Flexibility or Certainty? Comparing the First and Second Restatements of Conflict of Laws' Approach to Contract Cases

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I. INTRODUCTION

Modern contracts frequently span across multiple states either because of the parties involved, the contract's negotiation, or its performance. Therefore, the question of which state's law should govern the contract becomes incredibly important. Determining the most important factors in making this determination has been no easy task;, and scholars and courts have never come to unanimous agreement on the issue.[1] In the field of contracts, the two most popular choice of law theories used by American courts today are the Restatement of Conflict of Laws ("First Restatement") and Restatement (Second) of Conflict of Laws ("Second Restatement").[2] Twenty-four states follow the Second Restatement while 11 states still follow the First Restatement, placing it in a distant second.[3] The fact that both are Restatements and are the two most popular choice of law theories for contract cases in the United States today, a comparison and analysis of the First and Second Restatement can prove instructive of how conflict of law jurisprudence has evolved

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[1] *See, e.g.*, SYMEON SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 88–121 (2006) (discussing the Second Restatement's judicial following as well as other prominent modern choice of law theories).

[2] Symeon C. Symeonides, *Choice of Law in the American Courts in 2017: Thirty-First Annual Survey*, 66 AM. J. COMP. L. 1, 54 (2017) [hereinafter *Thirty-First Annual Survey*].

[3] *Id.* Ten states follow what Symeonides refers to as the "combined modern" approach, which combines interest analysis and the Second Restatement. Symeonides refers to these approaches as "combined modern" because they generally combine two types of modern choice of law analyses—the Second Restatement and interest analysis—instead of only relying on either the First or Second Restatements. Because "combined modern" approach states at least partially base their decisions on the Second Restatement, this paper will focus on the First and Second Restatements for two reasons. First, the First and Second Restatements are the two most popular choice of law theories followed by states in contract cases, and second the combined modern approach shares many elements with the Second Restatement approach. *See also* SYMEONIDES, *supra* note 1, at 63–70, 115–116 (discussing the various choice of law approaches and their use by different states).

over time. Comparing the First and Second Restatement will also demonstrate why the Second Restatement is a superior conflict of law methodology to the First Restatement.

This paper will begin with an analysis of the First Restatement in Part II. Part II.A will begin with an analysis of vested rights theory, the jurisprudential basis for the First Restatement, and the goals of the First Restatement. Part II.B will examine the First Restatement's general contract sections that control how the First Restatement makes choice of law determinations for most contracts. Part II.C will then examine critiques of the First Restatement as well as escape devices used by courts that view the First Restatement's rules as too restrictive. Part II.D will conclude the section on the First Restatement by addressing its omission of any sections about choice of law clauses and the contemporary response to that decision. Part III will then examine the Second Restatement, beginning with a brief overview of the "conflicts revolution" and the adoption of the Second Restatement in Part III.A. Part III.B will then address the Second Restatement's general contract sections that control how the Second Restatement makes choice of law determinations for most contracts. Part III.C will then conclude the analysis of the Second Restatement be examining both judicial and scholarly responses to the Second Restatement. Finally, Part IV will argue that the Second Restatement is a superior choice of law theory to the First Restatement.

II. FIRST RESTATEMENT APPROACH

The first major attempt to unify conflict of law jurisprudence came with the First Restatement in 1934.[4] While most academics have moved past the First Restatement approach to

[4] *See, e.g.*, Restatement of Conflict of Laws § 358 (Am. Law Inst. 1934) (addressing specifically the choice of law rules governing performance of a contract, but demonstrating the timing of the First Restatement as a whole).

conflict of law, many courts still follow its conflict of law rules.[5] Unlike the Second Restatement's "most significant relationship" test, the First Restatement is based on vested rights theory. Vested rights theory bases its conflict of law analysis on a single contact under the theory that this is the place where rights "vested."[6] Under vested rights theory, conflict of law questions should be determined on a territorial basis based on where specific rights vested without taking other contacts into consideration.[7] Vested rights theory was the dominant conflict of law theory until the "conflicts revolution" led to the Second Restatement adopting the "most significant relationship" test.[8]

This section will begin with a brief overview of vested rights theory, the theoretical underpinning of the First Restatement, and the general theory behind the First Restatement. Then, the First Restatement's specific sections relating to the law governing contracts will be examined, followed by critiques—both contemporary and modern—of the First Restatement's approach. Finally, this section will end with an examination of how the First Restatement approaches choice of law clauses, a disfavored practice at the time that has become increasingly prominent in modern contracts and business dealings.

A. Vested Rights Theory and the Goals of the First Restatement

Vested rights theory is commonly viewed as the theoretical basis for the First Restatement.[9] Developed in the United States by Joseph Beale, the reporter of the First Restatement, vested rights

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[5] WILLIAM RICHMAN & WILLIAM REYNOLDS, UNDERSTANDING CONFLICT OF LAWS, 177 (3d ed. 2002); *Thirty-First Annual Survey*, *supra* note 2, at 54 (stating that eleven states still follow the First Restatement in contracts cases).

[6] *Compare* Restatement of Conflict of Laws § 358 (Am. Law Inst. 1934) (stating that the law of the place of performance should govern the contract), *with* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (AM. LAW INST. 1971) (stating that courts should choose the law of the state with the "most significant relationship" to the case to govern the contract).

[7] RICHMAN & REYNOLDS, *supra* note 5, at 177–78.

[8] A CONFLICT-OF-LAWS ANTHOLOGY 63–69 (Gene R. Shreve & Hannah L. Buxbaum eds., Lexis Nexus, 2d ed. 2012); Restatement (Second) of Conflict of Laws § 188 (Am. Law Inst. 1971).

[9] *See*, RICHMAN & REYNOLDS, *supra* note 5, at 177–78 (explaining the vested rights theory's connection to the First Restatement); William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-*

theory "explained the forum's use of foreign legal rules in terms of the creation and enforcement of vested rights."[10] An explanation of how the forum state could apply foreign law was necessary, because Beale, and by extension vested rights theory, viewed law as limited by territoriality and, therefore, unenforceable beyond a state's borders.[11] In order to address conflict of law issues while maintaining this territorial view of the law, vested rights theory focuses on when rights "vest" and grant a state jurisdiction over a case.[12] Under vested rights theory, rights vest when specific actions are taken, and only the state in which the action occurred has jurisdiction over the case.[13] The forum state is obliged to recognize the rights that vested in the state the conduct occurred in, called the foreign state, and cannot apply its own law extraterritorially to alter the legal rights created by the foreign state.[14] In this way, the sovereignty of the foreign state is protected while simultaneously permitting plaintiffs to file suit in forums other than the one in which the action causing their rights to vest occurred.[15] In practice, vested rights theory permits the forum state to follow its own procedural law while applying the substantive law of the state in which the right at issue in the case vested.

Application of vested rights theory leads to the conclusion that rights vest in the location of one specific act—for example the location of a car crash—irrespective of any other facts of the case, because that is the location where the right to a cause of action vested.[16] Under Beale's guidance, the First Restatement identified specific acts for specific types of cases that cause a right

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Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts, 56 MD. L. REV. 1196, 1197 (1997).

[10] Richman & Riley, *supra* note 9, at 1197; JAMES A. MARTIN, PERSPECTIVES ON CONFLICT OF LAWS: CHOICE OF LAW 1-2 (1980).

[11] LEA BRILMAYER, CONFLICT OF LAWS 22 (1995).

[12] *Id.*; RICHMAN & REYNOLDS, *supra* note 5, at 177.

[13] RICHMAN & REYNOLDS, *supra* note 5, at 177.

[14] *Id.*; BRILMAYER, *supra* note 11, at 22.

[15] RICHMAN & REYNOLDS, *supra* note 5, at 177.

[16] LEA BRILMAYER & RAECHEL ANGLIN, *Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger*, 95 IOWA L. REV. 1125, 1129 (2010).

to vest, referred to here as "triggers."[17] These different triggers are used to determine which state's law should govern specific types of cases based on the idea that the trigger causes rights to vest, because a trigger signifies the "last act" necessary to complete a cause of action.[18] Application of vested rights theory to the First Restatement was supposed to lead to greater uniformity, certainty, and predictability in the law, because it solved all conflict of law cases by looking at one individual contact.[19]

Through the application of vested rights theory, the First Restatement sought to create a choice of law system that promoted certainty, uniformity, and predictability.[20] Vested rights theory, with its focus on only one specific type of contact, certainly promotes each of these ideas. Vested rights theory led the First Restatement to adopt broad rules that control large numbers of occasionally unrelated cases the same way.[21] When addressing conflict of law problems in contracts cases, this led the First Restatement to divide these cases into two categories: validity issues and performance issues.[22] These two categories will be examined in detail in the following section.

