

Summer 2013

## How Modern Choice of Law Helped to Kill the Private Attorney General

Erin O'Hara O'Connor  
*Florida State University College of Law*

Follow this and additional works at: <https://ir.law.fsu.edu/articles>



Part of the [Conflict of Laws Commons](#)

---

### Recommended Citation

Erin O'Hara O'Connor, *How Modern Choice of Law Helped to Kill the Private Attorney General*, 64 *MERCER L. REV.* 1023 (2013),  
Available at: <https://ir.law.fsu.edu/articles/366>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Scholarly Publications by an authorized administrator of Scholarship Repository. For more information, please contact [efarrell@law.fsu.edu](mailto:efarrell@law.fsu.edu).

# Annual Brainerd Currie Lecture

## How Modern Choice of Law Helped to Kill the Private Attorney General

by Erin O'Hara O'Connor\*

*The law of unintended consequences pushes us ceaselessly through the years, permitting no pause for perspective.*<sup>1</sup>

### I. INTRODUCTION

It is a great honor to be asked to deliver the second Annual Brainerd Currie Lecture at Mercer University School of Law.<sup>2</sup> Brainerd Currie was an immensely influential law professor who is recognized as the leading scholar of conflict of laws in the twentieth century. Mercer has the distinction of being both Currie's law school alma mater as well as his first academic appointment, probably the two most significant intellectual influences on any scholar. More recently, Mercer has

---

\* Milton R. Underwood Professor of Law, Vanderbilt Law School. University of Rochester (B.A., cum laude, 1987); Georgetown University Law Center (J.D., magna cum laude, 1990). Special thanks to the faculty, students, and Dean of Mercer Law School for providing a very fruitful environment in which to address the topic of this Essay. I benefited from all of their many comments and suggestions. Thank you also to Beau Creson for valuable research assistance.

1. Richard Schickel, author, journalist, and documentary filmmaker. *Richard Schnickel Quoted*, Thinkexist.com, [http://thinkexist.com/quotation/the\\_law\\_of\\_unintended\\_consequences\\_pushes\\_us/224966.html](http://thinkexist.com/quotation/the_law_of_unintended_consequences_pushes_us/224966.html) (last visited May 10, 2013).

2. For the first lecture given in the Annual Brainerd Currie Lecture series, see Gary J. Simson, *Choice of Law After the Currie Revolution: What Role for the Needs of the Interstate and International Systems?*, 63 MERCER L. REV. 715 (2012).

attracted other influential conflicts scholars and cheerleaders of the topic, including Dean Gary Simson, Larry Ribstein, Hal Lewis, and Bruce Posnak, among others. Thus, Mercer is a most fitting host for such an occasion.

The lecture provides an occasion to celebrate the highly influential work of Brainerd Currie in the area of conflict of laws. Currie formulated an entirely new approach to choice of law that has revolutionized the way courts and scholars think about the problem. With fifty years of hindsight, however, it is possible to look back on the influence of Currie's work with quite a bit more perspective than might have been possible earlier. With that perspective, I hope to argue that Currie's approach has had unintended and, for Currie, perverse consequences. Without thinking carefully about the long-term consequences of their choice-of-law decisions or how the choice-of-law landscape would play a role in the ever-increasing pressures presented by interstate and international trade, courts using modern approaches to choice of law have contributed to the demise of the private attorney general. In doing so, the choice-of-law revolution, which Currie sparked in order to enable states to more effectively promote state policies, ultimately has produced the opposite result.

This Essay will briefly explain Currie's approach to choice of law and its significant influence for modern choice-of-law approaches. It will then explain how one of those approaches, the *Restatement (Second) of Conflict of Laws*,<sup>3</sup> both facilitated further state experimentation with choice-of-law policies and enabled private parties to gain some certainty regarding the governing law for contracts. This Essay will show how the choice-of-law clauses sanctioned in the Second Restatement work in tandem with other choice clauses to enable private parties to avoid undesired laws. Finally, this Essay will argue that the choice clauses have led to the demise of the private attorney general.

## II. BRAINERD CURRIE, MERCER UNIVERSITY SCHOOL OF LAW, AND CHOICE OF LAW

Brainerd Currie's best known intellectual contribution was offered a half century ago, when he proposed a revolutionary approach to choice of law.<sup>4</sup> Choice of law addresses the question of what law governs a legal dispute involving people, things, or events that span two or more

---

3. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter SECOND RESTATEMENT].

4. See Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171 (1959), reprinted in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 177 (1963).

jurisdictions (namely states or nations) where each jurisdiction can legitimately claim sovereign authority over the dispute. The problem of how to allocate sovereign authority in these inter-jurisdictional disputes has challenged courts throughout recorded legal history.<sup>5</sup>

Currie's proposed approach, known as interest analysis, was well-timed. American conflicts scholars and judges had become frustrated with the *Restatement (First) of Conflict of Laws*<sup>6</sup> formalistic, rules-based approach to choice of law.<sup>7</sup> At root, the First Restatement shared the virtues and vices of formalism. On the one hand, the rules were designed to be simple and clear, and therefore (at least in theory), capable of being uniformly applied across United States courts. As part of that simplicity, the applicable law was typically determined according to a single connecting factor, such as the location of property,<sup>8</sup> an injury,<sup>9</sup> or the making of a contract.<sup>10</sup> On the other hand, the simple rules often seemed arbitrary because they failed to produce sensible results in a world where real people became embroiled in locationally complicated relationships.<sup>11</sup> Moreover, the rules sometimes failed to

5. See EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, *CONFLICT OF LAWS* §§ 2.2-2.6 (3d ed. 2000).

6. RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934) [hereinafter FIRST RESTATEMENT].

7. There are multiple critiques of the First Restatement. *Watts v. Pioneer Corn Co.*, 342 F.2d 617, 618-20 (7th Cir. 1965) (discussing inadequacy of place of the wrong approach and citing multiple cases with similar criticisms); *Kilberg v. Ne. Airlines, Inc.*, 172 N.E.2d 526, 527-28 (N.Y. 1961) (criticizing the idea of deciding applicable law in case where wrongful death was caused by plane crash based on fortuity of the place of wrong); *Griffith v. United Air Lines, Inc.*, 203 A.2d 796, 801 (Pa. 1964) (agreeing with criticism of the First Restatement's "wooden application"); WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 344 (1942); see Walter Wheeler Cook, 'Characterization' in the Conflict of Laws, 51 YALE L.J. 191 (1941); Albert A. Ehrenzweig, *Guest Statutes in the Conflict of Laws-Towards a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws": I*, 69 YALE L.J. 595 (1960); Albert A. Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus the Restatement*, 36 MINN. L. REV. 1 (1951); Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924); J. H. C. Morris, *The Proper Law of a Tort*, 64 HARV. L. REV. 881 (1951).

