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Timing the Choice of Law by Contract

Dolly Wu



Timing the Choice of Law by Contract

By Dolly Wu*

I. INTRODUCTION

¶1 Contracts are a backbone of the economy.¹ Parties enter into contracts to solidify their bargains and carry out their intentions.² However, subsequent unanticipated changes in law might defeat the very purpose of a contract. “Our laws are not frozen into immutable form, they are constantly in the process of revision in response to the needs of a changing society.”³ New legislation, regulations, and common law are inevitable. However, such new law might prevent an existing contract from being executed as intended. Familiar examples of legal changes that affect contracts include new tax plans, local ordinances, and food and drug regulations.⁴ Less familiar examples include new patent laws,⁵ remedies,⁶ statutes of limitation,⁷ court procedures,⁸ judicial decisions governing forum selection,⁹ and adjustments to the Uniform Commercial Code.¹⁰

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¹ Arguably contracts exist ubiquitously and play a central role in our economy. Even in ancient times, contracts were important to many of the major transactions in life. *See, e.g.*, Paul Halsall, *Ancient History Sourcebook: A Collection of Contracts from Mesopotamia, c. 2300 - 428 BCE*, in INTERNET ANCIENT HISTORY SOURCEBOOK (1999), <http://www.fordham.edu/halsall/ancient/mesopotamia-contracts.html> (describing contracts for the sale of real estate, food, crops, and for rentals, leases, labor (employment), borrowing money, and so on).

² BLACK’S LAW DICTIONARY 341–51 (8th ed. 2004) (defining the term “contract”).

³ *Richardson v. Ramirez*, 418 U.S. 24, 82 (1974) (quoting *Dillenburg v. Kramer*, 469 F.2d 1222, 1226 (9th Cir. 1972)).

⁴ *See, e.g.*, Michael R. Taylor, *FDA Food Safety Conference: The FDA Food Safety Modernization Act: Putting Ideas into Action*, FOOD AND DRUG ADMIN. (Jan. 27, 2011), <http://www.fda.gov/AboutFDA/CentersOffices/OC/OfficeofFoods/ucm241192.htm> (referring to the FDA Food Safety Modernization Act); David M. Herszenhorn, *House Set to Follow Senate in Approving Tax Deal*, N.Y. TIMES, Dec. 15, 2010, at A1, *available at* <http://www.nytimes.com/2010/12/16/us/politics/16cong.html> (referring to an \$858 billion tax plan).

⁵ *See, e.g.*, *infra* Section II.B.

⁶ *See, e.g.*, *CoreBrace LLC v. Star Seismic LLC*, 566 F.3d 1069 (Fed. Cir. 2009).

⁷ *See, e.g.*, *Chapman v. Bd. of Cnty. Comm’rs of Douglas*, 107 U.S. 348 (1883) (holding that a change in statute of limitation barred suit in a contract dispute); *In re Apex Express Corp.*, 190 F.3d 624, 642 (4th Cir. 1999).

⁸ *See, e.g.*, *Goldhammer v. Dunkin’ Donuts, Inc.*, 59 F. Supp. 2d 248, 255 (D. Mass. 1999).

⁹ *See, e.g.*, *Caperton v. A.T. Massey Coal Co.*, 690 S.E.2d 322, 349 (W. Va. 2009).

¹⁰ *See, e.g.*, David Frisch, *Rational Retroactivity in a Commercial Context*, 58 ALA. L. REV. 765, 768 (2007) (citing changes to the U.C.C. Articles 1 (2001), 2 (2003), 2A (2003), 3 (2002), 4 (2002), 4A(1989), 5(1995), 6(1989), 7(2004), 8(1994), and 9(2001)).

¶2 In each of these examples, legal changes might hamper contracts. For instance, the imposition of new sales taxes on soda in certain states created an uproar because the taxes could increase product prices, thereby decreasing demand and profits.¹¹ Until the taxes expire, existing sales contracts for soda hold volume buyers hostage to lost profits, because the contracts might not account for lost sales from the taxes.¹²

¶3 This kind of scenario is prevalent in patent law and in patent licensing where courts are constantly reinterpreting the law. Within the last three or four years, cases such as *KSR v. Teleflex*,¹³ *Quanta v. LG*,¹⁴ *In re Bilski*,¹⁵ *Bilski v. Kappos*,¹⁶ *CoreBrace v. Star Seismic*,¹⁷ and *Uniloc v. Microsoft*¹⁸ frustrated patent practitioners and licensors.¹⁹ The new decisions have the potential to cause previously-granted patents to become invalid, or change the scope of an already-executed license²⁰ and thus diminish the value of the license. Unfortunately, parties have few retroactive remedies.

¹¹ See Janet Adamy, *Soda Tax Weighed to Pay for Health Care*, WALL ST. J., May 12, 2009, at A4, available at <http://online.wsj.com/article/SB124208505896608647.html>; Eric Boehm, "Soda Tax" Faces Many Opponents: Lobbyist and Unions Line Up to Fight Nutter's Proposal, PA INDEPENDENT (Mar. 11, 2010), http://www.paindependent.com/todays_news/detail/soda-tax-faces-many-opponents.

¹² The Business Council, *Legislative Memo Regarding Tax on Soft Drinks*, BUS. COUNCIL N.Y. STATE, INC. (Mar. 8, 2010), <http://www.bcny.org/inside/Legmemos/2009-10/s6610a9710TaxonSoftDrinks.htm>.

¹³ *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007). *KSR* confounded patent-holders and licensors. See Peter Lattman, *KSR v. Teleflex: The Supreme Court's Big Patent Ruling*, WALL ST. J. L. BLOG (May 1, 2007, 8:07 AM), <http://blogs.wsj.com/law/2007/05/01/ksr-v-teleflex-the-supreme-courts-big-patent-ruling/tab/article/> (highlighting how many commentators thought that the *KSR* ruling might invalidate patents and make it harder to get a patent in the future).

¹⁴ *Compare Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617 (2008), and *Mary LaFrance, LaFrance on Quanta Computer, Inc., v. LG Electronics, Inc.*, 2008 EMERGING ISSUES 2401 (2008) (LexisNexis Group), with *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, 706, 708 (Fed. Cir. 1992). *Quanta* puzzled practitioners, because it expanded the concept of patent exhaustion and seemed inconsistent with *Mallinckrodt*.

¹⁵ *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008); John A. Squires & Duane R. Valz, *Awaiting and Anticipating Bilski*, 2010 EMERGING ISSUES 4910 (2010) (LexisNexis Group).

¹⁶ *Bilski v. Kappos*, 130 S. Ct. 3218 (2010).

¹⁷ *Corebrace LLC v. Star Seismic LLC*, 566 F.3d 1069, 1072–73 (Fed. Cir. 2009) (holding the phrase "make, use and sell" implies have-made rights with regard to third parties).

¹⁸ *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1314 (Fed. Cir. 2011). The 25 percent "rule of thumb" for calculating a reasonable royalty for purposes of infringement damages "is a fundamentally flawed tool for determining a baseline royalty rate in a hypothetical negotiation," and thus precludes its use for damages calculations. This change has a major impact on past patent licenses that are paid-out and recomputed over many years and also on adverse licensing negotiations. Based on the past cases using this rule, practitioners assumed this 25% rate to set their existing licensing rate and to anticipate litigation should anything go awry. The Court did not propose a new rule in its opinion, thus leaving much uncertainty among the lower courts and practitioners.

¹⁹ See *infra* Section II.B for further explanation of the impact of these cases to patent licensing.

²⁰ For example, even though *Quanta* was decided in 2008, there are already nine litigated license cases that follow *Quanta*. The patent licenses in the following cases existed prior to the *Quanta* decision: *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 615 F. Supp. 2d 575, 577 (E.D. Ky. 2009); *Cornell Univ. v. Hewlett-Packard Co.*, No. 01-CV-1974, 2008 U.S. Dist. LEXIS 60209 (N.D.N.Y. Aug. 1, 2008). See also *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007) (applying a looser standard than the former TSM test, thus making it easier to invalidate already-patented inventions as being "obvious"); *Lufkin v. McCallum*, 956 F.2d 1104, 1107 (11th Cir. 1992) (Regarding a revised statute of limitations, the court stated that if a new rule of law was applied to the parties in the case in which it was announced, it was applicable retroactively to all pending cases.). Whether a new law is applicable may depend on the filing date of the cause of action. See, e.g., *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1576 n.2 (Fed. Cir. 1990).

¶4 Like judicial decisions, new statutes and administrative regulations also take immediate effect, or even take retroactive effect to the possible detriment of existing private contract holders.²¹ Unanticipated changes can render performance or breach of a contract impractical or impossible.²² Moreover, private parties to a contract are likely to lose if they attempt to challenge new laws based on constitutional grounds under the Contract Clause.²³ Accordingly, new laws can also adversely affect already-existing private contracts. If parties do not draft a contract defensively enough, there may be little they can do afterwards to salvage the situation inexpensively, if at all.

¶5 Therefore, there is a need for a proactive solution to overcome unwelcome and unanticipated changes in law.²⁴ The paper proposes to give private parties an option to include a “choice of *time* of law” clause in contracts to select the law existing at the time of contract execution or at some future time.²⁵ Examples of such clauses include a provision that establishes “the formation, effect, performance, and construction of Contract shall be governed by the laws of the State of X existing as of the execution date of Contract;” a provision that limits the “interpretation and execution of Contract to laws *then in force* a year from the date of execution;”²⁶ or even more selective clauses, such as “Patent License subject to Federal Circuit law existing at the time of execution of this license.” This solution should overcome or anticipate all the possible changes regardless of how laws evolve, which laws evolve, when they evolve, or how long courts take to interpret a new law.

¶6 The purpose of this solution is to promote stability and predictability.²⁷ Locking a private contract into a particular law existing at, for example the time of a contract, provides more certainty for parties. This allows an attorney to draft the rest of the contract knowing the law and include workarounds to any detrimental laws. This is the same reason choice of law provisions are already commonly used in current domestic contracts. However, current domestic choice of law provisions are only territorial and refer to the law of a location such as the state of incorporation.²⁸ Contracting parties include these provisions in order to immunize agreements from uncertainties and to find

²¹ See *In re TMI Litig.*, 193 F.3d 613, 626 (3d Cir. 1999) (providing examples of the retroactive application of various statutes, including one on the choice of law).

²² See *infra* Section II.A.

²³ See, e.g., *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 416 (1983). The Contract Clause is in U.S. CONST. art. I, § 10, cl. 1.

²⁴ Parties deal with many pitfalls even with existing laws and would face the possibility of additional unforeseen problems with new law. See, e.g., Charles A. Weiss, *A Few Problems in Licenses and How to Avoid Them and Due Diligence License Review Checklist*, INTELL. PROP. ISSUES IN BUS. TRANSACTIONS (Mar. 30, 2010), http://www.pli.edu/emktg/toolbox/Problems_Licenses13.doc.

²⁵ This paper does *not* suggest allowing parties to select any random time period such as past laws existing, for example, in President Lincoln’s day.

²⁶ Or more formally, what about a clause, such as “law existing as of [date X], which shall render inapplicable for the contract any later changes in the law” or “settlement agreement shall be subject only to governing law of [State Y] existing at the time of execution of this agreement”?

²⁷ See, e.g., Ronald T. Coleman, Jr. & David B. Darden, *The Constitutionality of Retroactive Franchise Laws*, 21 FRANCHISE L.J. 13, 14 (2001) (“Contracts Clause jurisprudence is essentially a balancing of the need for contractual stability and predictability on the one hand and the legitimate interest of the states in regulating to address public needs on the other.”).

²⁸ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 1 (1971) (“The world is composed of territorial states.”).

the most favorable law among the laws of different states.²⁹ Nonetheless, these provisions do not account for variations with time. As such, this paper suggests an extension to the existing choice of law clause to include a “choice of *time* of applicable law” provision in private domestic contracts.

¶7 Enforcing an explicit choice of time of law provision in private domestic contract should encounter few obstacles. First, some constitutional cases already hold that the laws existing at the “time and place of contract” are grafted onto each contract.³⁰ Second, choice of time of law clauses have been implemented successfully in international contracts.³¹ In the international context, these clauses are known as stabilization clauses.³² The practice should carry over to American contracts. To distinguish domestic from international practices, this paper adopts the phrase “choice of *time* of law” rather than “stabilization.” Third, state common law suggests that an express choice of time of law clause would be a welcome addition to lawyers’ toolboxes.³³ Finally, the proposed solution appears to be consistent with the Conflict of Laws rules that govern traditional choice of law provisions.³⁴

¶8 A major obstacle that an express choice of time of law clause may encounter is public policy. When there are policy arguments against the adoption of such a clause, this paper proposes a test (“Test”) that courts may invoke in individual cases to verify whether the clause should be accepted. The Test examines whether contracting parties could have substituted alternative language rather than using a choice of time of law clause to protect themselves against unanticipated negative changes in law, without violating public policy.

¶9 Sections II.A and II.B provide further examples of the problem and explain how new common law and legislation take effect. Section II.C proposes a proactive solution to the problem. Section III.A discusses constitutional law and federal decisions that have upheld a concept of “time and place of contract.” Section III.B discusses how choice of time of law clauses are already implemented in international contracts. Section III.C covers state contract law in relation to such a clause. Section III.D analyzes issues related to the Conflict of Laws. Section IV describes possible public policy hurdles. Section V counters with a Test to determine whether public policy allows enforcement of the clause. Section VI applies this paper’s solution to a specific example; namely, domestic patent licensing. A choice of time of law provision seems particularly

²⁹ For example, the U.C.C. is not adopted uniformly among the states, so a choice of law provision is particularly important for commercial contracts. See BRYAN D. HULL, *INSIDE SALES AND LEASES: WHAT MATTERS AND WHY* 3 (2008) (“Articles 2 and 2A of the UCC have been adopted in some form by all of the United States except for Louisiana. States do not necessarily enact all sections of the UCC without change—there are a number of non-uniform provisions, the number of which varies from state to state.”).

³⁰ See, e.g., *Home Bldg. & Loan Ass’n. v. Blaisdell*, 290 U.S. 398, 429–30 (1934).

³¹ These contracts are between a private party and the foreign government. See, e.g., ANDREA SHERBERG, *STABILIZATION CLAUSES AND HUMAN RIGHTS: A RESEARCH PROJECT CONDUCTED FOR IFC AND THE UNITED NATIONS SPECIAL REPRESENTATIVE TO THE SECRETARY GENERAL ON BUSINESS AND HUMAN RIGHTS* (2008), available at [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/\\$FILE/Stabilization+Paper.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_StabilizationClausesandHumanRights/$FILE/Stabilization+Paper.pdf) [hereinafter SHERBERG].

³² *Id.*

³³ See *infra* Section III.B.

³⁴ See *infra* Section V.

appropriate in patent licenses because patent law changes often and dramatically. Section VII concludes this paper.

II. THE UNCERTAINTY OF NEW LAW AND A PROPOSED SOLUTION

¶10 Contracts come in many types. For example, there are covenants, agreements, licenses, leases, assignments for franchises, employment, insurance, construction, property, trusts, pre-nuptials, and banking.³⁵ With many contracts in so many areas, there is a high probability that new legislation or judicial decisions can suddenly affect the scope of some existing contract in a way not intended or foreseen by the contracting parties. Both new judicial decisions and legislation tend to take effect immediately even if they are enacted after private parties executed their intentions by a contract. Alternatively, a new law that appears at first to be unrelated to a contract, such as a rule of civil procedure, can create a tangential impact on a contract. Tangential changes can be especially difficult for parties to anticipate. The disruption to private contracts caused by new law motivates the need for a solution.

A. *New Laws Take Effect Immediately*

¶11 With respect to common law, both federal and state courts hold that it is within the inherent power of a court to give a judicial decision prospective or retrospective application without offending the U.S. Constitution.³⁶ There are different factors for determining when procedural and non-procedural common laws are accorded prospective or retrospective effect.³⁷ “If the new law imposes significant new duties and conditions and takes away previously existing rights, then the law should be applied prospectively.”³⁸ As long as the judicially-revised conditions do not violate constitutional rights, it is a common law rule that a decision takes effect retroactively.³⁹ For example, in *Caperton v. A.T. Massey Coal Co.*, West Virginia changed its forum selection rules. West Virginia courts applied the new decision to interpret forum selection clauses to even those that existed in contracts executed and drafted *before* the new law took effect.⁴⁰

¶12 The retroactive application of new legislation is treated somewhat differently from judicial decisions.⁴¹ Application depends on whether the party to the contract is a state or

³⁵ See generally JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 8 (4th ed. 2001); E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. RES. L. REV. 203 (1990) (providing some examples).

³⁶ See, e.g., *Robinson v. Neil*, 409 U.S. 505, 507 (1973); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting); *Caperton v. A.T. Massey Coal Co.*, 690 S.E.2d 322 (W. Va. 2009); *Great N. Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932); *Crowe v. Bolduc*, 365 F.3d 86, 93 (1st Cir. 2004) (“As a general rule, judicial decisions are retroactive in the sense that they apply both to the parties in the case before the court and to all other parties in pending cases.”).

³⁷ See *Robinson*, 409 U.S. at 507–08, 511.

³⁸ *Lopez v. Maez*, 651 P.2d 1269, 1276 (N.M. 1982).

³⁹ *Robinson*, 409 U.S. at 509–10.

⁴⁰ *Caperton*, 690 S.E.2d at 352–53.