B. The First Restatement's Approach to Conflict of Law Problems in Contract Cases

The First Restatement follows two major sections to determine which state's law should govern a contract. The default rule for contractual choice of law cases under the First Restatement comes from § 332, stating that the law of the place of the contract should control questions about

[17] *Id.* at 1130. *Compare* Restatement of Conflict of Laws § 358 (Am. Law Inst. 1934) (stating that the law of the place of performance should govern the contract), *with* Restatement of Conflict of Laws § 332 (Am. Law Inst. 1934) (stating that the law of the place of contracting should govern the contract).
[18] BRILMAYER, *supra* note 11, at 23.
[19] *See* David F. Cavers, *A Critique of the choice of Law Problem*, 47 Harv. L. Rev. 173, 197–198 (discussing how the First Restatement's approach led to the benefits of uniformity, certainty, and predictability).
[20] RICHMAN & REYNOLDS, *supra* note 5, at 199.
[21] *Id.* at 200.
[22] *Id.* at 188–92.

validity of a contract.[23] This rule is not absolute, however, because of a massive exception found in § 358, stating that in some circumstances the law of the place of performance should control questions about performance of a contract.[24] This section will examine §§ 332 and 358 to provide greater context for how the First Restatement addresses contractual choice of law cases.[25]

First Restatement § 332 states:

> The law of the place of contracting determines the validity and effect of a promise with respect to
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> (a) capacity to make the contract;
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> (b) the necessary form, if any, in which the promise must be made;
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> (c) the mutual assent or consideration, if any, required to make a promise binding;
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> (d) any other requirements for making a promise binding;
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> (e) fraud, illegality, or any other circumstances which make a promise void or voidable;
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> (f) except as stated in § 358, the nature and extent of the duty for the performance of which a party becomes bound;
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> (g) the time when and the place where the promise is by its terms to be performed;
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> (h) the absolute or conditional character of the promise.[26]

Section 332 clearly makes the place of contracting –the location the contract was made –the default rule to govern contractual choice of law cases.[27] Section 332's general rule, however, has one major exception in that it defers to § 358 on issues of performance.[28] Comment (c) of § 332

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[23] Restatement of Conflict of Laws § 332 (Am. Law Inst. 1934); RICHMAN & REYNOLDS, *supra* note 5, at 187–92.

[24] Restatement of Conflict of Laws § 358 (Am. Law Inst. 1934); RICHMAN & REYNOLDS, *supra* note 5, at 187–92 (noting that the place of performance exception "is an exception so large that it threatens to swallow the [general place of contracting] rule.").

[25] The First Restatement does not have any section about choice of law clauses. This issue will be addressed in Part II.D, which examines the reasons the First Restatement did not include any section about choice of law clauses and details the critiques of this approach which eventually led to specific sections about this issue to be included in the Second Restatement.

[26] Restatement of Conflict of Laws § 332 (Am. Law Inst. 1934).

[27] *Id.*

[28] *Id.*

attempts to bring further clarity to this distinction with mixed results, stating that there is no bright line differentiating issues relating to the actual creation of an obligation to perform from actual performance.[29] Instead, comment (c) only states that "the nature of the obligation and the duty to render the performance for which a party becomes bound is governed by the law of the place of contracting."[30] With this ambiguity in mind, § 358 must also now be examined.

First Restatement § 358 states:

> The duty for the performance of which a party to a contract is bound will be discharged by compliance with the law of the place of performance of the promise with respect to:
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> (a) the manner of performance;
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> (b) the time and locality of performance;
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> (c) the person or persons by whom or to whom performance shall be made or rendered;
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> (d) the sufficiency of performance;
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> (e) excuse for non-performance.

Under § 358, "[t]he law of the place of performance determines the manner and method as well as the legality of the acts required for performance."[31] While § 358 acknowledges it is subordinate to § 332, under § 358 the place of performance should still govern all issues relating to performance of the contract itself.[32] The comments of § 358 reiterate those of § 332 stating that "there is no logical line which separates questions of the obligation of the contract, which is determined by the law of the place of contracting, from questions of performance, determined by the law of the place

[29] *Id.*
[30] *Id.*
[31] RESTATEMENT OF CONFLICT OF LAWS § 358 cmt. a (AM. LAW INST. 1934).
[32] *Id.* ("The rule stated in this Section expresses the general principle that all questions concerning the manner of performance, the exact time and conditions of performance, the person or persons to whom performance shall be rendered and similar questions of detail are determined by the law of the place where performance is to be made.").

of performance."[33] Instead, the line separating cases of performance and validity is a practical one that arises from the particular facts and circumstances of individual cases.[34]

While the First Restatement's approach to contractual choice of law cases at first appears simple, problems arise from different rules governing questions about what obligations arise under a contract and actual performance of the contract. By failing to provide a bright line to differentiate these types of cases, the First Restatement loses the advantages of certainty, uniformity, and predictability of results that its approach was supposed to ensure. Instead, the line-drawing issues created by §§ 332 and 358 are emblematic of the larger issues found in the First Restatement that will be discussed in the following section.

C. Critiques of the First Restatement

Before the ink had even dried on the First Restatement, contemporary critics were already attacking its approach.[35] The first, and potentially most influential of these critics, was Walter Wheeler Cook whose work on the subject has been characterized as a "theoretical dissection of the vested rights doctrine."[36] Following Cook, criticism of the First Restatement and vested rights theory continued. These critics focus on the line-drawing problems created by the First Restatement, specifically how its single-factor choice of law tests can lead to "absurd" results and, that the First Restatement's weaknesses in reality do not lead to greater certainty, uniformity, or predictability of result.[37] The First Restatement frequently does not lead to greater certainty, uniformity, or predictability of result, because judges are reluctant to follow it in all instances

[33] *Id.* at cmt. b; RESTATEMENT OF CONFLICT OF LAWS § 332 cmt. c (AM. LAW INST. 1934).
[34] RESTATEMENT OF CONFLICT OF LAWS § 358 cmt. b (AM. LAW INST. 1934).
[35] *See, e.g.*, Walter Wheeler Cook, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942) (criticizing the First Restatement's approach before the First Restatement was even finished).
[36] Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 807 (1983).
[37] *See, e.g.*, SYMEONIDES, *supra* note 1, at 11–24 (discussing the critiques of the First Restatement made by Walter Wheeler Cook, David Cavers, and Brainerd Currie that helped lead to the "conflicts revolution" and eventually to the adoption of the First Restatement).

leading to the creation of informal, but recognizable, "escape devices" used by courts to circumvent the constraints of the First Restatement.[38] Escape devices allow courts to circumvent the First Restatement's rules entirely by choosing the law of the state that they find most applicable to the case rather than strictly adhering to the First Restatement's rules.[39] This section will begin with an examination of Cook's criticism of the First Restatement and its vested rights foundation. Following Cook's criticisms, this section will examine common escape devices courts use to circumvent the First Restatement's strict rules and conclude with an analysis of how the First Restatement failed to accomplish its goals of certainty, predictability, and uniformity.

1. Walter Wheeler Cook's Critiques of the Theoretical Foundations of the First Restatement

One of the most influential critics of the First Restatement approach was Walter Wheeler Cook, who attacked the First Restatement—and the place of the contracting rule from § 332 in particular—as soon as it was enacted on the basis that it did not reflect the general principles of the First Restatement.[40] Cook attacked multiple aspects of the First Restatement's handling of contractual conflict of law issues, starting with the distinction made between the place of contracting and place of performance.[41] The First Restatement's decision to split contract cases into these two categories, and the corresponding lack of direction given to courts to help differentiate between the two, led to "doubt and uncertainty" and undermined the First Restatement's goal of certainty, uniformity, and predictability.[42] Cook also noted that when combined with the single-factor choice of law rules found in §§ 332 and 358 the First Restatement approach "leads to artificial and arbitrary results which take insufficient account of the needs of

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[38] *See, e.g.*, RICHMAN & REYNOLDS, *supra* note 5, at 187–92 (discussing escape devices and their impact on the First Restatement's application).
[39] *Id.*
[40] COOK, *supra* note 35, at 352.
[41] *Id.* at 355–63.
[42] *Id.* at 360.

the community," because they look at only one contract in a given case at the exclusion of all others.[43] Cook also attacked the idea that the place of contracting should control, because he viewed this choice as an arbitrary decision.[44]

Cook viewed the place of contracting determining the law to govern a contract as arbitrary for two reasons. First, Cook argued that having the place of contracting govern a contract can lead to absurd results, especially when the place of contracting is the only contact an actor has with the state and all other acts incident to the contract happened in another state.[45] Second, Cook argued that the place of contracting is an arbitrary choice because the Restatement holds that the place of contracting is where acceptance is given from, not where acceptance is received.[46]* Because the choice between where acceptance is made and where it is received, especially in oral contracts, is a choice between two equally viable options, Cook called the decision to adhere to the place of acceptance arbitrary. He noted that this choice does not necessarily flow from vested rights theory and the principles of the First Restatement.[47] As a result, Cook noted the First Restatement does not actually follow vested rights theory as closely as it initially appears. Cook's critique of the First Restatement highlighted the inherent deficiencies of its rigid and static system while attacking the very theory that led to this system in the first place: vested rights theory.[48] Cook's work cleared

[43] *Id.* at 388.
[44] *Id.* at 369–70.
[45] *Id.* (discussing this in terms of a unilateral contract in which the offer is made in State X and acceptance is given through shipment of goods in State Y. The First Restatement would have the law of State Y govern the contract, and by extension the rights of the offeror, despite the fact that all other contacts might point to State X).
[46] *Id.* at 387.
[47] *Id.* Cook is not alone in this critique of vested rights theory, as Brilmayer has also noted that the decision to use the place of contracting to determine which state's law should control contracts is arbitrary. Brilmayer also noted that the deficiencies of the vested rights theory only examining one individual contact for any given case are especially apparent in multi-state contract cases because vested rights theory and the First Restatement only look at one individual contact to make their entire choice of law determination, occasionally leading to absurd results. BRILMAYER, *supra* note 11, at 26.
[48] SYMEONIDES, *supra* note 1, at 11–12.

the way for later scholars to critically assess the First Restatement without having to address vested rights theory itself.

