Id.* at 288.
404. *Id.* at 293.
405. *Id.* at 294.

court relied upon the contract principle that "[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms."[406] Applying that law, the court concluded that an assignment had been completed by delivery of the letter of credit to the assignee.[407] The approach of the court was thus to anchor the contract to the law as it existed at the time of the transaction.[408] In *Case 5*, I argue that the law of the present should be applied, but in *Case 6*, the old law validates and the new law invalidates. In *Case 5*, it is the new law that validates. The overarching rule suggested, therefore, is to apply either the chosen state's old law or the new law, depending upon which one validates the transaction.

Pentax Corp. v. Boyd supports this principle of validation.[409] In that case, a Colorado corporation sold goods on credit to a Nevada corporation but failed to perfect its security interest.[410] The president of the Nevada corporate buyer had signed a personal guarantee providing that the agreement was governed by Colorado law.[411] The buyer corporation went bankrupt, leaving the seller with no means to recover its unsecured debt.[412] In an action against the president on the guarantee, the guarantor argued that he was not liable because the seller impaired the collateral by failing to perfect.[413] The guarantee included language broad enough to constitute a waiver of the defense of impairment of collateral.[414] The court accepted the parties' choice of Colorado law, but under Colorado law, the perfection and the effect of failing to perfect are governed by the law of the location of the collateral, which was Nevada.[415] The court applied Nevada law that

406. *Id.* (quoting Norfolk & W. Ry. Co. v. Am. Train Dispatchers' Ass'n, 499 U.S. 117, 130 (1991)).
407. *See id.* at 299–302. Current law would appear to have required the issuer to have been notified of the assignment. *See* N.Y. U.C.C. LAW § 5-114(c) (McKinney 2022) (noting the issuer "need not recognize an assignment of proceeds of a letter of credit until it consents to the assignment.").
408. *MSF Holding*, 435 F. Supp. 2d at 294.
409. Pentax Corp. v. Boyd, 904 P.2d 1024 (Nev. 1995).
410. *Id.* at 1025.
411. *Id.*
412. *Id.*
413. *Id.* at 1027–28.
414. *Id.*
415. *Pentax*, 904 P.2d at 1026, 1027.

was current at the time of the transaction, but which had since been repealed, that allowed a guarantor to waive defenses like the impairment of collateral.[416] The court thus applied the older law designated by the parties' choice of law clause which validated the clause in question.[417]

Other cases support this validation principle. The parties in *In re Chari* entered a series of loan transactions that were "blatantly usurious" under Texas law, the law that the parties selected to govern the transaction.[418] But Texas law had changed between the time of the transaction and the litigation,[419] and the court declined to apply a post-transaction Texas statute that may have made the loan somewhat less usurious, allowing for late fees to be excluded from the calculation of permissible interest.[420] The court chose to use the Texas usury law in effect at the time of the transactions.[421] *In re Chari* thus appears to support the use of old, time-of-transaction invalidating law. But the court also concluded that even if the new statute were temporally applicable, it did not apply because it allowed late fees only if the payment was more than ten days late, which was not the case under the facts.[422] The creditor would have received no relief under the statute.[423] But the court concluded that the new statute was, in part, a codification of prior practice, and prior practice *allowed* a late fee without the ten-day limitation.[424] The statute was thus *more* restrictive

416. *Id.* at 1027–28.

417. *See id.*

418. Rieser v. Todd (*In re* Chari), No. 99-35862, 2005 WL 4030034, at *4, *8 (Bankr. S.D. Ohio Sept. 2, 2005). The court equivocated on the efficacy of the choice of law clause. It noted that the documentation of the transaction differed from the agreed to terms and regarded them as a "sham." *Id.* at *5, *9. Accordingly, it analyzed choice of law as if there were no choice of law clause. *Id.* But, in doing that analysis, the court relied heavily on the parties' stated intention that Texas law was to apply: "A key component in the court's decision is the parties' choice of law. Despite the fact that the documents were a sham, those documents still contain clear choice of law clauses choosing Texas law." *Id.* at *10. In short, the court disregarded a choice of law clause only to later rely on it as "key" in determining what law to apply. *Id.*

419. *Id.* at *11.

