



---

Fall 9-1-2008

## Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom

Timothy P. Glynn

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Commercial Law Commons](#), and the [Conflict of Laws Commons](#)

---

### Recommended Citation

Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 Wash. & Lee L. Rev. 1381 (2008). Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol65/iss4/4>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

# Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom

Timothy P. Glynn\*

## *Table of Contents*

I. Introduction .....	1382
II. Interjurisdictional Competition and the Firm.....	1389
A. Competition Models Compared.....	1389
B. Employment and Corporate Law Compared.....	1395
1. Demand-Side Incentives for Firms to Choose Legal Regimes.....	1395
2. Supply-Side Incentives for States to Compete .....	1403
3. Overcoming Resistance from Other States: Competition, Choice of Law, and Choice of Forum .....	1408
III. Noncompetition Agreements and Law-as-Commodity Interjurisdictional Competition: A Case-Study.....	1418
A. NCA Enforcement: Demand and Supply-Side Incentives.....	1418
B. Evidence of Emerging Competition?.....	1424
1. Law-as-Commodity Competition by Transactionally Connected States.....	1424
2. Competition for NCAs Without Significant Transactional Connections .....	1428
IV. Broader Implications and Tentative Thoughts on Interjurisdictional "Self-Defense" .....	1434

---

\* Professor of Law, Seton Hall University School of Law. I would like to thank Rachel Arnov-Richman, Kathleen Boozang, Carl Coleman, Rachel Godsil, Crystal Olsen Glynn, Tristin Green, Frank Pasquale, and Charles Sullivan for their comments on earlier drafts of this Article, and thanks to Andrew Behlmann, Nathan Brown, and Daniel Gottlieb for their research assistance. I would also like to thank the participants in Seton Hall's faculty presentation series and in the Second Annual Labor and Employment Law Colloquium.

A. Law-as-Commodity Competition in Employment Law .....	1434
B. Self-Defense Against Law-as-Commodity Competition: Some Tentative Thoughts .....	1437
V. Conclusion.....	1443

### I. Introduction

The phenomenon of states engaging in a regulatory "race to the bottom" in pursuit of business activity is familiar. Because firms take into account employment and labor standards (or the lack thereof) in deciding where to establish operations, states have incentives to maintain employer-friendly legal environments to attract or retain such activity.<sup>1</sup> Academics have long studied the potential effects of such territory-based competition on worker welfare, including the increase of outsourcing, downward pressure on wages, and declining union density and worker solidarity.<sup>2</sup>

This Article explores another type of interjurisdictional competition that is largely absent from the employment law literature. This brand of competition is extraterritorial in nature: A state seeks to benefit by convincing firms to select its legal regime to govern the terms of their relationships potentially

1. See, e.g., Katherine V.W. Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 990–92 (1995) (stating that "corporations prefer to establish production facilities in countries with lower wage rates, lower labor standards and fewer labor rights," and discussing the policy implications); see also Mario F. Bognanno et al., *The Influence of Wages and Industrial Relations Environments on the Production Location Decisions of U.S. Multinational Corporations*, 58 INDUS. & LAB. REL. REV. 171, 194 (2005) (concluding that American multinational corporations prefer to locate production in countries with fewer labor protections and lower wages).

2. Professor Katherine V.W. Stone surveys the literature on interjurisdictional competition and discusses the pressure it places on domestic labor and employment standards, wages, and other aspects of worker welfare. See Stone, *supra* note 1, at 990–97 (noting that firms' threats to relocate to competing, less-regulated jurisdictions result in decreased union bargaining power, union acceptance of lower wages, decreased incentives for union lobbying, and a loss of union cohesion with respect to strategy); Katherine V.W. Stone, *To the Yukon and Beyond: Local Laborers in a Global Labor Market*, 3 J. SMALL & EMERGING BUS. L. 93, 95–97 (1999) [hereinafter Stone, *Yukon and Beyond*] (discussing how globalization "diminishes labor's bargaining power," decreases the amount of domestic labor regulations, incentivizes the competitive lowering of labor standards, breeds organizational and inter-union distrust, and diminishes labor's political power); Katherine V.W. Stone, *In the Shadow of Globalization: Changing Firm-Level Employment Practices and Shifting Employment Risks in the United States 2* [hereinafter Stone, *Shadow of Globalization*] (UCLA Sch. of Law, Law & Econ. Research Paper Series, Paper No. 07-13), available at <http://ssrn.com/abstract=1023696> (explaining that globalization leads corporations to seek out territories with more flexible labor laws, which ultimately undermines employee wages, benefits, and job security).

*independent* of the location of underlying business activities. Put another way, in this market, a state "sells" its law as a commodity to parties operating or transacting business, in whole or in part, outside of its territory.<sup>3</sup>

Law-as-commodity competition is not a new concept—it has had a profound impact on the development of American corporate law. The "market" for business entity charters has driven legal decision making in many states<sup>4</sup> and has produced a clear winner: Delaware.<sup>5</sup> It has also spawned a vast literature on whether the resulting legal norms are problematic—corporate law's race-to-the-bottom/race-to-the-top debate.<sup>6</sup> Recent scholarship further

---

3. Scholars have used various terms to describe this phenomenon. Roberta Romano uses the term "law as a product" to describe what states that seek corporate charters are selling. Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 225 (1985). Professors Eisenberg and Miller refer to such competition as a "market for contracts." Theodore Eisenberg & Geoffrey Miller, *The Market for Contracts* 3 (N.Y.U. Center for Law and Econ., Working Paper No. 06-45, 2007), available at <http://ssrn.com/abstract=938557>.

4. See, e.g., Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?*, 21 OXFORD REV. ECON. POL'Y 212, 217–18 (2005) (discussing home-state steps to retain corporate charters); see also Larry E. Ribstein & Erin A. O'Hara, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661, 701 ("There is . . . evidence that states use antitakeover statutes to attract incorporations, and competing evidence that firms are seeking flexible rules and high-quality judicial systems."). Others have analyzed states' use of antitakeover provisions to retain charters. See, e.g., Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 412–15 (2003) (discussing statistical findings showing that "standard antitakeover statutes make[] a state more likely to retain a local firm" but that "recapture statutes" and "staggered board statutes" do not improve retention in a statistically significant way); Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1801 (2002) (finding that "managers generally migrate to antitakeover statutes"). But see Marcel Kahan, *The Demand for Corporate Law: Statutory Flexibility, Judicial Quality, or Takeover Protection?*, 22 J.L. ECON. & ORG. 340, 363 (2006) (concluding that antitakeover statutes have no effect on a state's retention of corporate charters).

5. See, e.g., Bebchuk & Cohen, *supra* note 4, at 391–94 (compiling findings indicating that Delaware captures almost 60% of all incorporations of publicly traded firms and over 80% of all non-home-state incorporations).

6. Compare Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1509 (1992) (arguing that competition leads to rules biased towards managerial interests), and William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 665–66 (1974) (arguing that competition results in a "race to the bottom"), with Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913, 915–17 (1982) (challenging Cary's analysis), and Romano, *supra* note 3, at 280–81 (arguing that competition results in a race to the top). Both sides have marshaled empirical evidence for their claims as to whether chartering in Delaware enhances firm value. Compare Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 555 (2001) (finding that chartering in Delaware enhances firm value), with Lucian Bebchuk et al., *Does the Evidence Favor State Competition in Corporate Law?*, 90 CAL. L. REV. 1775, 1820

suggests that law-as-commodity competition has emerged in commercial contracting.<sup>7</sup>

Such competition may now be emerging in employment contracting, but its market potential has received little consideration. There are two signs that it is becoming increasingly important. First is the apparent growth of choice-of-law clauses in employment contracts generally.<sup>8</sup> Second is the increasing attention firms pay to choice-of-law and choice-of-forum clauses in noncompetition agreements and the resulting downstream litigation over such clauses.<sup>9</sup> These developments are important because law-as-commodity competition, if it takes hold in the employment context, could have dangerous implications for workers—frustrating state-level employment law reform efforts, and, in some instances, speeding the race to the regulatory bottom.

In this Article, I explore why this type of interjurisdictional competition is present in the corporate area but, until recently, largely absent from employment relationships. At a general level, distinctions in both firm- and state-level incentives explain the difference. On the demand side, firm managers typically are less concerned about horizontal choice-of-law considerations in employment than in the corporate context, because state-to-state differences are usually insignificant compared to the legal risks from federal employment law. This helps explain why arbitration clauses, which redirect state *and* federal claims to a more employer-friendly forum, have become employers' predominant litigation-risk management technique (instead of choice-of-law or choice-of-judicial-forum clauses). On the supply side, states have fewer incentives to promote firm selection of their employment law extraterritorially. Such selection produces no direct revenue akin to that which corporate chartering generates. In addition, legal decision makers may face greater internal resistance to softening employee protections to promote their

---

(2002) ("[T]he evidence does not establish that Delaware incorporation produces an increase in share value."), and Guhan Subramanian, *The Disappearing Delaware Effect*, 20 J.L. ECON. & ORG. 32, 57 (2004) ("Delaware law does not improve firm value.").

7. See Eisenberg & Miller, *supra* note 3, at 17–21 (arguing that a market for contracts has emerged in various types of major commercial contracts).

8. It would be difficult to determine how many individual employment contracts contain choice-of-law clauses. However, the frequent inclusion of choice-of-law clauses in sample or model contracts prepared by attorneys and others offering employers risk management advice suggests that, at least in those employment contracts that are heavily lawyered, inclusion of such clauses is becoming more common.

9. The enforceability of choice-of-law clauses in the NCA context is frequently litigated. See, e.g., Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 374–76 (2003) (finding that 71 out of 697 commercial contract cases addressing choice-of-law provisions involved NCAs). Indeed, commentary on choice-of-law clauses in the employment context focuses primarily on enforceability in the noncompetition area. *Id.* at 376.

law than to chasing incorporations with permissive corporate law. Finally, other states with an interest in regulating the underlying activity are far less likely to adhere to the parties' choice of law in the employment context than in the corporate context. Thus, because employees often control forum selection (absent an arbitration clause), they are able to avoid the employer-preferred law by filing in a more hospitable jurisdiction.

Upon closer examination, however, the conditions that have prevented law-as-commodity competition in employment law are neither fundamental nor permanent, and there are signs of a changing dynamic. Enhanced employer demand for state employment law is likely to arise where (1) there are substantial differences between state legal regimes, (2) these differences are significant enough to trump employers' other employment law concerns, and (3) employers have some confidence that they can control forum selection. A state that establishes an employer-friendly regime may choose to compete for interstate and out-of-state employment contracts when it perceives the benefits of competition—pleasing home-state employers and enhanced counseling and enforcement business—and has a judiciary both able and willing to further its competitive aims. And, importantly, a state serious about engaging in such competition need not rely entirely on other states' accepting the extraterritorial application of its law. The state can attempt to force acceptance of its law through aggressive judicial tactics, for example, by racing to judgment.

To illustrate this prospect, this Article will demonstrate the presence of conditions favorable to law-as-commodity competition in the context of non-competition agreements (NCAs). Significant employer demand for favorable state law and enforcement may exist in the NCA context because application of state NCA doctrine varies greatly, the associated legal risks to employers may exceed all others, and enforcement of NCAs typically requires immediate judicial (rather than arbitral) relief. Moreover, because employers typically are the first movers in NCA litigation, they often can litigate in a hospitable judicial forum. In addition, once domestic interest group dynamics play out and a state emerges with an employer-friendly NCA regime, it may have powerful incentives both to attract enforcement business into the state and to protect home firms by offering to enforce its favorable law extraterritorially.

Furthermore, we now observe the rise of interjurisdictional disputes involving NCA enforcement<sup>10</sup> and, within these conflicts, judicial attempts to

---

10. See, e.g., Symeon Symeonides, *Choice of Law in the American Courts in 2001: Fifteenth Annual Survey*, 50 AM. J. COMP. L. 1, 26 (2002) ("[C]ases involving breach of non-compete covenants in employment contracts illustrate the temptations of forum shopping and test the limits of interstate comity. . . . Litigation often follows in both states, with each state tending to favor the local employer, which explains the incentive for a race to the courthouse.").

preempt other courts from disregarding the parties' choice of law. The leading example is the interjurisdictional tug-o-war in *Advanced Bionics Corp. v. Medtronic, Inc.*,<sup>11</sup> in which the California Supreme Court addressed the appropriateness of a lower California court's antisuit temporary restraining order (TRO) against Medtronic, a Minnesota firm that sought to preempt the California action with a second action in Minnesota.<sup>12</sup> Mark Stultz, a former employee of Medtronic, and his new California-based employer, Advanced Bionics, brought the California suit seeking a declaration that the NCA Stultz signed with Medtronics and the choice-of-Minnesota-law clause it contained were invalid under California law.<sup>13</sup> After delaying the California action by improperly removing it to federal court,<sup>14</sup> Medtronic filed the Minnesota action and obtained a TRO and then a preliminary injunction enjoining Advanced Bionics from hiring Stultz and barring both parties from seeking relief in another court.<sup>15</sup> In response, Stultz and Advanced Bionics sought and received the antisuit TRO from the California court.<sup>16</sup>

On appeal, the California Supreme Court rejected the lower court's use of the TRO.<sup>17</sup> Although the majority acknowledged California's strong interest in protecting employees from NCAs,<sup>18</sup> it concluded that California's commitment to the norms of judicial restraint and comity rendered the antisuit TRO improper.<sup>19</sup> This is in stark contrast to the approach of the Minnesota trial and

---

11. See *Advanced Bionics Corp. v. Medtronic, Inc.*, 59 P.3d 231, 238 (Cal. 2002) (holding that the lower court should not have issued a temporary restraining order prohibiting the defendant from proceeding in the later-filed Minnesota suit).

12. *Id.* at 232–35.

13. See *id.* at 233. The NCA almost certainly would be invalid under California law, which broadly prohibits NCAs and unlawful restraints on trade. *Id.* at 237. Under Minnesota law, the clause is more likely to be enforceable. See *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 454 (Minn. Ct. App. 2001) (finding Minnesota law, which disfavors non-competition agreements but will enforce them in certain contexts, to be in conflict with California law, which much more clearly deemed the non-competition agreement unenforceable).

14. See *Advanced Bionics*, 59 P.3d at 234 (noting the federal district court's finding that Medtronic had removed the action "for the improper purpose of avoiding an unfavorable ruling upon a pending motion before a state court").

15. *Id.* at 233–34. When the Minnesota court converted the TRO into a preliminary injunction, it failed to include the antisuit portion. *Id.* at 234. The court later amended its order to include the antisuit language from the TRO. *Id.* The Minnesota Court of Appeals affirmed the injunction. *Medtronic*, 630 N.W.2d at 456–57.

16. *Advanced Bionics*, 59 P.3d at 234. The California court issued the TRO after the federal court had remanded the matter. *Id.*

17. *Id.* at 238.

18. *Id.* at 236–37.

19. *Id.* at 235–38. The Court reached this conclusion despite Medtronic's behavior and

appellate courts, which exhibited little restraint and no deference to the first-filed California action.<sup>20</sup> The Minnesota courts' actions suggest that they not only were complicit in Medtronic's obstruction of the California action but also aggressively sought to ensure extraterritorial application of Minnesota's employer-friendly NCA law.<sup>21</sup> While such judicial behavior does not establish that Minnesota is consciously marketing its legal regime as a commodity, it is consistent with the incentives described above and illustrates the role courts can play in furthering a state's competitive aims. In this setting, comity seems to run only one way, leaving California's public policy at risk to aggressive state-law exporters.

Using NCA enforcement as a lens, this Article explores a number of broader themes. First, it suggests that the potential for law-as-commodity competition in employment law extends to other contexts.<sup>22</sup> Conditions conducive to such competition may emerge in several areas, including other controversial employer-protective terms, new, enhanced employee protections, and reforms that blur the traditional lines between corporate and employment law. If these kinds of conditions materialize, employers may deploy several strategies to manage legal risks; among them is selecting the law of employer-friendly states willing to protect their selection.

This Article then addresses how states can defend their workers and other regulatory interests against competition-produced foreign law.<sup>23</sup> A state has great freedom to reject party autonomy in law and forum selection when the activity at issue is within its territory and the chosen law or forum defeats an important local public policy.<sup>24</sup> But the lurking danger is that such freedom will not be exercised effectively, particularly if legal decision makers fail to recognize the threat to domestic prerogatives law-as-commodity competition

---

the likely contrary outcome in the Minnesota litigation.

20. See *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 449 (Minn. Ct. App. 2001) (concluding that "[c]omity does not require that Minnesota defer to the California court in this matter" and that "[t]he cost to and the convenience of the litigants do not weigh heavily in favor of deference to California").

21. In upholding the preliminary injunction, the Minnesota Court of Appeals concluded that the first-filed rule is not intended to be inflexible and that Minnesota has a strong interest in having contracts executed in the state enforced according to party expectations. *Id.* at 449–50. While acknowledging that the federal court had found that Medtronic's removal was for an improper purpose, the court rejected the argument that Medtronic acted in bad faith. *Id.* at 450.

22. *Infra* Parts II.B.1 & II.B.2.

23. *Infra* Part II.B.3.

24. See, e.g., Timothy P. Glynn, *Delaware's VantagePoint: The Empire Strikes Back in the Post-Post-Enron Era*, 102 NW. U. L. REV. 91, 118–23 (2008) (arguing that the internal affairs doctrine—the prevailing horizontal choice-of-law rule in the corporate context—does not have a constitutional dimension, and states are largely free to apply their own law to corporate relationships within firms that have substantial contacts with the forum but foreign charters).



poses. Thus, lawmakers must be conscious of how competing jurisdictions may seek to force adherence to their laws through aggressive judicial tactics. For example, in *Advanced Bionics*, the California court should not have ignored the Minnesota courts' behavior or the fact that Minnesota was unlikely to exercise reciprocal restraint.

Next, states concerned about law-as-commodity competition must adopt other enforcement strategies to counteract the threat. Among these, the most dramatic is a shift from private enforcement to a public model, in which the state itself enforces its legal norms against employers seeking to circumvent them with foreign judgments. In some circumstances, the threat of public enforcement may be the only way to deter firms from thwarting local public policies by taking advantage of another state's aggressive competition strategy.

This Article offers important lessons regarding not only interstate struggles to control NCA law but also law-as-commodity competition generally. The conditions favorable to such competition are emerging in the employment context. As they expand, states will compete for selection of their law and encourage firms to race to their courthouses to avail themselves of it. States that wish to maintain regulatory schemes safeguarding their workers must be aware of the threat and respond strategically to stave off the creeping nullification of the protections they provide.

Part II of this Article compares types of interjurisdictional competition and considers why law-as-commodity competition is pervasive in corporate law but is only now beginning to emerge in employment law. It explores the contrasting incentives that have traditionally led the principal actors—firm managers, potentially competing states, and other interested states—to behave differently in the corporate and employment contexts. It then discusses how these incentives may change and how managers and competing states could overcome resistance to such competition through aggressive enforcement tactics. Part III builds on this analysis by surveying the conditions conducive to law-as-commodity competition in the NCA context. It begins with a discussion of the factors that alter managerial and state incentives in this area and the ways in which states wishing to engage in NCA enforcement competition might overcome resistance from other states. It also explores the evidence that states are currently engaged in such competition. Finally, Part IV turns to broader implications, considering additional areas of employment law in which law-as-commodity competition might emerge. Further, this Part offers suggestions on how states concerned about the threat to local interests can defend against such competition and its effects on local workers.

## II. Interjurisdictional Competition and the Firm

### A. Competition Models Compared

Interjurisdictional competition (or "regulatory competition") involves the deployment of legal incentives by national or subnational governments to attract or retain benefits from firms or persons with the ability to direct their activities or capital into the jurisdiction.<sup>25</sup> In a globalizing world where capital and commercial activities frequently cross jurisdictional borders, such competition affects many regulatory areas governing business operations and relationships.<sup>26</sup> The impact of such competition on social welfare—including the pressure it puts on states to deregulate or soften legal enforcement—is a matter of intense scholarly and public policy debate.<sup>27</sup>

But interjurisdictional competition can take different forms. This is true even with regard to corporate and employment law, two regulatory areas that have much in common: Both govern private relationships between principal actors within business entities and, in both areas, management typically chooses the terms governing these relationships.<sup>28</sup>

---

25. See, e.g., Stone, *supra* note 1, at 992–93 ("Countries now have an incentive to compete for business by altering their domestic regulations in order create a regulatory environment that business will find attractive. This . . . has been termed 'regulatory competition.'").

