Substance-Targeted Choice-of-Law Clauses

Katherine Florey[†]

Recent cases highlight two persistent problems in U.S. litigation: the frequency with which parties seek to validate an otherwise unenforceable provision through a choice-of-law clause, and the disparate results courts have reached in such cases. These problems, while not wholly new, have recently become more troublesome and widespread. Courts, however, have not grown more consistent in their approach to them. On the contrary, they increasingly reach varied results on highly similar facts, resulting in endless legal uncertainty, forum shopping, and doubts about judicial impartiality. These effects are all the more problematic because, as most conflicts scholars would agree, parties should not be allowed to choose a jurisdiction's law solely for the purpose of validating a contested contractual provision; indeed, permitting them to do so is at odds with most purposes of contractual choice-of-law enforcement.

For this reason, this Article proposes that, rather than fall back on complicated public policy exceptions to contractual choice-of-law, courts should instead identify and refuse to apply choice-of-law clauses that are adopted for the purpose of making a separate contractual provision enforceable. This Article refers to such clauses as "substance-targeted." Courts typically do not distinguish between targeted and non-targeted choice-of-law clauses. As a result, targeted clauses are often treated as if they represent an ordinary instance of allowing contracting parties autonomy to choose the law applicable to their dispute. Yet they involve meaningfully different considerations, both because of the reasons that parties choose to include them and because of their ultimate effects. Unlike conventional choice-of-law clauses, substance-targeted clauses are neither aimed at achieving predictability nor likely to result in it. Their frequent use encourages litigation, disadvantages weaker parties, and fosters fears about results-oriented reasoning when their enforceability is tested. These pernicious effects call for a fundamentally different choice-of-law approach.

Table of Contents

[†] Professor of Law, University of California, Davis, School of Law; visiting scholar, Freie Universität, Berlin, Germany, 2018-19. I wish to thank Afra Afsharipour, David Horton, John Patrick Hunt, Lisa Ikemoto, Kevin Johnson, Courtney Joslin, and Niharika Sachdeva, as well as my hosts at the Freie Universität: Dr. Andres Fijal, Dr. Felix Hartman, and Ms. Grit Rother.

INTRODUCTION

On October 24, 2001, Christopher Ridgeway, a resident of Louisiana, accepted a job with Michigan-based Stryker Corporation selling medical supplies to Louisiana doctors and hospitals.[1] The offer was conditional on Ridgeway's signing several documents, among them a noncompete agreement that included Michigan choice-of-law and forum selection clauses.[2] Ridgeway went on to become a highly successful salesman for

[1] See Stone Surgical LLC v. Stryker Corp., 858 F.3d 383, 386 (6th Cir. 2017).

[2] Ridgeway initially disputed the authenticity of the noncompete agreement, but evidence produced in discovery suggested that Ridgeway had received a form noncompete identical to 132 others Stryker had signed with its employees over a five-year period. *See id.* at 387-88. A jury later found that Ridgeway had signed the noncompete. *Id.* at 388.

Stryker,[3] during which time, according to him, Stryker's human resource director and other top management assured him on several occasions that no "[noncompete] agreement existed in his file."[4] Based on these assurances, Ridgeway maintains, he began in 2013 to explore employment with a competitor, Biomet.[5] Stryker learned of these discussions and immediately fired Ridgeway, who then began working for Biomet in Louisiana.[6] A few weeks later, Stryker filed suit against Ridgeway in federal court in Michigan.[7]

Stryker's claims – for breach of contract, breach of fiduciary duty, and misappropriation of trade secrets – all directly or indirectly involved the noncompete agreement Ridgeway had signed.[8] The enforceability of noncompetes is a point on which state law differs substantially; in this case, the court noted, "Michigan law favors non-competes and Louisiana law severely restricts them."[9] While there is more consensus on contractual choice-of-law provisions, such as the one in Ridgeway's contract, which are generally enforced in the United States, most states also recognize an exception when the chosen law would violate a "fundamental policy" of the state with both the "most significant relationship" to the dispute and a "materially greater interest" in the issue.[10] Ridgeway argued that the exception should be applied, but both the district court and the Sixth Circuit disagreed. The Sixth Circuit, while finding both that Louisiana indeed had the most significant relationship to the dispute and that its anti-noncompete policy was "fundamental," nonetheless concluded that Louisiana's interest was not "*materially* greater" than Michigan's.[11] Therefore, Michigan law applied and the noncompete was valid.[12]

The lawsuit ended badly for Ridgeway. The jury entered a verdict of $745,195 for Stryker.[13] Biomet, fearful of being drawn into the litigation, had

---

[3] *Id.* at 386.

[4] *Id.* at 386. Stryker unsurprisingly disputed Ridgeway's view of these conversations, maintaining that they related instead to whether Ridgeway had signed a second noncompete that would enable him to receive stock options. *See id.* at 387.

[5] *Id.* at 386.

[6] *Id.* at 387.

[7] Ridgeway was fired on September 10, 2013; Stryker filed suit on September 30. See Complaint, Stryker v. Ridgeway, Complaint, No. 1:13CV01066, 2013 WL 5526657 (W.D. Mich. Sept. 30, 2013).

[8] *See* Amended Complaint, Stryker v. Ridgeway, No. 1:13CV01066, 2013 WL 11276336 (W.D. Mich. Oct. 21, 2013).

[9] *See* Stone Surgical, 858 F.3d at 391.

[10] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) [hereinafter SECOND RESTATEMENT].

[11] *See Stone Surgical,* 858 F.3d at 391 (emphasis in original).

[12] *See id.* at 390-91.

[13] *Id.* at 388. The jury also denied relief to Ridgeway in his counterclaims against

terminated Ridgeway's employment shortly after Stryker's lawsuit was filed.[14] In March 2016, Ridgeway filed for bankruptcy.[15]

As Ridgeway was fighting his lengthy and ultimately unsuccessful legal battles, another employee in a dispute over noncompete enforceability met with a very different result. In 2013, Nevada resident Landon Shores was hired as a sales trainee by Global Experience Specialists (GES), a Nevada company specializing in event marketing.[16] The large majority of Shores's sales for GES related to events in Las Vegas.[17] Three years later, Shores was promoted to sales manager, a position that required him to sign a noncompete agreement that included a Nevada choice-of-law clause.[18]

In 2017, Shores gave notice at GES and made plans to move to California to accept a job with one of the California offices of Freeman Expositions, a Texas corporation.[19] GES did not take the news well, and two GES employees made threatening calls to Shores.[20] Undeterred, Shores began his job at Freeman, which shortly thereafter filed suit in federal court in California seeking a declaration that Shores's noncompete clause was invalid.[21]

In contrast to Ridgeway's experiences in court, Shores and Freeman encountered a friendly reception. Nominally applying precisely the same doctrinal framework the Sixth Circuit had in Ridgeway's case, the California district court nonetheless concluded that the Nevada choice-of-law clause was invalid[22] – reaching this result despite connections between Shores's employment and Nevada that were, one might conclude, objectively much stronger than Ridgeway's with Michigan.[23] In Shores's case, the court had

---

Stryker, which he originally filed in a separate proceeding but were ultimately consolidated with Stryker's action. *See id.* at 388,

[14] *Id.* at 387.

[15] *See* In Re Christopher Martin Ridgeway, No. 16-10643 (E.D. La. March 23, 2016).

[16] *See* Freeman Expositions, Inc. v. Global Experience Specialists, Inc., SACV 17–00364–CJC(JDEx), 2017 WL 1488269, at *1 (C.D. Cal. April 4, 2017).

[17] *See id.* ("During Mr. Shores' work at GES, "eighty to ninety percent" of his sales were for events in Las Vegas, Nevada, and the "vast majority" of his clients were "primarily engaged" in Las Vegas.)

[18] *See id.*

[19] *See id.*

[20] *See id.* at *2. One asked him "Do you really want to go down this road?", explaining that "[o]ne path is to remain with GES and the other path is to go with Freeman and get sued and go broke. It is a lot easier to get out of an offer letter than a non-compete agreement." *See id* at *2.

[21] *See id*. at *2.

[22] *See id.* at *5.

[23] Ridgeway, after all, had left a Louisiana-based sales job for another employer in Louisiana; his only contact with Michigan was that his former employer was headquartered there. By contrast, Shores had lived and worked in Nevada prior to beginning employment

little difficulty making the determination that California had a materially greater interest in having its well-established anti-noncompete policy applied.[24] California had a stake, the court argued, in allowing an employer "to hire a California resident to work in California organizing and facilitating exhibitions to showcase California goods and services." While Nevada, too, had a significant interest in protecting its employer, GES, "its interest pales in comparison to California's."[25] The court declined to stay proceedings in light of an ongoing Nevada court action and instead granted Freeman summary judgment on the noncompete issue.[26]

These two recent cases highlight two persistent problems in U.S. litigation: the frequency with which parties attempt to use a choice-of-law clause to validate an otherwise unenforceable provision, and the disparate results courts have reached in such cases. These issues are not wholly new.[27] In the realm of noncompetes in particular, employers have for decades attached choice-of-law provisions, despite the fact that their enforceability has been in doubt from the start.[28] Nonetheless, both these problems have recently become more persistent and widespread.[29] This is true in part because, with the growing popularity of telecommuting and other sorts of long-distance employment, many disputes over noncompetes affect multiple jurisdictions and thus are likely to require a more extended and complex choice-of-law analysis.[30] Further, noncompetes are spreading to industries

---

with Freeman.

[24] *See id.* at *5.

[25] *See id.* at *2.

[26] *See id.* at *1. The court also declined to dismiss a claim by Freeman for interference with its contractual relationship with Shores. *See id.* at *7.

[27] As early as 1993, one commentator observed that the issue of choice-of-law enforcement in difficult cases "has generated a raft of judicial decisions marked by confusion, temerity, and vacillation." *See* Kirt O'Neill, *Note, Contractual Choice of Law: The Case for a New Determination of Full Faith and Credit Limitations*, 71 TEX. L. REV. 1019, 1020 (1993).

[28] See Catherine L. Fisk, *Reflections on the New Psychological Contract and the Ownership of Human Capital*, 34 CONN. L. REV. 765, 782-73 (2002).

[29] *See* Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 367 (2003) [hereinafter *Efficiency*] (noting that "the number of cases involving contractual choice is increasing significantly over time").

[30] *See* Norman D. Bishara & David Orozco, *Using the Resource-Based Theory To Determine Covenant Not To Compete Legitimacy*, 87 IND. L.J. 979, 980, 984-85 (2012) (discussing the need to adapt the law governing noncompetes in a world where a "trend toward the greater use of noncompetes is occurring when ... geographic boundaries are becoming less important to economic activity."); Gillian Lester & Elizabeth Ryan, *Choice of Law and Employee Restrictive Covenants: An American Perspective*, 31 COMP. LAB. L. & POL'Y J. 389, 389 (2009) (noting that more mobile employees and more geographically dispersed employers have contributed to a rise in noncompete litigation).

that have not historically relied on them, with hair stylists,[31] camp counselors,[32] dog walkers,[33] or janitors[34] sometimes being required to sign them – and facing suit by their employer if they violate them.[35] Moreover, employers are increasingly relying on alternatives to noncompetes, such as clauses requiring employees to pay back a portion of their salary or other financial benefits upon quitting or being fired for cause.[36] As one might expect, state law varies significantly on the enforceability of these provisions as well,[37] and employers thus have incentives to couple them with choice-of-law clauses.[38]

Employment contracts, however, are just the start. Contracting parties in many other areas have similarly attempted to rely on choice-of-law clauses to secure a validating law, and courts have also met those efforts with varying responses. For example, while the use of choice-of-law clauses to sidestep usury laws initially met with increasingly widespread judicial acceptance in

[31] *See* Steven Greenhouse, *Noncompetes Increasingly Pop Up in an Array of Jobs*, N.Y.TIMES (June 8, 2014), at https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html?_r=0.

[32] *See id.*

[33] *See* Matt O'Brien, *Even Janitors Have Noncompetes Now. Nobody Is Safe*, WASH. POST. (Oct. 8, 2018), at https://www.washingtonpost.com/business/2018/10/18/even-janitors-have-noncompetes-now-nobody-is-safe/?utm_term=.c316c5c61487.

[34] *See id.*

[35] *See id.* (describing suit by employer against janitor that was dropped following media coverage).

[36] *See* Stuart Lichten and Eric M. Fink, *"Just When I Thought I Was Out": Post-Employment Repayment Obligations*, 25 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 51, 54 (2018) (describing growth of such provisions' popularity). These arrangements have recently attracted national publicity for, among other things, the threat they may pose to journalistic independence; many Sinclair Broadcasting employees, for example, chose to read "politically charged" statements on air despite their personal reservations because of worries about triggering repayment clauses in their contracts. *See id.* at 55-56. The statements were described as "prepackaged reports reflecting conservative views." *See id.* at 54 n.15 (internal quotation marks omitted).

[37] *See id.* at 68-69, 77-78 (noting differences in particular between the law of California and of other states on the enforceability of post-employment repayment obligations).

[38] It is difficult to assess exactly how common choice-of-law clauses are in such agreements because employment contracts are normally private. *See* Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 7 (2015). However, it is reasonable to speculate that employers frequently include such provisions, given their popularity in the noncompete context and the uncertainty of the law in this area. For an example of one such case, see Willis Re Inc. v. Hearn, 200 F. Supp.3d 540, 548 (E.D. Pa. 2016) (discussing contractual choice-of-law clause in dispute involving repayment of a retention bonus following employee's departure for a competitor).

most jurisdictions,[39] courts in some recent cases have declined to enforce such provisions in usury cases where the state of the chosen law lacks the most significant relationship to the dispute.[40] Courts have frequently refused to enforce choice-of-law provisions in various issues involving consumer contracts[41] and have also often opted for nonenforcement of provisions

[39] *See* Erin Ann O'Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1563-64 (2000) [hereinafter *Opting*] (noting that, in contrast to the approach of the First Restatement, courts have transitioned to "almost uniformly enforc[ing] choice-of-law provisions that enable the parties to evade state usury laws"). The Restatement (Second) likely played a role in this acceptance by including a fairly liberal usury provision that operates even in the absence of a choice-of-law clause, providing that a given interest rate will not be invalidated on usury grounds if it is "permissible in a state to which the contract has a substantial relationship" and "not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law." *See* SECOND RESTATEMENT § 203. The "substantial relationship" requirement is fairly easily satisfied – if, for example, the applicable rate is that of the lender's place of business or the place where the loan is to be repaid. *See* Robert Allen Sedler, *The Contracts Provisions of the Restatement (Second): An Analysis and a Critique*, 72 COLUM. L. REV. 279, 315-18 (1972).

[40] *See* Fleetwood Services, LLC v. Complete Business Solutions Group, Inc., No. 18-268, 2019 WL 1558087, at *6 (E.D. Pa. April 10, 2019) (finding that, despite parties' choice of Pennsylvania law, Texas law applied because Texas had the most significant relationship to the dispute and "applying Pennsylvania law would violate a fundamental public policy of Texas, namely its antipathy to high interest rates") (internal quotation marks omitted); American Exp. Travel Related Services Co., Inc. v. Assih Civil Court, 26 Misc.3d 1016, 1025-26 (Civ. Ct. Richmond Co. 2009) (declining to enforce a choice of Utah law in action to collect credit card payments based on New York's materially greater interest and "strong public policy against interest rates which are excessive"); American Equities Group, Inc. v. Ahava Dairy Products Corp., No. 01 Civ.5207(RWS), 2004 WL 870260, at *7-*8 (S.D.N.Y. April 23, 2004) (declining to enforce a choice of New Jersey law in a case involving a usury defense on the same grounds). *See also* TriBar Op. Comm., *Supplemental Report: Opinions on Chosen-Law Provisions Under the Restatement of Conflict of Laws*, 68 BUS. LAW. 1161, 1161 & n.2 (2013) (discussing analysis of this issue in New York courts and noting that it deviates somewhat from the orthodox Second Restatement approach).

[41] *See* William J. Moon, *Contracting Out of Public Law*, 55 HARV. J. ON LEGIS. 323, 347 (2008) ("[C]ourts have consistently refused to enforce choice-of-law clauses in the context of ... consumer contracts."). In some cases, this refusal has been based on concerns about the substantive content of the chosen law. *See*, *e.g.*, Masters v. DirecTV, Inc., Case Nos. 08–55825 and 08–55830, 2009 WL 4885132 (9th Cir. Nov. 19, 2009) (holding that California law rather than the parties' chosen law applied to consumer class action waivers because such waivers were contrary to a fundamental policy in California). *See also* William J. Woodward, Jr., *Legal Uncertainty and Aberrant Contracts: The Choice of Law Clause*, 89 CHI.-KENT L. REV. 197, 207ff (2014) (discussing case law on enforcement of choice-of-law clauses in questions regarding the applicability of state statutes that convert one-way attorney's-fee-shifting provisions into two-way provisions) [hereinafter *Aberrant*]. Procedural concerns about information asymmetry and bargaining power disparities in form consumer contracts may also weigh in favor of nonenforcement. *See generally* Giesela Rühl,

intended to evade state franchise law protections, such as laws prohibiting waiver of a franchisee's right to sue under certain circumstances.[42] Recently, emerging issues such as the protection of privacy rights in biometric data[43] and the practice of telemedicine[44] have also raised issues about choice-of-law-clause enforceability.

The issue has arisen, too, in the area of marriage and family law. Many courts, for example, allow choice-of-law provisions to validate antenuptial agreements,[45] but according to one commentator, "[t]he paucity of court decisions" in areas where potentially applicable law differs significantly continues to "create[] uncertainty for all migratory couples who sign such an agreement."[46] Choice-of-law clauses present distinct but related issues in other areas where states are sharply divided, such as the circumstances (if any) under which gestational surrogacy contracts are enforceable.[47]

Consumer Protection in Choice of Law, 44 CORNELL INT'L L.J. 569 (2011).

[42] See Andrew Elmore, *Franchise Regulation for the Fissured Economy*, 86 GEO. WASH. L. REV. 907, 954 n.229 (2018) ("States prohibit choice of law provisions and waivers in franchise agreements to contract around state franchise law obligations, which will foreclose evasions of a liability through waiver."). For example, in Wright-Moore Corp. v. Ricoh Corp., 908 F. 2d 128, 132-33 (7th Cir. 1990), the court found that Indiana law applied, rather than the parties' chosen law of New York, because Indiana had a materially greater interest in the dispute and waiver of a franchisee's rights was against Indiana's fundamental policy.

[43] *See, e.g.*, In re Facebook Biometric Information Privacy Litigation, 185 F. Supp. 3d 1155, 1169-70 (N.D. Cal. 2016) (concluding that California choice-of-law provision could not be enforced where "California has not legislatively recognized a right to privacy in personal biometric data and has not implemented any specific protections for that right" and biometric data protection was a fundamental policy in Illinois, the state of the most significant relationship).

[44] *See* J. Kelley Barnes, *Telemedicine: A Conflict of Laws Problem Waiting to Happen – How Will Interstate and International Claims be Decided?*, 28 HOUS. J. INT'L L. 491, 497 (2006).

[45] *See* O'Hara, *Opting*, *supra* note 39, at 1563-64 ("Antenuptial agreements are also incorporating choice-of-law provisions with mounting, albeit tentative, judicial support").

[46] *See* Linda J. Ravdin, *Premarital Agreements and the Migratory Same-Sex Couple*, 48 FAM. L.Q. 397, 406 (2014).