⁴¹ Frisch, *supra* note 10, at 766–67. There seem to be conflicting decisions regarding whether retroactive application of legislation is permitted and under what circumstances. See, e.g., Robert C. Feldmeier, *The Illinois Supreme Court's Latest Last Word on Statutory Retroactivity*, 92 ILL. B.J. 260 (May 2004); James L. Huffman, *Retroactivity, the Rule of Law, and the Constitution*, 51 ALA. L. REV. 1095

a private entity.⁴² Unless a state is a contracting party, courts apply rational-basis scrutiny and defer to legislative judgment as to the reasonableness of new legislation.⁴³ The Supreme Court has construed the Contract Clause such that it “does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with *retroactive* effects.”⁴⁴ In fact, new legislation will sometimes contain an express provision allowing retroactive application.⁴⁵ When there is no clear legislative intent and the parties' vested rights are not harmed or the statute is deemed to be procedural, courts may then apply the statute retroactively.⁴⁶ For instance, where an amendment to an oil and gas corporate income tax did not create a harsh or unfair result for the affected parties, the amendment was held to operate retroactively.⁴⁷ Likewise, when the patent statutes extended the term of a patent from seventeen to twenty years, a patent licensee was expected to pay for the extra three years.⁴⁸ The rule also applies to administrative regulations that encompass a large body of law.⁴⁹

¶13 As a result, private contracting parties can encounter the consequences of changes from legislation, judicial decisions, or administrative law overriding the parties' intent as expressed in their original contract.⁵⁰ Worse still, this can cause breach of contract and lead to expensive litigation, such as over a hotel sales contract,⁵¹ a capital management agreement,⁵² or an agreement to purchase excess electricity.⁵³

B. Examples of Legal Changes that Affect a Contract

¶14 There are two categories of legal changes that may affect a contract. One category is related to contract law generally and the second category is related to other areas of law

(2000) (noting that Supreme Court justices cannot agree as to retroactivity). Regardless, there is case law where statutes have been applied retroactively.

⁴² *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 505–06 (1987).

⁴³ *Id.*

⁴⁴ U.S. CONST. art. I, § 10, cl. 1; *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 17 (1977) (emphasis added).

⁴⁵ *In re TMI Litig.*, 193 F.3d 613, 626 (3d Cir. 1999) (providing an example allowing the retroactive application of 42 U.S.C. § 2014(hh) related to the choice of law provision).

⁴⁶ *United States Trust Co.*, 431 U.S. at 17; *Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1120–21 (10th Cir. 1999) (citing *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 275 (1994)).

⁴⁷ *Atl. Richfield Co. v. State*, 705 P.2d 418, 424 n.17 (Alaska 1985). It is arguable whether the oil companies were happy with the retroactive application of additional taxes levied by the amended administrative statute.

⁴⁸ *BJM, Inc. v. Melpport Corp.*, 18 F. Supp. 2d 704, 705–07 (W.D. Ky. 1998) (The agreement stated that royalty payments to BJM “shall continue until the last of the patents expires.” Then, the patent laws changed, extending the life of a patent.)

⁴⁹ *See, e.g., Rehart v. Clark*, 448 F.2d 170, 173 (9th Cir. 1971).

⁵⁰ Both varieties, new legislation and judicial decisions, are referred to as “new law” in this paper.

⁵¹ *Landis v. Hodgson*, 706 P.2d 1363, 1368–69 (Idaho Ct. App. 1985) (reasoning that if government imposition of a new law was an event, the nonoccurrence of which was assumed at the time of the contract, the performing party would be excused from the duty to perform).

⁵² *Admiral Fin. Corp. v. United States*, 378 F.3d 1336, 1338 (Fed. Cir. 2004) (holding that Admiral could not recover damages from the U.S. based on the enactment of the statute, as Admiral “assumed the risk of a regulatory change” and was not injured by the change).

⁵³ *BP Chems., Inc. v. AEP Texas Cent. Co.*, 198 S.W.3d 449, 457 (Tex. Ct. App. 2006) (holding that the electrical generating facility's failure to comply with new legislation that required it to register with the state's electric production and transmission grid rendered it impossible or commercially impracticable for the utility to either capture or resell the electricity).

that only impinge on particular elements specific to that contract. In the second category, a new law seemingly related to a legal issue other than contracts may later turn out to impact the contract. The distinction is important because different areas of law change more rapidly than others. Parties may wish to overcome disruptions from only the rapidly-changing areas of law or only one particular area of law; this can be done by proper drafting of a choice of time of law clause to refer only to “patent law” or “food and drug regulation.”

¶15

In the first category, for example, sales contract law and patent law have recently experienced wide-ranging changes that affect parties to contracts. There was a major revision to U.C.C. Article 2 in 2003, which the states could choose to adopt and that would affect many sales contracts.⁵⁴ In particular, the *Bi-Economy Market, Inc. v. Harleystville Ins. Co. of New York* decision appeared to signal a shift in New York contract law towards litigation avenues and revised rules for consequential damages.⁵⁵ Sixteen cases have already followed some aspects of the decision in *Bi-Economy*.⁵⁶ There are also new laws targeted at contracts for intellectual property, e.g., patent licenses. In 2009, the Court of Appeals for the Federal Circuit’s (“CAFC”) *TransCore, LP v. Elec. Transaction Consultants Corp.* decision created implied license obligations that disregarded express statements in the contract.⁵⁷ The CAFC also held that unconditional covenants-not-to-sue authorize sales to third parties by the licensee for purposes of patent exhaustion.⁵⁸ The third party in *TransCore* happened to be a competitor of the licensor.⁵⁹ Thus, had the licensor anticipated the *TransCore* decision, he may have drafted the agreement with an anti-competitor clause. Also in 2009, in *CoreBrace LLC v. Star Seismic LLC*,⁶⁰ the CAFC expanded the meaning of the “make, use, sell” phrase to include implied have-made rights, which revises the scope of existing licenses that do not happen to have language expressing any contrary intent.⁶¹ Like *KSR*

⁵⁴ HULL, *supra* note 29, at 3.

⁵⁵ New York’s highest Court did not recognize independent tort causes of action for an insurer’s alleged failure to perform its contractual obligation under an insurance contract. The First Department’s decision in *Acquista v. New York Life Ins. Co.*, 285 A.D.2d 73 (N.Y. App. Div. 2001), was not followed by New York Courts until the Court of Appeals’ rulings in *Panasia Estates, Inc. v. Hudson Ins. Co.*, 886 N.E.2d 135 (N.Y. 2008), and *Bi-Economy Market, Inc. v. Harleystville Ins. Co. of New York*, 886 N.E.2d 127 (N.Y. App. Div. 2008), on February 19, 2008. See Mark B. Seiger & Jeffrey L. Kingsley, *Seiger and Kingsley On Panasia Estates and Bi-Economy Market*, 2008 EMERGING ISSUES 2150 (2009) (LexisNexis). See also, *Recent Case: Contract Law-Consequential Damages-New York Court of Appeals Holds that Insurers May Be Liable for Consequential Damages*, 122 HARV. L. REV. 998 (2009) (citing *Bi-Economy Market*). These new rules could have great consequences for insurance contracts because existing contracts were drafted with a particular liability calculation and payout model, not accounting for the additional litigation costs that could reduce profit margins for the insurance companies or even make them insolvent if a company is small and there is a major catastrophe.

⁵⁶ According to the LexisNexis Shepard’s report for *Bi-Economy Market* that was accessed on January 30, 2011, thirteen cases followed, eight distinguished, and three were neutral to *Bi-Economy Market*.

⁵⁷ *TransCore, LP v. Elec. Transaction Consultants Corp.*, 563 F.3d 1271, 1279 (Fed. Cir. 2009). See also, Ian A. Feinberg & Joseph A. Mahoney, *US Federal Circuit Decision Affects Law of Patent Exhaustion, Licensing and Covenants Not to Sue*, THE MAYER BROWN PRACTICES (April 13, 2009), <http://www.mayerbrown.com/publications/article.asp?id=6476&nid=6>.

⁵⁸ *TransCore*, 563 F.3d at 1274.

⁵⁹ *US Court Rejects TransCore Complaint Against ETC on Open Road Tolling*, TOLLROADNEWS (May 23, 2008, 1:56 PM), <http://www.tollroadnews.com/node/3554>.

⁶⁰ *CoreBrace LLC v. Star Seismic LLC*, 566 F.3d 1069 (Fed. Cir. 2009).

⁶¹ Lawrence M. Sung, *Lawrence Sung on What Your Licensed Patent Rights Include: CoreBrace LLC v. Star Seismic LLC*, 2009 EMERGING ISSUES 4545 (2009) (Lexis Nexis).

Int'l Co. v. Teleflex Inc. and *Quanta Computer, Inc. v. LG Electronics, Inc.*, these cases become immediate precedent. Accordingly, patent licensors would benefit from a solution that can immunize them from potentially drastic changes in law.⁶²

¶16

A second category of changes, namely new laws not related to contract law, could also affect the provisions in a particular contract. For example, in 2007, the Supreme Court's *KSR* decision eliminated Federal Circuit's exclusive use of the so-called TSM (teaching, suggestion, motivation) test for gauging whether an alleged invention is so obvious as not to be inventive.⁶³ The Court invoked a new test of using "common sense" to determine whether an alleged invention is an obvious combination of existing objects and methods.⁶⁴ In the first year after *KSR*, there was a six-fold increase in the number of court decisions invalidating patent claims based on the new standard of obviousness.⁶⁵ Although the new test was not contract law, it tended to extinguish existing contracts. Likewise in 2008, the en banc CAFC in *In re Bilski* revised the test to determine whether method claims in patents constitute patent-eligible statutory matter.⁶⁶ Applying the machine-or-transformation test from *Bilski*, a New York court backed by scientists invalidated an exclusive licensee's gene patent that would diminish pharmaceutical licenses.⁶⁷ Big software companies like Microsoft opposed the CAFC's decision.⁶⁸ In 2010, the Supreme Court limited the role of the machine-or-transformation test, which potentially revives patents that were invalidated under the previous CAFC decision, and their corresponding licenses.⁶⁹ As a final example, the Patent Reform Bill is winding its way through Congress, and includes many amendments, such as the controversial inventorship and patent-infringement damages provisions.⁷⁰ In sum, these recent judicial

⁶² RAYMOND T. NIMMER, LICENSING OF INTELLECTUAL PROPERTY AND OTHER INFORMATION ASSETS 1 (2d ed. 2007).

⁶³ *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007).

⁶⁴ *Id.* at 420 ("Common sense teaches, however, that familiar items may have obvious uses beyond their primary purposes, and in many cases a person of ordinary skill will be able to fit the teachings of multiple patents together like pieces of a puzzle.").

⁶⁵ This six-fold increase in the number of court decisions invalidating patent claims is compared to the year before *KSR* was decided. Nicholas G. Papastavros & Maia H. Harris, *Do Predictions Come True? KSR, eBay, and the Real Impact on Patent License Negotiations*, INTELL. PROP. TODAY, July 2008, at 1 [hereinafter Papastavros]. The article stated that 38% of cases before a group of patent courts had a finding of obviousness invalidating at least one patent claim after *KSR* versus 6% of cases before the same group of patent courts before *KSR*; that is approximately a six-fold increase. As an actual example, a court denied an injunction in *Altana Pharma AG v. Teva Pharms. USA, Inc.* because the exclusive license is likely to be worthless where the previously-valid patent is probably now invalid under *KSR*. 566 F.3d 999, 1002 (Fed. Cir. 2009) (exclusive licensee attempted to sue Teva et al. for patent infringement, but with the licensed patent invalid under the new *KSR* standard, the value of the license is diminished).

⁶⁶ *In re Bilski*, 545 F.3d 943, 964–65 (Fed. Cir. 2008) (holding that business methods are not statutory matter, the Court provided *dicta* that software patents are not statutory matter either, unless the business algorithm and software claims recite sufficient machinery or physical transformation).

⁶⁷ *Ass'n for Molecular Pathology v. USPTO*, 702 F. Supp. 2d 181 (S.D.N.Y. 2010).

⁶⁸ *E.g.*, Roy Schestowitz, *Why In re Bilski Can Wipe Microsoft off the Map*, TECHRIGHTS (May 10, 2010, 9:19 AM), <http://techrights.org/2010/05/10/bilski-vs-msft/>.

⁶⁹ *Bilski v. Kappos*, 130 S. Ct. 3218, 3231 (2010).

⁷⁰ Dennis Crouch, *Patent Reform Act of 2009*, PATENTLYO (Mar. 3, 2009, 2:58 PM), <http://www.patentlyo.com/patent/2009/03/patent-reform-act-of-2009.html>. A similar Patent Reform Act (Bill) was started in 2007 but was not successful. There is now a Patent Reform Act of 2011. *See, e.g.*, Andrew Ramonas, *Senate Judiciary Panel Leaders to Introduce Patent Reform Bill*, MAIN JUSTICE (Jan. 21, 2011, 12:56 PM), <http://www.mainjustice.com/2011/01/21/senate-judiciary-panel-leaders-to-introduce-patent-reform-bill/>.

decisions immediately took effect and invalidated existing patents.⁷¹ Likewise, the new Patent Reform Act is also expected to have immediate consequences. As a result, existing licenses for already granted patents may be in jeopardy if a licensor failed to anticipate the changes when drafting the contract.⁷²

¶17 Aside from patent law, food goods in a sales contract are also illustrative of the second category of changes. There are often revisions to food laws (e.g. laws governing the handling, inspection, delivery, *etc.* of food), or to tax laws that affect the price of the food goods.⁷³ Manufacturers follow the revised laws that are implemented after the execution of their contracts, whether or not they welcome the new law.⁷⁴

¶18 As the examples show, the variety of changes sufficiently divergent that parties would be hard pressed to come up with a protective provision for each scenario without increasing their contract to an unwieldy length. Moreover, legal changes create concerns for many years.⁷⁵ A law can remain uncertain until courts slowly interpret and apply it to cases.⁷⁶ Instead of a long, nervous wait, companies and practitioners could renegotiate their existing contracts. But renegotiation can be expensive and leave the parties uncertain as to appropriate salutary contract language. Alternatively, parties can try to fight the new law reactively and argue frustration of purpose of the contract.⁷⁷ There is even a suggestive “solution” in the Restatement (Second) of Contracts tailored to the impracticality of performance due to intervening law.⁷⁸ But litigation to overcome a new law is expensive and even more uncertain than renegotiating the private contract.⁷⁹ As such, it would be opportune if the original agreements could be proactively drafted with some provisions that could immunize the parties from the vagaries of *any* new law.

⁷¹ After *KSR*, the first four cases heard by the Federal Circuit regarding “obvious” inventions in essence killed the patent. See Donald S. Chisum, *Chisum on Patentability Standards: Early Federal Circuit Response to the Supreme Court’s 2007 KSR International Decision*, 2008 EMERGING ISSUES 477 (2007) (LexisNexis Group). As for *Bilski*, see Lawrence M. Sung, *Sung on Patent Eligible Medical Technology Post-Bilski: Prometheus Labs., Inc.*, 2010 EMERGING ISSUES 4810 (2010) (LexisNexis Group) (“Perhaps the most significant patent law case to be heard in 2009 was *Bilski v. Kappos*. . . . While much public attention had focused on the implications for financial services and computer software companies . . . there were broad implications for the patenting of all technologies.”); Eric Bensen, *Bensen on the Federal Circuit’s Landmark Decision Regarding the Patent Eligibility of Process Claims Under 35 U.S.C. § 101: In re Bilski*, 2008 EMERGING ISSUES 3063 (2008) (LexisNexis).

⁷² *E.g.* *Bilski*, 129 S. Ct. at 3231. Software cases adjudicated in the year before this decision were prone to be invalidated, and it is unclear as to how courts will decide.

⁷³ See generally *Laws and Regulations*, U.S. DEP’T OF AGRIC., http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1OB?navid=LAWS_REGS&navtype=SU (last visited April 18, 2011).

⁷⁴ *E.g.*, Interview with Susan Chao, in-house senior counsel at Frito-Lay (March 2, 2010).

⁷⁵ Even three years after *KSR*, practitioners still consider the obviousness test to be an “emerging issue” and generated no less than seven expert commentaries on LexisNexis and at least 330 law review articles, according to the Shepard’s report for *KSR Int’l Co., v. Teleflex*, 550 U.S. 398.

⁷⁶ See *id.*

⁷⁷ See, e.g., *United States v. Winstar Corp.*, 518 U.S. 839 (1996).

⁷⁸ RESTATEMENT (SECOND) OF CONTRACTS § 264 (“If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.”).

⁷⁹ The respondents in *Winstar* hired very large, expensive law firms, arguing frustration of purpose. See generally Brief for Trinity Ventures, Ltd. & Castle Harlan, Inc. as Amici Curiae Supporting Respondents, *United States v Winstar Corp.*, 518 U.S. 839 (1996) (No. 95-865), 1996 WL 143638 (Could financial institutions that acquired insolvent thrifts be awarded rescission and restitution under frustration of purpose doctrine upon enactment of FIRREA, which eliminated special accounting treatment for those acquisitions? Financial Institutions Reform, Recovery, and Enforcement Act of 1989, § 5, 12 U.S.C. § 1464).