26. See Richard A. Bales, *Explaining the Spread of At-Will Employment Doctrine as an Inter-Jurisdictional Race-to-the-Bottom of Employment Standards*, 75 TENN. L. REV. 453, 464 (2008) (noting that scholars have found effects of competition on trust, banking, environmental, tax, local government, property, bankruptcy, and family law areas); *id.* at 469–71 (describing an international race to the bottom in labor regulation); Stone, *supra* note 1, at 992–93 (noting prior scholars' concerns that regulatory competition will affect banking, environmental regulation, products liability, tort law, and labor standards); Stone, *Yukon and Beyond*, *supra* note 2, at 95–96 (positing that international regulatory competition affects labor standards).

27. In *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 541 (1933) (upholding a Florida statute that imposed a flat tax on opening and maintaining stores against an equal protection clause challenge despite the fact that the tax did not adjust to the amount or value of each store's business), Justice Brandeis observed the deregulatory effect of interjurisdictional competition in the corporate context, stating: "Lesser States, eager for the revenue derived from the traffic in charters, had removed safeguards from their own incorporation laws. . . . The race was one not of diligence but of laxity." *Id.* at 557–59 (Brandeis, J., dissenting). William Cary initiated the scholarly discussion of the competition-induced "race for the bottom" in the corporate context. Cary, *supra* note 6, at 705. Today, whether interjurisdictional competition produces socially beneficial outcomes remains a matter of great scholarly disagreement in many areas, including employment. See, e.g., ROGER BLANPAIN ET AL., *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW* 8–11 (2007) (discussing the debate over globalization and whether it has spawned a race to the bottom in the labor context); Stone, *Shadow of Globalization*, *supra* note 2, at 1–3 (same).

28. See, e.g., Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The*

As an initial matter, discussions regarding interjurisdictional competition in these two areas have focused on different levels of government. In the employment law context, domestic state-versus-state competition garners some scholarly attention,<sup>29</sup> but the principal contemporary public policy concern is international competition.<sup>30</sup> In corporate law, interstate rather than international competition for corporate charters has been the primary subject of scholarly interest,<sup>31</sup> although, recently, the potential for American-style charter competition among member states of the European Union and international competition for securities regulation have become matters of heightened interest.<sup>32</sup>

---

*Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 963–64, 977–80 (discussing management's substantial advantages at the formation stage of employment relationships); see also Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 392 (2006) [hereinafter Estlund, *Between Rights and Contract*] (discussing lower-level employees' limited bargaining power); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 340 (2005) (observing that employers typically impose arbitration clauses on employees without negotiation); Glynn, *supra* note 24, at 102 (describing managers as "the prime movers in chartering decisions").

29. See, e.g., Bales, *supra* note 26, at 455 (arguing that at-will employment spread due to competition for capital among under-industrialized states).

30. See, e.g., *id.* at 469–71 (describing an international race to the bottom in labor regulation); Stone, *supra* note 1, at 990–97 (discussing the labor regulation concerns globalization raises). American states undoubtedly engage in interjurisdictional competition to increase employment by drawing business into the jurisdiction, as evidenced by the fact that states have touted their business-friendly employment law norms over the past century to attract business activities. *Id.* at 990–91. However, states also utilize tax breaks and other enticements external to employment law to attract such business activities. See, e.g., Bebchuk & Cohen, *supra* note 4, at 421 (discussing other factors that make states attractive to firms, including adoption of the uniform Model Business Corporation Act and the use of antitakeover statutes). Softening or manipulating basic employment law standards—which, as discussed below, are relatively permissive and uniform—is not the primary mechanism states utilize to compete for employment-producing business activities.

31. See *supra* note 6 (citing literature regarding the race to the bottom/race to the top debate in corporate law, which focuses almost exclusively on competition between states).

32. A wave of charter competition scholarship followed the European Court of Justice's 1999 decision in *Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, Case C-212/97, 1999 E.C.R. I-1459 (ruling that one member country cannot "refuse to register a branch of a company" formed under the laws of another country, even when that company carries out no business in its formation country and seeks to conduct "its entire business in the [country] in which the branch is sought."). See, e.g., Ribstein & O'Hara, *supra* note 4, at 707–08 (discussing the increased charter competition following *Centros*). Recent scholarship has also focused on the potential for interjurisdictional competition among nations in the securities arena. See, e.g., *id.* at 710 ("[T]he international market for securities regulations threatens continued dominance of the U.S. federal role in securities regulation.").

Yet the underlying nature of the competition in these areas also differs. Interjurisdictional competition in the employment law context typically involves the states (most notably nation-states, but also American states) competing for business by adopting or weakening labor and employment standards to attract or retain capital investment.<sup>33</sup> Such regulatory competition and its effects—e.g., outsourcing, wage pressures, declining union density—often are at the center of debates regarding the effects of globalization and free trade on worker welfare.<sup>34</sup>

In the corporate area, the discussion regarding interjurisdictional competition typically addresses something different: Competition between states to attract or retain business entity charters, potentially independent of the location of operations.<sup>35</sup> In other words, some states seek to profit not from drawing firm operations into their territory, but rather by granting legal recognition and a set of corresponding stakeholder rights and duties to firms that may have little or no operational contact with the jurisdiction.<sup>36</sup>

In a sense, this type of regulatory competition produces a law-as-commodity business. By granting entity charters (for corporations, limited partnerships, LLCs, etc.), a state can "sell" its entity law to firms operating completely outside of its borders.<sup>37</sup> With Delaware's emergence as the dominant producer of state-level corporate law norms, such regulatory

---

33. See Stone, *Shadow of Globalization*, *supra* note 2, at 1 (noting that some race-to-the-bottom theorists argue that globalization will lead nation-states to "relax[] or repeal[] labor protections to attract firms and jobs"); Stone, *supra* note 1, at 992 ("Countries do not have an incentive to compete for business by altering their domestic relations in order to create a regulatory environment that business will find attractive."). For a discussion of the literature addressing "competitive federalism," and the role of law in inducing jurisdictional entry or exit, see Dan L. Burk, *Federalism in Cyberspace*, 28 CONN. L. REV. 1095, 1100–07 (1996).

34. See *supra* note 2 and accompanying text (discussing how global competition affects labor standards, unions, and overall worker welfare).

35. See, e.g., Bebcuk & Cohen, *supra* note 4, at 384 ("[M]ost scholars [assume] . . . that states seek to attract incorporations.").

36. See Cary, *supra* note 6, at 668–69 (discussing Delaware's competitive efforts to create a favorable climate for businesses to incorporate there, even though they may operate elsewhere).

37. See Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1505–06 (1989) ("A small state has a very strong financial incentive to design a corporate law regime that will sell—that is, a regime that will attract incorporation."); see also Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861, 861 (1969) ("Delaware is in the business of selling its corporation law."); cf. Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1603 (2002) (concluding that if a state developed a new rule firms found beneficial, Delaware could adopt that rule and prevent corporations from migrating to the other state).

competition has played a key role in the evolution of American corporate law.<sup>38</sup> It also lies at the center of the corporate law "race to the bottom/race to the top" debate that has produced a sprawling body of literature over the last half-century.<sup>39</sup>

When I refer to "competition" for corporate or entity law, I am not suggesting that a broadly competitive or efficient market exists. On the contrary, Delaware has unique historical and other advantages that largely preclude other states from competing effectively against it to export corporate law.<sup>40</sup> Nor is the location of primary firm operations irrelevant in this market. Because of Delaware's dominant position, competition in the market for publicly traded firms is largely limited to two sellers: Delaware and a firm's "home state" (place of operations).<sup>41</sup> And home state competition is largely reactive: These states modify their law structures simply to avoid losing charters of home-state firms to Delaware.<sup>42</sup> Law-as-commodity competition—as I use the term—therefore can exist even if only one state is able or willing to promote its law extraterritorially on a wide scale.

Because this type of competition has yet to come to fruition in the employment context, the distinction between the employment and corporate areas is stark. Interjurisdictional competition with regard to the former involves attracting operations to the state, while competition with regard to the latter

38. See Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 37 (2006) (observing that states had the power to respond to Delaware's success by monopolizing charters within their own borders, but instead "foreswore" those monopolies, making Delaware "the primary purveyor of corporate charters").

39. See *supra* note 6 and accompanying text (outlining the literature and arguments central to this debate); see also Bebchuk & Cohen, *supra* note 4, at 384–85 (discussing the academic arguments on each side of the race-to-the-bottom/race-to-the-top debate); cf. Erin Ann O'Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1569–72 (2000) (discussing the academic debate over whether party choice-of-law in general leads to a race-to-the-top or race-to-the-bottom).

40. See, e.g., Lucian Ayre Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553, 615 (2002) (finding that other states pose no real "competitive threat to Delaware's dominant position"); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 748 (2002) (concluding that other states' attempts to compete with Delaware are ultimately futile).

41. See Bebchuk & Cohen, *supra* note 4, at 420 (noting that companies generally choose either Delaware or their home state as their place of incorporation); Daines, *supra* note 37, at 1600 (same); Eisenberg & Miller, *supra* note 3, at 15–16 (same).

42. See, e.g., Ribstein & O'Hara, *supra* note 4, at 701 (noting that corporate law innovations spread through the states, with other states seeking to avoid losing firms to Delaware); Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 214 ("[G]iven Delaware's leading position, other states are engaged in . . . 'defensive' competition.").

does not (at least not necessarily) because it can be achieved through the parties' selection of foreign state law to govern firm activities or relationships. To this extent, these models of competition stand at opposite ends of a spectrum of operational contacts between the firm and the state.

Forms of interjurisdictional competition also may occupy an intermediate position. Because of prevailing choice-of-law rules and other limiting conditions, a state's ability to market its law for extraterritorial use may depend on the number of connections—operational or otherwise—it has with parties wishing to take advantage of it.<sup>43</sup> Where such conditions are present, a state can engage in law-as-commodity competition only to the extent that purchasing firms have some relationship to the state. Relatedly, a state's competitive position in the market for firm operations may be bolstered if the law it promulgates to attract investment will govern at least some firm activities occurring elsewhere. In other words, one enticement states can offer to attract or retain business activities is a willingness to extend domestic law to the extraterritorial activities of firms with local contacts. By promoting and then enforcing the selection of its law by entities with at least some contacts with the jurisdiction, a state therefore may engage in a limited form of law-as-commodity competition as part of its strategy to attract or retain business investment.<sup>44</sup>

While these models may work concomitantly, their relationship may also be inverse. If firms with limited or no operational contact with a state supplying favorable law are unable to take advantage of it—i.e., another jurisdiction prohibits them from choosing foreign law to govern activities within its borders—then they have stronger incentives to relocate some or all of their operations or activities to the supplier state.<sup>45</sup> If, on the other hand, background legal principles facilitate extraterritorial application of favorable law, firms may have fewer incentives to move their operations or activities.<sup>46</sup>

---

43. See Ribstein & O'Hara, *supra* note 4, at 672 (stating that enforcement of choice-of-law clauses typically depends on the parties' contacts with the law of the chosen state and the states whose laws they seek to avoid).

44. Eisenberg & Miller, *supra* note 3, at 33–34 (finding that, as part of New York's efforts to attract commercial contracting, New York courts consider a choice-of-law clause itself to constitute sufficient contact with the state to warrant enforcement and give such clauses "nearly absolute respect" in commercial litigation).

45. See Ribstein & O'Hara, *supra* note 4, at 669–72 (noting that firms seeking to use the law of a state to which they have no connection might be willing to move if the connection requirement imposed by the non-competing state where their operations are located forces them to do so); Larry E. Ribstein & Erin A. O'Hara, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1162 (2000) (same).

46. See Ribstein & O'Hara, *supra* note 45, at 1162 (stating that the cost of exit would be low if firms could continue to reside in one state while being governed by another's law).

We observe the latter phenomenon in the corporate area: Because they do not have to, American business entities do not move their headquarters or operations to take advantage of more favorable legal standards.<sup>47</sup> Promoters simply charter their entities in favorable jurisdictions.<sup>48</sup>

If legal and other conditions are conducive, broad-based, law-as-commodity competition may supplant the market for operations. Assuming all else is equal,<sup>49</sup> export-style competition may be more attractive because it is cheaper and easier for both the purchaser (the firm) and the supplier (the competing state) of such law. On the demand side, because firms select favorable law without having to relocate their operations, they can take advantage of such law either at a lower cost or in circumstances in which they otherwise could not have done so.<sup>50</sup> On the supply side, a state selling law extraterritorially may be able to externalize many of the costs of its law, because the on-the-ground application is outside of its territory.<sup>51</sup> Moreover, unless the state where activities actually occur intervenes—say, by refusing to enforce the choice of foreign law—a firm's selection of foreign law results in its application, carving the preferences of that state out of the equation, even though it may bear many (or all) of the costs.

For these reasons, those who believe that interjurisdictional competition to attract business activity or capital produces a socially harmful race to the regulatory bottom should recognize that the law-as-commodity model is of potentially greater concern. Because of both the incentives it creates and its means of adoption and distribution, such competition may spread the legal norms preferred by firm decision makers more quickly and effectively, thereby accelerating the race. It is therefore worth exploring why this type of interjurisdictional competition has not previously taken off in the employment

---

47. See *id.* (noting that firms are generally governed by the law of the state in which they choose to incorporate, thus resulting in a less conventional form of choice of law).

48. See Bebchuk & Hamdani, *supra* note 40, at 568 ("Delaware, where approximately 58% of public companies incorporate, is the state of location for less than 0.9% of publicly traded companies.").

49. I realize this is a big assumption, at least from the supply side, because the operations model often would produce greater benefits for the supplying state (i.e., jobs and tax revenue) than the law-as-commodity model would. These types of supply-side incentives are discussed in the next section.

50. See *supra* note 46 and accompanying text (noting that firms' costs decrease when they do not have to relocate to be governed by favorable foreign law).

51. See KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW* 114 (2006) (stating that states' decisions to market their law are facilitated by the presence of externalities—costs of decisions that the states will not bear and thus do not have to account for).

law context and remains largely unconsidered in the literature, while, in corporate law, it has had such a profound impact.

### *B. Employment and Corporate Law Compared*

Many incentives that drive law-as-commodity interjurisdictional competition in the corporate area have not been present in the employment law context. Although favorable law always has value, the powerful demand- and supply-side incentives that compel firms to select foreign corporate law and states to "sell" it are either dampened or absent in the employment area. For related reasons, states have generally been far less willing to allow foreign employment law norms to govern employment and other working relationships within their borders than the corporate law norms that govern relationships between shareholders and managers.<sup>52</sup>

None of this is particularly surprising given the distinct histories, structures, and subjects of these two regulatory areas. Yet, upon closer examination, the conditions that have historically discouraged law-as-commodity competition in the employment area are neither fundamental nor permanent. And, as revealed in both this section and the next, these conditions may not prevail in all employment contexts. Indeed, significant changes in state employment law norms could usher in competition in various employment-related regulatory areas.

#### *1. Demand-Side Incentives for Firms to Choose Legal Regimes*

In one important respect, the demand-side incentives that might foster law-as-commodity interjurisdictional competition in the employment and corporate areas are the same. Given their position within the firm structure, superior bargaining power, repeat-player status, and access to risk expertise and resources, management is usually the prime mover in choosing the terms governing a firm's internal "corporate" relationships (the relationships between and among shareholders, directors, and officers) and what terms will govern firm employment relationships.<sup>53</sup> And, the basic inducement that drives

---

52. See *infra* Part II.B.3 (discussing states' reluctance to allow foreign employment law to govern).

53. See *supra* note 28 and accompanying text (discussing the disparity in bargaining power and authority between managers and lower-level employees); see also Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783, 1795 (1996) (focusing on the disparity in bargaining power between managers and



management's incorporation decision—finding a source of favorable and predictable law to govern internal corporate relationships—is present with regard to firm employment relationships, particularly in business entities operating in multiple jurisdictions.<sup>54</sup> In many firms, and particularly those that are closely held, the legal and business risks associated with employment relationships exceed those arising from the relationship between investors and managers.<sup>55</sup> Moreover, most employees are not inherently better positioned than shareholders to resist management's pursuit of preferred terms.<sup>56</sup>

But focusing solely on management's incentives would be an oversimplification. In all but the smallest firms, management's decision-making regarding the selection of contract terms may be influenced greatly by legal counsel.<sup>57</sup> As scholars have noted in the corporate area, counsel's familiarity with local law produces a natural preference for it.<sup>58</sup> Thus, despite Delaware's advantages, this contributes to a significant bias towards home-state entity chartering.<sup>59</sup> In both the corporate and employment areas, counsel is

employees in establishing the parameters of employment).

54. See Ribstein & O'Hara, *supra* note 4, at 668–69 (stating that firms seek a system of law that will predictably enforce their contracts and that this concern is particularly important to firms that deal with a diverse array of parties); see also Daines, *supra* note 37, at 1565 (“[Both sides of the race debate] agree[] that . . . firms . . . search [for and] select the regime with the most favorable legal rules.”).

55. While rules governing managers' and shareholders' fiduciary duties to one another are significant in the context of closely-held businesses, corporate litigation involving such businesses is unlikely to occur repeatedly. Glynn, *supra* note 24, at 131. Employment law, on the other hand, creates the ongoing risk of liability. See Adele Nicholas, *GCs Reveal Their Litigation Fears and Headaches*, CORP. LEGAL TIMES, Oct. 2004, at 72 (indicating that sixty-two percent of corporate general counsel surveyed ranked labor and employment litigation as their number one potential exposure).

56. Employees usually have inferior bargaining power to management. See *supra* note 28 and accompanying text (noting the significant disparity in bargaining power between management and employees).

57. See Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 486 (1987) (“The most influential advisors to corporate management are generally the firm's lawyers. The incorporation decision is heavily dependent on the different legal environments within which the firm could operate, which is dependent on the particular expertise of the firm's legal counsel.”).

58. See, e.g., Bebchuk & Cohen, *supra* note 4, at 399 (“[I]n-state incorporation would provide [a] local law firm with an advantage over out-of-state law firms that might compete for the firm's business, as the local law firm would be likely to have greater familiarity with the home state's corporate law and better connections in the state.”). Home-state law firms might also direct clients to incorporate in-state to position themselves for any future litigation. *Id.*

59. See Daines, *supra* note 37, at 1559 (finding that there is a “substantial home-state advantage” in terms of where firms initially choose to incorporate).

unlikely to recommend the law of a foreign jurisdiction to govern firm relationships absent compelling business or legal reasons for doing so.

For a number of reasons, however, counsel is more likely to consider and recommend foreign corporate law than foreign employment law. One is purely practical: To form any business entity that enjoys limited liability (e.g., a corporation, LLC, or limited partnership), promoters must seek a charter from an appropriate state authority.<sup>60</sup> Chartering therefore mandates an initial choice of a state and, pursuant to the internal affairs doctrine, its entity law to govern the "corporate contract." In the employment context, no such initial choice is required. Indeed, the parties usually do not spell out any of the terms of their relationship, in part because the default rule—employment at-will—dampens employers' incentives to contract explicitly.<sup>61</sup>

Disparate histories and practice traditions also play a role. Interstate charter competition has existed for nearly a century, and with it, as described below, a choice-of-law regime that allows firm promoters to select foreign corporate law largely unimpeded.<sup>62</sup> While entity-law norms are now relatively uniform across states as a result of charter competition, such competition emerged because of significant substantive differences between states.<sup>63</sup> Thus, corporate attorneys traditionally have felt a need to be familiar with their home state's corporate law, Delaware law, and perhaps the law of additional states. Indeed, selecting among the chartering options is one important aspect of what corporate counselors do.

State employment law, on the other hand, began the last century as largely uniform, with a strong presumption of at-will employment dominating the legal landscape.<sup>64</sup> Only recently have employment law norms diverged in a variety

---

60. Owners of unchartered enterprises, such as general partnerships, do not enjoy limited liability. *See, e.g.*, UNIFORM PARTNERSHIP ACT § 306 (1997) (stating that partners in a general partnership are jointly and severally liable for partnership obligations).

61. *See Bales, supra* note 26, at 454–55 (discussing the rise of at-will employment and the subsequent desirability of employers taking advantage of it). In light of the differing character of the steps required for formation, the genesis of the corporation and the legal rules that will govern internal corporate relationships will be, on balance, more considered—and highly lawyered—than the birth of many employment relationships.