8. See, e.g., FIRST RESTATEMENT, *supra* note 6, §§ 211, 214, 216-23, 225-27, 237-38, 244-46, 248-51 (designating the law of the state where land is located as the governing law for various matters related to interests in real property).

9. See, e.g., *id.* § 377 (defining place of wrong to be the place of injury in most tort contexts); *id.* §§ 378, 384-87, 390-91, 412, 421 (designating the law of the place of wrong as the governing law for a number of tort issues).

10. See, e.g., *id.* § 332 (stating various contract issues that are to be resolved according to the law of the place of contracting).

11. See, e.g., *Alabama G.S.R. Co. v. Carroll*, 11 So. 803, 804, 809 (Ala. 1892) (applying Mississippi law to case involving two Alabama parties and an employment contract formed in Alabama where fellow employees failed to perform an inspection in Alabama but the

produce clear results, effectively undermining the uniformity or predictability that justify a rules-based treatment of choice of law.

Although judges often found the rules unsatisfactory, as a group they generally lacked the time and inclination to figure out a sensible alternative approach.<sup>12</sup> After all, choice of law is, or at least should be, a preliminary procedural question to be decided in pretrial hearings. To most people, even most lawyers, the choice-of-law question seems technical and uninteresting. Indeed, even though choice of law functionally allocates sovereign authority, in most states the general question has not even attracted the attention of the legislature. Most academics view the choice-of-law question as similarly dull and unworthy of sustained attention. Mercer is a distinct exception in that it has a history of attracting scholars who are drawn to the topic and understand its importance. In most other corners of the country, however, choice of law is plagued by what I will call "the Snooze Factor."

Currie offered a dramatically different conception of how courts should treat choice-of-law issues. Rather than blindly following arbitrary rules, Currie thought that courts should use choice-of-law principles designed to effectuate state policies.<sup>13</sup> After all, given that state laws are tools designed to further state policies, exercising sovereign authority can be justified only when doing so serves to further those policies. Differing state laws typically reflect differing policy priorities, and Currie advocated that a court should first determine the policy that each state is attempting to further and then determine whether, given the locational facts of a case, the policies of each state are in fact implicated.

---

injury happened to occur in Mississippi); *Linn v. Emp'rs Reinsurance Corp.*, 139 A.2d 638, 639-40 (Pa. 1958) (holding that the law of the state where a phone call was made would determine applicable law even though the call may have been placed in any number of states while the agent was travelling for unrelated matters).

12. Judge Fuld on the New York Court of Appeals was an exception to this general observation. He devoted substantial energy to identifying and then articulating an alternative approach to choice of law through a series of case opinions. See, e.g., *Auten v. Auten*, 124 N.E.2d 99, 102 (N.Y. 1954) (rejecting "rigid general rules" in a divorce agreement case for a "grouping of contacts" theory that chose the law of the state that was more interested); *Haag v. Barnes*, 175 N.E.2d 441, 444 (N.Y. 1961) (using significant contacts test for contract dispute for child support); *Babcock v. Jackson*, 191 N.E.2d 279, 284-85 (N.Y. 1963) (applying significant contacts test in a tort dispute involving a guest statute); *Downs v. Am. Mut. Liab. Ins. Co.*, 200 N.E.2d 204, 206 (N.Y. 1964) (using significant contacts test for case involving woman's collection of wages from ex-husband); *Oltarsh v. Aetna Ins. Co.*, 204 N.E.2d 622, 625-26 (N.Y. 1965) (using significant contacts test to determine foreign law allowing direct suit was applicable).

13. See Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323, 1323-24 (1960) (discussing an alternative approach based on purposes behind state law).

If a state's policies are not implicated (for example, if *state X* attempts to ensure that its injured citizens are compensated, but the plaintiff is not from *state X*), then that state's law need not apply to resolve the dispute. To Currie, the choice-of-law inquiry could be simplified by eliminating disinterested states from the consideration.<sup>14</sup> When a state's policies are implicated, then its policies can be furthered through application of that state's law.

As a general conceptual matter, Currie's approach appealed to many. Judges began to experiment with the approach.<sup>15</sup> Scholars applauded the innovation and offered their own refinements and tweaks for dealing with difficult fact patterns.<sup>16</sup> In particular, William Baxter and other scholars offered alternative solutions to the situation where more than one connected state could claim a legitimate interest in having its law apply.<sup>17</sup>

---

14. Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 252-54 (1958) (using the phrase "false-problem" initially).

15. See, e.g., *In re Disaster at Detroit Metro. Airport on Aug. 16, 1987*, 750 F. Supp. 793, 802 (E.D. Mich. 1989) (using interest analysis to determine applicable law between interested states); *Reich v. Purcell*, 432 P.2d 727, 729 (Cal. 1967) (applying interest analysis rather than mechanical conflicts of laws and citing Currie); *Melk v. Sarahson*, 229 A.2d 625, 629 (N.J. 1967) (citing Currie when refusing to apply traditional conflicts rules and instead applying the law of the interested state); *Fed. Ins. Co. v. Fries*, 355 N.Y.S.2d 741, 747 (Civ. Ct. 1974) (noting that neither state was interested and reasoning that under Currie's interest analysis the law of the forum would apply, but finding that New York law applied regardless); *Wilcox v. Wilcox*, 133 N.W.2d 408, 412-13 (Wis. 1965) (citing Currie and others as critical of the traditional approach and applying interest analysis to decide applicable law).

16. See, e.g., Hans W. Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Casers, the Choice-of-Law Process*, 46 TEX. L. REV. 141 (1967); William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 8 (1963) (agreeing with some of Currie's basic ideas, including the rules on false conflicts); Bruce Alan Rosenfield, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005, 1038 (1976) (citing Currie's interest analysis as a good approach that could be used in extraterritorial application of law cases); Michael Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CAL. L. REV. 845, 845 (1961).

17. See Baxter, *supra* note 16, at 33 (proposing the comparative impairment approach for true conflicts); John F. Bradley II, Note, *After Hurtado and Bernhard: Interest Analysis and the Search for a Consistent Theory for Choice-of-Law Cases*, 29 STAN. L. REV. 127, 151 (1976) (arguing that in the case of true conflicts, the court should avoid the bias in choosing the forum law and try to reach a "just" result); Susan P. Windle, *Choice of Law Governing Land Transactions: The Contract-Conveyance Dichotomy*, 111 U. PA. L. REV. 482 (1963) (offering various ways to deal with true conflicts for real property situations); Note, *Direct-Action Statutes: Their Operational and Conflict-of-Law Problems*, 74 HARV. L. REV. 357, 387 (1960) [hereinafter *Direct-Action Statutes*] (offering that certainty should also play a role in the case of true conflicts); Note, *The Choice of Law in Multistate Defamation—A Functional Approach*, 77 HARV. L. REV. 1463, 1471 (1964) (arguing that in the case of true conflicts, a functional approach should be employed).