C. Choosing the Time of Applicable Law

¶19 This paper proposes that it should be possible for parties to include a clause in private domestic contracts to choose the time of the applicable law and to limit the interpretation and execution of the contract to some law existing as of a particular date, for example, the date of execution of the contract. A riskier but related technique would be to choose some future law. For instance, wills occasionally refer to future laws: “the Trust Fund shall be distributed to my then surviving heirs, according to the laws of descent and distribution *then in force* in Kentucky.”⁸⁰ But because of the uncertainty of the outcome in legislative votes or court decisions in the United States, contracting parties should probably not select future laws to apply to their contracts.⁸¹ Because results are more predictable for contracting parties who choose known laws, this paper recommends selecting laws already existing at the time of contract. There are many possible variations within such a choice, as explained in Section III-C. To clarify, this paper does *not* propose that parties may randomly choose laws from *any* time period that they desire. This would likely violate public interest and governmental sovereignty. If nothing else, such a choice would be overly burdensome on the adjudication process.

¶20 There are already hints that the public would welcome the option of choosing the time of law by contract as a means of reducing risk. For example, apartment renters have “rent stabilization” clauses in their leases to keep the rent the same over a period of time.⁸² There are also contracts that stabilize the prices of goods, like electricity or gasoline, by keeping the price fixed over a certain time period.⁸³ There are also stabilization provisions to maintain the price of securities.⁸⁴ However, in these examples, the contracts only attempt to freeze prices and other commercial terms, but they do not have a clause to choose the time of the applicable laws that affect or govern the prices. Thus, should any new laws arise, the contract would likely be affected by them.⁸⁵ This paper explores the feasibility of an explicit choice of time of law clause that can address the problems and act consistently with American jurisprudence.

⁸⁰ *Minary v. Citizens Fid. Bank & Trust Co.*, 419 S.W.2d 340, 341 (Ky. Ct. App. 1967) (emphasis added).

⁸¹ JESSE DUKEMINIER, ROBERT SITKOFF & JAMES LINDGREN, *WILLS, TRUSTS, AND ESTATES* 106 (8th ed. 2009).

⁸² *See Fed. Home Loan Mortg. Corp. v. New York State Div. of Hous. and Cmty. Renewal*, 83 F.3d 45, 48 (2d Cir. 1996) (concluding that rent stabilization law does not constitute either physical or regulatory taking); *Adamson Cos. v. City of Malibu*, 854 F. Supp. 1476, 1501–02 (C.D. Cal. 1994) (concluding that city's mobile home rent control ordinance was substantially related to a legitimate interest).

⁸³ *See Mobil Oil Corp. v. Dep't of Energy*, 728 F.2d 1477, 1479–80 (Temp. Emer. Ct. App. 1983); *Mobil Oil Corp. v. Dep't of Energy*, 547 F. Supp. 1246 (N.D.N.Y. 1982); *Naph-Sol Ref. Co. v. Murphy Oil Corp.*, 550 F. Supp. 297 (W.D. Mich. 1982); *Appeal of Pennichuck Water Works*, 419 A.2d 1080 (N.H. 1980). For electricity, TXU Energy offers contractual plans where the rate of electricity remains the same for twelve months regardless of fluctuations due to usage, weather conditions, cost of production, etc. The author is on a TXU plan called “TXU Energy Texas Choice 12.”

⁸⁴ *See, e.g., United States v. Morgan*, 118 F. Supp. 621, 648 (S.D.N.Y. 1953) (“Stabilization provisions have become commonplace pursuant to statutory provisions and administrative regulations and interpretations relating to their use. While the authority to stabilize is generally given, it is only in relatively few cases that the authority has been exercised.”).

⁸⁵ *See, e.g., United Ref. Co. v. Dep't of Energy*, 585 F. Supp. 626, 627 (W.D. Pa. 1984). The appellate court's holding that the FEA had good cause to invoke emergency rulemaking procedures implicitly recognizes that the substance of the regulation was within the agency's power vis-à-vis existing legislation.

III. FACTORS THAT WEIGH IN FAVOR OF A CHOICE OF TIME OF LAW CLAUSE

A. *Constitutional Law Related to the Time of Contracting*

¶21 American constitutional jurisprudence suggests that there is a basis for enforcing an explicit choice of time of law in domestic contracts based on the Contract Clause. The Contract Clause states, “No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .”⁸⁶ The statement is significant for contracts because contracts are governed primarily by state law rather than federal law.⁸⁷ Although the Clause is silent about the retroactive application of new laws to contracts a prohibition against retroactive application of new law may be implied⁸⁸ by the Founders when they initially drafted the clause.⁸⁹ Notably, the Contract Clause is placed next to the Ex Post Facto clause, which has caused some courts to argue that the prohibition against the application of Ex Post Facto laws also applies to civil matters such as contracts.⁹⁰ Indeed, some delegates to the Constitutional Convention believed that it should. Both clauses relate to due process issues: the lack of fair notice when new laws are applied retroactively and impair contractual intentions or deemed-criminal acts.⁹¹

¶22 However, the fact remains that private contracts have suffered under the vagaries of new law. One reason is that the Court has not settled on a framework or standard of review for analyzing Contract Clause issues in the same way as it has for other constitutional issues like substantive due process.⁹² For private contracts, the Court has tended to apply a rational basis review of a new law.⁹³ Also, the importance and interpretation of the Contract Clause has varied widely over the years. Some Supreme Court decisions have even refuted the plain meaning of the Clause and actually impaired existing private contracts.⁹⁴

¶23 Initially, contract rights and the Contract Clause were prominent in American history and jurisprudence.⁹⁵ In the early 1800s, in cases like *Sturges*, the Supreme Court seemingly followed the literal meaning of the Contract Clause of the Constitution, prohibiting the application of *new* state laws when they impaired the obligation of a previously-entered-into private contract.⁹⁶ Additionally, the Court defined “contract” and

⁸⁶ U.S. CONST. art. I, § 10, cl. 1.

⁸⁷ ARTHUR L. CORBIN, 1-1 CORBIN ON CONTRACTS § 1.21 (Joseph M. Perillo ed., 2009).

⁸⁸ E-mail from Joseph Thai, Constitutional Law Professor at Univ. of Okla. and former judicial clerk to two U.S. Supreme Court Justices, to author (June 13, 2010, 7:35 PM CST) (on file with author).

⁸⁹ Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 547 (2009).

⁹⁰ *Id.* at 547 n.20; *Town of Cheney's Grove v. VanScoyoc*, 191 N.E. 289, 290 (Ill. 1934) (referring to both the U.S. and the Illinois constitution). Other state constitutions also prohibit ex post facto laws that impair existing contracts. *See, e.g.*, *United Cos. Lending Corp. v. Autrey*, 723 So. 2d 617, 624 (Ala. 1998) (“A retroactive change in [the code] would impair the obligations of the plaintiffs' contracts, in violation of . . . the Constitution of Alabama of 1901. . . .”).

⁹¹ *Textualism as Fair Notice*, *supra* note 89, at 547 n.20.

⁹² Thai, *supra* note 88.

⁹³ *Id.* (referring to *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 418 (1983)).

⁹⁴ *See, e.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502 (1987) (“Unlike other provisions in the section, it is well settled that the prohibition against impairing the obligation of contracts is not to be read literally.”) (citing *W.B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934)).

⁹⁵ *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 14–15 (1977).

⁹⁶ *Sturges v. Crowninshield*, 17 U.S. 122, 208 (1819) (“It is the opinion of the court, that the act of the State of New York, which is pleaded by the defendant in this cause, so far as it attempts to discharge this defendant from the debt in the declaration mentioned, is contrary to the constitution of the United States,

“impair,” stating that “[a]ny law which releases a part of this [agreement to do something], must, in the literal sense of the word, impair it.”⁹⁷

¶24 The role and sanctity of contracts was of paramount importance until the *Lochner laissez-faire* era ended.⁹⁸ Then, the Contract Clause took on different meanings such as: (1) impairment must be substantial⁹⁹ and (2) the powers of the states to create new laws affecting contracts are not limited, except with respect to the imposition of punishment.¹⁰⁰ In cases like *West Coast Hotel*, the Supreme Court demoted the “freedom” of contract to a “liberty.”¹⁰¹

¶25 Subsequently, there were instances where constitutional law was interpreted in a way so as to justify the concept of a choice of time of law clause. The following paragraphs focus on such case law in recent history.

¶26 The Court returned to a more favorable interpretation of the Contract Clause, at least with respect to contracts where a state is a party.¹⁰² The Supreme Court concluded:

Whether or not the protection of contract rights comports with current views of wise public policy, the Contract Clause remains part of our written Constitution. We therefore must attempt to apply that constitutional provision¹⁰³ At the time the Constitution was adopted, and for nearly a century thereafter, the Contract Clause was one of the few express limitations on state power. The many decisions of the Court involving the Contract Clause are evidence of its important place in our constitutional jurisprudence.¹⁰⁴

For example, in *United States Trust*, despite public policy concerns, the Court required a state to uphold the terms of its original contractual obligations based on the freedom and intent of contract.¹⁰⁵ Arguably, if contractual obligations were considered to be of great

and that the plea is no bar to the action.”). Chief Justice Marshall drafted the opinion using his rather convoluted style of argument.

⁹⁷ *Id.* at 197–98 (“A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money, on or before a certain day. The contract binds him to pay that money on that day; and this is its obligation. Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. Much more must a law impair it, which makes it totally invalid, and entirely discharges it.”).

⁹⁸ *Lochner v. New York*, 198 U.S. 45 (1905); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 641–42 (1819) (“Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which the constitution is solicitous, and to which its protection is extended.”); *Fletcher v. Peck*, 10 U.S. 87 (1810); Gregory S. Alexander, *The Limits of Freedom of Contract in the Age of Laissez-Faire Constitutionalism*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 103, 103 (F. H. Buckley ed., 1999).

⁹⁹ There must be substantial impairment. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992).

¹⁰⁰ *United States Trust Co.*, 431 U.S. at 17 n.13 (citing *Cummings v. Missouri*, 71 U.S. 277, 322–26 (1866); *Calder v. Bull*, 3 U.S. 386, 390–91 (1798)).

¹⁰¹ *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (“The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty.”); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 578 (2009).

¹⁰² Alexander, *supra* note 98, at 103.

¹⁰³ *United States Trust Co.*, 431 U.S. at 16.

¹⁰⁴ *Id.* at 14–15.

¹⁰⁵ *Id.* at 16. The Court was motivated partly by the unfairness to the bondholders who were powerless against the state that issued the bonds and changed the laws. *Id.* at 29 n.27. When fairness issues come

importance again and parties elected to implement a choice of time of law provision in their agreement, it should be more likely to be enforced.

¶27 Alternatively, another perspective is that the Supreme Court adopted language in some of its modern decisions that is particularly relevant to a choice of time of law clause:

The obligation of a contract is the law which binds the parties to perform their agreement. This Court has said that “*the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.* This principle embraces alike those which affect its *validity, construction, discharge and enforcement.* Nothing can be more material to the obligation than the means of enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion.”¹⁰⁶

A contract includes not only its express terms but also the *contemporaneous state law* pertaining to interpretation and enforcement as if they were expressly *referred to or incorporated* by its terms.¹⁰⁷ “This principle presumes that contracting parties adopt[ed] the terms of their bargain *in reliance on the law in effect at the time the agreement [was] reached.*”¹⁰⁸ Although the cases relate mostly to contracts where the state government is a party, the Court’s statements about the *law-at-the-time* rule seemingly can be applied to both private and public contracts.¹⁰⁹ Moreover, lower federal courts have also

into play because a governmental party altered or even rescinded its own obligations retroactively, a court will apply heightened scrutiny. *See, e.g.,* S. California Gas Co. v. City of Santa Ana, 336 F.3d 885, 889 (9th Cir. 2003); Sanitation & Recycling Indus. v. City of New York, 107 F.3d 985, 992–93 (2d Cir. 1997).

¹⁰⁶ Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398, 429–30 (1934) (citing *Sturges v. Crowninshield*, 17 U.S. 122, 197 (1819), and quoting *Von Hoffman v. City of Quincy*, 71 U.S. 535, 550, 552 (1866)) (emphasis added). The Court almost appeared to be wringing its hands, trying to rationalize why they veered away from the usual rule (quoted) for contracts. It presented some distinction between the obligation of the contract and the remedy given by the legislature to enforce that obligation. However, courts sometimes no longer make this distinction regarding contracts. *See City of El Paso v. Simmons*, 379 U.S. 497, 508 n.9 (1965). However, the distinction could still be useful, especially for patent licenses where the remedies are sometimes bifurcated from other patent issues. Any choice of law and choice of time provision may be refined so that one set of laws are selected for the obligation portion of the contract and another set of laws for the remedy.

¹⁰⁷ *United States Trust Co.*, 431 U.S. at 19 n.17.

¹⁰⁸ *Id.* (emphasis added) (preventing bondholders from losing the value in their bonds when the state itself repealed its past law and did away with its contractual obligation to secure the bonds with a minimum amount of reserve funds).

¹⁰⁹ *El Paso*, 379 U.S. at 508 (referring to all contracts and not just governmental contracts). The Supreme Court refers to the laws at the time in several decisions related to contracts. For example, in 1941, in *Wood*, the Supreme Court stated that “laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.” *Wood v. Lovett*, 313 U.S. 362, 370 (1941). The Court decided that Arkansas Act 264, repealing Act 142 that forgave property taxes effectively voided the state’s contracts with a seller, contracts which were made during the existence of Act 142. *Id.* at 371. The Court held the state violated the Contract Clause and the obligations under the original Act 142 must apply. *Id.* Later, in 1977, the Court again alluded to the concept of laws at the time of contract in order to prevent bondholders from losing the value in their bonds when the state itself repealed its past law and did away with its contractual obligation to secure the bonds with a minimum amount of reserve funds. *United States Trust Co.*, 431 U.S. at 18–19, 32.

occasionally applied the law-at-the-time rule to purely private contracts.¹¹⁰ The federal courts balance contract rights against public policy, emergency circumstances, and equitable principles.¹¹¹ Even when a decision goes against contract rights in the balancing act, the decisions often mention the law-at-the-time rule.¹¹² As such, one might conclude from the decisions and the rule that parties could adopt a choice of time of law clause in their contracts and enforce it.

¶28

It is more common for courts to *sua sponte* assert a *prior* law—one existing at the time of contract formation such as stated in *United States Trust*—but at least one Supreme Court case referenced *future* regulations. *Mastrobuono v. Shearson* was a private contract case where the Court was implicitly receptive to a choice of time of law.¹¹³ The Court gave effect to contract language where the parties chose *future* finance semi-administrative regulations to govern an agreement between plaintiff investor and defendant stock-brokerage firms.¹¹⁴ The language in question was: “Unless unenforceable due to federal or state law, any controversy arising out of or relating to [my] accounts, . . . shall be settled by arbitration in accordance with the *rules then in effect . . . as I may elect.*”¹¹⁵ (emphasis added). The Court decided, “The arbitral award

¹¹⁰ For example, in a private contract case, the Third Circuit permitted the defendant Hess Oil to revert to a prior law existing at the time of contract to continue relying on an old doctrine known as “borrowed employees” that applies to contract workers. *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1253 (3d Cir. 1987). The lawsuit was already pending in court when new legislation eliminating the doctrine was enacted. *Id.* There was a retroactive-application provision of the new statute, stating the new law was to apply even to the suits that had already been filed under the old law for four of the contract employees. *Id.* at 1250. The Third Circuit held the alleged public purposes of the retroactive application provision and the means chosen to accomplish them violated the Contract Clause. *Id.* at 1252. The old doctrine of “borrowed employees” thus continued to apply to the workers who were contracted under the old doctrine. *See also* *Ocean View Towers Assocs. v. United States*, 88 Fed. Cl. 169, 176 (Fed. Cl. 2009) (regarding rent contracts, the court stated, “contracting parties are nonetheless ‘presumed to be aware of applicable statutes and to intend to incorporate them.’”); *Dart Advantage Warehousing, Inc. v. United States*, 52 Fed. Cl. 694, 700 (2002) (regarding warehouse space contracts with the U.S. Postal Service, the court stated, “parties are presumed to be aware of applicable statutes and intend to incorporate them” into the contract together with rules and regulations which are considered to be contemporaneous circumstances.); *Puerto Rico Dep’t of Labor & Human Res. v. United States*, 49 Fed. Cl. 24 (Fed. Cl. 2001) (interpreting a settlement agreement); *Shell Oil Co. v. M/T Gilda*, 790 F.2d 1209, 1212 n.3 (5th Cir. 1986) (“This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Acts of the United States, approved April 16, 1936”); *Markwell’s Estate v. Comm’r of Internal Revenue*, 112 F.2d 253, 254 (7th Cir. 1940) (regarding taxes and a contract between divorced spouses).

¹¹¹ American courts are also courts of equity. *THE GUIDE TO AMERICAN LAW: EVERYONE’S LEGAL ENCYCLOPEDIA* 370 (1984) (federal courts were empowered to sit either in equity or at law until 1938 when the Federal Rules of Civil Procedure established one system for processing both law and equity cases, and all actions became “civil” actions.).

¹¹² *Compare* *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 448 (1934) (suspending private contract obligations because of hardships during the Great Depression), *with* *United States Trust Co.*, 431 U.S. at 21 (upholding contract rights).

¹¹³ *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995).

¹¹⁴ *Id.* at 58 n.2. The rules refer to semi-administrative law, the NASD Code of Arbitration Procedure.

¹¹⁵ *Id.* (“This agreement shall inure to the benefit of your [Shearson’s] successors and assigns[,] shall be binding on the undersigned, my [petitioners’] heirs, executors, administrators and assigns, and shall be governed by the laws of the State of New York. Unless unenforceable due to federal or state law, any controversy arising out of or relating to [my] accounts, to transactions with you, your officers, directors, agents and/or employees for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange Inc. as I may elect.”) (emphasis added). In 2007, the NASD merged with the New York Stock Exchange’s regulation committee to form the Financial Industry Regulatory Authority, or FINRA. *See Securities*

should have been enforced as within the scope of the contract.”¹¹⁶ Thus, this precedent implicitly condones a contractual choice of time of law in private contracts.