[47] *See, e.g.*, Hodas v. Morin, 442 Mass. 544, 550-53 (2004) (applying Section 187 of the Second Restatement to determine that a surrogacy agreement was valid and finding that no state other than the state of the chosen law, Massachusetts, clearly had the "most significant" relationship to the dispute). Martha A. Field summarizes the manifold approaches states take toward surrogacy contracts, including fairly broad enforcement, enforcement provided certain requirements are met, toleration without explicitly regulating the subject, and criminalizing paid surrogacy. *See* Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1161-65 (2014). Parties to such contracts have sometimes selected the law of a state hospitable to surrogacy, clauses that courts have enforced in some cases "notwithstanding manipulated contacts with the selected state and strong anti-surrogacy policies in the gestational carrier's domicile." *See* Susan Frelich Appleton, *Leaving Home? Family, Domicile, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1512 (2014). Parties, however, cannot

Yet despite the proliferation of situations in which the validity of choice-of-law clauses is sharply contested, courts have not grown more consistent in their approach to them. In fact, the opposite is true; as the opening example suggests,[48] courts increasingly reach disparate results on highly similar facts.[49] In one sense, this is surprising, given that jurisdictions in the United States have widely embraced the same authority – Section 187(2) of the Restatement (Second) of Conflict of Laws – to guide their approach to contractual choice-of-law.[50] Notwithstanding this rare consensus on choice-of-law methodology, however, courts interpret Section 187(2) in ever-diverging, often wholly contradictory ways.[51] This means that the enforceability of choice-of-law clauses involving controversial issues is driven by judicial reasoning that takes highly variegated approaches to seemingly similar facts and is, as a result, often impossible to predict at the time of contracting.

Courts' inconsistent resolutions of this category of cases have created several problems. To begin with, the disparate results courts have reached on similar facts have undermined faith in the judiciary's ability to deal with many contested areas of law in a reasoned, unbiased manner.[52] Different commentators have argued in parallel, for example, that results refusing to honor contractual choice-of-law provisions in noncompete agreements[53] and those insisting on enforcement[54] are driven by forum-law preference or other

---

count on such a result, meaning that "the safest approach [for parties to a surrogacy contract] is to do something substantial in connection with the surrogacy arrangement in that state beyond just choosing its law." *See* Joseph F. Morrissey, *Surrogacy: The Process, the Law, and the Contracts*, 51 WILLAMETTE L. REV. 459, 509 (2015) (also noting that "courts may not honor the choice-of-law provision" in the absence of a substantial contact such as "using a clinic in [the] state [of the chosen law], or using an agency, surrogate or egg donor from that state").

[48] *See supra* note 23 and accompanying text.

[49] *See* Woodward, *Aberrant*, *supra* note 41, at 209 (discussing the uncertainty created by the "fact-based and hopelessly uncertain" analysis under Section 187).

[50] *See infra* notes 87 to 91 and accompanying text.

[51] *See infra* Part II.B.3.

[52] *See* David A. Lineham, *Due Process Denied: The Forgotten Constitutional Limits on Choice of Law in the Enforcement of Employee Covenants Not to Compete*, 2012 UTAH L. REV. 209, 213 (positing that courts, rather than respecting relevant constitutional constraints "expansively apply their own restrictive rules against noncompetes to virtually any dispute tried within their borders").

[53] *See* Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Noncompete Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381, 1386-87 (2008) (describing and positing the likely future growth of a phenomenon whereby states seek to export their employer-friendly policies extraterritorially by broadly enforcing both noncompetes and choice-of-law clauses).

[54] *See* Lineham, *supra* note 52, at 213 (arguing that courts have applied their choice-of-

forms of state favoritism.

Moreover, even assuming that judges are applying Section 187 scrupulously and in good faith, the sheer unpredictability of results creates a host of issues in itself.[55] Contracting parties are less able to negotiate effectively if the validity of a choice-of-law provision is in doubt, [56] and disputes are more likely to end in litigation.[57] Further, where parties have unequal bargaining power, legal uncertainty about choice-of-law provisions often unfairly disadvantages the weaker party, which might be able to successfully challenge the clause in court but may lack the resources to try.[58] Finally, the potential to achieve different results in different courts creates an incentive not merely for forum-shopping but for a race to judgment in which parties pursue parallel litigation in hand-picked forums that each hopes will be the first to deliver a final result.[59]

A more fundamental objection, however, is that the practice of using a choice-of-law clause to validate a specific provision not only tends to foster judicial confusion, but is out of keeping with the fundamental goals of contractual choice-of-law enforcement. At first glance, this second point might seem counterintuitive: Isn't the whole point of contractual choice-of-law provisions to allow parties to specify the law that will govern their

---

law principles in noncompete cases in a way that "fail[s] to respect due process constraints on their power to prefer their own laws to those of sister states.").

[55] *See* Lineham, *supra* note 52, at 212.

[56] *See, e.g.*, Lawrence J. LaSala, *Partner Bankruptcy and Partnership Dissolution: Protecting the Terms of the Contract and Ensuring Predictability*, 59 FORDHAM L. REV. 619, 643 n. 135 (1991) ("Because parties normally will not enter into a contract if they are unable to foresee accurately their rights and liabilities under the contract, predictability is a prime objective of contract law.").

[57] *See* Glynn, *supra* note 53, at 1385 (calling attention to "the rise of interjurisdictional disputes involving [noncompete] enforcement").

[58] *See, e.g.*, Woodward, *Aberrant*, *supra* note 41, at 212 (noting that "many rational clients will forego using a lawyer in a small claim or defense if they risk paying their lawyer more (probably far more) than the claim or defense is worth").

[59] *See* Vera R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 959-60 (2012) (noting that disparities in enforcement of both choice-of-law clauses and noncompetes leads to a situation in which both parties "race to the courthouse in an effort to have the jurisdiction with the more favorable law hear the case"); O'Hara, *Opting*, *supra* note 39, at 1566 ("Unfortunately, however, enforcement of these clauses often turns on an ex post race to judgment.") A widely invoked example of this situation is the litigation underlying Advanced Bionics Corp. v. Medtronic, Inc., 59 P.3d 231 (Cal. 2002), in which parallel proceedings in Minnesota and California considered the same noncompete but arrived at different outcomes. The two courts each ultimately issued contradictory injunctions forbidding the parties from proceeding in the other court, a standoff only resolved when the California Supreme Court ultimately gave way and dissolved the lower court's injunction. *See id.*; Moffat, *supra* note 59, at 960-63 (describing the case's procedural history in detail).

contract? Yet, as this Article will discuss in detail, most advocates of choice-of-law enforcement have assumed that parties will generally choose a particular jurisdiction's law for reasons other than the content of specific substantive rules – reasons such as, for example, a jurisdiction's general expertise in a particular area, the desire to choose a law with which both parties are familiar, or the wish to avoid uncertainty.[60] Indeed, conflicts scholars have fairly consistently agreed that contractual choice-of-law clauses should not be used to evade a jurisdiction's public policy, particularly when it is a strongly defined one.[61] The current approach, however, allows parties to do so in many circumstances, limiting them only through a narrow, difficult-to-apply exception to the general policy of enforcement.[62]

In response to this situation, this Article argues for a new way of conceptualizing the issue. Rather than fall back on complicated public policy exceptions to contractual choice-of-law, the Article argues, courts should instead recognize, and generally refuse to enforce, a particularly problematic category of choice-of-law clauses – those that are adopted specifically in the hope of validating a separate contractual provision. This Article refers to such clauses as "substance-targeted." A provision is substance-targeted, for example, when it reflects an employer's wish to substitute more favorable Michigan law for the less noncompete-friendly law that would otherwise apply to its Louisiana employee.

Courts typically do not distinguish between targeted and non-targeted choice-of-law clauses. As a result, targeted clauses are often treated as if they represent an ordinary instance of allowing contracting parties autonomy to choose the law applicable to their dispute.[63] Yet they involve meaningfully different considerations, both because of the reasons that parties choose to include them and because of their ultimate effects. Unlike conventional choice-of-law clauses, substance-targeted clauses are neither aimed at achieving predictability nor likely to result in it. Their frequent use encourages litigation, disadvantages weaker parties, and fosters fears about results-oriented reasoning when their enforceability is tested. More broadly, scholars have raised concerns about the possibility that choice-of-law clauses adopted to gain the benefit of substantive rules will "undermine the enforcement of public regulatory statutes designed to safeguard a particular

[60] *See infra* notes 126 to 130 and accompanying text.

[61] *See infra* notes 149 to 152 and accompanying text.

[62] *See* SECOND RESTATEMENT § 187(2) (delineating a three-pronged exception to the general policy of enforcement).

[63] *See, e.g.*, Stone Surgical, 858 F.3d at 391 (finding "no reason to disturb the parties' choice of Michigan law" with respect to a noncompete where no state had a materially greater interest than Michigan).

vision of the market."[64] These pernicious effects – unlike the normally positive consequences of enforcing non-targeted clauses – call for a fundamentally different choice-of-law approach.

While other authors have advocated reforms in the courts' approach to choice-of-law clauses,[65] this Article is the first to identify and propose a solution to the problem of substance targeting. The Article argues that it is feasible for courts to identify substance-targeted clauses[66] and that, once so categorized, such provisions – because they fail to serve the goals of contractual choice of law more generally – should generally not be enforced.[67]

This Article proceeds in three parts. The first part describes the typical framework applied to the enforceability of choice-of-law clauses in the United States. The second argues that substance-targeted choice-of-law clauses should represent a distinct category of conflicts analysis and discusses the reasons why current doctrine fails to adequately address the issues such conflicts present. Finally, the Article sets forth a proposal for reform, arguing that targeted choice-of-law clauses implicating questions of policy should be unenforceable in most cases.

I. CONTRACTUAL CHOICE-OF-LAW'S LEGAL BACKDROP

While choice-of-law approaches applied by various states are famously diverse,[68] courts are more unified when it comes to the way they treat contractual choice-of-law. This section considers the current contractual

---

[64] *See* Moon, *supra* note 41, at 325.

[65] Notably, Larry Ribstein has argued that courts should "enforce express written choice-of-law clauses notwithstanding common law or statutory restrictions on enforcement, except when the clause is explicitly prohibited by a state where a contracting party resides and no party resides in the designated state." *See* Ribstein, *Efficiency*, *supra* note 29, at 368. Elsewhere, O'Hara and Ribstein advocate for a somewhat similar approach under which "choice-maximizing rules proposed in this Article operate as default rules that legislatures can overrule by explicit statutes where necessary to preserve their power to legislate effectively." *See* Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1153 (2000). In contrast to Ribstein and O'Hara, this Article's central focus in reforming contractual choice of law is not on legislative involvement, although it does argue that a legislative role in defining areas of significant policy is desirable. *See infra* notes 257-258 and accompanying text. Rather, this Article argues that targeted and non-targeted choice-of-law clauses are fundamentally different and require distinct treatment.

[66] *See infra* Part III.A.

[67] *See infra* Part III.B.

[68] *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2017: Thirty-First Annual Survey*, 66 AM. J. COMP. L. 1, 60 (2018) [hereinafter *2017*] (summarizing various state approaches in tabular form).

choice-of-law landscape in the United States. It looks first at the Restatement (Second) as a whole, examining how jurisdictions came to their current state of relative consensus[69] around the Second Restatement's principles for addressing contractual choice of law. It then looks in more detail at the mechanics of the Second Restatement's contractual choice-of-law provision, Section 187.

A. The Restatement (Second) and Contractual Choice of Law

The enforceability of contractual choice-of-law clauses is, in most jurisdictions in the United States, governed by the Restatement (Second) of Conflicts of Law, regardless of whether the state follows the Second Restatement in other particulars.[70] While reliance on Restatements is in many fields routine and unremarkable, in the realm of conflicts the Second Restatement presents something of a special case.

The Second Restatement was drafted during a period of great tumult in conflicts doctrine in the United States.[71] At the time, many states had abandoned, or were in the process of abandoning, the "traditional" conflicts principles codified in (but in most cases long predating) the First Restatement.[72] These traditional principles embodied a stance of extreme skepticism toward contractual choice-of-law as a whole. Joseph Beale, the First Restatement reporter who dominated the conflicts landscape for decades, derided choice-of-law agreements as giving to the contracting parties the "absolutely anomalous" power to "adopt any foreign law at their pleasure to govern their act" and thus "free themselves from the power of the law which would otherwise apply."[73] Rather than enforce choice-of-law clauses, courts confronted with contractual conflicts issues applied a methodology in keeping with the First Restatement's general approach of assigning choice of law based on a particular connecting factor between the dispute and a jurisdiction.[74] Thus, issues of contract validity were governed by the law of the place where the contract was made,[75] while courts applied

[69] *See infra* notes 87 to 91 and accompanying text.

[70] *See infra* note 87.

[71] *See* Kermit Roosevelt III and Bethan R. Jones, *The Draft Restatement (Third) of Conflict of Laws: A Response to Brilmayer & Listwa*, 128 YALE L.J. FORUM 293, 293-94 (2018) (noting that "[t]he Reporter of the Restatement (Second), Willis Reese, was aware that choice of law was undergoing a revolution" at the time of drafting).

[72] *See id.*

[73] *See* Joseph H. Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 260, 261 (1910).

[74] See Joseph H. Beale, TREATISE ON THE CONFLICT OF LAWS, §§ 377.1-378.3, at 1286-90 (1935).

[75] RESTATEMENT OF CONFLICT OF LAWS § 332 (1934)

the law of the place where the contract was to be performed to issues relating to such performance.[76]

Starting in the mid-twentieth century, scholars and courts alike began to balk at the First Restatement's rigid and formalistic approach to conflicts. While contractual choice-of-law was not a particular focus of this rebellion, the more flexible methodologies advocated by reformers often included a greater willingness to uphold the parties' contractual agreement.[77]

This principle, however, was one of the few on which the Second Restatement's drafters could agree. In areas apart from contractual choice, the Second Restatement project was complicated by the variety of conflicts approaches favored by its drafters and the absence of well-developed case law from which to draw.[78] As a result, the Second Restatement in its final form represents a compromise, allowing judges wide discretion to consider a variety of factors that are themselves often influenced by diverse conflicts methodologies.[79] Further, the Second Restatement differs from many restatements of the law in that it sets forth a mostly new proposal for how conflicts might be resolved rather than simply attempting to synthesize and draw best practices from existing case law.[80]

In consequence, the Second Restatement as a whole has been somewhat controversial from the beginning. Although a substantial plurality of states

---

[76] *Id.* at § 358.

[77] *See* Moon, *supra* note 41, at 330-31 (noting that "proponents of [the] new intellectual movement [in choice of law] identified the intent of contract signatories as an important factor in determining the applicable law," leading to greater acceptance of contractual choice of law).

[78] *See* Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1237 (1997) [hereinafter *Courts*].

[79] *See* Symeon C. Symeonides, Symposium, *The Silver Anniversary of the Second Conflicts Restatement: The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1250 (1997) [hereinafter *Silver*]

[80] *See* Roosevelt & Jones, *supra* note 71, at 294 (noting that the Second Restatement's Reporter, Willis L.M. Reese "did not believe it possible … to restate determinate rules" given courts' ongoing experimentation, instead opting for "a flexible approach that ... set [courts] loose to see what they did" in hopes that more uniform rules would ultimately emerge). *See also* Willis L. M. Reese, *Contracts and the Restatement of Conflict of Laws*, Second, 9 INT'L & COMP. L.Q. 531, 532 (1960) (noting that "[t]he subject [of conflicts of law] is still relatively unexplored [by courts], and there are many areas where the all too sparse authority does not point indubitably to a single rule"). The Restatement (Third) of Conflicts, currently in the drafting process, has moved to some extent closer in the direction of a conventional restatement. *See* Roosevelt & Jones, *supra* note 71, at 298 (2018) ("The methodology of its Reporters is to look at current choice-of-law decisions under the Restatement (Second), other modern approaches, foreign-country systems, … and identify categories of cases where the results are consistent enough to be stated in the form of rules.")

have adopted it for torts or contracts or both, many states continue to apply either the traditional First Restatement approach or other modern conflicts methodologies.[81] Further, states that rely on the Second Restatement differ in both the manner in which and the extent to which they apply it.[82] The Second Restatement has met with an even cooler reception among most scholars, who have criticized it variously as "too much of a compromise among conflicting philosophies, too vague, exceedingly elastic, unpredictable, directionless, and rudderless."[83] The drafting of a Restatement (Third), intended to address some of the Second Restatement's deficiencies, is well underway, but sections pertaining to contractual choice of law had, at the time of writing, reached only the earliest stages of drafting.[84] Further, given the persistent lack of choice-of-law consensus among states, it is an open question whether and how rapidly states will adopt the new Restatement.

In contrast to the ambiguities surrounding much of the Second Restatement, the provision dealing with contractual choice-of-law, Section 187, provides courts with a relatively straightforward analytical path in cases that do not involve its complex exception,[85] as will be described in more detail in the next section. Perhaps in consequence, Section 187 represents, in the complicated realm of Second Restatement adoption, something of an oasis of consensus support. The large majority of states to have considered the issue apply Section 187 to determine whether a choice-of-law provision is enforceable,[86] even if the conflicts methodology they apply in tort or other

---

[81] *See* Symeonides, *2017*, *supra* note 68, at 60 (breaking down the various choice-of-law approaches of all fifty states).

[82] For a table showing the varying extent to which different states rely on the Second Restatement, *see id.* at 60-62. For an example of the disparate ways in which courts can make use of the Second Restatement, *see id.* at 59-60 (discussing a series of cases in which Wyoming courts have relied upon the Second Restatement to varying degrees).

[83] See Symeonides, *Silver*, *supra* note 79, at 1250. But see Lea Brilmayer, *Hard Cases, Single Factor Theories, and a Second Look at the Restatement Second of Conflicts*, 2015 U. ILL. L. REV. 1969, 1978 (praising the Second Restatement on the grounds that, in contrast to other popular choice-of-law methodologies, its "flexibility ... avoids allowing a single contact, no matter how inconsequential or fortuitous, to dominate a case").

[84] *See generally* Kermit Roosevelt III & Bethan Jones, *What a Third Restatement of Conflict of Laws Can Do*, 110 AJIL UNBOUND 139, 141 (2016). *See also* Restatement of the Law Third, Conflict of Laws, available at https://www.ali.org/projects/show/conflict-laws/ (showing progress of various parts of the project).

[85] Section 187(1) and (2), that is, make the parties' contractual choice of law enforceable in many circumstances after a relatively brief inquiry. *See* Ribstein, *Efficiency*, *supra* note 29, at 367 (discussing courts' ready enforcement of choice-of-law clauses in a majority of situations). This generalization, however, does not apply to situations in which 187(2)'s exception, discussed *infra* Part I.C., comes into play. *See* Matthias Reimann, *A New Restatement for the International Age*, 75 IND. L.J. 575, 588 n.73 (2000).

[86] *See* Patrick J. Borchers, *An Essay on Predictability in Choice-of-Law Doctrine and*

sorts of contracts cases is entirely different.[87] To take just one example, California courts have since at least 1992 applied Section 187 to contractual choice-of-law disputes[88] in hundreds of cases,[89] despite the fact that California applies a different set of conflicts principles, interest analysis, in all other situations, including contract disputes in which the parties have not included a choice-of-law clause.[90] Indeed, the use of Section 187 is so widespread that it has been called "essentially a declaration of universal law in the United States"[91] – although, it should be noted, a few states continue to follow more idiosyncratic approaches,[92] and the Universal Commercial Code's choice-of-law provisions often apply to commercial transactions, [93] although they are considered in many jurisdictions to incorporate common-law principles similar to those of Section 187.[94] Scholars, too, have widely –

Implications for a Third Conflicts Restatement, 49 CREIGHTON L. REV. 495, 503 (2016) (describing Section 187 as "among the most widely and faithfully followed sections of the Second Restatement") [hereinafter *Essay*]; Woodward, *Aberrant*, *supra* note 41, at 206 ("The closest thing to a general statement of governing common law principles [in choice of law] is the Restatement (Second) of Conflict of Laws, section 187(2), recognized in most states.")

