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Mark Edwin Burge

Texas A&M University School of Law, markburge@law.tamu.edu

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TOO CLEVER BY HALF: REFLECTIONS ON
PERCEPTION, LEGITIMACY, AND CHOICE OF
LAW UNDER REVISED ARTICLE 1 OF THE
UNIFORM COMMERCIAL CODE

MARK EDWIN BURGE*

ABSTRACT

The overwhelmingly successful 2001 rewrite of Article 1 of the Uniform Commercial Code was accompanied by an overwhelming failure: proposed section 1-301 on contractual choice of law. As originally sent to the states, section 1-301 would have allowed non-consumer parties to a contract to select a governing law that bore no relation to their transaction. Proponents justifiably contended that such autonomy was consistent with emerging international norms and with the nature of contracts creating voluntary private obligations. Despite such arguments, the original version of section 1-301 was resoundingly rejected, gaining zero adoptions by the states before its withdrawal in 2008. This Article contends that this political failure within the simultaneous overall success of Revised Article 1 was due in significant part to proposed section 1-301 invoking a negative visceral reaction from its American audience. This reaction occurred not because of state or national parochialism, but because the concept of unbounded choice of law violated cultural symbols and myths about the nature of law. The American social and legal culture aspires to the ideal that “no one is above the law” and the related ideal of maintaining “a government of laws, and not of men.” Proposed section 1-301 transgressed those ideals by taking something labeled as “law” and turning on its head the expected norm of general applicability. Future proponents of law reform arising from internationalization would do well to consider the role of symbolic ideals in their targeted jurisdictions. While proposed section 1-301 made much practical sense, it failed in part because it did not—to an American audience—make sense in theory.

* Associate Professor of Law, Texas A&M University School of Law. Special thanks to William Henning, Andrew Morriss, Jay Westbrook, Paul George, and Frank Snyder, all of whom provided valuable comments and insights on earlier drafts of this Article, particularly on areas of disagreement. I am also grateful for legislative history research assistance during the course of this project provided by Assistant Director of the Dee J. Kelly Law Library, Patrick Flanagan, and by student research assistants Michael Doyle and Hannah Bell. Any errors and opinions in this Article are, of course, the sole responsibility of the author.

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INTRODUCTION

The ideals that “no one is above the law”¹ in a properly representative democracy and that a fundamental function of such a republic is to provide for “a government of laws, and not of men”² are deeply rooted in American popular and political culture. The aspiration to equally applicable law remains even when the American legal system falls short of these ideals. Consider how atypical a movement or campaign would be that explicitly promoted uneven application of the law: “Vote for me, and I promise to shower legal privileges on a chosen few!” Laws or policies that in fact do promote different treatment must either include an ostensible explanation grounded in the language of equality under the law,³ or else they must remain stealthy. In a culture aspiring to legal egalitarianism, no one praises disparate legal treatment as a standalone virtue. Thus, rhetorical attacks on “the one percent” from the populist left⁴ and on “crony capitalism” from the populist right⁵ share at least one common trait: a deep-seated belief that laws should

¹ This popular maxim has been stated in many forms. *See, e.g.*, *United States v. Lee*, 106 U.S. 196, 220 (1882) (“No man in this country is so high that he is above the law.”); Theodore Roosevelt, Third Annual Message (Dec. 7, 1903), *quoted in* JOHN BARTLETT, *FAMILIAR QUOTATIONS* 576 (Justin Kaplan ed., 16th ed. 1992) (“No man is above the law and no man is below it; nor do we ask any man's permission when we require him to obey it.”).

² *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”); *see also* *Cooper v. Aaron*, 358 U.S. 1, 23 (1958) (quoting the 1780 Massachusetts Declaration of Rights, credited to John Adams). In a related formulation, the “rule of men” is unfavorably contrasted with “the rule of law.” *See, e.g.*, Richard H. Fallon, Jr., “*The Rule of Law*” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 3 (1997) (“Within perhaps the most familiar understanding of this distinction, the law—and its meaning—must be fixed and publicly known in advance of application, so that those applying the law, as much as those to whom it is applied, can be bound by it. If courts (or the officials of any other institution) could make law in the guise of applying it, we would have the very ‘rule of men’ with which the Rule of Law is supposed to contrast.”).

³ *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding law school admissions policies could include diversity as a factor for review because it could promote equality); *Goldberg v. Kelly*, 397 U.S. 254 (1969) (holding that welfare benefits balanced the interests of the recipient and the interests of the State, promoting equality).

⁴ *See, e.g.*, Michael A. Fletcher, *As the Economy Recovers, the Richest Are Getting Richer, Study Shows*, WASH. POST, Apr. 23, 2013, at A16, *archived at* <http://perma.cc/R5JR-DA8G> (“The issue of inequality leapt to prominence in late 2011, when supporters of the Occupy Wall Street movement began setting up encampments in Washington, Lower Manhattan and elsewhere to protest the financial chasm between the wealthiest one percent of Americans and the rest.”).

⁵ *See, e.g.*, Michael S. Rosenwald & Antonio Olivo, *Capitalism, Ethics Drive Brat's Worldview*, WASH. POST, June 12, 2014, at A09, *archived at* <http://perma.cc/7XU-MLCZ> (describing the successful primary unseating of sitting Republican House Majority Leader

apply to everyone. Special rules are an aberration that must be explained by prudence or necessity because they violate the norm of general applicability.⁶ Stated differently, populists at both ends of the ideological spectrum are accusing their opponents of committing no less than an American heresy by placing a privileged class both above and outside of the law.

This Article is a significant rethinking of what occurred when legal and academic elites charged into a populist heresy and were soundly rebuffed, a rebuff most notable for having been part of a tremendous success: revising Article 1 of the Uniform Commercial Code (UCC). The UCC is widely recognized as one of the great successes in the nearly century-long history of drafting uniform state laws and model acts.⁷ With varying degrees of uniformity, most parts of this joint enterprise between the American Law Institute (ALI) and Uniform Law Commission (ULC)⁸ have been adopted in all 50 states—even in the civil law jurisdiction of Louisiana.⁹ Perhaps more remarkable than the UCC's wide adoption in the 1960s¹⁰ is that the Code has been the subject of major revisions over the past fifty years,¹¹ and these revisions have themselves gained widespread adoption comparable

as a “nuanced and populist primary campaign not against big business, but crony capitalism and the Wall Street ‘crooks’ who ... cheat and destroy a beautiful system.”)

⁶ See Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 103 (2007) (observing that the appeal to equal liberty reflects “an egalitarian strain in the American legal tradition” and that this strain is ancient in its origin, dating as far back as Aristotle).

⁷ See, e.g., Henry Gabriel, *The Revision of the Uniform Commercial Code: How Successful Has It Been?*, 52 HASTINGS L.J. 653, 654–55 (2001) (“[T]here is a lot of successful history behind the Code For the present, the UCC is now fifty years old, and it has been showing its age Much of the Code has been revised to reflect contemporary business practices and it continues to guide commercial law and practice in America. Success is success.”).

⁸ In 2007, the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted Uniform Law Commission (ULC) as its descriptive name, while retaining NCCUSL as its formal name. For convenience and consistency, this Article will refer to this organization as the Uniform Law Commission or ULC, even when discussing matters in which the organization was involved prior to 2007. See *About the ULC*, UNIFORM LAW COMMISSION, <http://www.uniformlawcommission.com/Narrative.aspx?title=About%20the%20ULC> (last visited Mar. 26, 2015), archived at <http://perma.cc/YV9U-FKW9>.

⁹ Gabriel, *supra* note 7, at 654 & n.1. Louisiana has most notably not adopted the common-law inspired Article 2 on sales of goods and Article 2A on leases of goods, both of which it rejected as being incompatible with its civil law of obligations derived from the Napoleonic Code.

¹⁰ Pennsylvania adopted the Uniform Commercial Code in 1953, followed by Massachusetts in 1957, and Connecticut in 1959. The bulk of adoptions occurred in the 1960s, however, and by 1967 the UCC had been substantially enacted by every state except Louisiana. See William A. Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 10 (1967).

¹¹ See Gabriel, *supra* note 7, at 655.

to that of the original UCC. One of the more recent major changes was the revision of Article 1—general provisions for the entire Code—in 2001. Revised Article 1 has been a political success, at least as evidenced by the forty-five and growing number of states that have adopted the vast majority of it.¹²

Arguably, the most prominent innovation of Revised Article 1 as originally conceived was proposed section 1-301 concerning choice of law.¹³ The statute would have allowed non-consumer contracting parties to choose the law of any jurisdiction to govern their transaction, even where the jurisdiction bore no relationship to the underlying transaction.¹⁴ Proposed section 1-301 was itself a “significant rethinking”¹⁵ of choice-of-law rules, and many scholars and commentators contended that the idea was one whose time had come.¹⁶ Yet, out of all the states that enacted Revised Article 1, none enacted section 1-301 as it was proposed. The year 2008 was thus an atypical moment in UCC history when the ALI and the ULC finally withdrew proposed section 1-301 and replaced it with the pre-revision law.¹⁷ Given passage of enough time for the dust to settle, a reflective post-mortem now seems appropriate.

Regardless of the international precedent¹⁸ and transactional logic¹⁹ in its favor, proposed section 1-301 aroused a strong negative reaction because it appeared, at first blush, to be a frontal assault on a foundational principle to the public legitimacy of the law in the United States: absent necessity, the coverage of a legal rule should be general. While Americans are as prone as any to praise the virtues of a free market, they—at least outside of the academy²⁰—do not tend to view law as an enterprise out of which parties

¹² See generally Unif. Commercial Code, 1 U.L.A. 5–6 (Supp. 2014) (listing forty-five states plus the District of Columbia and the U.S. Virgin Islands in a table of jurisdictions where Revised Article 1 was in effect as of July 1, 2013). Of course, any jurisdiction substantially adopting Revised Article 1 may also have included state-specific non-uniform provisions, such as the notable minority that did not adopt the revision’s definition of “good faith.” See generally Keith A. Rowley, *The Often Imitated, But (Still) Not Yet Duplicated, Revised UCC Article 1* (Aug. 15, 2011), archived at <http://perma.cc/ARJ4-CPXX> (updating substantially through July 1, 2011 the earlier-published article, Keith A. Rowley, *The Often Imitated, But Not Yet Duplicated, Revised UCC Article 1*, 38 U.C.C. L.J. 195 (2006)).

¹³ See Rowley, *supra* note 12, at 7–8.

¹⁴ See *id.*, at 6–7, 19.

¹⁵ See Lance Liebman et al., *Proposal to Amend Official Text of § 1-301 (Territorial Applicability; Parties Power to Choose Applicable Law) of Revised Article 1 of the UCC* (2008), available at <http://perma.cc/D2GE-LGG5>.

¹⁶ See Rowley, *supra* note 12, at 7–8.

¹⁷ See Liebman, *supra* note 15, at 9.

¹⁸ See *infra* text accompanying notes 72–97.

¹⁹ See *infra* Part II.B, text accompanying notes 142–58.

²⁰ See *infra* note 146 and accompanying text.

should have a general free market right to contract. Choice of law is, in this view, more akin to a necessary evil than to a systemic good, rather like forum shopping in civil litigation. Both are prices one must pay as a consequence of having multiple and overlapping legal systems. Some forum shopping is tolerable by necessity,²¹ yet Americans bristle and cringe when the practice goes too far.²² Choice of law likewise shares this trait, at least on the surface, of being a “bug” rather than a “feature” of a complex legal system. Revised section 1-301 faced a particularly uphill battle to enactment because it went too far outside the American understanding of law. It elevated contracting around generally applicable law to a norm rather than an exception. The experience of the UCC’s failed journey into the realm of unbounded party autonomy is relevant for the future because of what it reveals about the perceived boundaries of law in the American tradition, boundaries certain to be approached again and again in an era of increasing globalization of law and commerce. This failure in the midst of a successful lawmaking enterprise contains lessons for the future when viewed through the lenses of legal philosophy and political science.

Part I of this Article describes background history of contractual choice of law and the limits on party autonomy, particularly movement from the vested-rights approach of the formalist era to the reasonable-relationship approach represented by the original UCC and the Restatement (Second) of Conflicts of Law.²³ Part II describes the drafting process and the arguments by proponents of proposed section 1-301 and documents the ultimate political failure that led to its abandonment in 2008 in the face of the otherwise widespread success of Revised Article 1.²⁴ Part III seeks to account for the disproportionately negative reaction that many Americans have to the idea of unbounded party autonomy and suggests that—rather than arising from mere parochialism—the negative reaction is grounded in a significant incompatibility with American socio-legal culture.²⁵ The usage of foundational symbol and myth drawn from political theory helps explain the success that certain strands of legal philosophy have had in the United States, creating a culture in which unbounded party autonomy in choice of law was a step too far. Part IV, using the failure of proposed section 1-301 as an object lesson, proposes a framework for understanding the dominant American view of general applicability of legal rules and the

²¹ See Micheal S. Shenberg, *Identification, Tolerability, and Resolution of Intercircuit Conflicts: Reexamining Professor Feeney's Study of Conflicts in Federal Law*, 59 N.Y.U. L. REV. 1007, 1023 (1984).

²² See *id.*

²³ See *infra* Part I, text accompanying notes 27–97.

²⁴ See *infra* Part II, text accompanying notes 98–186.

²⁵ See *infra* Part III, text accompanying notes 187–239.

relationship of general applicability to legal legitimacy.²⁶ Ultimately, any highly visible attempts at legal reform, including changing the nature of cross-jurisdictional legal relationships, must pay substantial deference to the ideal of general applicability if such reforms are to succeed in the United States.

I. CONTRACTUAL CHOICE OF LAW AND THE RETREAT FROM FORMALISM

For most of the past century, the narrative arc of choice-of-law doctrine has been a journey down a one-way street. The departure point is a formalist commitment to rigid bright-line rules, followed shortly by the creation of escape devices to avoid those rules, and eventually leading to the disposal of those rules in favor of flexible alternatives. Beyond that basic narrative, however, choice of law as a whole has justifiably been labeled “a morass of confusion . . . universally said to be a disaster,”²⁷ at least in terms of adopting an overarching theory to replace the agreed-upon rejection of formalism. For contract law, however, the story of choice of law does not require delving into across-the-board theory. The tale of contractual choice of law begins with autonomy-free formalist rules and proceeds toward ever-increasing amounts of autonomy for contracting parties. The existence of this progression does much to explain why the drafters of Revised Article 1 crafted section 1-301 as they originally did, and also why an impartial sideline observer in 2001 might have thought the chances for widespread adoption were much greater than they proved to be.