¶29 Finally, it is important to note that when the courts refer to the “laws at the time,” they refer to all areas of law that may affect a particular contract and not merely contract law—i.e., it may be food regulations, patent law, procedural rules, or any matter that is related to the subject of the contract. In fact, the Supreme Court described this scenario in a case dealing with appellate-procedure rules, finding that the appellate-procedure rules impacted a contract and were thus subject to the laws at the time of contract rule.¹¹⁷ As such, parties considering a choice of time of law clause should consider *all* types of laws and strategically select only certain sets of laws under the choice of time of law provision.¹¹⁸

¶30 In sum, the federal courts have held that laws existing at the time a contract is formed and where the contract is performed are treated as if they were expressly incorporated in the contract.¹¹⁹ A logical extension of these decisions is that a choice of time of law provision may actually be expressly drafted into a contract, where the parties’ intent is to enforce the contract under then-existing law or even future law.

B. Compatibility with State Contract Law

¶31 Although federal courts adopted the concept that “the laws which subsist at the time . . . [are] as if they were expressly referred to or incorporated,”¹²⁰ a bigger concern is whether state courts would enforce a choice of time of law clause in a contract because contracts are generally governed by state law. For one thing, states do not have uniform laws. Also, some states apparently do not adhere to the federal concept in contract cases.¹²¹ Consequently, it is even more important for parties to include an express provision because contracts largely governed by state law. Such a provision may well deter a court’s attempt to defeat the party’s original choice. Fortunately, state contract law, like federal constitutional law, contains a basis for adopting and enforcing an express choice of time of law clause.

¶32 U.S. contract law comes primarily from state common law (represented by the Restatement (Second) of Contracts) and state statutory law (modeled after the Uniform

Regulations Advice for the Individual Investor, SEC, NASD, AND SECURITIES LAW INFORMATION CENTER, <http://www.sec-nasd-regulations.com/> (last visited Apr. 18, 2011).

¹¹⁶ *Mastrobuono*, 514 U.S. at 64.

¹¹⁷ In *Digital Equipment*, a petitioner tried to appeal a lower court’s decision related to a private contract. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 876–77 (1994). The Court concluded the particular order is not appealable under 28 U.S.C. § 1291. *Id.* When the petitioner argued that section 1291 should be ignored because the petitioner held an express right by contract not to be subjected to trial by the other party, the Court pointed out, “[T]he laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as if they were expressly referred to . . . in its terms.” *Id.* at 876 n.5 (quoting *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 429–30). That is, section 1291 existed even at the time of contract and it did not allow an appeal of the order.

¹¹⁸ This is a technique already practiced in international contracts where parties attempt to avoid the most-rapidly changing or disadvantageous laws. See *infra* Section III.C.

¹¹⁹ *United States Trust Co. of N.Y. v. N.J.*, 431 U.S. 1, 19, n. 17 (1977) (citing *Home Bldg.*, 290 U.S. at 429–30 (quoting *Von Hoffman v. City of Quincy*, 71 U.S. 535, 550 (1867))).

¹²⁰ *Home Bldg.*, 290 U.S. at 430–31. See discussion *supra* note 106.

¹²¹ See examples *supra* Introduction and Section II.

Commercial Code).¹²² Although specialized law governs some types of contracts,¹²³ there are fundamental principles that are common to most types of contracts.¹²⁴ For example, freedom to contract is fundamental to all contracts, including sale of goods contracts and patent licenses.¹²⁵ Due partly to shared fundamental principles, it is possible to demonstrate the general applicability of the proposed solution. This paper examines the feasibility of the choice of time of law concept for both goods and patents.¹²⁶ The same concepts should be extendable even to other types of contracts. Sale of goods contracts are governed by the U.C.C. Art. 2 (“UCC2”).¹²⁷ Patent licenses, on the other hand, are governed by traditional common law because patents are not “goods.”¹²⁸ Also, the Restatement (Second) of Contracts theoretically provides a reasonable basis for patent license law.¹²⁹

¶33

The two laws, UCC2 and the Restatement, presumably share some common fundamental principles. They were both drafted partly by the same group, but the UCC2 tends to favor legislation while the Restatement tends to favor common law.¹³⁰ The most

¹²² U.C.C. § 1-103 (2009) (Official Comment 3); CORBIN ON CONTRACTS, *supra* note 87, at § 1.21.

¹²³ JOHN E. MURRAY, JR., 1-1 CORBIN ON CONTRACTS DESK EDITION § 1.01 (2009).

¹²⁴ U.C.C. art. 2; JOHN E. MURRAY, 1-1 MURRAY ON CONTRACTS § 8 (4th ed. 2001) (“Sources and Theories—Classical, Neoclassical et al.”); CORBIN ON CONTRACTS, *supra* note 87, at § 1.21 (“There are legal questions common to all of these transactions,” but that “[t]here are also questions unique to each kind of transaction, the business context of maritime charters requires that special rules should apply that do not apply to a contract for sale of a house”).

¹²⁵ See CORBIN ON CONTRACTS, *supra* note 87, § 1.1 (“The Main Purpose of Contract Law Is the Realization of Reasonable Expectations Induced by Promises”); *infra* note 126.

¹²⁶ Patent licenses are peculiar because not only are patents not “goods,” they are anti-goods. They provide a limited right to exclude someone from making the goods, the patented invention; they do not provide a right to make the goods. Compare *Lamle v. Mattel, Inc.*, 394 F.3d 1355, 1359 (Fed. Cir. 2005) (citing *Novamedix, Ltd. v. NDM Acquisition Corp.*, 166 F.3d 1177, 1182 (Fed. Cir. 1999)), and 35 U.S.C. § 154(a)(1), and *Bloomer v. McQuewan*, 55 U.S. 539, 549 (1852) (emphasis added), and *TransCore, LP v. Elec. Transaction Consultants Corp.*, 563 F.3d 1271, 1275 (Fed. Cir. 2009), with 35 U.S.C. § 261 (Ownership; assignment: “[p]atents shall have the attributes of personal property.”).

¹²⁷ HULL, *supra* note 29, at 3.

¹²⁸ See, e.g., *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) (involving a license contract for a keyholder design, the court stated “[c]ommercial agreements traditionally are the domain of state law.”); *Lear, Inc. v. Adkins*, 395 U.S. 653, 661 (1969) (noting “the California Supreme Court’s construction of the 1955 licensing agreement was decided solely as a matter of state law”); *Imation Corp. v. Koninklijke Philips Elecs. N.V.*, 586 F.3d 980, 985 (Fed. Cir. 2009) (citing *Power Lift, Inc. v. Weatherford Nipple-Up Sys., Inc.*, 871 F.2d 1082, 1085 (Fed. Cir. 1989) (“A license agreement is a contract governed by ordinary principles of state contract law.”)).

¹²⁹ RESTATEMENT (SECOND) OF CONTRACTS ch.1, intro., § 201(1), § 202(5) (1981) (“Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.”); *Epistar Corp. v. Int’l Trade Comm’n*, 566 F.3d 1321, 1333 (Fed. Cir. 2009) (stating that the settlement agreement binds the parties, as understood and intended by them); *Lamle*, 394 F.3d at 1364 (relying on the Restatement for the definition of the completeness of a patent license).

¹³⁰ The American Law Institute drafted the Restatement and, together with National Conference of Commissioners on Uniform State Laws, drafted the U.C.C. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS Vol. I, 31–32, 41 (3d ed. 2004) (“[S]ince the creative forces of contract law had traditionally been judicial rather than legislative, scholars tended to regard contract law as essentially case law and to seek these generalities in judicial decisions. . . . This emphasis on case law was reinforced by the American Law Institute. . . . [T]he Institute undertook to reduce the mass of case law to a body of readily accessible rules in the form of a Restatement of the Law” In contrast, “The origins of the U.C.C. lie in the law merchant, a specialized body usages, or customs, that governed contracts dealing with commercial matters until the seventeenth century.”) [hereinafter FARNSWORTH]. Finally, Corbin unites the two. “While it is a statute that courts must apply, the interpretation, application, and construction of the sections of Article 2

important legislation affecting contract law was the enactment of UCC2,¹³¹ which has been adopted by all states except Louisiana.¹³² On the other hand, the Restatement is only persuasive authority.¹³³

¶34 Both the UCC2 and the Restatement arguably allow a provision for parties to select a choice of time and of law of a state. U.C.C. § 1-301, applicable to UCC2, expressly permits contracting parties to select a territorial choice of law—the provision does not even require a “reasonable relation” to the chosen state.¹³⁴ Also, U.C.C. § 1-302(a) suggests it may be possible to expand territorial choice of law to include a choice of time of law because § 1-302(a) allows “variation by agreement.” Not only can parties “change the legal consequences that would otherwise flow from the provisions of the U.C.C.,” but the Official Comments state, “Subsection (a) states affirmatively at the outset that *freedom of contract* is a principle of the Uniform Commercial Code.”¹³⁵ By contrast, the Restatement itself does not have a provision on choice of law; rather, the official comments of various sections refer to the Restatement (Second) of Conflict of Laws, which does permit freedom to choose by contract.¹³⁶ Chapter 8 of the Restatement (Second) of Contracts, which is most relevant to choice of law, states that contract terms or provisions are prohibited only when they violate public policy.¹³⁷ If there is no intractable violation, “[i]n general, parties may contract as they wish, and courts will enforce their agreements without passing on their substance.”¹³⁸ These aspects suggest that neither the UCC nor the Restatement pose any real obstacle to a choice of time of law clause.

¶35 Moreover, recent case law confirms the foregoing of the more liberal provisions and comments in the UCC2 and the Restatement. For example, in patent licensing, most of the reported cases enforce contractual choices of law, unless the choice violates a fundamental public policy of the forum state.¹³⁹ Some decisions even relate the rights of contract law directly with the right to choose the particular law with which to interpret and enforce the contract. Applying state contract and choice of laws, the Fourth Circuit stated, “[P]arties enjoy *full autonomy* to choose controlling law with regard to matters within their contractual capacity.”¹⁴⁰ Likewise, the Tenth Circuit expressed,

Because conflicts of law are inevitable in a federal system, parties to a contract are empowered to and frequently do choose a particular *state's* law to apply to the

continue to manifest a common law approach consistent with the views of the principal draftsman of Article 2.” CORBIN ON CONTRACTS DESK EDITION, *supra* note 123, § 1.01.

¹³¹ CORBIN ON CONTRACTS DESK EDITION, *supra* note 123 at § 1.01; Karl N. Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367, 378 (1957). (“[T]he heart of the code . . . is Article 2.”).

¹³² CORBIN ON CONTRACTS DESK EDITION, *supra* note 123 at § 43; HULL, *supra* note 29, at 3.

¹³³ CORBIN ON CONTRACTS DESK EDITION, *supra* note 123 at § 1.01.

¹³⁴ U.C.C. § 1-301 (2009) (Territorial Applicability; Parties' Power to Choose Applicable Law; Official Comments: Summary of changes from former law).

¹³⁵ *Id.* at § 1-302 (Variation by Agreement).

¹³⁶ *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981). *See supra* Sections III.D and IV for discussion.

¹³⁷ RESTATEMENT (SECOND) OF CONTRACTS § 178, ch. 8 (Unenforceability due to public policy).

¹³⁸ *Id.* ch. 8, intro.

¹³⁹ RAYMOND T. NIMMER & JEFF C. DODD, MODERN LICENSING LAW § 2:58 (2009).

¹⁴⁰ *Barnes Grp., Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1029 n.10 (4th Cir. 1983) (emphasis added).

execution and interpretation of the contract. Absent special circumstances, courts usually honor the parties' choice of law because two '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.'¹⁴¹

Many state court decisions have expressed that the primary objectives of contract law are to enable the parties to fulfill their expectations and give them the ability to predict the outcome of their contract with accuracy.¹⁴²

¶36 Finally, like the federal decisions in *United States Trust* or *Home Building*, some state court decisions also provide that "[t]he laws that are in force at the time parties enter into a contract are merged with the other obligations that are specifically set forth in the agreement."¹⁴³ Aside from Pennsylvania, at least ten other state courts made similar statements.¹⁴⁴ Both Pennsylvania and Illinois adopted an even more aggressive stance finding that "[a]ny law which enlarges, abridges, or in any manner changes the *intention* of the parties . . . [or] imposing conditions not expressed therein or dispensing with the performance of those which are a part of it, impairs its obligation, whether the law affects the validity, construction, duration, or enforcement of the contract."¹⁴⁵ The parties are presumed to be aware of applicable statutes and to intend to incorporate them.¹⁴⁶ Given these sentiments, at least a number of states arguably would enforce a choice of time of law clause, especially a "freezing" clause, which selects laws existing at the time the contract was executed.

¶37 In sum, a logical extension of the presently enforceable choice of law provision should include adding a provision to select the choice of time of law based on existing law or on future law. Such a technique would further fulfill the parties' expectations and aid their ability to predict the outcome of their contract with accuracy as supported by state contract law.

¹⁴¹ *Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1121 (10th Cir. 1999) (emphasis added). See also *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 428 (10th Cir. 2006). Similarly, the Sixth Circuit agreed with the Tenth; see *Meijer, Inc. v. Gen. Star Indem. Co.*, No. 94-1152, 1995 U.S. App. LEXIS 19951 at *8 (6th Cir. July 21, 1995).

¹⁴² See, e.g., *MCS Servs., Inc. v. Coronel*, No. 289729-V, 2008 WL 2400867 (Md. Cir. Ct. Mar. 4, 2008); *Erwin v. Cotter Health Ctrs., Inc.*, 167 P.3d 1112 (Wash. 2007); *Hall v. Sprint Spectrum L.P.*, 876 N.E.2d 1036 (Ill. App. Ct. 2007); *Modroo v. Nationwide Mut. Fire Ins. Co.*, No. DV-03-620, 2004 Mont. Dist. LEXIS 3724, at *16 (Mont. Dist. Feb. 9, 2004); *Register v. Nationwide Mut. Fire Ins. Co.*, Nos. C-020318, 2003 WL 1571597, ¶ 10 (Ohio Ct. App. Mar. 28, 2003).

¹⁴³ *Empire Sanitary Landfill, Inc. v. Pennsylvania*, 684 A.2d 1047, 1059 (Pa. 1996) (citing *Walsh v. Sch. Dist. of Phila.*, 22 A.2d 909 (Pa. 1941), cert. denied, 315 U.S. 823 (1942)).

¹⁴⁴ CORBIN ON CONTRACTS, *supra* note 87, § 24.26 (citing cases from OK, AK, MD, FL, UT, CO, MO, NM, OH, WY). Sometimes, states' decisions hold that the laws are implied in the contracts. *Id.* § 24.26 n.533.

¹⁴⁵ *Paronese v. Midland Nat'l Ins. Co.*, 706 A.2d 814, 816 (Pa. 1998) (emphasis added). Like the U.S. Constitution, state constitutions sometimes expressly do not permit retroactive application of legislation. See, e.g., *id.* at 819; *Sanelli v. Glenview State Bank*, 483 N.E.2d 226 (Ill. 1985).

¹⁴⁶ CORBIN ON CONTRACTS, *supra* note 87, § 24.26, n.535 (citing *State Farm Fire & Cas. Co. v. Workers' Comp. Appeals Bd.*, 57 Cal. Rptr. 2d 443 (Cal. Ct. App. 1996)).

C. Laws Regarding Stabilization Clauses in International Contracts

¶38 Pioneering concepts tend to be met with opposition. There is evidence of this in both contract and patent law. Even after many years, the 2003 amendments to U.C.C. Articles 2 and 2A have yet to be adopted by any state.¹⁴⁷ UCC Article 2B, which governed intellectual property licenses, has died altogether.¹⁴⁸ Also, the revised 2007 Patent Reform Bill is still winding its way through Congress in 2011.¹⁴⁹ Fortunately, there already exist real-life examples of contract provisions that include a choice of time of law in international contracts. As such, there is evidence that the concept at least works to some extent. Also, international contracts provide useful insights as to how the clauses should be implemented domestically.

¶39 Among international contracts, there are so-called “stabilization” clauses that attempt to overcome the application of new legislation that may be inconsistent with the terms of a preexisting contract.¹⁵⁰ The provision is implemented proactively to reduce the risk to investors doing business in developing nations that have fluctuating governing laws.¹⁵¹ Because these international contracts are usually between a large private company, like Exxon-Mobil and a foreign state in control of the minerals of that country (e.g. oil fields),¹⁵² the state potentially has the authority to revise laws in an arbitrary manner.¹⁵³ The concerns in the international situation are similar to those in *United States Trust*, where the Supreme Court held that a state may not revise the laws in a way that relieves the state of its previous contractual obligations.¹⁵⁴ Among international circles, there is some resistance toward the use of stabilization clauses due to socio-political and anti-sovereignty implications.¹⁵⁵ However, there are also persuasive

¹⁴⁷ HULL, *supra* note 29, at 3.

¹⁴⁸ See generally Peter B. Maggs, *The Effect of Proposed Amendments to Uniform Commercial Code Article 2*, 2002 U. ILL. J.L. TECH. & POL'Y 311 (2002).

¹⁴⁹ Dennis Crouch, *Patent Reform Moving Forward*, PATENTLYO (Feb. 25, 2010, 4:16 PM), <http://www.patentlyo.com/patent/2010/02/patent-reform-moving-forward.html>.