420. *Id.* at *13.

421. *Id.*

422. *Id.*

423. *Id.*

424. *In re Chari*, 2005 WL 4030034, at *13.

by putting a time requirement on the late fee. In the end, the creditor was allowed to take advantage of the old law that (partially) validated the transaction.[425]

And in *Coon v. Federal National Mortgage Association*, the court declined to apply new law of the state chosen by the parties that would have invalidated a remedy that the creditor had at the time of the transaction.[426] *Coon* does not fit precisely into *Case 6* because it does not involve a contract clause that was valid at the time of the transaction but was invalidated by later law.[427] But it is at least an adjacent case: A creditor wished to use a remedy that was lawful at the time of the transaction (albeit not expressly mentioned in the agreement) which was later declared illegal.[428] The plaintiff in *Coon* sued for wrongful foreclosure, alleging that the lender had violated a prohibition on "dual track foreclosure"[429] that requires lenders to evaluate loan forbearance applications before proceeding with foreclosure.[430] The deed of trust had a choice of law clause selecting "federal law and the law of the jurisdiction in which the Property is located" and a clause defining "Applicable Law" as "all controlling applicable federal, state[,] and local statutes, regulations, ordinances[,] and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions."[431] It empowered the creditor to use any remedy "permitted by Applicable Law."[432] The plaintiff argued that the dual track foreclosure violated a federal regulation issued after the transaction.[433] In rejecting this argument, the court relied upon the doctrine that "courts should not

425. *Id.*
426. Coon v. Fed. Nat'l Mortg. Ass'n, No. 18CV108, 2018 WL 3887508, at *6–7 (E.D. Va. Aug. 15, 2018).
427. *See id.*; *see supra* Table 2.
428. *Coon*, 2018 WL 3887508, at *6–7.
429. *Id.* at *3,
430. *See* 12 C.F.R. § 1024.41(f)(2) (2022).
431. *Coon*, 2018 WL 3887508, at *2, *9 n.17 (alteration in original) (quoting the Deed of Trust in question).
432. *Id.* at *6.
433. *Id.* at *7.

interpret contracts to incorporate *future* changes to the law."[434] Instead, because contracts "are generally understood to incorporate only those laws which exist at the time of formation[,] . . . [an] after-enacted regulation could not have been incorporated through the 'all applicable law' clause in a deed of trust."[435] The creditor was thus allowed to keep the remedy that was lawful at the time of the transaction.[436]

Similar to *Coon*, in *Gloucester Realty Corp. v. Guthrie*, the court held that a mortgagee's foreclosure remedies included those existing at the time of the contract, despite later-enacted limitations.[437] The mortgage in *Guthrie* was executed in 1926, and it expressly referenced a statute requiring that a sale upon foreclosure be advertised "as the deed may provide, or, if none be provided, then in such reasonable manner as the trustee may elect."[438] A 1940 statute, however, required advertising at least once per week for four successive weeks.[439] The court relied in part upon a retroactivity analysis, concluding that the legislature intended only prospective application of the amended statute.[440] But the court also relied upon the reference to the old statute in the deed of trust as a contractual choice of law that selected the law of the state as it existed at that time.[441] By "expressly incorporating [section] 5167 in the deed, it became a part of the contract," and the "mode of advertisement . . . was provided in the deed by the incorporated section 5167" under which the sale "should be advertised 'in such reasonable manner as the trustee may elect.'"[442]

Similar results can be found in cases assessing whether a post-transaction enactment violates a contract's clause. In *Cummings, McGowan & West, Inc. v. Wirtgen America, Inc.*, a franchisee alleged

434. *Id.* (quoting Condel v. Bank of Am., N.A., No. 12cv212, 2012 WL 2673167, at *8 (E.D. Va. July 5, 2012)).