A. From Formalism to Limited Autonomy

The formalist approach to law that dominated the United States in the early part of the twentieth century has been likened to a false religion,²⁸ with subsequent legal history being the story of its vanquishing. As to the substantive law of contracts, for example, one might view Samuel Williston, reporter for the first Restatement of Contracts, as the false prophet of formalism. In this understanding, Williston’s unrelentingly mechanical view of contract was defeated by just and humane legal realists, such as Arthur Corbin and Karl Llewellyn.²⁹ As Williston was to contracts, so was Joseph

²⁶ See *infra* Part IV, text accompanying notes 241–250.

²⁷ Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2449 (1999).

²⁸ See, e.g., Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 950 (1988) (“Formalism is like a heresy driven underground, whose tenets must be surmised from the derogatory comments of its detractors.”).

²⁹ See Franklin G. Snyder, *Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code*, 68 OHIO ST. L.J. 11, 12 (2007) (analogizing the triumph of

Beale to choice of law, an “arch-priest” of formalism whose teachings were ultimately unmasked and driven from legal orthodoxy.³⁰ Beale saw choice of law as mechanical and bright-line, hinging upon the geographic birth-place of “vested rights.”³¹ A court, upon determining the place where a particular legal right vested, would be obligated to apply that jurisdiction’s law. Thus, a cause of action for a tort must be governed by the place where the tort occurred because that was the place where the plaintiff’s legal rights, if any, sprang into existence.³² The formalist vested-rights view was memorialized in the 1934 first Restatement of Conflict of Laws, for which Beale served as Reporter. The first Restatement dominated American conflicts thinking in the first part of the twentieth century.³³

For contract law, the concept that parties might choose their own governing law is not even accounted for in the first Restatement, so alien was the concept of party autonomy.³⁴ In his treatise, Beale admitted that some courts had allowed parties to choose the governing law for their contracts, but he found that allowance to be both theoretically and practically objectionable.³⁵ The theoretical problem was that allowing contractual choice of law, in Beale’s view, made the contracting parties into a virtual legislature by permitting them to “do a legislative act,” which could be contrary to the sovereign will of the state whose law authorized the making of the contract in the first place.³⁶ Granting such extraordinary power to individuals was an

the Uniform Commercial Code over its formalist predecessors to the overthrow of the Titans in Greek and Roman mythology).

³⁰ See William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1376 (1997) (calling Joseph Beale the “arch-priest” of vested-rights theory whose “Sacred Text was the first Restatement of Conflict of Laws”).

³¹ EDWIN SCOTT FRUEHWALD, *CHOICE OF LAW FOR AMERICAN COURTS: A MULTI-LATERALIST METHOD* 11–12 (Greenwood Press 2001) (summarizing Joseph H. Beale’s theory of territorial vested rights).

³² RESTATEMENT OF THE LAW OF CONFLICT OF LAWS § 378 (1934) (“The law of the place of wrong determines whether a person has sustained a legal injury.”); see also 2 JOSEPH H. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* 1289 (1935) (“The existence and nature of a cause of action for a tort is governed by the law of the place where the plaintiff’s alleged right to be free from the act or event complained of is alleged to have been violated by a wrongful act or omission. It follows therefore that the law of the place of the wrong determines whether or not there is a cause of action for the wrong.”).

³³ Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1840 (2005); FRUEHWALD, *supra* note 31, at 10; Roosevelt, *supra* note 27, at 2449 n.6 (describing Beale’s theory of vested rights as “received wisdom for the first half of the twentieth century”).

³⁴ See generally RESTATEMENT OF THE LAW OF CONFLICT OF LAWS §§ 311–376 (covering the entirety of Chapter 8 of first Restatement, entitled “Contracts”).

³⁵ See BEALE, *supra* note 32, at 1080.

³⁶ *Id.* at 1079–80.

invitation to mischief.³⁷ Beale's practical objection, oddly enough, was that allowing parties to choose their governing law would actually increase transactional *uncertainty* because courts might not accept the parties' choice,³⁸ which of course is precisely what Beale thought courts ought to do. The vested-rights approach tended to be dogmatic in the certainty of its rules. Beale's description of the proper approach for determining contract validity, for example, left no room for party autonomy:

The question of whether a contract is valid ... can on general principles be determined by *no other law* than that which applies to the [parties'] acts, that is, by the law of the place of the contracting. If the law at that place annexes an obligation to the acts of the parties, the promise has a legal right which *no other law* has power to take away except as a result of new acts which change it. If on the other hand the law of the place where the agreement is made annexes no legal obligation to it, there is *no other law* which has power to do so.³⁹

Thus, the forum court would generally have no choice but to enforce the legal rights as and where they vested. The rigid and highly mechanical rules of the first Restatement did not consider policy concerns or desirability of outcome, though the Restatement did contain a limited escape device⁴⁰ for when the other jurisdiction's law contravened the "strong public policy" of the forum.⁴¹

Despite its initial dominance in American courts, the formalist vested-rights approach to choice of law had drawn substantial criticism even before the publication of the first Restatement. Early critics such as Walter Wheeler Cook,⁴² Ernest Lorenzen,⁴³ and David Cavers⁴⁴ attacked the vested-rights

³⁷ *Id.* at 1080 ("The meaning of the suggestion, in short, is that since the parties can adopt any foreign law at their pleasure to govern their act, that at their will they can free themselves from the power of the law which would otherwise apply to their acts.")

³⁸ *Id.* at 1085 ("[C]ounsel sufficiently familiar with the law might advise the parties to agree expressly upon the law of one state or the other as the law intended by them to apply to their agreement. Here, however, we are met by the difficulty that the courts will not necessarily enforce such an agreement or accept it as an expression of the real *bona fide* intention of the parties.").

³⁹ *Id.* at 1091 (emphasis added).

⁴⁰ FRUEHWALD, *supra* note 31, at 12.

⁴¹ RESTATEMENT OF THE LAW OF CONFLICT OF LAWS § 612 (1934) ("No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum.")

⁴² Walter W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 458–60 (1924).

⁴³ Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 743–46 (1924).

⁴⁴ David Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 194 (1933); see also DAVID CAVERS, *THE CHOICE OF LAW PROCESS* 9 (1965).

approach for failing to explain what the courts were actually doing and should be doing, namely, considering issues of policy. The critics—particularly the legal realists—ultimately gained the upper hand in the late 1950s with the writings of Brainerd Currie.⁴⁵ Currie rejected the bright-line certainty of Beale and the first Restatement in favor of interest analysis, which held that a court should examine the policies behind competing law in light of specific case facts in order to determine which jurisdiction's policies were implicated.⁴⁶ Among academics, interest analysis has become “the leading scholarly position, and the only doctrine that could plausibly claim to have generated a school of adherents.”⁴⁷ Despite the general agreement that interest analysis of some sort is preferable to vested rights, the agreement ends there, as interest analysis has, since Currie, come in a variety of flavors that would do Baskin-Robbins proud.⁴⁸

The Restatement (Second) of Conflict of Laws was finalized in 1971⁴⁹ in a world of broad agreement that the first Restatement needed to be repudiated;⁵⁰ however, there was only marginal consensus on what should replace it. The ultimate product has thus understandably been criticized as “mush”⁵¹

⁴⁵ See Reynolds, *supra* note 30, at 1380 (describing Brainerd Currie's articles from 1958 onward as “the weapons of legal realism ... brought fully to bear on the problems of choice of law.”); Giesela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT'L L. 801, 823 (2006) (calling Currie's governmental interest analysis the “most influential approach that arose in the course of the American conflicts revolution ...”).

⁴⁶ Reynolds, *supra* note 30, at 1381–82.

⁴⁷ Roosevelt, *supra* note 27, at 2466.

⁴⁸ See, e.g., ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW § 107 (4th ed. 1986) (including determination of “the better rule of law” in system of choice-influencing considerations); RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 351–52 (4th ed. 2001) (emphasizing pragmatic consideration of the consequences of selecting particular laws); William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 41–42 (1963) (advocating a form of interest analysis weighted toward selection of law of the jurisdiction whose policies would be more impaired by rejection).

⁴⁹ Prior drafts of this Restatement, however, had been exerting influence for many years before 1971. See Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232 (1997) (“In draft form, the Second Restatement attracted early attention from courts, including a prominent citation in the New York Court of Appeals pathbreaking 1963 *Babcock v. Jackson* decision.”).

⁵⁰ Ralph U. Whitten, *Curing the Deficiencies of the Conflicts Revolution: A Proposal for National Legislation on Choice of Law, Jurisdiction, and Judgments*, 37 WILLAMETTE L. REV. 259 (2001) (“There is a general consensus that the ‘conflicts revolution’ has been successful in destroying the premises on which the traditional vested rights, or “territorial,” system of conflict of laws was based.”).

⁵¹ Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 253 (1992) (describing the Restatement (Second) of Conflict of Laws as trying to be “all things to all people” and producing “mush” as a result).

and “a confusing morass.”⁵² Still, in the area of contract law, the Second Restatement, particularly its section 187,⁵³ represented a major step toward greater party autonomy, certainly as compared to Beale’s Restatement. It authorized such choice within limits. Under section 187, parties to a contract are free to choose the law of any state to govern their contractual rights and duties unless the state “has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice.”⁵⁴ Generally, American courts will honor the selection of non-forum law by the parties absent a fairly narrow exception by which the courts will not enforce law that would be “contrary to a fundamental policy of a state which has a materially greater interest than the chosen state” in the issue.⁵⁵ This approach might best be characterized as *confined* party autonomy. The two confining limitations are (1) that the chosen law is not allowed to be one with “no substantial relationship to the parties or the transaction” and “no other reasonable basis for the parties’ choice” and (2) that application of the chosen law must not violate a “fundamental policy” of a state with “a materially greater interest” than the state whose law is chosen in the contract. In the United States, section 187 is today considered “largely representative of American case law” on the issue of contractual choice of law.⁵⁶

⁵² Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731 (1990) (observing that Restatement (Second) of Conflict of Laws has not produced consistency in judicial analysis of choice-of-law issues).

⁵³ In full, section 187 provides:

(1) The 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.

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

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

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

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

⁵⁴ *Id.* § 187(2)(a) (1971, revised 1988).

⁵⁵ *Id.* § 187(2)(b).

⁵⁶ Ronald A. Brand, *The Rome I Regulation Rules on Party Autonomy for Choice of Law: A U.S. Perspective* (U. of Pittsburgh Legal Studies Research Paper Series No. 2011-29,

The Restatement's allowance of the possibility of parties selecting law predicated solely upon a "reasonable basis for the parties' choice"⁵⁷ certainly could be read as allowing significant party autonomy to select law unrelated to their transaction. Indeed, the drafters of Revised Article 1 used that phrasing from the Restatement as support for proposed section 1-301,⁵⁸ noting the comment to section 187 that contracts "are entered into for serious purposes and rarely, if ever, will the parties choose a law without good reason for doing so."⁵⁹ Still, the backstop requirement for at least a "reasonable basis" would circumscribe party autonomy, if only due to the inherent uncertainty of what a given court might find reasonable. The safer selection, in terms of certainty of enforcement, would be the law of a jurisdiction substantially related to either the parties or their transaction.

Former UCC section 1-105 was, like Restatement section 187, another result of the rejection of vested-rights theory. The choice-of-law section in the UCC emerged in its first widely adopted form in the 1958 Official Text of the Code.⁶⁰ While the UCC provision seems by its promulgation date to predate section 187 of the Restatement (Second),⁶¹ both products involved the ALI and were born of the "conflicts revolution" that sought both a rejection of Beale's formalism and greater respect for contracting-party autonomy in choosing governing law.⁶² Section 1-105 remained unchanged in its basic framework until its—temporary, as it turned out—replacement in 2001.⁶³ The core of former section 1-105 provided:

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the

Dec. 2011), *archived at* <http://perma.cc/J4RD-B6TH>. *But see* Whitten, *supra* note 50, at 260 ("[I]t is generally agreed that the states adopting the Restatement (Second) approach do not apply it in the way it was intended by its drafters, or, indeed, in any consistent way among themselves.").

⁵⁷ Brand, *supra* note 56, at 8.

⁵⁸ See Memorandum from Boris Auerbach, Neil B. Cohen, & H. Kathleen Patchel on Proposed UCC Section 1-301 to Members of the Am. Law Inst. 3 (May 10, 2001), *archived at* <http://perma.cc/W3D4-TDC3>.

⁵⁹ RESTATEMENT (SECOND) CONFLICT OF LAWS § 187, cmt. F.

⁶⁰ See Robert A. Leflar, *Conflict of Laws Under the U.C.C.*, 35 ARK. L. REV. 87, 94 (1981) ("The 1958 official draft of the Code ... put section 1-105 in very nearly its [1981] present form," with amendments being confined to the exceptions in subsection (2) necessitated by revisions of other articles of the Code.).

⁶¹ Despite its 1971 end product, the process of drafting the Second Restatement began nearly two decades prior in 1952. See Willis L.M. Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679, 680 (1963).

⁶² Borchers, *supra* note 49, at 1232 (describing the Restatement (Second) of Conflict of Laws as the product of a decades-long "conflicts revolution" that replaced formalism).

⁶³ Compare U.C.C. § 1-105 (1958), with U.C.C. § 1-105 (2000) (containing identical text save for certain cross references in section 1-105(2)).

parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.⁶⁴

Thus, parties to a transaction subject to the UCC could contract for the law of their choosing, provided that such law bore a “reasonable relation” to the transaction. This approach, like that of the Second Restatement, is also properly characterized as confined autonomy, even though the confining standard is framed differently. One paragraph of the Official Comments was devoted to the question of party autonomy, and it “mysteriously”⁶⁵ suggested that a “reasonable relation” did not necessarily mean a relation to the transaction: “[A]n agreement as to choice of law may sometimes take effect as a shorthand expression of the intent of the parties as to matters governed by their agreement, *even though the transaction has no significant contact with the jurisdiction chosen.*”⁶⁶ The question of where the outer bounds of party autonomy lay under former section 1-105 was “unanswered,” however, the official comments “suggest[ed] that common sense defines it.”⁶⁷ As for what courts actually did with the potentially broad party autonomy, Robert Leflar by 1981 could do no more than predict that “some day, in some courts” section 1-105 would “be held to be satisfied simply by the parties’ deliberate designation of a relevant law that in their opinion best serves the purposes of their voluntary transaction.”⁶⁸ Judicial interpretation of section 1-105

⁶⁴ U.C.C. § 1-105 (2000). Subsection (2), omitted from the main text above, listed exceptions to the general rule that largely dealt with the rights of third parties to a transaction:

(2) Where one of the following provisions of this Act specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods. Section 2-402.

Applicability of the Article on Leases. Sections 2A-105 and 2A-106.

Applicability of the Article on Bank Deposits and Collections. Section 4-102.

Governing law in the Article on Funds Transfers. Section 4A-507.

Letters of Credit. Section 5-116.

[If Article 6 has not been repealed:] Bulk sales subject to the Article on Bulk Sales. Section 6-103.

Applicability of the Article on Investment Securities. Section 8-110.

Perfection provisions of the Article on Secured Transactions. Section 9-103.