¹⁵⁰ See, e.g., SHEMBERG, *supra* note 31; Lorenzo Cotula, *Regulatory Takings, Stabilization Clauses and Sustainable Development*, OECD GLOBAL FORUM ON INTERNATIONAL INVESTMENT (Mar. 27, 2008), available at <http://www.oecd.org/dataoecd/45/8/40311122.pdf>.

¹⁵¹ See, e.g., Ignaz Seidl-Hohenveldern, *Book Reviews and Notes*, 77 AM. J. INT'L L. 669, 701 (1983) (reviewing PATRICK COURBE, *LES OBJECTIFS TEMPORELS DES REGLES DE DROIT INTERNATIONAL PRIVE* (1981)). Patrick Courbe was one of the earliest proponents of time of law clauses in various types of international contracts.

¹⁵² J. Nna Emeka, *Anchoring Stabilization Clauses in International Petroleum Contracts*, 42 INT'L LAW 1317, 1318–19 (2008).

¹⁵³ Some foreign governments confiscate the development equipment and oil production despite the existence of a contract. *Id.* at 1319–20 (citing examples in Russia, the government of Vladimir Putin acquired Gazprom and revoked a permit for a Shell oil and gas project; in Chad, the government demanded that international operators Chevron, Exxon, and Petronas renegotiate their revenue share; in Venezuela, President Hugo Chavez took control of the formerly independent Petroleos de Venezuela, forcing out Exxon and Conoco-Phillips; in Bolivia and Ecuador, the governments nationalized the oil and gas fields and assumed control of the holdings of Occidental). Thus, the stabilization clauses in contracts sometimes proved ineffective, internationally, because the foreign state is the sole or at least primary decision maker.

¹⁵⁴ When a state is party to a contract, the courts apply heightened scrutiny out of concerns of unfairness. *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 29 (1977) (applying a “reasonable and necessary” standard).

¹⁵⁵ The clauses continue to be used in modern day practice in mining contracts, including oil and gas in Africa, Eastern and Southern Europe, Central Asia, the Middle East and Latin America. SHEMBERG, *supra* note 31, at ix; Cotula, *supra* note 150, at 4. The way it works is that some foreign states dangle fiscal incentives to attract investments. Emeka, *supra* note 152, at 131. A private company then commits much

counterarguments that justify their use.¹⁵⁶ In addition, international arbitral tribunals have upheld the stabilization provision by reason that a country's entry into a contract is itself an exercise of sovereignty.¹⁵⁷ In any case, this paper considers only domestic contracts between purely-*private* parties, which are unlike international contracts between a foreign ruling state and a private investor.¹⁵⁸ Thus, some of the international problems would not exist in the domestic context, and therefore and a choice of time of law clause would be workable.¹⁵⁹

¶40

In international contracts, there are different types of stabilization clauses: freezing, hybrid and economic equilibrium clauses.¹⁶⁰ With *freezing* clauses in contracts, "the applicable . . . law is the one in force at the time the contract is concluded, to the exclusion of subsequent legislation."¹⁶¹ By contrast, *hybrid* clauses permit an adaptation mechanism where the foreign state compensates the investor should subsequent legislation increase the investor's financial burden.¹⁶² Lastly, *equilibrium* clauses link any alterations to the scope of the contract, which are due to changes in the law, to contract renegotiations in order to restore its original economic intent.¹⁶³ Equilibrium clauses create inherent uncertainty because parties might not reach a new agreement altogether, which is a scenario that goes against the purpose of the proposed solution of this paper.¹⁶⁴ Therefore, only the other two types of clauses are considered in this paper.

capital, expertise and technology know-how that remains with the foreign state even after the project. *Id.* A contract with a stabilization clause is negotiated between the state and the private company. But, people in developing nations are rather angry with the practice, feeling trapped into accepting stabilization provisions in order to get investment dollars. SHERBERG, *supra* note 31, at vii ("Concerns about stabilization clauses and human rights arose in . . . 2003 when the oil company BP published its private investment contracts relating to a major cross-border pipeline project."). The argument is that these clauses are contrary to the concept of sovereignty of the host country. Cotula, *supra* note 150, at 3–4. The concern is decades old. See, e.g., Hugh A. Rawlins, *Aspects of the UNCITRAL Regimes for Procurement and for International Commercial Arbitration, and Government International Commercial Contracts in the Commonwealth Caribbean*, 7 J. TRANSNAT'L L. & POL'Y 41, 72–73 (1997). Moreover, the clauses may exempt investment projects even from new laws aimed at protecting human rights. SHERBERG, *supra* note 31, at viii.

¹⁵⁶ Rather than stepping on sovereignty, the argument is that because a state itself is making the contract, "a State may not invoke the cloak of sovereignty to disavow earlier commercial contractual commitments." Emeka, *supra* note 152, at 1324.

¹⁵⁷ *Id.*

¹⁵⁸ Indeed, both private parties in domestic contracts are equally at the mercy of whatever new laws may arise in the U.S. A new law or court decision may disadvantage either party with equal probability in the U.S. As a result, this avoids any negative aspects associated with the international contracts. Moreover, U.S. courts can apply the paper's proposed Test in U.S. contract disputes and objectively check whether a time of law a provision (i.e. the contract) could be enforced, all in a neutral fashion without favoring either party at the outset.

¹⁵⁹ Christopher T. Curtis, *The Legal Security of Economic Development Agreements*, 29 HARV. INT'L L.J. 317, 336–38 (1988) (arguing why governments should not interfere with stabilization clauses used in international contracts).

¹⁶⁰ SHERBERG, *supra* note 31, at 17–19.

¹⁶¹ Cotula, *supra* note 150, at 6.

¹⁶² Emeka, *supra* note 152, at 1321.

¹⁶³ Cotula, *supra* note 150, at 6.

¹⁶⁴ The economic equilibrium flavor of stabilization could also be useful in domestic contracts, but only in limited situations. First, the international contracts span about forty years or more and involve very large investments. Emeka, *supra* note 152, at 1318. Unless a domestic contract is that long in duration and that expensive, it seems impractical to make the choice of time provision overly complicated to include the possibility of a renegotiation. Patents, for example, last less than twenty years and technology becomes obsolete quickly; so patent licenses may last only ten years or less. Second, while the economic

¶41

A *hybrid* stabilization contract clause may be of great utility in domestic affairs because the contract is preserved when there are new laws. The parties would follow the new laws in interpreting and executing the contract, but one party may have to indemnify the other for additional costs incurred. There are domestic contract attorneys who favor the hybrid approach or practice it to some extent already.¹⁶⁵ The method is akin to provisions in contracts that attempt to allocate and shift risks by providing for future contingencies.¹⁶⁶ For example, food makers negotiate contracts to buy food-packages and prefer that package manufacturers make up the difference in price if the tax rate changes or if the packages have to meet new safety regulations.¹⁶⁷ A better-known example occurs in construction contracts, where new regulations may require an edifice be built to new specifications.¹⁶⁸ If meeting the new specifications entails significant cost overruns, both parties might share in the costs *if* their original contract had been presciently drafted with *all* possible new regulations in mind.¹⁶⁹ In these situations, a choice of time of law provision could serve the contracting parties well in anticipating *all* changes; then, if laws do change the parties could agree *a priori* to a shared cost adjustment formula based on, for example, a threshold cost increase.¹⁷⁰

equilibrium contracts have grown in popularity internationally, renegotiating a contract is fraught with perils. For one thing, what is the threshold for mandating a renegotiation? For another, the parties may not reach a new agreement, particularly if the law has changed so much so as to invalidate their contract or revise its scope drastically. Other than good faith, there may not be anything left to encourage the parties to form a new contract. SHERBERG, *supra* note 31, at 6. For instance, if the previously-licensed patent suddenly became invalid as a result of *Bilski* or *KSR*, there is no incentive whatsoever for the licensee to continue with a license. If the parties cannot reach a new agreement, perhaps they would necessarily have to submit to arbitration or go to court. This prospect and the general uncertainty of economic equilibrium contracts in the event of new law defeat the entire purpose of the proposed solution in this paper—to have some mechanism by contract to provide contracting parties more certainty, stability, and peace of mind after they entered into a contract. The goal is to reduce litigation, arbitration, and uncertainty.

¹⁶⁵ Interview with Susan Chao, *supra* note 74. In small mom and pop deals—such as around-the-house construction projects for a new kitchen, etc.—parties may very well renegotiate costs if something unexpected happens—such as when the economy collapsed and so on.

¹⁶⁶ See George G. Triantis, *Unforeseen Contingencies: Risk Allocation in Contracts*, ENCYCLOPEDIA OF LAW AND ECONOMICS, 100 (1999), <http://encyclo.findlaw.com/4500book.pdf>.

¹⁶⁷ Interview with Susan Chao, *supra* note 74.

¹⁶⁸ See *Viacom, Inc. v. United States*, 70 Fed. Cl. 649, 663 (Fed. Cl. 2006) (“[W]here the pension costs are attributable to contracts that were entered into before the effective date of the revised CAS 413, either the contractor or the government is entitled to an equitable adjustment to the extent that the contractor or the government is liable for more under the revised CAS 413 than they would have been liable for under the original CAS 413.”); *Kearfott Guidance & Navigation Corp. v. Rumsfeld*, 320 F.3d 1369 (Fed. Cir. 2003) (contending that when a party enters into a contract with the government after a new regulation takes effect, the parties are bound by the new regulation). Also, Boston’s Big Dig project has spiraled in costs from \$2.6 billion to \$14.8 billion.

¹⁶⁹ A cost overrun is often resolved by passing it to the consumer rather than to either party. See, e.g., *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 367 (1988) (describing how the cost of the nuclear power plant overrun and the consumers utility bill had to be increased); *Sovereign Bank v. BJ’s Wholesale Club, Inc.*, 533 F.3d 162, 165 (3d Cir. 2008). In cost overrun cases in U.S. courts, the contracting parties raise many issues—i.e., good faith, deceptive practices, problems restructuring the contract—regarding the overrun.

¹⁷⁰ This kind of bargaining seems intuitively logical and reasonable. Recently, my neighbor had to move out early due to a job change and she negotiated to pay part of her lease-breaking penalty. The landlord agreed; so, my neighbor and landlord each gained and lost a bit of money. However, if international cases are any lesson, a major study undertaken in 2008 for the World Bank and the United Nations states, “There appear to be no reported cases where economic equilibrium or hybrid clauses have been enforced in either private or international arbitration, so it is not clear how such clauses would be dealt with in the context of arbitration.” SHERBERG, *supra* note 31, at 37. The study summarizes, “it is unclear how these clauses

¶42 Finally, a simple *freezing* clause may be the best solution. However, even simple freezing clauses can be uncertain along multiple dimensions. In the international context, there are full freezing clauses that attempt to freeze the application of both fiscal and non-fiscal laws for the duration of the contract. An example is:

Specific Juridical Stability: The State guarantees . . . the Recipient Company that this Investment Contract . . . shall enjoy absolute legal stability in accordance with the Legal Framework in Effect. Accordingly, neither the Investment Contract, nor [other agreements] . . . may be modified unilaterally by laws or other dispositions from the State of any type that affect them or by changes in the interpretation or application thereof and each thereof in which the State is a party may only be modified by the mutual written agreement of the Parties that expressly evidences such modifications.¹⁷¹

In addition, there are *limited* freezing clauses that aim to protect the investor from a limited set of legislative actions.¹⁷² For example, the international clauses may refer only to tax and customs regulations.¹⁷³ Other limited freezing clauses may simply list the types of laws that are pertinent to the contract, or list certain sets of exempt laws.¹⁷⁴

¶43 Although freezing clauses in the oil and gas industry have largely fallen out of use in favor of modern economic equilibrium clauses,¹⁷⁵ this paper submits that their simplicity makes them more readily enforceable. First, this is evidenced by the fact that the clauses were still used in about 16% of international contracts in the 1990s and 2000s.¹⁷⁶ Presumably, sophisticated corporate lawyers expect the freezing clause to be valid and enforceable at least to some extent. Second, freezing clauses require less work than other stabilizing clauses. The other types of stabilization clauses necessitate not only determining whether there is “new” law, but also adopting subsequent remedial action based on a fuzzy good faith standard when new laws do arise. A freezing provision on the other hand, simply keeps the status quo. The parties theoretically do not need to renegotiate the contract with the other party when new laws emerge.¹⁷⁷

¶44 In summary, for short-term contracts,¹⁷⁸ this paper recommends freezing clauses for their simplicity or hybrid clauses for providing easily-calculated compensation schemes when detrimental laws do arise.¹⁷⁹ For long-term contracts, the hybrid approach may be

would be enforced formally and whether they would potentially result in monetary compensation.” *Id.* Therefore, keeping the choice of time of law provision simple, certain and easily enforceable is a high priority. A simple freezing clause may be the best bet initially in domestic contracts.

¹⁷¹ SHEMBERG, *supra* note 31, at 6 (quoting a Latin American infrastructure model agreement 2000s).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 6–7.

¹⁷⁶ *Id.* at 20.

¹⁷⁷ The parties should have already obtained insurance to deal with cost overruns that may result from changes in law.

¹⁷⁸ An example is sale of food contracts. Apparently, they are generally quite short in duration due to market fluctuations in food prices and stabilization clauses for changes in law seem unnecessary. *See* Interview with Susan Chao, *supra* note 74.

¹⁷⁹ In the past, some researchers have questioned the enforceability of freezing clauses in either common law or civil law countries. “Common law countries quite generally seem to adhere to principles which do not allow the parties to fetter by contract the executive powers of government or the legislative power of

more ideal. Even though hybrid approaches to contracts are more difficult to negotiate, their long-term nature counterbalances the additional effort expended during the negotiation effort. Additionally, the hybrid approach of stabilization appears to be favored internationally today.

IV. COMPATIBILITY WITH THE RULES ON CONFLICT OF LAWS

¶45 Conflict of Laws rules are highly relevant to a choice of time of law clause, because the clause is essentially an extension of the traditionally-accepted choice of law provision in contracts.¹⁸⁰ Conflict of Laws rules might very well govern a choice of time of law clause. Unfortunately, the “Laws” are rather divergent among the different states.¹⁸¹ As a result, there are practical hurdles challenging the actual implementation of such clauses. This Section gives an overview of some obstacles, examines the traditional choice of law clause and the Restatement (Second) on the Conflict of Laws, and explains why the provisions in the Restatement should support a new, express choice of time of law clause. Finally, courts readily enforce the existing choice of law provisions for reasons of litigation efficiency; by the same rationale, a choice of time of law provision should find favor as well.

¶46 The first obstacle to the implementation of a choice of time of law provision is the potential reluctance of practitioners to implement these provisions. There are two camps of thought regarding even the traditional choice of law provision. First, a majority of practitioners favor having a choice of law provision.¹⁸² “Choice of governing law is essential. Absent such a choice, there may be circumstances under which the parties do not know if their conduct breaches the agreement, or what the available remedies for such a breach are.”¹⁸³ Clearly, parties want to choose the particular state law that is most beneficial to them. “The failure to include a choice of law provision means increased costs to clients and the judicial system, because without an effective selection by a party, choice of law provisions and choice of law rules are based on indeterminate and often

the legislature . . .” Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT’L L.J. 215, 235 (1996). But, contrary to this concern is that freezing clauses have actually been upheld in international arbitration and sovereignty has not been transgressed. *See, e.g., id. at 267* (citing eight prominent cases). A secondary benefit is that if these types of contracts are also implemented and upheld domestically, then the ones that Americans negotiate internationally are much stronger. Domestic and international practices would be harmonized. Foreign countries cannot complain that they are somehow being disadvantaged by American practices. And at the same time, Americans gain an additional option in their ability and freedom to contract domestically.

¹⁸⁰ Scholars generally treat choice of law as one aspect of the study of conflict of laws, which centers on transactions that have legal implications involving more than one sovereign. WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *UNDERSTANDING CONFLICT OF LAWS* 1 (3d ed. 2002).

¹⁸¹ *See e.g.,* CORBIN ON CONTRACTS, *supra* note 87, § 12.18; Harold P. Southerland, *Sovereignty, Value Judgments, and Choice of Law*, 38 BRANDEIS L.J. 451, 452 (2000).

¹⁸² This is at least true in patent licensing. *See* NIMMER & DODD, *supra* note 139, § 2:58 (“In part because of the confusing and uncertain background law, most licenses specify what law governs disputes relating to a license.”). *See also*, BRIAN G. BRUNSVOLD, DENNIS O’REILLY & D. BRIAN KACEDON, *DRAFTING PATENT LICENSE AGREEMENTS* 266 (6th ed. 2008).