Currie's interest analysis was not universally embraced, however. For example, some scholars charged that Currie's definition of state interests was too parochial because he assumed that states had an interest only in protecting or otherwise aiding their own citizens.<sup>18</sup> Others expressed concern over Currie's singular focus on state interests; they argued forcefully that advancing state interests was just one of several purposes to be furthered with choice of law.<sup>19</sup> Several scholars offered alternative proposals for choice of law, some of which were the source of court experiment.<sup>20</sup>

For one who believes that optimal public policy is furthered with a robust intellectual marketplace of ideas, choice of law enjoyed a happy state during the course of the last half century. In this ideal state, the generation of and experimentation with diverse solutions should produce an environment where one proposal stands out as superior to others.<sup>21</sup> At a minimum, one would hope that experimentation with choice of law would generate consensus regarding the basic approach even though states might adopt variation regarding specific problems, reflecting the difficulty of satisfactorily resolving some choice-of-law problems. Our federal system might have proven specially adapted to help achieve optimal choice-of-law reform, whether the goal of choice of law was efficiency, fairness, or something else. But, alas, this utopian fairy tale does not reflect the realities of choice of law in our federal system.

Choice of law in the United States has been chaotic since Currie offered his proposed treatment of the topic. A large majority of states

---

18. See Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 392-93 (1980); Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 388-90 (1966); John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 175-76 (1981); see also EHRENZWEIG, *CONFLICTS IN A NUTSHELL* (3d ed. 1974) ("[G]overnments are, outside the law of admiralty, 'interested' in the solution of conflicts problems only in such exceptional cases as tax or currency matters.").

19. See, e.g., Brilmayer, *supra* note 18, at 393-95; Maurice Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946, 947 (1981); Note, *Direct-Action Statutes*, *supra* note 17, at 378.

20. California has adopted Baxter's comparative impairment approach. See, e.g., *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 937 (Cal. 2006). Five other states have adopted the "Better-Law" Methodology, a factor in Leflar's choice-influencing considerations approach. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2011: Twenty-Fifth Annual Survey*, 60 AM. J. COMP. L. 291, 309, 317, 342 (2012).

21. That is true unless the environments across states differ in ways suggesting that diverse solutions to a problem are warranted. In this context, however, the states are experimenting with solutions to the problem of how to coordinate the allocation of sovereign authority across the states. Presumably optimal coordination needs a single approach.

(although not all) have abandoned the First Restatement and replaced it with one or more distinct approaches to choice of law. Many have adopted Currie's interest analysis. Others have moved toward a "comparative impairment," "better law," forum law, or European-style statutory approach to choice of law.<sup>22</sup> Although these other approaches to choice of law are distinct, embedded in many of them is a type of interest analysis. The chaos in choice of law does not merely result from states having adopted differing approaches to choice of law. Even within individual states it is commonly impossible to predict what law will be applied in an interstate case. In some states, the actual approach adopted has remained somewhat uncertain. The movement away from the First Restatement was typically announced through state court decision, but choice of law is a technical, procedural issue that rarely sits at the forefront of a state supreme court's agenda (the Snooze Factor), and as a result, the clarification and refinement of a state's approach often proceeds quite slowly. Even when it is clear which approach a state has adopted, the resolution to any given choice-of-law issue can remain unpredictable. Under the modern approaches to choice of law, relatively vague standards effectively grant trial court judges significant discretion.<sup>23</sup>

### III. THE SECOND RESTATEMENT EMPOWERS CONTRACTING PARTIES TO RESTORE CERTAINTY

In 1954, the American Law Institute formed a working group to produce the Second Restatement of Conflict of Laws. The project proved especially challenging, as disenchantment with the First Restatement had not yet worked to produce an alternative approach in state courts. Although some drafters were comfortable articulating a new approach for courts to adopt, the draft produced exhibits a schizophrenic position over basic matters, such as whether choice-of-law issues should be resolved with rules or with standards. The text of the Second Restatement was not published until 1971 and contained a very complicated approach that relied on both default rules and a universally applied multi-factored standard focused on determining the state with the most "significant relationship" to the parties and the relevant occurrence.<sup>24</sup> As part of the multi-factored standard, courts are encouraged to consider just about everything a court or commentator had thought was

---

22. See generally LEA BRILMAYER, JACK GOLDSMITH & ERIN O'HARA O'CONNOR, *CONFLICT OF LAWS: CASES AND MATERIALS* ch. 3 (6th ed. 2011).

23. Michael Ena, Comment, *Choice of Law and Predictability of Decisions in Products Liability Cases*, 34 *FORDHAM URB. L.J.* 1417, 1456 (2007).

24. *Id.* at 1428-30.



important to a choice-of-law decision, including a determination of how choice of law might further state policies.<sup>25</sup> The Second Restatement certainly represents a comprehensive approach to choice of law, but it reflects a grand political compromise rather than offering a coherent mechanism for moving forward with choice of law.

Given the state of choice of law in 1971, the grand political compromise might well have seemed the best possible solution to the drafters' dilemma. If one agrees with Justice Brandeis that states serve as valuable laboratories of experimentation,<sup>26</sup> then the Second Restatement preserved maximal flexibility for the states to continue to work with the several credible approaches to choice of law that had been proffered.

It now seems clear, however, that choice of law has proven to be a poor place for the drafters to have counted on productive state experimentation. Relying on the states themselves to sort out choice of law was a mistake for multiple reasons, including the Snooze Factor.<sup>27</sup> Typically, no entity within a state cares to treat the matter systemically. Legislatures tend not to focus on technical pretrial litigation procedure, and in the rare circumstances when they do, their attentions quickly return to matters of salience. It now seems clear, however, that appellate judges are more likely to have an interest in the question, but even their attention spans seem to be short in the face of competing matters. Trial court judges must routinely contend with choice-of-law issues, but they are not in a position to treat the problem systemically. In general, state trial court judges are too mired in the trees to focus on the forest.

---

25.

Under § 6, factors relevant to the choice of law 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.

SECOND RESTATEMENT, *supra* note 3, § 6(2).

26. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")

27. Another problem is that the states themselves are asked to allocate state sovereign authority, leading inevitably to non-neutral decisions. Currie understood this difficulty but created an approach to choice of law that accepted political realities. See *SCOLES ET AL.*, *supra* note 5, at 29-30. Baxter also understood the difficulty, but rather than accepting it as inevitable, he proposed returning authority to the federal courts to develop sensible guidelines for such allocation. See *Baxter*, *supra* note 16, at 33.

This Essay will not dwell on the problems of modern choice of law in the United States, however. Large volumes of ink have already been spilt bemoaning our predicament, with little good resulting from the effort. Instead, this predicament sets the stage for understanding how the choice-of-law problem in the United States led to the creation of § 187 of the Second Restatement, which provided a new approach to the treatment of choice-of-law clauses by U.S. courts. Section 187 unintentionally planted the seeds of a movement by private parties to use choice of law to circumvent undesired state laws. In doing so, the private attorney general has been dealt a mortal blow. Ironically, Currie's efforts to help further state policies have led to a chain of events that threaten to undermine those very policies.