62. *See Tung, supra* note 38, at 36 (noting the "widespread acceptance" of permitting the law of a firm's state of incorporation to govern); *see also Daines, supra* note 37, at 1560 ("Firms can elect to be governed by any . . . regime[] simply by incorporating in the state of their choice."); Ribstein & O'Hara, *supra* note 4, at 690–91 (discussing how choice-of-law clauses are more frequently enforced now than they traditionally were).

63. *See Tung, supra* note 38, at 74 (discussing New Jersey's modification of its corporate law to attract incorporation by out-of-state firms).

64. *See Bales, supra* note 26, at 458 (noting that at-will employment was widespread at the turn of the twentieth century and nearly universal by the 1930s).

of potentially important ways—e.g., the greater willingness of some states to impose contractual, tort, and statutory limits on the at-will doctrine and some material differences in other regimes, including workers' compensation and wage and hour protections.<sup>65</sup> And, as discussed below, unlike in the corporate law context, states historically have been reluctant to apply foreign law to domestic employment relationships.<sup>66</sup> In light of these substantive differences, there has been less need for *ex ante* counseling in the employment context, and counsel advising firm management at the outset of employment relationships traditionally has had fewer reasons to worry about other states' law.

Even today, with employment relationships becoming more heavily lawyered, there remain substantive and structural differences between corporate and employment law that create disparate incentives. This is not because of greater uniformity in employment law; indeed, the divergence of some employment law norms may mean that the opposite is true. The doctrinal differences in both contexts are on the margins: Given the nearly universal adherence to employment at-will and the convergence of corporate and entity law, state legal norms in both the corporate and employment areas are largely uniform. Yet the marginal differences between states with regard to corporate law are more important than those in employment law in light of the nature and importance of the federal law in the two areas. And, relatedly, state-to-state differences in enforcement are more paramount in the corporate context.

Both corporate and employment law in the United States have federal- and state-law components, but the substance and structure of these components differ materially. Despite periodic expansions, including in the post-Enron period, federal corporate law (i.e., securities law) remains primarily concerned with disclosure obligations of publicly traded firms.<sup>67</sup> Thus, although federal securities law creates potentially enormous legal risks for some corporate actors, these risks have been limited largely to disclosure and anti-fraud matters. Moreover, because of their distinctiveness and jurisdictional

---

65. See, e.g., Stone, *supra* note 1, at 990–91 (“[C]orporations began moving to the South in search of lower wages and lower unionization rates in the 1920s. In more recent years, corporate flight has been motivated by additional factors such as avoiding state worker compensation systems, state unemployment insurance programs, and other labor protective programs.”). For a general discussion of the history of state and federal employment regulation, see TIMOTHY P. GLYNN ET AL., *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* xxv–xxxvi (2007).

66. *Infra* Part II.B.3.

67. See Roberta S. Karmel, *Realizing the Dream of William O. Douglas—The Securities and Exchange Commission Takes Charge of Corporate Governance*, 30 DEL. J. CORP. L. 79, 80 (2005) (“The federal securities laws generally have been considered full disclosure statutes, as opposed to merit regulation statutes or laws governing the internal affairs of corporations.”).

considerations, securities matters are often enforced and litigated separately from state corporate law issues.<sup>68</sup>

State corporate law governs most substantive rights and obligations of shareholders, directors, and officers—e.g., voting rights and fiduciary duties. Managers therefore have strong incentives to control legal risks through the selection of favorable state law. This is true even though state corporate law has converged over time. As a number of scholars have suggested, although the basic rules governing corporate law do not vary greatly, important differences in potential application and enforcement of such terms remain.<sup>69</sup> Incorporators find Delaware preferable because its vast body of judge-made law provides predictability not available elsewhere.<sup>70</sup> At the same time, this law is flexible enough to adjust to particular circumstances.<sup>71</sup> Moreover, at least for some firms, enforcement mechanisms may be a key determinant of whether a state's regulatory environment is attractive.<sup>72</sup> With the chartering decision comes the ability to choose among states with more- or less-favorable enforcement schemes. Here, again, Delaware offers a powerful enticement to firms. Its Court of Chancery is known as an efficient, expert court system, with no juries and appellate review by a supreme court also well-versed in corporate law issues.<sup>73</sup> Moreover, Delaware courts are perceived by critics and

---

68. See Joel Seligman, *The New Corporate Law*, 59 BROOK. L. REV. 1, 2–3 (1993) (noting that federal courts have exclusive jurisdiction over a substantial number of securities claims); see, e.g., 15 U.S.C. § 78aa (2000) (granting exclusive jurisdiction to the federal courts for violations of securities exchange laws under that chapter); see also 15 U.S.C. § 78bb(f)(1) (2000) (providing for the preemption and removal to federal court of certain securities-fraud class actions).

69. See Glynn, *supra* note 24, at 104–07 (reviewing the literature addressing the unique way Delaware applies and enforces its corporate law to help it attract business).

70. See Daines, *supra* note 37, at 1583 (stating that other states are "less likely able to develop a distinctive and predictable body of case law" compared to Delaware); Glynn, *supra* note 24, at 100 (citing that other states cannot easily duplicate Delaware's "corporate decisional law"); see also Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1591 (2005) ("In Delaware, judge-made law, to the virtual exclusion of statutory law, governs fundamental issues such as fiduciary duties of directors, officers, and controlling shareholders, the prerequisites for a derivative suit, and disclosure obligations.").

71. Glynn, *supra* note 24, at 100 n.44; see also Kahan & Rock, *supra* note 70, at 1598 (describing the judge-made elements of Delaware corporate law as "flexible and highly fact-intensive" and able to adapt to new or changed circumstances).

72. Glynn, *supra* note 24, at 100–01.

73. See, e.g., Curtis Alva, *Delaware and the Market for Corporate Charters*, 15 DEL. J. CORP. L. 885, 918 (1990) (noting that Delaware judges are very skilled and the court system is very efficient); Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 COLUM. L. REV. 1931, 1963 (1991) (stating that Delaware has "expert courts" for corporate matters).

supporters alike as adhering, on balance, to norms that favor managerial prerogatives.<sup>74</sup>

It is worth noting that these enforcement-related incentives are not limited to the corporate context. For example, in their recent work on the market for commercial contracts, Professors Eisenberg and Miller observe a similar phenomenon with regard to New York's specialized business court: It is perceived in the market as efficient and predictable in handling major commercial matters.<sup>75</sup>

State law also governs critical aspects of the employment relationship, and, again, some important differences between the laws of various states have emerged. However, in contrast to corporate law, a wide range of substantive employment law obligations are federal in nature.<sup>76</sup> For example, in the private sector, federal law is the primary source of wage and hour mandates, workplace safety standards, and antidiscrimination protections,<sup>77</sup> and, given its broad, preemptive sweep, federal law also is the predominant source of labor and employee benefits regulation.<sup>78</sup> Unsurprisingly then, a large number of employment-related lawsuits contain one or more federal claims.<sup>79</sup>

The paramount importance of federal employment law norms may explain why contemporary discussions of interjurisdictional competition in the employment context often focus on the international competition.<sup>80</sup> It also

74. See, e.g., Gordon, *supra* note 73, at 1963 ("[Delaware] corporate law [is] generally favorable toward management prerogative"); see also Bebhuk & Hamdani, *supra* note 40, at 599–601 (suggesting that Delaware law tends to favor management).

75. Eisenberg & Miller, *supra* note 3, at 42–43. Faced with a decline in commercial litigation, in 1995, New York added to its Supreme Court the Commercial Division, a specialized trial court with expert judges selected for their business experience. *Id.* The Commercial Division has enabled New York to remain competitive in the market for commercial contracts. *Id.*

76. See, e.g., GLYNN ET AL., *supra* note 65, at xxv–xxxvi (citing many federal laws that govern employment). State counterparts often exist, but they largely mimic the federal standards. *Id.*

77. See *id.* at xxvi (giving examples of how federal legislation governs wage and hour law, workplace safety standards, and antidiscrimination protections).

78. See *id.* at 754–76 (discussing ERISA preemption and its implications); Stephen F. Befort & Brian N. Smith, *At the Cutting Edge of Labor Law Preemption: A Critique of Chamber of Commerce v. Lockyer*, 20 LAB. LAW. 107, 109–19 (2004) (discussing the scope of preemption under the NLRA).

79. See Michael D. Moberly, *Proceeding Geometrically: Rethinking Parallel State and Federal Employment Discrimination Litigation*, 18 WHITTIER L. REV. 499, 502–03 (1997) (stating plaintiffs can and often do pursue state and federal employment law claims simultaneously in one action).

80. See *supra* notes 25–30 and accompanying text (stating that international competition is "the principal contemporary public policy concern" in employment law).

explains why controlling horizontal choice of law may be perceived as less valuable in this area than others.

In part because of federal law's paramount role, arbitration clauses—which redirect both state and federal claims to a more hospitable forum<sup>81</sup>—have become employers' primary litigation-risk management device.<sup>82</sup> Like the Delaware courts and New York commercial courts, arbitration offers management an adjudicatory forum with no jury, expert decision makers, quicker and more efficient dispute resolution than judicial proceedings, and severe limits on employee appeals to potentially favorable fora.<sup>83</sup> Some also argue that mandatory arbitration is subject to a structural bias towards employers, although there are some contrary data on substantive outcomes.<sup>84</sup> Arbitration clauses offer the further, substantial benefit of potentially defeating attempts by plaintiffs' counsel to aggregate employee claims,<sup>85</sup> something that

---

81. The Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2000), is a "super-statute" that makes agreements to arbitrate—rather than litigate—state and federal statutory employment claims "valid, irrevocable, and enforceable" unless the agreement is otherwise revocable at law or in equity (e.g., if the agreement is unconscionable, entered into by a minor, or induced by duress). See *id.* § 2 (establishing the validity, irrevocability, and enforceability of arbitration agreements); see also, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123–24 (2001) (noting that "there are real benefits to the enforcement of arbitration provisions" and that the Court has previously held "that arbitration agreements can be enforced under the [Federal Arbitration Act]"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (noting that arbitration clauses are generally enforceable with some exceptions).

82. Although only a minority of businesses require employees to arbitrate disputes, the use of arbitration agreements has grown dramatically in recent years. See, e.g., Nathan Koppel, *When Suing Your Boss Is not an Option*, WALL ST. J., Dec. 18, 2007, at D1 (estimating that 15–20% of businesses require arbitration, which is up from 10% in 1995); cf. Theodore Eisenberg, et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts* 9 (Dec. 18, 2007) (unpublished draft, on file with the Washington and Lee Law Review), available at <http://ssrn.com/abstract=1076968> (discussing two empirical studies finding arbitration agreements in 41.6% and 37% of senior and executive employment contracts, respectively).

83. See Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1349–51 (1997) (stating arbitration is "less expensive, more expeditious, less draining and divisive, . . . yet still effective," and noting that many firms desire limited ex post judicial review).

84. See Katherine V.W. Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1050 (1996) ("[Mandatory arbitration] channel[s] disputes into a legalistic maze . . . at the end of which the worker, exhausted, demoralized, and dispirited, finds she has lost whatever rights she once believed were worth seeking."); see also Estreicher, *supra* note 83, at 1355 (discussing, in disagreement, scholars' criticisms of employment arbitration). For empirical evidence suggesting arbitration outcomes may be more favorable to employees, see Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUMAN RTS. L. REV. 29, 49–50 (1998) (agreeing that arbitration should be allowed for federal securities claims).

85. That is, mandatory arbitration clauses divert claims to individual arbitration,

is not an issue in breach of fiduciary duty cases involving large corporations, since they must be pursued derivatively.<sup>86</sup> Also, because courts enforce arbitration clauses in the run of cases, management is likely to perceive such clauses *ex ante* as far less likely to succumb to judicial preferences for nonenforcement than choice-of-law and choice-of-judicial-forum clauses.

These employer incentives are consistent with the findings of Professors Eisenberg and Miller in their empirical study of arbitration and choice-of-law clauses in commercial contracts.<sup>87</sup> In that study, they found employment contracts contained a higher density of arbitration clauses than all other types of contracts.<sup>88</sup> At the same time, while New York and Delaware attract the bulk of commercial contracts,<sup>89</sup> there is no such trend with regard to choice of law in employment contracts.<sup>90</sup> Correspondingly, employment contracts were the only category in which neither New York nor Delaware was the supplier of choice<sup>91</sup>—that is, although choice-of-law clauses are being deployed in employment contracts, they tend to specify a state with a substantial connection to the employment relationship. Thus, while Eisenberg and Miller suggest that a market for contracts has emerged with regard to some types of commercial agreements,<sup>92</sup> no such market has yet appeared for employment contracts.

---

precluding employee class actions under state or federal law. *Cf.* Eisenberg et al., *supra* note 82, at 7 (concluding from empirical data that mandatory arbitration in consumer and employment contracts is designed to circumvent aggregation).

86. Interestingly, however, powerful corporate constituencies have begun pushing for the ability of publicly traded firms to include in their certificate arbitration clauses for federal securities claims—which, under current law, often are brought as class actions. *See, e.g.,* COMM. ON CAPITAL MKT. REGULATION, INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 109–11 (2006), [http://crapo.senate.gov/documents/committee\\_capmarkets\\_reg.pdf](http://crapo.senate.gov/documents/committee_capmarkets_reg.pdf).

87. In their study of mandatory arbitration clauses, Professors Eisenberg and Miller examined 2,758 commercial contracts attached to companies' SEC filings during 2002. Theodore Eisenberg & Geoffrey P. Miller, *The Flight From Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies' Contracts*, 56 DEPAUL L. REV. 335, 348 (2007).

88. *Id.* at 351 tbl.2. Mandatory arbitration clauses were present in 41 of 111—36.94%—of the employment contracts examined, the highest concentration of any of the twelve classes of contracts in the study. *Id.* By contrast, just 10.65% of the overall study set contained mandatory arbitration clauses. *Id.*

89. Parties engaged in commercial transactions select the law of these states even in the absence of another substantial connection to them. *See id.* at 354 (explaining that 61% of commercial contracts choose New York or Delaware law).

90. *Id.* at 354–56. New York was the dominant supplier of law for several types of contracts, but choice-of-law provisions in employment contracts demonstrated no concentration in any state. *Id.* at 355.

91. *Id.* at 356 fig.1.

92. *See* Eisenberg & Miller, *supra* note 3, at 49 (concluding that New York and Delaware

Of course, arbitration and choice-of-law terms are not mutually exclusive.<sup>93</sup> And employment practitioner materials and standard form employment contracts suggest that inclusion of a choice-of-law clause is now common practice. Yet the preeminence of federal law mandates combined with the arbitration option renders such clauses of less practical significance in many employment relationships and resulting disputes. This explains, at least in part, why far more judicial and scholarly ink has been spilled on arbitration clauses in employment contracts than on choice-of-law and choice-of-judicial-forum clauses.

In sum, the practical, historical, and structural differences between corporate and employment law have led to greater demand for state corporate law as a commodity than state employment law. But the employment side of this picture might be changing. We already observe increased use of choice-of-law clauses in employment contracts, and one can detect changes in the underlying conditions that have inhibited demand in the employment area. For example, the emergence of more significant differences between states, along with the growth of worker and firm mobility, could increase demand, particularly in circumstances in which such differences create substantial legal risks. In addition, the use of arbitration clauses might decline if a judicial forum becomes, for one reason or another, a better option for management and if management is able to ensure suits are litigated in that forum. Although genuine competition roughly akin to that in the corporate area remains only a possibility, as discussed in Part III, we do see signs that favorable demand-side conditions are emerging in the NCA context.

## 2. *Supply-Side Incentives for States to Compete*

Law-as-commodity competition will occur only when there are sufficient supply-side benefits to induce states to sell their law. As on the demand side, at present, there are important differences in supply-side incentives between the corporate and employment areas.

As an initial matter, entity charters produce revenues for states in the form of fees and recurring franchise or entity taxes.<sup>94</sup> Thus, in the corporate context,

---

offer benefits to entice businesses to choose their law and fora in contracts).

93. See Eisenberg & Miller, *supra* note 87, at 358 (finding that there is a statistical correlation between the choice of certain states' law (such as California's) and the presence of mandatory arbitration clauses).

94. See, e.g., Glynn, *supra* note 24, at 98 (stating that Delaware makes over \$500 million a year from corporate franchise taxes and fees).



the parties' choice-of-law decision itself produces revenue for the chosen state. If a state becomes a primary alternative choice for chartering, these revenues can be tremendous. Delaware is the obvious example, although other states, including Nevada, have sought to compete for charters (and revenues) in recent years.<sup>95</sup> Through both sheer volume and a unique franchise tax structure, Delaware's entity taxes and fees produce approximately *twenty-five percent* of its annual revenue.<sup>96</sup> Delaware in particular therefore has powerful, direct incentives to provide a favorable substantive and legal enforcement regime to continue to attract and retain charters.

Yet a state may have other incentives to structure its legal norms or enforcement mechanisms to persuade parties to select its law and, correspondingly, to resolve disputes within the forum. One incentive is the creation of work for the local legal services industry.<sup>97</sup> Again, in the corporate context, Delaware is the leading example. The combination of chartering activity and significant downstream corporate-related litigation supports a large incorporation and corporate law industry (composed of lawyers, registered agents, and others) in this tiny state.<sup>98</sup>

Even in a state whose corporate formation and dispute resolution industry is economically insignificant, and hence, produces insufficient incentives to compete with Delaware directly for out-of-state incorporations,<sup>99</sup> local attorneys have an incentive to push for a corporate legal regime attractive to home firms. By doing so, local attorneys retain a greater share of the corporate counseling and litigation business because local firms will be less likely to charter elsewhere. This is one explanation for the supply side of the home-state verse

---

95. See Daines, *supra* note 37, at 1566 (stating that although Delaware is home to roughly 50% of Fortune 500 firms, Nevada is trying to compete for the incorporation business and become the "Delaware of the West") (citations omitted).

96. Glynn, *supra* note 24, at 98.

97. See Macey & Miller, *supra* note 57, at 522 (stating that Delaware produces "substantial revenues" by attracting chartering business); see also Glynn, *supra* note 24, at 99–100 (stating that Delaware attorneys profit from Delaware's legal regime).

98. See Kahan & Kamar, *supra* note 40, at 694–98 (stating that Delaware law firms receive much greater revenues than if Delaware did not have a unique legal system that attracted corporations); Maureen Milford, *Delaware's Corporate Dominance Threatened*, THE NEWS J., Mar. 2, 2008, available at <http://www.delawareonline.com/apps/pbcs.dll/article?AID=/20080302/NEWS/803020319> (noting that when taxes from lawyers and others in Delaware's corporate law industry are included, its charter-related business may account for 40% of state revenue).

99. To do this, such states might have to undertake significant changes. See Daines, *supra* note 37, at 1603 (discussing how a state could adopt statutory schemes in order to become more attractive than Delaware for corporations); see also Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1213–14 (2001) (discussing barriers to competition with Delaware).

Delaware story in corporate law: As a result of successful local interest group lobbying to retain home-state charters, other states generally have followed Delaware's lead on corporate law matters, and hence, moved over time toward a permissive regime akin to Delaware's.<sup>100</sup> In other words, protecting local legal work creates incentives for other, larger states to compete for charters, even if these incentives are more modest than Delaware's.

This explanation for why larger states would compete for legal business is also consistent with Eisenberg and Miller's analysis of New York's incentives to compete to be the source of law and the forum of choice for major commercial contracts.<sup>101</sup> The authors detail the efforts of the New York legal lobby to make changes—such as creating a business-centered court system and a substantively favorable commercial law—to maintain this status.<sup>102</sup>

These incentives can be contrasted with those in the employment law area. Obviously, choice-of-law clauses in employment contracts do not produce direct tax revenues. Moreover, although local employment law practitioners would benefit from a state's attracting and retaining employment law counseling and litigation work, the interest group dynamics and, hence, legislative incentives are likely to play out very differently. While state lawmakers in Delaware and elsewhere have faced relatively little opposition to chasing incorporations with more permissive corporate law norms or to seeking to attract other types of commercial contracts,<sup>103</sup> state actors—particularly legislators—would face far greater resistance to reforms reducing existing employee protections. It seems highly unlikely that they would do so simply to benefit the "employment law industry." Indeed, this may offer at least a partial explanation for why, as Eisenberg and Miller observe, New York and Delaware have not traditionally competed for employment contracts, while they have sought to attract other types of major commercial contracts.<sup>104</sup>

---

100. See Glynn, *supra* note 24, at 99–100 (noting that some scholars think there is "robust competition" among states for corporate charters); Ribstein & O'Hara, *supra* note 4, at 699–702 (discussing the role of local lawyers in pressing for state law to retain corporate charters); *cf.* Macey & Miller, *supra* note 57, at 522–23 (concluding that the Delaware bar exerts influence over the state's corporate lawmaking to retain charters and maximize its own revenue). Even if other states modify their corporate statutes to attract or retain incorporations, they are unlikely to take more costly steps to compete. See Kahan & Kamar, *supra* note 99, at 1213 n.35 (stating that neither Nevada, Virginia, nor Pennsylvania has instituted a specialized corporate court).