¹⁸³ Ian N. Feinberg, *Standard and Not So Standard Terms in Intellectual Property License Agreements (aka Boilerplate)*, 985 P.L.I./PAT 777, 809 (2009).

fact-intensive inquires [sic] by the courts.”¹⁸⁴ This means lawyers will spend less time litigating; it would be thus “negligent” to not include such clauses.¹⁸⁵

¶47 Second, a minority of practitioners choose to not select a choice of law because these attorneys do not put much faith in the clauses believe that courts are unlikely to uphold them.¹⁸⁶ However, the reality is that courts generally do uphold express clauses when not dealing with consumer or employment contracts.¹⁸⁷

¶48 Another concern over the implementation of choice of law provisions is the time and cost required to analyze which particular state laws are most beneficial to a party.¹⁸⁸ However, the merits of this concern are questionable, particularly when an attorney practices primarily in one area of law and should be familiar with the most beneficial state laws. Yet another concern is that some parties fear they will be locked into a less beneficial law at the time of litigation.¹⁸⁹ However, this is the very problem this paper proposes to solve. Locking a contract into a particular *law at the time of contract* (*i.e.* freeze clause) should be beneficial, or at the very least more certain, so that an attorney may draft the other provisions of the contract knowing the law and including workarounds to any detrimental law that may exist. Working on known problems seems far superior to gambling on an unknown state’s law, or worse, *new* laws that may be detrimental or may take years to settle. Alternatively, if the laws existing at the time of contract are especially unfavorable, parties could contract to elect future anticipated law. For example, the Patent Reform bill that is now before Congress is expected to pass and impact damage awards and patent licensing. Parties to a license can opt for this future law by contract. In conclusion, unless the parties were not able to agree to a particular choice, there seems little reason *not* to include one.¹⁹⁰

¶49 The second issue is that even traditional choice of law rules diverge among the different states. One divergent aspect is due to the fact that court decisions could hinge on whether the choice of law provisions are considered procedural or substantive matters.¹⁹¹ As such, throwing in yet another provision—a choice of time of law clause—might compound the problems even further and thus prove challenging. Intuitively, a

¹⁸⁴ David Hricik, *Infinite Combinations: Whether the Duty of Competency Requires Lawyers to Include Choice of Law Clauses in Contracts They Draft for Their Clients*, 12 WILLAMETTE J. INT’L L. & DIS. RES. 241, 242 (2004).

¹⁸⁵ See *id.* at 243 (citing Symeon C. Symeonides, *Choice of Law in the American Courts in 2002: The Sixteenth Annual Survey*, 51 AM. J. COMP. L. 1, 3 n.3 (2003) (publishing a study showing that judges had to resolve choice of law and conflict of laws problems in 2002)).

¹⁸⁶ Richard J. Bauerfeld, Note, *Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination?*, 82 COLUM. L. REV. 1659, 1669–70 (1982).

¹⁸⁷ This is true in, for example patent licensing. See NIMMER & DODD, *supra* note 139, § 2:59. And the dearth of controversial cases over express provisions suggests that courts are amenable to them. The annual survey provided by Dean Symeonides shows that the contract cases which do crop up are typically only consumer and employment cases, where there is naturally unequal bargaining power. See Symeon Symeonides, *Conflict of Laws*, WILLAMETTE LAW ONLINE, <http://www.willamette.edu/wucl/journals/wlo/conflicts/> (last visited Mar. 19, 2011).

¹⁸⁸ Dean Symeonides provides an annual study of the choice of law rules in each state to sort out the intricacies. *Id.*

¹⁸⁹ Hricik, *supra* note 184, at 257.

¹⁹⁰ If parties know an issue will be contentious, perhaps parties will avoid or let the issue go.

¹⁹¹ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 8, intro. (1971) (“Contracts is one of the most complex and most confused areas of choice of law. This complexity results in part from . . . the many different kinds of contracts and of issues involving contracts and by the many relationships a single contract may have to two or more states.”).

choice of law seems procedural, but this is not always the case.¹⁹² Worse still, there is difficulty in ascertaining the rules from state to state and even from court to court, because the rules are almost entirely judge-made.¹⁹³ Local courts within a state may even decide to use the rules and laws of another state for sometimes-obscure reasons,¹⁹⁴ so it may be uncertain as to what the ultimate governing law might be. Fortunately, most courts probably consider choice of law as a procedural issue, because forum courts have an interest in calling an issue “procedural” as a way of ensuring that the forum protects its own interest in the application of its own laws.¹⁹⁵ On the other hand, the Constitution imposes some limitations on state powers to characterize an issue as procedural and then to determine the issue in accordance with its own local law.¹⁹⁶ Also, the comments of Restatement (Second) Conflict of Laws section 122 expressly disclaim attempts to classify issues as substantive or procedural.¹⁹⁷ Even so, as a result of these uncertainties, a choice of time of law clause is likely to inherit the problems that already exist with regular choice of laws rules. Each court may try to individually resolve whether it

¹⁹² *Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1118 (10th Cir. 1999) (“what is substantive or procedural for *Erie* purposes is not necessarily substantive or procedural for choice-of-law purposes”) (citing *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988)); *Imation Corp. v. Koninklijke Philips Elecs. N.V.*, 586 F.3d 980, 985 (Fed. Cir. 2009) (“As the Agreement provides that it shall be ‘construed, governed, interpreted and applied in accordance with the laws of the State of New York,’ . . . this court will apply New York *substantive* law in interpreting the Agreement”) (citing *Parental Guide of Texas, Inc. v. Thomson, Inc.*, 446 F.3d 1265, 1269 (Fed. Cir. 2006)); RICHMAN & REYNOLDS, *supra* note 180, § 1 at 179 (“[T]he impact of the U.S. Constitution on conflict problems . . . is sometimes quite significant (e.g. jurisdiction) and sometimes hardly evident at all (e.g. choice of law).”).

Intuitively, choice of time of law seems to be procedural. Such clauses are unlike the substance of an agreement as the type and quantity of objects for sale, the duration, exclusivity of ownership, and so on. Also, the regular choice of law is a step in the procedure of deciding a case, along with the standard of review and other procedures. Courts choose the appropriate law and then move to the merits of the case. *See, e.g., Imation Corp.*, 586 F.3d at 985; *Gen. Mills, Inc. v. Kraft Foods Global, Inc.*, 487 F.3d 1368, 1373 (Fed. Cir. 2007) (applying state law because the Settlement Agreement provides in Article 8.9 that it is to be interpreted under Minnesota law; the Court settled the procedural issues, and then moved on to the main discussion.). But, intuition is not foolproof. For example, local rules themselves, which are used to choose the appropriate law (or uphold the choice of law by contract), may be substantive. Jeffrey D. Dunn, *Texas Choice of Law Analysis for Contracts*, 40 TEX. J. BUS. L. 37, 47 (2004). “[I]f the court has determined that the matter is substantive, then it looks to the substantive law of the forum state, including its choice of law principles, to determine the applicable substantive law.” *Boyd Rosene*, 174 F.3d at 1118.

¹⁹³ *Southerland*, *supra* note 181, at 452.

¹⁹⁴ For example, in Texas, the choice of law clause must be conspicuous. Also, if the overall contract is for the sale of goods less than \$50,000, the law of another state will be selected. Dunn, *supra* note 192, at 62–3.

¹⁹⁵ RICHMAN & REYNOLDS, *supra* note 180, §§ 58–59 (“*Substance—procedure dichotomy*. The courts have traditionally approached issues falling within the scope of the rule of this Section by determining whether the particular issue was ‘procedural’ and therefore to be decided in accordance with the forum’s local law rule, or ‘substantive’ and therefore to be decided by reference to the otherwise applicable law. . . . To avoid encouraging errors of that sort, the rules stated in this Chapter do not attempt to classify issues as ‘procedural’ or ‘substantive.’ Instead they face directly the question whether the forum’s rule should be applied.”) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122, cmt. b (1971)).

¹⁹⁶ *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

¹⁹⁷ The Restatement (Second) of Conflict of Laws avoids classifying issues as “procedural” or “substantive,” instead querying whether local rules apply or not. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 comment. b. “A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.” *Id.* Also, “[c]ommonly, it is said that the forum will apply its own local law to matters of procedure and the otherwise applicable law to matters of substance.” *Id.* at ch. 6, intro. note at 350.

considers a choice of time of law clause to be *procedural* or *substantive*. Regardless, ideally, the choice of time of law provision would be adopted by many states¹⁹⁸ as state legislation in order to harmonize the rules.¹⁹⁹ This is a daunting prospect considering that only about twenty-three states have even adopted²⁰⁰ the Restatement (Second) of Conflict of Laws, which was finalized over forty years ago and could have unified the rules for the choice of law.²⁰¹

¶50

Aside from these obstacles, the principles underlying the choice of laws for contracts grow ever more liberal and thus a choice of time of law clause should still find favor among practitioners.²⁰² Since Restatement (Second) of Conflict of Laws is accepted by about half the states, it is useful to examine the Restatement as being representative and authoritative. Chapter 8 of the Restatement is devoted entirely to contracts.²⁰³ Sections 186 and 187 of Chapter 8 favor “party autonomy,” where parties can choose the law to govern “rights and duties” arising under contract.²⁰⁴ Party autonomy as expressed in section 187 appears to be a nearly universal principle in the United States.²⁰⁵ However, Chapter 8 also recognizes certain limitations as expressed in section 187 and these limitations would presumably also apply to a choice of time of law clause.²⁰⁶ Party autonomy is only true for those contract matters where parties have free choice, and not for matters beyond the parties’ contractual capacity.²⁰⁷ For instance, the chosen law, at the chosen time, should have some substantial relation to the contract.²⁰⁸

¹⁹⁸ As for federal courts, a federal trial court sitting in diversity jurisdiction must apply the law of the forum state to determine the choice of law. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941).

¹⁹⁹ JAMES A.R. NAFZIGER, *CONFLICTS LAW APPLICABLE TO CONTRACTS* (2000) (concluding that legislation to codify choice of law rules to govern contract-related issues is the best approach to harmonize the chaotic judicial decisions), available at http://www.willamette.edu/wucl/pdf/olc/conflict_report.pdf.

²⁰⁰ *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMP. L. 227 (2010). Alternatively, some states adopt only portions of the Restatement (Second) Conflict of Laws. *See, e.g.*, Dunn, *supra* note 192, at 39.

²⁰¹ Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501 (1983). Professor Reese of Columbia University was the Reporter for the project.

²⁰² RESTATEMENT (SECOND) OF CONFLICT OF LAWS Ch. 8, intro. The Second Restatement liberalizes the First Restatement, which did not acknowledge any power in the parties to choose the applicable law. This increased freedom is a positive indication that the Restatements (ALI) could conceivably favor a choice of time of law.

²⁰³ *See id.* (“In the Restatement of this Subject, the term ‘contract’ is used to refer both to legally enforceable promises and to other agreements or promises which are claimed to be enforceable but are not legally so.”).

²⁰⁴ *Id.* §§ 186, 187(1) (1971) (Section 186 states “Applicable Law Issues in contract are determined by the law chosen by the parties in accordance with the rule of § 187 and otherwise by the law selected in accordance with the rule of § 188.”). *See also* RICHMAN & REYNOLDS, *supra* note 180, § 74(b)(3), at 224–25.

²⁰⁵ EUGENE F. SCOLES ET. AL., *CONFLICT OF LAWS* 980 (4th ed. 2004). This study also stated that subsection 1 of § 187 provides that, for issues that the parties “could have resolved by an explicit provision in their agreement,” the parties’ choice of law is not subject to any geographical or *substantive* limitations.

²⁰⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS Ch. 8, intro (“The present Chapter recognizes that the parties have [the power to choose the applicable law] subject to certain limitations (*see* § 187).”).

²⁰⁷ *See* Bauerfeld, *supra* note 186, at 1660. In this respect, Restatement (Second) of Conflict of Laws parallels the Restatement (Second) of Contracts. Also, if a contract or term is unconscionable at the time the contract is made, a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result. RESTATEMENT (SECOND) OF CONTRACTS § 208.

²⁰⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (“Application of the law of the chosen

But, section 187(2) softens the substantial relation criterion to one where any “reasonable basis” exists for doing so.²⁰⁹ A good faith effort to create certainty by contract and to reduce future litigation costs arguably comprises a “reasonable basis”²¹⁰ for implementing a choice of time of law provision.

¶51

Further supporting a choice of time of law clause is the large amount of case law promoting the idea that the proper choice of law in a contract is the law that conforms to the parties’ *intent* and *expectations*.²¹¹ For example, the Eighth Circuit held that an anti-waiver provision in the Minnesota Franchise Act was not sufficient to overcome Minnesota’s countervailing policy of enforcing contractual choice of law provisions²¹²

state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.”). However, if the difference in policy between the chosen law and forum law is not significant, party autonomy may prevail. *See, e.g.,* *Wilkinson v. Manpower, Inc.*, 531 F.2d 712, 715 (5th Cir. 1976) (regarding business covenants not to compete).

Because of the substantial relation criteria, the Restatement (Second) Conflict of Laws is somewhat more restrictive than contract law. Parties would be wise to have some contacts with the state whose laws they choose. For instance, parties deciding to contract to gamble within the territory of a state that prohibits gambling probably cannot select the laws of, for example, Nevada. *See, e.g.,* *Bauerfeld, supra* note 186, at 1661 n.9 (citing Louis C. James, *The Effects of the Autonomy of the Parties on the Validity of Conflict of Laws "Illegal Contracts"—Sunday, Gambling, Lottery, and Other Agreements*, 8 AM. U. L. REV. 67, 86 (1959)). On the other hand, if they place bets with a Nevada company (place of performance), then, they should be able to select Nevada law, particularly if the contract is also contract there (place of contract). *See, e.g.,* RESTATEMENT (SECOND) OF CONFLICT OF LAW § 188 (listing place of performance as a factor in determining the most significant relationship); *Intercontinental Hotel Corp. (Puerto Rico) v. Golden*, 203 N.E.2d 210 (N.Y. 1964); RESTATEMENT (SECOND) OF CONFLICT OF LAW § 188 (1971) (stating the place of contract is a factor in determining the most significant relationship). Regardless, the limitation should not matter to a choice of time of law unless the laws of the chosen state, by chance, changes in such a way as to critically affect the particular activity—say, the chosen state bans placing bets with Nevada companies altogether. Other than this unlikely scenario, a choice of time of law should be an acceptable addition to the Restatement on Conflict of Laws.

²⁰⁹ RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 cmt. f; Farnsworth, *supra* note 130, at Vol. II, 19–20, 41.

²¹⁰ Moreover, except for consumer contracts, the new revision of the U.C.C. has rendered even more innocuous the requirement for a “reasonable basis.” *SCOLES, supra* note 205, at 982 (referring to U.C.C. § 1-105 (2001)).

²¹¹ RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 cmt. g. Also, absent contracts of adhesion, fraud or illegality, the Sixth Circuit upholds choice of law provisions. *See, e.g.,* *Tele-Save Merch. Co. v. Consumers Distrib. Co.*, 814 F.2d 1120, 1122 (6th Cir. 1987); *Macurdy v. Sikov & Love, P.A.*, 894 F.2d 818 (6th Cir. 1990) (concerning fraud); *Zogg v. Penn Mut. Life Ins. Co.*, 276 F.2d 861, 863 (2d Cir. 1960) (concerning adhesion contracts, particularly in the insurance field). *See also* *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Olvera*, 119 F.2d 584, 586 (9th Cir. 1941) (allowing a party (a circus) to designate Florida state law, even though the party wandered from state to state and had little contacts with Florida); *Wilkinson v. Manpower, Inc.*, 531 F.2d 712, 715 (5th Cir. 1976) (relying on the Restatement (Second) Conflict of Laws to uphold choice of law by contract if there are only small policy differences between the forum and the chosen state); *Symeonides, supra* note 187, at 5, (showing Illinois, within the Seventh Circuit adopted the Restatement (Second) Conflict of Laws that favors party autonomy). But, the Second Circuit upholds the law selected by contract as long as the state selected has sufficient contacts with the transaction. *See, e.g.,* *Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 393 (2d Cir. 2001) (quoting *Hartford Fire Ins. Co. v. Orient Overseas Container Lines (UK) Ltd.*, 230 F.3d 549, 556 (2d Cir. 2000)); *Bauerfeld, supra* note 186, at 1669–74 (stating that in New York cases, “[c]hoice-of-law clauses simply are not followed by the courts”).

²¹² *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.*, 871 F.2d 734, 738–40 (8th Cir. 1989) (en banc). The Minnesota legislature later superseded the court decision by revising the Franchise Act so that Minnesota residents cannot waive compliance with the Act by a contractual choice-of-law clause. *See* *Costa v. Carambola Partners, LLC*, 590 F. Supp. 2d 1141, 1151 (D. Minn. 2008).

¶52

Most notably, the U.S. Supreme Court has upheld an express choice of law provision, which could portend good implications for a choice of time of law clause. The Court held that despite the rules of the Federal Arbitration Acts, the FAA does not preempt state law where the private parties agreed in their contract to be bound by a choice of law provision.²¹³ The Court's rationale was that "we give effect to the *contractual rights and expectations of the parties*, without doing violence to the policies behind by the FAA."²¹⁴ The Court adopted similar views in *M/S Bremen v. Zapata Off-Shore Co.*,²¹⁵ which was then followed by the lower courts with enthusiasm.²¹⁶ Although *Bremen* involved a forum selection clause in a private contract between American and German parties, the Court's reasoning is relevant here. The clause "was an effort to *eliminate all uncertainty* as to the nature, location, and outlook of the forum in which these companies of differing nationalities might find themselves."²¹⁷

It is settled . . . that *parties to a contract may agree in advance* to submit to the jurisdiction of a given court This approach is substantially that followed in other *common-law* countries including England. It is the view advanced by noted scholars and that adopted by the *Restatement of the Conflict of Laws*. It accords with ancient concepts of *freedom of contract*²¹⁸

Given these sentiments of the Court, it seems reasonable to infer that a choice of time of law clause in a contract would be judicially accepted. Such a clause is a proactive solution consistent with the Court's rationale of enforcing the parties' intent to procure certainty through and during the execution of their contract.