Id.

⁶⁵ Thomas G. Ryan, *Reasonable Relation and Party Autonomy Under the Uniform Commercial Code*, 63 MARQ. L. REV. 219, 225 (1979).

⁶⁶ U.C.C. § 1-105 cmt. 1 (2000) (emphasis added).

⁶⁷ Leflar, *supra* note 60, at 96.

⁶⁸ *Id.* at 98.

could conceivably have permitted the extensive party autonomy that was explicitly permitted some two decades later in proposed section 1-301. But as Neil Cohen, the reporter for Revised Article 1, suggested in a statement at the ALI's 2001 meeting, such judicial movement had, even by then, not occurred.⁶⁹ Little had changed from courts limiting their analysis of the reasonable relation limit on choice of law to "the presence of certain geographic contacts."⁷⁰ The sustained and relatively constrained approach to choice of law by courts applying former section 1-105 thus set the stage for a dramatically different proposal by the proponents of party autonomy.

B. Autonomy Ascendant?

Despite the absence of substantial judicial movement in the United States to expand party autonomy under former section 1-105, the concept gained momentum internationally. Ultimately, a collection of international norms coalesced and found their way into the pro-autonomy arguments that led to the promulgation of proposed UCC section 1-301 in 2001. The drafters and proponents used international trends toward expanded choice-of-law autonomy to craft an argument that not only was such contractual autonomy logical as a matter of private ordering, but the UCC had fallen behind the times for international business transactions. There had been, in other words, "an ubiquitous move toward a general extension of party autonomy as the starting point for conflict-of-laws assessment of international situations," and this move was accordingly "accompanied by calls from the ranks of legal scholarship for ever-broader expansion,"⁷¹ such as that proposed in Revised Article 1.

The three principal examples of "international norms" cited by the drafters of Revised Article 1⁷² were (1) the Inter-American Convention on the Law Applicable to International Contract, Article 7 (the 1994 "Mexico City Convention");⁷³ (2) the Convention on the Law Applicable to Contracts for the International Sale of Goods, Article 7(1) (the 1986 "Hague

⁶⁹ *Discussion of the Uniform Commercial Code, Revised Article 1*, 78 A.L.I. PROC. 427 (2001) [hereinafter *2001 ALI Proceedings*] (statement of Prof. Neil B. Cohen) ("Courts have done something very interesting with ... § 1-105: They have ignored it.").

⁷⁰ Ryan, *supra* note 65, at 228.

⁷¹ Florian Rödl, *Private Law Beyond the Democratic Order? On the Legitimatory Problem of Private Law "Beyond the State"*, 56 AM. J. COMP. L. 743, 753-54 (2008).

⁷² U.C.C. § 1-301 cmt. 2, ¶ 1 (2003).

⁷³ Inter-American Convention on the Law Applicable to International Contracts art. 7, Mar. 17, 1994, 33 I.L.M. 732, 734 [hereinafter *Mexico City Convention*], available at <http://perma.cc/8CV3-HT9C>.

Convention”),⁷⁴ and (3) the European Community (EC) Convention on the Law Applicable to Contractual Obligations, Article 3(1) (the 1980 “Rome I Convention”).⁷⁵ These three precedents, along with the 2008 European Regulation on choice of law that has since replaced the Rome I Convention, illustrate the strength of the drafters’ contention that sanctioning party autonomy had ascended to become not only common, but indeed dominant as a norm in international contracting.

First, the EC’s Rome I Convention was promulgated in 1980 for the purpose, among others, of providing choice-of-law rules for “Contracting States” in the EC.⁷⁶ Because the convention participants drafted it as a European treaty, the then-member nations of the EC were required to ratify Rome I before they were bound by it. The Convention was on its face unequivocal in mandating respect for party contractual autonomy: “[A] contract shall be governed by the law chosen by the parties.”⁷⁷ Moreover, the law susceptible to such choice was extensive; it need not have arisen from anywhere in the European Union.⁷⁸ The chosen law did, however, have to come from a nation or state, and not from commercial custom or a private or intergovernmental organization.⁷⁹

Despite its general rule of contracting-party autonomy, the Rome I Convention broadly exempted numerous contracts from such choice. For consumer contracts, contracting parties generally could not select law “depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence[.]”⁸⁰ Employment contracts similarly required application of protective law of the employee’s habitual residence.⁸¹ The Convention did not apply at all to many classes of contracts, including those relating to wills and succession, marital

⁷⁴ Convention on the Law Applicable to Contracts for the International Sale of Goods art. 7(1), Dec. 22, 1986, 24 I.L.M. 1573, 1575 [hereinafter Hague Convention], available at <http://perma.cc/59SZ-DC8X>.

⁷⁵ Convention on the Law Applicable to Contractual Obligations art. 3(1), opened for signature June 19, 1980, 1980 O.J. (L 266) 1 [hereinafter Rome I Convention], available at <http://perma.cc/B4JW-CV9Y>.

⁷⁶ See *id.* art. 27.

⁷⁷ *Id.* art. 3(1); see also Friedrich K. Juenger, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons*, 42 AM. J. COMP. L. 381, 383 (1994) (“The [Rome I] Convention’s lodestar is party autonomy.”).

⁷⁸ See Rome I Convention, *supra* note 75, at art. 2 (“Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State.”).

⁷⁹ See Juenger, *supra* note 77, at 384 (observing that Rome I Convention allows for application of only “the positive laws of particular states and nations” and finding such a positivistic limitation to be “a throwback to an earlier age” and “at odds with current commercial and judicial practice”).

⁸⁰ Rome I Convention, *supra* note 75, at art. 5(2).

⁸¹ See *id.* art. 6(1)–6(2)(a).

property, child support obligations, arbitration and forum-selection agreements, negotiable instruments (at least as to their negotiable character), and insurance contracts.⁸²

The 1986 Hague Convention, unlike its Rome counterpart, has never been adopted by enough nations for it to come into force, but it nonetheless supplied another reference point for the drafters of Revised UCC Article 1. On its face, this treaty would apply only to contracts for the international sale of goods,⁸³ rather than to contracts generally. Even then, it excluded from its scope contracts for “sales of goods bought for personal, family or household use” unless the seller neither “knew nor ought to have known” of the buyer’s consumer status.⁸⁴ The Hague Convention generally permitted contracting parties to stipulate the applicable law,⁸⁵ provided that the chosen law would allow such a stipulation.⁸⁶ Upon reaching litigation, however, the parties’ selected law would be disregarded to the extent it conflicted with mandatory rules of the forum in which their dispute was pending.⁸⁷ The forum could further pare back the parties’ choice of law to the extent application of such law “would be manifestly incompatible with public policy.”⁸⁸

The Mexico City Convention of 1994, intended for ratification by nations in the Western Hemisphere who are members of the Organization of American States (OAS),⁸⁹ also built from a basic premise of party autonomy in contractual choice of law. The regional OAS effort was inspired, in notable

⁸² See generally *id.* art. 1 (stating the scope of the treaty’s applicability).

⁸³ Despite their similar-sounding names, the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods should not be confused with the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980). The not-in-force Hague Convention deals entirely with choice-of-law rules, while the in-force United Nations CISG is a code of substantive law that applies to many international sales contracts. See generally Larry A. DiMatteo et. al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 24 NW. J. INT’L L. & BUS. 299, 308 (2004) (describing the CISG as an international sales law code).

⁸⁴ Hague Convention, *supra* note 74, at art. 2(c).

⁸⁵ See *id.* art. 7(1).

⁸⁶ See *id.* art. 10(1).

⁸⁷ See *id.* art. 17 (“This Convention does not prevent the application of those provisions of the law of the forum that must be applied irrespective of the law that otherwise governs the contract.”).

⁸⁸ *Id.* art. 18.

⁸⁹ As of this writing, the Mexico City Convention has not come into effect because it has been ratified only by Mexico and Venezuela. See Signatories and Ratifications, Inter-American Convention on the Law Applicable to International Contracts, available at <http://www.oas.org/juridico/english/sigs/b-56.html> (last visited Mar. 26, 2015), archived at <https://perma.cc/3VLR-ND9Y?type=source>; see also Charles R. Calleros, *Toward Harmonization and Certainty in Choice-of-Law Rules for International Contracts: Should the U.S. Adopt the Equivalent of Rome I?*, 28 WIS. INT’L L.J. 639, 658-59 (2011).

part, by the experience of the Rome I Convention for Europe.⁹⁰ If the parties provided for choice of law, then “[t]he contract shall be governed” by such law, with the exception of mandatory requirements, and it would be “up to the forum to decide” which of its laws qualified as “mandatory provisions.”⁹¹ This ability for each forum to select individual rules as mandatory, however, was not new to the Mexico City Convention, as it also was drawn from the Rome I Convention.⁹²

Those three sources, then, were the “international norms” available to and cited as support by the drafters of proposed UCC section 1-301. But the rise of autonomy continued even well afterward. In 2008, the original Rome I Convention described above was superseded by the “Rome I Regulation.” The Regulation was an enactment of the European Parliament, not a treaty. Unlike its predecessor, the Regulation mandated that it “shall be applied whether or not it is the law of a [European Union] Member State.”⁹³ The prefatory recitals to the Regulation showed that this body of law not only supported contractual party autonomy, but relied on it as a foundational principle: “The parties’ freedom to choose the applicable law should be one of the *cornerstones* of the system of conflict-of-law rules in matters of contractual obligations.”⁹⁴ Furthermore, while the Rome I Convention allowed only for “a choice between the laws of different countries,”⁹⁵ its replacement Regulation applied across the board to “contractual obligations in civil and commercial matters.”⁹⁶ Parties could thus choose non-state laws, such as model laws or UNIDROIT Principles.⁹⁷

Thus, the “international norms” claimed by the drafters of Revised UCC Article 1 strongly show today—as they did in 2001—a trend toward generally unlimited party autonomy in contractual choice of law in the non-consumer context. In significant part, cognizance of this trend led the ULC and the ALI to approve what became proposed UCC section 1-301. It fit the arc of legal history. The first Restatement of Conflict of Laws, which

⁹⁰ See Juenger, *supra* note 77, at 382 (finding that Rome I Convention “served as a model for our hemisphere’s drafters”).

⁹¹ Mexico City Convention, *supra* note 73, at arts. 7 & 11.

⁹² See Juenger, *supra* note 77, at 392 (“Like article 7(1) of the Rome Convention, article 11 of the Mexico City Convention authorizes decisionmakers to take into account not only the forum’s ‘mandatory’ rules of decision but also strongly held policies of a foreign legal system with which the contract has close ties. This would include, e.g., a third state’s antitrust laws or consumer legislation.”).

⁹³ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), 2008 O.J. (L 177) 6, 10 [hereinafter Rome I Regulation], available at <http://perma.cc/R8S6-N93S>.

⁹⁴ *Id.* ¶ (11) (emphasis added).

⁹⁵ Rome I Convention, *supra* note 75, at art. 1(1).

⁹⁶ Rome I Regulation, *supra* note 93, at art. 1(1).

⁹⁷ See Juenger, *supra* note 77, at 384.

rejected autonomy, had given way to former UCC section 1-105 and section 187 of the Restatement (Second), both of which sanctioned party autonomy to contractually choose governing law within stated (albeit amorphous) limits. In the realm of international contracts, treaties pushed the concept further, containing no general limits analogous to a “reasonable relation” standard, yet subjecting most consumer contracts to mandatory rules. Autonomy certainly seemed ascendant as Revised UCC Article 1 was drafted and promulgated.

II. THE PROMULGATION AND NOT-QUITE ADOPTION OF UCC ARTICLE 1

In many respects, the drafting and ultimate promulgation of Revised Article 1 in 2001 was no different than the long line of successes that had been a hallmark of the creation and updating of the UCC. Drafting occurred over a multiyear period and was the subject of substantial deliberation and debate by members of both the ALI and the ULC. The ultimate outcome, however, stands unique in the history of the UCC as having been an overwhelming political success—the states having widely adopted Revised Article 1⁹⁸—simultaneously mingled with the unanimous⁹⁹ political failure of proposed section 1-301. While discussions during the drafting process previewed the controversy over choice of law, few would have guessed the extent to which the concept of unbounded choice of law would face rejection.

A. *The Drafting Process*

According to prominent members of the drafting committee, “[t]he Article 1 revision process began with a report from an American Bar Association Task Force to the Permanent Editorial Board of the UCC recommending certain substantive revisions to Article 1. The Article 1 Committee was appointed in 1996.”¹⁰⁰ By November 1999, the Committee had completed a “Council Draft” for discussion at the following month’s meeting of the Council of the ALI.¹⁰¹ This draft of Revised Article 1, while not the earliest one, appeared far enough into the process that debate on choice of law crystallized over the following two years. Consistent with other versions, it contained

⁹⁸ See Rowley, *supra* note 12, at 13.

⁹⁹ Unanimous, that is, as to the fifty United States. See Kenneth C. Kettering, *Harmonizing Choice of Law in Article 9 with Emerging International Norms*, 46 GONZ. L. REV. 235, 247 (2011) (describing the rejection of proposed section 1-301 as being “[w]ith the negligible exception of the U.S. Virgin Islands”).

¹⁰⁰ Kathleen Patchel & Boris Auerbach, *The Article 1 Revision Process*, 54 SMU L. REV. 603 (2001). Kathleen Patchel was the Associate Reporter for the Article 1 Drafting Committee and Boris Auerbach was the Committee Chair.

¹⁰¹ U.C.C. Art. 1 (Council Draft, 1999).

what the Committee called “significant changes” to the then-existing Article 1 scheme for choice of law.¹⁰²

Structurally, the choice-of-law provision was moved from section 1-105 and renumbered as section 1-301,¹⁰³ a reorganization that was part of a larger goal of making Article 1 more user-friendly.¹⁰⁴ The Committee sought to place all rules of interpretation in the 1-100 series (Part 1) and definitions and related provisions in the 1-200s (Part 2), while substantive rules applicable throughout the Code became the new 1-300 sections.¹⁰⁵ From the drafters’ perspective, new section 1-301 was the “most significant change to Article 1,” so it was an appropriate choice to lead off the series of ten substantive provisions contained in Part 3. Although section 1-301 underwent several changes following the 1999 Council Draft,¹⁰⁶ the overall structure of Revised Article 1 remained unchanged through its final approval by ALI and ULC.

The prefatory note to the 1999 Council Draft prepared by the reporter, Professor Neil Cohen, opened by summarizing the new statute’s purpose as to allow “broad autonomy, with several important limitations” on choice of law in transactions within the scope of the UCC.¹⁰⁷ This autonomy included the ability to choose law “even if the transaction bears no relation to the State [of the United States] or country whose law is selected.”¹⁰⁸ The Reporter’s Note also identified domestic and international precedents for section 1-301.¹⁰⁹

The Code itself had previously allowed broad choice of law for funds transfers (Article 4A), letters of credit (Article 5), and investment securities (Article 8).¹¹⁰ The funds transfer article expressly authorized the choice of law “whether or not that law bears a reasonable relation to the matter in issue,”¹¹¹ while the letters of credit article similarly provided that the law

¹⁰² *Id.* § 1-301 reporter’s note.