In furtherance of establishing this thesis, let us return to the Second Restatement. The drafters contemplated the same "most significant relationship" approach for contracts problems that was to be applied to other choice-of-law problems.<sup>28</sup> Uncertainty regarding the governing law could prove particularly problematic for contracting parties, however, because being able to rely on a promise is part of the value for contracts, and yet, reliance can be undermined with uncertainty regarding an agreement's enforceability. To alleviate this uncertainty concern, the drafters began with § 187, which enables contracting parties to choose their own governing law.<sup>29</sup> Section 187 is a significant departure from the First Restatement, which does not mention choice-of-law clauses. To Joseph Beale, the reporter for the First Restatement, choice-of-law clauses constituted impermissible private legislation.<sup>30</sup> After all, if choice of law is an exercise in the allocation of sovereign authority, it seemed nonsensical to enable private parties to allocate that authority. The Second Restatement drafters viewed the matter differently, probably for several reasons, but one important reason was to restore a sense of certainty to choice of law for contracts.<sup>31</sup>

---

28. See SECOND RESTATEMENT, *supra* note 3, § 188(1) ("[T]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.").

29. *Id.* § 187 cmt. e.

30. Joseph H. Beale, *What Law Governs the Validity of a Contract: III. Theoretical and Practical Criticisms of the Authorities*, 23 HARV. L. REV. 260, 260 (1910).

31. See SECOND RESTATEMENT, *supra* note 3, § 187 cmt. e ("Prime objectives of contract law 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. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured.").

Section 187(1) allows the parties to choose any law that they wish to serve as the basis for governing default rules, or rules that the parties could write directly into their contracts.<sup>32</sup> Section 187(2) also gives the parties substantial ability to choose the governing law even in cases where one or more of the states connected to the parties or transaction would not permit the parties to directly write such a provision into the contract.<sup>33</sup> Specifically, section 187(2) provides:

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

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the [general choice-of-law rule for contract], would be the state of the applicable law in the absence of an effective choice of law by the parties.<sup>34</sup>

Section 187 has not proven to be a controversial addition to the Second Restatement. State courts appear to have embraced it just as willingly as they have embraced the rest of the Second Restatement. In fact, today, courts across the country use § 187 to govern the enforceability of choice-of-law clauses, even in states that have not adopted the Second Restatement for other choice-of-law purposes.<sup>35</sup>

On its face, § 187(2) appears to have built-in safeguards to prevent parties from strategically using choice-of-law clauses to circumvent important state policies. Under subsection (a), the parties are constrained from choosing a state that is wholly unrelated to the contract.<sup>36</sup> And under subsection (b), the parties' choice need not be respected where it would have the effect of violating state policies.<sup>37</sup> With closer scrutiny, however, these limitations are narrow exceptions to the rule, to preserve parties' certainty regarding the governing law. Consider, for example, the substantial relationship requirement. In

---

32. *Id.* § 187(1).

33. *Id.* § 187(2).

34. *Id.*

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

36. See SECOND RESTATEMENT, *supra* note 3, § 187(2)(a).

37. *Id.* § 187(2)(b).

addition to the fact that a court can excuse this requirement if it finds another reasonable basis for the parties' choice,<sup>38</sup> corporations and wealthy parties can establish connections with a desired state where necessary in order to choose its law. It takes relatively little for a company to open a sales office, to create a subsidiary entity to handle the relevant portion of the company's business, or to locate a key mobile asset in a particular state.

Moreover, although subsection (b) provides a public policy exception to a state's enforcement obligations, the exception is quite narrow. First, application of the law of the chosen state must be contrary to a fundamental policy of the state whose law would otherwise apply. Second, it is not sufficient that the chosen law would violate public policy in the forum. Instead, the chosen law must violate the public policy of the state with the most significant relationship to the parties and the transaction. Even so, the state with the most significant relationship must have a materially greater interest in the outcome of the particular issue than the chosen state. All three hurdles must be cleared before a court can ignore the parties' choice of governing law.<sup>39</sup>

#### IV. CHOICE CLAUSES AT WORK

##### A. *Choice-of-Law Clauses*

The state of uncertainty for choice of law, about to be made quite a bit worse with the multi-factored Second Restatement approach, created the justification for a strong presumption in favor of party choice. In the years following the publication of the Second Restatement, however, potent market forces have pressured states to provide even more significant freedom of choice to contracting parties. In particular, technological advancements, decreased transportation costs, and lowered barriers at national borders have all worked to make assets much more mobile. With this enhanced mobility, states must compete to attract those assets, and one carrot in the interstate competition is to enable parties to choose their own governing laws, and, consequently, desired regulatory environments.<sup>40</sup> In order to attract private parties, six U.S. states have passed statutes that open freedom of choice for governing law beyond the generous provisions of the Second Restatement. In

---

38. Michael Guajardo, Comment, *Texas' Adoption of the Restatement (Second) of Conflict of Laws: Public Policy is the Trump Card, But When Can It Be Played?*, 22 TEX. TECH. L. REV. 837, 855 (1991).

39. See SECOND RESTATEMENT, *supra* note 3, § 187 cmt. g.

40. See generally ERIN A. O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* (2009).

particular, California, New York, Texas, Delaware, Illinois, and Florida have all enacted statutes enabling parties to choose their law for high-value contracts without either a connection requirement or a public policy exception.<sup>41</sup>

In a world where just about everyone outside of Macon, Georgia, yawns about choice of law, the Second Restatement provisions, broadly interpreted, and the even more expansive statutes of the states considered commercial leaders, are especially effective because they are very quiet mechanisms for attracting firms and wealthy individuals to the state. Unlike tax breaks or the repeal of substantive laws designed to benefit or protect purely local constituents, treatment of choice of law is unlikely to generate significant legislative pressures for reversal, and it is even less likely to generate significant media attention.

With pressure for states to accept a party's choice of law come incentives on the part of some states and nations to create regulatory environments considered appealing to private parties. Examples of states providing appealing substantive laws as mechanisms for attracting others to the state, both within and without contract, can be found in many contexts. For example, Delaware is reputed to dominate the competition for corporate law in the United States, and companies can choose Delaware law simply by incorporating in Delaware.<sup>42</sup> New York strives to provide state-of-the-art commercial law and business courts, which outsiders can opt for with choice-of-law and forum clauses.<sup>43</sup> Few believe that these choices work to corrode the public policies of other states. Consider, however, a few potentially more problematic situations.