101. See Eisenberg & Miller, *supra* note 3, at 12 fig.2, 20 fig.7 (finding that over 45% of commercial contracts designated New York law as governing and over 40% specified New York as the forum of choice).

102. *Id.* at 47–48.

103. See, e.g., Glynn, *supra* note 24, at 99–100, 105 (discussing interest group dynamics in Delaware and elsewhere).

104. See Eisenberg & Miller, *supra* note 87, at 355 (observing that unlike many other types

Nevertheless, law-as-commodity competition may still emerge in the employment area if it could produce other benefits to the state or other powerful domestic constituencies. The process might begin with traditional interjurisdictional competition: Powerful domestic interest groups would convince the state's legal decision makers to create an employment law environment that attracts business investment into the state or persuades existing firms to stay. Once this occurs, and a state emerges with an employer-friendly regulatory regime, that state will have two reasons to offer extraterritorial application of its favorable law. First, a state competing for business investment has an incentive to offer not only a favorable legal environment, but also a willingness to enforce its legal rules outside of the state for firms operating locally. In a sense, then, a state might be willing to compete for selection of its law as part of a larger effort to attract business investment into the state. Second, once such a regulatory environment is in place, there may be little opposition to drawing additional *legal* business into the state by marketing the state's law and willingness to enforce it to parties operating or transacting business outside of the state. Indeed, where an employer-friendly regime has emerged, there would be few reasons for it to withhold offering such an enticement.

The two incentives described above are again consistent with Eisenberg and Miller's findings. Having long been a hub for major commercial activity, New York has natural incentives not only to maintain a favorable regulatory environment for in-state commercial activities, but also to assist local enterprises in taking advantage of its law for commercial activities occurring elsewhere.<sup>105</sup> Thus, commercial contracts with one or more parties headquartered or operating in New York frequently designate New York law.<sup>106</sup> Yet, New York has also expanded its enforcement business to compete for selection of its law in commercial contracts between parties with more tenuous ties to the state.<sup>107</sup> And, it encourages parties to select its law by robustly enforcing choice-of-law and choice-of-forum clauses in major commercial contracts, whether or not the parties have significant contacts with the state.<sup>108</sup>

---

of contracts, employment contracts have low choice-of-law concentrations).

105. See Eisenberg & Miller, *supra* note 3, at 38 (stating that New York's legal and business community would benefit from businesses being able to depend on enforceability of choice-of-law and forum selection clauses choosing New York).

106. *Id.* at 12, 18.

107. *Id.* at 18, 33–34 (discussing New York's success attracting out-of-state contracts and the steps it has taken to ensure application of its laws).

108. New York encourages commercial parties to specify its law and forum by generally assuring that those choices will be honored, despite few if any other contacts with the state. See Eisenberg & Miller, *supra* note 3, at 34 (stating that contracting parties' choice of New York

New York therefore is now engaged in traditional interjurisdictional competition for commercial activity *and* law-as-commodity competition for commercial contracts.

Once domestic interest group dynamics have shaken out in the employment context in a particular state and an employer-friendly regime has emerged, one might expect that state to engage in the latter kind of interjurisdictional competition. Yet there is little evidence that states with employer-friendly legal regimes are actually competing in this way. For example, in certain respects, New York's regulatory environment is more employer-friendly than many other states',<sup>109</sup> yet, as Eisenberg and Miller found, New York appears not to have sought employment contract-related business.<sup>110</sup> Why New York and other states have not done so is unclear. Perhaps relevant interest groups and lawmakers believe that such competition is unlikely to produce significant enforcement business because of the demand-side conditions described above and because out-of-state employees, absent an arbitration clause, typically control forum selection. Perhaps this also reflects comity concerns: Recognizing that attempts to regulate the conditions of employment for workers in other states might elicit a far stronger negative reaction from states than seeking to regulate other types of commercial arrangements, lawmakers may simply refrain from doing so.

But if the relevant state actors—interest groups and legal decision makers—saw the benefits of competing aggressively for employment law contracts as outweighing the comity-related or other costs of doing so, they might pursue such competition. Thus, while there are obvious reasons why a

---

law has been found itself to be a sufficient contact with New York to warrant enforcement of the choice-of-law clause). Furthermore, New York law mandates enforcement of choice-of-law clauses designating New York law in contracts for two hundred fifty thousand dollars or more, "whether or not such contract . . . bears a reasonable relation to [New York]." N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2007). The following section precludes matters from being dismissed on forum non conveniens grounds if the contract is for at least one million dollars and if Section 5-1401 applies. N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 2007).

109. New York has been unwilling to recognize a generally applicable common law public policy exception, see, for example, *Murphy v. American Home Product Corp.*, 448 N.E.2d 86, 89–90 (N.Y. 1983) (stating that New York courts would not recognize the same public policy exceptions recognized in other states unless the legislature enacted such laws), and its legislature has not provided broad statutory protections along these lines. New Jersey, on the other hand, has long recognized the common-law public policy exception. See, e.g., *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 512 (N.J. 1980) (recognizing a cause of action when employee discharge is contrary to public policy). New Jersey has also enacted a statute that provides fairly broad whistleblower and other protections. See generally *Conscientious Employee Protection Act*, N.J. STAT. ANN. §§ 34:19-1 to -14 (2007).

110. See *supra* note 92 and accompanying text (stating that no market has emerged yet for employment contracts).

state may have a greater interest in competing in the market for corporate contracts than for employment contracts, there may be other reasons for states to compete for the latter. Although such competition has yet to take hold as it has in the corporate and commercial contracting contexts, the potential exists.

### 3. *Overcoming Resistance from Other States: Competition, Choice of Law, and Choice of Forum*

Law-as-commodity interjurisdictional competition depends on the extraterritorial application of the chosen law. States engaging in such competition, and firms seeking to take advantage of it, cannot ensure that this occurs directly, because a competing state lacks the power to compel another state to apply its law to transactions and relationships within the latter's territory. Rather, application depends on the willingness of other states to adhere to the contractually chosen law or on a federal mandate—constitutional or statutory—to do so.<sup>111</sup>

Under the Full Faith and Credit Clause, Congress has the authority to enact national legislation regulating state-level choice of law.<sup>112</sup> However, Congress has not done so (yet) in either the corporate or employment contexts.<sup>113</sup>

Without a federal statutory mandate, law-as-commodity competition emerges most easily when states adopt a choice-of-law regime that generally applies the law chosen by the contracting parties. This type of regime prevails in the entity-law context. In internal corporate disputes, states generally adhere to the internal affairs doctrine, which provides that the law of the state of incorporation governs the relationships between and among managers,

---

111. See Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts* 9 (Mar. 18, 2007) (unpublished manuscript, on file with the Washington and Lee Law Review), available at [http://www.law.columbia.edu/null/?exclusive=filemgr.download&file\\_id=10797](http://www.law.columbia.edu/null/?exclusive=filemgr.download&file_id=10797) (arguing that unless other courts enforce choice-of-law clauses, the chosen law is ineffective); Ribstein & O'Hara, *supra* note 4, at 687–89 (noting that parties including choice-of-law provisions in their contract face difficulties in some states that do not enforce those provisions); see also *id.* at 21 (suggesting that noncompeting states may enforce choice-of-law clauses because it deters local firms from moving operations to a more friendly jurisdiction and is less costly than deregulation).

112. See U.S. CONST. art. IV, § 1 (granting Congress the authority to prescribe the effect of judicial proceedings).

113. In another article, I suggest that Delaware and its allies may seek this kind of federal "relief" if they perceive a genuine threat that other states might begin to regulate the internal affairs of Delaware firms. Glynn, *supra* note 24, at 143.

shareholders, and the corporation.<sup>114</sup> Despite some important exceptions, the parties' choice of law (through incorporation) is widely respected both within and outside of the jurisdiction of incorporation. This rule finds support in a special provision in the *Restatement (Second) of Conflicts of Law*,<sup>115</sup> and it has been extended to govern the internal affairs of other business entities.<sup>116</sup>

States typically do not extend the internal affairs doctrine to other contractual relationships, including employment contracts.<sup>117</sup> More general choice-of-law principles apply in the employment context, and, under these terms, a forum state is far less likely to adhere to a contractual choice-of-law clause, particularly when important state public policies are implicated.<sup>118</sup> Many states apply Section 187 of the *Restatement* when parties have contractually agreed upon a choice of law.<sup>119</sup> Section 187(1) provides for

---

114. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2004*, 52 AM. J. COMP. L. 919, 989 (2004) [hereinafter Symeonides, 2004 Survey] (stating that the "internal affairs" of corporations are governed by the law of the state of incorporation); Symeon C. Symeonides, *Choice of Law in the American Courts in 2005*, 53 AM. J. COMP. L. 559, 651–52 (2005) [hereinafter Symeonides, 2005 Survey] (observing that only a few cases did not apply the law of the state of incorporation in 2005); UNIFORM LIMITED LIABILITY COMPANY ACT § 1001(a) (1996) ("The laws of the State or other jurisdiction under which a foreign limited liability company is organized govern its organization and internal affairs . . .").

115. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (1971) (providing that the law of the state of incorporation will be applied to corporate rights and liabilities "except in the unusual case" where some other state has a more significant relationship to the occurrence and the parties).

116. See Glynn, *supra* note 24, at 132 (observing that LLC statutes in New York, California, and most other states expressly provide that charter-state law governs internal affairs of LLCs); Ribstein & O'Hara, *supra* note 4, at 664–65 (stating that the IAD has been applied in partnerships and other non-corporate business associations that were not traditionally state creations).

117. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 196 (1971) (noting that in the absence of a choice-of-law clause, courts will look at a variety of factors to determine which law to apply, but the place of the employee's primary performance is often paramount); see also *id.* § 188(3) ("If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied.").

118. See SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 63–119 (Martinus Nijhoff Publishers 2006) (stating that twenty-four states generally follow the approach in the *Second Restatement*); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) (stating that the law of the chosen state will be followed unless another state has a materially greater interest in the issue). Symeonides categorizes the remaining approaches: eleven states follow a traditional approach, ten follow a combined modern approach, five follow a significant contacts approach, and two follow a "better law" approach. SYMEONIDES, *supra*, at 63–119. Interestingly, non-enforcement of the parties' choice of law is higher in NCA cases than in nearly all other types of commercial contracts. See Ribstein, *supra* note 9, at 376 (stating that the parties' choice of law was not enforced in twenty-nine out of seventy-one NCA cases).

119. See Patrick J. Borchers, *Choice of Law in American Courts in 1992: Observations*

enforcement of contractual choice of law in situations where "the parties['] [dispute] could have [been] resolved by an explicit provision in their agreement directed to that issue."<sup>120</sup> However, if Section 187(1) is inapplicable—that is, the chosen law is inconsistent with a mandate of the jurisdiction whose law otherwise would have applied—courts will still generally enforce choice-of-law clauses unless one of two conditions is met.<sup>121</sup> First, a court will not enforce the parties' choice of law if neither the parties nor the transaction has a "substantial connection" with the chosen state and "there is no other reasonable basis for the parties' choice."<sup>122</sup> In addition, a court may refuse to uphold the parties' choice of law if it would be contrary to a fundamental policy of another state which has a "materially greater interest" than the chosen state and the other state "would be the state of applicable law in the absence of an effective choice of law by the parties."<sup>123</sup>

Courts in those jurisdictions that have not adopted Section 187 tend to apply interest-based choice-of-law analyses that impose similar limitations on party autonomy. For example, some jurisdictions will not enforce a choice-of-law provision in an employment contract if the effect would violate a local fundamental public policy.<sup>124</sup> In addition, a few jurisdictions have statutory

*and Reflections*, 42 AM. J. COMP. L. 125, 136 (1994) (stating that fifteen states still follow the First Restatement of Conflict of Laws); see also SYMEONIDES, *supra* note 118, at 63–119 (stating that twenty-four states generally follow the approach in the *Second Restatement*); Patrick J. Borchers, *The Choice of Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 357 (1992) (stating that thirty-six states have adopted some alternative to the First Restatement of Conflict of Laws that focus on "interests" and "significant relationships"); Symeon C. Symeonides, *Choice of Law in the American Courts in 2006: Twentieth Annual Survey*, 54 AM. J. COMP. L. 697, 713 tbl.1 (2006) [hereinafter Symeonides, *2006 Survey*] (citing twenty-three states that follow the *Second Restatement*); Symeon C. Symeonides, *Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1260 n.96 (1997) (stating that many states follow the *Second Restatement* in this regard even when they have not formally adopted the *Second Restatement*).

120. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1971). Whether the contract was validly formed is assumed in this formulation, although that too may be an issue in some circumstances. See William J. Woodward, Jr., *Constraining Opt-Outs: Shielding Local Law and Those It Protects from Adhesive Choice of Law Clauses*, 40 LOY. L.A. L. REV. 9, 17–20 (2006) (stating that the issue of whether the contract was validly formed is "scarcely addressed anywhere").

121. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971).

122. *Id.* § 187(2)(a).

123. *Id.* § 187(2)(b); see also Mark Kantor, *The Scope of Choice-of-Law Clauses*, 119 BANKING L.J. 724, 726 (2002) (discussing application of Section 187(2)); Symeonides, *2005 Survey*, *supra* note 114, at 619–28 (2005) (discussing important cases decided by the courts applying Section 187).

124. See, e.g., *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1373 (11th Cir. 2003) (overruling an Alabama district court's ruling that venue was proper in Alabama and allowing

provisions barring or limiting enforcement of choice-of-law provisions in employment or service contracts.<sup>125</sup>

These disparate choice-of-law regimes have played an important role in setting state corporate and employment law on different trajectories for interjurisdictional competition. Indeed, because the internal affairs norm emerged very early as a quasi-jurisdictional doctrine and quietly transformed into a horizontal choice-of-law rule,<sup>126</sup> party autonomy in the selection of corporate law—and hence, law-as-commodity competition—took hold well before the loosening of the traditional constraints imposed on party autonomy in other areas, including employment. The inertia of history and precedent obviously contributes to the differences that remain today.

Yet the formal distinctions between the choice-of-law rules that prevail in these areas should not be viewed as either independently decisive or permanent.<sup>127</sup> States adhere to these different frameworks—for example, the internal affairs doctrine and Section 187—voluntarily, and apply them somewhat differently by jurisdiction and situation. For example, contrary to the claims of the Delaware Supreme Court, the internal affairs doctrine does not have a constitutional dimension.<sup>128</sup> Although, on the margins, there may be Dormant Commerce Clause and Full Faith and Credit limitations, individual states have broad discretion to decide whether and how to apply these choice-of-law rules to firm activities occurring within the state or otherwise affecting state interests.<sup>129</sup> A few states, most notably California, already recognize

---

the court to apply Georgia substantive law to the noncompetition agreement); *Palmer & Cay, Inc. v. Marsh & McClennan Co.*, No. 4:03-CV-00094-BAE, 2003 WL 24096162, at \*10 (S.D. Ga. Nov. 11, 2003) (determining that noncompetition agreements were unenforceable in Georgia), *aff'd in part, vacated in part* 404 F.3d 1297 (11th Cir. 2005); *Convergys Corp. v. Keener*, 582 S.E.2d 84, 85 (Ga. 2003) (determining that Georgia courts will not enforce a choice-of-law clause if doing so would contravene Georgia policy).

125. See LA. REV. STAT. ANN. § 23:921 (2007) (stating that Louisiana will not enforce a choice-of-law provision in an employment contract unless the employee consents to the clause after the occurrence of the incident that gave rise to the dispute).

126. See Ribstein & O'Hara, *supra* note 4, at 664–65, 674–79 (noting the transition of the internal affairs doctrine); Tung, *supra* note 38, at 44–46 (arguing that the internal affairs doctrine became a choice-of-law rule).

127. See Symeon C. Symeonides, *Choice of Law in American Courts in 1994: A View "From the Trenches"*, 43 AM. J. COMP. L. 1, 2 (1995) (noting that scholars tend to agree that choice-of-law frameworks themselves are sufficiently flexible that they do not produce consistent outcomes across jurisdictions).

128. See, e.g., Glynn, *supra* note 24, at 111, 117–24 (arguing that the Delaware Supreme Court's constitutional conclusions are a "significant stretch"); Ribstein & O'Hara, *supra* note 4, at 716–21 (arguing there is very little constitutional support for the internal affairs doctrine).

129. See, e.g., Glynn, *supra* note 24, at 115–17 (stating that a state can often use its own choice-of-law provisions when corporate activity affects it); Ribstein & O'Hara, *supra* note 4, at



limitations on the internal affairs doctrine,<sup>130</sup> and the *Restatement* articulation of the doctrine expressly acknowledges that it is not absolute.<sup>131</sup> A state could, for example, choose to apply a choice-of-law analysis to corporate internal affairs more akin to Section 187.<sup>132</sup> Indeed, as I discuss in another article,<sup>133</sup> Delaware is very much aware of the genuine threat such inroads into the internal affairs norm pose to the benefits of its domination in the chartering market.<sup>134</sup>

Horizontal choice of law therefore is essentially a political rather than a constitutional matter. While the prevailing choice-of-law rules in the corporate and employment areas are products of distinct histories, they are also subject to shifts in local policy preferences and are the result of local political judgments about when and the extent to which other local interests should outweigh party autonomy.<sup>135</sup> Thus, most of the time, states continue to allow party autonomy to trump local corporate governance interests such as the protection of resident minority shareholders. At the same time, states have been less willing to allow party autonomy to trump local interests in protecting resident employees.<sup>136</sup> For example, it is unlikely that a state would enforce a choice-of-law clause between an in-state resident employee and an out-of-state employer that would result in the application of minimum wage or workers' compensation protections weaker than those under local law. Yet in both the corporate and

---

718 (stating that the Full Faith and Credit Clause "would not compel enforcement of choice-of-law clauses").

130. See, e.g., CAL. CORP. CODE § 2115 (West 2006) (applying California corporate law to the affairs of some foreign corporations); N.Y. BUS. CORP. L. §§ 1317–1320 (McKinney 2003) (applying New York law concerning directors and officers of foreign corporations doing business in New York).

131. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (1971).

132. Cf. Ribstein & O'Hara, *supra* note 4, at 716–21 (discussing policy reasons and constitutional justifications for upholding choice-of-law issues).

133. See generally Glynn, *supra* note 24.

134. In *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108 (Del. 2005), the Delaware Supreme Court responded to this threat by claiming that California and other states are constitutionally bound to apply Delaware law to Delaware corporations (regardless of the location of their shareholders or operations). *Id.* at 1113–18. Although the decision is doctrinally weak, the court's aim was not so much to persuade as to deter other states from abandoning the internal affairs norm and to create the appearance of ongoing interjurisdictional conflict that might convince federal lawmakers to step in and mandate adherence to the internal affairs norm. Glynn, *supra* note 24, at 136–43.

135. See *supra* Parts II.B.1–2 (discussing historical changes in state supply of and consumer demand for favorable choice-of-law rules).

136. See *supra* Parts II.B.1–2 (discussing reasons why states defer more to party autonomy in corporate matters than in employment matters such as public policy concerns and different federal regulation in the two areas).

employment contexts, a state's willingness to enforce choice-of-law terms could change with the prevailing political winds.

Importantly, however, a state's ability to pursue a law-as-commodity business is not necessarily determined solely by foreign states' choice-of-law preferences. Faced with the prospect of resistance from other states to applying its law, a state interested in competing has a second, sometimes overlooked, option for seeking to have its law apply extraterritorially.<sup>137</sup> In addition to relying on other states voluntarily upholding parties' choice of law, a state marketing its law can, at least in privately litigated disputes, impose its will on parties elsewhere, and, hence, on the other states themselves, through its judgments.<sup>138</sup>

As mentioned above and detailed by Professors Eisenberg and Miller, New York courts give almost absolute respect to choice-of-law clauses in commercial contracts, at least between sophisticated parties.<sup>139</sup> Similarly, New York courts are very receptive to choice-of-forum clauses.<sup>140</sup> And, to provide greater assurance to parties selecting New York law or fora in major commercial transactions, the state's legislature enacted statutes mandating enforcement even when the parties have *no* other connections to the state.<sup>141</sup>

These guarantees not only bolster the incentives for some parties to choose New York law and fora and produce work for New York practitioners<sup>142</sup> but also deny other states the opportunity to apply their own, potentially adverse choice-of-law rules to contracts selecting its law. Under the Full Faith and Credit Clause,<sup>143</sup> a state generally must accord a foreign state's judgment the same preclusive effect that it would give a judgment issued by the foreign

---

137. See Eisenberg & Miller, *supra* note 3, at 7–8 (noting that courts must recognize judgments of other states under the Full Faith and Credit Clause).