2. Escape Devices that Undermined the First Restatement in Contractual Choice of Law Cases

As the First Restatement was enacted in states, it quickly became apparent that many judges were using "escape devices" to circumvent the First Restatement's strict rules.[49] Importantly, when judges use escape devices, it is often done without acknowledging their use to avoid choosing the law the First Restatement's single-factor tests. This approach favors the law of a state that "justice and common sense" would favor.[50] Instead, when judges use escape devices they act as if they are not manipulating the rules of the First Restatement, but instead applying them correctly to the specific facts of an individual case.[51] Use of these escape devices directly frustrated the First Restatement's goals of certainty, predictability, and uniformity. Failing to accomplish these goals, the First Restatement quickly came under attack, eventually leading to the adoption of the Second Restatement in 1969.[52]

There are five major escape devices available to courts in contractual choice of law cases. The first two are specific to contractual choice of law questions and are manipulations of the place of making and use of the performance/making distinction.[53] These two escape devices flow directly from First Restatement §§ 332 and 358, as judges manipulate the rules in these sections to find the result they want in an individual case.[54] The following three escape devices all apply to the First Restatement generally and are not specific to contractual choice of law cases. These

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[49] *See, e.g.*, RICHMAN & REYNOLDS, *supra* note 5, at 187–92 (discussing escape devices and their impact on the First Restatement's application). For further discussion regarding how judges used escape devices to avoid the constraints of the First Restatement, *see* BRILMAYER & ANGLIN, *supra* note 16, at 1133–35.

[50] RICHMAN & REYNOLDS, *supra* note 5, at 181.

[51] *Id.*

[52] SYMEONIDES, *supra* note 1, at 31.

[53] RICHMAN & REYNOLDS, *supra* note 5, at 189.

[54] *Id.*

escape devices are characterization, renvoi, and public policy.[55] Together, the use of these escape devices directly undermine the First Restatement's goals of certainty, predictability, and uniformity by giving judges a way to circumvent the First Restatement's strict rules and apply the law of the state they think makes the most sense for individual cases.

The most important escape devices are the two that are specialized for contractual choice of law cases. First, manipulation of the general rule requiring the place of the making to govern a contract allows judges to use the inherent ambiguities within contract law itself to manipulate what law First Restatement § 332 would apply to a given case.[56] An easy example of this comes from the fine line in many cases between offer and acceptance. In close cases, judges can characterize a specific act as either offer or acceptance depending on what state the act occurred in to effectively choose which state's law should govern the contract.[57] Similarly, the distinction between issues of making and performance also use the inherent ambiguities in contract law to permit courts to effectively choose which law should govern a contract. As First Restatement §§ 332 and 358 themselves point out, the distinction between issues of validity and performance are often difficult to make and frequently are determined by the facts of individual cases.[58] In close cases, judges can use this escape device to avoid the law of the place of the making in favor of the place of performance by characterizing a case as one about performance of the contract rather than its validity.[59] While both of these contract-specific escape devices rely on characterization of specific elements of cases, they should be viewed as distinct from the more general characterization escape device that applies to the First Restatement more generally.

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[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] RESTATEMENT OF CONFLICT OF LAWS § 332 cmt. c (AM. LAW INST. 1934); RESTATEMENT OF CONFLICT OF LAWS § 358 cmt. a (AM. LAW INST. 1934).
[59] RICHMAN & REYNOLDS, *supra* note 5, at 190.

The general characterization escape device is different from the previous two in that it does not refer to characterization of specific elements within contract cases, but, instead, to what category of law should apply to the case.[60] For example, if a case can arise in either tort or contract a court can use this escape device to characterize the case as one or the other depending on which choice of law determination would flow from that decision.[61] If a contract was made in state X, but the place of injury was in state Y, then a court that wants to apply the law of state X would characterize the case as a contract case while a court that wants to apply the law of state Y would characterize it as a tort case.[62] Characterization can also be used by courts to classify certain laws as either substantive or procedural, depending on whether they wanted to apply that specific law in their case.[63] While the distinction between different types of cases can allow characterization to entirely change which state's law will apply to a case, the substance-procedure distinction allows courts to manipulate the substantive law of a state in subtle ways that can eventually be dispositive in a case.[64] As a practical matter, the problems that happen when courts use the general characterization escape device are similar to the problems with the two contract-specific escape devices. Each of these escape devices feature judges manipulating the nuances in the law when there are two logical results to have a specific state's law determine a case. In contrast, the remaining two escape devices work in different ways.

The final two escape devices are renvoi and public policy. Renvoi is the process by which a court follows not only the substantive law of the state the First Restatement says should control

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[60] *Id.* at 191.

[61] For an example of how the same cause of action can arise in either tort or contract law, compare Worldwide Commodities, Inc. v. J. Amicone Co., 630 N.E.2d 615, 617–18 (Mass. App. Ct. 1994) (interpreting Mass. Gen. Laws Chapter 93A claim as a contract claim), *with* Stagecoach Transp., Inc. v. Shuttle, Inc., 741 N.E.2d 862, 868 (Mass. App. Ct. 2001) (interpreting Mass. Gen. Laws Chapter 93A claim as tort claim).

[62] RICHMAN & REYNOLDS, *supra* note 5, at 191.

[63] BRILMAYER, *supra* note 11, at 27.

[64] *Id.* at 28.

a case, but also that state's choice of law rules.[65] By adopting a different state's choice of law rules, renvoi can lead to circular reasoning in which multiple states choose each other to control a case.[66] To avoid this problem, the First Restatement explicitly disavows renvoi, but this has not always prevented courts from using it as a method to avoid the state law the First Restatement would initially choose in a case.[67] Using renvoi requires courts to explicitly contradict the First Restatement and, as such, is less commonly used than the other escape devices.

Finally, the last escape device is public policy. The public policy escape device permits a court to refuse to apply a specific state's law if application of that law would be contrary to the forum state's public policy.[68] The public policy exception requires a very high bar to become effective and, as such, is rarely used by courts.[69] Perhaps another reason the public policy exception is rarely used is because it requires judges to explicitly acknowledge that they are using an escape device to avoid the substantive law of a state, whereas judges can use the other escape devices without acknowledging they are doing so with the intention of choosing a different state's law to govern a case.

Dissatisfaction with the First Restatement, due to both the flaws in its theoretical foundations as well as the escape devices commonly used to thwart it, eventually led to the adoption of the Second Restatement. The Second Restatement will be examined in detail in Part III; but, before addressing this issue, one other flaw in the First Restatement must be addressed.

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[65] RICHMAN & REYNOLDS, *supra* note 5, at 191.
[66] *Id.*
[67] *Id.*; *see also* Restatement of Conflict of Laws § 7 (Am. Law Inst. 1934) ("The classification and interpretation of conflict of laws concepts and terms are determined in accordance with the law of the forum, except as stated in § 8.").
[68] RICHMAN & REYNOLDS, *supra* note 5, at 192.
[69] *Id.* (discussing the high bar required for the public policy exception to actually apply in a case and permit the forum state to refuse to apply the substantive law of the state its choice of law rules decided should govern a case).

This final flaw of the First Restatement is its omission of any section about choice of law clauses. This issue must be addressed before examining the Second Restatement to understand both the prevailing view on choice of law clauses at the time the First Restatement was adopted as well as the subsequent shift in view of choice of law clauses that led to their inclusion as a major part of the Second Restatement.

D. The First Restatement's View of Choice of Law Clauses

While Beale's influence over the First Restatement can clearly be illustrated through its adopting vested rights theory and determining contractual choice of law cases based on the places of the contracting and performance, it can also be seen through the First Restatement's omission of any section on contractual choice of law clauses. Even though choice of law clauses were already in use at the time of the First Restatement, Beale stood as a vehement opponent of the practice.[70] Beale viewed choice of law clauses as theoretically and practically unsound.[71] Given Beale's influence over the First Restatement and his view of choice of law clauses, it should come as no surprise that the First Restatement does not even address the issue, implicitly stating that choice of law clauses should have no force and that, instead, the places of the making or performance should control contract cases. Under the First Restatement, therefore, choice of law clauses should be given no weight because courts should determine what law governs the case based exclusively on the place of the making or the place of performance depending on the type of case.[72]

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[70] *See* Joseph Beale, *What Law Governs the Validity of a Contract*, 23 HARV. L. REV. 1, 260–65 (1909) (discussing the contemporary practice of choice of law clauses and critiquing it as both theoretically and practically unsound); *see also* COOK, *supra* note 35, at 393–98 (discussing contemporary cases with choice of law clauses).