V. ACCEPTABLE TO PUBLIC POLICY

¶53

Public policy concerns appear to be the only real obstacle to the adoption and enforcement of a choice of time of law clause in domestic contracts. These concerns are inferred from how existing rules and laws are interpreted and enforced.²¹⁹ For example, both contract law and conflict of laws rules are very liberal about enforcing choice of law clauses in accordance with the parties' intent and expectations, *unless* the parties' decisions violate a fundamental public policy.²²⁰ At the very least, any policy concerns

²¹³ Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477–79 (1989).

²¹⁴ *Id.* at 479.

²¹⁵ *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13 n.15 (1972).

²¹⁶ See J. Zachary Courson, *Survey: Yavuz v. 61 MM, Ltd.: A New Federal Standard—Applying Contracting Parties' Choice of Law to the Analysis of Forum Selection Agreements*, 85 DENV. U. L. REV. 597, 603 (2008) (citing Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 307–13 (1988)).

²¹⁷ *M/S Bremen*, 407 U.S. at 13 n.5. (emphasis added).

²¹⁸ *Id.* at 11–12 (emphasis added).

²¹⁹ See generally RESTATEMENT (SECOND) OF CONTRACTS § 317(2) (1981) ("A contractual right can be assigned unless . . . (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy . . ."). From conversations with Professors Gregory Crespi (contract law) and Raymond Nimmer (intellectual property licensing), both also believe that public policy is the only obstacle.

²²⁰ See RESTATEMENT (SECOND) CONFLICT OF LAWS § 90 (1971) ("No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum."). This suggests that forums do not have to apply a law that violates its own local public policy, but note that the rule has a narrow application. See *id.* § 90 cmt. c (The public policy must be a "strong" one.); *id.*

that apply to the traditional choice of law provisions would likely also apply to a choice of time of law provision. This Section addresses the different possible types of policy concerns that may hinder the acceptance of a choice of time of law clause. Then, this Section proposes a set of rules or test (“Test”) to gauge whether a choice of time of law provision should be enforceable. The proposed Test can be applied by the courts to decide whether a choice of time of law clause should be enforceable in a particular contract case.

¶54 Public policy varies from state to state²²¹ and it is a potential obstacle²²² that litigants might encounter in any type of court action. Undoubtedly, parties would eventually encounter it if they attempted to enforce a choice of time of law clause in a contract. Public policy is vague in that it is hard to define and anticipate in advance. Generally, it appears to be a “rule of reason”²²³ that, ironically, seems unreasonably fickle.²²⁴ For example, one observer thinks “public policy” is something that a court can invoke and magisterially sweep away the results called for by traditional rules and, usually without much explanation, apply its own law to achieve some desired result.²²⁵ Even with existing choice of law clauses, Corbin provides many examples where courts balance whether to uphold a choice of law provision that might go against “policy” concerns.²²⁶ Such a clause is likely to be upheld as valid and enforceable, unless the

§ 187(2)(b) (“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 . . . 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 interests of the chosen state . . .”). Note that public policy is so strong that it might even override a choice of law provision. *See also* U.C.C. § 1-103 cmt. 1 (“The Uniform Commercial Code should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as also of the Uniform Commercial Code as a whole, and the application of the language should be construed narrowly or broadly, as the case may be, in conformity with the purposes and policies involved.”); SCOLES, *supra* note 205, at 986; FARNSWORTH, *supra* note 130, at Vol. II, 19–20 (An agreement with a choice of law governing the contract may be unenforceable if “there is no . . . reasonable basis for the parties’ choice.”) (citing the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a)) (1981).

²²¹ *See, e.g.*, *Boone v. Boone*, 546 S.E.2d 191, 194 (S.C. 2001) (“Because interspousal immunity violates the public policy of South Carolina, we will no longer apply the *lex loci delicti* when the law of the foreign state recognizes the doctrine.”). Examples of policy matters are stated in *Nash v. Tindall Corp.*, 650 S.E.2d 81, 83–84 (S.C. Ct. App. 2007) (“Under the ‘public policy exception,’ the Court will not apply foreign law if it violates the public policy of South Carolina. Foreign law may not be given effect in this state if it is against good morals or natural justice. Examples of cases against good morals and natural justice are ‘prohibited marriages, wagers, lotteries, racing, contracts for gaming or the sale of liquors, and others.’”).

²²² *See Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 233–34 (1892) (In a patent contract case, the Court stated, “[i]t is impossible to define with accuracy what is meant by that public policy for an interference and violation of which a contract may be declared invalid. It may be understood in general that contracts which are detrimental to the interests of the public as understood at the time fall within the ban. The standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interests, at a more advanced stage are treated as legal and binding.”). State courts express the same. *See, e.g.*, *Hearst-Argyle Props., Inc. v. Entrex Commc’n Servs., Inc.*, 778 N.W.2d 465, 472 (Neb. 2010) (“The power of courts to invalidate contracts for being in contravention of public policy is a very delicate and undefined power which should be exercised only in cases free from doubt.”).

²²³ FARNSWORTH, *supra* note 130, at Vol. II, 12 (providing sections on public policy).

²²⁴ *See Pope Mfg. Co.*, 144 U.S. at 233–34.

²²⁵ RICHMAN & REYNOLDS, *supra* note 180, at 169.

²²⁶ CORBIN ON CONTRACTS, *supra* note 87, § 79.7.

forum state has a contrary public policy or other public interest.²²⁷ Likewise, in Comment (g) of the Restatement (Second) of Conflict of Laws, there is a warning that the policy must be *substantial* before courts may override the choice of law clause in the contract agreed to by the parties.²²⁸ Similarly, under contract law, the 2001 Revision of the U.C.C. promotes the same inclinations as the Restatement and allows courts fewer reasons to invalidate a choice of law clause.²²⁹ As such, it is reasonable to expect that most choice of law provisions are enforceable. By extension, a choice of time of law clause should also be enforceable, and public policy issues should not pose a real obstacle if the parties intended to include the clause in their contracts. Furthermore, as the following paragraphs show, an analysis of each type of public policy concern tends to show that many policy concerns are refutable anyway.

¶155 There are two different categories of public policy that could restrict a choice of time of law clause. The first category encompasses general concerns against enforcing such a clause. These general concerns are perhaps better categorized as psychological barriers rather than policy issues. They are akin to human nature's general resistance to change. The second category of public policy concerns encompasses issues that are fact specific, such as concerns against gambling and lotteries in a state. For instance, Nevada laws permit such activities, whereas Utah laws do not.

A. *General Policy Concerns: A New Concept, Sovereignty and Efficiency Issues*

¶156 Among the first category of policy concerns is that there is a lack of knowledge as to the consequences of implementing a new clause or that there may be no general incentive to include a choice of time law provision in a contract. However, at least in patent law, food laws, health regulations, civil procedures, and local rules, there are good reasons to include some time or freezing provision in a domestic contract. From a policy perspective, there might be less of a reason to implement such clauses here in the United States. In international contracts, there is a higher incentive because some foreign governments have been very unstable and the country might have changed its laws dramatically due to political turmoil. By contrast, the U.S. law is relatively stable. For instance, in contract law, the revised U.C.C. Article 2 (2003) has yet to be adopted in any state and a revised version of U.C.C. Article 2-B (1999) for information technology licenses has been adopted by only two states so far.²³⁰ In comparison, much of the 1950's version of U.C.C. Article 2 has been adopted by nearly all the states and has been fairly stable for about fifty years now.²³¹ On the other hand, other areas of U.S. law,

²²⁷ See *id.* But, perhaps Restatement (Second) of Contracts has a lower threshold in determining whether public policy should prevail. See generally RESTATEMENT (SECOND) OF CONTRACT § 178 (1981). However, a “choice of *time* of law” is closer in purpose to a choice of law provision than to other provisions and terms governed by the restatement. Therefore, the threshold set out in the Restatement (Second) of Conflict of Laws should be more applicable.

²²⁸ For example, it cannot be based merely on technical requirements, such as, formalities of the statute of frauds, the need for consideration, or rules tending to become obsolete. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 comment g.

²²⁹ SCOLES, *supra* note 205, at 961 (citing U.C.C. § 1-301) (2011).

²³⁰ HULL, *supra* note 29, at 3. See generally Maggs, *supra* note 148; Raymond T. Nimmer, *Through the Looking Glass: What Courts and UCITA Say About the Scope of Contract Law in the Information Age*, 38 DUQ. L. REV. 255 (2000).

²³¹ HULL, *supra* note 29, at 3; Harry G. Kyriakodis, *Past and Present ALI Projects*, THE AMERICAN

which impinge on the objects under contract, are constantly evolving and this has caused uncertainty with existing contracts. Thus, there is a need for a choice of time of law provision at least for some types of contracts.

¶157

Another policy concern is whether a choice of time of law clause is contrary to the sovereign authority of states²³² to legislate and the sovereign authority of the courts to interpret the law.²³³ One purpose of the federal and state governments is to provide order over society. Governmental entities make new laws and people are expected to follow them.²³⁴ For example, the federal and state governments restrict the liberty to contract, such as, through consumer protection regulations.²³⁵ Further, the Supreme Court has stated that sovereign power is read into contracts in order to maintain legal order.²³⁶ Under such circumstances, a choice of time of law clause might be perceived as an attempt to curtail governmental sovereignty, curtailing the effect of the government's ability to rule and the courts' ability to make decisions. However, a different perspective is that courts still retain their sovereignty simply because they have the freedom and authority to decide whether a choice of time of law clause is valid.²³⁷ Courts have the authority to decide amongst competing public policies when they adjudicate contract clauses. For instance, under the federal system, the Supreme Court has the authority to decide between the autonomy to contract versus a state's police power. Likewise, a legislature is free to exercise its authority and sovereignty by banning choice of time of law clauses by statute. The very existence of such authority to decide the fate of such clauses, in itself, constitutes sovereignty. Therefore, choice of time of law clauses should not be considered obstacles to sovereignty.²³⁸

LEGAL INSTITUTE, http://www.ali.org/doc/past_present_ALIprojects.pdf (last updated April 2010). For Article 2 as enacted by a particular state and any proposed revisions, see Cornell University Law School, *Uniform Commercial Code Locator—Article 2 Sales*, LEGAL INFORMATION INSTITUTE (Mar. 15, 2004), <http://www.law.cornell.edu/uniform/ucc.html#a2>.

²³² See, e.g., *Castleman v. Scudder*, 185 P.2d 35, 37 (Cal. Dist. Ct. App. 1947) (“Into all contracts is superimposed the higher authority of the state . . .”).

²³³ This is a primary concern with stabilization clauses in international contracts. See, e.g., SHERBERG, *supra* note 31, at viii. See also FARNSWORTH, *supra* note 130, at Vol. II, 10 (describing judicially developed policies, the policy against interfering with the judicial process).

²³⁴ *Government*, DICTIONARY.COM, <http://dictionary.reference.com/browse/government> (last visited Apr. 18, 2010) (“[T]he political direction and control exercised over the actions of the members, citizens, or inhabitants of communities, societies, and states; direction of the affairs of a state, community, etc.; political administration: *Government is necessary to the existence of civilized society.*”).

²³⁵ See, e.g., *Consumer Protection*, ATTORNEY GENERAL OF TEXAS, <http://www.oag.state.tx.us/consumer> (last updated Nov. 8, 2010).

²³⁶ *City of El Paso v. Simmons*, 379 U.S. 497, 508 (1965) (“[N]ot only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end ‘has the result of modifying or abrogating contracts already in effect.’ Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.”) (citation omitted).

²³⁷ International arbitral tribunals have generally upheld the stabilization provisions in international contracts by reason that entry into a contract is itself an exercise of sovereignty. *Emeka*, *supra* note 152, at 1324.

²³⁸ Note, the sovereignty concern comes up in international contracts partly because the two negotiating parties are unequal, or at least different, because one is a government that has sole authority to change the laws. This is not true domestically as contemplated in this paper. The majority of contracts involve two private parties; both are subjected to the very same new or old law governing the contracts and their

¶58

Yet another policy concern is that choice of time of law clauses that attempt to keep the status quo may be perceived as circumventing the progress of law.²³⁹ However, certain limitations on contracts, such as the duration of a contract, temper any such concerns about retarding the progression of law. First, short-lived contracts expire before too many laws have changed. Even if laws do change, the parties are released from their choice of time of law obligations relatively soon after the changes. Patents have a life span of only twenty years²⁴⁰ and technology changes rapidly.²⁴¹ As a result, patent licenses are of relatively short duration. Similarly, transactions in food or goods usually comprise only short-term contracts because market conditions change constantly.²⁴² Second, for longer-term contracts, one solution is that any contract with freezing clauses can be limited in duration by parties to five years or limited only to select areas of legal changes. Thus, long-term contracts can have limits placed upon them. Lastly, courts reserve the power to verify whether a choice of time of law clause substantively impedes public policy on a case-by-case basis before deciding to enforce a clause.

¶59

Finally, a policy concern of the courts is the efficiency of adjudication.²⁴³ If a contract has choice of time of law clause, especially a freezing provision, it may force courts to adjudicate under prior law and to keep track of multiple sets of laws. However, courts already undertake this task under the existing, traditional choice of law clauses in contracts. For example, courts apply the laws of other states,²⁴⁴ or the CAFC applies regional law rather than its own set of laws in many contract cases and on civil procedure matters.²⁴⁵ Courts also retroactively apply new laws to some past events and may analyze

content. Or in the case of the governmental contracts between a state and a private party, a choice of time of law clause might have been very appropriate to avoid litigation like in *United States Trust*. The various domestic governmental entities retain the authority and the option to exercise the ultimate sovereignty over both parties and their contract.

²³⁹ *Richardson v. Ramirez*, 418 U.S. 24, 76 (1974) (“[C]onstitutional concepts of equal protection are not ‘immutably frozen like insects trapped in Devonian amber.’”) (citation omitted).

²⁴⁰ *Wyeth v. Kappos*, 591 F.3d 1364, 1366 (Fed. Cir. 2010) (“In 1994, the law changed the effective term of a patent from seventeen years commencing from issuance to twenty years from filing.”).

²⁴¹ One circuit judge began his opinion with a lament “[t]his case illustrates how fast technology can outdistance the capacity of contract drafters to provide for the ramifications of a computer software licensing arrangement.” *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1116–17 (9th Cir. 1999) (attempting to determine copyright infringement on software that saw significant changes and improvements within a mere few months after a license agreement was made). See also NIMMER, *supra* note 62, at 224–43 (Ch. 5 § III. Changing Technology and Content).

²⁴² Indeed, quantifying what represents the “food industry” is itself a near impossible task. See Sarah Murray, *The World’s Biggest Industry*, FORBES (Nov. 15, 2007, 6:00 PM), http://www.forbes.com/2007/11/11/growth-agriculture-business-forbeslife-food07-cx_sm_1113bigfood.html.

²⁴³ E.g. FED. R. CIV. P. 1. See also FARNSWORTH, *supra* note 130, at Vol. II, 9–11 (describing judicially developed policies, the policy against encouraging litigation).

²⁴⁴ See generally, *Hughes v. Fetter*, 341 U.S. 609, 613 (1951) (holding that a Wisconsin statutory policy excluding Illinois wrongful death claims violated the Full Faith and Credit Clause); *Peresipka v. Elgin, Joliet & E. Ry. Co.*, 231 F.2d 268, 275 (7th Cir. 1956) (“[A]side from the principles of conflict of laws, we are of the view under the reasoning of *Hughes v. Fetter*, 341 U.S. 609, 71 S.Ct. 980, 982, 95 L.Ed. 1212, that an Indiana court was required under the Full Faith and Credit clause of the Constitution of the United States to give effect to the law of Illinois . . .”).

²⁴⁵ See, e.g., *Imation Corp. v. Koninklijke Philips Elecs. N.V.*, 586 F.3d 980, 985 (Fed. Cir. 2009) (applying New York contract law to a patent license); *Rentrop v. Spectranetics Corp.*, 550 F.3d 1112, 1118 (Fed. Cir. 2008) (“The Federal Circuit ‘defers to the law of the regional circuits on matters of procedural law that do not implicate issues of patent law.’”).

two sets of laws.²⁴⁶ Lastly, courts, including the Supreme Court, have applied the laws existing at the time of contract.²⁴⁷ Thus, contracts containing freezing clauses should not pose a major hurdle during adjudication. If anything, the old laws may be better developed and have a larger body of precedents that could facilitate adjudication as opposed to new laws that still need to be interpreted.

B. Case Specific Policy Concerns

¶60 The second category of public policy concerns that may prevent the enforceability of a choice of time of law clause is case specific. Courts balance policy concerns against contractual obligations by considering several factors, including 1) the reasonableness and necessity of the new law,²⁴⁸ 2) any changed circumstances and their impact, 3) whether there were alternative solutions instead of enacting new legislation, 4) whether a lesser modification of the laws would have achieved the same goals, and 5) whether the new law would have negative consequences.²⁴⁹ Yet other factors could include countervailing public policies such as enforcing the “justified expectations” of a contract,²⁵⁰ and the lack of foreseeability and notice that may hinder the parties’ freedom and rights to have a contract with a choice of law clause.²⁵¹

¶61 For example, new food safety laws are arguably very compelling and would probably pass scrutiny under the different factors listed above. A contract that freezes the interpretation and execution under old food safety laws would probably not be enforceable. Understandably, *new* food safety regulations are in the public’s immediate best interest, because no one wants to be harmed by unsafe foods. As such, food companies ought to be interested in adopting the latest regulations²⁵² and might draft a freezing clause only for other, non-food areas of law.²⁵³ For instance, if there are new regulations for food packaging rather than food safety, the very same company might welcome a freezing clause for packaging regulations in order to avoid the extra costs of retooling for new packages.²⁵⁴

²⁴⁶ See, e.g., *Lufkin v. McCallum*, 956 F.2d 1104, 1107 (11th Cir. 1992) (considering whether litigants actually relied on the old rule and how they would suffer from the retroactive application of the new); *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1575 (Fed. Cir. 1990) (regarding the effect of changes in the venue statutes on two consolidated cases, one which began before the change in statute and one which began after).