138. As a general matter, the Full Faith and Credit Clause requires states to honor the judgments of other states. See U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

139. Eisenberg & Miller, *supra* note 3, at 33–34.

140. See *id.* at 36 (stating that New York courts enforce forum-selection clauses unless there is a strong showing "that they result from fraud or overreaching, are unreasonable or unfair, or contravene some strong public policy").

141. *Id.* at 38–39.

142. See *id.* at 37–38 (stating reasons why "New York's receptive attitude towards choice-of-law and forum selection clauses" is advantageous to contracting parties and New York practitioners).

143. See U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.").

state.<sup>144</sup> If a court enters a judgment on a particular matter, foreign jurisdictions usually will be incapable of reaching a contrary conclusion in pending or later enforcement proceedings.<sup>145</sup> Thus, facing reluctance by other states to enforce a choice-of-law clause, a state marketing its law may be able to ensure enforcement by adjudicating the matter first.

Of course, the state's success using this method depends on a number of factors, some of which are out of its immediate control. For example, suit must actually be filed within the state—litigation elsewhere is of no use.<sup>146</sup> Also, to the extent there is competing litigation in another interested jurisdiction where enforcement of the clause is unlikely, the judge handling the matter must refuse to stay or slow proceedings in deference to the other action and reject other forum-related motions—e.g., a motion to dismiss for *forum non conveniens* or, where appropriate, to dismiss for lack of jurisdiction.<sup>147</sup> Further, the judge must win the race to final judgment. Accordingly, success of this strategy depends on buy-in by the judiciary, who may be more removed from political and interest group influences, feel bound by judicial norms, such as following precedent, ignoring political considerations, and adhering to notions of comity, or otherwise resist acting to further the state's competitive ambitions.<sup>148</sup>

While it is unclear how far New York courts might go in such interjurisdictional disputes, at least systematically, Delaware's courts have sought to defend the state's corporate law franchise in precisely this manner.<sup>149</sup> The Delaware Court of Chancery has a history of closely guarding its jurisdiction in corporate law related matters by, for example, showing a reluctance to defer to first-filed proceedings elsewhere in the past.<sup>150</sup> And, in

144. See Eisenberg & Miller, *supra* note 3, at 7 n.22 ("For judgments of courts in other states, recognition is required under the Full Faith and Credit Clause.").

145. *Id.*; see 28 U.S.C. § 1738 (2000) (giving "Acts, records and judicial proceedings . . . the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of any State, Territory or Possession from which they are taken"); Baker v. General Motors Corp, 522 U.S. 222, 246 (1998) (Kennedy, J., concurring) (discussing how the Full Faith and Credit Clause requires that courts recognize the preclusive effects of judgments in other states); Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373 (1996) (same).

146. See Ribstein, *supra* note 9, at 419–30 (noting the importance of the parties' ability to choose a forum that will enforce favorable contractual clauses).

147. See *id.* at 421–22 (discussing advantages of enforcing choice-of-forum clauses and noting that a court can enforce such clauses "without analyzing and applying another state's law or establishing controversial precedent on enforcement of contractual choice-of-law").

148. See *id.* at 448–49 (discussing the pressures that influence members of the judiciary).

149. Glynn, *supra* note 24, at 137–38; see also Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1074–81 (2000) (discussing developments in Delaware's decisional law on corporate matters).

150. See, e.g., Biondi v. Scrusby, 820 A.2d 1148, 1150 (Del. Ch. 2003) (declining to stay

recent decisions, the Chancery Court has become very aggressive in wresting shareholder derivative actions away from other jurisdictions.<sup>151</sup> What is particularly telling about these decisions is that the interests cited for not deferring—including the internal affairs doctrine and the presence of unresolved questions of Delaware law—can be used to justify Delaware's pushing ahead in almost *any* corporate law matter. Moreover, because the Court of Chancery is designed for speed,<sup>152</sup> its Chancellors almost always can issue a final judgment before other courts.<sup>153</sup>

Consider how this race-to-judgment strategy is a win-win-win for Delaware. By wresting shareholder litigation involving Delaware corporations away from other jurisdictions, Delaware ensures that its own law gets applied to such disputes; it pleases its primary corporate constituents—firm managers—who, on balance, would prefer to have such matters litigated in Delaware (even if they occasionally lose there); and it signals to the plaintiffs' bar how its members can create more work for themselves (and, as a result, their colleagues in the local defense bar).<sup>154</sup> Delaware's coordinated efforts—i.e., buy-in by its courts and local interest groups—to promote and then win the race to judgment in the corporate area shows the potential for this approach to benefit a state committed to law-as-commodity competition when enforcement of its law is uncertain elsewhere.

---

the current case in deference to an action first filed elsewhere); *In re* Walt Disney Co. Derivative Litig., C.A. No. 15452, 1997 WL 118402, at \*3 (Del. Ch. Mar. 13, 1997) (same); see also *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970) (setting forth the factors to consider in determining whether to stay an action that was filed first in another jurisdiction).

151. See, e.g., *Brandin v. Deason*, 941 A.2d 1020, 1021 (Del. Ch. 2007) (denying a motion to stay the Delaware proceeding in favor of a later-filed parallel Texas action); *In re* Topps Co. Shareholders Litig., 924 A.2d 951, 953–54 (Del. Ch. 2007) (denying a motion to stay or dismiss the current Delaware action in favor of a first-filed parallel action in New York); *Ryan v. Gifford*, 918 A.2d 341, 346 (Del. Ch. 2007) (denying defendant's motion to dismiss or stay in favor of an earlier-filed California action). In another context, the Delaware Supreme Court recently emphasized that Delaware courts should resist giving up jurisdiction over corporate disputes. See *Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 135 (Del. 2006) (reversing a forum non conveniens dismissal, because, while Florida would be convenient and Florida law would govern, a Delaware trial was not an overwhelming burden).

152. See *Fisch*, *supra* note 149, at 1076–77 (stating that Delaware chancery courts resolve issues quickly because they sit without a jury).

153. See *id.* at 1085–86 (discussing how "[p]rocedural features of the Delaware courts enhance their responsiveness").

154. Cf. *Ribstein & O'Hara*, *supra* note 4, at 683–85 (noting that because lawyers generally are experts in their own law, they can act as local counsel for firms, which creates an incentive to promote management-friendly legislation).

We have yet to observe a state engaging in a Delaware-like competition strategy in the employment law context; although, as the discussion of *Advanced Bionics* suggests, we do see some interjurisdictional conflicts and aggressive judicial behavior in the enforcement of NCAs.<sup>155</sup> Again, this contrast is due in part to the fact that the demand and supply-side incentives to engage in such competition have, to date, not been as strong<sup>156</sup> and because the prominence of federal claims makes forum selection and first-filed rule considerations more complicated.<sup>157</sup> It is also due to differences in plaintiffs and proceedings, which may limit use of such a strategy in some circumstances.<sup>158</sup> Again, because most employment disputes involve alleged violations of employee rights, employees typically are the first movers in litigation and thus control initial forum selection.<sup>159</sup> In the absence of some kind of consent, if the employer files a second suit in the state designated by the choice-of-law clause, that state may lack personal jurisdiction over an employee who resides and works elsewhere.<sup>160</sup> This complication is less likely in corporate law litigation, since the second-filed action may be brought by another set of shareholders seeking to represent the corporation or by management seeking declaratory relief against the firm itself.

Moreover, even if some in-state constituencies prefer aggressive competitive tactics, courts may be reluctant to sidestep the first-filed rule and proceed with second-filed suits brought by employers.<sup>161</sup> Regardless of their motives, Delaware's Chancellors often are able to justify their seizure of litigation as best for the corporation or the shareholders as a whole, particularly when the

---

155. See *supra* note 10 and accompanying text (discussing "the rise of interjurisdictional disputes involving NCA enforcement").

156. See *supra* Part I (stating that "[o]n the demand side, firm managers typically are less concerned about horizontal choice-of-law considerations in employment than in the corporate context," and, "[o]n the supply side, states have fewer incentives to promote firm selection of their employment law extraterritorially").

157. See *supra* Part I (noting that differences amongst state employment laws are "usually insignificant compared to the legal risks from federal employment law").

158. Compare *supra* Part I (discussing that in the employment context "employees often control forum selection" and are the plaintiffs in litigation), with *supra* Part I (discussing how "employers typically are the first movers in NCA litigation").

159. See *supra* Part I ("[B]ecause employees often control forum selection (absent an arbitration clause), they are able to avoid the employer-preferred law by filing in a more hospitable jurisdiction.").

160. A court must have personal jurisdiction over both parties in order to adjudicate a dispute and a court seeking long-arm jurisdiction over a defendant must establish that a defendant has minimum contacts with the forum state. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-78 (1985) (discussing what minimum contacts are required between a party and the forum state).

161. Ribstein, *supra* note 9, at 448-49.

underlying claims are derivative in nature.<sup>162</sup> Since such a justification is absent in the employment context, it may be more difficult for a court to claim that it is the more appropriate forum: The second suit is likely to be the mirror image of the first and, thus, an unambiguous exercise in forum shopping. In light of the uncertainty all of this produces, and for other reasons discussed previously, arbitration probably is a more attractive option for employers in many circumstances than trying to win the race to judgment in dueling courts.<sup>163</sup>

Nevertheless, the potential for such competition in the employment area remains. Some of the foregoing impediments to the second-filed proceeding—such as lack of personal jurisdiction over and undue burden on employees—may be countered, at least to the satisfaction of courts in states engaged in competition, with contractual choice-of-forum or consent-to-jurisdiction clauses.<sup>164</sup> Moreover, the background choice-of-law and comity principles leave much flexibility in application. In addition, if differences in the substance or enforcement of underlying law produce stakes high enough both for employers and for a state wishing to market its law as a commodity, both may work to ensure that even initially reluctant local courts go along.<sup>165</sup>

Finally, and perhaps most importantly, because of their *in terrorem* effects, a competing state's judgments can defeat another state's public policy prerogatives as a practical matter, even if the competing state cannot ensure extraterritorial enforcement in every case. Even a relatively small number of judgments favoring employers in the competing state might send a powerful signal to present and future employees that the employer can and will enforce its preferred terms.<sup>166</sup>

---

162. See, e.g., *In re Topps Co. Shareholders Litig.*, 924 A.2d 951, 961–62 (Del. Ch. 2007) (discussing how Delaware adjudication of matters involving a Delaware corporation is good for the investors as a whole).

163. See *supra* Part II.B.1 (discussing the advantages of using arbitration to minimize litigation risk and resolve employee disputes quickly and efficiently).

164. See Eisenberg & Miller, *supra* note 3, at 7–8 (noting that forum selection clauses are "usually effective to confer jurisdiction on the court selected by the parties").

165. As Eisenberg and Miller detail, interest groups were able to convince the New York legislature to pass a number of statutory provisions limiting the ability of New York courts to choose not to enforce choice-of-law and choice-of-forum clauses contained in large commercial contracts. Eisenberg & Miller, *supra* note 3, at 33–39.

166. Scholars have discussed this kind of effect in the NCA area. Whether or not NCAs ultimately are fully enforceable, their presence and potential enforcement can affect employee behavior on a wide scale. See, e.g., Arnow-Richman, *supra* note 28, at 980–84 (discussing this effect and the literature); Catharine L. Fisk, *Reflections on the New Psychological Contract and the Ownership of Human Capital*, 34 CONN. L. REV. 765, 782–83 (2002) (discussing the *in terrorem* value of NCAs even in jurisdictions where they are unenforceable); Charles A. Sullivan, *Revisiting the "Neglected Stepchild": Antitrust Treatment of Postemployment Restraints of Trade*, 1977 U. ILL. L. F. 621, 622–23 (discussing how the presence and potential enforcement of NCAs affect employees' behavior).

Not only might this result in employees being resigned to such terms, but the added costs and risks of having to prevail in dueling litigation might also deter employees from seeking relief downstream. Thus, ultimate enforcement may be less important than a supplier state's willingness to race to judgment on behalf of employers who have selected its law.

### *III. Noncompetition Agreements and Law-as-Commodity Interjurisdictional Competition: A Case-Study*

As the prior Part demonstrates, conditions generally have not been ripe for law-as-commodity competition in the employment law area.<sup>167</sup> Yet, importantly, none of these conditions are necessarily permanent. The emergence of different firm- and state-level incentives therefore could lead to corporate law-like interjurisdictional competition or a more limited variant in the employment context. In exploring this possibility, consider, for example, noncompetition agreements.

#### *A. NCA Enforcement: Demand and Supply-Side Incentives*

In the NCA context, the demand-side equation can differ sharply from most other areas of employment law. Where technological innovation or sustained customer relationships drive firm value, the risks to employers of competition from former employees may exceed other legal risks.<sup>168</sup> Recently, this has produced the dramatic growth in the use of such covenants, particularly in the information and technology sectors,<sup>169</sup> and litigation over their enforcement.<sup>170</sup>

167. See generally *supra* Part II.

168. See Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 602–03 (1999) (discussing employers' interest in preventing "employee-disseminated spillovers of employee proprietary knowledge" by enforcing NCAs).

169. Cf. Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERK. J. EMP. & LAB. L. 287, 295–97 (2006) (discussing these changes and the importance of NCAs); Estlund, *Between Rights and Contract*, *supra* note 28, at 392 ("The growth of the information-based economy has converged with increasing job mobility to generate an upsurge in [NCAs], as well as in scholarly attention to those covenants."); Katherine V.W. Stone, *Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 723 (2002) (discussing the growth in the use of and litigation over NCAs).

170. See Stone, *Shadow of Globalization*, *supra* note 2, at 17 (discussing how economic changes, the rise in importance of human capital to firms, and employee incentives have resulted

Moreover, horizontal choice-of-law considerations with regard to NCAs are paramount because enforcement varies widely from state to state. California and a few other states broadly prohibit NCAs as unlawful restraints on trade.<sup>171</sup> Other states, such as Georgia, subject such agreements to rigorous scrutiny.<sup>172</sup> Most other states will enforce these agreements, although not if their only purpose is to limit former employee competition.<sup>173</sup> These states typically require NCAs to serve some other "legitimate interest" of the employer—such as protecting trade secrets or goodwill<sup>174</sup>—and enforce them only to the extent their restrictions are "reasonable" in scope (i.e., time, substance, and sometimes geography).<sup>175</sup> Courts occasionally also require that an NCA be supported by separate consideration.<sup>176</sup>

---

in the enforceability of post-termination restraints being "probably the most frequently litigated issue in the employment area").

171. See CAL. BUS. & PROF. CODE § 16600 (West 2007) (stating that contracts restricting professions and trades are generally void unless excepted); HAW. REV. STAT. § 480-84 (2007) (same); N.D. CENT. CODE § 9-08-06 (2007) (same); see also COLO. REV. STAT. § 8-2-113 (2007) (prohibiting covenants that restrict employment with specific exceptions).

172. See *Advance Tech. Consultants, Inc. v. RoadTrac, LLC*, 551 S.E.2d 735, 737 (Ga. Ct. App. 2001) (stating that restrictive covenants in employment contracts are strictly scrutinized under Georgia law and nonseverable).

173. See RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. b (1981) (noting that an NCA in the employment context must be ancillary to a "transaction or relationship that gives rise to an interest worthy of protection" and that an NCA without such a connection is "necessarily unreasonable").

174. See Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1176–77 (2001) ("Those interests that satisfy this test and constitute 'protectable' employer interests fall into two doctrinal categories: interests in customer relationships or business goodwill and interests in confidential or secret business information."); Estlund, *Between Rights and Contract*, *supra* note 28, at 393–94 (discussing legitimate protectable interests covered by NCAs).

175. See, e.g., Arnow-Richman, *supra* note 174, at 1178 (stating that the "reasonable inquiry" focuses on the duration of time, geographic area, and substance covered by the NCA); Estlund, *Between Rights and Contract*, *supra* note 28, at 381 (noting that NCAs are "scrutinized for the legitimacy of the employer interests that they protect and the reasonableness of the restraints they place on postemployment competition"); Gillian Lester, *Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis*, 76 IND. L.J. 49, 54–58 (2001) (discussing the legitimate interest and reasonableness factors).

176. See *Alex Sheshunoff Mgmt. Serv., L.P. v. Johnson*, 209 S.W.3d 644, 651 (Tex. 2006) ("The covenant cannot be a stand-alone promise from the employee lacking any new consideration from the employer."); see also *Poole v. Incentives Unlimited, Inc.*, 548 S.E.2d 207, 209 (S.C. 2001) (discussing whether an NCA was supported by sufficient consideration from the employer); cf. Arnow-Richman, *supra* note 174, at 1239–40 (stating that courts typically find that employment itself is adequate consideration, but some courts will require additional compensation or some other consideration for NCAs signed long after employment commenced).



Yet, even in those states that have adopted the legitimate interest and reasonableness approach, application may differ. For instance, some states rarely find NCAs enforceable.<sup>177</sup> Others tend to enforce NCAs to the extent they find them reasonably necessary to protect one or more of a broad range of interests.<sup>178</sup> Further, while some states will not reform overly broad NCA terms, many are willing to rewrite or "blue pencil" provisions to enforce them to the extent they are reasonable.<sup>179</sup> Thus, in practice, state treatment lies along a wide spectrum from near-certain nonenforcement to frequent enforcement.<sup>180</sup>

These differences in NCA enforcement regimes may have important market-wide effects, not just for workers but for business activity more generally. For example, Professor Ronald Gilson has argued that California's triumph over Massachusetts in technological innovation is partially due to the greater transfer of knowledge among firms due to California's prohibition of post-employment NCAs.<sup>181</sup>

177. See, e.g., Estlund, *Between Rights and Contract*, *supra* note 28, at 395 (discussing how Texas's "strict scrutiny" approach presumes that NCAs are invalid and requires "'compelling' employer interests and a tighter fit between those interests and the covenant's restrictions").

178. See, e.g., *id.* at 395 (discussing Massachusetts's recognition of a broad range of NCA-supporting interests and its tendency to enforce reasonably necessary provisions); cf. Arnow-Richman, *supra* note 174, at 1181–97 (detailing how courts have found enforceable legitimate interests by broadening traditional categories—such as trade secrets and highly specialized training—to cover more amorphous interests).

179. Compare MICH. COMP. LAWS § 4454.774a (2007) (stating a court may limit an NCA to render it reasonable and enforce it as limited), *Fearnow v. Ridenour*, Swenson, Cleere & Evans, P.C., 138 P.3d 723, 731 (Ariz. 2006) (noting that Arizona courts may edit but not rewrite NCAs), and *Intermountain Eye & Laser Ctrs. v. Miller*, 127 P.3d 121, 130–31 (Idaho 2005) (stating that a court may "simply and accurately" edit NCAs), with WIS. STAT. ANN. § 103.465 (2006) (stating that unreasonable NCAs are void in their entirety). See also Arnow-Richman, *supra* note 28, at 965 n.6, 976 n.49, 989 n.99 (discussing judicial approaches to NCA reformation).

180. See Estlund, *Between Rights and Contract*, *supra* note 28, at 421 (noting variances among state's treatment of NCAs).

181. See Gilson, *supra* note 168, at 602–09; see also Richard A. Booth, *Give Me Equity or Give Me Death—The Role of Competition and Compensation in Building Silicon Valley* 3–4 (Villanova Univ. Sch. of Law Working Paper Series, Paper No. 99, 2006), available at <http://law.bepress.com/villanovawps/papers/art99> (discussing California and Massachusetts approaches to enforcing NCAs). See generally Alan Hyde, *The Wealth of Shared Information: Silicon Valley's High-Velocity Labor Market, Endogenous Economic Growth, and the Law of Trade Secrets* (Sept. 1998) (unpublished paper, on file with the Washington and Lee Law Review), available at <http://andromeda.rutgers.edu/~hyde/> (follow "Silicon Valley: The Wealth of Shared Information; Some Economics of Nonrivalrous Information"; "Legal Impediments to Endogenous Growth"; "How Silicon Valley Effectively Abolished Trade Secrets"; and "Three Alternative Economic Analyses" hyperlinks) (discussing the legal and economic factors, including the lack of impediments to employee mobility, that contributed to the growth of Silicon Valley's computer industry).