435. *Id.* (quoting Reamer v. Deutsche Bank Nat'l Tr. Co. Ams., No. 15cv00601, 2016 WL 1259557, at *5 (E.D. Va. Mar. 28, 2016)).

436. *Id.*

437. Gloucester Realty Corp. v. Guthrie, 30 S.E.2d 686, 688 (Va. 1944).

438. *Id.* at 687 (emphasis omitted).

439. *Id.*

440. *Id.* at 687–88.

441. *Id.* at 688.

442. *Id.* (quoting the 1926 version of the relevant code section which is now codified at VA. CODE ANN. § 55.1-320 (2022)).

that his termination violated a Tennessee statute enacted after the parties entered the contract.[443] The franchise agreement chose Tennessee law and allowed termination "with or without cause."[444] Seven years later, Tennessee amended its franchisee protection statute to prohibit termination without "good cause."[445] The new law of the chosen state thus collided with an express term of the contract. The court found the new statute inapplicable under the Tennessee constitution.[446] In doing so, the court rejected an argument that a severability provision, which would sever contract provisions that could violate the law, indicated that the parties anticipated future changes to the law and intended to "incorporate changes in the governing law."[447]

In *Case 7*, the agreement was at all times void under the law of the state of most significant relationship and was originally void under the chosen state's law but is now valid. Can the obligation, apparently stillborn, be resurrected by the new law of the chosen state? *Case 7* is structurally similar to *Case 3* because in both problems, the agreement was initially void under both states' laws.[448] In *Case 3*, the state of most significant relationship supplies the later, validating law;[449] in *Case 7*, it is supplied by the chosen state. It was suggested above that although the parties' expectations would be furthered by applying post-transaction law, that conclusion runs headlong into a good deal of authority providing that a contract void when entered into was never a contract at all.[450] An argument for resuscitation is further confounded when the chosen state is brought in by election of the parties, but the parties evidently made a mistake in choosing a law that, at the time, invalidated their agreement. The usual result is to set aside the choice

443. Cummings, McGowan & West, Inc. v. Wirtgen Am., Inc.,160 F. App'x 458, 459 (6th Cir. 2005).
444. *Id.*
445. *Id.* at 459–60.
446. *Id.* at 462.
447. *Id.* at 462.
448. *See infra* Table 3; *see supra* Table 1; *see supra* Table 2.
449. See *infra* Table 3; *see supra* Table 1.
450. *See, e.g.*, Griffin v. Coca-Cola Refreshments USA, Inc., 989 F.3d 923, 935 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 75 (2021).

of law clause as a mistake.[451] If that is done, there never was any basis for the law of the chosen state to apply, so a later amendment of that state's law is irrelevant.

Moreover, the argument for expectations is weak here. It is one thing to attempt to uphold the parties' expectations when there was an available law validating the agreement. But if the agreement is not valid under the law of the state of most significant relationship and not valid under the law of the chosen state, it is fair to say that regardless of the parties' subjective expectations, they had no legitimate expectations.

Thus, the best treatment here, which parallels the converse instance presented in *Case 3*, is to treat the contract as never existing. Two possible exceptions exist here. First, as noted above in connection with *Case 3*, one might differentiate between an entire agreement that was void and a particular clause of an agreement that was void.[452] In the latter case, there were other valid contractual obligations, and one could say it was a valid contract with an invalid clause. If that clause can be regarded as severable, perhaps the new, validating law can be applied to give force to the formerly void contract term. Second, under normal rules of retroactivity, so-called curative legislation is applied retroactively.[453] If the chosen state's new law is found to be curative legislation—correcting a misapprehension of the law's content—there is a good argument that the corrected statement of the law was actually what the law was meant to be at the time of the transaction. This would lead to validation. If the changed rule is common law and not statutory, then a more adventuresome argument is that a new common law rule in the chosen state is technically not new law but is instead a recent discovery of what the law of the state had always been.[454] The new case is not new law; instead, the new case "vindicate[s] the old one

451. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. e (AM. L. INST. 1971) ("If the parties have chosen a law that would invalidate the contract, it can be assumed that they did so by mistake.").