¹⁰³ Earlier and less widely circulated drafts of Revised Article 1 numbered the provision as section 1-302, while the scope of Article 1 was described in section 1-301. *See, e.g.*, U.C.C. § 1-302 (Discussion Draft, 1997). When the “Scope of Article” section was moved out of Part 3 and into section 1-102 in Part 1, the choice of law provision became section 1-301. *See, e.g.*, U.C.C. § 1-301 (Council Draft, 1999).

¹⁰⁴ *See* Patchel & Auerbach, *supra* note 100, at 605.

¹⁰⁵ *See id.*

¹⁰⁶ *Compare* U.C.C. Art. 1 (Council Draft, 1999), *with* U.C.C. Art. 1 (2001) (placing the Article 1 choice-of-law statute at section 1-301 in both instances).

¹⁰⁷ U.C.C. § 1-301 reporter’s note a (Council Draft, 1999).

¹⁰⁸ *Id.*

¹⁰⁹ *See id.*; *supra* text accompanying notes 72–97 (describing “international norms” referred to by the drafters).

¹¹⁰ U.C.C. § 1-301 cmt. 2 (2001) (asserting that recognition of party autonomy with respect to governing law had been established in Articles 4A, 5, and 8 prior to the 2001 revision of Article 1).

¹¹¹ U.C.C. § 4A-507(c) (2012).

chosen “need not bear any relation to the transaction.”¹¹² The investment securities article did not, in contrast, explicitly disclaim a reasonable relationship limitation on choice of law, but allowed for similar autonomy through a provision giving discretion to securities issuers to “specify the law of another jurisdiction,” for various rights and duties related to the security.¹¹³ Notably, the two provisions clearly disclaiming the reasonable relation standard applied to transactions that are less common and less familiar among the general public: wire transfers and letters of credit.¹¹⁴ Article 1 was more “ubiquitous” and widely applicable, and thus more likely to attract broad attention and debate.¹¹⁵

Following the 1999 Council Draft, there was “extensive discussion at the December 1999 meeting of the Council, the 2000 Annual Meeting of the ALI, and the 2000 Annual Meeting of the National Conference of Commissioners on Uniform State Laws.”¹¹⁶ The proposals regarding choice of law “were the subject of more extensive Drafting Committee analysis and deliberation than any other topic.”¹¹⁷

Subsequent discussion of proposed section 1-301 was likewise extensive and occasionally heated. Given the later unfavorable response by the states to proposed section 1-301, one might assume that deliberation centered on questions of whether the drafters had gone too far with party autonomy. Many complaints at the ALI Annual Meeting in May 2000, however, suggested the opposite. Practitioners with an international focus went so far as to suggest the statute was “potentially offensive” to other nations.¹¹⁸ The concept of purely domestic United States transactions being limited to choosing the law of an American state was called, by more than one speaker, “xenophobic.”¹¹⁹

¹¹² *Id.* § 5-116(a).

¹¹³ *See id.* § 8-110(d).

¹¹⁴ *See id.* § 4A-507(c) & 5-116(a).

¹¹⁵ *See* Rowley, *supra* note 12, at 1 (“Because the provisions of Article 1 apply to the entire Code, the impact of decisions regarding what provisions it includes is greater than that for decisions regarding provisions in individual articles The ubiquitous nature of Article 1 justifies attention to its revision.”).

¹¹⁶ U.C.C. § 1 memorandum to council at xiv (Council Draft No. 2, 2000).

¹¹⁷ *Id.* at xiii.

¹¹⁸ *Discussion of the Uniform Commercial Code, Revised Article 1*, 77 A.L.I. PROC. 258 (2000) [hereinafter *2000 ALI Proceedings*] (statement of John K. Lawrence) (“I would appreciate the advice of the Reporter as to why it was felt necessary to exclude the choice of foreign governing law if it were a purely domestic transaction. It seems to me that that is potentially offensive to other countries, because it seems to suggest we don’t regard their law as an appropriate choice under particular circumstances.”).

¹¹⁹ *E.g., id.* at 260 (statement of Thomas Woodward Houghton) (“I strongly urge the [American Law] Institute to dissent from this provision. It is xenophobic; it is contrary to current practice. I have worked on matters involving oil and gas interests in Indonesia that

When Council Draft No. 2 came out later that year, the drafters defended the proposal from the critics contending it did not go far enough. The cover memo accompanying the draft included a ringing endorsement of contracting parties' right to choose law of a jurisdiction with no relationship to the transaction.¹²⁰ The 2000 Draft and its successors thus contained definitions for a "domestic transaction"¹²¹ and an "international transaction"¹²² and used them to state what had been implied: if a non-consumer transaction bore any reasonable relationship to a country outside the United States, then the parties could choose the law of any state or nation to govern.¹²³ The prefatory note to the 2000 Draft also credited it as following "emerging international norms,"¹²⁴ presumably insulating the drafters from further charges of xenophobia.

At the 2001 Annual Meeting of the ALI, discussion of Revised Article 1 continued to be dominated by choice of law, much of the discussion arising in the context of two motions that opposed certain aspects of the extension of party autonomy. The first motion by Professor Jay Westbrook sought to recommit Article 1 for one more year of consideration. Though Westbrook supported greater party autonomy in concept, he found that the as-proposed version of section 1-301 undermined the role of state legislatures: "[t]he real point is the mandatory rules that democratically elected legislatures in the states . . . that those rules can be completely overridden by an ungoverned party autonomy, and that is the problem, it is an ungoverned party autonomy. There is no reasonableness formulation; there is no limitation whatsoever."¹²⁵

The Drafting Committee opposed the Westbrook motion, in part, by appealing to section 187 of the Restatement (Second) of Conflict of Laws.¹²⁶

chose the law of Alberta. It is routine for people who are in different countries to choose the law of a jurisdiction that is neutral."); *see also id.* at 258 (statement of Houston Putnam Lowry) (describing the exclusion of foreign law from a transaction "having no reasonable relationship 'to any country other than the United States'" as being "xenophobic").

¹²⁰ *See* U.C.C. § 1 memorandum to council at xv (Council Draft No. 2, 2000) ("[T]his section [1-301] was misinterpreted by some commentators as allowing only the designation of the law of a foreign country to which the transaction bore some relation and was criticized as 'xenophobic' for that limitation. This draft is restructured to make it clear that limitation is not present.")

¹²¹ U.C.C. § 1-301(a)(1) (2003) ("'Domestic transaction' means a transaction other than an international transaction.").

¹²² *Id.* § 1-301(a)(2) ("'International transaction' means a transaction that bears a reasonable relation to a country other than the United States.").

¹²³ *Compare id.*, with U.C.C. § 1-301(a) (Council Draft No. 2, 2000).

¹²⁴ U.C.C. § 1, memorandum to council at xxii (Council Draft No. 2, 2000).

¹²⁵ 2001 ALI Proceedings, *supra* note 69, at 442–43 (statement of Jay L. Westbrook).

¹²⁶ *See* "Proposed UCC Section 1-301" Memorandum from Boris Auerbach, Neil B. Cohen, & H. Kathleen Patchel to Members of the Am. Law Inst. ¶ 2 (May 10, 2001) (on file with the ALI), available at <http://perma.cc/HPF7-NGVH>.

To the committee, the UCC proposal was close to the Restatement, which it asserted “upholds the designation of the law of a jurisdiction to which the transaction does not bear a reasonable relation so long as there is a ‘reasonable basis for the parties’ choice’” of law for their contract.¹²⁷ Moreover, states would still have the ability to govern private contracts through the ability to refuse to enforce law that violates “fundamental policy” of the state.¹²⁸ Section 1-301 was not, in the committee’s words, “an antidemocratic break with the past”¹²⁹

The second motion, by Professor William Woodward, sought to retain the reasonable relation rule from original Article 1 for domestic contracts while still eliminating it from international contracts. Woodward argued that “this is a place where we ought to go slowly” and “if this rule generates no problems at the international level . . . we might import it domestically.”¹³⁰ One market-based argument by proponents of expansive party autonomy, as described by Woodward, was that extensive autonomy would encourage states to “begin diversifying their law so that people would pick their law rather than . . . the law of some other state.”¹³¹ Woodward criticized this view by observing that it “almost defies the whole idea of lawmaking itself.”¹³² Both the Westbrook motion and the Woodward motion were ultimately defeated, and Revised Article 1—including section 1-301—was approved.

From the perspective of party autonomy, the heart of promulgated section 1-301 was its subsection (c). There, the UCC explicitly rejected the reasonable relation limitation on contractual choice of law. Apart from exceptions stated elsewhere, it set up two general rules:

- (1) an agreement by parties to a domestic transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State is effective, whether or not the transaction bears a relation to the State designated; and

¹²⁷ See Memorandum from Boris Auerbach, Neil B. Cohen, & H. Kathleen Patchel on the Motion of Professor Jay L. Westbrook to Members of the Am. Law Inst. ¶ 9 (May 10, 2001) (on file with the ALI), available at http://www.ali.org/ali_old/2001_Reporters_M3.htm (last visited Mar. 26, 2015), archived at <http://perma.cc/47ZX-FBWU> (citing RESTATEMENT (SECOND) CONFLICT OF LAWS, § 187(2)(a)). The committee arguably overstated the level of autonomy provided by the Restatement, as it provides that the parties’ chosen law will not apply if “the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice.” RESTATEMENT (SECOND) CONFLICT OF LAWS, § 187(2)(a) (1971). The use of “other reasonable basis” seems to have operated more as an extraordinary fallback position rather than as a commonly invoked rule.

¹²⁸ Memorandum from Boris Auerbach et al., *supra* note 127, at ¶ 2.

¹²⁹ See *id.* at ¶ 6.

¹³⁰ 2001 ALI Proceedings, *supra* note 69, at 512 (statement by Prof. William J. Woodward, Jr.).

¹³¹ *Id.* at 514.

¹³² *Id.*

(2) an agreement by parties to an international transaction that any or all of their rights are to be determined by the law of this State or of another State or country is effective, whether or not the transaction bears a relation to the State or country designated.¹³³

The UCC defined a “domestic transaction” as “a transaction other than an international transaction,” while an “international transaction” broadly encompassed any transaction that “bears a reasonable relation to a country other than the United States.”¹³⁴ Thus, a contract between two American contracting parties could quite plausibly be an “international transaction” if it had some discernable foreign component.

The approved version of section 1-301 had nearly 4,500 words of official comments accompanying it, a size that, while not completely unprecedented, certainly stood out as being on the long side. The extensive comments can best be read as a response to both prior and anticipated critics of the “significant rethinking of choice of law issues.”¹³⁵ One notable feature of the comments is the extent to which they emphasized the *lack* of party autonomy. Consumer transactions required application of the “relevant consumer protection rules ... of the consumer’s home jurisdiction.”¹³⁶ In business-to-business transactions that were wholly domestic (that is, not bearing “a reasonable relation to a country other than the United States”), the chosen law could only be that of an American state. All transactions would be subject to the “important safeguard” of an exception where no jurisdiction would be required to apply law “contrary to a fundamental policy” of that jurisdiction.¹³⁷ The drafters cited the oft-used statement from Judge Cardozo’s 1918 opinion in *Loucks v. Standard Oil Co. of New York*,¹³⁸ as a “helpful touchstone” for when this exception would apply, though the opinion was most noteworthy for emphasizing the rarity of the actual existence of a choice-negating policy,¹³⁹ and providing little guidance on garden-variety conflicts issues.¹⁴⁰ Finally, the drafters emphasized the limited extent to which section 1-301 would apply at all. For the section to be effective, a transaction would have to be (1) within the scope of the UCC and also

¹³³ U.C.C. § 1-301(c) (2003).

¹³⁴ *Id.* § 1-301(a).

¹³⁵ *Id.* § 1-301 cmt. 1 at ¶ 1.

¹³⁶ *Id.* at ¶ 3.

¹³⁷ *Id.* at ¶ 5.

¹³⁸ *Loucks v. Standard Oil Co. of N.Y.*, 120 N.E. 198 (N.Y. 1918).

¹³⁹ *See id.* at 202 (“The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness.”).

¹⁴⁰ *See Reynolds, supra* note 30, at 1378 (observing that a “public policy” exception “makes good sense when dealing with the laws of Nazi Germany, of course, but what about the laws of Connecticut?”).

(2) *not* otherwise controlled by choice of law rules in a specific article of the code—such provisions appearing in Articles 2, 2A, 4, 4A, 5, 8, and 9, and even in the widely repealed Article 6 on Bulk Sales.¹⁴¹

Given these significant exceptions to the actual application of proposed section 1-301, one might fairly wonder why either its supporters or their opponents would be invested in its promulgation at all. Would it truly matter? Less substance was at stake in the debate, I suggest, than the primacy of a view of what law *is*. Proposed section 1-301 ran too far contrary to the American view of legal legitimacy—and it did so in too prominent of a manner to ultimately succeed. Nonetheless, the concept behind less-anchored party autonomy had some powerful arguments in its favor.

B. The Pro-Autonomy Case

Many scholars, both before and after the promulgation of Revised Article 1, characterized the greater party autonomy of the sort contained in proposed section 1-301 as imminently sensible, with opposition to the project as backward. William Henning, who was heavily involved in the revision process for Articles 2 and 2A during the drafting of Revised Article 1,¹⁴² characterized proposed section 1-301 as having “represented a significant advance in the law” and charged that “its opponents never articulated a compelling, or even a particularly coherent, argument against it.”¹⁴³ Nonetheless, these opponents were “able to block its enactment . . .”¹⁴⁴ Before turning to proposed section 1-301’s rejection by the states, consideration of the underlying arguments favoring party autonomy is in order.

The notion of treating contract law different from, say, tort or criminal law, arises from the fact that contracts are essentially a *private* ordering of transactional obligations rather than a matter of public interest. Choosing law is thus no different from the voluntary decision to be bound by a contract in the first place. Proponents of choice-of-law autonomy thus find it foundational that “in the absence of third-party effects, the parties to the transaction should be permitted to choose the applicable law through contract”

¹⁴¹ U.C.C. § 1-301(g) (2003) (cataloging choice-of-law provisions that would supersede section 1-301).

¹⁴² Professor Henning was a member of the Committee to Revise Uniform Commercial Code U.C.C. Article 2—Sales from 1996 to 1999, chaired the reconstituted Committee to Amend Uniform Commercial Code U.C.C. Article 2—Sales and Article 2A—Leases from 1999 to 2001, and was Executive Director of the ULC (then the National Conference of Commissioners on Uniform State Laws) when amended Articles 2 and 2A were promulgated in 2003. William H. Henning, *Amended Article 2: What Went Wrong?*, 11 DUQ. BUS. L.J. 131, 131 n.1 (2009).