From the perspective of an employer seeking to manage risk, which state's noncompetition law governs the enforcement of NCAs also matters—a lot. Individual employers have a strong incentive to keep their employees and intellectual capital from migrating to competitors.<sup>182</sup> Indeed, at least with regard to some types of firms or categories of workers, employers' *ex ante* concerns regarding NCA enforceability against departing employees may outweigh all other employment law considerations.<sup>183</sup>

These substantive distinctions and corresponding incentives also alter employers' forum considerations. Where the threat of employee competition is paramount, arbitration clauses are of less value to employers and may, in fact, be detrimental, because effective enforcement often requires immediate injunctive relief to prevent the competitive activity. Although an arbitrator may be empowered to award injunction relief, arbitration is typically not conducive to facilitating speedy resolution or providing interim remedies.<sup>184</sup> Moreover, employers often want to join the former employee's putative new employer as a defendant—a tactic binding arbitration would preclude.<sup>185</sup> Thus, perhaps ironically, while both arbitration and NCAs have risen to recent prominence in employment law practice,<sup>186</sup> they do not work well together.

---

182. See Arnow-Richman, *supra* note 174, at 1202–03 (discussing employers' "People Interest" in the availability of skilled employees); Estlund, *Between Rights and Contract*, *supra* note 28, at 415–17 (discussing employers' reasons for using NCAs to protect trade secrets and other business interests); Gilson, *supra* note 168, at 609 (noting that a firm has an individual interest in restricting the mobility of its employees). Professor Gilson suggests the presence of a collective action problem: While the market as a whole may benefit from nonenforcement, individual employers have powerful incentives to have their employees sign NCAs. *Id.* at 609. The prospect of NCA enforcement might produce other related benefits for employers, including keeping down compensation levels by making exit more difficult and reducing the need to compensate employees to prevent them from leaving.

183. See Gilson, *supra* note 168, at 609 (discussing the importance of NCAs as a method of protecting employer knowledge).

184. *Cf.* Hough Assocs. v. Hill, No. Civ. A. 2385-N, 2007 WL 148751, at \*2 (Del. Ch. Jan. 17, 2007) (noting that NCAs often give rise to expedited suits for injunctive relief against not only the employees but also third parties, and this might motivate an employer to favor a judicial forum over arbitration).

185. Arbitration would preclude joining the putative new employer as a defendant because the new employer is not a party to the arbitration agreement. See *id.* at \*13 (noting that in the NCA context a former employer will often "seek injunctive relief against the competing employee's new employer, a party that will, for obvious reasons, not have signed up to arbitrate that dispute").

186. See Estlund, *Between Rights and Contract*, *supra* note 28, at 379 (discussing how NCAs and mandatory arbitration agreements are important and controversial contractual instruments in employment law); see also Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 638 (2007) (noting employers' increasing use of both these types of contract terms).

Some courts have been willing to grant preliminary injunctions barring competition pending the outcome of arbitration,<sup>187</sup> but others are unwilling to entertain such motions when a binding arbitration clause is present.<sup>188</sup> On balance, the safer route for an employer with great *ex ante* concerns about preventing employee competition is to omit arbitration clauses from employment contracts containing noncompetition provisions. Either way, access to a hospitable judicial rather than arbitral forum is essential—something that distinguishes NCA enforcement from most other types of employment litigation.

Noncompetition litigation differs from most other employment-related suits in another important respect. Employers typically are the first movers in NCA litigation—they sue, alleging breach of contract and related claims.<sup>189</sup> Firms therefore have a much greater ability in this context than in other areas of employment law to control the judicial forum in the first instance.

As a whole, employers facing a substantial risk of employee competition have powerful incentives to choose the applicable law and find a hospitable judicial, rather than arbitral, forum when anticipating the need to enforce noncompetition agreements. The recent growth in litigation over employment contracts containing both noncompetition clauses and choice-of-law or forum-selection clauses provides some evidence of this. *Advanced Bionics*<sup>190</sup> is the best-known example; *Keener v. Convergys Corp.*<sup>191</sup> and *Application Group, Inc. v. Hunter Group, Inc.*<sup>192</sup> also have received significant attention, and there are many others.<sup>193</sup> And, while arbitration clauses have received the most

187. See, e.g., *Merrill Lynch, Pierce, Fenner, & Smith v. Schwartz*, 991 F. Supp. 1480, 1482 (M.D. Ga. 1998) (granting preliminary injunction upholding an NCA). Another option is to exclude claims for injunctive relief from arbitration. See, e.g., *James & Jackson, L.L.C. v. Willie Gary, L.L.C.*, 906 A.2d 76, 81 (Del. 2006) (describing an arbitration clause which allows nonbreaching parties to obtain injunctive relief in court). The downside of such an exclusion for employers is that employees seeking both monetary and equitable remedies for alleged violations of federal or state law may also gain access to a judicial forum in the first instance.

188. See, e.g., *Bakery Drivers & Salesmen Local 194 v. Harrison Baking Group*, 869 F. Supp. 1168, 1178–80 (D.N.J. 1994) (denying a motion for preliminary injunction and a motion to compel expedited arbitration where parties consented to an arbitration agreement).

189. See *supra* Part I (noting that "employers typically are the first movers in NCA litigation").

190. See *supra* notes 11–21 and accompanying text (discussing *Advanced Bionics*).

191. See *Keener v. Convergys Corp.*, 205 F. Supp. 2d 1374, 1382 (S.D. Ga. 2002) (finding the NCA between the parties unenforceable), *aff'd in part, rev'd in part* 342 F.3d 1264 (11th Cir. 2003).

192. See *Application Group, Inc. v. Hunter Group, Inc.*, 72 Cal. Rptr. 2d 73, 75 (Cal. Ct. App. 1998) (affirming the trial court's decision to apply California law in determining that the NCA was unenforceable).

193. See, e.g., Ribstein, *supra* note 9, at 376 (discussing statistics on cases involving

judicial and scholarly attention of all employer risk-management techniques, choice-of-law and choice-of-judicial-forum clauses emerge more frequently in the noncompetition context.<sup>194</sup>

Turning to the supply side, conditions likewise may be favorable to competition. As an initial matter, the balance of interests at issue in the enforcement of NCAs may play differently in many jurisdictions than do other employment law doctrines. For example, although some employers now insist that a much broader group of employees sign noncompetition agreements, the class of employees against whom such clauses have been enforced historically have greater bargaining power and, hence, may have garnered less sympathy than other employees.<sup>195</sup> The willingness of many states to enforce NCAs within certain limits may also suggest the intuitive appeal of employer claims that their businesses are vulnerable to opportunistic former employees.<sup>196</sup>

Furthermore, enforcing NCAs broadly may be politically appealing in states where employers fear their employees being wooed away by out-of-state competitors; in other words, legal decision makers may be convinced to enforce robustly restrictive covenants if, on balance, they perceive the need to protect local firms from external competition. This is something scholars have suggested in their discussion of Massachusetts's employer-friendly NCA regime and its competition with California's high-tech sector.<sup>197</sup> The threat of competition from California to Minnesota's significant medical device segment also may have influenced the Minnesota court in the *Advanced Bionics* litigation.<sup>198</sup> In fact, some courts will declare explicitly that the state has an interest in protecting local firms from such foreign competition.<sup>199</sup>

---

choice-of-law provisions and noncompetition clauses in employment agreements).

194. See, e.g., Eisenberg & Miller, *supra* note 3, at 8–10 (discussing the historical context for increased use of choice-of-law and choice-of-forum provisions in contracts).

195. Cf. Estlund, *Between Rights and Contract*, *supra* note 28, at 392 (stating that NCAs have filtered down to lower-level employees with relatively little sophistication, bargaining power, or economic wherewithal).

196. Cf. *id.* at 379 (describing a former employee's right to compete as "conditionally waivable").

197. See, e.g., Gilson, *supra* note 168, at 602–13 (comparing Massachusetts and California laws with respect to NCAs and their impact on the states' competition within the high-tech sector).

198. See Michael D. Goodman, *The Medical Device Industry in Massachusetts: An Updated Profile*, A Presentation to MassMEDIC's 11th Annual Meeting (May 1, 2007), <http://www.massmedic.com/docs/goodman07.pdf> (indicating that Minnesota is ranked second to California in the absolute number of employees and annual payroll in the medical device industry and ranks first on a per capita basis).

199. See, e.g., *Estee Lauder Cos. v. Batra*, 430 F. Supp. 2d 158, 173 (S.D.N.Y. 2006) ("Just as California has a strong interest in protecting those employed in California, so too does

States where the internal dynamics have produced such employer-friendly noncompetition regimes therefore have powerful incentives to please home firms by offering to enforce their law extraterritorially. Given the importance of these matters to employers and the sheer volume of litigated noncompetition cases,<sup>200</sup> they may also have good reasons to enter the broader market to attract additional NCA business. Thus, some states may have incentives to sell their NCA regime akin to the incentives New York has to sell its commercial law.

### B. Evidence of Emerging Competition?

#### 1. Law-as-Commodity Competition by Transactionally Connected States

In light of the foregoing conditions, is there evidence that law-as-commodity variants of interjurisdictional competition exist in the NCA context? As discussed above, choice-of-law clauses and choice-of-forum clauses have proliferated in employment contracts containing NCAs. And, the validity of these clauses are now the subject of frequent litigation.<sup>201</sup> This most often occurs when an employee leaves to work for a new employer in another state. The circumstances in *Advanced Bionics* provide the classic example: An employee who had signed an NCA containing a choice-of-law clause while working for a Minnesota-based firm left the state to work for a California employer.<sup>202</sup>

Of course, as discussed above in Part II.B.3, choice-of-law doctrine and the constraints on party autonomy limit the use of choice-of-law clauses. In determining whether to adhere to a choice-of-law clause in the NCA context, states tend to apply Section 187 or other choice-of-law frameworks containing public policy limitations rather than a corporate-internal-affairs-type doctrine.<sup>203</sup>

---

New York have a strong interest in protecting companies doing business [in New York].").

200. See Stone, *Shadow of Globalization*, *supra* note 2, at 17 ("The enforceability of post-termination restraints is now probably the most frequently litigated issue in the employment area.").

201. See Ribstein, *supra* note 9, at 376 (discussing an analysis of trends in the enforcement of NCAs and choice-of-law clauses among states); Symeonides, *supra* note 10, at 26 (discussing how incentives for a "race to the courthouse" arise when the current and former employers are citizens of different states and both want their local law to apply in determining the enforceability of the NCA).

202. See *Advanced Bionics Corp. v. Medtronic, Inc.*, 59 P.3d 231, 233–35 (Cal. 2002) (discussing the facts of the case); see also *supra* Part I (discussing *Advanced Bionics* as an example of "interjurisdictional disputes involving NCA enforcement").

203. See, e.g., *Convergys Corp. v. Keener*, 582 S.E.2d 84, 85 (Ga. 2003) (refusing to uphold an NCA agreement which contravened the public policy of the forum state); Symeon C.

Those jurisdictions most protective of employees—e.g., those that prohibit or rarely enforce NCAs—are likely to invalidate choice-of-law clauses designating more permissive law.<sup>204</sup> This conclusion typically is based on one or more of the following findings: (i) enforcement would violate a fundamental public policy of the state;<sup>205</sup> (ii) the forum state has a greater interest in applying its law than the state whose law is chosen,<sup>206</sup> or (iii) the state whose law was chosen has an insufficient relationship to the contract to support application of its law.<sup>207</sup>

In some jurisdictions, a finding that the covenant violates a fundamental state public policy is enough to invalidate a choice-of-law clause.<sup>208</sup> Section 187 requires the second finding as well, but courts in jurisdictions that adhere to this approach and view NCAs as unenforceable often find both and invalidate the selection of another state's law,<sup>209</sup> even if an employee signed a

---

Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1266 (1997) (discussing state approaches to following the *Second Restatement of Conflict of Laws*' approach in tort and contract disputes).

204. See, e.g., LA. REV. STAT. ANN. § 23:921 (2007) (voiding all choice-of-law clauses in employment contracts unless employee voluntarily ratifies the choice after the occurrence of the cause of action); *DCS Sanitation Mgmt., Inc. v. Castillo*, 435 F.3d 892, 894 (8th Cir. 2006) (affirming the district court's invalidation of the Ohio choice-of-law clause and applying Nebraska law to the NCA); *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1133 (11th Cir. 2005) (affirming the district court's invalidation of the Alabama choice-of-law clause and applying Georgia law to the NCA); *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1367 (11th Cir. 2003) (affirming the district court's invalidation of the Alabama choice-of-law clause and applying Georgia law to the NCA); *Keener v. Convergys Corp.*, 342 F.3d 1264, 1265 (11th Cir. 2003) (affirming the district court's invalidation of the Ohio choice-of-law clause and applying Georgia law to the NCA); *Pruco Sec. Corp. v. Montgomery*, 264 F. Supp. 2d 862, 868 (D.N.D. 2003) (invalidating the parties' choice of New Jersey law and applying North Dakota law).

205. See *Nucor Corp. v. Bell*, 482 F. Supp. 2d 714, 728–29 (D.S.C. 2007) (disregarding a choice-of-law clause where application of the chosen law would violate the public policy of the forum state); *Convergys Corp. v. Keener*, 582 S.E.2d 84, 85 (Ga. 2003) (same); *Beilfuss v. Huffy Corp.*, 685 N.W.2d 373, 377 (Wis. Ct. App. 2004) (same).

206. See *DCS Sanitation Mgmt., Inc., v. Castillo*, 435 F.3d 892, 896 (8th Cir. 2006) (considering whether the forum state has a greater interest than the chosen state in the case as a factor in determining whether to respect a choice-of-law clause).

207. See *id.* (finding Ohio lacked a substantial relationship to the parties or transaction); *Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 948–49 (7th Cir. 1994) (holding incorporation in Delaware to be an insufficient connection between the contract and Delaware and applying Illinois law).

208. Georgia is one such jurisdiction. See *Convergys Corp.*, 582 S.E.2d at 85 (disregarding a choice-of-law clause where application of the chosen law would violate the public policy of the forum state).

209. See *DCS Sanitation Mgmt.*, 435 F.3d at 896–97 (considering whether both sections of the Restatement are satisfied and deciding to apply Nebraska law rather than the chosen laws); see also *Dearborn v. Everett J. Prescott, Inc.*, 486 F. Supp. 2d 802, 814–16 (S.D. Ind. 2007) (setting out the five factors that Indiana courts should consider in evaluating an NCA as:

covenant while working for the employer in the other state and only later moved to the forum to work.<sup>210</sup> In the latter circumstance, the courts reason that the forum state has a greater interest in regulating because the noncompetition clause addresses post-employment conduct, which takes place within the forum rather than in the state of former employment.<sup>211</sup> The third basis also is contemplated in Section 187, which requires that the chosen state have sufficient connection with the employment relationship to have an interest in regulating or that there is some other reasonable basis for the selection.<sup>212</sup>

Yet, again, this is only half of the choice-of-law story. State suppliers of more employer-friendly noncompetition law are poised to apply their law extraterritorially, and aggressively so. First, courts in these states usually find that their own law applies when there is a significant conflict between the noncompetition law of the two relevant jurisdictions.<sup>213</sup> In particular, in cases

(i) subject matter of covenant; (ii) public policy underlying any relevant statute; (iii) whether nonenforcement of the NCA will further such public policy; (iv) potential damage from nonenforcement; and (v) relative bargaining power of the parties); *Konecranes, Inc. v. Sinclair*, 340 F. Supp. 2d 1126, 1129–30 (D. Or. 2004) (applying Oregon law in spite of a choice-of-law clause specifying Ohio and finding the NCA unenforceable as an excessive restraint on trade).

210. See *Application Group, Inc. v. Hunter Group, Inc.*, 72 Cal. Rptr. 2d 73, 85 (Cal. Ct. App. 1998) (applying California choice-of-law rules to an NCA between a California resident and a Maryland corporation); *Symeonides*, *supra* note 10, at 26 (discussing *Advanced Bionics* where a California court granted a temporary restraining order against a Minnesota employer who was seeking to enforce an NCA against a former employee now domiciled in California (citing *Advanced Bionics Corp. v. Medtronics, Inc.*, 105 Cal. Rptr. 2d 265 (Cal. Ct. App. 2001))).

211. See *Davis v. Advanced Care Techs., Inc.*, No. Civ. S-06-2449 RRB DAD, 2007 WL 2288298, at \*7 (E.D. Cal. Aug. 8, 2007) (finding that "California has a 'materially greater interest' in the outcome . . . than Connecticut because it has a greater connection with the facts of this case and the determination of the enforceability of the Non-Competition Agreement will affect whether Davis, a California resident, will be permitted to remain employed in California"); *Application Group*, 72 Cal. Rptr. 2d at 85 (finding "California has a correlative interest in protecting its employers and their employees from anticompetitive conduct by out-of-state employers" even if the California employer was not a party to the covenant not to compete); cf. *Google, Inc. v. Microsoft Corp.*, 415 F. Supp. 2d 1018, 1024–26 (N.D. Cal. 2005) (considering the "place of performance" of the NCA as a factor in determining which state's law to apply).

212. See *DCS Sanitation Mgmt., Inc. v. Castillo*, 435 F.3d 892, 895–96 (8th Cir. 2006) (discussing the choice-of-law determination under Nebraska law); *Curtis 1000*, 24 F.3d at 948–49 (applying Illinois law to the dispute after finding incorporation in Delaware to be an insufficient connection between the contract and Delaware); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) (setting out how to determine which state's law to apply); see also *Kantor*, *supra* note 123, at 726 (discussing that the application of Section 187(2) requires that the chosen jurisdiction have some relationship with the parties or the contract or some other "reasonable basis to support the choice"); *Symeonides, 2005 Survey*, *supra* note 114, at 619–28 (discussing state approaches to applying *Restatement* Section 187).

213. See, e.g., *Estee Lauder Cos. v. Batra*, 430 F. Supp. 2d 158, 172–74 (S.D.N.Y. 2006)

involving a choice-of-law clause pointing to domestic law, these courts tend to enforce the clause, finding either that the other jurisdiction has no greater interest in applying its noncompetition law (even if the former employee is currently employed there) or that their own local public policy—protecting employer interests—is as strong as the policy of the other state.<sup>214</sup> Thus, perhaps unsurprisingly, states likely to enforce NCAs tend to reach the opposite conclusion of states unlikely to enforce these terms, even though they may apply a similar choice-of-law framework.<sup>215</sup>

In addition, some courts in supplier jurisdictions have proven aggressive in enforcing their law. This includes refusing to stay second-filed proceedings in lieu of first-filed litigation elsewhere and issuing anti-suit injunctions to bar

---

(enforcing an NCA under New York law based on public policy, notwithstanding conflict between New York and California law regarding enforcement of NCAs); *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 454 (Minn. Ct. App. 2001) (enforcing an NCA under Minnesota law based on public policy, notwithstanding conflict between Minnesota and California law regarding enforcement of NCAs); *see also* Symeon C. Symeonides, *Choice of Law in the American Courts in 2002: Sixteenth Annual Survey*, 51 AM. J. COMP. L. 1, 59 (2003) [hereinafter Symeonides, *2002 Annual Survey*] (noting that *Application Group* exemplifies how California courts would resolve a jurisdictional conflict in NCA policy where there is no pending litigation in the other state but the *Medtronic* cases illustrate that "courts of the first employment state would resolve the same conflict in exactly the opposite way"); Symeonides, *supra* note 10, at 26–29 (discussing *Medtronic* cases); Woodward, *supra* note 120, at 29–33 (analyzing the fundamental policy restriction with regards to enforcement of NCAs).

214. *See, e.g., Estee Lauder*, 430 F. Supp. 2d at 172–73 (concluding that New York law, not California law, applied because of New York's strong interest in protecting companies doing business in the state and because it was consistent with the state's recognized interest in maintaining the preeminent commercial nerve center, even though the former employee had significant ties to California); *Machado-Miller v. Mersereau & Shannon, LLP*, 43 P.3d 1207, 1212–13 (Or. Ct. App. 2002) (recognizing California's fundamental policy disfavoring trade restraints but concluding that this interest is not materially greater than Oregon's interests in protecting Oregon citizens' ability to choose their employment terms, in creating a disincentive for leaving one employer for a higher bidder, and in protecting employers from losing trained employees); *see also* O'Hara, *supra* note 39, at 1566–67 (discussing state enforcement of choice-of-law clauses and noting that "enforcement of these clauses often turns on an *ex post* race to judgment").