[71] BEALE, *supra* note 70, at 260–65.

[72] *See* Restatement of Conflict of Laws § 332 (Am. Law Inst. 1934); Restatement of Conflict of Laws § 358 (Am. Law Inst. 1934) (establishing under the First Restatement either the place of performance of the place of contracting should govern the contract).

The First Restatement did not make the decision to hamstring choice of law clauses on a whim, however; but, did so because Beale's view of choice of law clauses carried the day. Beale's initial opposition to choice of law clauses arose from his belief in vested rights theory. Because Beale viewed choice of law issues as territorial in nature, and because determining what law should govern a contract is an act of law in and of itself, he viewed choice of law clauses as legislative acts.[73] In characterizing choice of law clauses as legislative acts, Beale argued that they give individuals too much power and take away power that rightfully belongs to the state.[74] Beale did not stop here, but also argued that choice of law clauses should not be permitted because they could be used by parties to "free themselves" of the law that would normally govern their contract and actions.[75] When combined with his view that choosing the law that applies to a contract is itself an act of law, Beale viewed choice of law clauses as simply giving parties too much power and making the practice "theoretically indefensible."[76] While Beale's view of choice of law clauses proved persuasive enough to be adopted by the First Restatement, much like vested rights theory, it quickly came under attack by contemporary scholars led by Cook.

In response to Beale's view of choice of law clauses, Cook argued that choice of law clauses do not actually give parties too much power.[77] While Beale viewed choice of law clauses as a legislative act, Cook argued that even if parties make a legislative act in a choice of law clause, it only governs the specific parties to the contract and, therefore, does not have nearly as much power as the actual legislature.[78] Cook continues with perhaps his most powerful argument in

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[73] BEALE, *supra* note 70, at 260.
[74] *Id.*
[75] *Id.* at 261.
[76] *Id.* at 264. Beale then goes on to argue that there are also practical objections to choice of law clauses. These objections primarily come from a belief that they do not lead to increased certainty because lawyers cannot know with any certainty whether a judge will actually honor the choice of law clause in a contract. *Id.* at 264–66.
[77] COOK, *supra* note 35, at 389–413.
[78] *Id.* at 393.

support of choice of law clauses in pointing out that parties already have the power to alter their rights under a contract through the contract itself, and that a choice of law clause is simply an extension of this practice.[79] Once viewed in this light, choice of law clauses can be seen as simply a tool used in contracts to increase efficiency. In practice, parties could either write out every even potentially relevant element of the law of the state chosen by the choice of law clause (Chosen State) or simply include a choice of law clause. Under this view, having the Chosen State control a contract is simply one part of a larger agreement that does not choose the law of a specific state but instead establishes a part of the agreement between the two parties.[80]

Cook, however, did not think that parties should have unlimited discretion to choose the law that should apply to their contracts. Instead, Cook believed that courts should limit parties in their choice of law to states with which the parties, or the transaction, have a substantial connection .[81] By limiting the extent to which he was willing to permit choice of law clauses, Cook strikes a compromise between his theory that views choice of law clauses as simply terms in a contract and Beale's theory that choice of law clauses should not be permitted because they give parties too much power. Cook's arguments would ultimately prove persuasive as the Second Restatement adopted § 187 addressing choice of law clauses and the question of when courts should honor them following the conflicts revolution.[82]

III. SECOND RESTATEMENT APPROACH

[79] *Id.*

[80] *Id.* at 400. As noted by Cook, the Supreme Court also expressly adopted this view in *Mutual Life Insurance Co. v. Hill* in 1904, holding that the choice of law clause in the case made it "precisely like one in which the parties, without mentioning laws or state, stipulate that the contract shall be determined in accordance with certain specified rules." Mutual. Life Ins. Co. v. Hill, 193 U.S. 551, 554–55 (1904).

[81] *Id.* at 413.

[82] SHREVE & BUXBAUM, *supra* note 8, at 203; *see also* Restatement (Second) of Conflict of Laws § 187 (Am. Law Inst. 1971) (establishing choice of law rules for when a contract has an effective choice of law clause); Restatement (Second) of Conflict of Laws § 188 (Am. Law Inst. 1971) (establishing choice of law rules for when a contract has not made an effective choice of clause). Both of these sections of the Second Restatement will be examined in more detail in Part III.B.

The Second Restatement is the dominant conflict of laws approach used in American courts today.[83] In order to understand why the Second Restatement has become so influential, this section will begin by briefly examining the conflicts revolution that led to the adoption of the Second Restatement. Then, this section will examine Second Restatement §§§ 6, 187, and 188, the sections that govern most general contract cases. Finally, this section will address reactions to the Second Restatement and its application by the courts.

A. The "Conflicts Revolution" That Led to the Adoption of the Second Restatement

Dissatisfaction with the First Restatement quickly led courts to abandon their approach and sparked the "conflicts revolution." The conflicts revolution was a movement following the First Restatement in which both judges and scholars sought to find a better way to address conflict of law problems.[84] The watershed moment of the conflicts revolution undoubtedly came in 1963 when the New York Court of Appeals decided *Babcock v. Jackson* and abandoned the First Restatement's vested rights analysis in favor of a more nuanced "center of gravity" interest analysis.[85] In rejecting the First Restatement rule, the *Babcock* court characterized it as an "inflexible traditional rule" that "fail[s] to take into account essential policy considerations and objectives" and whose "application may lead to unjust and anomalous results."[86] In its place, New York adopted a "center of gravity" approach that chooses the law of the state with the "greatest concern with the specific issue raised" in the case based on "its relationship or contact with the occurrence or the parties."[87] By shifting to the center of gravity test based on multiple contacts, New York sought to avoid the "unjust and anomalous results" the First Restatement frequently led

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[83] *Thirty-First Annual Survey*, *supra* note 2, at 54.
[84] *See, e.g.*, SHREVE & BUXBAUM, *supra* note 8, at 61.
[85] Babcock v. Jackson, 191 N.E.2d 279, 283 (N.Y. 1963); SHREVE & BUXBAUM, *supra* note 8, at 61 (describing *Babcock* as "probably the most important choice-of-law decision rendered by an American court.").
[86] *Babcock*, 191 N.E.2d at 283.
[87] *Id.*

to; and, instead adopted a conflict of law analysis that chooses the law of the state with the greatest connection to the case. The shift to a multi-factor contact analysis in *Babcock* paved the way for the conflicts revolution and the proposals of many new theories to govern conflict of law cases.[88]

While the First Restatement accurately restated the general law of conflict of law in the United States, the advent of the conflicts revolution and its many conflict of law theories made accomplishing this in the Second Restatement impossible.[89] Instead, the Second Restatement, which took eighteen years to complete, "is an amalgamation of different conflicts approaches."[90] The combination of these different approaches helped lead to the Second Restatement's inclusion of sections requiring courts to examine both territorial and policy factors when making conflicts determinations.[91] By including both territorial and policy considerations, the Second Restatement stands as a compromise between the traditional territorial approach to conflict of laws and the more modern approaches that sought conflict of law decisions to be made in light of specific policy considerations, referred to as interest analysis.[92] Together, these policy and territorial considerations are supposed to lead courts to choose the state with the "most significant relationship to the parties."[93]

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[88] *See* SYMEONIDES, *supra* note 1, at 63–88 (quoting Swift v. Baker, 280 N.Y. 135) (describing some of the major conflict of law theories in use by courts today and that were under consideration when the Second Restatement was being drafted).

[89] *See* Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1234–40 (1997).

[90] *Id.* at 1237.

[91] *Id.*; *see also* further discussion about these sections in detail in Part III.B.

[92] *See, e.g.*, BORCHERS, *supra* note 89, at 1237 (describing the Second Restatement as "an amalgamation of different conflicts approaches, producing a document of a distinctly normative character"); Elliott E. Cheatham and Willis L. M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 960 (1952). The policy considerations more modern scholars wanted included in the Second Restatement can be found in section 6 while other sections, like section 188 for contracts without an effective choice of law by the parties, reflect the traditional territorial view of conflict of laws. These will be discussed in greater detail in Part III.B.

[93] *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (AM. LAW INST. 1971) (stating the Second Restatement's choice of law rule for contracts that lack a choice of law clause should choose the state with the "most significant relationship to the parties" based on the factors listed in §§ 6 and 188).

In contract cases, the Second Restatement generally resolves cases through the use of three specific sections: 6, 187, and 188.[94] These three sections provide a window into the composite nature of the Second Restatement with § 6 reflecting interest analysis; § 188 representing a more traditional, albeit multi-factor, territorial approach; and § 187 incorporating elements of both types of tests.[95] Section 6 outlines the general policies underlying all conflict of law determinations in the Second Restatement and is incorporated by reference in §§ 187 and 188.[96] In contrast, §§ 187 and 188 both address contracts cases specifically.[97] Section 187 addresses contracts with choice of law clauses and generally defers to them, while § 188 addresses contracts in which parties have not made an effective choice of law.[98] Parties can fail to make an effective choice of law because either 1) there was no choice of law clause in their contract or 2) § 187 directed the court to not honor the choice of law clause in the contract. Each of these sections will be addressed in greater detail in the following section.