¹⁴³ *See id.* at 141.

¹⁴⁴ *Id.* at 142.

without reference to any limiting test.¹⁴⁵ In this view, law is not and should not be different from any negotiated and fully private contract term: let law be part of a marketplace.¹⁴⁶

Connected to this concept of law as a marketplace commodity, autonomy proponents have further suggested that free choice of law is, through competition, likely to promote more efficient laws in each jurisdiction.¹⁴⁷ From a law-and-economics perspective, “private parties are assumed to engage in transactions only when it is in their interest to do so” and their transactions “will be both welfare-increasing and value-maximizing.”¹⁴⁸ These value-maximizing parties should, as a result, be allowed “to maximize their return ... by selecting the legal regime that is best suited to their needs.”¹⁴⁹ The experience of international commercial law also suggests several reasonable grounds for supporting greater party autonomy in choice of law for non-consumer transactions.¹⁵⁰ From this perspective, the principal problem with proposed section 1-301 is that it did not go far enough. Two American contracting parties in a wholly domestic transaction, for example, should be able to select the law of the Cayman Islands but would not have been allowed such a choice. Contracting parties can have legitimate and non-mischievous reasons to wish to apply unrelated law. The parties may want a neutral jurisdiction’s law to apply so that neither side has a real or perceived hometown advantage.¹⁵¹ Unrelated law may be better

¹⁴⁵ Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 913 (2002).

¹⁴⁶ See ERIN A. O’HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 15 (2009) (advocating contractual choice-of-law autonomy as a means of creating a “law market” where parties could ultimately choose whether their transaction is bound by “quasi-mandatory” rules). Notably, O’Hara and Ribstein suggest that such a market could go well beyond contract law. See, e.g., *id.* at 11 (“Despite the difficulties these issues present, enabling a full-fledged market in marriage laws has potential value.”).

¹⁴⁷ See, e.g., Erin Ann O’Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1570 (2000) (describing the market-efficiency argument and its proponents); Michael J. Whincop & Mary E. Keyes, *Statutes’ Domains in Private International Law: An Economic Theory of the Limits of Mandatory Rules* (August 1998) at 12, available at <http://perma.cc/HY45-8XVX> (“Mandatory rules increase the costs associated with inefficient selection of terms by lawmakers where party preferences vary. [F]ew laws are completely mandatory—parties may reorder their transactions in a way that makes application of the laws of a disfavoured system unlikely.”).

¹⁴⁸ Guzman, *supra* note 145, at 913–14.

¹⁴⁹ *Id.* at 914.

¹⁵⁰ See generally Jack M. Graves, *Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. § 1-301 and a Proposal for Broader Reform*, 36 SETON HALL L. REV. 59 (2005).

¹⁵¹ *Id.* at 75 (“In fact, a choice of law, other than the seller’s own law, might well be fairer to all of the parties involved.”). For a rather extreme but entertaining story of the mischief of which parties are capable when they can have complete control of their governing law, see James Grimmelman, *Sealand, Havenco, and the Rule of Law*, 2012 U. ILL. L. REV. 405, 412–37 (describing the “stranger than fiction” creation and operation

developed, such as in the cases of Delaware corporate law or English maritime law. In a world of ever-increasing international commerce, the desire for American law to be “consistent with international norms”¹⁵² reflected by the European Union, China, and international trade treaties is certainly non-frivolous.¹⁵³ As previously noted, consideration of international commercial practices was prominent in the advocacy for section 1-301 during the deliberations leading up to its promulgation.¹⁵⁴

A particularly compelling substantive argument in favor of party autonomy is the already-existing extent of such choice by means of contractual arbitration clauses.¹⁵⁵ Under the Federal Arbitration Act, parties who wish to do so can avoid the substantive law of any jurisdiction with only the narrowest of exceptions.¹⁵⁶ Thus, the argument suggests, those who oppose permitting wide-ranging choice of law on the grounds of protecting state sovereignty are fighting a losing battle. The incentive already exists for parties to escape the laws of their sovereign through arbitration. An arbitrator is able to enforce the law of an unrelated jurisdiction in a way that the sovereign’s courts could not do given the restrictions of the reasonable-relation rule for contractual choice of law.¹⁵⁷ Recognition of party autonomy in the judicial system would reduce the incentives for parties to turn to arbitration in order to get their desired system of law. Given the judicial notion of comity, courts applying the law of another jurisdiction “are in a better position to protect state sovereignty,” and, if the reasonable-relation requirement is removed, “can do so in ways that will not necessarily drive parties desiring autonomy in choice of law away from court adjudication.”¹⁵⁸

of the “Principality of Sealand” on abandoned World War II antiaircraft platform seven miles off British coast).

¹⁵² Proposed U.C.C. § 1-301 cmt. 2.

¹⁵³ Graves, *supra* note 150, at 102–03 (citing Inter-American Convention on the Law Applicable to Int’l Contracts, Mar. 17, 1994, 33 I.L.M. 733 and Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 1980 O.J. (L 266) 1, 19 I.L.M. 1492); *see also* Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law*, 20 EMORY INT’L L. REV. 511, 516 (2006) (concluding that the dominant international perspective is that “party autonomy deserves full respect and need not have a relation base” with law selected by the parties).

¹⁵⁴ *See* Thomas Woodward Houghton, *78th Annual Meeting: 2001 Proceedings*, 78 A.L.I. PROC. 520 (2001) (“[T]his Institute is reinventing itself, so that it is no longer simply an American Law Institute, but it is an institute that is concerned with the law generally and not just in the United States.”).

¹⁵⁵ Graves, *supra* note 150, at 80–82.

¹⁵⁶ *See* 9 U.S.C. §§ 10–11 (2012) (stating nonsubstantive grounds upon which arbitration award may be judicially vacated or modified); *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 592 (2008) (holding that grounds stated for vacatur in section 10 of Federal Arbitration Act section 10 and for modification in section 11 of Federal Arbitration Act are exclusive).

¹⁵⁷ Graves, *supra* note 150, at 85.

¹⁵⁸ *Id.* at 87.

Though not necessarily intuitive, these arguments were (and still are) persuasive to many. Unrestricted choice of law is more consistent with the private and voluntary nature of contractual obligations, precisely as it is less consistent with the norm of law being generally applicable because it resides in the public sphere. Contractual choice of law can enable parties to make more economically efficient decisions and drive competing jurisdictions to improve their legal rules. It promotes international trade by making the United States' conflict-of-laws framework more consistent with the dominant approach of other nations. Finally, the substance of unrestricted contractual choice of law already exists in the United States via the Federal Arbitration Act. The academic argument sounds not only promising but indeed overwhelming, and it makes subsequent failure of proposed section 1-301 all the more worth careful evaluation.

C. Political Reaction

Following the success of proposed section 1-301 in gaining approval from both the ULC and the ALI, its fate after 2001 was dismal, and it stands in striking contrast to success of Revised Article 1. What happened? State legislative history of the enactments of Revised Article 1 between 2001 and 2008 is frequently not extensive, and successful efforts to thwart section 1-301 by replacing it could, in some circumstances, even predate a proposed bill.¹⁵⁹ But the record does show some procedural commonalities.

Texas was one of the first states to consider legislation adopting Revised Article 1, and it did so with the as-proposed version of section 1-301 already stripped from the bill and replaced.¹⁶⁰ The official bill analysis prepared from the as-introduced version of Revised Article 1 spoke of the Texas legislature's past record of "expanding party autonomy" but nonetheless retained the reasonable relation test of original section 1-105 because it "provides protection both for small businesses and consumers."¹⁶¹ A later bill analysis described the decision to keep prior choice-of-law language as preserving a "workable standard for choice of law among states." Moreover, "[i]f parties were allowed to choose any state law to govern an agreement with no regard to whether the transaction was related reasonably to that state, Texas courts increasingly would be burdened by the requirement

¹⁵⁹ See Boris Auerbach, *85th Annual Meeting: 2008 Proceedings*, 85 A.L.I. PROC. 303 (recounting Revised Article 1 proponents' use of a "hip pocket" amendment on choice of law in states "where it was clear that Article 1 revisions simply were not going to go forward").

¹⁶⁰ H. Comm. on Bus. & Indus., B. Analysis, Tex. H.B. 1394, 78th Leg., R.S. (2003), available at <http://perma.cc/GHB8-XFJT>.

¹⁶¹ *Id.*

to apply foreign law if litigation resulted from the agreement.”¹⁶² The stated rationale in Texas, one of the first states to adopt Revised Article 1, was thus a reluctance to tamper with what was working and a concern for burden on the judiciary.

The California version of the bill initially tracked the uniform proposal, but the modified choice-of-law statute was ultimately “amended out of the bill by the author” on the basis of unspecified concerns “raised by the business community.”¹⁶³ Hawaii’s experience was similar and likewise resulted in an amendment to the original bill.¹⁶⁴ California and Hawaii both reflect lobbying against the bill. Statements that the existing law was fine were largely conclusory.

For shedding light on why proposed section 1-301 was rejected, the Connecticut experience is especially instructive. Connecticut House Bill 6985, considered in 2005, did indeed contain section 1-301 as promulgated by its drafters. The choice-of-law provision drew a powerful objection in a public hearing before the legislature’s Judiciary Committee from the Property Casualty Insurer’s Association of America (PCI).¹⁶⁵ Connecticut is well-known as a center of the insurance industry, and PCI presented itself as “a property and casualty insurance trade association representing over 1,000 members” nationwide.¹⁶⁶ A collection of over 1,000 insurance companies is of a size and political influence that would be difficult for any legislature to ignore, and probably more so in Connecticut.¹⁶⁷

PCI’s representative, Jay Jackson, focused on section 13(c), the choice-of-law provision of the bill, as the only concern of his members. He began by emphasizing—not consumer issues or transactional costs—but the simple fact that a contract could choose law “whether or not the transaction bears a relationship to the state or country.”¹⁶⁸ Like any professional

¹⁶² H. Research Org., B. Analysis, Tex. H.B. 1394, 78th Leg., R.S. (Apr. 14, 2003), available at <http://perma.cc/66SS-WEPJ>.

¹⁶³ Cal. S. Judiciary Comm. Rep. on SB 1481 as Amended (May 9, 2006), available at <http://perma.cc/SZ4G-FL9E>.

¹⁶⁴ See, e.g., Haw. H.R. Rep. of the Comm. on Consumer Protection and Commerce on H.B. No. 1259 (2004) (attributing objections by Hawaii Bankers Association as the principal reason for deleting proposed section 1-301 and retaining “reasonable relation” requirement for choice of law), available at <http://perma.cc/Y3MU-LMUM>.

¹⁶⁵ Conn. Judiciary Comm. Transcript (Apr. 12, 2005) (statement of Jay Jackson, attorney representing the Property and Casualty Insurers Association of America), available at <http://perma.cc/UH7X-VBEN>.

¹⁶⁶ *Id.*

¹⁶⁷ Hartford, Connecticut has, for example, been nicknamed the “Insurance Capital of the World” and Hartford houses many of the world’s insurance company headquarters. According to *Forbes* magazine, insurance remains that region’s major industry. See FORBES HARTFORD, CT., archived at <http://perma.cc/LS63-TTZK> (Forbes profile of Hartford, CT).

¹⁶⁸ Conn. Judiciary Comm. Transcript, *supra* note 165.

advocate, an industry lobbyist would want to lead off with his strongest point, and Mr. Jackson succeeded here. This focus on the lack of relationship between the parties' transaction and their governing law is designed to provoke a visceral reaction. How on earth can parties do something like *that*? Undecided members of the committee could well have discomfort nagging them already.

At first, PCI's objection seems counterintuitive because it suggests that the parties disadvantaged by greater autonomy in contractual choice of law would be "Connecticut businesses."¹⁶⁹ In fact, if *any* business has the ability to benefit from wide-open selection of law, it would be an industry that relies heavily on adhesion contracts, as insurers do. Few parties would be better positioned than an insurer to choose the most favorable law for their contracts if the law permitted them to do so.

Nonetheless, even if one is cynical and reads "property and casualty insurers" in place of "Connecticut businesses" as the disadvantaged party in Mr. Jackson's warning, he is likely correct. Most mainstream insurance policies are designed as a defined but broad blanket of coverage where the insurer avoids financially unacceptable known risks by coverage exclusion.¹⁷⁰ Where coverage provisions are uncertain or ambiguous, they are construed against the insurer.¹⁷¹ What unlimited choice of law does, then, to risk-averse insurers, is introduce a largely unknown and (perhaps worse) *unquantifiable* risk into their equations.

That, then, is financial incentive for insurers to oppose proposed section 1-301. Mr. Jackson raised other, more populist points that have some persuasive value, even if they do not ring quite as true for his industry client. Connecticut businesses should have "the protections felt necessary by Connecticut lawmakers who enacted statutes governing business transactions."¹⁷² Adhesion contracts were also a concern, as "many electronic contracts or standard form contracts are drafted by a licensor that unilaterally determines its terms and conditions."¹⁷³ The concerns about the state legislature preserving its role in protecting its citizens would be persuasive to state legislators, but the concern about form contracts does not quite

¹⁶⁹ *Id.*

¹⁷⁰ See William E. O'Neil, *Insuring Contractual Indemnity Agreements Under CGL, MGL, and P & I Policies*, 21 TUL. MAR. L.J. 359, 371 (1997) (describing liability insurance as a "broad grant of coverage" subject to specified exclusions).

¹⁷¹ See John Randolph Prince, III, *Where No Minds Meet: Insurance Policy Interpretation and the Use of Drafting History*, 18 VT. L. REV. 409, 416 (1994) (describing the *contra preferentem* canon of construction whereby "insurance contracts are to be interpreted against their drafters, who are usually members of insurance trade association committees."); see also RESTATEMENT (SECOND) OF CONTRACTS § 206 (1979).

¹⁷² Conn. Judiciary Comm. Transcript, *supra* note 165.

¹⁷³ *Id.*

ring true. The insurance industry, after all, is built upon the use of relatively consistent form contracts.

Mr. Jackson's final entry in his parade of horrors arose from the area of software licensing: Connecticut businesses might find themselves governed by the software-vendor friendly Uniform Computer Information Transaction Act (UCITA), a uniform law enacted only in Maryland and Virginia and "which the Connecticut Legislature has in past sessions refused to implement."¹⁷⁴

Ultimately, both the ULC and the ALI acquiesced in 2008 to the "reality on the ground."¹⁷⁵ Thirty-three states had enacted Revised Article 1, and no jurisdiction—save the territory of the U.S. Virgin Islands—had enacted the 2001 version of section 1-301.¹⁷⁶ The 2008 (and still current) version of section 1-301¹⁷⁷ is, in the drafters' words, "substantively identical to former Section 1-105" from original Article 1 with only stylistic changes.¹⁷⁸ Put another way, official Article 1 once again requires that a transaction bear a "reasonable relation" to another American state or foreign nation before contracting parties may choose the law of such a state or nation to govern their transaction.¹⁷⁹ The official comments are, once again, a modest affair, covering less than 650 words,¹⁸⁰ the brevity all the more magnified by contrast to the tally of nearly 4,500 words in the 2001 version.¹⁸¹ For the first time since 2001, the official text of Article 1 reflected the dominant rule prevailing in the states.