²⁴⁷ *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 (1977).

²⁴⁸ *Id.* at 22–23; *East New York Sav. Bank v. Hahn*, 326 U.S. 230, 233 (1945).

²⁴⁹ *United States Trust Co.*, 431 U.S. at 28–32.

²⁵⁰ *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1130 (Ind. 1995) (“[T]he factors . . . to be considered in determining whether a contract not prohibited by statute or clearly tending to injure public but nevertheless alleged to contravene public policy should be enforced, (i) the nature of the subject matter of contract; (ii) the strength of the public policy underlying statute; (iii) the likelihood that refusal to enforce the bargain or term will further that policy; (iv) how serious or deserved would be forfeiture suffered by party attempting to enforce bargain; and (v) the parties’ relative bargaining power and freedom to contract.”). See also the many factors listed in RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 179 (2010).

²⁵¹ Under the closely related topic of forum shopping, these are factors that are considered by courts. See, e.g., *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 595 (1991).

²⁵² See e.g., Interview with Susan Chao, *supra* note 74.

²⁵³ *Id.*

²⁵⁴ *Id.*

¶62 However, regardless of the factors courts will consider in shaping policy, the threshold needed to invalidate a choice of law provision is high,²⁵⁵ and this heightened threshold is expected to carry over to a choice of time of law clause because the rationale for both provisions is the same.²⁵⁶

C. Public Policy that Approves a Choice of Time of Law Clause

¶63 In contrast to the foregoing, there is a public policy argument in favor of choice of law and choice of time of law provisions. The public policy justifying a choice of law clause emanates from the Contract Clause,²⁵⁷ the Restatements for contracts and for conflict of laws, the U.C.C., and even procedural rules such as Federal Rule of Civil Procedure 1—the policy of providing certainty and peace of mind and efficiency afforded by contract.²⁵⁸ The same policy should also extend to justifying a choice of time of law clause as well. Thus, the question really becomes which public policy prevails in any given case, the policies behind the choice of time of law or some other policy.

¶64 Unlike with food safety, implementing new patent and patent license laws is arguably not as urgent; therefore, the contract parties should be permitted to adopt and enforce a choice of time of law provision.²⁵⁹ For instance, the Supreme Court's *KSR* decision championed the use of “common sense” in determining whether a purported invention is “obvious.”²⁶⁰ Subsequently, if a license dispute occurs over the obviousness (validity) of existing patents issued before the *KSR* decision, it may not be clear which way a judicial scale will tip, in favor of patent policy or in favor of a choice of time of law provision.²⁶¹ The new *KSR* decision may not pass scrutiny under the factors used to balance policy against contract intent, such as the necessity of the new law or alternative solutions. Perhaps, the new *KSR* decision may not be sufficiently compelling to overcome the policies of the freedom and expectations of contracts.²⁶² In all likelihood, certain types of contracts will never permit containing a choice of time of law provision, such as for food, health care, and transportation safety regulations. On the other hand, patent licensing could permit a choice of time of law, including freezing clauses, because patents are rarely so essential and life-sustaining, like food or health.²⁶³

²⁵⁵ See the beginning of this Section. See also BRUNSVOLD, *supra* note 182, at 268.

²⁵⁶ See Section II.C and the beginning of Section IV.

²⁵⁷ Curtis, *supra* note 159, at 336 n.98 (arguing why the Contract Clause supports U.S. government upholding stabilization) (citing U.S. Const. art. I, § 10 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts”); Trustees of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819); United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977)).

²⁵⁸ FED. R. CIV. P. 1 (The Rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”). See also *supra* Sections III.B and V.

²⁵⁹ See *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 233–34 (1892) (regarding policies related to a patent contract).

²⁶⁰ *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007).

²⁶¹ See Papastavros, *supra* note 65, at 8.

²⁶² It is debatable whether the new “test” under *KSR* is better or worse than the old test. The policy behind *KSR* is to deny patents to trivial inventions and to move away from the previous, more rigid TSM test. On the other hand, a “common sense” test is nebulous and subjective because different people have a different sense of what is “common” when it comes to inventions. By contrast, the TSM test was rigorous and objective, which has merits as well. See generally Lester Horwitz, *Horwitz on Some Strategies on the Question of Obviousness*, 2008 Emerging Issues 792 (2007) (LexisNexis).

²⁶³ Patents are not necessarily essential. Patents and patent licenses are largely vehicles for economic transactions. When one party benefits, the other party loses, and vice versa. There is little moral right or

D. A Test to Determine Whether a Choice of Time of Law Clause is Valid

¶165 If there are public policy concerns in a particular case surrounding a choice of time of law provision, this paper proposes a test to help courts determine whether a choice of time of law clause should be valid and enforceable. The proposed test (“Test”) consists of verifying whether the clause could have been drafted in alternative language at the time of contract execution and whether the contract would still be valid under the new law and not in violation of public policy. That is, the Test would ask if there is a legally valid alternative. A party trying to enforce the clause would have the burden of proposing the substitute language in the event of litigation. Then, the court shall decide whether the substitute language is valid as a matter of law.

¶166 For instance, suppose *A* and *B* entered into a football gambling contract a year ago with a provision selecting “Texas law *existing on the date of contract execution.*”²⁶⁴ Further suppose, Texas abolishes gambling as being against public policy; then, the question is whether the choice of time of law clause is still valid. Applying the Test, a court would decide whether the clause could have been alternatively drafted at the time when the contract was executed. The party arguing for the validity of the choice of time of law clause should attempt to find alternative language that would not violate public policy. For example, suppose the party substitutes the phrase “Nevada law” for “Texas law.” Also suppose that the parties could indeed have selected Nevada law and gambling was and still is permitted in Nevada. Under these circumstances, a court should find the choice of time clause to be valid and enforceable. The rationale is that there is an alternative that was or is legally acceptable under the original language of “Texas law existing at the time of contract execution.” The existence of a legitimate alternative means that the original contract language would still be acceptable under some aspect of Texas public policy.

¶167 As another example, which parallels an actual case,²⁶⁵ suppose publishing house *P* entered into a contract with author *A* to pay for his copyrighted material, relying on a phrase “copyright law *existing on the date of contract execution*” clause. Then, suppose the United States extended the copyright term for the public policy reason of harmonizing with that of other countries’ copyright laws. Suppose *A* wants to be paid for the additional years under the new law in effect. But, consider if *P* can show there was no intent or perhaps no purpose in paying for any extra years (e.g. because the book would no longer be topical). *P* could have originally drafted alternate language such as “pay for *A*’s material for ten years,” which did and does not violate public policy and is obviously

wrong, let alone health or safety issues. Although some argue that patents encourage inventions and the spread of knowledge, other areas advance rapidly and openly without the need for patents. Math and science principles by themselves are not patentable and yet they flourish. Scientists publish openly and share their discoveries and science has advanced in leaps and bounds. See *generally* *Gottschalk v. Benson*, 409 U.S. 63, 71–2 (1972) (holding one may not patent an idea that has no substantial practical application); *Le Roy v. Tatham*, 55 U.S. 156, 175 (1852) (“A principle, in the abstract, is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in either of them an exclusive right.”).

As further evidence that patents are not essentials, there is open (i.e. unpatented and free) software. Wikipedia has also thrived in advancing knowledge, freely. See WIKIPEDIA, <http://www.wikipedia.org/> (last visited Mar. 18, 2011).

²⁶⁴ This question was provided by Professor Adam Todd, Southern Methodist University, Spring 2010.

²⁶⁵ *BJM, Inc. v. Melpot Corp.*, 18 F. Supp. 2d 704 (W.D. Ky. 1998).

a legitimate, legally acceptable condition. Accordingly, a court should find the choice of time of law provision valid and enforceable.

¶168 On the other hand, the food safety laws offer a contrary example. Suppose parties *S* (seller) and *B* (buyer) contracted for hotdogs with a provision “food laws *existing on the date of contract execution*.” Suppose a dye in the hotdogs causes cancer and a new food law permits only a different dye in hotdogs. If *S* does not want to pay extra for the more expensive dye then *S* can either use no dye (but then, the hotdog looks unpalatable and unmarketable) or use the more expensive dye. *S* should not be allowed to rely on the original contract clause to revert to the old food regulation because his dye causes cancer, which clearly violates public interest. Had the harm been discovered earlier, theoretically, the regulation would have already been in existence at the time of contract execution. Under these circumstances, the court should hold the choice of time of law clause invalid because it violates an essential public interest, and *S* must follow the new law. In this scenario, *S* should have negotiated a contract with a hybrid clause instead of a freezing clause in order to mitigate his risk allocation. *S* could have contracted to share any increased costs due to new regulations. Regardless, by utilizing the Test, courts have discretion to decide whether a choice of time of law provision should be enforceable.

¶169 As a final note, there are other justifications for the Test. For instance, it is consistent with Restatement (Second) of Conflict of Laws § 187(1) and general contract interpretation. In fact, the plain meaning of § 187(1) suggests the Test.²⁶⁶ “The [time of] law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties *could have resolved by an explicit provision in their agreement* directed to that issue.”²⁶⁷ The words “time of” have been inserted by the author to argue for a choice of time of law. Notice how easily a new provision could be added to the Restatement to implement this paper’s proposed solution.

VI. WHAT IS SPECIAL (AKA “DIFFICULT”) ABOUT PATENT LICENSING?

¶170 Patent licenses are one type of contract. Not taking into account legal costs, in 1994, U.S. patent licensing generated at least \$33 billion in revenue per year; in 2002, the figure grew to about \$68 billion²⁶⁸ and over \$100 billion in 2005.²⁶⁹ Revenue is expected to continue to increase because the number of patents granted per year more than doubled since 2002.²⁷⁰ Commentators indicate that patent licenses particularly need to include a choice of law clause.²⁷¹ Considering all the legal changes in patent law over the last three or four years, this paper contends that the licenses also need a choice of time of law

²⁶⁶ See RICHMAN & REYNOLDS, *supra* note 180, at 225 (summarizing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, cmt. c).

²⁶⁷ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1971) (emphasis added).

²⁶⁸ RUSSELL PARR, ROYALTY RATES FOR LICENSING INTELLECTUAL PROPERTY 18 (2007) (The companies with the largest U.S. patent portfolios are IBM, GE, Canon, Hitachi, Toshiba, NEC, Kodak, Matsushita, Mitsubishi, Sony, Motorola, Siemens, Philips, AT&T, and the U.S. Navy.).

²⁶⁹ See *Licensing Royalty Revenues*, INVENTION STATISTICS, http://www.inventionstatistics.com/Licensing_Royalty_Revenues.html (last visited Apr. 18, 2011).

²⁷⁰ See UNITED STATES PATENT AND TRADEMARK OFFICE, <http://www.uspto.gov> (last visited Apr. 18, 2011); *Number of New Patents Issued*, INVENTION STATISTICS, http://www.inventionstatistics.com/Number_of_New_Patents_Issued.html (last visited Apr. 18, 2011).

²⁷¹ See generally NIMMER & DODD, *supra* note 139, § 2:57 (“In part because of the confusing and uncertain background law, most licenses specify what law governs disputes relating to a license”).

provision.²⁷² Moreover, there are many different areas of laws that could conceivably change and impinge on patent licenses over the lifetime of a license.

¶71 Patents themselves are governed by federal statutes and common law created mostly by the U.S. Supreme Court and the CAFC.²⁷³ However, the licenses themselves are contracts, and state contract law should apply to the contract aspects of the licenses.²⁷⁴ But, occasionally, the courts will apply federal patent license law created by federal courts.²⁷⁵ Also, patent license litigation is sometimes conducted in state courts,²⁷⁶ but more often it is conducted in federal courts, because patents are a constitutional matter.²⁷⁷ But, if a case is appealed to the CAFC, the court may apply its own laws or may apply other federal circuit law (e.g. Fifth Circuit, Ninth Circuit, *etc.*).²⁷⁸ Also, given the amount of forum shopping in patent litigation,²⁷⁹ the effect of different local rules and particular judge-made rules becomes more of an issue. Finally, federal patent statutes, common law, and a very large body of U.S. Patent Office administrative²⁸⁰ law could also apply to the patent licenses. Given this myriad of laws, patent licensing parties may do well to track down as much certainty as possible by including a choice of time of law provision. Otherwise, because there are so many different governing laws, some regulation is bound to change and disturb the parties' intended agreement. For example, the agreement might include the following provision in bold face type²⁸¹ and perhaps exclude the local conflict of law rules because of the divergence among the different local rules.²⁸²

Governing Law.

This Agreement shall be deemed to have been entered into and shall be interpreted and governed in all respects by the judicial and legislative laws of the State of Texas and the United States of America, existing at the time of execution of this Agreement, without giving effect to their conflict of laws rules.

²⁷² *KSR, Bilski, Quanta Computer, and Transcore* are only a sample of the major patent or patent licensing cases decided by the Supreme Court or the CAFC in the last three years.

²⁷³ U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”); U.S. CONST. art. III, § 2 (“The judicial power shall extend to all cases, in law and equity, arising under this Constitution”).

²⁷⁴ *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) (“Commercial agreements traditionally are the domain of state law. State law is not displaced merely because the contract relates to intellectual property”). *See also* U.C.C. § 1-103, comment 3 (2009).

²⁷⁵ 35 U.S.C. § 261 (Ownership; assignment). *See also* *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617 (2008) (holding that due to patent exhaustion, the initial authorized sale of a patented item terminates all patent rights to that item).

²⁷⁶ *See, e.g., City of Hope Nat’l Med. Ctr. v. Genentech, Inc.*, 181 P.3d 142 (Cal. 2008).

²⁷⁷ U.S. CONST., art. I, cl. 8.

²⁷⁸ *See* Ted L. Field, *Improving the Federal Circuit's Approach to Choice of Law for Procedural Matters in Patent Cases*, 16 GEO. MASON L. REV. 643 (2009).

²⁷⁹ There is so much forum shopping that the Eastern District of Texas, where no high tech companies are incorporated, has about the same number of patent cases as California's Silicon Valley. Some federal courts have a reputation for being a patent rocket docket. *See* JUSTIA: DOCKETS & FILINGS, <http://dockets.justia.com/> (last visited Mar. 18, 2011) (providing statistics on court filings).

²⁸⁰ For example, Title 37, Code of Federal Regulation, and any other U.S. Patent Office rules.

²⁸¹ *Dunn, supra* note 192, at 41 (The choice of law clause for certain kinds of contracts must be made conspicuous or it may not be enforceable.).

²⁸² With the exception of the choice of time, the example is borrowed from a medical consortium membership agreement. *See* MEDBIQUITOUS, <http://www.medbiq.org/> (last visited Mar. 18, 2011).

VII. CONCLUSION

¶72 Our laws are not frozen into immutable form like insects trapped in Devonian amber, but instead are constantly undergoing revision. There are bound to be changes in laws that are not welcomed by contracting parties. Such a scenario is particularly ironic for parties to a contract because the changes may defeat the very purpose of preserving a binding agreement in writing. In the U.S., there should be a proactive solution of supplementing the traditional choice of territorial law through a choice of time of law clause to safeguard against detrimental new legislation, regulations, and common law.²⁸³ Importantly, a choice of time of law provision can be consistent with constitutional law, state contract law, and the rules on conflict of laws. Should public policy concerns arise against such a provision, this paper proposed the Test to help courts weigh which policy should prevail—the policy of upholding the intent of the parties by a contract or some other policy interests.

¶73 As for practical matters, a choice of time of law clause is a useful tool that domestic contracting parties may implement to ease their minds, gain more certainty, draft workarounds to disadvantageous law, and reduce litigation. Such a tool is particularly useful in constantly evolving areas such as patent law. Initially, it might be difficult to introduce the concept to the U.S. courts, but the tool has been used in international contracts and adjudicated in international courts, both of which can serve as practicable examples. Additionally, there have even been a few U.S. cases where a contract party selected future legislative law and the courts did not disapprove of the practice. As such, it is certainly plausible to continue and then popularize the practice. When courts try to decide whether to enforce a choice of time of law clause, they may apply the Test, which requires the proponent of the clause to provide substitute language for the matter at issue, which the party could have drafted into the original contract but did not do so because the party relied on its selection clause instead. If the substitute language creates a contract that does not violate public policy, then the choice of time of law clause should be deemed acceptable in that instance. In summary, domestic parties should be free to include and try to enforce a choice of time of law clause in their contracts because there are few theoretical and practical obstacles to implementing such a useful tool.

²⁸³ One commentator believes that the *ex post facto* clause in the Constitution applies also to the common law. Robert H. Hughes, *That Was Then, But That's What Counts: Freezing the Law of R.S. 2477*, 2002 UTAH L. REV. 679, 696–97 (2002) (citing *Shell Oil Co. v. M/T GILDA*, 790 F.2d 1209, 1213 (5th Cir. 1986) (“In general, parties intending to be bound by a statute intend to be bound by the body of judicial decisions interpreting and applying the statute.”); *Saint Paul-Mercury Indem. Co. v. Rutland*, 225 F.2d 689, 692 (5th Cir. 1955)). However, the role of “interpreting” the legislative law often leads to new common law. This is also true where there is only common law in existence and no legislation. Also, there are many cases where the opinion states that judicial decisions may take retroactive effect.