B. The Second Restatement's Approach to Conflict of Law Problems in Contract Cases

Unlike the First Restatement, the Second Restatement has two distinct methods of analysis that control most contractual choice of law problems.[99] Second Restatement contractual choice of

[94] While the Second Restatement does have specific sections for specific types of contracts, these are beyond the scope of this paper. For reference, the sections dealing with specific types of contracts can be found in sections 189–207.

[95] *See* discussion on each of these sections *infra* Part III.B.

[96] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971) (establishing the policy considerations that should addressed under the Second Restatement); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1971) (directing courts to consider the state chosen by § 188, which in turn directs court to consider § 6, in certain circumstances); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (AM. LAW INST. 1971) (directing courts to consider factors listed in § 6 when making a choice of law decision under § 188).

[97] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1971); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (AM. LAW INST. 1971).

[98] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1971); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (AM. LAW INST. 1971).

[99] While there are more specific Second Restatement sections that deal with discreet types of contract problems, this paper will instead focus on the general rules governing the Second Restatement's choice of law rules for contract cases.

law problems should be divided into those cases in which parties have at least attempted to make a choice of law to govern their contract and those cases in which the parties have made no attempt to have a specific state's law govern their contract. Any time parties attempt to have a specific state's law govern their contract, § 187 controls the issue of whether the chosen state will in fact govern the contract.[100] If the parties have not made an effective choice of law under § 187, either because their attempt failed or they never attempted to have a chosen state, then courts should apply §§ 6 and 188 to determine which state has the most significant relationship to the case.[101] Because a proper analysis under § 187 can lead courts to then apply §§ 6 and 188, the following will examine § 187 first followed by §§ 6 and 188.

1. Section 187 and the Second Restatement's View of Choice of Law Clauses

To determine if parties have made an effective choice of law in their contracts, the Second Restatement directs courts to follow § 187. Section 187 establishes a series of multi-factor tests to determine if the chosen state should really govern a contract. Section 187 states that:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> > (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

[100] *See* Restatement (Second) of Conflict of Laws § 187 (Am. Law Inst. 1971) (establishing the Second Restatement's choice of law rules for contracts with an effective choice of law clause).

[101] *See* Restatement (Second) of Conflict of Laws § 6 (Am. Law Inst. 1971) (establishing the policy considerations courts should consider when applying the Second Restatement); Restatement (Second) of Conflict of Laws § 188 (Am. Law Inst. 1971) (directing courts to consider the factors listed in § 6 when making a choice of law determination under § 188).

> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
>
> (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.[102]

Section 187(1) allows for parties to designate the chosen state's law to govern issues that could have been resolved by an express provision in the contract, essentially meaning that § 187(1) permits parties to choose the interpretation of contractual terms.[103] Most issues that arise under a contract, however, will fall under the category of issues that parties cannot cover by express terms of a contract and are governed by § 187(2).[104] Importantly, while § 187(2) places some limits on what state parties can choose to govern their contract, if an issue falls under § 187(1) then there are no restrictions on the state parties can choose.[105] While § 187(2) does not place many limits on what the Chosen State can be, it does outline a two-tiered test to determine if a court should honor the choice of law clause in a contract.[106] Application of the section 187(2) two-tiered test creates a strong presumption that the Chosen State will govern the contract, requiring the Chosen State to fail multiple tests for any other state to govern the contract.[107]

In applying the first tier of the § 187(2) test, § 187(2)(a) asks if the chosen state has a "substantial relationship to the parties or the transaction."[108] If no "substantial relationship" is

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[102] Restatement (Second) of Conflict of Laws § 187 (Am. Law Inst. 1971).

[103] RICHMAN & REYNOLDS, *supra* note 5, at 223.

[104] *Id.*; *see also, e.g.*, Hodas v. Morin, 814 N.E.2d 320, 324–25 (Mass. 2004) (applying Restatement § 187(2) without even addressing § 187(1)); Feeney v. Dell Inc., 908 N.E.2d 753, 766 (Mass. 2009).

[105] Restatement (Second) of Conflict of Laws § 187 (Am. Law Inst. 1971); RICHMAN & REYNOLDS, *supra* note 5, at 223.

[106] Restatement (Second) of Conflict of Laws § 187 (Am. Law Inst. 1971).

[107] Section 187(2) establishes two separate two-part tests. Each set of these tests will be referred to as one of the two "tiers," because § 187(2)(a) has one two-part test and§ 187(2)(b) has another two-part test that is only used if the chosen state passes the § 187(2)(a) test. These tests will be explained in more detail below.

[108] Restatement (Second) of Conflict of Laws § 187 (Am. Law Inst. 1971).

found, courts then ask if the parties had a "reasonable basis" to choose the chosen state in their choice of law clause.[109] Generally, a "substantial relationship" requires some type of tangible connection between the state and the parties or the transaction.[110] If no "substantial relationship" is found, however, § 187(2)(a) then asks if the parties had a "reasonable basis" to choose the Chosen State in their choice of law clause. While the Second Restatement does not give much guidance regarding what a "reasonable basis" could be, § 187 comment (f) establishes that the sophistication and familiarity of a state's law can provide a "reasonable basis" for parties to choose the Chosen State to govern their contract.[111]

If the chosen state fails either part of the § 187(2)(a) test then the contract has not made an "effective choice of law." When contracts fail to make an "effective choice of law" the court follows a separate analysis, outlined in Second Restatement § 188, to choose which state's law should apply.[112] If the chosen state passes both § 187(2)(a) tests, however, the court will then continue on to the next step of § 187(2) and undergo a second two-part test established in § 187(2)(b). First, § 187(2)(b) asks if a "fundamental policy" conflict exists between the chosen state and a state one of the parties argues should control the contract instead (the challenging state).[113] Second, § 187(2)(b) asks whether the challenging state has a "materially greater interest" in the case than the chosen state.[114]

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[109] *Id.*

[110] *See, e.g.*, Valley Juice Ltd. v. Evian Waters of Fr., Inc., 87 F.3d 604, 608 (2d Cir. 1996) (finding a "substantial relationship" because one of the parties to the contract was incorporated in the chosen state); Hodas v. Morin, 814 N.E.2d 320, 325 (Mass. 2004) (holding that a contract selecting Massachusetts as place of performance was sufficient to give Massachusetts a "substantial relationship" to the case).

[111] Restatement (Second) of Conflict of Laws § 187 cmt. f (Am. Law Inst. 1971); *see also Valley Juice*, 87 F.3d at 608 (holding that choice of New York law was reasonable for a party's general distribution agreement because choosing New York law "ensured uniformity in the interpretation of the contract, and decreased the legal costs associated with making individual arrangements with its distributors.").

[112] Restatement (Second) of Conflict of Laws § 188 (Am. Law Inst. 1971).

[113] *Id.*

[114] *Id.*

In order for a fundamental policy conflict to exist between the challenging and chosen States, the policy at issue in the case "must . . . be a substantial one."[115] In applying the "fundamental policy" standard, courts generally do not find a fundamental policy conflict when the chosen state's law would lead to a different result than application of the challenging state's law.[116] Instead, courts applying § 187(2)(b) generally only find a "fundamental policy" conflict when one state recognizes a type of claim and the other does not, but no "fundamental policy" conflict when both states recognize the same type of claim.[117] If no "fundamental policy" conflict exists between the chosen state and the challenging state then the court applies the chosen state's law.[118]

If a "fundamental policy" conflict does exist, courts should then move to the next part of the § 187(2)(b) test and examine whether the challenging state has a "materially greater" interest than the chosen state in the case.[119] In making this determination, § 187(2)(b) directs courts to § 188 to determine which state would control the contract "in the absence of an effective choice of law by the parties."[120] If the challenging state is also the state with a "materially greater interest" in the case under § 188 and has a fundamental policy conflict with the chosen state, then the parties have not made an effective choice of law and § 188 will control which state's law should govern

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[115] Restatement (Second) of Conflict of Laws § 187 cmt. g (Am. Law Inst. 1971).

[116] *See, e.g.*, Taylor v. E. Connection Operating, Inc., 988 N.E.2d 408, 412–13 (Mass. 2013) (finding no "fundamental policy" conflict despite the chosen state's law leading to a different result from the challenging state's law).

[117] *Compare* Hodas v. Morin, 814 N.E.2d 320 (Mass. 2004) (finding a "fundamental policy" conflict when New York law prohibited gestational carrier agreements and Massachusetts law permitted them), *and* Feeney v. Dell Inc., 908 N.E.2d 753, 766–67 (Mass. 2009) (finding fundamental policy conflict when Texas prohibited type of class action suit and Massachusetts allowed same type of suit), *with Taylor*, 988 N.E.2d at 412–13 (no fundamental policy conflict where New York and Massachusetts have similar definitions of "employee"), *and* KSA Elecs., Inc. v. M/A–COM Tech. Sols., Inc., No. CV 15–10848–FDS, 2015 WL 4396477, at *3 (D. Mass. July 17, 2015) (finding no fundamental policy conflict where "[b]oth Massachusetts and California have statutes that protect sales representatives.").