[87] *See* Symeonides, *Silver*, *supra* note 79, at 1260 n.96 ("Section 187 ... has had an almost universal appeal among courts and has been followed even in states that do not follow the Restatement (Second) in other respects").

[88] *See* Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459, 464-65 (1992) (explicitly holding that Section 187 will apply to such cases and noting that earlier courts had already applied either 187 or similar approaches).

[89] A Westlaw search on June 18, 2019, of California state and federal cases for "Restatement w/3 187" produced 215 cases.

[90] *See* Kelly v. Teeters, A138423, 2014 WL 6698787 (Cal. Ct. App. Nov. 26, 2014), at *8 (explaining, in case involving an oral contract, that Section 187 applies only to contracts with an explicit choice-of-law provision and that in all other contract cases courts apply either a relevant statutory choice-of-law directive or governmental interest analysis).

[91] *See* Borchers, *Essay*, *supra* note 86, at 503.

[92] *See, e.g.*, St. Jude Medical S.C., Inc. v. Biosense Webster, Inc., 818 F.3d 785, 788 (8th Cir. 2016) (not mentioning Section 187 but applying a Minnesota rule under which "a contractual choice-of-law provision will govern so long as the parties acted in good faith and without an intent to evade the law" (internal quotation marks and brackets omitted). *See also* Lester & Ryan, *supra* note 30, at 396-37 (2010) (noting that a few states, such as South Carolina, do not enforce any choice-of-law provisions that are contrary to public policy).

[93] Most states currently apply former UCC § 1-105 on this point, which requires a "reasonable relation" between the contract and the state of the chosen law. See U.C.C. § 1-105 (superseded 2001). An ambitious draft revision of this standard, which would have increased party autonomy by doing away with the relationship requirement while including specific protections for consumers, was widely rejected by states. *See* Jack M. Graves, *Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. § 1-301 and a Proposal for Broader Reform*, 36 SETON HALL L. REV. 59, 59-62 (2005).

[94] *See* Neil B. Cohen, *The Private International Law of Secured Transactions*, 81 LAW & CONTEMP. PROBS. 203, 218 (2018) (noting that, while former UCC § 1-105 does not contain a "fundamental policy" exception, many believe such a rule "is implicit or ...

if not universally[95] – praised Section 187's approach, calling the provision "[one] of the most successful provisions in the Second Restatement."[96]

B. The Restatement (Second)'s Overall Approach

Although Section 187 stands apart from the rest of the Second Restatement in some respects, a working knowledge of Second Restatement methodology is required to apply it. That in turn demands an understanding of the Second Restatement's overarching goal in nearly all situations, which is to find and apply the law of the jurisdiction with the "most significant relationship" to the dispute.[97] That determination is based on a variety of factors, including both those embodied in Section 6, which are intended to apply to disputes of all kinds, and field- and claim-specific considerations, which are important only in cases implicating particular subject matter.[98] Section 6 factors include, among others, considerations of "justified expectations," the relevant policies of the forum and other interested states, and "certainty, predictability, and uniformity of result."[99] In contracts disputes where no effective choice-of-law clause exists, courts are also supposed to consider Section 6 principles in light of several other factors, such as the place of contracting and performance and the domicile of the parties.[100]

---

applicable to U.C.C. transactions through U.C.C. § 1-103(b), which allows supplementation of U.C.C. rules by common law principles in some contexts").

[95] *See, e.g.*, David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 638-39 (2010) (arguing that a weakness of Section 187 is that it "it focuses entirely on the choice-of-law provision's substantive effect" and thus, for example, "does not deter drafters from unilaterally adding a choice-of-law clause").

[96] *See* Borchers, *Essay*, supra note 86, at 503 (contrasting 187 favorably with "open-ended" provisions such as Sections 188 and 6, which Borchers describes as "the laundry list to end all laundry lists").

[97] *See* Lea Brilmayer & Rachael Anglin, *Choice-of-Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1166 (2010).

[98] *See* SECOND RESTATEMENT § 6.

[99] *See id.* The factors, in their entirety, include: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied."

[100] In full, these factors are "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties." See SECOND RESTATEMENT § 188. As with many other Second Restatement provisions, Section 188 provides a weakly presumptive rule that, if the contract was negotiated and performed in one jurisdiction, the law of that place will "usually be

In addition to Section 6, the Second Restatement also contains more focused provisions applicable only to specific situations and causes of action. These include provisions that address certain types of contracts, such as Section 196, which discusses contracts for services. As with the majority of Second Restatement provisions, these state a general guideline about which state's law will usually be applicable to the dispute.[101] Section 196, for example, indicates that the validity of and rights created by a contract for services are determined by the law of the state in which the services are to be performed, "unless, with respect to the particular issue, some other state has a more significant relationship ... to the transaction and the parties," in which case that jurisdiction's law applies instead.[102] Courts differ in the significance they attach to the Second Restatement's predictive rules in this (as in other) contexts,[103] with some treating them as a presumption that must be directly

applied." *See id.*

[101] Symeon C. Symeonides, *Choice of Law in the American Courts in 2001: Fifteenth Annual Survey*, 50 AM. J. COMP. L. 1, 42 (2002) (noting that most Second Restatement rules specify the law of the place that will apply based on particular contacts "subject to an 'unless clause' that authorizes the application of the law of another state upon a showing that the other state has a more significant relationship"). The Second Restatement was written in this way largely due to the influence of partisans of the First Restatement, which selected for each type of dispute a jurisdiction whose law would apply based on a single contact. By retaining this approach, but providing an exception in the situation where another state had the "most significant relationship" to the dispute, the drafters hoped to ease the transition from the First Restatement and promote further development in the law. *See* Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 519 (1983) (describing the Second Restatement as "[seeking] to provide formulations that were true to the cases ... [but] were broad enough to permit further development in the law").

[102] *See* SECOND RESTATEMENT § 196.

[103] These rules are sometimes called "presumptive," but many courts do not treat them as creating a formal presumption, nor does the Second Restatement specify any particular weight they should be accorded. *See* Lea Brilmayer and Daniel B. Listwa, *Continuity and Change in the Draft Restatement (Third) of Conflict of Laws: One Step Forward and Two Steps Back?*, 128 YALE L.J. FORUM 266, 289 (2018) (arguing that under the Second Restatement and, they contend, potentially under the draft Third Restatement as well, "[a[ny litigant who finds it to his or her advantage will argue that the Restatement's rule should not apply ....Yes, the judge will weigh these arguments against the Restatement's rule, but what weight should such a rule have?").

rebutted,[104] and others ignoring them entirely,[105] even while in some cases reaching conclusions consistent with the prediction.[106]

C. Section 187: Contractual Choice of Law

In contrast to most of the rest of the Second Restatement, in situations where the parties have agreed to a contractual choice-of-law clause, the search for the most-significant-relationship jurisdiction is not the starting point of the analysis. Instead, the Second Restatement sets forth a basic policy that such clauses should generally be enforced.[107] Under Section 187(1), application of the parties' chosen law is mandatory if "the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue,"[108] such as, for example, issues related to construction and sufficiency of performance.[109] Even if a choice-of-law

[104] In a case, for example, in which a party argued that the state of the chosen law was not the state with the "most significant relationship" to the dispute, a court found that "there is nothing in this case to rebut the presumption that the state where services are to be performed is the state having the most significant relationship to the transaction [.]" *See* Charleston, Inc. v. Pfeil, 4:16–CV–3153, 2017 WL 2963867, at *5 (D. Neb. May 31, 2017) (internal citation and quotation marks omitted). *See also* Mertz v. Pharmacists Mut. Ins. Co., 261 Neb. 704, 709 (2001) ("The effect of § 196 is to create a presumption that the state where services are to be performed is the state having the most significant relationship to the transaction when the issue is the validity of a covenant not to compete.").

[105] For example, while the cases discussed earlier in this article, Stone Surgical LLC v. Stryker Corp., 858 F.3d 383 (6th Cir. 2017) and Freeman Expositions, Inc. v. Global Experience Specialists, Inc., 2017 WL 1488269 (C.D. Cal. April 4, 2017), otherwise embody opposite approaches to the questions of noncompete and choice-of-law clause enforceability, they are alike in that neither so much as mentions Section 196 of the Second Restatement.

[106] Many courts, for example, give important or decisive weight to the fact that services were performed in a particular jurisdiction without mentioning Section 196. *See, e.g.*, Medicrea USA, Inc. v. K2M Spine, Inc., 17 Civ. 8677 (AT), WL 3407702 (S.D.N.Y. Feb. 7, 2018), at *9 (collecting and agreeing with the results in several cases in which the performance of work in California gave California a materially greater interest under Section 187).

[107] *See, e.g.*, Ribstein, *Efficiency*, *supra* note 29, at 373 ("The Restatement's general thrust ... clearly favors enforcement of contractual choice").

[108] *See* SECOND RESTATEMENT § 187(1).

[109] A comment to the Second Restatement notes that these matters generally include "rules relating to construction, to conditions precedent and subsequent, to sufficiency of performance and to excuse for nonperformance, including questions of frustration and impossibility." *See* SECOND RESTATEMENT § 187, cmt. on subsection 1. Section 187(1) is almost wholly uncontroversial; as Richard J. Bauerfeld notes, it is a useful "interpretive or a gap-filling rule" with which there can be "little quarrel," since this practice "involves little more than incorporation by reference." *See* Bauerfeld, *Note, Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination?*, 82 COLUM. L. REV. 1659, 1660 (1982). That Section 187(1) seemingly both widely supported

provision does not fall into this category, however, Section 187(2) provides that it is also enforceable provided it bears a "substantial relationship" to the parties or transaction or is grounded in some other "reasonable basis" for its selection, unless a complicated three-part exception (discussed in detail later) is met.[110]

Applying Section 187, courts validate the large majority of choice-of-law provisions,[111] in some cases even when the relevant law on a particular issue varies sharply from state to state.[112] Many scholars have thus praised Section 187 for making contractual choice-of-law more predictable.[113]

Contractual choice-of-law provisions run into problems under the Second Restatement in only two major circumstances. First, in some cases, parties have sparred over what constitutes a "substantial relationship" (or other reasonable basis) sufficient to justify the selection of a particular law.[114] Scholars have likewise disagreed about whether this requirement should be interpreted strictly, applied generously, or revised or eliminated altogether.[115]

---

and clear, however, has not stopped courts from construing it in unorthodox ways. In *Stone Surgical*, 858 F.3d at 389, for example, the court suggested that a noncompete clause might fall in this category – surely an unusual view given that noncompetes are unenforceable in many states – but, because the lower court had applied Section 187(2), decided to do so as well. *See id.* ("Although there is a plausible argument that § 187(1) applies, because the district court focused on § 187(2), so do we.")

[110] *See* SECOND RESTATEMENT § 187(2).

[111] *See* Ribstein, *Efficiency*, *supra* note 29, at 367 (finding, on the basis of a 700-case study, that choice-of-law clauses are "enforced in all but certain narrow categories of cases").

[112] For example, courts generally enforce parties' choice of law in usury cases. *See* O'Hara, *Opting*, *supra* note 39, at 1564 n.65 (collecting cases). An illustrative case is Jett Racing & Sales, Inc. v. Transamerica Commercial Fin. Corp., 892 F. Supp. 161, 164 (S.D. Tex. 1995), in which the court upheld the parties' choice of Illinois law despite their numerous Texas contacts, concluding that Texas had no "fundamental public interest in protecting its residents from usury." *See id.* Other courts have, however, seen this issue differently and declined to enforce choice-of-law provisions because of policy concerns surrounding usury. *See supra* note 40.

[113] *See, e.g.*, Patrick J. Borchers, *Conflicts Pragmatism*, 56 ALB. L. REV. 883, 902 (1993) [hereinafter *Pragmatism*] (citing Section 187 as one of the Second Restatement provisions that promotes the "virtues of predictability").

[114] *See* William J. Woodward, Jr., *Constraining Opt-Outs: Shielding Local Law and Those It Protects from Adhesive Choice-of-Law Clauses*, 40 LOY. L.A. L. REV. 9, 27 (2006) [hereinafter *Opt-Outs*] (noting the existence of "a scattering of cases where the courts have invalidated a choice of law as having an insufficient relationship with the parties or their contract").

[115] *See, e.g.*, Glynn, *supra* note 53, at 1429 (noting that the "law's trajectory" may "develop toward favoring the designation of the law of a transactionally unrelated state"); Mo Zhang, *Rethinking Contractual Choice of Law: An Analysis of Relation Syndrome*, 44 STETSON L. REV. 831, 849 (2015) (discussing controversy over efforts to "depart from the rigid relation requirement" in some circumstances in the Uniform Commercial Code's

The most troublesome issue, however, has been the application of Section 187(2)'s exception, which specifies circumstances under which courts should not enforce the parties' chosen law even where it satisfies the "substantial relationship" criterion. Under the exception, the parties' choice will not be applied when "application of the law of the chosen state would be contrary to a fundamental policy" of a different jurisdiction that meets two additional criteria: having a "materially greater interest than the chosen state in the determination of the particular issue"; and being the place that, "under [the Restatement (Second)'s more general contract provisions], would be the state of the applicable law in the absence of an effective choice of law by the parties."[116] What that means is that the alternative jurisdiction in this context – that is, the state whose law would apply in the absence of an effective choice by the parties – is determined by essentially the same "most significant relationship" test that characterizes the Second Restatement as a whole.

As has often been noted,[117] this exception is complex and somewhat confusingly written. Even the order of the three steps – that is, determining whether an alternative jurisdiction exists that has the most significant relationship to the dispute, whether that jurisdiction's fundamental policy is involved, and whether it has a materially greater interest – is unclear and troublesome. On the one hand, Section 187(2) seems to invite courts first to determine the question whether the chosen law is "contrary to a fundamental policy" of the alternative jurisdiction, and some courts have indeed endeavored to proceed in this manner.[118] At the same time, of course, courts

---

choice-of-law provisions, which met "strong resistance from a majority of the states"); Symeon C. Symeonides, *The Hague Principles for Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. COMP. L. 873, 880-81 (2013) (discussing different versions of the relationship requirement in various choice-of-law contexts, including international ones, as well as the "trend" toward eliminating it). *See also* Robert J. Nordstrom & Dale B. Ramerman, *The Uniform Commercial Code and the Choice of Law*, 1969 DUKE L.J. 623, 626 (1969) (discussing purposes of a substantial relationship requirement).

[116] *See* SECOND RESTATEMENT § 187(2).

[117] *See, e.g.*, Woodward, *Opt-Outs*, *supra* note 114, at 25-26 (discussing the exception and noting that, in spite of the presumed intentions of its drafters to create uniform results that would discourage forum-shopping, its "complexity ... makes it extremely difficult to predict the outcome"); Reimann, *supra* note 85, at 588 n.73 ("Section 187 confounds the reader by convoluted language, double negatives, exceptions and counter-exceptions; very few courts fully grasp it and it takes students [a complex] flow chart[] to figure out what the section is trying to say.").

[118] *See, e.g.*, Mitchell v. Michael Weinig, Case No. 2:17-cv-905, 2018 WL 4051826 (S.D. Ohio Aug. 4, 2018) at *6 (analyzing whether choice-of-law provision was contrary to a fundamental policy of Ohio without first considering whether Ohio was the state of the most significant relationship to the dispute). Some courts have dodged the issue by simply relying on the parties' shared belief as to which law would govern in the absence of a choice-

cannot effectively consider whether the chosen law violates another jurisdiction's fundamental policy until they know *which* other jurisdiction's policy is in question. This suggests the opposite chronology – that is, that courts should first determine whether or not the chosen law is that of the jurisdiction with the most significant relationship to the dispute, and if not, which jurisdiction is, before beginning to consider the fundamental policy and materially greater interest prongs. In keeping with this view, some courts consider the factors in "reverse order" to that suggested by the text of Section 187(2) itself.[119]

The question of the order of analysis, which might seem trivial, is important in that it affects the degree to which 187(2) simplifies courts' choice-of-law task; if a court must perform the usual "most significant relationship" analysis even when a choice-of-law clause is involved, the provision does little to promote judicial efficiency.[120]

As succeeding sections will describe more fully,[121] courts have also stumbled over the substance of the exception. The process of determining the state of the "most significant relationship" is complex and leaves much to judicial discretion.[122] Likewise, Section 187(2)'s language provides relatively little guidance over both what qualifies as a "materially greater interest" and a "fundamental policy."[123] As a result, courts apply a variety of approaches and routinely reach opposite results on these questions despite

---

of-law provision. *See, e.g.*, Cabela's LLC v. Highby, 362 F.Supp.3d 208, 217 (D. Del. 2019).

[119] *See* Cardoni v. Prosperity Bank, 805 F.3d 573, 582 (5th Cir. 2015) ("Texas takes the Section 187(2)(b) factors in reverse order. This makes sense as the first two inquiries do not matter unless "yes" is the answer to the last question posed [i.e., whether a state other than that of the chosen law has the most significant relationship to the dispute].") *See also* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 678-79 (Tex.1990) (finding that Texas, not the chosen state, was the state of the most significant relationship before proceeding to analyze other aspects of the Section 187 analysis). Other courts have taken still different approaches. Some courts, for example, have asked whether a jurisdiction other than that of the chosen law has a materially greater interest in the dispute without first determining whether that jurisdiction is that of the "most significant relationship." *See, e.g.*, Medicrea USA, Inc. v. K2M Spine, Inc., 17 Civ. 8677 (AT), 2018 WL 3407702 (S.D.N.Y. Feb. 7, 2018), at *9; Freeman Expositions, 2017 WL 1488269, at *5.

[120] *See* William A. Reppy, Jr., *Eclecticism in Methods for Resolving Tort and Contract Conflict of Laws: The United States and the European Union*, 82 TUL. L. REV. 2053, 2072 n.98, 2072-73 (2008) (noting that Section 187(2) appears to require an analysis of the state of the most significant relationship in every case, although its language on this point is confused).

[121] *See infra* Part II.B.3.

[122] *See infra* note 204.

[123] *See* SECOND RESTATEMENT § 187 & § 187 cmt. g (mentioning the "materially greater interest" requirement but providing no further explanation and noting that "[n]o detailed statement can be made" about which policies are fundamental).

similar facts.[124]

Despite these ambiguities, however, what the exception seeks to accomplish is relatively clear – to provide a narrow path to nonenforcement in situations where the chosen law raises significant public policy concerns for the jurisdiction whose law would otherwise apply. Nonetheless, because courts have disagreed over many aspects of its application, the exception has led to diverse and conflicting results.

II. THE SECOND RESTATEMENT AND SUBSTANCE-TARGETED CHOICE-OF-LAW CLAUSES

This section first identifies a category of contractual choice of law that should spark particular concern – substance-targeted clauses whose aim is to validate a provision that might otherwise be unenforceable under the law of one or more jurisdictions whose law would potentially apply. It goes on to argue that the Second Restatement has been mostly successful in its approach to choice-of-law clauses that are not substance-targeted – a category that is likely includes the large majority of choice-of-law provisions.[125] Where such clauses are concerned, the Second Restatement's generally enforcement-favoring policy serves the goals of predictability, efficiency, and facilitating party choice. By contrast, the Second Restatement approach has proved problematic as applied to substance-targeted clauses.

A. Problematic and Unproblematic Choice-of-Law Clauses

Parties have diverse motives for including a choice-of-law provision in a contract, many of which are largely uncontroversial. Parties may choose a governing law simply for the sake of having relative certainty about which decisional rules will be applied in the event of a dispute; this factor is

---

[124] One commentator, for example, has called the "fundamental policy" standard "amorphous and difficult to define," one that some courts have defined "circularly" while others have "balked at the notion of defining" at all. *See* Justin Markel, *Comment, Efficacy of Contractual Solutions in the Interstate Enforcement of Covenants Not to Compete*, 51 S. TEX. L. REV. 783, 803 (2010).