452. *See supra* notes 342–43 and accompanying text.

453. *See supra* notes 221–31 and accompanying text.

454. *See* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (describing "new" law as an "outside thing to be found," not created).

from misrepresentation."[455] But that view of the law has receded, and this seems too abstract an argument to overcome the practical consequence of the parties having attempted an agreement that was invalid under the law known to exist at the time.

In *Case 8*, the agreement was invalid at all times under the law of the state of most significant relationship and was originally valid under the law of the state chosen by the parties. But the agreement is now invalid under the chosen state's law as well. This problem is similar to *Case 4* in that the agreement was always invalid under one state's law but has moved from initial validity to invalidity under the law of the other state.[456] But in *Case 8* it is the law of the state chosen by the parties that has changed.

The former, validating law of the state chosen by the parties should apply here unless the chosen state's new law rests on a public policy strong enough to counterbalance the expectation interests of the parties.[457] The agreement the parties wished to make was not allowed by the state of most significant relationship. But we allow parties in this situation to opt out of that regime and choose the law of another state, so long as that state has sufficient connections to the parties or the transaction.[458] The choice of law rules governing the parties selecting a law thus favor party autonomy and seek to uphold expectations.[459] It is important to remember that the problems addressed here assume a valid and enforceable choice of law clause. We need not worry at all about the law of the chosen state unless it is connected to the parties and the transaction and no fundamental policy of the state of most significant relationship exists that the chosen state's law violates.

In the converse of this problem—*Case 4*, where the changed law is in the state of most significant relationship—one can assess the problem simply using retroactivity. The chosen state's law—always

455. 1 BLACKSTONE, *supra* note 88.
456. *See supra* Table 1.
457. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187(2)(b) (AM. L. INST. 1971).
458. *See id.* § 187(2)(a).
459. *See id.* § 187 cmt. e.

invalidating in *Case 4*—was a mistake and is ignored.[460] That leaves only the old and new law of the state of most significant relationship. But *Case 8* differs because the law that has changed is that of the chosen state. And it applies not of its own force but by the election of the parties. Their election and expectations therefore remain important. And those expectations are best served by applying the law that they chose to validate the agreement that they voluntarily entered.

Moreover, because we can set aside the law of the state of most significant relationship since the parties validly chose another law, we are left only with the law of the chosen state, and the question is simply whether to apply its old or new law. If we view this problem as essentially a choice of law issue between the new and the old law of the chosen state, the matter comes into focus. Under § 187, we apply the law of the state chosen by the parties unless the state of most significant relationship has a fundamental policy that the chosen state's law would violate.[461] This is the suggested analysis here as well: The court should apply the chosen state's old law because it is the best explanation of what the parties intended, unless doing so would violate a public policy of the chosen state's current law. This is similar to using § 187 to invalidate a choice of law clause in favor of a fundamental policy of the state of most significant relationship.[462] In short, we should follow the thrust of § 187 and apply the chosen state's former law to fulfill expectations unless the current public policy demands of that state are so fundamental that the court is willing to upset those expectations. Modeling the problem as a choice of law issue between two temporal states—the chosen state's old legal regime and the new legal regime—would allow courts to use existing caselaw under § 187 that addresses whether a policy is so fundamental as to invalidate the parties' choice of law clause.

460. *See supra* notes 324–27 and accompanying text.
461. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187(2)(b) (AM. L. INST. 1971).
462. *See id.*

CONCLUSION

As is often true with geographic choice of law problems, there are few easy answers to the question of how time interacts with choice of law clauses. But from what is ventured above, one may draw some useful, broad principles.