[118] *See, e.g.*, *Taylor*, 988 N.E.2d at 412–13 (applying the chosen state's law because there was no fundamental policy conflict between the chosen state and the challenging state).

[119] Restatement (Second) of Conflict of Laws § 187 (Am. Law Inst. 1971).

[120] *Id.*

the contract.[121] If the § 188 factors do not point to any individual state, then the chosen state will govern the contract.[122] Both tests outlined in § 187(2) clarify the Second Restatement's deference to party choice in contracts. For a choice of law clause to be held ineffective, it must fail both tests under either § 187(2)(a) or §187(2)(b).[123] The complex scheme established in § 187 is designed to promote party choice in contracts, but also to constrain that choice within reasonable boundaries. In contrast, when parties have failed to make an effective choice of law in their contract the less complex, but also much less instructive, §§ 6 and 188 apply.[124]

2. The Second Restatement's approach to contracts without an effective choice of law clause established by §§ 6 and 188

When parties fail to make an effective choice of law, § 188 determines which state's law should govern the contract based on which state has the "most significant relationship to the transaction and the parties."[125] Section 188 states that:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
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> (a) the place of contracting,

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[121] *Id.*; Restatement (Second) of Conflict of Laws § 188 (Am. Law Inst. 1971). As a practical matter, this means that the Challenging State will govern the contract because to get to this point it must already have been selected by the § 188 factors.

[122] *See Hodas*, 814 N.E.2d at 326 ("'[W]here the significant contacts are so widely dispersed that determination of the state of the applicable law without regard to the parties' choice would present real difficulties," the Restatement instructs that the parties' choice of law will be honored. (quoting Second Restatement section 187 cmt. g)); Restatement (Second) of Conflict of Laws § 187 cmt. g (Am. Law Inst. 1971).

[123] A choice of law clause must fail both parts of either §§ 187(2)(a) or 187(2)(b) to be found ineffective. In practice, this means that choice of law clauses only fail, and therefore become ineffective, under § 187 if (1) under§ 187(2)(a) the chosen state has no substantial relationship to the parties or transaction and the parties had no reasonable basis to choose the chosen state to govern their contract, or (2) under § 187(2)(b) a fundamental policy conflict exists between the chosen state and the challenging state and the challenging state has a materially greater interest in the case than the chosen state.

[124] Restatement (Second) of Conflict of Laws § 188 (Am. Law Inst. 1971).

[125] *Id.*

> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.
>
> (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, except as otherwise provided in §§ 189–199 and 203.[126]

Section 188 incorporates § 6 by reference. Section 6 states that:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.[127]

Both §§ 6 and 188 establish multi-factor balancing tests.[128] The §§ 6 and 188 balancing tests, on their faces, are much more straightforward than the series of tests outlined in § 187. The clarity of §§ 6 and 188, can be deceiving, because neither section gives courts much, if any, direction

[126] *Id.*

[127] Restatement (Second) of Conflict of Laws § 6 (Am. Law Inst. 1971).

[128] *See id.* (requiring courts to consider seven factors when applying § 6); Restatement (Second) of Conflict of Laws § 188 (Am. Law Inst. 1971) (requiring courts to consider five factors along with § 6 when applying § 188).

regarding how to balance the competing factors in each section.[129] Instead, § 188(2) lists a series of contacts that all carry the same weight in determining what state's law should govern a contract.[130] Therefore, unless the specific factual situation outlined in § 188(3) occurs, § 188 provides courts with little actual guidance regarding what specific contacts should have more or less importance in determining the state with the "most significant relationship to the transaction and the parties."[131] Section 188's incorporation by reference of § 6 provides courts with further direction in making their choice of law determination; but, because § 6 also lists a series of unweighted factors, the inclusion of the § 6 factors in the § 188 analysis does not necessarily provide courts with much more guidance than § 188 itself does.[132] The multi-factor test outlined in § 188 marks a substantial deviation from the rigid, single-factor analysis of the First Restatement and along with §§ 6 and 187 provide an example of the differences in approach between the First and Second Restatements.

C. Reactions to the Second Restatement

There is a large split between scholars and the courts regarding the Second Restatement. While many scholars criticize the Second Restatement, courts have been much more receptive to it. Most scholarly criticism of the Second Restatement's approach to contractual conflict of law issues focus on §§ 6 and 188 rather on than on § 187. Criticism of §§ 6 and 188 are generally confined to issues about their flexibility in that they give judges too much discretion. These

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[129] *See* Restatement (Second) of Conflict of Laws § 6 (Am. Law Inst. 1971) (listing factors without any direction regarding how to weigh the factors against each other); Restatement (Second) of Conflict of Laws § 188 (Am. Law Inst. 1971) (listing factors without any direction regarding how to weigh the factors against each other).

[130] Restatement (Second) of Conflict of Laws § 188 (Am. Law Inst. 1971).

[131] *Id.* The comments to § 188 establish that most of the contacts listed in § 188(2) on their own do not carry much weight in the choice of law analysis. The major exception to this rule is the place of performance, but even this contact can have diminished importance if it is either unknown at the time of contracting, or split among multiple states. Instead of relying on the outsized importance of any one contact, the Second Restatement instead relies upon a counting of contacts approach, stating that "[t]he states which are most likely to be interested are those which have one or more of the [§ 188(2)] contacts with the transaction or the parties." *Id.* cmt. e.

[132] *Id.*; Restatement (Second) of Conflict of Laws § 6 (Am. Law Inst. 1971).

characteristics make it difficult to anticipate how courts will handle cases under the Second Restatement, but also have led courts to take a more favorable view of the Second Restatement. Application of the Second Restatement has not remedied the problem of uncertainty, unfortunately, as courts often only apply § 188 without addressing § 6.[133] Fortunately, while Second Restatement courts do not always follow § 188's directive to also apply § 6 they do not use nearly as many escape devices as courts that follow the First Restatement. Each of these issues will be addressed in this section, starting with judicial reaction to the Second Restatement followed by scholarly critiques of it.

Despite scholarly misgivings, the Second Restatement has quickly become the dominant choice of law approach in the United States, with 24 states adopting it to govern their contractual choice of law cases.[134] This number becomes even larger when considering the influence of § 187, as some states like Alabama, still follow the place of the contracting rule for most contract issues but follow § 187 if "the parties have legally contracted 'with reference to the laws of another jurisdiction.'"[135] Because so many states have adopted the Second Restatement approach to contractual conflict of law cases, either in whole or in part, it has become the dominant conflict of law approach in the United States for contract cases.[136]

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[133] *Compare* OneBeacon Am. Ins. Co. v. Narragansett Elec. Co., 57 N.E.3d 18, 22–23 (Mass. App. Ct. 2016) (only examining the Second Restatement §188 factors), *and* Bergin v. Dartmouth Pharm. Inc., 326 F. Supp. 2d 179, 182–83 (D. Mass. 2004) (applying Massachusetts law and only examining the Second Restatement § 188 factors), *with* Bushkin Assocs., Inc. v. Raytheon Co., 473 N.E.2d 662, 669–70 (Mass. 1985) (applying both §§ 188 and 6 in a contract choice of law case), *and* Clarendon Nat. Ins. Co. v. Arbella Mut. Ins. Co., 803 N.E.2d 750, 752 (Mass. App. Ct. 2004) *see also* SYMEONIDES, *supra* note 1, at 93; Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1046 (1987) (stating that courts generally apply § 188 without applying § 6).

[134] *Thirty-First Annual Survey*, *supra* note 2, at 54.

[135] DJR Assocs., LLC v. Hammonds, 241 F. Supp. 3d 1208, 1220 (N.D. Ala. 2017) (quoting Colonial Life & Accident Ins. Co. v. Hartford Fire Ins. Co., 358 F.3d 1306, 1308 (11th Cir. 2004)); *see also* SYMEONIDES, *supra* note 1, at 90 (discussing how other states such as Maryland, Kansas, and California have also adopted Second Restatement § 187 without adopting the rest of the Second Restatement).

[136] *See Thirty-First Annual Survey*, *supra* note 2, at 54 (listing which states follow the Second Restatement compared to other choice of law approaches). It should be noted that the Second Restatement is also the dominant conflict of law approach for tort cases as well, with twenty-five states adopting it for tort cases. *Id.*

The principal aspect of the Second Restatement that likely made it so attractive to courts in the first place, the immense discretion it gives to judges, has led to extensive scholarly scrutiny.[137] The discretion given to courts under the Second Restatement can clearly be seen in sections 6 and 188, the two basic Second Restatement sections that control most contract cases without an effective choice of law clause.[138] Both §§ 6 and 188 represent seismic shifts from the single-contact tests of the First Restatement as they not only establish unweighted, multi-part tests, but § 6 explicitly calls on courts to engage in an interest analysis based on policy considerations.[139] The lack of direction given to courts regarding how to actually apply §§ 6 and 188 has given them "virtually unlimited discretion."[140] This lack of direction from the Second Restatement simultaneously makes it more difficult to apply and permits judges to establish a façade of working within an orderly system.[141] The discretion given to judges in the Second Restatement is not all bad, as the Second Restatement represents a conscious decision to sacrifice some certainty in favor of a more flexible choice of law system that can properly address more types of cases than the First Restatement could.[142]

By granting judges more discretion through the unweighted, multi-part tests established in §§ 6 and 188, the Second Restatement sought to replace the rigidity of the First Restatement with a more flexible approach.[143] The greater flexibility of the Second Restatement allows for judges to

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[137] *See* SYMEONIDES, *supra* note 1, at 91–95. Symeonides goes on to note, however, that despite the broad discretion given to courts under the Second Restatement, only one other modern theory—New York's *Neumeier* tort theory—gives courts *less* discretion. *Id.* at 93.