[125] Most choice-of-law clauses, that is, are not contested strongly (if at all) by either party and are readily enforced by courts. More than 20 years ago, Symeon C. Symeonides observed that uncontroversial choice-of-law clauses were "too numerous to mention" and that the "vast majority of cases routinely uphold such clauses, often without much discussion." *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 1996: Tenth Annual Survey*, 45 AM. J. COMP. L. 447 (1997); Symeon C. Symeonides, *Choice of Law in the American Courts in 1997*, 46 AM. J. COMP. L. 233, 273 (1998). While the developments described in this Article have likely made friction over choice-of-law clauses more common today, enforcement is still unproblematic in many situations.

particularly important given the complex, variegated choice-of-law landscape that currently exists in the United States (and the even greater uncertainties when international conflicts law issues are at stake).[126] Parties with different domiciles may choose the law of a neutral jurisdiction to avoid the disproportionate advantage one party might otherwise receive from the application of its home state's law.[127] Conversely, parties may choose a law on the grounds that it is familiar to both of them.[128] Parties whose contract concerns a specialized subject matter may benefit from applying the law of a jurisdiction whose courts have particularized experience in that area.[129]

---

[126] *See* Edith Friedler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 U. KAN. L. REV. 471, 471 (1989) (noting that contractual choice-of-law provides a welcome "degree of control and predictability" in situations "in which many unknown factors, players, and events may interact in different continents under different legal systems"); Reese, *supra* note 80, at 534 ("[O]rdinary choice of law rules as to what law governs the validity of a contract and the rights created thereby are vague and uncertain in the extreme."). Entities that conduct business in many states may have a special interest in ensuring that their conduct is assessed according to a uniform set of laws. *See* 1-800-Got-Junk? LLC v. Superior Court, 189 Cal. App. 4th 500, 505 (Cal. Ct. App. 2010) (observing that "a multi-state franchisor has an interest in having its franchise agreements governed by a uniform body of law").

[127] *See* John F. Coyle & Christopher R. Drahozal, *An Empirical Study of Dispute Resolution Clauses in International Supply Contracts*, 52 VAND. J. TRANSNAT'L L. 323, 334 (2019) (noting that the law of a neutral jurisdiction was chosen in 45.9 percent of choice-of-law clauses in the international supply contracts studied).

[128] *See* SECOND RESTATEMENT § 187 cmt. f (noting that "when contracting in countries whose legal systems are strange to them as well as relatively immature, the parties should be able to choose a law on the ground that they know it well and that it is sufficiently developed").

[129] In a study of choice-of-law and choice-of-forum provisions in 2,865 contracts of various types, Theodore Eisenberg and Geoffrey P. Miller found that choice of law was "strongly associated with contract type." *See The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 Cardozo L. Rev. 1475, 1490-91 (2009) [hereinafter *Flight*]. As the authors note, this is likely because the parties' hopes for "certainty and predictability" are furthered by choosing the law of a jurisdiction with expertise in a particular type of contract, such that "[o]nce [a] venue is perceived as having a lead in legal development, that lead should induce more parties to contract for that state's law to govern." *See id.* at 1478-79. *See also* Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 741 (2011) (noting that "parties' selections often reflect preferences for a particular mutually preferred substantive law and for particular forums' decisionmakers," such as Delaware law for corporate internal governance and New York law for other corporate matters). A closely related phenomenon is the decision by parties to choose the law of a jurisdiction perceived to have a well-functioning system of regulation in the contract's subject area, such as business formation or real estate transfer. *See* Horst Eidenmüller, *The Transnational Law Market, Regulatory Competition, and Transnational Corporations*, 18 IND. J. GLOBAL LEGAL STUD. 707, 713-14 (2011).

Finally, a choice of law may be driven by the parties' prior choice of forum.[130]

In such situations, there is widespread agreement that choice-of-law provisions should be readily enforceable,[131] and the drafters of Section 187 mostly had these circumstances in mind when they opted to validate choice-of-law clauses fairly expansively.[132]

In rarer circumstances, parties may choose a law to avoid a rule that would render the contract invalid on grounds of contract mechanics or subject it to an undesired interpretation – such as, for example, a statute of frauds or a technicality of how the mailbox rule is applied.[133] While these provisions are targeted in the sense of being chosen with particular elements of the chosen law in mind, they are closely related to the process of contracting itself. Again, commentators tend to agree that such provisions should be enforceable.[134] Rules governing contract mechanics only rarely involve

---

[130] *See id.* at 1476 (finding, in an empirical study of choice-of-law and choice-of-forum contracts, that "[w]hen a forum is specified it usually matches the contract's choice of law"). *See also* Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1975, 1981 (2006) (noting that, in a study of merger contracts, "a substantial degree of overlap exists between choice of law and choice of forum designations").

[131] *See Appendix A: Letter from Friedrich Juenger to Harry C. Sigman, Esq.*, (June 23, 1994), 28 VAND. J. TRANSNAT'L L. 445, 447, 449 (1995) [hereinafter *Letter A*] (observing that "[t]hroughout the world, there is near universal agreement that contracting parties of roughly equal bargaining power should be free to negotiate, at arm's length, the law they wish to govern their agreement" provided they have no "design to evade norms that represent an especially strong policy"); *see also* Michael Whincop and Mary Keyes, *Putting the 'Private' Back into Private International Law: Default Rules and the Proper Law of the Contract*, 21 MELB. U. LAW REV. 515, 518 (1997) (noting that most commentators would enforce choice-of-law provisions that "reflect genuine bipartite agreement" and are not designed to evade mandatory law).

[132] *See* SECOND RESTATEMENT § 187 cmts. f & g (suggesting that it is beneficial to enforce choice of law provisions in situations where it promotes predictability or allows parties to opt for a familiar or well-developed body of law). *See also* Reese, *supra* note 80, at 534 (describing the ability by parties to "predict with fair certainty what their rights and liabilities will be" as the "supreme advantage" of choice-of-law enforcement).

[133] *See* William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697, 767-68 (2001) [hereinafter *Legislative*]. *See also* Salustri v. Dell, Inc., No. EDCV 09-02262 SJO. 2010 WL 11596554, at *7 (C.D. Cal. April 27, 2010) ("General rules of contract law are usually not considered "fundamental" public policies within the meaning of Restatement § 187."); Juenger, *Letter A*, *supra* note 131, at 450 (noting that "every legal system contains a motley array of provisions, such as statutes of frauds and blue laws, which amount to little more than hindrances to interstate and international commerce" and do not embody strong policy concerns); SECOND RESTATEMENT § 187 cmt. g (1989) (suggesting that a fundamental policy "will [only] rarely be found in a requirement, such as the statute of frauds, that relates to formalities").

[134] *See id.*

significant issues of policy.[135] In such cases, the inclusion of a choice-of-law provision can spare courts the effort of having to make a choice-of-law determination that is likely both to be complicated and to rest substantially, in any case, on factors pertaining to party expectations and choice.[136]

A somewhat less benign situation occurs when the chosen law is selected because it is generally advantageous to the party with greater bargaining power. That party might, for example, choose the law with which it is more familiar, giving it an advantage in potential litigation.[137] Alternatively, it might choose the law of a state that, in general, has a more business-friendly climate in preference to that of a state that offers more consumer protections.[138]

These situations are troubling, and arguably some restraints should be placed on contractual choice-of-law in these circumstances. For example, David Horton has argued that drafters often use unilateral amendment to slip favorable choice-of-law clauses into contracts[139] and proposes, in response

---

[135] *See id. But see* Woodward, *Legislative*, *supra* note 133, at 770 (expressing, in discussion of proposed revisions to the choice-of-law provisions of the Uniform Commercial Code, some concern about an approach to contractual choice of law that would "convert to non-mandatory status all of the state's mandatory rules that do not rise to the level of 'fundamental policy.'"). Note that some practices, such as unilateral amendment, may provide an occasional exception. *See* Horton, *supra* note 95, at 638-40 (discussing policy issues surrounding unilateral amendment and the failure of the Section 187 test to adequately address them).

[136] The Second Restatement's provisions regarding choice of law in contract cases where there is no party choice, for example, focus on party expectations as well as many sorts of contacts that can be easily manipulated by the parties to create connections with a particular state. *See* SECOND RESTATEMENT § 188 (2) (listing the place of contracting and the place of contract negotiation as the first two factors for courts to consider); *id.* at §188 cmt. b (noting that "the protection of the justified expectations of the parties is of considerable importance" in choice-of-law issues involving contracts).

[137] *See, e.g.*, Dana Stringer, *Note, Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way*, 44 COLUM. J. TRANSNAT'L L. 959, 981 (2006) (noting that U.S. businesses entering into contracts abroad "have an obvious interest in drafting contracts that limit their liability via choice-of-forum and choice-of-law clauses ... towards the more favorable and familiar procedure and substance of the U.S. courts").

[138] *See* Dodge, *supra* note 129, at 741-42 ("In contrast to the potential for mutually beneficial selections of law and forum in the corporate context, studies have suggested a uniformly one-sided selection of legal regimes favoring sellers in the consumer context."); Horton, *supra* note 95, at 637 ("[T]hrough choice-of-law clauses, businesses can project other favorable legal rules through all their nationwide transactions."); Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 999 (2008) (finding that choice-of-law clauses in a study of Internet contracts benefited the seller when included).

[139] David Horton observes that "[c]hoice-of-law clauses have thus increased the use of

to this and other abuses, that "policymakers simply ban unilateral revisions to procedural terms."[140] Further, as Horton notes, aspects of a single state's legal regime can interact; states with business-friendly legal climates are often "hospitable to contract procedure" as well, meaning that they are more likely to approve such practices as the insertion of unilateral terms to begin with.[141]

While these concerns are serious, a corporation's ability to have its affairs primarily governed by a business-friendly state's entire *body* of law is nonetheless less pernicious than its ability to select a particular provision of that law. When the law of a jurisdiction is to be applied in multiple contractual situations, that is, it is less likely to consistently benefit one party over the other than when it is applied to a single issue.[142] Further, choice-of-law clauses standing alone have a lesser effect in these circumstances; corporations would have many tools to influence the overall body of law likely to apply to their transactions even if contractual choice of law were not enforced.[143] For example, businesses may invest resources in states with favorable law to ensure that the requisite "substantial relationship" with that state will exist when a court is determining whether to enforce a choice-of-law clause.[144] Yet by establishing contacts with a state[145] or by including choice of forum clauses electing its preferred state's courts,[146] a business can

---

unilateral modifications, as drafters export the law of favorable jurisdictions to bolster the legality of unilaterally added arbitration clauses and class arbitration waivers." *See* Horton, *supra* note 95, at 640. In cases such as the ones Horton described, choice-of-law clauses might be characterized as substance-targeted. *See infra* Part III.A.

[140] *See* Horton, *supra* note 95, at 665.

[141] *See id.* at 639.

[142] This is because while a particular state may have, for example, a generally pro-business climate, an individual business cannot guarantee that the law will be tailored to serve its interests in every particular. *See* O'Hara & Ribstein, *supra* note 65, at 1192 (making this argument).

[143] Indeed, in corporate internal affairs, courts invariably apply the law of the place of incorporation, allowing corporations broad scope to choose the applicable law. *See* O'Hara & Ribstein, *supra* note 65, at 1162 ("In the United States, the law of a corporation's state of incorporation almost always governs its management and control arrangements.").

[144] *See* Horton, *supra* note 95, at 637 ("[A] firm often cannot select a particular state's law unless a significant part of its infrastructure – including people, money, and jobs – resides in that state.").

[145] *See* SECOND RESTATEMENT § 188 (citing the "domicil, residence, nationality, place of incorporation and place of business of the parties" as among the factors to be weighed in determining which law should apply to a contract in the absence of party choice).

[146] Forum selection clauses tend to be even more readily enforceable than choice-of-law clauses, and where the forum is the same jurisdiction as that of the chosen law, courts are more likely to apply the chosen law. *See* Moon, *supra* note 41, at 332 & 332 n.50 (making the latter point and discussing the "dominant," relatively relaxed framework for determining

also significantly increase the likelihood that that jurisdiction's law will apply even without a choice-of-law clause. Including a contractual choice-of-law clause that courts will enforce adds to this probability, to be sure, but – in contrast to substance-targeted provisions, as discussed below – it plays a less decisive role.

By contrast to the above examples, an entirely different situation exists when parties insert a choice-of-law provision into contracts because one or both sides benefit from a specific decisional rule that the chosen law supplies. These are the provisions that this Article calls "substance-targeted." Such choice-of-law clauses tend to involve questions of public policy, although not necessarily public policy deeply enough held to qualify as "fundamental" under Section 187(2).[147]

Such provisions raise issues that vary significantly from choice-of-law clauses that select a particular jurisdiction's law primarily for reasons other than its specific content (such as to provide certainty as to which law will apply or to gain the benefit of a jurisdiction's subject-matter expertise). They are also different from most choice-of-law clauses that are directed to contract mechanics or interpretation.

As the following sections will explore in more depth,[148] this difference arises because, in contrast to more typical choice-of-law clauses, the very purpose of targeted provisions is to enable the parties to avoid an otherwise operable legislative command. Because this purpose falls outside contractual choice-of-law's core purposes of achieving predictability and efficiency, both the drafters of the Second Restatement and later choice-of-law scholars have looked on the impulse to evade otherwise governing law with suspicion or hostility. Second Restatement reporter Willis Reese noted that the "most important limitation" on parties' contractual freedom was that a choice-of-law clause should not be used to allow the parties to "escape ... a fundamental policy" of the state whose law would otherwise govern.[149] Summarizing scholarly views on the subject, Michael Whincop and Mary Keyes likewise find that "[p]arty autonomy is treated as having ... the weakest claim [to application] where it appears designed to evade the application of mandatory provisions."[150] Conflicts scholar Friedrich Juenger, a proponent of strong party autonomy in general, likewise believed that parties' freedom to include applicable law should not include any "design to evade norms that represent

whether forum selection clauses are enforceable).

[147] *See* SECOND RESTATEMENT § 187(2) and 187 cmt. g.

[148] *See infra* Part II.B.2.

[149] *See* Reese, *supra* note 80, at 536.

[150] *See* Whincop & Keyes, *supra* note 131, at 518.

an especially strong policy."[151] Larry Ribstein and Erin O'Hara, supporters of robust choice-of-law enforcement in nearly all circumstances, have acknowledged that "the choice-of-law system ... must preserve a role for beneficial government regulation by prohibiting some party choice of law or by making it contingent upon the satisfaction of procedural protections."[152]

Formally, however, the Second Restatement and Section 187(2) in particular do not distinguish between substance-targeted clauses and more general ones. Of course, Section 187(2)'s exception is presumably less likely to apply to clauses that are not substance-targeted[153] and, conversely, will render many substance-targeted provisions unenforceable.[154] The exception itself, however, while considering other factors, does not explicitly take into account the degree to which the clause is targeted – that is, deliberately aimed at avoiding a potentially operable legal rule – in determining whether it is valid.

To be sure, developing a working means for identifying substance-targeted provisions is not necessarily an easy task, particularly to the extent that question is one of intent. When a contract is limited to a single matter that is the subject of policy disagreement among states, such as a stand-alone noncompete or a surrogacy contract, it is fairly likely that any choice-of-law clause was likely included primarily to validate the substance of the contract. This conclusion may be even clearer, perhaps unmistakable, when the subject matter of the contract has been segregated from other aspects of the parties' relationship – for example, when an employee is asked to sign a separate noncompete that specifies a different governing law from the employee's primary employment contract.[155]

---

[151] *See* Juenger, *Letter A*, *supra* note 131, at 449.

[152] *See* O'Hara & Ribstein, *supra* note 65, at 1153.

[153] In other words, when parties choose a particular law for reasons not closely tied to its substance – such as greater predictability or a wish to take advantage of judicial expertise in a particular area – their disputes will involve significant policy issues only incidentally.

[154] That is, substance-targeted provisions are by definition those that implicate substantive issues, some of which may be important enough to rise to raise questions of fundamental policy under the Second Restatement.

[155] For example, one employee received four separate documents as part of his employment agreement, only one of which (a nondisclosure agreement) contained a choice-of-law clause, which specified Pennsylvania law. A court held that Washington law, as the law of the place with the most significant relationship to the dispute, governed the non-compete agreements that were also part of the package (the nondisclosure agreement was not at issue in the dispute). *See* In re Prithvi Catalytic, Inc., 571 B.R. 105, 119 n.62, 120 (W.D. Pa. 2017). Such situations could, of course, arise for some other reason, but they strongly suggest that the choice of law was particularly important to one substantive provision. *See also* Ribstein, *Efficiency*, *supra* note 29, at 380 (noting that parties often "narrowly draft clauses," perhaps to avoid severability issues in the case of nonenforcement, and that, of 690

In other situations, however, the parties may include a choice-of-law provision that by its terms applies to a variety of matters under their contract, while at the same time remaining more or less indifferent (at least ex ante) to which law applies to all but one or two. In such situations, the court might strongly suspect that the choice-of-law clause was substance-targeted, but it would be likely be impractical to undertake an inquiry into the parties' motives thorough enough to determine what they actually had in mind.[156]

For this reason, this Article proposes a definition of substance-targeted clauses that does not rely on directly ascertaining party intent. This approach is explained in Part III.

B. Applying Section 187 to Targeted and Non-Targeted Clauses

The Second Restatement approach to contractual choice-of-law reflected widespread sentiment at the time in favor of the enforcement of such provisions, a consensus that has likely grown over the years.[157] The Second Restatement's drafters and supporters believed that validating the parties' choice of law would promote values of predictability and party autonomy, while simplifying the judicial task. When they discussed these benefits of enforcing the parties' choice, however, they appeared to have non-targeted choice-of-law clauses almost exclusively in mind.[158]

The following section argues that, where non-targeted clauses are concerned, the Second Restatement's approach – under which such clauses are generally enforced – mostly succeeds in fostering the surer, more efficient results that advocates of party autonomy sought to achieve. The situation with respect to targeted clauses, however, is far more troublesome. To begin with, the arguments that have been advanced for enforcing choice-of-law provisions generally apply more weakly or not at all to targeted clauses. Further, Section 187's exception – which is at issue in much litigation

---

contractual choice-of-law cases studied, 124 included situations where the contractual choice of law did not apply to some issues in the case).

[156] Friedrich Juenger, for example, rejected the notion of inquiring into party intent in contractual choice-of-law in part on the grounds that it would be easy to manufacture an acceptable ground for including a clause. *See Appendix C: Letter from Friedrich Juenger to Harry C. Sigman, Esq., (August 15, 1994)*, 28 VAND. J. TRANSNAT'L L.469, 473 (1995) [hereinafter *Letter C*] (noting that "during my six years of practice ... I never saw a contract with a choice-of-law clause for which the parties could not proffer some good reason" and objecting that "[a]s a matter of principle, [an intent requirement] seems paternalistic and superfluous"). Richard Bauerfeld similarly argues that inquiry into the intent of a choice-of-law clause is pointless because parties can be assumed to have chosen a law that will validate their contract. *See* Bauerfeld, *supra* note 109, at 1666.

[157] *See supra* notes 77 and 91 and accompanying text.

[158] *See infra* Part II.B.1.

involving targeted choice-of-law provisions – is ambiguous, needlessly complex, and difficult to apply objectively. The following section explores these issues in considering how well both targeted and non-targeted clauses comport with the overall aims of contractual choice-of-law enforcement.