At the time of the repeal, Boris Auerbach of the ULC recounted opposition from "bankers associations, who were very concerned that somehow

¹⁷⁴ *Id.* The Uniform Computer Information Transaction Act was, in early drafting, intended to be a new Article 2B of the Uniform Commercial Code, but ran into enormous criticism both as a possible part of the UCC and as a standalone uniform act. See David Frisch, *Commercial Law's Complexity*, 18 GEO. MASON L. REV. 245, 247–48 (2011) (describing UCITA and its in-draft predecessors as having endured "heated criticism from consumer, business, and governmental groups"); Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and Its Lessons for Policing of Standard Form Contracts*, 7 J. SMALL & EMERGING BUS. L. 393, 394 (2003) (describing "central flaw" of UCITA as being its "policy choice to allow digital producers to write their own intellectual property law using delayed standard form contracts").

¹⁷⁵ Neil B. Cohen, *85th Annual Meeting: Discussion of Proposal to Amend §1-301 (Choice of Law) of Revised Article 1 of the Uniform Commercial Code*, 85 A.L.I. PROC. 302 (2008).

¹⁷⁶ *Id.*

¹⁷⁷ See 85th Annual Meeting Program, Am. Law Inst., at 8–16 (May 2008), available at <http://perma.cc/GVR7-A87H>; Am. Law Inst., *85th Annual Meeting: 2008 Proceedings*, 85 A.L.I. PROC. 302–03 (2008).

¹⁷⁸ U.C.C. § 1-301 cmt. (2014).

¹⁷⁹ *Id.* § 1-301(a).

¹⁸⁰ *Id.* § 1-301 cmt.

¹⁸¹ *Id.* § 1-301 cmt. (2001).

these new rules and the new [consumer] protections would greatly affect them.”¹⁸² In particular, he described the banking interests as being concerned with the regulation of finance charges,¹⁸³ even though the UCC does not regulate such charges. The bankers, Auerbach observed, “are a formidable group when it comes to state legislatures.”¹⁸⁴ While interest groups and parochial concerns likely played some role in the process,¹⁸⁵ the misunderstanding described by Auerbach seems inadequate to explain a failure as widespread, yet narrowly targeted, as that of proposed section 1-301.

The demise of proposed section 1-301 was an exceptional moment in the UCC’s history. In fact, it stands out even more than the overwhelming rejection of the proposed 2003 revision of Articles 2 and 2A.¹⁸⁶ The 2003 versions of the articles governing the sale and lease of goods could be defeated by a lobbying effort capable of summary in two words: “Vote no.” The defeat of section 1-301 was more complex, as it occurred in the context of a highly *successful* rewrite of Article 1. The more procedurally complicated message accompanying Revised Article 1 was, “Vote yes, but change the choice-of-law section before you do so.” Each legislature was required, at some point in its process, to intentionally carve out choice-of-law from the bill proposed by the ULC and ALI. The failure of proposed section 1-301 is extraordinary because it occurred in the simultaneous context of a highly successful Revised Article 1, and it holds lessons beyond mere interest-group politics regarding the dominant American conception of the nature of law.

III. UNDERSTANDING FAILURE

The potential for a zone of unbounded choice of law through the UCC is, for now, gone. This failure is more than a mere piece of legal history, however. The demise of proposed section 1-301 is instructive and has implications for future law-reform efforts. The choice-of-law proposal embodied

¹⁸² Boris Auerbach, *85th Annual Meeting: Discussion of Proposal to Amend §1-301 (Choice of Law) of Revised Article 1 of the Uniform Commercial Code*, 85 A.L.I. PROC. 302 (2008).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See Graves, *supra* note 150, at 61–62.

¹⁸⁶ Several accounts have been written telling the story of the rejection of Revised Articles 2 and 2A and the convoluted process of reaching that point. See, e.g., Linda J. Rusch, *Is the Saga of the Uniform Commercial Code Article 2 Revisions Over? A Brief Look at What NCCUSL Finally Approved*, 6 DEL. L. REV. 41 (2003); William H. Henning, *Amended Article 2: What Went Wrong?*, 11 DUQ. BUS. L.J. 131 (2009); Fred H. Miller, *What Can We Learn from the Failed 2003–2005 Amendments to UCC Article 2?*, 52 S. TEX. L. REV. 471 (2011).

some independently laudable goals: legal certainty in transactions, efficiency, consumer protection, and better integration of American commercial law with international commercial norms in an era of increased economic globalization. Those goals, however, were ultimately sought at too high a price for the American legal tradition and its symbols. Rather than simply changing what American law *does*, proposed section 1-301 sought to change what the law *is*, at least in the popular conception. That was a step too far.

In this Part, I first attempt to illustrate how section 1-301 suffered from a visceral reaction problem; that is, the choice-of-law proposal tended, outside of certain academic and business circles, to provoke a negative reaction before any analysis of its merits or problems. The more interesting question is *why* such a negative visceral reaction occurred. Some have asserted that an unwillingness to conform American choice-of-law rules to international practices is, at best, illogical,¹⁸⁷ and at worst, xenophobic.¹⁸⁸ I suggest instead that the reaction has more complicated roots in a predominant American understanding of the nature of law. Second, I examine the issue in the context of legal philosophy, particularly in the lay understanding of the law, and show how section 1-301 ran contrary to that understanding. Finally, I consider political theory, particularly the role of myth and symbol, as a means for explaining American reticence toward allowing contractual choice of law on the scale originally embodied in Revised Article 1. Taken together, the visceral, legal philosophy, and political theory boundaries violated by proposed section 1-301 show that general applicability is a critical and central norm for achieving legal legitimacy in American law.

A. The Visceral Reaction Problem: Counter-intuition

Consider this statement: “Unrestricted choice of law sounds irrational.” The drafters and defenders of proposed section 1-301 would likely raise two strenuous objections to that proposition as applied to that statute. First, they would point out that proposed section 1-301 was not “unlimited.” In consumer transactions, it actually prohibited contracting out of protective law in the consumer’s home jurisdiction.¹⁸⁹ The proposal also contained a “fundamental policy” exception,¹⁹⁰ which would prevent truly offensive mischief by contracting parties and, at least conceptually, would short-circuit the parade of horrors that opponents of proposed 1-301 might advance.

¹⁸⁷ See Henning, *supra* note 142, at 141–42.

¹⁸⁸ See Houston Putnam Lowry, *supra* note 119, at 519 and accompanying text.

¹⁸⁹ See, e.g., U.C.C. § 1-301(e)(2) (2002) (stating that contractually-chosen law “may not deprive the consumer of the protection of any rule of law governing a matter within the scope of this section, which both is protective of consumers and may not be varied by agreement.”).

¹⁹⁰ U.C.C. § 1-301(f) (2002).

Second, the proponents would undoubtedly object to characterizing the jettisoning of the reasonable-relationship anchoring limitation on choice of law as “irrational.” Upon close consideration, many arguments and sound policies support the granting of greater party autonomy to sophisticated contracting parties in a private transaction.¹⁹¹ Even if one disagrees with the rationale for allowing such a high degree of autonomy for commercial parties, the argument cannot fairly be called irrational.

Both of these objections have great merit, yet the statement stands: unrestricted choice of law *sounds* irrational, especially at first blush and outside the halls of the academy and the international business community. Moreover, proposed section 1-301 *sounds* like unlimited choice of law, even where it substantively would have been no such thing. Consider this hypothetical fact pattern from the Official Comments by which the drafters sought to illustrate the scope of their proposal:

[F]or example, in a non-consumer lease of goods in which the lessor is located in Mexico and the lessee is located in Louisiana, a designation of the law of Ireland to govern the transaction would be given effect under this section even though the transaction bears no relation to Ireland.¹⁹²

This Ireland-law hypothetical, for which no facts are stated beyond those in the above excerpt, is a clear statement of just how far the UCC drafters intended party autonomy to extend. In that regard, the illustration is effective. The illustration, however, is equally effective in eliciting some flavor of the following reaction from the unprepared: “*Huh?*” If the reader questions the pervasiveness of this response, try soliciting a reaction to the Ireland-law hypothetical from a group of (a) non-lawyers or (b) first-semester law students, or even try the hypothetical on an experienced attorney whose practice does not encompass substantial interaction with conflicts of law or trans-national law. The puzzled reaction may not be unanimous, but it will be widespread.

In aid of his argument questioning the constitutionality of proposed section 1-301, Professor Richard Greenstein posited some non-UCC hypotheticals that would provoke a response similar to the Ireland-law transaction. “As I sit here in my Philadelphia office,” writes Greenstein, “I might for some reason desire that my conduct be subject to Surinamese criminal law, rather than to that of Pennsylvania.”¹⁹³ But, of course, such a previously expressed wish would not sway Pennsylvania authorities that sought to press criminal

¹⁹¹ See *supra* text accompanying notes 130–46.

¹⁹² U.C.C. § 1-301, cmt. 5 (2002).

¹⁹³ Richard K. Greenstein, *Is the Proposed U.C.C. Choice of Law Provision Unconstitutional?*, 73 TEMP. L. REV. 1159, 1181 (2000).

charges. “My wife and I cannot by mere agreement” further writes the Pennsylvania resident, “cause California law to govern our marriage.”¹⁹⁴

On the surface, Professor Greenstein’s examples and the drafters’ example from the Official Comments are the same: both illustrate law as something to be shopped for rather than being of general application. A fair-minded reader might object to that characterization, however. Criminal law and family law are quite different from a sophisticated commercial transaction in that the former are matters of public concern while the latter involves the creation of (arguably) entirely private rights. Nonetheless, the public-private distinction does not change the important surface commonality, which is that both involve *law*.

The social understanding of law is that the “applicability of law is, to a significant extent, independent of the wishes of individuals.”¹⁹⁵ In other words, virtually every provision of an unrelated jurisdiction’s law could conceivably be stated as express contract terms, and such terms could be enforceable as private terms rather than a body of public law.¹⁹⁶ That functional truth becomes irrelevant once the label of *law* is attached. The American social understanding changes along with the label. It matters what society calls “law” even where its substantive content or desirability is not known.¹⁹⁷

The drafters of Revised Article 1 and supporters of extensive party autonomy have given a number of sound and detailed reasons why sophisticated parties ought to be able to choose law that has no relationship to their transaction or contract.¹⁹⁸ Those reasons, however, are counterintuitive. They take substantial time, space, and effort to explain. In the United States in particular, the idea of unbounded choice of law broadly evokes a negative visceral reaction because it actively defies common intuition of what law is.¹⁹⁹ It would be easy to blame the negative response to proposed

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See Thomas W. Pounds, *Party Autonomy—Past and Present*, 12 S. TEX. L.J. 214, 218 (1970) (pointing out the availability of party autonomy where “many of the rules of law existing in a chosen jurisdiction could often be expressly included in the contract without violating any policies of the forum state”).

¹⁹⁷ THOMAS SCHULTZ, *TRANSNATIONAL LEGALITY: STATELESS LAW AND INTERNATIONAL ARBITRATION* 31 (2014) (“[G]enerally perceived legitimate authority obtains as a consequence of the fact that a normative system qualifies as law. It extends to all the individual parts of the system labeled as law, to all its norms, regardless of their contents, thus regardless of whether we even know their contents.”).

¹⁹⁸ See, e.g., O’Hara, *supra* note 146, at 157; Graves, *supra* note 150, at 75.

¹⁹⁹ See generally Arthur H. Garrison, *The Traditions and History of the Meaning of the Rule of Law*, 12 GEO. J.L. & PUB. POL’Y 565, 567–81 (2014) (describing historical bases for the American concept of the rule of law where, in Theodore Roosevelt’s formulation, “[o]bedience to the law is demanded as a right” against all).

section 1-301 on American parochialism or the influence of special interests fearful of the proposal's potential for greater consumer protection. Those factors could and likely did contribute to the statute's rejection, but they do not account for the *reflexive* and *overwhelming* negative reaction to it, a reaction one can still duplicate with use of the hypotheticals stated in this Section.

If the extent of the near-universal difficulties that proposed UCC section 1-301 faced in state legislatures can be attributed to negative visceral reaction, then the source of that reaction should be identifiable. The idea that governing contract law can be unrelated to the transaction of the contract has gained considerable acceptance elsewhere.²⁰⁰ Yet in the United States, the concept faced so much initial skepticism as to require an unusually lengthy roadmap explaining why the bizarre-sounding idea actually made sense. It would be easy to dismiss the experience as an instance of American parochialism or anti-intellectualism that simply fails to come to terms with the cosmopolitan realities of law in the twenty-first century. That dismissal would be both premature and wrong. In fact, the reaction arises in large part from strands of legal philosophy and political theory that have strong, pervasive roots in the United States.

B. The Legal Philosophy Problem: General Applicability

Legal philosophy frequently occupies itself with all-encompassing theoretical questions such as explaining the nature of law or describing the relationship between law and morality.²⁰¹ While those issues can lead to broad disagreement, even divergent legal philosophies overlap at some points, and such points are particularly descriptive of the popular culture of law in the United States. For example, H.L.A. Hart and Lon Fuller might disagree in their normative understandings of whether morality is inherent in law rather than entirely separate from it.²⁰² Such disagreement, nonetheless, does not undermine the fact that both have articulated understandings of the nature of law that resonate strongly in the American experience, even where the understandings might be inconsistent.²⁰³

²⁰⁰ See, e.g., Hannah L. Buxbaum, *Conflict of Economic Laws: From Sovereignty to Substance*, 42 VA. J. INT'L L. 931, 933–34 (2002) (discussing how such laws have potential to reduce friction in the area of foreign relations).

²⁰¹ H.L.A. HART, *THE CONCEPT OF LAW* 1 (photo. reprint 1979) (“Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question ‘What is law?’ No vast literature is dedicated to answering the questions ‘What is chemistry?’ or ‘What is medicine?’ as it is to the question ‘What is law?’”).

²⁰² See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 187–91 (1969 Revised Edition) (recounting and documenting multiple “rounds” of debate between Hart and Fuller on the topic).