[138] While there are more specific Second Restatement sections for some types of contracts, they are used much less than section 188 and thus will only be discussed to the extent that some scholars argue they are under-utilized by courts that would prefer to use the more general section 188 that grants them more discretion. *See* Borchers, *supra* note 87, at 1233–34.

[139] Restatement (Second) of Conflict of Laws § 6 (Am. Law Inst. 1971).

[140] SYMEONIDES, *supra* note 1, at 91.

[141] BRILMAYER, *supra* note 11, at 75; SYMEONIDES, *supra* note 1, at 93.

[142] *See, e.g.*, Shreve & Buxbaum, *supra* note 8, at 168 (stating that the increased flexibility of the Second Restatement permits it to more effectively address the facts of individual cases).

[143] SYMEONIDES, *supra* note 1, at 94.

make decisions grounded in the Second Restatement that are tailored to the specific facts of the case.[144] In order to achieve enough flexibility to allow judges to base their decision on the Second Restatement itself and prevent the widespread use of escape devices from the First Restatement and its "absurd results," the Second Restatement necessarily sacrifices some certainty of result.[145] Many scholars argue that the Second Restatement sacrificed too much certainty of result in favor of flexibility for it to be a truly effective conflict of law methodology.[146]

The problem of the Second Restatement giving judges too much discretion in theory has only been exacerbated in practice. Neither § 6 nor § 188 provide courts with any meaningful guidance regarding how they should actually weigh the different factors under consideration, leading many judges to simply "count contacts" and choose the state with the greatest number of contacts in a case.[147] Furthermore, many courts not only "count contacts," but also ignore § 6 entirely, preferring instead to solely examine § 188 and its factual contact analysis.[148] When courts do actually apply § 6, however, they often do so to confirm, rather than to test, the conclusion they came to through "contact counting" under § 188 rather than furthering the Second Restatement's goal of finding the state with the "most significant relationship" to the case.[149] The practice of

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[144] Shreve & Buxbaum, *supra* note 8, at 168.

[145] *Id.*

[146] *See, e.g.*, BRILMAYER, *supra* note 11, at 75 ("The Second Restatement has something for everyone, but that is precisely its problem. No matter what result you want to reach, the Second Restatement provides support."); SYMEONIDES, *supra* note 1, at 93 ("In the final analysis, the reason for the Restatement's higher appeal to judges is that, while it provides as much discretion as the other modern approaches, it also retains the façade of an orderly system."); Ralph U. Whitten, *Curing the Deficiencies of the Conflicts Revolution: A Proposal for National Legislation on Choice of Law, Jurisdiction, and Judgments*, 37 WILLAMETTE L. REV. 259, 271 (2001) ("The chief defect of [the Second Restatement] is its fluid quality.").

[147] *See, e.g.*, SYMEONIDES, *supra* note 1, at 93.

[148] *Compare* OneBeacon Am. Ins. Co. v. Narragansett Elec. Co., 57 N.E.3d 18, 22–23 (Mass. App. Ct. 2016) (examining the Restatement section 188 factors without examining the section 6 factors), *and* Bergin v. Dartmouth Pharm. Inc., 326 F. Supp. 2d 179, 182–83 (D. Mass. 2004) (applying Massachusetts law and only examining the Restatement section 188 factors), *with* Bushkin Assocs., Inc. v. Raytheon Co., 473 N.E.2d 662, 669–70 (Mass. 1985) (applying both sections 188 and 6 in a contract choice of law case), *and* Clarendon Nat. Ins. Co. v. Arbella Mut. Ins. Co., 803 N.E.2d 750, 752 (Mass. App. Ct. 2004) (same); *see also* SYMEONIDES, *supra* note 1, at 93; Smith, *supra* note 132, at 1046.

[149] SYMEONIDES, *supra* note 1, at 93.

contact counting and only applying § 188 without considering § 6 represents a dual divergence from what the Second Restatement calls for.

Fortunately, while courts have strayed from the directions of the Second Restatement in their application of §§ 6 and 188, they have not adopted nearly as many escape devices as there are in the First Restatement. Due to the flexibility of the Second Restatement, most of the escape devices found in the First Restatement have become obsolete under the Second Restatement.[150] Under the First Restatement, most escape devices were used in response to rigid rules that judges had to avoid to reach decisions they wanted, but the flexibility of the Second Restatement permits judges to find the results they want within the confines of the Second Restatement itself.[151] Without the rigidity of the First Restatement driving courts towards escape devices, only two devices remain under the Second Restatement: characterization and public policy.[152]

Much like the First Restatement, the Second Restatement still suffers from the escape device of characterization.[153] Fortunately, while the First Restatement had characterization issues within contract cases, the Second Restatement does not make the same distinction between contract cases of validity and performance.[154] Instead, because the Second Restatement is organized by subject matter there are inherent characterization issues that arise from this organizational scheme.[155] While characterization will always remain an escape device given the organizational scheme of the Second Restatement, the flexibility of the Second Restatement has

[150] RICHMAN & REYNOLDS, *supra* note 5, at 213.
[151] *Id.*
[152] *Id.*
[153] *Id.*; Whitten, *supra* note 14,4 at 272–73.
[154] *Compare* RESTATEMENT OF CONFLICT OF LAWS § 332 (AM. LAW INST. 1934) *and* RESTATEMENT OF CONFLICT OF LAWS § 358 (AM. LAW INST. 1934), *with* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (AM. LAW INST. 1971).
[155] RICHMAN & REYNOLDS, *supra* note 5, at 213.

permitted judges to work within its constraints more often than with the First Restatement and correspondingly resulted in a less frequent use of this escape device.[156]

Finally, while public policy can still be viewed as an escape device, its inclusion as a factor in § 6 has expressly made this consideration a factor for judges to consider.[157] By including public policy in § 6, the Second Restatement forces judges to address it head on when it becomes a factor in their decision making. Furthermore, while § 6's treatment of public policy still grants judges immense discretion, any attempt to limit this discretion here would likely result in judges simply resorting to the public policy escape device anyway.[158] The flexibility of the Second Restatement, therefore, has substantially decreased not only the number of escape devices present, but also the frequency in which the remaining two will be used. By reducing judicial use of escape devices, parties can more reliably expect judges to base their decision on the Second Restatement itself than they could with the First Restatement, which is one of the many advantages of the Second Restatement that will be discussed in the following section.

IV. THE SECOND RESTATEMENT IS A SUPERIOR CHOICE OF LAW METHODOLOGY TO THE FIRST RESTATEMENT

When compared to its current reception by scholars or the courts, the First Restatement has clearly been supplanted by the Second Restatement. The reasons for the Second Restatement's greater popularity are not as simple as the fact that it came after the First Restatement. Instead, the Second Restatement represents a new view of conflict of laws analysis that has proven much more influential and effective than the First Restatement. While the First Restatement was based on vested rights theory and single-factor territorial tests, the Second Restatement embraced multi-

[156] *Id.*
[157] *Id.*; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971).
[158] RICHMAN & REYNOLDS, *supra* note 5, at 213.

factor tests that combine both territorial and policy considerations.[159] The First Restatement's rigid adherence to vested rights theory was supposed to lead to greater certainty, uniformity, and predictability of result, but instead proved too rigid for courts to follow as it was quickly undermined by escape devices.[160] In response, the Second Restatement developed a choice of law system that was much more flexible and granted judges immense discretion. Furthermore, the Second Restatement also embraced choice of law clauses in contracts, which the First Restatement had refused to do. While the Second Restatement is far from perfect, it has improved on the First Restatement in many ways, and its trade off in allowing for greater flexibility at the expense of losing some certainty of result has been more than worth it. When confronted with a choice between these two options, the Second Restatement has proven to be a superior choice of law methodology to the First Restatement.

The problems with the First Restatement stem from its basis in vested rights theory. By tying itself to vested rights theory, the First Restatement necessarily focuses on territoriality and sovereignty to make its choice of law determinations.[161] Under vested rights theory and the First Restatement, the location of one specific action determines the entire choice of law analysis.[162] For cases regarding validity this contact is the place of contracting, while for cases about performance this is the place of performance.[163] The First Restatement's single-factor analysis frequently leads to absurd results where it directs courts to apply the law of one state even if all

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[159] *Compare* RESTATEMENT OF CONFLICT OF LAWS § 332 (AM. LAW INST. 1934) *and* RESTATEMENT OF CONFLICT OF LAWS § 358 (AM. LAW INST. 1934), *with* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971), RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1971), *and* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (AM. LAW INST. 1971).