In maritime commerce, ship owners are permitted to register and carry the flag of any nation they choose. Traditionally, the law of the flag applies to the activities onboard the vessel, to ensure uniform treatment of the ship and its owners and employees as it passes through

---

41. CAL. CIV. CODE § 1646.5 (current through 2012 Legis. Sess.), available at <http://www.leginfo.ca.gov/calaw.html>; DEL. CODE ANN. tit. 6, § 2708 (current through 2012 Legis. Sess.), available at <http://delcode.delaware.gov/title6/c027/sc01/index.shtml>; FLA. STAT. § 685.101 (current through 2012 Legis. Sess.), available at <http://www.leg.state.fl.us/statutes>; 735 ILL. COMP. STAT. ANN. 105/5-5 (current through 2012 Legis. Sess.), available at <http://www.ilga.gov/legislation/ilcs>; N.Y. GEN. OBLIG. LAW § 5-1401 (current through 2012 Legis. Sess.), available at <http://public.legalinfo.state.ny.us/Lawseaf>; TEX. BUS. & COMM. CODE §§ 271.001-011 (current through 2012 Legis. Sess.), available at <http://www.statutes.legis.state.tx.us>.

42. Faith Stevelman, *Regulatory Competition, Choice of Forum and Delaware's Stake in Corporate Law*, 34 DEL J. CORP. L. 57, 59-60 (2009).

43. See William J. Woodard, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 SMU L. REV. 697, 699 (2011).

the marine territory of many nations.<sup>44</sup> Despite the efforts of some governments to ensure that ship operations comply with minimum acceptable safety and environmental measures, many ships have been registered in states without such regulatory standards.<sup>45</sup> Small nations in particular can benefit significantly from the registration fees, and they can credibly commit not to impose regulatory requirements on ships. Thus, nations identified by the International Transport Workers Federation as unable or unwilling to enforce international minimum social standards on their vessels include Antigua, the Bahamas, Liberia, Panama, and the Marshall Islands.<sup>46</sup> Known as flag-of-convenience states, these countries each register in excess of 1,000 foreign ships.<sup>47</sup> Ship owners who register in these nations can place choice-of-law clauses in their employment contracts in an effort to ensure that their obligations as employers do not extend beyond those required by the lax laws of the flag-of-convenience states.<sup>48</sup>

Consider also usury and other consumer credit laws within the United States. Under the National Bank Act,<sup>49</sup> nationally chartered banks are permitted to charge an interest rate that is permitted in the state where the bank is located.<sup>50</sup> Over time, this provision has been interpreted to permit such banks to charge interest permitted at the state of charter even when much of the bank's activities are located elsewhere.<sup>51</sup> Moreover, this interest-rate freedom has been interpreted to include late fees and other charges.<sup>52</sup> In an effort to attract companies from the financial-service industries to their states, South Dakota, Delaware, and other states repealed their usury laws and pledged not to regulate late

---

44. William Telley, *The Law of the Flag, "Flag Shopping," and Choice of Law*, 17 TUL. MAR. L.J. 139, 146-47 (1993).

45. *Id.* at 173-74.

46. *International Transport Workers' Federation: FOC Countries*, ITFGLOBAL.ORG, <http://www.itfglobal.org/flags-convenience/flags-convenien-183.cfm> (last visited Apr. 7, 2013).

47. The World Factbook, CIA.GOV, <https://www.cia.gov/library/pulications/the-world-factbook/index.html>. For each country, the vast majority of ships on its registry are foreign ships: ninety-seven percent of the ships registered with Antigua, ninety-two percent of the ships registered with the Bahamas, ninety-three percent of the ships registered with Liberia, eighty percent of the ships registered in Panama, and ninety-two percent of the ships registered in the Marshall Islands are foreign-owned. *Id.*

48. *See* *Lauritzen v. Larsen*, 345 U.S. 571, 588-89 (1953).

49. 12 U.S.C. § 38 (2006).

50. 12 U.S.C. § 85 (2006).

51. *Marquette Nat'l Bank v. First Omaha Serv. Corp.*, 439 U.S. 299, 301 (1978).

52. *Smiley v. Citibank*, 517 U.S. 735, 738-40, 747 (1996).

fees and other charges found in credit agreements.<sup>53</sup> As a result, credit card companies can operate nationwide as branches of national banks chartered in South Dakota and Delaware, and the other states are not permitted to regulate the credit agreements, even if the agreements involve their own state citizens. Given that nationally chartered banks have such freedom, pressure is put on the states to unfetter the state-chartered banks so they can compete effectively in the credit markets. And, of course, one quiet mechanism for freeing such banks is to permit them to choose the law that governs their agreements.<sup>54</sup> Thus, while it was once commonplace for states to conclude that banks violated local public policy for a loan charging a usurious interest rate in the forum even if legally permitted elsewhere,<sup>55</sup> such cases have all but disappeared from the jurisprudential landscape, at least in choice-of-law cases outside the context of payday loans.

Finally, consider trust law. Some nations, such as the Cook Islands, the Cayman Islands, Gibraltar, Bermuda, and Jersey (Channel Islands), allow the creation of trusts under which the settlor and the beneficiary are the same person.<sup>56</sup> In doing so, these nations facilitate the use of a trust vehicle as a mechanism for shielding assets from third-party creditors. In an attempt to capture some of this multi-billion dollar activity, several U.S. states, including Alaska, Delaware, Nevada, Rhode Island, Utah, Missouri, Oklahoma, and South Dakota, have passed laws enabling the creation of domestic asset-protection trusts.<sup>57</sup> Although several features of U.S. law prevent domestic trust vehicles from providing the strength of asset protection possible in other nations, settlors need not worry about untrustworthy foreign trustees or unstable foreign governments. Competitive pressures may well lead to the

---

53. John P. Seidenberg et al., *States Create Friendly Climate for Card Issuers by Repealing Usury Laws*, CARD NEWS, June 3, 1991, available at <http://www.accessintel.com/>.

54. See, e.g., *Woods-Tucker Leasing Corp. of Ga. v. Hutcheson-Ingram Dev. Co.*, 642 F.2d 744, 753-54 (5th Cir. 1981) (holding that the Mississippi choice-of-law clause was effective to avoid Texas's usury law); *Christiansen v. Beneficial Nat'l Bank*, 972 F. Supp. 681, 684-85 (S.D. Ga. 1997) (holding that the Delaware choice-of-law clause was enforceable even though the terms of agreement violated Georgia's criminal usury statute). Similar efforts could one day frustrate state ability to regulate payday loans. For now, however, the Office of the Comptroller of the Currency is taking the position that the National Bank Act does not govern such agreements. Angela Littwin, *Testing the Substitution Hypothesis: Would Credit Card Regulations Force Low-Income Borrowers into Less Desirable Lending Alternatives?*, 2009 U. ILL. L. REV. 403, 418 (2009).

55. 15 GRACE MCLANE GIESEL, CORBIN ON CONTRACTS: CONTRACTS CONTRARY TO PUBLIC POLICY § 87 (Joseph M. Perillo ed., rev. ed. 2003) (listing several usury bargains).