²⁰³ See, e.g., Liam Murphy, *Better to See Law This Way*, 83 N.Y.U. L. REV. 1088, 1089–90 (2008) (observing that the Hart positivist tradition and the Fuller non-positivist

A useful starting point is with the understanding of what “law” is. In his essay “The Rule of Law and Its Virtue,” Joseph Raz observed that the aspirational maxim “government by law and not by men” is, in one respect, obscure.²⁰⁴ Government itself cannot exist without law, or else it is not government, but only the exercise of power. Since human beings establish the law and constitute the government, then “[s]urely government must be both by law and by men.”²⁰⁵ One possible logical reaction to this point would be to jettison the aspiration and assume that John Adams, Chief Justice Marshall, and others²⁰⁶ were mouthing an empty tautology. Raz, however, takes another approach. He finds that a dichotomy exists between the professional and the layperson’s meaning of law. A lawyer will tend to recognize anything as “the law” if it “meets the conditions of validity laid down in the system’s rules of recognition or in other rules of the system.”²⁰⁷ To the lawyer, law exists if its promulgation and authority are procedurally sound. The layperson’s conditions of validity, however, require more. To the non-lawyer, “the law is essentially a set of open, general, and relatively stable laws.”²⁰⁸ As a result, finds Raz, “[g]overnment by law and not by men is not a tautology if ‘law’ means general, open, and relatively stable law.”²⁰⁹ In other words, lawyers tend to view law as being all aspects of a legal system, including the legal construction of the government. A layperson, in contrast, thinks of law as being enacted legal rules, such rules being open (that is, knowable by the law’s subjects), relatively stable (that is, not subject to change on frequent or arbitrary whim), and general.²¹⁰ A normative baseline of general applicability is crucial to the lay understanding of “law” once that label has been applied rather than some other, such as “contract term.”

For present purposes, this quality of generality is most important, as it is an aspect of the layperson’s understanding of law that carries over with great force into descriptive legal philosophy, which is certainly not a province

tradition “agree that there is something potentially valuable about law” and that “there are often moral obligations to obey (some of) the law”).

²⁰⁴ JOSEPH RAZ, *THE RULE OF LAW AND ITS VIRTUE* (1979), reprinted in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 212 (1979).

²⁰⁵ *Id.*

²⁰⁶ See *supra* notes 1–2.

²⁰⁷ RAZ, *supra* note 204, at 213.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ For a marginally less serious insight into the distinctive views of lawyers and laypeople in interacting with the law, see MARK EDWIN BURGE, *WHO WANTS TO BE A MUGGLE? THE DIMINISHED LEGITIMACY OF LAW AS MAGIC* 333, 343–47, in *THE LAW AND HARRY POTTER* (Jeffrey E. Thomas & Franklin G. Snyder eds., 2010) (analogizing the lawyer-nonlawyer dichotomy in American legal system to wizards and Muggles in the *Harry Potter* books).

of the layperson. “In a modern state,” noted H.L.A. Hart, for example, “it is normally understood that, in the absence of special indications widening or narrowing the class, its general laws extend to *all persons* within its territorial boundaries.”²¹¹

Hart raised a dichotomy that is useful for present purposes: the separation of law into categories of primary rules and secondary rules.²¹² Primary rules are those that govern conduct by creating obligation to engage in or refrain from particular acts, such as the rules of criminal law and tort law.²¹³ All other legal rules, in Hart’s conception, are secondary rules.²¹⁴ While secondary rules include matters of legal procedure—such as the process by which a legal rule comes to be recognized as valid law—secondary rules also include matters of private ordering and obligation, a category that includes the law of contracts. Hart introduced the distinction between primary and secondary rules, among other reasons, as a means to deal with inadequacies in John Austin’s earlier theory of law,²¹⁵ which explained law entirely in terms of being commands or coercive orders.²¹⁶ Austin’s theory did not, without much twisting of the concept of coercion, deal with the categories of rules Hart placed in the secondary camp. Just as the layperson’s understanding of law tends to emphasize the importance of generality, it likewise emphasizes the role of Hart’s primary rules in the understanding of what “law” is. Returning to Raz’s point, then, the popular conception of law is that of general rules.²¹⁷ While the private and procedural secondary rules are, as Hart asserts, qualitatively different from their primary brethren, the label of law is affixed to both, and that label has consequences.²¹⁸ Both generality and primary-rule coercion are not descriptive qualities that necessarily fit in contract law, but they are intertwined with the popular conception of law.

Furthermore, the popular conception of law—once the label of “law” has been applied to it—tends to include general applicability as a moral imperative. Lon Fuller articulated “eight demands of the law’s internal morality,”²¹⁹ and at the very top of Fuller’s list is the requirement of generality.

²¹¹ HART, *supra* note 201, at 21 (emphasis added).

²¹² See *generally id.* at 79–99.

²¹³ See *id.* at 81.

²¹⁴ See *id.* at 95.

²¹⁵ See *id.* at 48.

²¹⁶ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 5 (1970) (“Every law or rule (taken with the largest signification which can be given the term *properly*) is a command. Or, rather, laws or rules, properly so called, are a *species* of commands.”).

²¹⁷ RAZ, *supra* note 204, at 213 (“It is one of the important principles of the doctrine [of the rule of law] that the making of particular laws should be guided by open and relatively stable general rules.”).

²¹⁸ *Id.*

²¹⁹ FULLER, *supra* note 202, at 46.

His principal example of violation of generality is of administrative agencies that, rather than issuing rules, decide matters on an *ad hoc* basis.²²⁰ Fuller's moral imperative of generality, however, does not always require that the law act impersonally, and states "that its rules must apply to general classes and should contain no proper names."²²¹ Yet generality is the guiding normative principle rather than the exception, and "Constitutional provisions invalidating 'private laws' and 'special legislation'"²²² are evidence of it. Ultimately, Fuller's generality is "a principle of fairness," which is an integral aspect of the morality of the law.²²³

Generality is a crucial quality of law, both in the popular conception and in philosophic conceptions. A broad underlying lay understanding of law is that it is general in its application. Although the generality principle exists as a matter of legal theory, it has a widespread "common-sense of fairness" aspect to it as well. Proposed section 1-301, I suggest, contradicted this understanding. But should such a contradiction matter, and why would the ability to contract out of generally applicable law be especially problematic in American jurisdictions? To whatever extent legal philosophy sheds light on the rejection of proposed section 1-301, that light might well be illusory. American state legislators and their constituents were almost certainly not reading Hart and Raz (*British* legal philosophers) after all. One can, nevertheless, legitimately connect the normative value of generality from legal philosophy to the failure of section 1-301, and that is by consideration of the role of myth and symbol in the United States.

C. The Political Theory Problem: Myth and Symbol

Political theory explaining the American tradition aids in understanding the fate of potentially unbounded choice of law represented by proposed section 1-301, and of particular importance is the work of Eric Voegelin and those applying his theories of political science. Myths and symbols, according to Voegelin, play a critical role in the political self-interpretation of a people.²²⁴ The myths and symbols representing the idea that no one being is above the law, and of government of laws and not of men, are potent in the American political understanding. Proposed section 1-301 was, from its

²²⁰ Richard A. Epstein, *Government by Waiver*, NATIONAL AFFAIRS, Spring 2011, at 39–40 (observing that providing waivers to generally applicable law is not "necessarily pernicious" but is inherently susceptible to abuse).

²²¹ FULLER, *supra* note 202, at 47.

²²² *Id.*

²²³ *Id.*

²²⁴ See generally ERIC VOEGELIN, ORDER AND HISTORY, VOLUME I: ISRAEL AND REVELATION (Maurice P. Hogan ed., 2001) (1956) (describing myths of Ancient Near East and symbolization of order in the history of ancient Israel).

outset, doomed to an uphill battle due to its violation of the general applicability norm reflected in these ideals.

The idea that law is generally applicable is a foundational, potent myth in the American political tradition. Use of the term “myth” is not intended to disparage a story or otherwise suggest that it is false. Rather, an idea rising to the level of “myth” suggests that it has achieved a high and pervasive level of cultural significance, regardless of its truth or falsity. The aspiration to be a nation of laws and not of men is a story “soaked up by living in a particular place and time” such that, in the United States in the early twenty-first century, the story has “become part of us . . . ready to orchestrate our understanding of the world, including the world of law.”²²⁵

Myth playing a role in law is not a new idea, even as it relates to the UCC.²²⁶ For example, the idea of a medieval and transnational law by which merchants policed themselves—a *lex mercatoria*—is firmly ensconced in the Code, which to this very day purports not to fully displace “the law merchant.”²²⁷ Though the point is hotly contested, some scholars have gone so far as to assert that historical evidence does not actually support the existence of a medieval law merchant, at least in its common understanding.²²⁸ The possible existence or non-existence of *lex mercatoria*, however, is irrelevant to its status. The story has attained such a level of legal mythology that it lives on, holding too much symbolic power as an ideal of borderless commercial law for it ever to vanish.²²⁹ Foundational myths like the law merchant “are not falsifiable by new evidence because their truth lies not in empirics but in a common faith.”²³⁰

The Voegelin usage of myth and symbol as a descriptive matter, in contrast, is not inherently positive or negative. It simply *is*. Political scientists

²²⁵ Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 889–90 (2010).

²²⁶ See, e.g., Franklin G. Snyder, *Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code*, 68 OHIO ST. L.J. 11, 12–13 (2007) (describing promulgation of Uniform Commercial Code as a creation myth in which Karl Llewellyn-led Legal Realists toppled “the life-devouring rule of the Titans of Legal Formalism” associated with Samuel Williston).

²²⁷ U.C.C. § 1-103(b) (2011) (“Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant . . . supplement its provisions.”).

²²⁸ See, e.g., Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153, 1156–59 (2012) (asserting that historical evidence does not bear out “the law merchant tale” and that “it is highly improbable that medieval merchants could have created, transmitted, and maintained a body of commercial customs that remained uniform from place to place”).

²²⁹ Kadens, *supra* note 228, at 1157.

²³⁰ Ralf Michaels, *Response: Legal Medievalism in Lex Mercatoria Scholarship*, 90 TEX. L. REV. 259, 264 (2012).

writing in the Voegelin tradition find that myths and symbols are the necessary means by which people constitute themselves into a political society. Political scientist Donald Lutz, for example, described the role of symbols and myths as providing a people's "meaning to their existence together" and serving to "link them to some transcendent order"²³¹ that allows them to act as a people in answering foundational political questions:

Through what procedures do we reach collective decisions? By what standards do we judge our actions? What qualities or characteristics do we strive to maintain among ourselves? What kind of people do we wish to become? What qualities or characteristics do we seek or require of those who lead us?²³²

"Far from being the repository of irrationality," concludes Lutz, "shared myths and symbols constitute the basis upon which collective, rational action is possible."²³³ Put another way, these ideals are foundational to a group whose members have bound themselves together as a people or a nation.

Thus, in applying Voegelin's approach, the ideas and stories that obtain this foundational status for the Jewish people can be found in the Torah in stories of the call of Abraham,²³⁴ the Exodus,²³⁵ and the Law of Moses.²³⁶ For the ancient Athenians, to take another example, Thucydides recorded foundational self-definition in Pericles' funeral oration.²³⁷ The Athenians envisioned their law around the symbol of democracy:

Our constitution does not copy the laws of neighbouring states; we are rather a pattern to others than imitators ourselves. Its administration favours the many instead of the few; this is why it is called a democracy. If we look to the laws, they afford equal justice to all in their private differences; if no social standing, advancement in public life falls to reputation for capacity, class considerations not being allowed to interfere with merit; nor again does poverty bar the way, if a man is able to serve the state, he is not hindered by the obscurity of his condition.²³⁸

In essence, whether Athens consistently lived up to ideals of equal justice and disregard of wealth and class is irrelevant. Pericles' oration was

²³¹ DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 6 (1988).

²³² *Id.*

²³³ *Id.*

²³⁴ *Genesis* 12:1–3.

²³⁵ *Exodus* 2:1–15:20.

²³⁶ *See, e.g., Deuteronomy* 4:1–8:20; *see also* VOEGELIN, *supra* note 224, at 157–87.

²³⁷ THUCYDIDES, *THE HISTORY OF THE PELOPONNESIAN WAR* 174–86 (Richard Crawley trans. 2008) (T.E. Wick rev. 1982) (431 B.C.E); *see also* ERIC VOEGELIN, *ORDER AND HISTORY, VOLUME II: THE WORLD OF THE POLIS* 443–47 (Athanasios Moulakis ed., 2000) (1957).

²³⁸ THUCYDIDES, *supra* note 237, at 176–77 (British spellings in original).

still the answer for each Athenian to the question of “What do I assert as *true*, as *good*, as *meaningful*, as *beautiful*?”²³⁹ The fact that the Athenians as a society had answers to these questions is indicative of their success at being a people instead of a mere population of individuals. These concepts and ideals defined who they were as a people in contrast to the rest of the world, and in contrast to their authoritarian Spartan enemies in particular.

So how does such political theory relate to the UCC and choice of law? The American myth and symbol of general applicability of law did not by itself doom proposed section 1-301. The complete overthrow of general applicability, however, made the proposal unlikely to succeed as a prominent default rule. The overarching view of contracted-for law as a default rule rather than an exceptional case is fundamentally inconsistent with the way Americans have defined themselves as a people.²⁴⁰ One who can consistently contract out of law is, at first blush, above the law, and a body of law that invites its treatment to be on an *ad hoc* basis is, in essence, a government of men (and women) rather than a government of laws. The British legal philosophers Hart and Raz were surely not thinking of American political culture and theory when they addressed law’s generality. Voegelin’s political theory of myth and symbol likewise was not articulated with commercial law in mind. Yet there is a fit. Proposed section 1-301 induced a negative visceral reaction in much of its audience, and the central role of generality as an American myth and symbol goes far to explain the reaction.

IV. MAKING FAILURE MATTER

One could reasonably suggest that proposed section 1-301 failed in part because it was *un-American*. But that statement would be loaded with McCarthyite overtones and calls for immediate disassembly. Unbounded choice of law is not nefarious. Rather, proposed section 1-301 could be labeled un-American only in the same way that the Eiffel Tower and the French Revolution are un-American; these things are—for good or for ill—simply not part of the American experience. Outside of elite quarters, American legal and political culture tends not to be receptive to an idea that has succeeded elsewhere: the idea that broad swaths of something called “law” are, as a normative matter, something out of which individual parties should be able to contract.

²³⁹ WILMOORE KENDALL & GEORGE W. CAREY, *THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION* 21 (1970) (explaining the Voegelin usage of myth and symbol).

²⁴⁰ *Cf.* BRUCE A. ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 14 (1998) (observing that law in America resists change based prior definitions of who constitutes “We the People” even after the establishment of “a more expansively conceived People”).

In addition, by substantially ascribing the failure of proposed section 1-301 to a negative visceral reaction grounded in American political theory that values particular aspects of legal philosophy, I do not for a moment imagine that state legislators and lobbyists were pondering deeply the myths and symbols contained in Founding Era documents. The Connecticut experience with Revised Article 1 certainly suggests otherwise, showing self-serving interests²⁴¹ just as much at work as one would expect anywhere in representative democracy.²⁴² What I *do* suggest, however, is that the symbolic aspiration of having “a government of laws and not of men” where “no one is above the law” is so powerful and deeply rooted in American political and legal culture that the stage was already set for proposed section 1-301 to fail.