215. *See supra* note 213 (discussing decisions upholding NCAs based on public policy in jurisdictions looking to enforce NCAs); O'Hara, *supra* note 39, at 1566–67 (describing the variation in state policies regarding enforcement of NCAs). *Compare* *DCS Sanitation Mgmt., Inc. v. Castillo*, 435 F.3d 892, 895–98 (8th Cir. 2006) (finding that Nebraska law governed an NCA, notwithstanding an Ohio choice-of-law clause, and concluding that the NCA was overly broad and unenforceable pursuant to Nebraska law), *and* *Application Group, Inc. v. Hunter Group, Inc.*, 72 Cal. Rptr. 2d 73, 82–91 (Cal. Ct. App. 1998) (finding that California law governed an NCA, notwithstanding a Maryland choice-of-law clause, and concluding that the NCA was unenforceable as it violated a California statute and the Unfair Practices Act, CAL. BUS. & PROF. CODE §§ 17,200–17,210 (West 2008)), *with Estee Lauder*, 430 F. Supp. 2d at 172–74 (enforcing an NCA under New York Law based on public policy, notwithstanding conflict between New York and California law regarding the enforcement of NCAs).



parties from litigating the matter elsewhere.<sup>216</sup> The Minnesota court engaged in such behavior in *Advanced Bionics*: The employee and his new employer filed first in California seeking a declaration that the employee could compete; the former employer responded by filing in Minnesota.<sup>217</sup> The Minnesota court not only refused to stay its proceedings, but also sought to bar the former employee from continuing to litigate in the first matter.<sup>218</sup>

In sum, we observe employers using choice-of-law clauses to take advantage of more favorable noncompetition law, and the states supplying that law enforcing it robustly. Activity on both the demand and supply sides is therefore consistent with the emergence of export-style competition. Whether the supplier states consciously compete to drum up "enforcement business" beyond simply protecting domestic employers is unclear. But, at a minimum, some states are pushing their noncompetition law (regulating the activity of former employees and their potential new employers in other jurisdictions) for competitive advantage.

## 2. Competition for NCAs Without Significant Transactional Connections

To this point, we do not observe the emergence of pure law-as-commodity competition—that is, party selection of state law favorable to the enforcement of NCAs but unconnected or minimally connected to the employment relationship. Here, again, prevailing choice-of-law doctrine imposes an initial impediment: Under Section 187 (and other analyses<sup>219</sup>), the designated state must have a sufficient connection, defined as a "substantial relationship," with the parties or transaction itself or there must exist some other reasonable basis for the parties' choice.<sup>220</sup> As a result, most states refuse to enforce a choice-of-law clause specifying the law of a state other than one having a significant connection with the employment relationship.<sup>221</sup>

---

216. See, e.g., *Estee Lauder*, 430 F. Supp. 2d at 158, 160 (issuing a preliminary injunction); *Cent. States Indus. Supply, Inc. v. McCullough*, 218 F. Supp. 2d 1073, 1094 (N.D. Iowa 2002) (refusing to stay proceedings); *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 444 (Minn. Ct. App. 2001) (affirming the Minnesota District Court's injunction order).

217. *Advanced Bionics*, 630 N.W.2d at 438.

218. *Id.*; see *supra* note 15 and accompanying text (discussing the *Advanced Bionics* court's grant of preliminary injunction).

219. See *supra* notes 130–31 and accompanying text (discussing choice-of-law analyses in jurisdictions not adopting Section 187).

220. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971).

221. See *supra* note 207 and accompanying text (presenting cases refusing to enforce choice of law for want of a substantial relationship with the employment contract).

Yet, choice-of-law principles may develop toward favoring the designation of the law of a transactionally unrelated state. That has been the law's trajectory elsewhere, even outside of the corporate chartering context. Again, New York and Delaware promote their law for various types of commercial contracts without other substantial connections with the transaction.<sup>222</sup> Also, Article 1-301 of the U.C.C. now provides that choice-of-law clauses are effective "whether or not the transaction bears a relation to the State or country designated."<sup>223</sup> Although this provision expressly excludes customer contracts,<sup>224</sup> and although continuing resistance to such an approach can be anticipated for employment contracts where employees lack bargaining power, some states may prove more willing to extend this freedom to employment contracts, where less profound bargaining inequities exist. And, by contemplating some other reasonable basis for the parties' choice besides a substantial relationship with the parties or transaction, Section 187(2)(a) leaves open this possibility as well.<sup>225</sup>

Moreover, in the employment context, some courts have been willing to enforce choice-of-law clauses selecting the place of an employer's principal operations or headquarters, even though the employee exclusively worked elsewhere.<sup>226</sup> In addition, although some courts have found an employer's state of incorporation alone insufficient to support the choice of its law,<sup>227</sup> others, including the Fourth Circuit, have found otherwise.<sup>228</sup>

---

222. See *supra* Part II.A (comparing interjurisdictional competition models).

223. U.C.C. § 1-301(c) (2004).

224. See U.C.C. § 1-301(e) (2004) ("If one of the parties to a transaction is a consumer, . . . [a]n agreement [that the law of a state or country shall determine any or all of the parties' rights and obligations] is not effective unless the transaction bears a reasonable relation to the state or country designated.").

225. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (1971).

226. See, e.g., *Estee Lauder Cos., Inc. v. Batra*, 430 F. Supp. 2d 158, 172 (S.D.N.Y. 2006) (selecting the law of New York, the location of Estee Lauder's headquarters, despite Batra spending his entire tenure with Estee Lauder in California); *Guidant Sales Corp. v. Niebur*, No. 01-1772, 2001 U.S. Dist. LEXIS 17797, at \*17 (D. Minn. Oct. 18, 2001) (applying Minnesota law despite the employee's having worked exclusively in Illinois).

227. See, e.g., *Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 948 (7th Cir. 1994) (finding an insufficient connection between an employment contract and Delaware, the employer's state of incorporation, to justify an Illinois court's invalidation of a consensual choice-of-law clause).

228. See, e.g., *Ciena Corp. v. Jarrard*, 203 F.3d 312, 324 (4th Cir. 2000) (concluding that a party's state of incorporation provides the necessary substantial relationship for application of that state's law); *Carlock v. Pillsbury Co.*, 719 F. Supp. 791, 807-08 (D. Minn. 1989) (stating that a party's incorporation in a state is a contact sufficient to allow the parties to choose that state's law to govern their contract).

Still, states prohibiting or greatly restricting NCAs typically refuse to enforce choice-of-law clauses even when the chosen state has a substantial relationship to the parties.<sup>229</sup> Thus, it seems unlikely that they would prove willing to credit a choice-of-law clause designating a state with a more attenuated connection to the parties. In other words, broad acceptance of an internal affairs-type choice-of-law regime appears doubtful in this context.

Nevertheless, even widespread resistance to such choice-of-law terms may not eliminate law-as-commodity competition. Again, if a state's legal decision makers—in particular, its judiciary—refuse to defer to other jurisdictions and structure their processes to win the race to judgment, the state can force extraterritorial acceptance of its terms.<sup>230</sup> Thus, if a state that generally enforces NCAs wants enforcement business, it may do so through aggressive tactics despite resistance from other states.

Consider, then, the type of state that might choose such a strategy. To attract firm management and to produce no significant opposition within the state, the state's law would have to be among the most permissive with regard to enforcing NCAs. Moreover, the state must have a judicial branch not only receptive to furthering its competitive designs, but also capable of bringing disputes over NCAs to judgment quickly.

Perhaps unsurprisingly, Delaware fits this description, and other states may as well. Like a number of its East Coast neighbors,<sup>231</sup> Delaware has shown a willingness to enforce NCAs robustly, provided they serve some legitimate employer interest.<sup>232</sup> It is also hospitable to former employer claims against new employers for tortious interference with NCA terms.<sup>233</sup>

---

229. See *supra* notes 208–18 and accompanying text (discussing enforcement of choice-of-law clauses).

230. See *supra* Part II.B.3 (discussing the race-to-judgment strategy).

231. See Hyde, *supra* note 181 (follow "Legal Impediments to Endogenous Growth" hyperlink) (discussing NCA enforcement in Massachusetts, New York, and elsewhere).

232. See *Del. Express Shuttle, Inc. v. Older*, No. 19596, 2002 Del. Ch. LEXIS 124, at \*40 (Oct. 23, 2002) ("[C]ovenants restricting future employment must be determined to be reasonably limited with respect to both geography and time; they must as well advance a legitimate economic interest of the employer."); see also, e.g., *Hough Assocs. v. Hill*, No. 2385-N, 2007 Del. Ch. LEXIS 5, at \*48–51 (Jan. 17, 2007) (upholding an NCA where it adequately protected the employer's economic interests); *Del. Express Shuttle*, 2002 Del. Ch. LEXIS 124, at \*40–54 (same); *Norton v. Cameron*, No. 15212-NC, 1998 Del. Ch. LEXIS 32, at \*9–16 (Mar. 5, 1998) (same).

233. See, e.g., *Hough Assocs.*, 2007 Del. Ch. LEXIS 5 at \*46–62 (finding that the subsequent employer of an employee bound by an NCA tortiously interfered with the legitimate interests of the employee's prior employer when the subsequent employer knowingly hired him and engaged in discussions forbidden by that NCA).

Delaware is campaigning to attract additional chartering and business litigation activity.<sup>234</sup> For example, it has recently sought to attract greater numbers of closely held entities to the state to compensate for stagnating growth in franchise tax revenues from publicly traded firms.<sup>235</sup> It is also actively seeking to increase U.C.C. filings.<sup>236</sup> In addition, in 2003, the Delaware Legislature expanded the jurisdiction of the Chancery Court to cover certain technology disputes involving at least one Delaware entity and to mediate a wide range of business disputes, and it extended its ability to obtain jurisdiction over executives of Delaware firms in suits involving their alleged wrongful conduct.<sup>237</sup> Robust enforcement of NCAs, even in the face of dueling litigation elsewhere, might prove a natural extension of these other recent initiatives—it could be marketed as yet another "service" Delaware offers its entity clients.

Moreover, once Delaware recognizes a regulatory interest, its courts closely guard the state's jurisdiction and extend it broadly to claims against out-of-state actors. For example, the Chancery Court recently held that the state has personal jurisdiction over an attorney residing and practicing in a case involving alleged breaches of duties while representing a Delaware corporation.<sup>238</sup> Delaware courts only rarely recognize that matters filed initially in Delaware should be tried elsewhere, emphasizing that they will do so only in extreme circumstances.<sup>239</sup> They are far more likely to retain jurisdiction despite the existence of competing litigation in other states or other states' strong

---

234. See Glynn, *supra* note 24, at 125–28 (discussing Delaware's recent efforts to expand its entity chartering franchise).

235. *Id.* at 127–28.

236. See DEL. DEP'T OF STATE, DIV. OF CORPS., 2006 ANNUAL REPORT 2 (2006), [http://corp.delaware.gov/2006%20Annual%20Report%20with%20Signature%20\\_2\\_.pdf](http://corp.delaware.gov/2006%20Annual%20Report%20with%20Signature%20_2_.pdf) (discussing growth in Delaware U.C.C. filings from 2005 to 2006).

237. See Del. Dep't of State, Div. of Corps., *General Assembly Approves 2003 Amendments to Corporate Laws*, June 30, 2003, <http://www.corp.delaware.gov/2003amends.shtml> (last visited Aug. 30, 2008) (outlining the expansions of the Court of Chancery's jurisdiction) (on file with the Washington and Lee Law Review).

238. *Sample v. Morgan*, 935 A.2d 1046, 1057–65 (Del. Ch. 2007).

239. See, e.g., *Aveta, Inc. v. Colon*, 942 A.2d 603, 616 (Del. Ch. 2008) (affirming the Master's decision to stay the Delaware proceeding under the doctrine of *forum non conveniens* in an NCA case where the defendant demonstrated overwhelming hardship in litigating the matter in Delaware, Delaware law did not govern the dispute, and much of the relevant testimony would be in Spanish). Before affirming the grant of the stay in *Aveta*, the Chancellor emphasized that "Delaware's courts frequently repeat the adage that only in rare cases can a defendant successfully defeat a plaintiff's choice of forum. It is even rarer that a defendant can defeat a plaintiff's choice of forum that is mandated by a contractual forum selection clause." *Id.* at 605.

interests in resolving the underlying dispute.<sup>240</sup> Delaware courts also broadly enforce choice-of-forum clauses, provided such clauses are sufficiently explicit.<sup>241</sup> Furthermore, the Delaware courts' recent, aggressive strategies for protecting the state's interest in corporate matters evinces both the willingness and capability of its judicial actors to defend the state's interests by racing to judgment.<sup>242</sup> Finally, because so many out-of-state firms are incorporated or chartered within Delaware, it has at least a legal "hook" on which it can justify exercising jurisdiction and enforcing choice-of-law and forum clauses in contracts pointing to Delaware.<sup>243</sup>

The point is not that Delaware consciously engages in competition for NCA business. Rather, it is that the state is well positioned to do so and that it does not appear much of a stretch to imagine it furthering its entity-law franchise by allowing Delaware-chartered firms to bring NCA enforcement actions there. And this potential extends beyond Delaware. If serious about competing, other states without Delaware's legal infrastructure, but with similarly favorable political conditions, could take steps to attract such business, as New York did in establishing its dominance in the market for commercial contract enforcement.<sup>244</sup>

If a state deployed this kind of strategy to compete for NCA enforcement business there would be complications. For example, diversity jurisdiction may exist in many noncompetition agreement disputes involving two or more interested jurisdictions, and, as a result, an employee may file suit in federal court initially or remove a suit filed by a former employer. This could directly affect a state's competition strategy because federal judges do not

---

240. See *supra* notes 150–51 and accompanying text (describing the Delaware courts' tendency to closely guard jurisdiction in corporate law matters).

241. See, e.g., *Troy Corp. v. Schoon*, No. C.A. 1959-VCL, 2007 WL 949441, at \*2 (Del. Ch. Mar. 26, 2007) (stating that it is well-settled law in Delaware that the court will give respect to the parties' agreement regarding forum selection, but, to be interpreted as providing the exclusive forum, the clause must be clear (citing *Prestancia Mgmt. Group, Inc. v. Va. Heritage Found. II, LLC*, No. Civ. A. 1032-S, 2005 WL1364616, at \*7 (Del. Ch. May 27, 2005))); see also *Aveta*, 942 A.2d at 605 (emphasizing how rare it is that a defendant can defeat a plaintiff's choice of forum that is mandated by a forum-selection clause).

242. See *supra* notes 150–54 and accompanying text (discussing the Delaware Court of Chancery's tendency to closely guard jurisdiction of corporate law matters and its race-to-judgment strategy).

243. See *supra* note 5 and accompanying text (stating that Delaware captures approximately 60% of all incorporations of publicly traded firms and over 80% of all non-home-state incorporations).

244. See *supra* note 75 and accompanying text (describing how New York, faced with a decline in commercial litigation, added a Commercial Division to its Supreme Court, which has enabled the state to remain competitive in the market for commercial contracts).

face local political pressure, and, accordingly, may prove less willing to buy into any such scheme. Moreover, if one or more of the cases occur in federal court, it alters the legal and practical dynamics of dueling suits.

Nevertheless, employers can manage such complications. For example, they can include forum-selection clauses in their employment contracts identifying the preferred state court as the exclusive forum. The enforceability of such clauses is uncertain, but a federal court foreseeably might decline to exercise jurisdiction for this reason.<sup>245</sup> Once facing litigation, former employers could make other procedural moves. In some cases, they could defeat diversity jurisdiction and, hence, removal to federal court, by joining nondiverse defendants. Moreover, after enough time has passed for the litigation of a sizable number of NCA enforcement actions, state choice-of-law standards will be firmly established, constraining to some extent the freedom of the local federal court to apply contrary law.<sup>246</sup> Indeed, a recent survey suggests that federal courts prove *more* likely than state courts to enforce choice-of-law clauses.<sup>247</sup>

In conclusion, law-as-commodity competition for enforcement of NCAs with tenuous transactional or relational ties to the selected jurisdiction has yet to emerge. However, conditions prove conducive to such competition, particularly where firms can establish some kind of link to the forum, and, accordingly, the forum can justify its exercise of jurisdiction, including "piggy-backing" on the entity charter or selecting the law of the firm's operational headquarters.

---

245. In general, federal courts respond favorably to choice-of-forum clauses, typically enforcing them. *See, e.g.,* *Bense v. Interstate Battery Sys., Inc.*, 683 F.2d 718, 721–22 (2d Cir. 1982) (stating that contractual forum-selection clauses will be enforced unless enforcement would clearly be unreasonable and unjust).

246. A federal court sitting in diversity jurisdiction must apply the choice-of-law rules of the state within which it sits (provided it has personal jurisdiction over the defendant(s) and is otherwise a proper venue). *See, e.g.,* *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941) (opining that in diversity cases federal courts are prohibited from making independent choice-of-law determinations and, rather, must apply the law of their state's courts in order to avoid an unequal administration of justice).

247. *See* Ribstein, *supra* note 9, at 375 (stating that there was 12% nonenforcement of choice-of-law clauses amongst federal courts surveyed and 25% amongst state courts surveyed). And, as the decision in *Estee Lauder* suggests, federal courts can be as aggressive as state courts in supporting the underlying state's interest in enforcing an in-state employers' NCA. *See supra* note 214 (discussing how *Estee Lauder* concluded that New York law, not California law, applied).

#### *IV. Broader Implications and Tentative Thoughts on Interjurisdictional "Self-Defense"*

The foregoing analysis has implications extending well beyond the NCA context. First, the conditions favorable to law-as-commodity competition in the NCA context show the genuine potential for such competition in employment law. In addition, it reveals a strategy—racing to judgment—competing states can utilize to apply their law extraterritorially, even when faced with other states' resistance. Taken together, these lessons raise the question of how states can counter such competition when, in their view, it will create a race-to-the-bottom within their borders.

##### *A. Law-as-Commodity Competition in Employment Law*

Law-as-commodity may emerge where: (i) state employment law regimes prove sufficiently divergent and create sufficient legal incentives to trump concerns about other employment law risks; (ii) employers have some confidence that they can control the judicial forum or at least the judgment-entering forum; and (iii) a state with an employer-friendly regime both perceives the benefits of competition and has a judiciary able and willing to further its competitive aims by racing to judgment.

Of course, it is too early to predict whether law-as-commodity competition will aggressively take hold in employment law. For one thing, employers might see competition as only a second- or third-best option for addressing the rise of what they perceive as unfavorable state-level employment law regulation. The ideal response for many employers would be preemptive federal legislation offering little or no substantive protection for workers. The regulatory vacuum ERISA created in the regulation of welfare benefit plans serves as an obvious example.<sup>248</sup> If such deregulation proves politically infeasible, many employers might prefer the certainty federal legislation could provide, as long as it is less employee-friendly than some states and preempts stricter state laws.

Moreover, fearing a political or public relations backlash or enactment of more restrictive federal legislation, both states and firms may prove unwilling to press for extraterritorial application of employment law in areas implicating longstanding state public policies and in which foreign states have not traditionally interfered. For example, few legal decisionmakers or managers may act so boldly as to side-step (by enforcing choice-of-law clauses) employee

---

248. See *supra* note 78 and accompanying text (describing how federal law's preemptive sweep makes it the predominant source of labor and employee benefits regulation).

protections contained in minimum wage statutes or workers' compensation regimes, even if wider disparities between state regimes emerge. In addition, the more general interest in maintaining good relations with neighboring states may provide a countervailing incentive not to compete. For example, given the need for cross-border regulatory cooperation, New York might resist the urge to adopt a systematically aggressive approach to applying New York's more employer-friendly law to employment relationships in New Jersey.

Law-as-commodity competition, however, seems a genuine possibility when legal or economic changes give rise to the favorable conditions described above. For example, in addition to NCAs, other contractual terms addressing post-employment or dispute resolution matters may produce these incentive structures. Some such terms—including claw-back, confidentiality, and training repayment provisions—are, like NCAs, designed to deter employees from leaving and competing. Others, including nondisparagement clauses and various types of liquidated damages provisions, also have become more prominent in recent years, as have terms designed to control *ex ante* the forum or judicial process, including not just arbitration clauses, but also jury and class action waivers, and "loser-pays" attorney fee provisions. As with NCAs, enforcement of such terms may vary widely by state.