56. Frederick J. Tansill, *Asset Protection Trusts (APTS): Non-Tax Issues*, STOIZ ALI-ABA 293, 310, 315-16 (2011).

57. *Id.* at 327.

enforcement of choice-of-law clauses for any disputes involving the domestic asset-protection vehicles, especially in the courts of those states where the trust is located.

The federal courts face the same pressure to enforce choice-of-law clauses. Indeed, the federal courts seem particularly cognizant of the negative trade consequences by refusing to enforce choice-of-law clauses. For example, every federal circuit that has considered the issue has determined that the choice-of-law clause in contracts between American names and Lloyd's of London are enforceable despite the fact that the clauses would work to defeat the investor's federal-securities law and federal racketeering claims.<sup>58</sup> Even in diversity cases, where state law principles are to apply to determine the enforceability of choice-of-law clauses, federal courts as a whole enforce the clauses at higher rates than do the state courts as a whole.<sup>59</sup> The difference in enforcement rate stems from the flexibility inherent in § 187 of the Second Restatement. Under that test, it is often unclear what will count as a "substantial relationship" or "other reasonable basis for the parties' choice"; it is similarly unclear what constitutes a "fundamental policy," or whether a state has a "materially greater interest" under the public-policy exception.<sup>60</sup> Perhaps because of greater enforcement, federal courts apparently hear the vast majority of cases where enforcement of the choice-of-law clause is disputed.<sup>61</sup>

### B. Choice-of-Court Clauses

In those relatively rare circumstances where parties cannot ensure enforcement of choice-of-law clauses in state court or with removal of a case to federal court, enforcement can typically be secured with the addition of a forum-selection clause to the contract. If parties wish to have their agreement enforced according to Delaware law, they can couple the choice-of-law clause with a choice-of-court clause that provides that all disputes will be resolved exclusively in Delaware courts. Presumably judges in Delaware would embrace the application of Delaware law, but the harder question is whether the choice-of-court

---

58. See, e.g., *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1294-95 (11th Cir. 1998); *Richards v. Lloyd's of London*, 135 F.3d 1289, 1294, 1296 (9th Cir. 1998); *Haynsworth v. Corp. of Lloyd's*, 121 F.3d 956, 966 (5th Cir. 1997); *Allen v. Lloyd's of London*, 94 F.3d 923, 929-30 (4th Cir. 1996); *Bonny v. Society of Lloyd's*, 3 F.3d 156, 162 (7th Cir. 1993); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1366 (2d Cir. 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958-59 (10th Cir. 1992).

59. See O'HARA & RIBSTEIN, *supra* note 40, at 83-84; Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 420 (2003).

60. SECOND RESTATEMENT, *supra* note 3, § 187.

61. See O'HARA & RIBSTEIN, *supra* note 40, at 83-84; Ribstein, *supra* note 59, at 420.



clause will be enforced by courts outside of Delaware. For state law claims in state court, enforcement of a choice-of-court clause is a matter of state law.<sup>62</sup> Enforcement of choice-of-court clauses is one easy way to alleviate docket congestion. Moreover, even those courts that would be reticent to enforce the choice-of-law clause often are willing to enforce the choice-of-court clause because the choice-of-court clause insulates them from having to directly address the choice-of-law matter.<sup>63</sup>

For cases removable to federal court, federal law typically governs the enforcement of a choice-of-court clause.<sup>64</sup> For federal law purposes, the United States Supreme Court has expressed a strong policy in favor of enforcing such clauses.<sup>65</sup> In order to defeat enforcement of the forum-selection clause, the party resisting enforcement must "clearly show that enforcement would be unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud or overreaching."<sup>66</sup> According to the Court, this presumption in favor of enforceability was justified by international trade pressures.<sup>67</sup> In particular, the Court has said:

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.<sup>68</sup>

### C. Arbitration Clauses

If parties have some reason for concern that their choice-of-law clause will not be enforced, either alone or in conjunction with a choice-of-court clause, there remains an arbitration option. Under the Federal

---

62. SECOND RESTATEMENT, *supra* note 3, § 80.

63. *See, e.g.,* Rafael Rodriguez Barril v. Conbraco Indus., Inc., 619 F.3d 90, 95 (1st Cir. 2010); *In re Autonaton, Inc.*, 228 S.W.3d 663, 670 (Tex. 2007).

64. Federal law unequivocally governs the question for claims brought under federal statute and for motions to transfer venue in the federal courts. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31-32 (1988). And a majority of circuits considering the matter have concluded that the enforceability of court-selection clauses is procedural for *Erie* purposes and therefore governed by federal law. *See, e.g.,* *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 827-28 (6th Cir. 2009) (discussing circuit court caselaw). Two circuits have concluded that enforceability is to be determined according to state law but that the law designated in the parties' agreement is to be used to resolve the question. *Id.* at 827. This conclusion is also very likely to result in the enforcement of a choice-of-court clause.

65. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

66. *Id.*

67. *Id.*

68. *Id.* at 9.

Arbitration Act,<sup>69</sup> both state and federal courts have an obligation to enforce arbitration agreements.<sup>70</sup> Parties are entitled to an order referring their dispute to arbitration even when it involves a cause of action premised on public-law concerns. Thus, securities law,<sup>71</sup> antitrust law,<sup>72</sup> employment discrimination,<sup>73</sup> and federal racketeering<sup>74</sup> claims are all subject to arbitration unless the parties indicate otherwise. Moreover, states cannot create private causes of action that are immune from resolution in arbitration.<sup>75</sup> Most arbitration associations require the arbitrators to apply the law designated in the parties' agreement,<sup>76</sup> and the Supreme Court has indicated that, because arbitration is a creature of contract, the arbitrator is required to comply with the limitations provided in the agreement.<sup>77</sup> Thus, coupling an arbitration clause with a choice-of-law clause can secure enforcement of the latter.

The Supreme Court has addressed potential problems associated with parties using arbitration as a mechanism for circumventing public regulatory laws and has attempted to provide assurances that abuses of these clauses can be prevented.<sup>78</sup> For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>79</sup> the plaintiff argued that it should not have to proceed to arbitration because the arbitration clause worked to effect an end-run around U.S. antitrust law.<sup>80</sup> Specifically, the contract called for arbitration in Japan and contained a choice-of-law clause that provided: "This Agreement is made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein."<sup>81</sup> The U.S. government submitted an amicus brief in the case expressing concern that the

---

69. 9 U.S.C. §§ 1-16 (2006).

70. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

71. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 482-83 (1989) (applying the Securities Act of 1933); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987) (applying the Securities Exchange Act of 1934).

72. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624, 627-28 (1985).

73. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28-29 (1991).

74. *McMahon*, 482 U.S. at 242.

75. *Southland Corp.*, 465 U.S. at 9-10; *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987).