1. The Goals of Contractual Choice-of-Law Enforcement

The Second Restatement's treatment of contractual choice of law represented a fresh start that its drafters and advocates hoped would bring many benefits. Early advocates for contractual choice-of-law enforcement wished to break with the unwarranted rigidity of Beale's views on the subject[159] and to promote a simpler approach more sparing of judicial and party resources. Particularly in the early stages of advocating for a more liberal approach to contractual choice of law, "proponents of contractual choice of law focused on the practical benefits of letting the parties choose," given that "predictability and certainty are especially important to contracting parties."[160] Around the time of Section 187's drafting and first reception by the legal community, many commentators emphasized this aspect in particular. Second Restatement reporter Willis L.M. Reese noted, for example, that, especially in light of the "vague[ness] and uncertain[ty]" of contractual choice-of-law decision-making, "[t]he best way of achieving certainty and predictability in the area ... is to give the parties power within certain limitations to choose the governing law."[161]

These views still resonate today. Given the complexity and variability of choice-of-law determinations, allowing parties a shortcut through this part of the legal process remains as desirable as ever. Arguments for enforcing choice-of-law provisions may be particularly compelling in a more globalized society, where contracting parties may have contacts with multiple jurisdictions and no single state or nation may have a particularly strong connection to the dispute.

Enforcement of contractual choice-of-law provisions has also been defended as promoting party autonomy for its own sake. As William J. Moon argues, because consent is widely accepted as the main justification for the exercise of governmental authority in general, "[i]t is … unsurprising to find consent as the principal rationale offered" for broad enforcement of contractual choice of law.[162] Many have also seen the freedom to choose the

[159] *See, e.g.*, Reese, *supra* note 80, at 534 (finding that Beale's view – that is, that permitting contracting parties to select the applicable law would be tantamount to making them legislators – "falls wide of the mark").

[160] *See* O'Hara, *Opting*, *supra* note 39, at 1569.

[161] *See* Reese, *supra* note 80, at 534.

[162] *See* Moon, *supra* note 41, at 328. *See also* Mo Zhang, *Party Autonomy and Beyond*

applicable law as a logical extension of the freedom to contract more generally, in that both are "primarily concerned with the reconciliation of private interests and expectation."[163]

Yet in contrast to predictability, party autonomy for its own sake is less commonly valued as a goal. To begin with, because conflicts commentators use "party autonomy" as a purely descriptive term for a system in which parties' contractual choice of law is enforced, they frequently do not purport to ascribe to it any normative value of its own.[164] Further, even where scholars find party autonomy to be praiseworthy, they have frequently focused on its instrumental value in honoring parties' expectations and thus contributing to predictable results[165] – not on the idea that party autonomy is an end in itself.

More recently, a few commentators have suggested that party autonomy has an additional form of instrumental value, hypothesizing that allowing parties to opt in to the legal regime of their choice contributes to regulatory competition between jurisdictions.[166] They have, however, differed on whether this phenomenon is efficiency-producing[167] or an invitation to a harmful "race to the bottom."[168]

Even scholars on the pro-autonomy side of this debate, however, have seen contractual choice of law primarily as a means of promoting a more effective legal regime in a broad area, such as business formation, rather than as a contest between individual laws and policies. For example, Horst Eidenmüller notes that competitive markets have come to exist among

---

[hereinafter *Autonomy*], 20 EMORY INT'L L. REV. 511, 516-19 (2006) (arguing that party autonomy has been accepted internationally for centuries as a core choice-of-law principle).

[163] *See* Zhang, *Autonomy*, *supra* note 162, at 553.

[164] See, e.g., *Note, Conflict of Laws: "Party Autonomy" in Contracts*, 57 COLUM. L. REV. 553, 555 (1957) [hereinafter *Note*] (defining "party autonomy" as "the issue of the extent, if any, to which the contracting parties may select the applicable local law").

[165] *See, e.g.*, Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 130-31 (2008) [hereinafter *Adhesion*] ("[B]y letting the parties choose which law governs their contract, the objectives of protecting the justified expectations of the parties and enabling the parties to foretell with accuracy what their rights and liabilities are under the contract will be best attained.").

[166] *See, e.g.*, O'Hara & Ribstein, *supra* note 65, at 1152.

[167] *See id.* at 1152 (noting that "[a]ssuming that [contracting] parties typically would prefer to be governed by the law that maximizes their joint welfare, they could be expected to choose the law of the state with the comparative regulatory advantage."). *See also* Eidenmüller, *supra* note 129, at 748 ("Regulatory competition between the legal products of different states and the law market are, in principle, to be assessed positively and used as a process to discover which law is best. ... [R]egulatory competition is tenable as a policy choice.").

[168] *See* O'Hara, *Opting*, *supra* note 39, at 1570-71 (summarizing some of the race-to-the-bottom arguments and listing the relevant literature).

jurisdictions in fields such as "company law, contract law, the law of dispute resolution, and insolvency law" with "[s]imilar developments ... in the law of property and family law.[169] Larry Ribstein and Erin O'Hara, while in general favoring party choice as an efficiency-promoting mechanism, nonetheless also advocate "bundling" – that is, applying a single state's law to all issues in a dispute.[170] As they note, "[i]f designating parties must accept both favorable and unfavorable legal rules, it is harder for them to use contractual choice of law to insert one-sided terms in contracts."[171] Further, they argue, bundling has other benefits, such as allowing related laws to work in tandem with each other.[172] Targeted clauses – the opposite of bundled ones – would not, then, generally serve the goal of promoting regulatory competition.

Finally, it is worth noting that a handful of scholars have rejected the notion of party autonomy entirely. Some have observed that, where form consumer contracts are concerned, it is questionable whether meaningful autonomy is being exercised at all by the weaker party.[173] Other commentators have gone still further, struggling to find a "sound theoretical basis for making the parties' intention" – in any circumstances – "a determinative factor in the choice of law."[174] In any event, the idea that public policy concerns should limit contractual choice of law is widely accepted, even by most commentators who favor a robust view of party autonomy in general.[175]

2. Section 187(2) and Non-Targeted Clauses

In order to facilitate the drafters' aims, which focused largely on

---

[169] *See* Eidenmüller, *supra* note 129, at 708-09.

[170] *See* O'Hara & Ribstein, *supra* note 65, at 1192.

[171] *See id.* at 1192.

[172] *See id.* at 1192-94 (describing various advantages of bundling).

[173] *See id.* at 129 (arguing that "contracts of adhesion do not conform to the notion of autonomy that underlies the choice of law by the parties"); William J. Woodward, *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1, 13 (2006) [hereinafter *Finding*] (criticizing courts' lack of attention to whether consumers actual understand and assent to choice-of-law terms).

[174] *See* Bauerfeld, *supra* note 109, at 1662. One manifestation of this lack of intellectual justification, Bauerfeld argues, is that courts treat the question of intent differently in the absence of an explicit choice-of-law clause, in which situation it is given relatively little weight. *See id.* at 1662.

[175] *See* Juenger, Letter A, *supra* note 131, at 448 (noting that "[e]veryone agrees" that "[w]hile individuals and enterprises ought to be free to select any law they please, they should not be able to abuse that freedom to the detriment of one of the contracting parties or society at large"); Walter Wheeler Cook, *'Contracts' and the Conflict of Laws: 'Intention' of the Parties: Some Further Remarks*, 34 ILL. L. REV. 423, 427 (1939) ("That there must be some limits, however, to the choice of law by the parties, is admitted by all.").

predictability and efficiency, the Second Restatement creates a presumptive rule that choice-of-law clauses will be enforced in all circumstances where the parties could have contracted directly for the rule[176] and in most other circumstances as long as there exists some relationship between the chosen law and the dispute or other basis for selecting the chosen law. This presumption is a strong one and means that, in the vast majority of cases, the parties' choice is enforceable.[177] The conditions under which Section 187(2) precludes enforcement are not only narrow and difficult to satisfy, but in many cases simply do not come into question. If no jurisdiction aside from the chosen one has a meaningful relationship to the dispute, for example, it is a near certainty that the clause will be enforced, and the issue should not cause the court or the parties significant time or trouble.[178]

The basic rule of Section 187(2) is not, of course, wholly free of complexity or unpredictability in all cases. In particular, the issue of what constitutes an adequate basis for choosing a particular law has vexed courts with relative regularity.[179] In many cases, however, the standard is minimal enough not to cause problems. For example, so long as the chosen law is that of one party's domicile[180] (or, for some courts, its place of incorporation),[181] is the place where a meaningful part of the contract is to be performed,[182] represents a specialized body of doctrine dealing with the subject matter of the contract,[183] or is even the law of a jurisdiction neighboring the one in

---

[176] *See* SECOND RESTATEMENT § 187(1).

[177] *See* Borchers, *Essay*, *supra* note 86, at 503 (describing Section 187 as setting forth one of the Second Restatement's strongest presumptions). *See* Friedler, *supra* note 126, at 489 ("Section 187(2) is the embodiment of the autonomy principle. It very clearly indicates that party autonomy is the rule and not the exception.")

[178] *See supra* note 125.

[179] *See supra* notes 114 to 115 and accompanying text.

[180] *See* SECOND RESTATEMENT § 187 cmt. f. (noting that a reasonable basis exists for choosing the law of a place "where one of the parties is domiciled or has his principal place of business").

[181] *See* Carlock v. Pillsbury Co. (D. Minn. 1989) 719 F. Supp. 791, 807 ("A party's incorporation in a state is a contact sufficient to allow the parties to choose that state's law to govern their contract."). *See also* Graves, *supra* note 93, at 73 n. 102 (collecting cases both holding that the incorporation is an adequate ground for choosing a jurisdiction's law and those holding that it is not).

[182] See SECOND RESTATEMENT § 187 cmt. f (noting that, in most circumstances, the law of the place of performance or contracting is a reasonable choice).

[183] *See, e.g.*, General Retirement System of City of Detroit v. UBS, 799 F.Supp.2d 749 (E.D.Mich. 2011) ("While New York may not have a substantial relationship to the parties, New York does have a highly developed body of commercial law, so it is reasonable in cases of complex financial transactions for parties domiciled in different states to elect New York law to govern their disputes."); Exxon Mobil Corp. v. Drennen, 452 S.W.3d 319, 325 (319 Tex. Sup. Ct. J. 2014) (New York's "well-developed and clearly defined body of law" on

which a party does business,[184] courts usually enforce such clauses without difficulty.[185]

Where non-targeted choice-of-law clauses are involved, Section 187(2)'s approach of broad enforcement thus does a generally serviceable job of promoting the functions its drafters intended to serve – above all predictability and efficiency. In these areas, the benefits that mid-twentieth-century scholars expected from enforcement of the parties' choice have in fact materialized in many situations.[186] These benefits are likely realized to the greatest extent where the parties' primary motive for including a choice-of-law clause is predictability – as, for example, when a contract involves parties from several states or countries with contacts scattered across multiple jurisdictions.[187] In many such situations, the choice-of-law provision is not narrowly targeted – rather, it is designed to apply to multiple types of contracts or elements of a single contract that are likely to involve the application of a variety of legal rules.[188]

Where such provisions are concerned, Section 187 provides various sorts of desirable predictability. First, it allows the parties assurance that a choice-of-law clause will almost certainly be enforced; second, it also ensures that, by virtue of applying the chosen law, the court will not need to concern itself

---

the subject matter of the contract made it a reasonable choice). *See also* SECOND RESTATEMENT § 187 cmt. f ("[W]hen contracting in countries whose legal systems are strange to them as well as relatively immature, the parties should be able to choose a law on the ground that they know it well and that it is sufficiently developed.").

[184] *See* 1-800-Got-Junk?, 189 Cal. App. 4th 500, 505 (finding there to be a reasonable basis for the choice of Washington law "given that state's proximity to [one party]'s headquarters in Vancouver, Canada").

[185] *See* Kevin W. Bufford, *Threshold or Procedural Issue: The Order of Interpretation Required By Contractual Choice-of-Law Provisions Versus The Law of the Forum Where the Suit Is Commenced*, 40 AM. J. TRIAL ADVOC. 131, 137 (2016) (noting that, in simple cases, courts may "go immediately to the choice-of-law clause without any reference to qualifications suggested by the Restatement").

[186] *See* Borchers, *Pragmatism*, *supra* note 113, at 903 (describing Section 187 among the Second Restatement provisions that successfully "fulfill pragmatic goals" such as fostering predictability).

[187] *See* Eisenberg and Miller, *Flight*, *supra* note 129, at 1479 (theorizing that patterns seen in choice-of-law clauses are driven by parties' desire for predictability).

[188] *See, e.g.*, *id.* at 1478, 1482-84 (noting that, in a large study of choice-of-law provisions negotiated by sophisticated parties, New York law was generally preferred regardless of the type of contract involved; the authors advance several historical hypotheses as to why New York may have developed an advantage in numerous areas of commercial law). *See also id.* at 1487 (explaining that, in the authors' sample, "one can be reasonably confident that the contracting parties did not systematically anticipate the nature of any dispute that might arise, and therefore would not know whether a choice of law or forum would help or hurt them in the event of a conflict").

further with choice-of-law analysis.[189] While related, these two forms of predictability confer distinct benefits. Parties that are reasonably certain that the choice-of-law provision will be applied are better able to negotiate contracts and understand how they will be interpreted.[190] At the same time, the enforcement of choice-of-law provisions simplifies what would often otherwise be a burdensome choice-of-law analysis, sparing parties an onerous and uncertain phase of the litigation process.[191] As Larry E. Ribstein has argued, broad choice-of-law enforcement in some circumstances may promote a third kind of predictability as well: It enables corporations acting in more than one state to attain greater certainty about the substantive law applicable to their conduct, thus sparing them "the costs of complying with the inconsistent laws of many jurisdictions."[192]

Of course, even non-targeted choice-of-law provisions will sometimes result in litigation over which law should apply, since there will always arise situations in which the parties' preferred law – even if not originally chosen for that reason – happens to advantage one litigant over another. Such situations have produced many recurring grounds of conflict, on which courts do not always agree. One persistent question, for example, has been whether claims related to the contract but not directly arising out of it, such as tort claims for breach of fiduciary duty,[193] should or should not be governed by the chosen law.

---

[189] *See* John F. Coyle, *Party Autonomy and the Presumption Against Extraterritoriality*, 55 WILLAMETTE L. REV. __ (forthcoming 2019, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3319849) (arguing that enforcement of choice-of-law clauses serves the private purposes of "protect[ing] the justified expectations of the parties," which "enhances certainty and predictability," as well as the public ones of "arguably serv[ing] to promote cross-border trade" and "serv[ing] to conserve scarce judicial resources").

[190] *See* Zhang, *Autonomy*, *supra* note 162, at 553 (noting that contractual choice-of-law enforcement serves the "growing requirement for a reasonable amount of certainty and predictability" in global dealings); Woodward, *Finding*, *supra* note 173, at 10 ("There is ... a substantial economic case ... for giving contracting parties the ability to predict with greater accuracy the law that will apply to their transaction. Since the conflict of laws system cannot deliver that level of certainty, the case for permitting the parties themselves to settle the matter through a contract provision is great.")

[191] The frequently chaotic and uncertain choice-of-law landscape in the United States has been much remarked upon. *See, e.g.*, Celia Wasserstein Fassberg, *Realism and Revolution in Conflict of Laws: In with a Bang and out with a Whimper*, 163 U. PA. L. REV. 1919, 1941 (2015) (arguing that changes to the choice-of-law landscape have "frustrated the basic expectation of lawyers, judges, and the general public that law provide a minimal degree of certainty and predictability").

[192] *See* Ribstein, *Efficiency*, *supra* note 29, at 393.

[193] *See, e.g.*, Nedlloyd Lines B.V. vs Superior Court, 3 Cal. 4th 459, 468 (1992) (concluding that a contractual choice-of-law provision applied to a fiduciary duty claim).

While such disputes may be troublesome, however, they are less likely to be fully outcome-determinative than those involving more targeted provisions; for the most part, rather than relating to the question whether the contract is valid in the first place, they determine more peripheral issues such as whether a party has an additional cause of action or not.[194] Further, courts have developed principles – if sometimes conflicting ones – for resolving such questions, and careful drafting of a choice-of-law provision often allows parties to sidestep them.[195]

To the extent that it provides greater dependability and certainty in contracting, Section 187's policy of widespread choice-of-law enforcement promotes party autonomy as well. In cases where parties choose a governing law based on such considerations as the desire for neutrality or the wish to take advantage of a particular jurisdiction's subject-matter expertise, choice-of-law provisions enhance party autonomy by enabling parties to more precisely tailor the governing legal framework to their needs. Finally, enforcement of non-targeted clauses may foster productive regulatory competition by allowing parties to opt into the law of a jurisdiction known for having a well-functioning regulatory regime.[196]

3. Section 187(2)'s Shortcomings as Applied to Targeted Clauses

In contrast to general choice-of-law provisions, the application of Section 187 to substance-targeted provisions fails to serve the goal of predictability (and related values such as efficiency). In many cases, it also does little to advance, and in some cases actually undermines, the goal of party autonomy.

Under the prevailing Section 187(2) approach, the unfolding of litigation over substance-targeted provisions is anything but predictable. This is because these provisions are likely to involve questions of policy – indeed, they are normally added to contracts precisely for this reason – and may thus trigger Section 187(2)'s exception. As a result, they add an additional layer of uncertainty in the event of legal disputes: Courts must consider both whether the provision should be enforced – a process that in itself may involve surveying both the law in various jurisdictions and the extent of the parties' contacts with them – and how the dispute should be resolved substantively under whatever law is found to govern.

Consider, for example, the issue of noncompetes. State substantive law

---

[194] *See id*.

[195] *See* John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 638 (2017) (discussing two competing common views on the question whether contractual choice-of-law provisions apply to related tort claims but noting that both can be overridden by an explicit contractual statement).

[196] *See supra* note 166 and accompanying text.

varies greatly on the subject of their enforceability. Most states enforce noncompetes to some degree, but many subject them to a reasonableness test[197] or, in other cases, demand that they conform to specific requirements. Thus, even states enforcing noncompetes may have rules that differ significantly from jurisdiction to jurisdiction.[198] Other states, such as California and North Dakota,[199] are "extreme outliers" with famously near-absolute anti-noncompete policies.[200] While it is certainly the case that, in many situations, noncompetes will be clearly enforceable or unenforceable under the laws of a particular jurisdiction, the issue in others is ambiguous.

Of course, even in the absence of choice-of-law issues, this uncertainty would not disappear. But the inclusion of a choice-of-law provision that will ultimately be tested under Section 187(2) magnifies it. Courts must determine whether the provision is enforceable at all; they must determine which law will apply if it is not; and they must finally decide whether the provision that the choice-of-law clause is designed to substantively validate is enforceable under that law.[201] To the extent the parties relied on the presence of a choice-of-law clause to simplify these matters, their expectations may be sharply uprooted.

Two factors make these layers of uncertainty particularly troublesome. First, courts as an empirical matter do not apply Section 187(2) in the same way.[202] Indeed, where the exception is concerned, courts both use different methodology and put weight on different factors for all three of the

---

[197] *See* Moffat, *supra* note 59, at 946-47 (noting that many states "apply a rule of reason ... and regularly enforce non-competition agreements," while nonetheless "scrutinize[ing] non-competes more closely than ordinary commercial contracts").

[198] *See id.* at 952 (noting that "it is clear that the requirements for enforceability [of noncompetes] – and, indeed, enforceability itself – vary dramatically from state to state" and that "nearly all states apply some version of an inherently unpredictable, ad hoc, and fact-intensive standard of reasonableness").

[199] *See id.* at 944 (noting that, in addition to California, Montana, North Dakota, and Oklahoma have strong anti-noncompete policies).

[200] *See* Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751, 757 (2011).

