Maryland Law Review

Volume 56 | Issue 4 Article 6

The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing

Symeon C. Symeonides

THE JUDICIAL ACCEPTANCE OF THE SECOND CONFLICTS RESTATEMENT: A MIXED BLESSING

SYMEON C. SYMEONIDES*

* Vice Chancellor and Judge Albert Tate Professor of Law, Louisiana State University Law Center. LL.B. (Priv. Law), LL.B. (Publ. Law), Aristotelian University of Thessaloniki; LL.M., S.J.D., Harvard Law School.

I. INTRODUCTION

I came to the United States to study conflicts law in 1973, that is, only two years after the *Restatement (Second) of Conflict of Laws*[1] had been officially published. That same year, a notable British author had called the *Restatement (Second)* "the most impressive, comprehensive and valuable work on the conflict of laws that has ever been produced in any country, in any language, at any time."[2] That was pretty powerful stuff. Understandably, therefore, the *Restatement (Second)* became one of the main objects of study in my struggle to understand American conflicts law. I soon realized that the above author was virtually alone among academics in his enthusiasm for the *Restatement (Second)*. Its reception by academic opinion in this country ranged from lukewarm to hostile.[3] Among the criticisms were that the *Restate-*

1. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

2. J.H.C. Morris, *Law and Reason Triumphant, or How Not to Review a Restatement*, 21 AM. J. COMP. L. 322, 330 (1973).

3. For early critiques of the *Restatement (Second)*, see David F. Cavers, *Re-Restating the Conflict of Laws: The Chapter on Contracts*, *in* XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 349 (Kurt H. Nadelmann et al. eds., 1961); Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230 (1965); Albert A. Ehrenzweig, *The "Most Significant Relationship" in the Conflicts Law of Torts: Law and Reason Versus the Restatement Second*, 28 LAW & CONTEMP. PROBS. 700 (1963); Robert Allen Sedler, *The Contracts Provisions of the Restatement (Second): An Analysis and a Critique*, 72 COLUM. L. REV. 279 (1972); Arthur Taylor von Mehren, *Le Second "Restatement" of the Conflict of Laws*, 101 CLUNET 815 (1974); Arthur Taylor von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927 (1975); Russell J. Weintraub, *The Contracts Proposals of the Second Restatement of Conflict of Laws—A Critique*, 46 IOWA L. REV. 713 (1961). For foreign critiques, see M. Bernard Audit, *Le Second "Restatement" du Conflit de Lois aux Etats-Unis*,

ment (Second) was too much of a compromise among conflicting philosophies, too vague, exceedingly elastic, unpredictable, directionless, and rudderless. As one of the *Restatement (Second)*'s harshest critics put it, "the [American Law] Institute, caught between its fundamentalist heritage and realist scepticism, has sought a compromise between the Revolution and the Establishment in Anarchy and Counter-revolution."[4]

Twenty-three years later, the *Restatement (Second)* seems to dominate the American conflicts scene. At the same time, "anarchy" is the word that most often comes to mind when reading contemporary choice-of-law cases.[5] If this description is even partially accurate, it is worth asking whether there is any correlation between the *Restatement (Second)*'s apparent success in winning the hearts and minds of American judges and the current "anarchic" state of American conflicts law. Can the *Restatement (Second)*'s drafters be blamed for this anarchy, if that is what it is? To paraphrase a famous rhetorical question, "Are we better off today than we were twenty-five years ago?" If the answer is yes, is it because of, or despite, the *Restatement (Second)*? What has been the overall contribution of the *Restatement (Second)* to the development of American conflicts law? More importantly, where do we go from here? These are some of the questions that I will try to address in this Article.

TRAVAUX DU COMITÉ FRANÇAIS: DE DROIT INTERNATIONAL PRIVÉ 29 (1977-79); Rodolfo de Nova, *Il "Restatement, Second, Conflict of Laws,"* 10 RIV. DIR. INT'LE PRIV. PROCES. 424 (1974); Vischer, *Das Neue Restatement "Conflict of Laws,"* 38 RABELSZ 128 (1974).

4. ALBERT A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW 67 (1967) (citations omitted).

5. For six of the last ten years, I have had the dubious luck of being assigned by the Conflicts Section of the Association of American Law Schools to the task of reading all American choice-of-law cases decided every year and reporting on them to my colleagues. In this assignment I must have read or perused at least five thousand cases. These reports are published annually in the *American Journal of Comparative Law.* In chronological order, the reports are: P. John Kozyris, *Choice of Law in the American Courts in 1987: An Overview,* 36 AM. J. COMP. L. 547 (1988); Symeon C. Symeonides, *Choice of Law in the American Courts in 1988,* 37 AM. J. COMP. L. 457 (1989); P. John Kozyris & Symeon C. Symeonides, *Choice of Law in the American Courts in 1989: An Overview,* 38 AM. J. COMP. L. 601 (1990); Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments,* 39 AM. J. COMP. L. 465 (1991); Michael E. Solimine, *Choice of Law in the American Courts in 1991,* 40 AM. J. COMP. L. 951 (1992); Patrick J. Borchers, *Choice of Law in the American Courts in 1992: Observations and Reflections,* 42 AM. J. COMP. L. 125 (1994); Symeon C. Symeonides, *Choice of Law in the American Courts in 1993 (and in the Six Previous Years),* 42 AM. J. COMP. L. 599 (1994) [hereinafter Symeonides, *Six Previous Years*]; Symeon C. Symeonides, *Choice of Law in the American Courts in 1994: A View "From the Trenches,"* 43 AM. J. COMP. L. 1 (1995) [hereinafter Symeonides, *From the Trenches*]; Symeon C. Symeonides, *Choice of Law in the American Courts in 1995: A Year in Review,* 44 AM. J. COMP. L. 181 (1996) [hereinafter Symeonides, *A Year in Review*]; Symeon C. Symeonides, *Choice of Law in the American Courts in 1996: Tenth Annual Survey,* 45 AM. J. COMP. L. 447 (1997) [hereinafter Symeonides, *Tenth Annual Survey*].