76. See O'HARA & RIBSTEIN, *supra* note 40, at 87-88 (discussing phenomenon).

77. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476-79 (1989); *Prima Paint Corp. v. Flood & Conkline Mfg. Co.*, 388 U.S. 395, 406-07 (1967).

78. See *Mitsubishi Motors Corp.*, 473 U.S. at 628-37.

79. 473 U.S. 614 (1985).

80. *Id.* at 624-25.

81. *Id.* at 652 n.19.

arbitrators would read this provision as wholly displacing U.S. law where it would otherwise apply.<sup>82</sup> The International Chamber of Commerce (the body that would host this arbitration) also submitted an amicus brief admitting it was “[c]onceivabl[e], although we believe it unlikely, [that] the arbitrators could consider Soler’s affirmative claim of anticompetitive conduct by CISA and Mitsubishi to fall within the purview of this choice-of-law provision, with the result that it would be decided under Swiss law rather than the U.S. Sherman Act.”<sup>83</sup> The Court was able to avoid dealing with the matter directly because the defendant had effectively conceded to the application of U.S. antitrust law by representing that the claims had been submitted to arbitration on that basis.<sup>84</sup> To address the concern in future cases, however, the Court stated in a footnote:

We therefore have no occasion to speculate on this matter at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award. Nor need we consider now the effect of an arbitral tribunal’s failure to take cognizance of the statutory cause of action on the claimant’s capacity to reinitiate suit in federal court. We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party’s right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.<sup>85</sup>

Although this statement suggests a willingness to refuse enforcement of arbitration agreements in future cases, the Court has expressed a repeated reluctance to police potentially problematic arbitral behavior at the agreement enforcement stage. For example, when the same argument was raised in a later case involving the Carriage of Goods by Sea Act,<sup>86</sup> the Supreme Court dismissed the concern as premature.<sup>87</sup> The Court reasoned that choice-of-law questions must be decided in the first instance by the arbitrator, and that concerns about the effective enforcement of U.S. law can be treated at the award-enforcement stage.<sup>88</sup>

---

82. Brief for the United States as Amicus Curiae Supporting Respondent, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (No. 83-1569), 1985 WL 669814, at \*20.

83. *Mitsubishi Motors Corp.*, 473 U.S. at 637 n.19 (alterations in original).

84. *Id.*

85. *Id.*

86. 46 U.S.C. § 30701 (2006).

87. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-41 (1995).

88. *Id.* at 541.

In reality, however, circumvention of federal or state law typically cannot be effectively addressed at the award-enforcement stage. In international commercial arbitration, it is generally understood that the awards are to be vacated only at the seat of arbitration,<sup>89</sup> so parties can avoid U.S. court vacatur by seating the arbitration outside of the United States, which occurred in both of the Supreme Court cases discussed above.<sup>90</sup> And even if a U.S. court was willing to vacate an arbitral award rendered elsewhere, other nations remain free to enforce the award.<sup>91</sup> U.S. courts could refuse to enforce an award if the prevailing party came to the United States for enforcement, but that is unlikely to occur for at least two reasons. First, in cases where avoiding U.S. law leads to no liability for a party, there is no subsequent enforcement action. Second, the awards can be enforced wherever the losing party has assets, so in many cases avoiding the U.S. courts is entirely feasible.

For both international and domestic arbitrations, the parties are entitled to choose their arbitrators, and the chosen arbitrators typically need not be lawyers.<sup>92</sup> Additionally, unless the parties or the arbitration association require otherwise, arbitrators need not issue reasoned opinions with their awards.<sup>93</sup> Thus, it can be practically impossible for a court to determine whether an arbitrator actually refused to apply U.S. law. In apparent recognition of the very real possibility that U.S. antitrust laws would not be applied, the Court in *Mitsubishi* quoted the

---

89. This understanding comes from the fact that the only mention of set aside or suspension of an arbitration award makes reference only to the courts of the country in which, or under the law of which, the award was rendered. United Nations Conference on International Commercial Arbitration, New York, June 10, 1958, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art. V(1)(e), 330 U.N.T.S. 3, available at <http://treaties.un.org>.

90. See *Mitsubishi Motors Corp.*, 473 U.S. at 627-28; *Vimar Sequros y Reasequros*, 515 U.S. at 540-41.

91. In fact, refusals to enforce arbitral awards are apparently quite rare. One study found that only ten percent of the reported cases involving the New York Convention resulted in court refusal to enforce a foreign arbitral award. Albert Jan van den Berg, *New York Convention of 1958: Refusals of Enforcement*, ICC ICARB. BULL. 75 (Supp. 1999). Of course, this ten percent figure drastically overstates the frequency of enforcement refusal, because the vast majority of awards are voluntarily complied with, and in the few cases where the enforcement question is raised in a court, judgments leading to enforcement are less likely to include a written opinion, and the opinions are less likely to be published. CHRISTOPHER R. DRAHOZAL, *COMMERCIAL ARBITRATION: CASES AND PROBLEMS* 563 (2d ed. 2006).

92. *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 407 (1967) (Black, J., dissenting).

93. Michael P. O'Mullan, Note, *Seeking Consistency in Judicial Review of Securities Arbitration: An Analysis of the Manifest Disregard of the Law Standard*, 64 *FORDHAM L. REV.* 1121, 1135 (1995).

same language from *M/S Bremen v. Zapata Off-Shore Co.*,<sup>94</sup> when it stated:

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.<sup>95</sup>

## V. THE DEMISE OF THE PRIVATE ATTORNEY GENERAL

Taken together, the enforcement of these choice clauses has resulted in the demise of the private attorney general. Private causes of action designed to help further the states' interest in compliance with federal regulations need no longer be heard in forums where laws will provide relief for their violations. Franchise regulations, discrimination claims, securities laws, antitrust laws, fraud claims, fiduciary duty claims, and others suffer in a world where choice-of-law clauses enable drafting parties to opt for the laws they prefer.

The problem for states attempting to protect their own interests is particularly acute in the context of adhesion contracts, where the party losing legal rights may not have made a knowing choice to abdicate them. State and federal private causes of action designed to protect consumers and employees can be defeated with choice-of-law clauses, especially where the contract also contains an arbitration clause. In general, arbitration clauses are enforceable in both consumer<sup>96</sup> and employee<sup>97</sup> contracts, and the United States Supreme Court has disabled courts from categorically refusing to enforce class waivers in the arbitration agreements.<sup>98</sup> Thus, in addition to enabling a company to choose more favorable law, an arbitration clause can work to defeat the class mechanism, which is considered essential to the effective vindication of small-value claims.<sup>99</sup>

---

94. 407 U.S. 1 (1972).

95. *Mitsubishi Motors Corp.*, 473 U.S. at 629 (quoting *M/S Bremen*, 407 U.S. at 9) (internal quotation marks omitted).

96. See, e.g., *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745-46 (2011); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272-73 (1995).

97. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28-29 (1991).

98. See *Concepcion*, 131 S. Ct. at 1744-45, 1753.

99. Companies could sometimes avoid class proceedings with a choice-of-court clause designating that disputes would be heard in Virginia state courts, which do not have a class mechanism. See, e.g., *Forrest v. Verizon Commc'ns, Inc.*, 805 A.2d 1007, 1013 (D.C.

No doubt the demise of the private attorney general has had as much to do with choice-of-court and arbitration clauses as it has had to do with choice-of-law clauses. Nevertheless, the role of choice-of-law clauses remains significant. If parties are free to choose their forum but not their governing law, then it is more likely that the substantive policies embodied in a state law will be respected wherever the dispute is resolved. Instead, the choice-of-law and choice-of-forum clauses work together as a kind of one-two punch that gives parties unprecedented freedom to avoid undesired laws.

The demise of the private attorney general has forced the states to play a more active role in the protection of their citizens. The state itself remains free to bring its own enforcement actions under state and (to some extent) federal laws, and the state is not subject to the choice clauses found in the private contracts.<sup>100</sup> Thus, the Equal Employment Opportunity Commission can bring federal enforcement actions when employers impermissibly discriminate against employees,<sup>101</sup> and the Department of Justice can bring enforcement actions under the federal antitrust and securities claims.<sup>102</sup> State attorneys general can bring *parens patriae* actions under some federal consumer statutes.<sup>103</sup> In addition, state attorneys general<sup>104</sup> as well as state agencies are often empowered to enforce violations of state laws through specific statutory grants or under the state's general authority to protect the health, safety, and welfare of its citizens.<sup>105</sup> In fact, at times the Court attempts to console parties claiming that choice clauses will work to

---

2002). For contracts with international connections, choosing a court outside the United States can often also work to defeat the possibility of class proceedings, but these choice-of-court clauses were not inevitably enforced in state courts. *See, e.g., Am. Online, Inc. v. Superior Court of Alameda Cnty.*, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001); *Dix v. ICT Group, Inc.*, 161 P.3d 1016, 1024-25 (Wash. 2007).

100. *See, e.g., Gilmer*, 500 U.S. at 32.

101. *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 285-86 (2002).

102. *See U.S. v. John Doe, Inc. I*, 481 U.S. 102, 105 (1987) (allowing antitrust claims); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (allowing securities claims).

103. Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 708-11 (2011) (discussing federal laws that can be enforced through state government actions); Amy Widman & Prentiss Cox, *State Attorneys General's Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 CARDOZO L. REV. 53, 53 (2011) (citing twenty-four federal laws that explicitly enable states to act as public enforcement authorities).

104. *See generally* Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, The Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859 (2000).

105. *Id.* at 1869-71.

defeat state laws by pointing out that this state enforcement mechanism remains available.<sup>106</sup>

Of course, state enforcement actions can prove prohibitively expensive for many states, especially in the current climate of severe budget crises. A few states have managed to work around budgetary limitations by hiring private counsel to prosecute *parens patriae* actions on behalf of the state.<sup>107</sup> But regardless of the possibility of a work-around by the state, which is limited, private and state incentives to sue will inevitably differ. Some state actors will be constrained by partisan politics, or a fear that criticism of private fee arrangements by lobbying interests could jeopardize their reelection prospects, or both.<sup>108</sup> In some states, those opposing lobbying interests have successfully imposed bans on the hiring of outside counsel to represent the state under contingency fee arrangements.<sup>109</sup> In addition, the state attorneys general can face political and other constraints that prevent them from acting in concert, which may be necessary to effectively address a problem.<sup>110</sup> A state might have put in place the private attorney general vehicle to ensure that state laws and policies are effectively enforced, even in those cases where the state government could overcome the limited budgets, limited information, and/or potentially competing agendas of the state executive or attorney general offices. Without that mechanism, state policies necessarily suffer, at least somewhat.

I do not mean to take a position here on the desirability of class actions, treble damages remedies, and other mechanisms that have been used to empower private attorneys general to pursue the enforcement of state policies. Nor do I mean to take a position on whether the state's incentives are better or worse than those provided to private parties. Often, I am not even sympathetic to the state policy that is compromised. My goal here is much more modest and is confined to pointing out an irony.

Brainerd Currie proposed a replacement of the First Restatement, and in doing so, he powerfully argued that the goal of choice of law should be to facilitate state policies.<sup>111</sup> However, the chaos unleashed once

---

106. See *Gilmer*, 500 U.S. at 32.

107. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 670-72 (2012).

108. *Id.* at 630-31, 672-75.

109. *Id.* at 672-73 ("Fierce lobbying and popular outcry drove some jurisdictions to place limits on the ability of [attorney general] to hire outside counsel, and led President George W. Bush to ban the use of contingency fee agreements in federal contracts with outside counsel.") (footnotes omitted).

110. Ieyoub & Eisenberg, *supra* note 104, at 1881.

111. Currie & Schreter, *supra* note 13, at 1325.

states attempted to put in place more policy-oriented choice-of-law principles necessitated a broad recognition of choice-of-law clauses for contracts. Enforcement of these provisions, when coupled with enforcement of forum-choice provisions and very strong interstate and international trade pressures, has led to a significant compromise on the ability of states to effectuate their interests. In fact, I have argued elsewhere that the failure of the states to coordinate their modern choice-of-law policies has undermined the ability of states to promote their policies in other ways, because choice-of-law chaos provides an excuse to take lawmaking authority out of the hands of the state via the Dormant Commerce Clause and preemption doctrine.<sup>112</sup> In the end, the movement sparked by Brainerd Currie has worked to defeat states' abilities to promote their policies—the very last thing Currie would have wanted.

This Essay takes as a given that Currie's primary goal was to cause states to put in place a new choice-of-law approach that would work to promote the ability of states to effectuate their public policies. Jurisprudential realities and changing times have worked together to defeat the attainment of Currie's goal, even though his proposed approach to choice of law is so widely used in U.S. courts today. If Currie could join us now in reflection, would he denounce or modify his proposed approach to choice of law to more effectively promote state policies? Or would his faith in his proposed approach, as perhaps evidenced in its widespread use, prove stronger than the goal he articulated for its adoption? And if a different or modified approach to choice of law might be proposed, what would it look like? The first two questions can no longer be confidently answered, and the answer to this last question must await another day. Regardless of whether Currie's legacy might one day take an entirely different form in the conflict of laws, his influence over the field in the last fifty years has been remarkable. If a new proposal surfaces to more effectively use choice of law to promote state policies, it would not be surprising to learn that such proposal has its roots in Mercer University School of Law.

---

112. Erin O'Hara O'Connor & Larry E. Ribstein, *Preemption and Choice-of-Law Coordination*, 111 MICH. L. REV. 647, 673, 675, 677-82 (2013).



\*\*\*