[201] Courts have taken note of this complexity. In Savis, Inc. v. Cardenas, Case No. 18 CV 6521, 2018 WL 5279311 (N.D. Ill. Oct. 24, 2018), at *12-*13, for example, the court denied an employer's motion for a temporary restraining order enforcing a noncompete provision coupled with a Florida choice of law, noting that "[a] thick fog of legal and factual questions envelopes the choice of law question at this stage" and that it was additionally unclear whether the noncompete would be enforceable even if Florida law applied. *See also* Moffat, *supra* note 59, at 959-60 (noting that state views on noncompetes vary widely and that the choice-of-law analysis "creates another layer of unpredictability").

[202] *See* O'Neill, *supra* note 27, at 1020 (noting the varied and confused ways in which courts apply this provision).

exception's prongs.

To begin with, courts must establish which jurisdiction would be, under the rules of the Second Restatement, the place of the "most significant relationship" to the dispute. This is often a lengthy, fact-intensive process given the many factors courts must consider.[203] Even when this analysis is conducted by a careful and experienced court, it tends to rely to a large extent on the court's judgment and factors that are hard to quantify, leading to significant court-by-court and case-by-case variations.[204] Further, many jurisdictions are inexperienced in this task because they rely on approaches other than that of the Second Restatement in contractual matters not involving choice-of-law clauses, such as California's comparative impairment or New York's center of gravity.[205] This leads to a mix of outcomes – courts that follow the Second Restatement in their determinations of the state of the most significant relationship, with varying levels of success;[206] courts that apply their usual choice-of-law methodology in determining the alternative jurisdiction, without regard to the procedure specified in Section 187(2);[207] courts that ask whether enforcement of the choice-of-law provision would contravene a fundamental policy of the forum state, as opposed to the state of the most significant relationship;[208] and courts that apply the Restatement's framework with other local modifications.[209] Needless to say,

---

[203] *See supra* notes 98 to 102 and accompanying text.

[204] *See* Borchers, *Courts*, *supra* note 78, at 1233 (describing Second Restatement analysis as "often little more than a veil hiding judicial intuition"); *id.* at 1240 (describing the Second Restatement process as "contorted" and "schizophrenic" because of its demands that courts consider vague and often conflicting factors).

[205] *See supra* note 87.

[206] *See, e.g.*, Nedlloyd Lines, 3 Cal. 4th at 466 n.5 (stating without analysis that, under the Restatement framework, California is the state of the most significant relationship in this case).

[207] *See, e.g.*, Ingalls v. Government Employees Ins. Co., 903 F. Supp. 2d 1049, 1056 (D. Haw. 2012) (suggesting that Hawaii would apply its usual choice-of-law analysis, rather than that indicated by Section 187(2), in determining whether Hawaii qualified as the alternative jurisdiction to be weighed against the chosen law and also noting that the "materially greater interest" prong was folded into this analysis).

[208] *See* Theodore Eisenberg & Geoffrey P. Miller, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2088 (2009) (noting that New York courts, for example, appear to consider only whether a choice-of-law clause violates a fundamental policy of New York, not the state with the "most significant relationship" to the dispute); Woodling v. Garrett Corp., 813 F.2d 543, 551 (2d Cir. 1987) (describing test in New York as whether "fundamental policies of New York law are ... violated"). *See also* See Convergys Corp. v. Keener, 276 Ga. 808, 810-12 (2003) (noting that, while Georgia applies a similar approach to choice-of-law clauses, it has not adopted the Second Restatement and finds only Georgia policies relevant to the question of enforcement).

[209] *See, e.g.*, Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co., 6 Ohio

this array of approaches produces inconsistent results.[210]

The second requirement, that the state of the most significant relationship have a "materially greater interest" in the dispute, is even more problematic. There are difficulties with this prong even in theory, given the frequently expressed reluctance by conflicts scholars to require courts to weigh the interests of one jurisdiction against another.[211] In practice, "materially greater interest" analysis often serves as a vehicle for courts to favor forum law.[212] Further, as this Article's opening examples suggest, courts sometimes take radically different views of what constitutes a "materially greater interest" in a dispute. For one court, the fact that an employee now lived and worked in California, despite extensive past employment in Nevada for a Nevada employer, was enough to give California a materially greater interest;[213] for another court, Louisiana lacked a materially greater interest despite the fact that the employee's entire career had taken place there.[214] Courts differ as

---

St.3d 436, 438-39 (1983) (suggesting that, under Ohio conflicts principles, contractual provisions selecting the law of the place of performance will be particularly readily enforced).

[210] *See* Zhang, *Autonomy*, *supra* note 162, at 533 (noting the inconsistency of results under Section 187(2) and the difficulty lawyers have in predicting outcomes).

[211] Influential conflicts thinkers Brainerd Currie and William F. Baxter, for example, disagreed on many points but strongly believed that states should not weigh interests. *See* Earl M. Maltz, *Do Modern Theories of Conflict of Laws Work? The New Jersey Experience*, 36 RUTGERS L.J. 527, 530 (2005). While the Second Restatement's general approach permits some weighing of state interests, *see id.* at 530-31, this factor is just one of many, in contrast to its centrality in the "materially greater interest" language of Section 187(2).

[212] The "materially greater interest" prong has become in many cases a vehicle for courts to apply forum law whenever it is either the chosen law or the law of the jurisdiction deemed to be most significant. *See* Lineham, *supra* note 52, at 214 (arguing that, in the noncompete context, "contractual choice-of-law clauses have been no obstacle to courts intent on applying strong forum-state policies"). One explanation for this tendency to prefer forum law is that public policy exceptions in conflicts of law have traditionally referred to the law of the forum; Section 187(2) represents a partial departure from this view. *See* Philip J. McConnaughay, *Reviving the "Public Law Taboo" in International Conflict of Laws*, 35 STAN. J. INT'L L. 255, 265 n.32 (1999). That tendency, in turn, fosters both inconsistent decisions and skepticism about judicial motives. *See* O'Neill, *supra* note 27, at 1020; Lineham, *supra* note 52, at 213.

[213] *See supra* notes 24 to 25 and accompanying text.

[214] *See supra* note 23. *Compare also* DCS Sanitation Mgmt., Inc. v. Castillo, 435 F.3d 892, 897 (8th Cir. 2006) (finding without analysis that Nebraska, where employee was based, had a materially greater interest in noncompete case despite the fact that the employer's headquarters was in Ohio, the state of the chosen law) *with* Coface Collections North America Inc. v. Newton, 430 Fed. Appx. 162, 167-78 (3rd Cir. 2011) (finding that Louisiana, where employee lived and where he started a competing business, did not have a materially greater interest in noncompete dispute than Delaware, where the employer was incorporated).

well on the factors they deem to be relevant to the materially greater interest analysis; some base their conclusions primarily on the relative strength of parties' contacts with the states at issue, while others focus on the depth of the states' commitment to the policies at issue. [215] Finally, some courts disregard the requirement entirely.[216]

The "fundamental policy" prong, while exhibiting more areas of consensus (for example, many courts – though not all – have agreed that noncompete policies are generally fundamental[217]) has also not been without interpretive variation. The line separating an ordinary matter of public policy from a "fundamental" one is often hard to draw, particularly when – as Mo Zhang has noted – courts are called upon to evaluate policies that belong not to the forum state but to other jurisdictions.[218] For example, contractual choice-of-law provisions "tend to receive closer scrutiny" when "one party is likely to be in a weak bargaining position,"[219] and courts have frequently concluded that provisions enacted for such parties' benefit are matters of fundamental policy.[220] This is, however, not always the case.[221]

A second, less obvious issue is that post hoc connections often dominate courts' analysis of the exception. Parties agree to contracts on the basis of the

---

[215] *Compare* Diversant, LLC v. Carino, Civ. No. 18–3155, 2018 WL 1610957 (D.N.J. April 2, 2018), at *3-*4 (deeming "contacts, not state policy" to be the proper focus for determining materially greater interest) *with* Ascension Ins. Hldgs, LLC v. Underwood, C.A. No. 9897–VCG, 2015 WL 356002, at *5 (Del. Ch. Jan. 28, 2015) (approaching the "materially greater interest" prong by weighing California's "clear public policy ... stated unequivocally by statute" against Delaware's "general interest in the sanctity of a contract").

[216] *See Ingalls*, 903 F. Supp. at 1056 (indicating that the "materially greater interest" prong was folded into other parts of the analysis and did not need to be considered separately); *Woodling*, 813 F.2d at 551 (suggesting that New York does not apply any equivalent of the "materially greater interest" requirement).

[217] Unsurprisingly, courts have frequently recognized that strong anti-noncompete policies are fundamental. *See, e.g.*, Ascension Insurance Holdings, LLC v. Underwood, C.A. No. 9897–VCG, 2015 WL 356002 (Del. Ch. Jan. 28, 2015), at *5 (Delaware court took note of "clear public policy of California stated unequivocally by statute" against noncompetes and deemed it to be fundamental). In many cases, courts have also found restrictions placed on noncompetes to be fundamental even in states that sometimes enforce them. *See* Lester & Ryan, *supra* note 30, at 402. *But see Coface Collections*, 430 Fed.Appx. at 168) (noting cases to the contrary on this point).

[218] *See* Zhang, *Autonomy*, *supra* note 162, at 336 (noting that requiring courts to "evaluate the fundamental policy of the non-forum states" constitutes "a great burden to the court and is generally unrealistic in international cases"). *See also* Ribstein, *Efficiency*, *supra* note 29, at 373 n.34 (criticizing the idea of a "fundamental" policy as vague).

[219] *See, e.g.*, Symeon C. Symeonides, *Choice of Law in the American Courts in 2005: Nineteenth Annual Survey*, 53 AM. J. COMP. L. 559, 623-24 (2005).

[220] *See id.* at 624 n.429 and n.430 (collecting cases in which courts both did and did not honor choice-of-law clauses on fundamental policy and other grounds).

[221] *See id.*

information they have at the moment; that information may, of course, include the parties' sense of what may happen in the future, but just as obviously cannot encompass all probabilities. By contrast, post-contracting contacts play a substantial role in determining whether the Section 187 exception applies. This is true, for example, in the search for the jurisdiction with the "most significant relationship" to the dispute. This test, to be sure, invites courts to consider, at least to some extent, party expectations and other factors that are likely to remain constant, such as domicile and the place of contracting.[222] Nonetheless, the criteria are so flexible and the sorts of contacts court are exhorted to consider so variegated that connections that arise post-contracting tend to loom large.[223]

Courts are certainly not wrong to consider post-contracting contacts in a conflicts analysis: The way in which a contractual breach (or other contract dispute) unfolds can and often should matter in choice of law.[224] At the same time, the disproportionate role of such contacts in the analysis of Section 187(2)'s exception undercuts the predictability that is often said to be one of contractual choice-of-law's main advantages.

The ill effects of the legal uncertainty that Section 187(2)'s exception creates are particularly pernicious because they fall disproportionately on less powerful parties. Catherine L. Fisk, for example, notes that, while noncompetes have been unenforceable in California since 1872, "[California] [e]mployers ask their employees to sign such contracts anyway, presumably counting on the *in terrorem* value of the contract when the employee does not know that the contract is unenforceable."[225] According to one study, 22 percent of California employees have signed a noncompete agreement;[226] another study found that 62.4 of California-based employers included noncompete agreements in CEO contracts, a rate only modestly lower than

[222] *See* SECOND RESTATEMENT §§ 6, 188.

[223] Courts sometimes do in fact apply the factors in a manner focused on expectations at the time of contracting. *See, e.g.*, Banta Oilfield Services, Inc. v. Mewbourne Oil Co., No. 06-17-00107-CV, __ S.W.3d __, 2018 WL 6314663 Tx. Ct. App. Dec. 4, 2018), at *13-*14 (noting, in a Section 187 analysis, that a contract containing an indemnity provision was "written in a manner showing the parties anticipated and intended that the provisions of the agreement would control regardless of the location of the work being performed" and that the parties had purchased insurance to comply with the law of the chosen state, Texas).

[224] For example, in choice-of-law methodologies that consider state interests, including both interest analysis and the Second Restatement, an interest may arise based on post-contracting developments.

[225] *See* Fisk, *supra* note 28, at 782-73. *See also* Glynn, *supra* note 53, at 1417-18 (noting that "[e]ven a relatively small number of judgments favoring employers in the competing state might send a powerful signal to present and future employees that the employer can and will enforce its preferred terms.").

[226] *See* Lichten & Fink, *supra* note 36, at 53 n.10.

that of non-California employers.[227] If employers in California – whose anti-noncompete policy could hardly be more sweeping[228] – find it valuable to include such provisions in contracts, one can imagine how useful they are to employers in other states, particularly when coupled with a choice-of-law clause selecting the law of a state that validates them. In many cases, such clauses would ultimately prove unenforceable if tested in court.[229] Many employees, however, are likely unprepared to take on the lengthy litigation process and risk of defeat that a challenge to such a provision would entail.[230]

William Woodward Jr. has similarly examined a specific area of consumer protection – statutes that transform one-way attorney's-fee-shifting provisions into two-way provisions, which finance companies often seek to evade through choice-of-law clauses.[231] In theory, Woodward argues, such statutes serve to "neutralize the enormous risks that one-sided fee-shifting provisions pose for those who would contest a business's claim" and to "perhaps encourage some consumer lawyers to take meritorious cases brought to them by consumers."[232] Yet, as Woodward notes, choice-of-law clauses "creat[e] uncertainty about the application of these statutes" and thus "undercut – or even eliminate – the value such statutes can bring to victims of aberrant contracts."[233]

The problems of uncertainty are exacerbated in situations that present a novel legal issue. A journalist whose contract includes both a repayment provision and a choice-of-law clause may have virtually no guidance as to whether the latter is enforceable and what the likely outcome of litigation might be.[234] Such uncertainty translates into legal risks that many individuals

---

[227] *See* Bishara et al., *supra* note 38, at 34. Non-California employers included noncompetes in 84 percent of contracts. This difference was statistically significant, *see id.*, but it is nonetheless notable that a strong majority of California employers included such a provision.

[228] *See id.* at 33-34.

[229] When cases are actually litigated, employees may sometimes benefit from the uncertainty surrounding choice-of-law and noncompete enforcement. *See Savis*, 2018 WL 5279311, at *12 (noting that, because the party seeking a temporary restraining order must make a clear showing, the employer seeking to enforce a noncompete "bears the risk from [the] lack of clarity" on the choice-of-law question).

[230] *See also* Woodward, *Aberrant*, *supra* note 41, at 207-08 (noting that Section 187 requires some legal sophistication to understand and may not be applied correctly by, for example, arbitrators in low-stakes disputes).

[231] *See id*. at 201-02.

[232] *See id.* at 202.

[233] *See id.* at 202.

[234] *See* Lichten & Fink, *supra* note 36, at 55 (quoting employee expressing reluctance to provoke litigation over a repayment provision, because "in the time that I'm in court, I'm not employable").

are reluctant to bear and may effectively prevent controversial new contract provisions from ever being tested regularly in court. Such uncertainty can also hinder effective negotiation and planning on often high-stakes issues.[235]

With respect to autonomy values, Section 187(2) also runs into problems. To begin with, the provision is obviously not intended to promote party autonomy to the exclusion of all else; as most conflicts commentators have advocated, it balances values associated with freedom of contract with the demands of public policy. [236] Yet even though the existence of an exception in itself is uncontroversial, the Section 187(2) exception creates particular problems because it is not clearly circumscribed. Rather, for the reasons described above, its application is highly variable.[237]

Because autonomy requires some degree of predictability, Section 187(2) thus undermines the possibility of fully informed, clear-eyed negotiation between parties[238] and may, in fact, encourage deceptive dealings by better-informed or more resource-rich parties.[239] Such practices surely do not promote the ability of parties to agree, in a fair and mutual way, to contractual terms.

III. DIFFERENTIAL TREATMENT OF TARGETED AND NON-TARGETED CLAUSES

This section proposes, in contrast to the Second Restatement approach, to treat targeted and non-targeted choice-of-law clauses differently. It argues that courts should be equally or more willing to enforce non-targeted clauses than they currently are but should almost always look with skepticism on targeted ones.

This disparate treatment reflects the fact that many situations exist in which parties should be encouraged to include choice-of-law clauses and in which ready enforcement serves important goals. Non-targeted clauses are generally in keeping with the aims of contractual choice-of-law enforcement.[240] They are popular in many fully negotiated agreements

---

[235] This is true, for example, in gestational surrogacy contracts, where parties may have little information – or conflicting information – about the utility of a choice-of-law clause. *See supra* note 47 and accompanying text.

[236] *See infra* note 261.

[237] *See* Zhang, *Autonomy*, *supra* note 162, at 533 (observing that the exception renders the landscape of choice-of-law enforcement "chaotic").

[238] *See id.* at 533 (noting that, for U.S. and international lawyers, "it is indeed a headache to predict the outcome of a contractual choice of law clause in U.S. courts because often the issue is dependent on the decision of a particular court undertaken on a case-by-case basis").

[239] *See supra* note 225 and accompanying text.

[240] As earlier noted, *see supra* notes 137 to 141 and accompanying text, this is not to say

between parties of equal bargaining power, and their use frequently promotes clear and efficient results.[241] There are therefore good arguments for enforcing such clauses at least as readily – and perhaps more so – than courts do today.[242]

By contrast, virtually no conflicts scholar has endorsed – or even provided a justification for – the view that it is desirable for parties to be able to avoid important policy mandates simply by contracting around them.[243] Indeed, clauses that aim to do so not only fail to serve the purposes of honoring contractual choice-of-law but also contribute to additional legal uncertainty, the costs of which fall disproportionately on weaker parties. For this reason, this section argues, targeted choice-of-law clauses should be unenforceable in most situations.

Despite the strong arguments for treating targeted and non-targeted provisions differently, distinguishing between the two poses challenges. This section thus begins by suggesting a basic way of identifying targeted clauses as well as steps that courts and legislatures could take to make the distinction clearer.

A. Identifying Targeted Choice-of-Law Clauses

This Part will argue that differential treatment of targeted and non-targeted provisions is justified overall. Yet even if one accepts that premise, there exists an anterior question: Is it possible for courts to identify targeted clauses without undue use of judicial resources? This section argues that it is, proposing to treat choice-of-law clauses as presumptively substance-targeted as applied to contractual provisions that 1) involve a significant question of public policy; and 2) would likely be invalidated under the law of any potentially interested jurisdiction.

This test is an attempt to grapple with the basic fact that the problems that

---

that non-targeted clauses are never subject to abuse. These issues, though, are somewhat different from the questions that arise where targeted choice-of-law clauses are concerned and likely require separate solutions. *See, e.g.*, Zhang, *Autonomy*, *supra* note 165, at 129 (arguing that choice-of-law clauses in form contracts should not take effect in the absence of an indication of meaningful agreement by both parties).

[241] *See* Eisenberg & Miller, *Flight*, *supra* note 129, at 1475, 1512 (finding that, in a study of contracts "carefully negotiated by sophisticated parties who are well-informed about the contract terms," choice-of-law clauses, in contrast to choice-of-forum clauses, were universally included).

[242] For example, commentators have debated, in various choice-of-law contexts, the desirability of a requirement that the chosen law be in some way related to the parties or transaction. *See supra* note 115.

[243] Commentators almost invariably endorse a public policy exception. *See supra* notes 149 to 152 and accompanying text.

targeted clauses create are related to the parties' motives. Where parties include a choice-of-law clause to advance a goal such as predictability or taking advantage of judicial expertise, there is normally good reason to encourage them. By contrast, when parties' design is to evade otherwise applicable law on a particular point, enforcement of their choice is, in most circumstances, hard to justify.

In practice, however, attempting to establish as a question of fact the reasons why a choice-of-law clause was included may be difficult. As commentators have pointed out, skillful lawyers are likely to be able to point to innocuous motives for including even choice-of-law provisions that appear highly likely to have been targeted.[244] Moreover, when litigation occurs, considerable time may have passed since the parties signed the contract, and reconstructing motives may be difficult, leading to undesirable uncertainty.