Four forces contend here. One is the cluster of concerns that may be thought of as stability or vestedness.[463] To the extent we conceive of law as being based in norms, those norms should be ascertainable. And for this to be a meaningful quality, they must be ascertainable before litigation concerning them. The law, that is, should be determinable *ex ante*. Courts are to "judge human beings on the basis of a previously defined conception of the good to which they were expected to adhere."[464] This preference for the law being fixed or anchored to a point in the past is reflected in the limitations on the retroactivity of legislation. New legislation is presumed to have only a prospective scope.[465] This preference is also reflected in a variety of rules that tend to fix the applicable law to the time of a transaction or event. For example, the contract doctrine stating that the law existing at the time of the making of a contract is presumed to be incorporated into the contract but that later-enacted law is not contemplated by the parties reflects this anchoring approach.[466] So too do choice of law cases that deal with facts that have changed (such as the acquisition of a new domicile) from the time of the underlying events to the time of the litigation. In this situation, courts tend to use the facts as they existed when the contract was created or the tort was committed.[467]

The second impulse is related to the first but is distinct. Apart from a jurisprudential argument about how the law should operate (vestedness), the parties have, especially in contract cases, an interest

463. *See supra* notes 115–22 and accompanying text.
464. Dane, *supra* note 116, at 1221.
465. Rensberger, *supra* note 1, at 427–28.
466. *See* Von Hoffman v. City of Quincy, 71 U.S. 535, 550 (1866); Coyle, *supra* note 107, at 633 n.7 (2017).
467. *See, e.g.*, Huddy v. Fruehauf Corp., 953 F.2d 955, 956–57 (5th Cir. 1992); Chen v. L.A. Truck Ctrs., LLC, 444 P.3d 727, 728–32 (Cal. 2019).

in having their initial expectations honored.[468] Using new law of either the state of most significant relationship or the state chosen by the parties to invalidate a transaction that was at the time valid under both laws sets aside what the parties expected. They expected validity because they took the effort to enter the contract. And they expected validity because that was the law at the time. Having the law remain stable over the term of a contract upholds the parties' expectations.

Third, there is the venerable impulse in choice of law cases to validate the transaction.[469] Outside of the temporal context, courts tend to apply the law of the state that validates the transaction.[470] In the context of changing law and choice of law clauses, this concern arises when the potentially applicable law (either the state of most significant relationship or the chosen state) has changed, therefore invalidating the contract. The principle of validation would argue against applying that new law. In the opposite case, when the changed law has moved from invalidating to validating, this impulse pushes toward applying the new law.

The fourth force is the state's current policy. States have laws—and change them—for reasons. These reasons can range from technical adjustments and clarifications to attempts to alter fundamental social arrangements.[471] Changing the age at which a person can marry from eighteen to seventeen is a small adjustment. Allowing marriages between same-sex couples when formerly disallowed is a fundamental social reordering. State policy should always be understood in the present tense. Sometimes, a state changes its policy in a way that

468. RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. e (AM. L. INST. 1971).

469. *See* Ehrenzweig, *supra* note 152.

470. *See id.*

471. *See, e.g.*, WASH. REV. CODE § 44.04.280 (2022) (replacing terms like "disabled" and "crippled" with "[i]ndividuals with disabilities" throughout the code); Diann Rust-Tierney, *How Can We End Capital Punishment?*, *in* LEGAL CHANGE: LESSONS FROM AMERICA'S SOCIAL MOVEMENTS 45, 51 (Jennifer Weiss-Wolf & Jeanine Plant-Chirlin eds., 2015) (describing policy changes as "a means of changing culture"); Michael Waldman, Barry Friedman, Helen Hershkoff, & Kenji Yoshino, *How Does Legal Change Happen? Perspectives from the Academy*, *in* LEGAL CHANGE: LESSONS FROM AMERICA'S SOCIAL MOVEMENTS 143, 144 (Jennifer Weiss-Wolf & Jeanine Plant-Chirlin eds., 2015) (describing the courts' power to "transform[] . . . the national conversation").

would alter prior legal arrangements, such as contracts. The state has a vision of the good and naturally wishes to pursue it.