[160] For further discussion on the First Restatement's escape devices see Part II.C.2.

[161] BRILMAYER, *supra* note 11, at 22.

[162] *See* RESTATEMENT OF CONFLICT OF LAWS § 332 (AM. LAW INST. 1934) (basing the choice of law determination on the place of the contracting).

[163] *See id.* (basing the choice of law determination on the place of the contracting); RESTATEMENT OF CONFLICT OF LAWS § 358 (AM. LAW INST. 1934) (basing the choice of law determination on the place of performance).

other factual contacts point to a separate state.[164] Despite the clear possibility that this type of analysis can lead to unsatisfactory results, vested rights theory does not support any other outcome.[165] Vested rights theory necessarily requires choice of law decisions to be determined by one individual contact.[166] By boiling down choice of law issues to one single contact, the First Restatement is supposed to lead to greater uniformity, certainty, and predictability of result. Instead, the First Restatement's broad rules group dissimilar cases together and lead to absurd results that courts have refused to follow.[167]

The First Restatement's broad rules are designed to simplify choice of law decisions for courts. In reality, this method produces results that courts refuse to follow. In order to avoid absurd results, courts have resorted to line-drawing and escape devices to choose a state they think has a stronger connection to the case.[168] By resorting to these safety valves, courts are able to successfully circumvent the First Restatement's rigid rules in an attempt to make "better" choice of law decisions. Judicial refusal to follow the strict rules of the First Restatement undercuts any real hope that the First Restatement can accomplish its intended goals of greater certainty, uniformity, and predictability of result.[169] The broad and simple rules that had initially been the First Restatement's greatest strength have been transformed by the realistic needs of the courts into a weakness by escape devices.

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[164] SYMEONIDES, *supra* note 1, at 11–24.

[165] *See* BRILMAYER, *supra* note 11, at 22 (stating that vested rights theory requires courts to only consider one contact when making their choice of law determinations).

[166] *Id.*

[167] RICHMAN & REYNOLDS, *supra* note 5, at 199.

[168] *See* SYMEONIDES, *supra* note 1, at 24 (discussing the effects of courts refusing to follow the First Restatement's strict rules); RICHMAN & REYNOLDS, *supra* note 5, at 187–92 (discussing the effect of line-drawing and escape devices by courts when applying the Second Restatement).

[169] *See* SYMEONIDES, *supra* note 1, at 24 (discussing the effects of courts refusing to follow the First Restatement's strict rules).

As a practical matter, the First Restatement has proven to be an inadequate choice of law methodology. Under the First Restatement, judges either follow its single-factor tests to achieve unsatisfactory results or circumvent its rules entirely through escape devices. Under either option, the First Restatement produces problematic results. If the First Restatement is followed then its application generally leads to absurd results that, while predictable, feel more arbitrary than right. If courts attempt to find more satisfactory results through the use of escape devices, the First Restatement loses its principal benefits of certainty, uniformity, and predictability of results, as judges no longer actually follow the rules of the First Restatement. Without these benefits, the foundational arguments in favor of the First Restatement over the Second Restatement lose much of their force, as the practical application of the First Restatement is unable to provide certainty, uniformity, and predictability of result.

In order to allow for more flexibility, the Second Restatement replaces the single-factor analysis of the First Restatement with a series of multi-factor tests. The greater flexibility of the Second Restatement has led courts to follow it much more closely than the First Restatement, while nearly eliminating the need for escape devices.[170] The Second Restatement has created this change in practice by allowing judges so much discretion that escape devices are no longer necessary to achieve an equitable result.[171] The flexibility and discretion given to judges by the Second Restatement has enabled judges to come to the "right" decision by tailoring their decision to the specific facts of a case.[172] While judges' application of the Second Restatement can vary, there is still a benefit to be had here because when judges apply the Second Restatement, it makes their decisions more transparent than if they relied on escape devices. Transparency of judicial

[170] RICHMAN & REYNOLDS, *supra* note 5, at 213*; see also* Part III.B.2 *supra*.
[171] BRILMAYER, *supra* note 11, at 75.
[172] Shreve & Buxbaum, *supra* note 8, at 168.

decisions should be seen as a major advantage of the Second Restatement, because even if judges value different factors from case to case, they do not hide these choice-influencing factors through the use of escape devices.

Transparency of judicial decision-making even makes the common practice of counting contacts under § 188 less detrimental than originally thought. While counting contacts does not strictly follow what the Second Restatement calls for because it ignores § 6, it is a consistent judicial tool that parties can rely on to influence judicial decisions.[173] Transparency of judicial decision making, if not of result, still grants the Second Restatement the benefit of predictability because judges do not hide choice-influencing factors like they do when using escape devices under the First Restatement. When combined with the fact that the Second Restatement permits courts to make a choice of law determination tailored to the specific case at hand, the Second Restatement certainly leads to more satisfying results than the First Restatement, even if these results are not as predictable.

The final and most important advantage the Second Restatement has over the First Restatement is its inclusion of § 187. Through this inclusion, the Second Restatement reflects modern legal practice much more effectively than the First Restatement. The Second Restatement's practice of deference to choice of law clauses within reasonable limits allows parties to contract with greater certainty as to which state's law should govern their contract than if they had to rely on a court to make this determination. Furthermore, the Second Restatement is not blind in its deference to choice of law clauses, placing reasonable limits on what states parties can choose to govern their contract.[174] In constraining party choice, § 187 establishes a concrete set of

[173] *See* SYMEONIDES, *supra* note 1, at 93 (discussing how courts frequently only count contacts under section 188 and do not also apply section 6). For further discussion on this point, see Part III.C *supra*.

[174] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1971) (establishing when courts should apply the law of the chosen state due to a choice of law clause); Part III.B.1 *supra*.

tests that must be followed in order to determine if parties have made an effective choice of law to govern their contract.[175] The problems that seem to plague §§ 6 and 188 have largely been avoided by § 187, possibly because § 187 represents a more discrete legal issue than those frequently addressed by §§ 6 and 188. Judges are not granted boundless discretion under § 187, but instead must work within well-defined parameters to determine if parties have made an effective choice of law. Because of the specificity of § 187, judges do not have nearly as much discretion as in §§ 6 or 188. This constraint correspondingly leads to much greater uniformity of result. The popularity of § 187, both in Second Restatement and in First Restatement jurisdictions, also demonstrates that it has found the proper balance between providing a rule set for judges to follow and directing them to choose the law of a state that they are comfortable with.[176]

When considered as a whole, the Second Restatement presents a choice of law methodology that allows courts to tailor their choice of law decisions to the specific facts of a case that, while occasionally inconsistent, ultimately proves superior to the choice of law methodology found in the First Restatement. The Second Restatement's multi-factor balancing tests give courts a much better chance to find the "right" result than the First Restatement's single-factor tests do. The Second Restatement's flexibility also encourages judges to work within its rule set and has led to greater transparency of judicial reasoning, even though application of the Second Restatement's rules can lead to inconsistent results. Transparency of judicial reasoning provides the Second Restatement with a major advantage over the First Restatement by promoting predictability in the sense that parties know what judges will base their decisions on instead of relying on escape devices as they would do under the First Restatement. Finally, the Second

[175] *Compare id.*, *with* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. LAW INST. 1971), *and* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (AM. LAW INST. 1971).

[176] *See* SYMEONIDES, *supra* note 1, at 90 (discussing the popularity of § 187 in jurisdictions that do not otherwise follow the Second Restatement).

Restatement also contains one last major advantage over the First Restatement in the form of § 187. By including a section—and a very well received section at that—about choice of law clauses, the Second Restatement reflects current legal practice much better than the First Restatement does. Section 187 permits the Second Restatement to address the issue of choice of law clauses directly and in a sensible way that promotes party choice while still placing reasonable limits on it. While the Second Restatement is far from perfect, it has clear advantages that make it a superior approach to the First Restatement, demonstrating why it is the dominant choice of law methodology in the United States for contract cases.

V. CONCLUSION

When determining what state's law should govern a contract, the Second Restatement presents a logical choice of law methodology that judges actually follow on a regular basis. While this might not sound like high praise, when compared to the arbitrary results and rampant use of escape devices found in the First Restatement, the Second Restatement represents a major upgrade. The Second Restatement has avoided this problem by granting judges more discretion through its unweighted balancing tests. The Second Restatement's unweighted balancing tests have made it flexible enough for judges to work within its confines to make their decisions. The flexibility of the Second Restatement has led to more transparent decisions and the abandonment of the escape devices that plagued the First Restatement. The Second Restatement's approach to choice of law clauses also appears to have struck the proper balance between providing a rule set for judges to follow and directing them to choose the law of a state that they are comfortable with. When compared to the rigid rules of the First Restatement that led to extensive use of escape devices, arbitrary results, and no way to address choice of law clauses, the Second Restatement clearly represents a superior choice of law methodology.