In this Part, I assert that we can and should view the failure of proposed section 1-301 as an object lesson. Specifically, we can usefully learn how to think about and understand the dominant American view of general applicability of legal rules, particularly the relationship of general applicability to legal legitimacy. Here, I propose a framework for such an understanding to help predict and account for future difficulties where the American view of default general applicability of legal rules conflicts with other goals, such as accommodating globalization. We can account for differing views of general applicability just as we account for conflicts in legal processes and remedies between civil law and common law systems. Mere recognition that the conflict exists is the first step to working around the conflict.

A. The Socio-Legal Working Zone

Unbounded choice of law, I have suggested, tends to provoke a visceral negative reaction, and the reasons for this reaction in the American political and legal system are neither xenophobic nor irrational. First, the lay philosophical understanding of legitimate law is that it is by default generally applicable. While “[i]t is humanly inconceivable that law can consist only of general rules”²⁴³ the public expectation of law is that it does precisely that, except where necessity requires otherwise. Such necessity is exceptional, even if it is also common. Second, the shared myths and symbols of self-governance in the American tradition require a norm of general application

²⁴¹ See generally THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961) (“The latent causes of faction are thus sown in the nature of man But the most common and durable source of factions has been the various and unequal distribution of property.”).

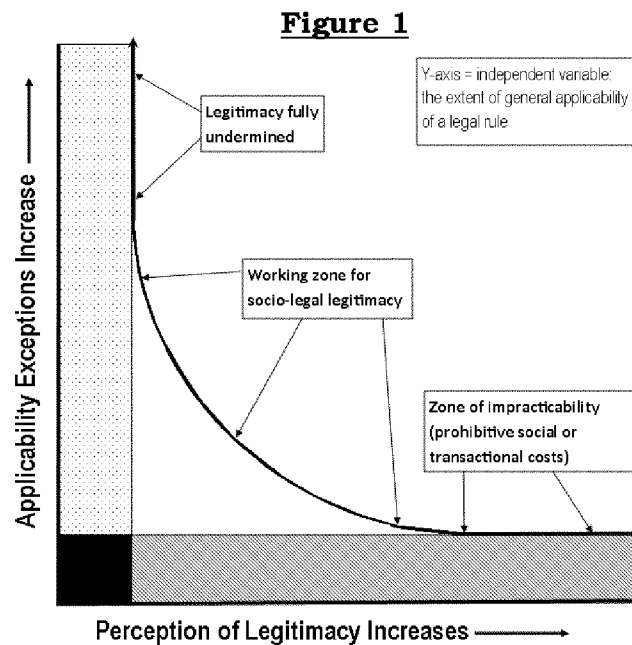
²⁴² See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) (describing a necessary quality of republican government as a structure where “[a]mbition must be made to counteract ambition”).

²⁴³ JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 213 (1979).

of legal rules. The ideal of “a nation of laws and not of men”²⁴⁴ is an inherent part of how this body politic has defined itself and how it acts.

The identification of reasons for visceral negative reactions to unbounded party autonomy is perhaps interesting, but is it at all useful? I suggest that it is, and that understanding the role of general applicability in the American political and legal system provides a framework and boundaries for future attempts at integrating the American system with any “international norms” of the sort that inspired proposed section 1-301. In other words, if one accepts that section 1-301 was overreaching and too clever by half, might one be able to determine the boundaries where it overreached?

Figure 1 below is an attempt to conceptualize in graphic form the relationship between general applicability of a duly enacted legal rule (that is, assuming no procedural irregularities in the rule’s enactment) and exceptions to that same rule. The quantitative extent of rule-exceptions forms the independent variable along the Y-axis, with perceived legitimacy constituting the dependent variable along the X-axis. The parabolic curve represents the potential points at which some form of the rule can exist.

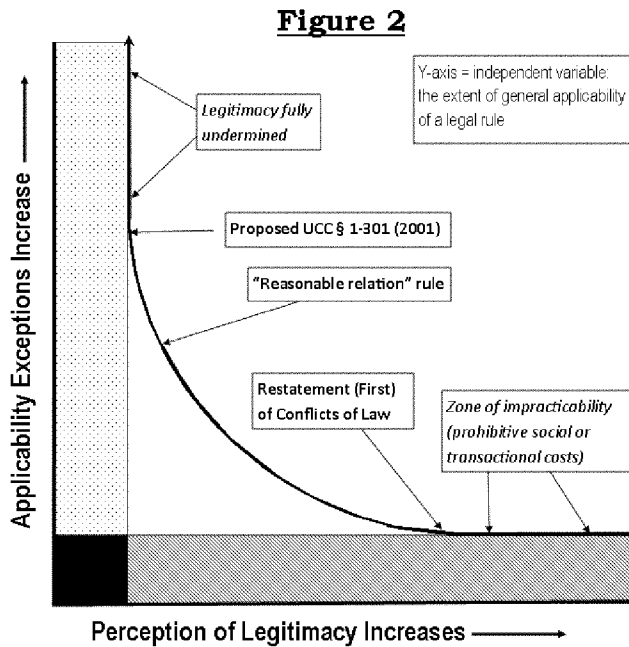


²⁴⁴ See *supra* note 2.

At its extremes, our hypothetical rule faces problems either of practicability or legitimacy. At the bottom of the parabolic curve, the rule is generally applicable to all persons subject to a jurisdiction's authority. While the applicability of such a rule lends to its perception as legitimate, its completely uniform application is impractical because of undue social costs (for example, unjust outcomes), undue transactional costs (such as enforcement difficulty), or some combination of both. At the top of the curve, in contrast, our rule lacks any pretense to general applicability, and exceptions by waiver or opt-out are so vast as to call into question not only the wisdom of the rule, but its very claim to legitimacy. The middle of the curve, accordingly, is the working zone for socio-legal legitimacy. Here, the rule has sufficient exceptions and flexibility built in such that its results are not unjust or outrageously expensive, but the rule is not so far from the general-application norm as to undermine its claim to be legitimate and evenly enforced law.

B. Contractual Choice of Law to Illustrate

Applying the general scheme described in Figure 1, the graph below states in visual terms how proposed section 1-301 and other past standards for governing contractual choice of law would compare to one another.



The pure and rigid vested-rights theory of the first Restatement of Conflicts of Law has the great benefit of general applicability contributing to its legitimacy. No one is above the law, which is applied evenhandedly, albeit with a lack of equity. Nevertheless, this Joseph Beale approach, despite its claim to legitimacy, must eventually falter. The social cost of certainty—prominent miscarriage of substantive justice—is simply too great. Sure enough, the first Restatement began to break down at its inception, first with escape devices that excused strict application,²⁴⁵ and eventually overwhelming displacement by the conflicts revolution and interest analysis.²⁴⁶

Toward the top of the curve, the autonomy-granting section 1-301 excels in its flexibility, but creates so many holes in the fabric of general applicability that it undermines the popular American conception of law. Something called “law” at this point on the chart has become a thing that, as a default matter, parties can freely choose to avoid. Here, the principle of general applicability has been so undermined as to call into question the law’s legitimacy and its very entitlement to be called “law.” Stated differently, being above the law has risen from a disfavored aberration to a systemic norm.

In the acceptable zone, then, is the UCC’s once and current reasonable-relation rule (and one could just as easily place section 187 of the Restatement (Second) of Conflicts of Law within the zone). In the middle range of the curve, contractual choice of law is authorized and occurs as a concession to practicality, avoiding the difficulties inherent as value on the X-axis increases. Many contracts have viable connections to multiple jurisdictions, and each of those jurisdictions has a colorable claim to having its law govern the contract. Giving the contracting parties autonomy to resolve the question of which law to apply in that situation is the least-bad solution to transactional uncertainty. Giving discretion to the parties does *some* harm to perception on the X-axis and allows for potential transactional mischief. It is, nonetheless, a workable middle-road between the culturally-valued myth of general applicability and the uncomfortable social costs of certainty without exception.

General applicability is not an absolute requirement, nor is it even a desirable feature in its absolute form. Indeed, the position away from extreme

²⁴⁵ See William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1206 (1997) (suggesting that the sustained need for “rule manipulation and the system of escape devices” ultimately led many courts to reject the first Restatement of Conflict of Laws).

²⁴⁶ Lea Brilmayer & Raechel Anglin, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1132 (2010) (“When the system of loopholes and exceptions [in the first Restatement] collapsed under its own weight, bellwether states like California and New York took their first steps toward modern ‘interest analysis.’”).

general applicability has the honored position of being the desirable “spirit of the law” that contrasts with the hard-nosed “letter of the law.” A just government should have some ability to create exceptions where the letter of the law leads to an undesirable result. Bounded discretion is a necessary feature of law in a liberal democracy.

Contractual choice of law is thus, in the American view, more of a necessary evil than a flexible transactional good (though it has qualities of both). The analogy that best makes this point is a comparison with forum shopping, which could also be expressed on the above graph. Forum shopping, of course, is popularly defined as a litigant's attempt “to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict.”²⁴⁷ The American legal system, particularly since the Supreme Court's articulation of the *Erie* doctrine,²⁴⁸ has viewed forum shopping as inappropriate and undesirable.²⁴⁹ Why? The oft repeated “twin aims” of the *Erie* rule are “discouragement of forum-shopping and avoidance of inequitable administration of the laws.”²⁵⁰ In principle, equitable administration of the law would mean that all courts evaluating the same facts under the same law would, with certainty, reach the same result. That ideal—absolute equitable administration of the laws—is impossible, of course, but *Erie* and its progeny sought to make forum shopping the discouraged exception rather than a rewarded norm. Inherent in the nature of having a federal system and human judges means that, as a necessary evil, some forum shopping will still occur. Widespread exploitation of rules that incidentally allow forum shopping is, however, not the same thing as a default rule that opens up forum shopping across the board. The myth and symbol of equal treatment under the law remains intact in a way that it could not in a judicial system that allows forum shopping as a matter of course. The *Erie* doctrine's condemnation of forum shopping is simply another manifestation of the general applicability norm in American law. A system where forum shopping was a fully authorized default practice would be positioned quite near proposed UCC section 1-301 on the graph. The actual system, which allows some degree of forum shopping by necessity rather than as a systemic good, would be positioned near the “reasonable relation” rule on the graph.

²⁴⁷ BLACK'S LAW DICTIONARY 655 (6th ed. 1990).

²⁴⁸ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

²⁴⁹ See Alan M. Trammell, *Toil and Trouble: How the Erie Doctrine Became Structurally Incoherent (and How Congress Can Fix It)*, 82 *FORDHAM L. REV.* 3249, 3272 (2014) (“The idea that forum shopping is inherently evil has become part of the received wisdom about *Erie* Scholars largely have accepted that received wisdom, even when they criticize the *Erie* doctrine on other grounds.”) (internal footnotes omitted); Note, *Forum Shopping Reconsidered*, 103 *HARV. L. REV.* 1677 (1990).

²⁵⁰ See *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

Contractual choice of law is conceptually both a necessary evil and a tool for transactional good. The dominant concept varies with the person imagining it. Just as a potential piece of litigation could arguably be tied to multiple courts and court systems, so too can the governance of a contract be tied to multiple bodies of law. Within limits, a plaintiff can successfully select a more favorable forum; within similar limits, contracting parties can choose their law from arguably applicable law. The idea of being able to obtain a legal outcome by selection of forum does, certainly in the abstract, induce an unfavorable visceral reaction. Unbounded contractual choice of law does likewise.

CONCLUSION: THE POWERFUL SYMBOL

*In those days there was no king in Israel: every man did that which was right in his own eyes.*²⁵¹

Proposed UCC section 1-301 plausibly represented the wave of commercial law's future at the time of the promulgation of Revised UCC Article 1. The treatment of contractual choice of law had been, over the twentieth century, an arc bending toward party autonomy. The 2001 proposal appeared to be, if not an ultimate destination, a highly probable or even inevitable stop along the way. It fully embodied the concept of contracts—non-consumer contracts, at least—as being matters of private ordering: the parties who chose to be bound to a contract could choose the body of law that governed that relationship. Well-informed and well-intentioned scholars—not least of whom included the voting membership of the ALI and the ULC—backed this point of law reform that would have put American commercial law in line with widespread international norms. But the plan failed. It was too clever by half.

For all of the consideration of the practical benefits and justifications of parties being able to select their *private* contract law, the concept hit great resistance in the United States because it was private contract *law*. Legal philosophers ponder the question of what law is because assigning the label of “law” to a body of rules has consequences. In the American popular and legal tradition, the consequence of a rule being a law implies at

²⁵¹ *Judges 21:25*. This description—not intended in its source to be complimentary—strikes me as an appropriate metaphor for the way unbounded choice of law fits in the American legal and political tradition; that is, unbounded choice of law does not fit terribly well. Credit for earlier metaphorical use of the quotation goes to historian Peter Novick. See PETER NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* 628 (1988) (describing the collapse of consensus on meaning and role of objectivity in American historiography in chapter obliquely entitled “There was no king in Israel”).

least a background adherence to general applicability. After all, no one is above the law in a nation of laws and not of men.²⁵² The conceptual symbols and myths baked into the preceding sentence are immensely powerful.²⁵³ Because proposed section 1-301 traversed these symbols and myths, it unintentionally was a frontal assault on a foundational principle to the public legitimacy of the law. The statute provoked a substantial visceral reaction against it for that reason. A private party having the unbounded ability to shop around for something called “law” does not fit the American conception of what law is. While a free market can be a beneficial thing in its proper place, law in the ingrained American view is not an enterprise out of which parties should have a general right to contract. Contractual choice of law is, rather like forum shopping in civil litigation, a price one must pay as a consequence of having multiple and overlapping legal systems. Proposed section 1-301 went too far in that it elevated the act of contracting around generally applicable law to a norm, rather than an exception.

The failure of proposed section 1-301 is more than a one-time event: instead, it is a cautionary tale for future law-reform efforts in the United States, particularly those motivated by ongoing globalization. Legal cultures include symbols and myths, and the story of law having general application is a particularly powerful one of these in American jurisdictions. Though it seems counterintuitive, unbounded contractual choice of law makes sense in practice but failed because it did not work in theory. Drafters of uniform laws, model codes, and treaties are well-advised to consider political symbols and myth in addition to the concrete policy implications of their proposals. In the United States, the ideal of law’s general applicability is a powerful symbol that cannot be easily traversed.

²⁵² See *supra* notes 1–2 and accompanying text.

²⁵³ See ACKERMAN, *supra* note 240, at 12–13 (“America is a legalistic country. As soon as reformers attempt an end-run around established principles and procedures, they will hand their opponents a potent political weapon.”).