These four impulses sometimes align and sometimes conflict. The desire for stability or vestedness as a jurisprudential matter always appears to argue for using older, time-of-transaction law.[472] But the other forces are less clearly aligned with either the old or the new. A new state law that invalidates a contract term to protect a frequently preyed upon class (like consumers or residential tenants) will pit the state's policy demands against parties' expectations and validation. But applying a new law that liberalizes and allows that which was once forbidden will be supported by expectations (the parties intended the now valid written term to govern their relations), validation, and current policy. But here the concern of vestedness pulls in the opposite direction, particularly if the now-valid contract or term was not valid under any law at the time of its creation. These four impulses have no hierarchy. The law reflects and supports all of them, and none has been enshrined as the highest value. They are not quantifiable factors that can be mathematically toted up to produce decisive answers.

Default rules are somewhat easier to analyze than mandatory rules. With default rules, the question is simply one of intent, and the best default rule for determining intent is to use the law as it existed at the time of the contract.[473] For mandatory rules, however, because of the complexity of the competing policies of vestedness, expectations, validation, and substantive state policy, the individualized approach taken above that analyzes whether a new law is validating is the best approach. Mandatory rules in choice of law clauses are still driven in large measure by the parties' intentions—we enable the parties to choose, with some limitations, the law applied even as to mandatory rules.[474] But the other factors mentioned above also come into play and limit those choices.[475] Still, when the suggested results are summarized as below, one sees the preference for upholding expectations and

472. *See* Dane *supra* note 116, at 1245; Wu, *supra* note 5, at 401.
473. *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 187 cmt. a (AM. L. INST. 1971).
474. *See id.* § 187 cmt. e
475. *See id.*; *supra* notes 116–20 and accompanying text.

validation. Of the eight cases, one (*Case 4*) is left to the law of retroactivity. Of the remaining seven, in five instances the above analysis recommends applying the law that validates the transaction. The two that reach a result of invalidation are driven by the fact that the contract was valid under neither state's law at the time it was entered into.

Table 3.

Case No.	*State of Most Significant Relationship*	*Chosen State*	*Result and Notes on Rationale*
1	Changing to validate	Valid	Valid/New. Use current policy. Expectations. Validation.
2	Changing to invalidate	Valid	Valid/Old. Expectations. Validation despite current policy.
3	Changing to validate	Invalid	Invalid/Old. Chosen law was a mistake. Never a contract.
4	Changing to invalidate	Invalid	Retroactivity question between old and new law of state of most significant relationship. Chosen law was a mistake.
5	Valid	Changing to validate	Valid/New. Current policy. Expectations. Validation. Old law chosen by mistake.
6	Valid	Changing to invalidate	Valid/Old. Expectations. Validation.
7	Invalid	Changing to validate	Invalid/Old. Never a contract.
8	Invalid	Changing to invalidate	Valid/Old unless new policy fundamental enough to overcome party choice.

Finally, as the complexity of the analysis shows, lawyers drafting choice of law clauses should consider whether their clients' interests

are served by also including a choice of time clause. This may be the case when the law of the present favors the client and there is a non-negligible prospect for adverse change. Specifying the chosen state's law as it exists at the time of the transaction would benefit the client. Alternatively, the law may be moving nationally in the client's favor and the client would benefit from a possible future change in the law of the chosen state. In such a situation, a choice of time clause would specify that the law as of the time of litigation should apply. Finally, it may be that the sole motive behind a choice of law clause is simply to avoid litigation over applicable law. Even here, a client would benefit from the added certainty of a choice of time clause. In that way, both the question of which jurisdiction's law applies and the temporal question are insulated from litigation.