It is worth noting nonetheless that intent-based inquiries are sometimes used in other contractual areas, such as determining whether a contracting party intended to put an item to improper use.[245] It is possible that direct evidence of intent might have a place in the targeting inquiry, perhaps in rebutting the presumption that a provision is targeted, as described below. Nonetheless, to address the possible difficulties of directly ascertaining intent, this Article proposes a test to identify targeted clauses primarily by objective characteristics, as discussed above.

The test is based on a few assumptions about contracting parties' reasoning. First, parties presumably include substance-targeted clauses because one or both of them wants to take advantage of a validating state law on an issue of some importance. The existence of diverse, policy-driven views among potentially interested jurisdictions on a question of enforceability is, then, an indicator that it is the type of contractual issue that is likely to invite targeting. Likewise, extending the analysis to all potentially interested states – not merely the one with the most significant relationship – is an indirect way of capturing the parties' intentions. If a state is interested, that is, it is an indicator that its law was one the parties believed might potentially apply in the absence of a choice-of-law clause.

The proposed framework could, in some circumstances, be applied on an issue-by-issue basis. If a contractual dispute involved a breach of a noncompete agreement as well as a question of contract mechanics, a

---

[244] *See supra* note 156. For this reason, the rebuttable presumption this Article advocates should not be too easily overcome. *See infra* note 251.

[245] Under the Restatement (Second) of Contracts, this issue is treated as a question of fact, with relevant types of evidence including the "doing of specific acts to facilitate the improper use" or a "course of dealing with persons engaged in improper conduct." *See* RESTATEMENT (SECOND) OF CONTRACTS § 182 and § 182 cmt. a (1982).

contractual choice-of-law provision could be considered targeted in the first case but non-targeted in the second. While in some cases this practice might raise difficult questions of severability, courts have in some cases been willing to apply different jurisdictions' laws in the same contractual dispute.[246]

There are several possible objections to this test as a means of identifying substance-targeted clauses. First, as with virtually any rule of categorization, it has the potential to be both under- and over-inclusive. Consider first the possibility of underinclusiveness. Some targeted provisions may escape the court's notice because they do not involve a significant policy question. In other situations, parties may have intended to target a clause based on a perception that states have different views on a particular issue, but – whether due to the parties' mistake, changing circumstances, or alterations in the law itself – that may prove not to be the case.

While these possibilities are real, they are unlikely to pose great peril. To begin with, this Article has argued that targeting is principally problematic only when it involves a meaningful substantive rule. If parties choose a law to take advantage of a matter of contract mechanics, their action may – at least in many cases – raise no red flags.[247] Thus, the proposed test does not attempt to identify all targeted clauses but only those that are most troublesome. As for the second scenario, if all interested states have converged on a common position on a particular issue, it will not matter to the result whether the choice-of-law clause is enforced or not; that the parties might have had an initial intention to target it is thus less relevant.

A perhaps more serious problem is with overinclusiveness. Parties might choose a particular jurisdiction's law primarily for reasons of familiarity or predictability; in such a case, the fact that its substantive rules serve to validate a particular contractual provision might be more or less incidental. In such situations, nonenforcement of the clause as a whole might be a disproportionate remedy.

The potential issue-by-issue operation of the test would provide some help in this situation, ensuring that a choice-of-law clause might be applied to contractual matters not involving disputed policy questions. In addition, the proposed framework assumes that parties could rebut the court's finding of presumptive substance-targeting by pointing to other characteristics of the contract and/or the chosen law. Considerations pointing against targeting might be the fact that a variety of provisions in the contract at issue – or, for a large entity, provisions in other contracts dealing with varied subject matter

---

[246] *See*, *e.g.*, *supra* note 155.

[247] *See* SECOND RESTATEMENT § 187 cmt. g (noting that important policies are "rarely ... found in a requirement, such as the statute of frauds, that relates to formalities").

– are subject to the chosen law (particularly if the chosen law does not work consistently to one party's benefit), that the chosen law is disadvantageous to the drafter, that the chosen law is that of a jurisdiction familiar to both parties[248] or well-known for its expertise in the primary subject matter of the contract, or that a different law would be highly burdensome to apply given the specialized or distinctive nature of the forum that the parties have selected.[249] Although the standard for overcoming the presumption would need to be fairly high to make its operation meaningful,[250] the rebuttable nature of the presumption nonetheless provides some protection against overinclusiveness.[251]

A second category of objections to the proposed test might be that, like Section 187(2)'s exception, it would be uncertain and difficult to administer. Yet any problems of administration are unlikely to be as serious as those of Section 187(2), which – while not aimed at identifying targeted choice-of-law provisions per se – has become the de facto means by which the validity of such clauses is litigated. In particular, the test is designed to substitute a simpler inquiry for the two-part determination of state interest under Section 187(2), of which both the "most significant relationship"[252] and "materially greater interest"[253] prongs can be highly problematic.

---

[248] The fact that the place of the chosen law is one party's domicile should not necessarily weigh against the presumption of targeting, if one or both parties had good reason to suspect that a different jurisdiction's law might ultimately be applied to the contract. *Cf.* St. Jude Medical S.C., Inc. v. Biosense Webster, Inc., 818 F.3d 785, 788 (applying atypical intent-based standard for contractual choice-of-law enforcement and concluding that the selection of the employer's home state did not constitute evidence of an intent to evade the law). However, overwhelming contacts by both parties with the forum state might suggest that the law was chosen for reasons of familiarity or predictability rather than substance.

[249] One example of this situation might be when the parties have agreed to resolve their dispute in tribal courts within the United States. In such a case, applying a law other than forum law might impose a significant burden on the court. By contrast, asking a state or federal court within the United States to apply a different state's law would generally not impose a meaningful burden.

[250] *See* Kenneth S. Braun, *The Unfulfillable Promise of One Rule for All Presumptions*, 62 N.C. L. REV. 697, 703 (1984) ("A presumption based on social policy may need an extra boost to ensure that the policy is not overlooked in the face of some explanation given by the opponent.")

[251] In other contexts, courts and scholars have recognized that rebuttable presumptions can be "an appropriate way to balance competing policy concerns." *See* Timothy R. Holbrook, *Patents, Presumptions, and Public Notice*, 86 IND. L.J. 779, 814 (2011) (discussing the prevalence of rebuttable presumptions in the Supreme Court's patent law jurisprudence). *See also* Braun, *supra* note 250, at 707-08 (describing how presumptions can be usefully tailored to achieve various ends).

[252] *See supra* note 203.

[253] *See supra* note 211 to 216 and accompanying text.

To avoid some of the issues with application of Section 187(2), the proposed framework requires courts to identify all potentially interested states, without weighing contacts or interests against each other. In most cases, this is likely to be a fairly straightforward determination. States where parties are domiciled, where the contract was performed, or where resident businesses that stand to gain or lose from the contract's enforcement (as in the case of a noncompete clause) would automatically be deemed interested; except in unusual circumstances, most other states would not.[254] The potential interest of a given state would thus be assessed based primarily on readily determined objective factors and would not require a detailed, case-specific inquiry into the extent of contacts with various states, their significance, and the consequent materiality of the state's interest in the matter.

In determining which policy matters require special treatment, this framework also substitutes the idea of a significant public policy for a fundamental one. In so doing, it aims both to lower the threshold for contractual provisions of concern and to simplify the process of determining which policies qualify. The question whether a policy is "fundamental" often requires a detailed look at a foreign state's law[255] to determine how long a policy has been in place, how committed legislators have been to it, how broadly it applies, the relationship between the contract and the place at issue, and even whether it implicates "principle[s] of justice, moral[s], or tradition."[256]

The proposed framework would, in contrast, cast a deliberately wider net, covering all state laws that embody meaningful public policy concerns without requiring courts to ask whether the policy has special characteristics that cause it to rise to the level of "fundamental." Further, it would spare courts the need to make the public-policy judgments that current 187(2) analysis – particularly in conjunction with the "materially greater interest" prong – often require. At the same time, courts' analysis need not be wholly

---

[254] In actions involving a large number of jurisdictions, such as a consumer class action, many states might be deemed interested; however, courts would not need to examine the law of each jurisdiction in detail to determine that significant policy differences exist among interested states.

[255] *See, e.g.*, Coface Collections N. Am. v. Newton, 430 Fed. Appx. 162, 168 (3d Cir. 2011) (noting the "high threshold" and "strong showing" required for a policy to be deemed fundamental). The Second Restatement gives littlate guidance on this point. *See* SECOND RESTATEMENT § 187 cmt. g (stating that "[n]o detailed statement can be made" about when such a policy might exist though suggesting that increased contacts with the state make it more likely that its policy is fundamental in the context of the dispute).

[256] *See* Salustri v. Dell, Inc., No. EDCV 09-02262 SJO, 2010 WL 11596554, at *7 (C.D. Cal. April 27, 2010).

divorced from prior case law; the sorts of policies that courts have generally agreed are fundamental under 187(2), such as enforcement or nonenforcement of noncompetes, could continue to be seen as "significant" under the new test, while some policies that courts have concluded are usually not fundamental, such as general principles of contract mechanics,[257] would not be.

Some trends already in existence could also make the determination of which policies are significant more straightforward. Many commentators have already called for greater legislative attentiveness to choice-of-law issues, particularly regarding the question of legislation's territorial scope[258] or the degree to which it represents a policy intended to override contractual choice of law.[259] Legislators could aid in identification of targeted choice-of-law clauses by clarifying the policy at stake in a state statute and indicating how broadly it is meant to apply.

No test, of course, can perfectly distinguish problematic from unproblematic provisions, and any test will require some judicial elaboration and trial and error. A more streamlined test, however, is likely to be easier to administer than Section 187(2)'s notoriously complex exception. In addition to being simpler, the proposed test is aimed more specifically at the problem of targeting than is the Second Restatement. The following sections defend that approach for both targeted and non-targeted choice-of-law provisions.

B. Non-Enforcement of Most Targeted Choice-of-Law Clauses

If, as previously argued, targeted and non-targeted choice-of-law clauses can be differentiated, there exist strong justifications for treating these two types of provisions in distinctive ways. Where choice-of-law provisions can be clearly categorized as targeted, courts should generally be unwilling to enforce them. At the same time, categorization of choice-of-law provisions in this fashion might pave the way to readier enforcement of non-targeted clauses.

---

[257] *See Salustri*, 2010 WL 11596554, at *7

[258] John F. Coyle, for example, notes that issues surrounding enforcement of choice-of-law clauses have been more easily resolved when the legislature clearly specifies that a particular statute either is or is not intended to apply extraterritorially. *See* Coyle, *supra* note 189, at p.4 of draft. Coyle argues that, where a particular statute is ambiguous as to territorial scope, courts should not invoke the presumption against extraterritoriality to defeat the parties' choice of law. *See id.* at 12.

[259] *See* O'Hara & Ribstein, *supra* note 65, at 1194-95 (noting that the author's "version of this longstanding public policy exception [to contractual choice-of-law enforcement" consists of "enforcing a specific prohibition or restriction on choice of law in a statute of the state whose law would apply [under general conflicts principles] notwithstanding the contractual choice of law clause").

This Article takes the stance that, because there are few justifications for enforcing targeted clauses, they should in general be unenforceable. Even if one rejects that view, however, a strong argument exists for developing some means for identifying substance-targeted choice-of-law clauses and weighing their targeting against them in any determination of enforceability.

Given the trend toward increasing acceptance of party autonomy in contracting, both in the United States and worldwide,[260] this view is likely to be somewhat controversial. The following section defends the view that targeted clauses should not be enforced.

1. Enforcement of Substance-Targeted Clauses Is Rarely Justified

As the preceding sections have argued, substance-targeted clauses are not in keeping with the widely accepted goals of contractual choice of law. Because they are likely to involve controversial issues on which states differ, they tend to invite rather than reduce litigation and consequent uncertainty. Section 187(2)'s current framework compounds this problem by employing a highly case-specific, subjective analysis. This leads to unpredictable results and fails to foster productive uses of party autonomy.

Further, it is not clear that there exists a compelling independent justification for the enforcement of targeted clauses. Rather than providing one, advocates of honoring contractual choice-of-law have mostly tended to argue that the harms caused by targeted clauses are outweighed by the advantages of contractual choice more generally,[261] or that public policy exceptions are sufficient to address the problem.[262] Larry Ribstein and Erin O'Hara, while not specifically addressing the idea of targeting, have taken the related position that wholesale rather than piecemeal application of a jurisdiction's law – what they call "bundling" – is desirable and that,

---

[260] *See, e.g.*, Zhang, *Autonomy*, *supra* note 162, at 532-53 (noting that "[t]oday, the power of the parties to choose the law governing a contract is a firmly established principle in most systems of law," although acknowledging that the situation is more complicated in the United States).

[261] Comments to Section 187, for example, appear to acknowledge some merit to the objection that choice-of-law enforcement will permit contracting parties "to escape prohibitions prevailing in the state which would otherwise be the state of the applicable law," responding by noting both that such problems must to some extent give way to "demands of certainty, predictability and convenience" and that parties' powers are "subject to some limitations." *See* SECOND RESTATEMENT § 187 cmt. e.

[262] *See id.* § 187 cmt. g (noting that "regard must also be had for state interest and for state regulation" and suggesting that Section 187(2)'s exception is intended to demonstrate this); Juenger, *Letter A*, *supra* note 131, at 450 (suggesting that an exception for choice-of-law clauses that violate a "fundamental policy" will serve to "outlaw ... those choice-of-law clauses that attempt to evade a particularly strong policy.")

because it hinders parties' efforts to exploit "bargaining or information disparities," it "might reasonably substitute for more burdensome restrictions on choice of law."[263]

The idea that the agreement of two private parties – one of whom may have all effective bargaining power – can displace an otherwise applicable policy mandate is a fairly radical position, and it is one that advocates of contractual choice have generally not tried to defend. The proposed test is, then, consistent with most choice-of-law scholars' positions. The aim of the test simply to draw a more precise line around the contractual choice-of-law provisions that should be denied enforcement by focusing on the parties' presumed intentions at the time of contracting, rather than the hazier, post hoc inquiry of whether enforcement would violate a fundamental policy in specific circumstances.

2. Non-Enforcement Would Correct Abuses While Producing Otherwise Similar Results

In the majority of cases, non-enforcement of targeted clauses is unlikely to represent a radical change from current law. Section 187(2)'s drafters looked with suspicion on clauses intended to evade a substantive rule,[264] and, under Section 187(2)'s exception, many targeted clauses are not enforced. Targeted clauses, that is, naturally tend to require consideration of the 187(2) exception. This is because the exception is likely to come into play when a jurisdiction other than the chosen one has the "most significant relationship" to the dispute or, depending on the order in which the court considers the exception's prongs,[265] when the contract concerns a matter of fundamental policy.

Where a clause is substance-targeted, one or both of these conditions is often met. It is reasonable to assume, that is, that parties often choose a substance-targeted choice-of-law clause because they know that the law that would likely apply in its absence might lead to the invalidation of a particular provision. Thus, in such cases, there is often an alternative jurisdiction that has a claim to being the state of the "most significant relationship" under the Second Restatement.[266] Further, where parties choose a law specifically to validate a particular provision, it is often because that provision is particularly important to them and because laws of other jurisdictions differ significantly; it seems fair to assume that significant, contested questions of law are likely

[263] *See* O'Hara & Ribstein, *supra* note 65, at 1192.

[264] *See supra* note 149 and accompanying text.

[265] *See supra* notes 118 to 119 and accompanying text.

[266] *See, e.g.*, Stone Surgical LLC v. Stryker Corp., 858 F.3d 383, 390 (6th Cir. 2017) (choice of Michigan law despite Louisiana having the most significant relationship to the contract).

to involve frequent questions of fundamental policy.

Yet because the 187(2) exception is both complicated and malleable, the current approach to substance-targeted clauses does not promote predictability, efficiency, or fairness. Rather, sophisticated parties know that enforceability of such clauses is both doubtful and highly dependent on the forum and judge. Parties, therefore, cannot count on their enforceability. At the same time, parties with greater knowledge or resources can exploit this uncertainty to their benefit by including clauses they know are likely invalid in hopes that their contracting partners are unprepared to take on the risks of litigation.[267]

A policy of general nonenforcement, therefore, would do relatively little to disturb party expectations. Sophisticated parties already know that nonenforcement of targeted clauses is a serious risk.[268] Because the proposed rule is, however, simpler than the current exception, it would spare the significant judicial resources that are currently expended in Section 187(2) litigation and analysis. Further, by making targeted provisions more straightforward to challenge in court, it would also reduce the abuse of choice-of-law clauses by better-informed or more powerful parties. Finally, because the proposal would be less subject to judicial variation, it would likely lower the rate of aggressive forum-shopping and races to the courthouse that often occur under current law.[269]

3. Many Choice-of-Law Clauses Do Not Alter the Result

As the previous section has argued, a general policy of nonenforcement would not dramatically expand the number of choice-of-law clauses that are unenforceable. It would, however, simplify the judicial determination that they are unenforceable, and in so doing aim to reduce their use in the first place. It is also worth noting, however, that in many cases the proposed framework would not change the bottom-line result – that is, the law that is ultimately applied to contractual disputes. This is because, in many situations, choice-of-law provisions are not strictly necessary; rather, they are simply an effort to modestly increase the probability that the court will select the law that would likely have applied in any case.

In many cases, for example, where courts enforce parties' choice-of-law preference despite analyzing whether the Section 187(2) exception applies,

---

[267] *See supra* note 225.

[268] *See* Ribstein, *Efficiency*, *supra* note 29, at 376 (noting, in describing results of study of choice-of-law enforcement, that clauses involving noncompetes, franchise agreements, and regulatory statutes are the least enforced).

[269] *See supra* note 59.

they do so because the chosen law is that of the place with the "most significant relationship" to the dispute.[270] At least in states that apply the Second Restatement more generally, this means that the chosen law is the same law that would have applied even in the absence of a contractual provision.

Further, precisely because choice-of-law clause enforcement, particularly with respect to targeted clauses, is uncertain, parties entering into contracts often feel the need to forge additional contacts with the jurisdiction of the chosen law in order to ensure that their preferred law is actually applied. This is particularly true given the current law's requirement of a "substantial relationship" between the chosen law and the contract, meaning that, for example, where a corporation does business in many jurisdictions, it may need to base significant operations in the state of the preferred law in order to ensure that choice-of-law clauses in its contracts will pass this threshold.[271] This tendency means that, in many cases where choice-of-law clauses are enforced under current law, the law of the same jurisdiction would apply even in the absence of a choice-of-law clause.

For example, parties entering into a gestational surrogacy contract often include a choice-of-law clause in situations where the enforceability of the contract might otherwise be in doubt under the law of one or both sides' domiciles. Indeed, the occasional case in which a court has enforced such a clause in the absence of meaningful connections to the state of the chosen law has been enough to raise the eyebrows of commentators.[272] At the same time, however, parties to a surrogacy contract would be foolish to rely solely or primarily on a choice-of-law clause to ensure that a particular jurisdiction's

---

[270] *See, e.g.*, Shanghai Commercial Bank Limited v. Kung Da Chang, 189 Wash. 2d 474, 484 (2017) (finding that Hong Kong, the jurisdiction of the chosen law, was also that place with the most significant relationship to the transaction); Carroll v. MBNA America Bank, 148 Idaho 261, 266-67 (2009) (declining to enforce parties' choice of Delaware law on the grounds it was contrary to Idaho public policy, but applying Delaware law nonetheless on the alternative basis that Delaware had the most significant relationship to the dispute); Armstrong Business Services, Inc. v. H & R Block, 96 S.W.3d 867, 873 (Mo. Ct. App. 2002) (Missouri was both the chosen law and the state of the most significant relationship); In re Western United Nurseries, Inc., 191 B.R. 820, 823 (D. Ariz. 1996) (same for New York law). Don King Productions, Inc. v. Douglas, 742 F. Supp. 741, 756 (S.D.N.Y. 1990) (same result).