Taken individually, these types of terms might not be enough to spawn great demand for law as a commodity. However, a state's general willingness to enforce such provisions might create a powerful incentive for employers to select that state's substantive law and fora. In other words, a state may promote its legal regime as *generally favorable to private ordering* and hence more likely than other states to enforce employer-protective terms. Delaware, for example, already markets its "strong presumption in favor of private ordering" in entity chartering,<sup>249</sup> and also has shown its preference for contractual freedom in the employment context.<sup>250</sup> One can imagine Delaware or another state signaling to employer counsel a willingness to enforce broadly contract terms in the employment arena.

In addition, if labor and employment law remains largely static at the federal level, and some states engage in new, significant types of legal

---

249. See, e.g., *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999) (emphasizing the policy of freedom of contract that underlies Delaware entity law).

250. See, e.g., *Mahani v. Edix Media Group*, 935 A.2d 242, 245 (Del. 2007) (making clear in enforcing a fee-shifting provision against a former employee found to have breached a noncompetition and confidentiality agreement that Delaware will enforce such provisions to the extent the fees are reasonable); see also *supra* notes 232–33, 239, 241 (highlighting Delaware's broad enforcement of employment contract terms).



reform, other states might engage in law-as-commodity competition. Indeed, states may be far less hesitant to pursue a competition strategy in such circumstances because, rather than appearing to break with history, they would offer employers the opportunity to opt into a legal regime "maintaining the status quo." Such competition-inducing reforms could take a number of forms, including, *inter alia*, the enactment of robust individual employee protections with regard to job security, the work-family balance, or privacy, or the willingness of state courts to impose new, broad structural remedies on employers to address systemic discrimination or other legal violations. Although forum control might pose challenges for employers in these kinds of matters (which typically arise in the first instance as employee claims), employers might deploy—and competing states might accommodate—creative litigation strategies to overcome such challenges.<sup>251</sup>

Finally, law-as-commodity competition is likely if state-level reforms begin to pierce the traditional lines between employment and corporate law, providing a potentially competing state yet another historical hook—the internal affairs norm—on which to hang aggressive enforcement of its law. These reforms might include, for example, imposing employment-related information sharing and disclosure requirements on firms operating within the jurisdiction; mandating greater employee voice in firm governance; regulating or rebalancing the relationship between managerial and employee returns; or providing employees with greater procedural or substantive rights in layoffs and other types of restructuring. Although we have yet to see such reforms take hold in the American context, and although some might create tensions with federal law, a progressive state—California comes to mind—foreseeably could consider a recalibration of firm stakeholder relations along these lines. Powerful employer interest groups obviously would oppose these kinds of reforms in the first instance. Yet, if such reform efforts are successful, managers would seek relief through resort to chartering states—Delaware comes to mind—selling entity law consistent with the traditional model of intra-firm relations. This might trigger fierce interjurisdictional battles between the state of incorporation and the state of operations.

---

251. For example, employers could seek early declarative relief in the friendly jurisdiction, or include, and then seek to enforce, choice-of-law and choice-of-forum clauses even in a second-filed action in the preferred state.

*B. Self-Defense Against Law-as-Commodity Competition: Some Tentative Thoughts*

Genuine potential for law-as-commodity competition exists in some employment areas. If one or more states implements this model, other states obviously are not required to abandon their preferences for their own law. But, how precisely they can respond to particularly aggressive tactics has not been explored in detail. In other words, if a state has a strong public policy favoring a certain protection of domestic workers, how does it prevent a competing state from seeking to have its less protective law apply extraterritorially?

As a threshold matter, as discussed in Part II.B.3, above, states have great freedom to reject or limit application of foreign law on firm stakeholders acting or residing within their borders. States are largely free to apply their own law in determining whether to enforce the parties' selection of foreign law to govern their relationship, as they are not constitutionally bound to apply the law chosen by firm stakeholders, and no federal statute mandating such adherence exists.<sup>252</sup>

Similarly, states need not credit parties' choice-of-forum clauses. Choice-of-forum clauses receive a presumption of validity under the *Restatement (Second) of Conflict of Laws*,<sup>253</sup> often do not offend due process,<sup>254</sup> and are frequently upheld.<sup>255</sup> But, consistent with the *Restatement* approach, a forum need not enforce the clause if enforcement would threaten a substantial local interest.<sup>256</sup>

---

252. This is true in both the corporate and employment contexts. As I argue elsewhere, Delaware's legal decision makers recognize this great vulnerability with regard to the corporate internal affairs doctrine: The bottom line is that other states need not adhere to it. Glynn, *supra* note 24, at 95, 143.

253. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1971) ("The parties' agreement as to the place of the action will be given effect unless it is unfair or unreasonable.").

254. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.14 (1985) ("Where such forum-selection provisions have been obtained through 'freely negotiated' agreements and are not 'unreasonable and unjust,' their enforcement does not offend due process.") (citations omitted).

255. See *supra* Part III.B.2 (describing how, due to so many out-of-state firms being incorporated or chartered within Delaware, the state can justify exercising jurisdiction and enforcing choice-of-law and forum clauses in contracts pointing to Delaware); Woodward, *supra* note 120, at 35 (discussing a tendency of courts to uphold forum selection clauses based on the assumption that customers freely contract for a specific forum).

256. See Woodward, *supra* note 120, at 37-41 (analyzing how courts have refused to uphold forum selection clauses when the clauses have posed a potential conflict with a fundamental state policy).

To protect local public policy interests, courts should consider the extent to which the selected forum might itself engage in competition when deciding whether to enforce such clauses. Interestingly, states likely to invalidate choice-of-law clauses in the NCA context appear more willing to enforce choice-of-forum clauses.<sup>257</sup> California courts, for example, have upheld forum-selection clauses in the NCA context even though, in the absence of such a clause, they would not enforce the parties' choice of another state's less protective law.<sup>258</sup> Underlying this difference in approach seems to be the assumption that enforcing a forum-selection clause is not the same as enforcing a choice-of-law clause because the forum in which the choice-of-law issue is litigated does not necessarily determine the outcome. The foregoing discussion of the disparate application of choice-of-law principles demonstrates the questionable nature of this assumption,<sup>259</sup> but it is particularly faulty—indeed blind—when the chosen state competes with the forum state. Thus, if the exclusive forum selected contractually is a state engaged in law-as-commodity competition, and the forum state has a strong policy interest favoring application of its own law, it should reject the clause for the same reasons it would reject a choice-of-law provision.

A similar lesson applies if the competing jurisdiction has adopted the aggressive judicial tactics we observe in the corporate and NCA contexts, and seeks to enforce its own law by wresting control of the litigation. Until entry of final judgment, the dictates of courts in other jurisdictions do not bind states.<sup>260</sup> Accordingly, although traditional notions of comity suggest restraint in interjurisdictional tussles, a state is within its power to push ahead despite first-filed judicial proceedings elsewhere. A court need not—and perhaps should

---

257. See *In re AutoNation, Inc.*, 228 S.W.3d 663, 669 (Tex. 2007) (concluding that although Texas law controlled enforcement of NCAs despite the presence of a choice-of-law provision, litigation of employment disputes in Texas was not a fundamental policy and a choice-of-forum clause designating Florida over Texas was enforceable); Symeon C. Symeonides, *Choice of Law in the American Courts in 2006: Twentieth Annual Survey*, 54 AM. J. COMP. L. 697, 742–47 (2006) (discussing cases enforcing choice-of-forum clauses).

258. See Symeonides, *supra* note 257, at 742–47 (discussing cases and stating that two factors have improved the lot of many non-California employers: First, most of those employers now include in their employment contracts not only a choice-of-law clause, but also a choice-of-forum clause and, second, the *Advanced Bionics* decision); cf. *Google, Inc. v. Microsoft Corp.*, 415 F. Supp. 2d 1018, 1022–26 (N.D. Cal. 2005) (assuming Washington would apply the same Section 187 analysis as California to a choice-of-Washington-law clause in an NCA).

259. See Symeonides, *2002 Annual Survey*, *supra* note 213, at 62–63 (discussing the potentially critical role of choice-of-forum clauses in NCAs); Woodward, *supra* note 120, at 35 (describing how enforcement of a forum selection clause may completely destroy a plaintiff's claim).

260. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 107 (1971).

not—stay its own proceedings or otherwise hold back when fundamental state policies are at stake and the other jurisdiction is not acting reciprocally.

Again, such an approach contradicts California's current practice, as reflected in the great restraint the *Advanced Bionics* court showed when confronted with the Minnesota tribunal's aggressive behavior.<sup>261</sup> If California is serious about protecting employees working within its borders, it ought to recalibrate its comity-driven judicial norms to account for interjurisdictional competition.<sup>262</sup> To protect its regulatory prerogatives with regard to activities within its territory, a state must be conscious of other states' potential engagement in law-as-commodity competition and respond to aggressive tactics by protecting its jurisdiction and expediting proceedings to prevent the competitor jurisdiction from entering judgment first.

If the competing jurisdiction nevertheless enters final judgment first, it binds the state of operations under the Full Faith and Credit Clause to accord the judgment respect, but even this bar has limits. In particular, a court may not have to enforce the injunctive portion of the judgment in the same way the judgment-entering court would. In *Baker v. General Motors Corporation*,<sup>263</sup> the Supreme Court indicated that while a state may not refuse to enforce a judgment in equity simply because it offends the state's fundamental public policy, it has discretion to limit injunctive relief that interferes with other state prerogatives.<sup>264</sup> *Baker* provides very little guidance,<sup>265</sup> but it suggests, for example, that a court might successfully limit its enforcement of a foreign injunction barring competition by a former employee to serve other local interests, such as mitigating harm to third parties.<sup>266</sup> Thus, despite full faith and

---

261. For a discussion of *Advanced Bionics*, see *supra* notes 11–21 and accompanying text.

262. Of course, it may be that the members of the California Supreme Court are not enamored with the state's statutory prohibition on NCAs, or not enamored enough to press its enforcement when an employee signed the NCA while working out-of-state. Obviously, if confronted with both law-as-commodity competition by other states and resistance by local courts to pressing enforcement of statutory prerogatives, the legislature would have to act to defend such prerogatives.

263. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 238–41 (1998) (holding that an injunction barring a former employee from testifying against a car manufacturer in a products liability case against the manufacturer did not control proceedings elsewhere, and thus, the employee could testify in an action brought against the manufacturer without offending the Full Faith and Credit Clause).

264. *Id.* at 223–24.

265. See Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747, 764–65 (1998) (claiming that *Baker* gleans little on the proper understanding of full faith and credit within the equity context, and that this could confuse state courts considering other types of equitable decrees).

266. See *Baker*, 522 U.S. at 235 ("Orders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the

credit, a state confronting law-as-commodity competition may have some discretion in deciding whether and how to enforce the injunctive portion of a competing state's judgment.

Yet, when faced with a truly committed competitor state and powerful managerial incentives to take advantage of preferable law, such defensive measures are destined to be imperfect. Absent significant procedural and structural changes in its court system, a self-defending state may be unable to beat a competing state to judgment. Delaware, for instance, will always win such a race. Once the race is lost, the state's judiciary may have flexibility on enforcing the injunctive portion of the judgment, but it has no discretion to alter any monetary component.<sup>267</sup> Firm managers thus can increase the probability of compliance with a judgment by, for example, including liquidated damages provisions in employment contracts.<sup>268</sup> In the NCA context, a former employer can also join a worker's putative new employer as a defendant,<sup>269</sup> ensuring its chosen court's orders have bite, because the new employer likely will want to do business in the jurisdiction, and will face contempt (or worse) if it fails to comply.

Most importantly, because of its *in terrorem* effects, a competing state's adverse judgments can defeat another state's public policy prerogatives even if there exists limited potential for extraterritorial enforcement. For instance, periodic judgments enforcing NCAs entered by a competing state—whether ultimately enforced elsewhere or not—are likely to deter other employees subject to such terms from exiting and competing.<sup>270</sup> Likewise, the fear of an adverse judgment and the potential costs and risks of dueling litigation might deter other potential employers from hiring employees who have signed such NCAs. Thus, again, ultimate enforcement in every case is less important than

---

exclusive province of that other State or interfered with litigation over which the ordering State had no authority.").

267. See Price, *supra* note 265, at 757 (discussing how courts have never been sure whether the Full Faith and Credit Clause, which among other things requires states to enforce money damage judgments of other states, likewise requires automatic enforcement of injunctions issued by other states).

268. See *id.* at 835 (discussing the complications of such self-defense in the NCA context, *post-Baker*); Scott Hovanyetz, Comment, *Non-Compete Agreements and the Equity Conflict: Applying Baker v. General Motors Through the Lens of History*, 38 SETON HALL L. REV. 253, 276 (2008) (same).

269. Indeed, Medtronic joined a tortious interference claim against Advanced Bionics in its Minnesota suit and, accordingly, sought and received injunctive relief against both its former employee and Advanced Bionics. For a discussion of the injunction ruling in *Advanced Bionics*, see *supra* note 15 and accompanying text.

270. See *supra* note 166 and accompanying text (discussing the effect whereby an NCA's presence and potential enforcement affects employee behavior).

the demonstrated willingness of the competing state to race to judgment on behalf of employers who have selected that state's law.

This leaves a state seeking to protect its regulatory prerogatives with few remaining options. One is to join forces with interest groups favoring greater employee protection and to press for federalization in a particular regulatory area. Yet, achieving the desired outcome—legislation providing similarly robust protections—through federalization is uncertain.

In another, less unwieldy approach the state may alter the way in which it enforces employment mandates. While a state cannot prevent other jurisdictions from seeking to compete,<sup>271</sup> it can minimize the preclusion and *in terrorem* problems by shifting to public enforcement of local law against firms trying to take advantage of foreign law, rather than relying on private enforcement. As nonparties to the litigation, agency authorities and attorneys general are not bound by foreign judgments in disputes between private parties. And, obviously, regulators have a number of means at their disposal to prevent firms based in the state or doing business there from engaging in conduct that contravenes local law. In other words, the threatened use of civil or even criminal sanctions for conduct that directly contravenes local policies may have its own, countervailing deterrent effect on firms that might otherwise seek to enforce contract terms in their preferred forum. Thus, although states have limited options at their disposal to prevent competing states from employing aggressive judicial tactics, they can, through enhanced public enforcement of local law, deter firms from taking advantage of such tactics.

Delaware's recent behavior in the corporate area suggests that it perceives the potential threat direct public enforcement poses to its chartering franchise. When it claimed in its 2005 *VantagePoint* decision that the internal affairs doctrine is a constitutional mandate,<sup>272</sup> the Delaware Supreme Court was aware of the aggressive post-Enron enforcement of corporate legal norms in other states, most notably in New York by its then Attorney General, Elliot Spitzer.<sup>273</sup>

---

271. Theoretically, a competing state's application of its law to activities occurring in another jurisdiction might violate the Dormant Commerce Clause if the burden such regulation imposes on commerce elsewhere is clearly excessive in light of the competing state's legitimate interests. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (stating that generally state statutes affecting interstate commerce will be found invalid only if the burden imposed on commerce is clearly excessive in relation to putative local benefits). However, this possibility is beyond the scope of this article.

272. See *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005) ("[T]his Court has held that an 'application of the internal affairs doctrine is mandated by constitutional principles, except in the 'rarest situations,' e.g., when 'the law of the state of incorporation is inconsistent with a national policy on foreign or interstate commerce.'" (quoting *McDermott Inc. v. Lewis*, 531 A.2d 206, 217 (Del. 1987))).

273. See, e.g., Robert W. Hamilton, *The Crisis in Corporate Governance: 2002 Style*, 40

These other states had stopped short of regulating directly the internal affairs of public firms, yet the members of the Delaware court must have recognized that such regulatory inroads are a clear prospect in times of heightened popular concern about corporate actors' misconduct. They also must have realized that Delaware lacked the ability to prevent officials in other states from so acting. As I contend elsewhere, this threat, along with others, prompted the court to draft *VantagePoint* not to serve as a piece of persuasive judge-craft, but rather to lay the groundwork for a campaign to convince federal courts or Congress to prevent other states from regulating the internal affairs of Delaware entities.<sup>274</sup>

Again, states may deploy the type of regulatory response that Delaware fears in the corporate context in the employment setting to protect the rights of local employees.<sup>275</sup> Currently, employment law protections often are enforced through private rights of action, in judicial and nonjudicial fora.<sup>276</sup> Faced with the specter of aggressive behavior by other states, a state could enhance public enforcement efforts to protect domestic employees or other interests. For example, California regulatory authorities could prevent out-of-state firms from doing business in California or impose other less dramatic penalties if the use of NCAs has anticompetitive effects within the state.

Many other arguments exist for and against a regulatory model that relies more heavily on public enforcement. In addition, this kind of response has the potential to prompt ugly interstate disputes over regulatory prerogatives, although the ugliness of such disputes relative to those created by a competing state's deployment of aggressive judicial tactics to further a law-as-commodity franchise exists in the eye of the beholder. Employee rights advocates also must be watchful that industry groups not use these types of conflicts to press

---

HOUS. L. REV. 1, 44–45 (2003) (describing Eliot Spitzer's Wall Street regulatory enforcement crackdown); H.D. Vinod, *Conflict of Interest Economics and Investment Analyst Biases*, 70 BROOK. L. REV. 53, 59 n.21 (2004) (same). Some states have passed laws that mirror aspects of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, and potentially extend greater protections. See, for example, Deborah Solomon, *Zealous States Shake up Legal Status Quo—Oklahoma's MCI Is Latest Headache for Federal Officials and Corporate Lawyers*, WALL ST. J., Aug. 28, 2003, at A4, for a discussion of the growing trend by certain states to further regulate corporate practice.

274. Glynn, *supra* note 24, at 136–43 (discussing post-Enron pushback against enforcement efforts).

275. See, e.g., *supra* notes 35–36 (describing state autonomy with regard to formulating laws regulating corporate relationships).

276. Cf. Cynthia Estlund, *Who Mops the Floors at the Fortune 500? Corporate Self-Regulation and the Low-Wage Workforce*, 12 LEWIS & CLARK L. REV. 671, 679–81 (2008) (stating that employees are largely responsible for enforcing their own employment-related rights through litigation or complaints to administrative agencies, but agencies often lack the resources to enforce rights broadly).

for enactment of deregulatory federal preemptive legislation or a federal choice-of-law regime favoring law-as-commodity competition—the type of pushback against state enforcement efforts we have seen recently in the corporate context.<sup>277</sup> Nevertheless, where a state's public policy is sufficiently compelling and the threat of competing state interference is sufficiently acute to justify the increased regulatory costs, a state can enhance compliance with its legal norms by expanding public enforcement efforts.

In sum, in the NCA context and elsewhere, states acting for their own benefit may seek selection of their law and induce races to their courthouses. But, other states have a number of defensive options at their disposal. At a minimum, states seeking to maintain more robust employee protections must recognize the potential for such competition, the means other states may deploy to further their competitive aims, and the tools available to resist the resulting race to the bottom. Ultimately, they may need to alter their judicial or regulatory enforcement practices to prevent firms from taking advantage of competing states' willingness to press for extraterritorial application of employer-friendly law.

### V. Conclusion

One thing is certain: Firms search for ways to reduce regulatory risks. The threat that firms will move operations across borders to reduce such risks—reflecting the standard type of interjurisdictional competition—already looms large in the labor and employment context. In contrast, the prospect of law-as-commodity competition in this area has not received much attention. Now it should. Contractual selection of favorable state law presents an attractive option for employers if selected states—and, in particular, their judiciaries—are willing to extend their law extraterritorially. This already happening to some extent in the NCA context, and genuine potential exists for this kind of competition to emerge in other areas, particularly if state employment law reforms widen disparities between jurisdictions.

Those concerned about employee welfare, therefore, must be watchful. States with an interest in regulating employment relationships need not accept employer-preferred contract terms, including choice-of-law clauses. Yet, this is not enough. Legal decision makers must also understand how firms and competing states might defeat local policy preferences through litigation techniques and aggressive judicial conduct, and respond by altering their

---

277. See Glynn, *supra* note 24, at 142 (discussing the corporate post-Enron pushback against the Sarbanes-Oxley Act and federal securities laws).



judicial and regulatory behavior to counteract this threat. A state's failure to recognize and respond to the rise of a cooperative venture between firms and a competing state could result in creeping nullification of protections for local workers. In a very real sense, then, inattention in this context could be hazardous to a state's policy interests.