[271] *See* Horton, *supra* note 95, at 637 (observing that the "substantial relationship" requirement often drives firms to locate a "significant part of [their] infrastructure – including people, money, and jobs" in the chosen state). Of course, if the "substantial relationship" requirement were eliminated, parties would have less incentive to create these sorts of contracts. Nonetheless, they would remain useful as a way of increasing the likelihood that the desired law would apply in non-contract claims.

[272] *See supra* note 47.

law applies; forging significant contacts with the state of the desired law is far more important.[273] Thus, in such scenarios, prospective parents seeking a gestational surrogate may, for example, select an egg donor domiciled in a state with favorable laws[274] and arrange for the surrogate to receive medical care and give birth in that state.[275] In such circumstances, courts in sympathetic states are generally willing to enforce surrogacy contracts regardless of whether the parties have included a choice-of-law provision.[276]

Of course, even when the law to be applied is relatively predictable, parties often make use of choice-of-law clauses, presumably because they hope to increase the certainty that a particular law will apply. Yet given the uncertainties attending choice-of-law enforcement, the sense of security provided by a choice-of-law clause may well be a false one. As a result, it may be better for parties to be aware from the outset of the potentially choice-of-law uncertainty than to face an unpleasant surprise when a choice-of-law provision is actually litigated.

It might be objected – as it has been in other contexts[277] – that parties should not be encouraged to create contacts with a particular state solely in order to manipulate the law that applies to a particular dispute. Yet unless choice-of-law clauses are universally enforced in all circumstances – a position virtually no one advocates[278] – incentives to do so will remain even if the parties' choice is enforceable in many or most cases. If courts or legislatures regard this as a problem, they can take other steps to combat it. Courts could, for example, disregard contacts that appear to have been manufactured solely with the aim of influencing the law applied or give the interests of consumers who sign form contracts more weight in the choice-of-law analysis.[279] Because parties that make use of choice-of-law provisions

---

[273] *See supra* note 47.

[274] *See* Morrissey, *supra* note 47, at 509.

[275] *See id.*

[276] *See id.* at 503 (noting that the "safer" option for parties worried about enforceability is "to proceed by having the surrogate give birth in a state that does support and enforce surrogacy arrangements," while relying on a choice-of-law clause is "riskier," since it may not be honored).

[277] *See, e.g.*, Juenger, *Letter C*, *supra* note 156, at 471 (objecting to "nugatory" requirements that parties choose the law of an interested state because "counsel could readily circumvent them by manufacturing contacts with the state whose law they wish to govern").

[278] Larry Ribstein, for example, perhaps the most forceful advocate for the benefits of robust party autonomy, put forth a proposal that, while lacking an "open-ended, fundamental, policy-type exception," would allow courts not to enforce choice-of-law clauses where enforcement is "prohibited by an applicable statute or a pre-existing applicable judicial rule" in one of the party's domiciles. *See* Ribstein, *Efficiency*, *supra* note 29, at 451, 460.

[279] The European Union, for example, has adopted an alternative approach to choice-of-law enforcement that has met with a favorable reception. In general, the Rome II Regulation

often couple them with manufactured contacts in any case, such measures – which deal with the latter problem directly – are likely to be more effective than any stance courts might take toward choice-of-law enforcement.

4. Section 187(2)'s Current Exception Is Needlessly Complex and Invites Judicial Meddling

Commentators are in near-universal agreement that Section 187(2)'s current exception is complicated, cumbersome, and difficult to understand.[280] Recall that the exception requires for courts to consider three complicated and somewhat ill-defined prongs: 1) determine whether there exists a jurisdiction other than the chosen law with the "most significant relationship" to the dispute"; 2) if so, determine whether that jurisdiction has a "materially greater interest" than the state of the chosen law; 3) if so, consider whether applying the chosen law would be contrary to a "fundamental policy" of that jurisdiction.[281]

As has been previously noted, even the order in which these steps are to be performed is unclear,[282] and the way in which they should substantively be applied is even murkier. Determination of the state of the "most significant relationship" can be a complex task and is presumably even more so in states

(governing choice of law in contracting) is highly favorable to party autonomy, stating that contracting parties' "freedom to choose the applicable law" is one of its "cornerstones." *See* Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), art. 2, 2008 O.J. (L 177) 6 (EU) [hereinafter Rome I], at Art. I, § 11. At the same time, it establishes a specific protection for consumers, who "should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement," as well as a similar one for employees. *See id.* at Art. 1, §§ 25, 35. The Rome II approach has met with widespread praise. *See, e.g.*, Juenger, Letter A, *supra* note 131, at 447 (praising the regulation's "eminent good sense"). Yet U.S. conflicts principles have little or no history of incorporating categorical rules for certain types of litigants (such as consumers or employees), and it is not clear if such principles would be widely accepted in the United States. *See* Borchers, *Essay*, *supra* note 86, at 502 ("[T]he United States has also shown no appetite for raw substantivism. ... The efforts to incorporate the Rome II Regulation's mild consumer preference into the Uniform Commercial Code's choice-of-law provision were a flop.") The greater porosity of state borders versus national ones (even in an integrated political body such as the European Union) and consequent ubiquity of multijurisdictional disputes in the United States are other important differences. *See Appendix D: Letter from Larry Kramer to Harry C. Sigman, Esq. (Aug. 29, 1994)*, 28 *Vand. J. Transnat'l L.* 475, 480 (1995) (noting differences in the choice-of-law climate in Europe and the United States).

[280] *See, e.g.*, Woodward, *Opt-Outs*, *supra* note 114, at 25-26; Zhang, *Autonomy*, *supra* note 162, at 533.

[281] *See* SECOND RESTATEMENT § 187(2).

[282] *See supra* notes 119 to 120 and accompanying text.

that do not generally apply Second Restatement methodology.[283] The other two steps are even more problematic, for reasons that have been discussed earlier.[284]

Because of the exception's complexity, courts often fail to apply it in consistent ways, and it is often hard for courts to avoid either the reality or the appearance of favoring forum interests and policies in their analysis. A general policy of nonenforcement would, then, simplify courts' task and, to the extent it is more objective, spare courts the difficult task of balancing forum contacts and interests against others.

It might be objected that, notwithstanding the simplicity of the nonenforcement policy itself, the proposal for *identifying* substance-targeted clauses would be more complicated than the inquiry courts undertake under Section 187(2). In particular, because the proposed identification measure calls for courts to identify any interested jurisdiction with a significant policy stance on a particular issue, the court might have to consider the policies of multiple jurisdictions rather than simply the place with the most significant relationship to the dispute.

As previously argued,[285] however, the proposed test would not add to courts' burden in most cases and would likely lighten it in some. To begin with, in many choice-of-law cases, there will be only one jurisdiction other than the chosen one with even a potential interest in the dispute. Further, where multiple jurisdictions are involved, courts applying Section 187(2) must already (at least in theory) assess contacts with all of them in detail in order to determine whether any of them has the most significant relationship to the dispute.[286] Under the proposed test, both the inquiry whether a state is interested and whether a particular policy is significant are designed to be less searching and more straightforward. A court need neither weigh the significance of contacts in one jurisdiction against another nor undertake a searching inquiry into the depth of a state's commitment to a particular policy. With time, means for identifying both interested states and significant policies could be refined through case law, making the inquiry even more clear-cut.

5. Courts Can Encourage Party Autonomy While Recognizing That It Should Not Permit Evasions of Public Policy

As previous sections have argued, advocates of party autonomy in choice-

---

[283] *See supra* notes 206 to 210 and accompanying text.
[284] *See supra* Part II.B.3.
[285] *See supra* Part III.A.
[286] *See* SECOND RESTATEMENT §§ 6, 187 & 188.

of-law have often supported the principle for purely instrumental reasons, believing that allowing this particular form of autonomy will, for example, reduce litigation costs,[287] facilitate contracting more generally,[288] simplify the judicial task,[289] or promote desirable competition among jurisdictions to develop more efficient laws.[290] A preoccupation with these advantages – mostly to the exclusion of a defense of party autonomy as an end in its own – pervades both the Second Restatement itself[291] and the writings of its drafters and advocates.[292] Nor have most later commentators put forth a strong defense of unlimited party autonomy per se; meanwhile, others have argued that reliance on party autonomy in conflicts decisions lacks a strong theoretical foundation.[293]

In keeping with the general emphasis on party autonomy's practical advantages, the proposed framework would aim to preserve the values that party autonomy is said to serve. By drawing a clearer line between enforceable and non-enforceable choice-of-law clauses, it would foster predictability and efficiency, which in turn would make negotiation and agreement easier. As described in the next section, it could also serve to facilitate enforcement of choice-of-law clauses in noncontroversial cases.

A few commentators have argued that party autonomy in itself is a value worthy of protection, noting, for example, that it is a "centuries' old principle that has withstood numerous attacks by conflicts fundamentalists of every shade."[294] Yet even defenders of robust party autonomy have generally

---

[287] *See* Stuart E. Sterk, *The Marginal Relevance of Choice-of-Law Theory*, 142 U. PA. L. REV. 949, 965 n.79 (1994) ("Proponents of party autonomy have argued that reduced litigation is an important reason for enforcing choice of law clauses.").

[288] In other words, parties more certain of the law applicable to their dispute will, because of increased predictability, be more likely to enter into a contract in the first place. *See* Woodward, *Finding*, *supra* note 173, at 10 (noting that uncertainty about the law to be applied "can upset finely-tuned calculations of risk and benefits engaged in by those who do transactional work").

[289] *See* Ribstein, *Efficiency*, *supra* note 29, at 403 (arguing that party autonomy reduces parties' "need to adduce [extensive] facts and legal arguments" in court and possibly increases incentives to settle).

[290] *See id.* at 404.

[291] Comments to Section 187 indicate that the provision is in keeping with the "prime objectives of contract law[, which] are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract." *See* SECOND RESTATEMENT § 187 cmt. e. The language referencing party autonomy is much weaker, stating only that the provision is "consistent with the fact that ...persons are free within broad limits to determine the nature of their contractual obligations." *See id.*

[292] *See*, *e.g.*, *supra* note 161 and accompanying text.

[293] *See* Bauerfeld, *supra* note 109, at 1662.

[294] *See* Juenger, *Letter A*, *supra* note 131, at 447.

agreed that contractual freedom should not extend to areas where the parties' choice is contrary to the public policy of an interested state.[295] Instead, the main focus of those seeking to expand party autonomy has generally been the elimination of the requirement of a relationship between the chosen law and the parties or contract[296] – a change that, as to non-targeted clauses, is generally compatible with the proposed framework.

It should be noted further that the proposed test still leaves many meaningful spheres in which party autonomy can operate. While virtually any choice-of-law issue can be said to implicate policy concerns to a degree, these concerns generally do not rise to the level of being significant ones.[297] Indeed, just a handful of issues have tended to spark targeted choice-of-law clauses: interest rates, class arbitration waivers, noncompetes and similar provisions, surrogacy, prenuptial agreements, franchisee rights, and perhaps a few others.[298] Clarifying that courts will not enforce choice-of-law clauses as applied to such subjects, particularly given that such clauses are often unenforceable under existing law in any case, would not significantly restrict parties' freedom relative to the current baseline.

Further, because – as argued in the preceding section – the parties' chosen law is often the law that would apply in any case, the proposed framework would restrict parties' ability to choose substantive contractual terms only when such terms are at odds with the law that would otherwise apply. Suppose, for example, parties domiciled, respectively, in New York and Delaware wanted to enter into a loan contract at a rate deemed usurious under New York law but not Delaware's. Under the proposal, a choice-of-law clause selecting Delaware law would be presumed targeted and thus unenforceable, because it would be invalidated based on the significant public policy of an interested state, New York. However, if the transaction otherwise had more meaningful connections with Delaware than with New York, a court would, in all likelihood, apply Delaware law to the contract and

---

[295] See, e.g., Matthias Lehmann, *Liberating the Individual From Battle Between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT'L L. 381, 429 (2008) (suggesting an approach to contractual choice of law more focused on private actors, in which "party autonomy trumps all other conflict rules (except for public policy)"; Juenger, *Letter A*, *supra* note 131, at 448 ("Everyone agrees that however desirable party autonomy may be, it cannot be absolute.").

[296] *See, e.g.*, *id.* at 453 (arguing against a relationship requirement in a proposed draft of the Uniform Commercial Code's choice-of-law provisions).

[297] Larry Ribstein's study of contractual choice-of-law enforcement, for example, showed that 85 percent of choice-of-law clauses were enforced; in a substantial minority of cases, enforcement was uncontested. *See* Ribstein, *Efficiency*, *supra* note 29, at 375-77.

[298] *See id.* at 376 ("Nonenforcement was concentrated in particular categories of cases[.]").

conclude that the interest rate was enforceable.

While this point may seem obvious, it is nonetheless important. On many controversial issues, most states allow a great deal of contracting freedom; the majority of states, for example, have repealed their usury laws.[299] In many situations, therefore, nonenforcement of targeted choice-of-law clauses will have little to no effect on parties' ability to contract for – and find a court to enforce – the contract terms of their choice.[300]

Finally, the new test would promote party autonomy by fostering greater predictability and transparency. Borderline bad-faith situations, such as an employer who includes a choice-of-law provision in a noncompete agreement knowing it is likely unenforceable or, conversely, an employee who agrees to such a provision intending to challenge it in court at the first opportunity, are all too common under current law. Clearer lines about what sort of choice-of-law clauses are permitted or prohibited would promote more forthrightness in negotiation and increase parties' ability to agree to an enforceable bargain that a court could not later undo.

C. Simplifying Enforcement of Non-Targeted Clauses

As previously noted, the proposed test aims to identify a category of choice-of-law clauses of concern that is somewhat broader but also more clearly defined than those clauses that within Section 187(2)'s exception. While the primary aim of this proposal is to address the problem of targeted choice-of-law clauses, a secondary goal is to facilitate straightforward and certain enforcement of non-targeted clauses.

That aim would be partially accomplished simply by substituting a less complicated test. That is, even though the Section 187(2) exception applies in theory to a narrower set of provisions than does the proposal, its complex, fact-specific nature and the variety of ways in which courts apply it likely create incentives for parties to argue for its application even in long-shot cases.[301] That in turn leads to both increased litigation costs and greater uncertainty. A brighter line, wherever it is drawn, would reduce incentives for parties to contest choice-of-law clauses that fall clearly to one side of it.

---

[299] See Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1121-22 (2008).

[300] Note, in addition, that under the proposed framework, there will be many situations in which the parties' choice of law, even on controversial areas of policy, will be enforceable. If all potentially interested jurisdictions permit the parties' choice of interest rate, for example, a choice-of-law clause in the same contract will not be treated as targeted.

[301] Lester and Ryan, for example, note that the general uncertainty surrounding noncompete enforcement creates incentives for litigation. *See supra* note 30 at 393.

A second way in which the proposal might facilitate enforcement of non-targeted clauses is by allowing rules about the strength of the required relationship between the chosen law and the contract to be relaxed, as has been frequently suggested.[302] To be sure, some reasons not to allow parties to choose a wholly unrelated law – such as the idea that it might unduly burden the court[303] – would be unaffected by this proposal. Many other objections, however, stem from concerns about allowing parties to make policy choices by mutual agreement in situations where 187(2)'s exception does not apply with certainty. Larry Kramer, for example, in defending the idea that parties should not be permitted to choose the law of a completely disinterested state, rests his argument primarily on concerns that parties will choose a law that "permits them to do something that all the interested states prohibit,"[304] citing such examples as a contract to adopt a child, which might be invalid in some jurisdictions based on "previous cases of abuse, or [lawmakers' concerns about] the consequences of commodifying child custody."[305]

Under the proposed approach, however, a choice-of-law provision in an adoption contract unenforceable under the law of some interested jurisdictions would, almost without question, fall into the "targeted" category. By segregating such cases from other instances in which parties might wish to choose the law of an unconnected state – such as a wish to take advantage of a jurisdiction's expertise in a particular subject area or the desire to choose a neutral state's law – the proposal might ease some objections to making enforcement in the latter situation more straightforward. Under current Section 187(2), of course, parties can choose an unconnected state's law provided they have a legitimate reason for doing so. Yet because courts take different views of this requirement, the need for the parties to establish in court the existence of a valid basis for their choice adds a layer of cost and uncertainty.[306] By contrast, under the proposed approach, there would be a strong case for allowing parties to select any law of their choice in all situations in which their selection is non-targeted and perhaps also where its application does not impose a significant burden on the court.

---

[302] *See, e,g.*, Larry E. Ribstein, *Choosing Law By Contract*, 18 J. CORP. L. 245, 264 (1993) (characterizing arguments in favor of the requirement as "weak[]").

[303] *See Note*, *supra* note 164, at 575 (describing the substantial relationship requirement as "rest[ing] on the practical consideration that the burden of ascertaining an "exotic law" must not be placed on courts").

[304] *See* Kramer, *supra* note 279, at 482. *See also* Zhang, *Autonomy*, *supra* note 162, at 527 ("One rationale underlying the reasonable connection requirement, whether it is persuasive or not, is the concern about the possible evasion of the law that otherwise would be applied.").

[305] *See* Kramer, *supra* note 279, at 478-79.

[306] *See id.* (arguing that such requirements have "more bite" than may be appreciated).

One potential problem with this approach is that states might want to preserve some ability to refuse to enforce choice-of-law provisions on public policy grounds even when the provision is non-targeted. Because all contractual provisions involving contested policy questions would be presumed targeted, this issue would arise only in cases where a party was able to overcome the presumption – for example, because a choice-of-law clause applied to numerous contractual provisions. But even in such a situation, there might be situations where a court would balk at enforcing it – as, for example, when an employee wished to leave a job in the state of the chosen law to work for a California competitor, despite a choice-of-law and noncompete agreement, and the dispute was heard in California court.[307]

There are a few possible answers to this problem. One might be to set a high threshold for overcoming the presumption of targeting – such that, for example, it would be nearly impossible for an employer to show that a choice-of-law clause coupled with a noncompete provision was not targeted. A second possibility could be to allow a narrow, carefully circumscribed public policy exception even for non-targeted clauses.[308] A final response might be that the predictability and efficiency benefits of enforcing non-targeted clauses are strong and should outweigh the qualms courts might have about enforcing laws that vary from forum law.[309]

CONCLUSION

When parties to a contract choose a governing law for the purpose of evading a policy-rooted rule that would otherwise apply, their endeavor is materially different than when parties choose a law for reasons of predictability, neutrality, or expertise. The goals of contractual choice-of-law do not support enforcing such provisions, and the current Second Restatement approach deals with them in an indirect, haphazard way that has promoted uncertainty and forum shopping. Rather than relying on current methodology, courts should adopt an approach that allows them to identify

[307] *See* Juenger, *Letter A*, *supra* note 131, at 450 (suggesting that "courts are simply disinclined to enforce certain contracts" and "will [in such cases] ignore the parties' choice" regardless of the legal framework they are nominally applying).

[308] If such an exception were to be created, it should probably be based on the forum's public policy rather than requiring courts to engage in the cumbersome and difficult task of determining whether there exists a third state (other than the forum state or the state of the chosen law) with an interest in the matter and assessing that state's public policy. *See supra* note 218.

[309] In other words, we should be less concerned about a situation where a choice-of-law clause touches on a controversial issue merely as an accidental byproduct of the parties' broader agreement than one where one or both parties set out deliberately to thwart a legal rule that might otherwise apply.

whether a provision is targeted or non-targeted and enforce only the latter. To do so would bring greater consistency and certainty to this often-disputed area of law while largely maintaining the desirable aspects of party autonomy.