II. THE CHRONOLOGY OF THE CONFLICTS REVOLUTION AND THE CONTRIBUTION OF THE *RESTATEMENT (SECOND) OF CONFLICT OF LAWS*

To appreciate the contribution of the *Restatement (Second)* in shaping contemporary American conflicts law, one must examine the chronology of the American conflicts "revolution,"[6] which has been largely confined to the area of tort and contract conflicts.[7] One result of this revolution has been the abandonment of the traditional rules of applying the *lex loci delicti* to tort conflicts and the *lex loci contractus* to contract conflicts. One way of determining the role of the *Restatement (Second)* in this development is to examine the extent to which these rules have been replaced by the approach provided in the *Restatement (Second)* for tort and contract conflicts, respectively.

A. Tort Conflicts

Since the seminal case of *Babcock v. Jackson*[8] in 1963, forty-one American jurisdictions have abandoned the traditional rule of *lex loci delicti*[9] in the chronological order shown in Chart 1 and documented in Table 1 below.

---

6. The term conflicts "revolution" has been used widely to denote the intellectual movement culminating in the 1960s that preached the demolition of the traditional choice-of-law methodology which was embodied in the first RESTATEMENT OF CONFLICT OF LAWS (1934), and which had dominated American judicial practice and scholastic thinking until then. Despite its rhetorical excessiveness, the term "revolution" will be used hereinafter without quotation marks as a convenient shorthand reference to all modern American choice-of-law methodologies. The adjective "modern" is used here in its temporal rather than its qualitative sense.

7. For this reason, this Article is confined to these two areas.

8. 191 N.E.2d 279 (N.Y. 1963). *Babcock* departed from the traditional choice-of-law rule that the law of the place where the tort occurred is invariably controlling. In doing so, the court relied both on a 1960 Tentative Draft of the *Restatement (Second)* and on the "center-of-gravity" approach announced in *Auten v. Auten*, 124 N.E.2d 99 (N.Y. 1954). Earlier cases laid the ground, *see, e.g.*, W.H. Barber Co. v. Hughes, 63 N.E.2d 417, 423 (Ind. 1945) (adopting a significant-contacts approach for contract conflicts); *Auten*, 124 N.E.2d at 101-03 (applying a grouping-of-contacts theory to a contract conflict, but also examining the interests of the competing jurisdictions), but *Babcock* is generally considered as marking the beginning of the revolution.

9. This number includes the District of Columbia and the Commonwealth of Puerto Rico. The remaining eleven jurisdictions that still adhere to the *lex loci* rule are listed in Table 3, *infra*. For examples of federal courts applying the *Restatement (Second)*, see *infra* note 148 and accompanying text.

CHART I

The Erosion of the *Lex Loci Delicti* Rule

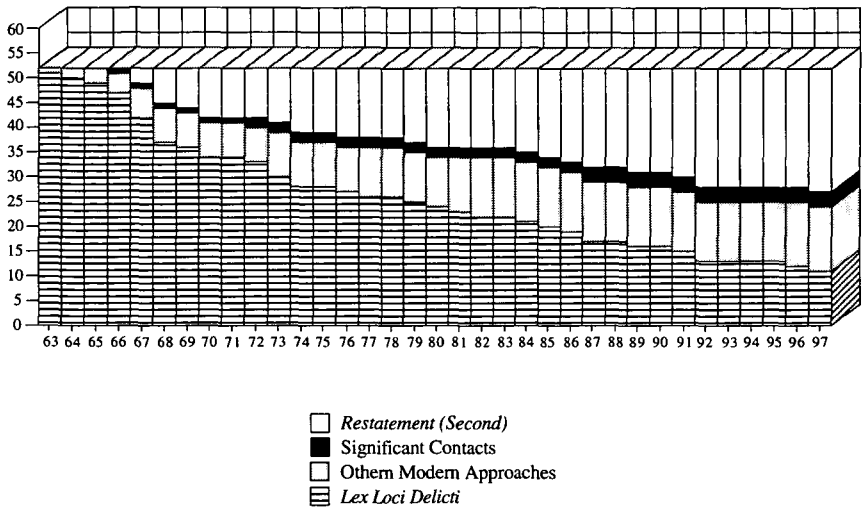


TABLE 1. CHRONOLOGICAL TABLE OF DEPARTURES FROM THE *LEX LOCI DELICTI* RULE

Year	*Restatement (Second)*	Significant Contacts Approach	Other Approaches
1963			New York[10]
1964			Pennsylvania[11]
1965			Wisconsin[12]
1966		Puerto Rico[13]	New Hampshire[14]

10. *See Babcock*, 191 N.E.2d at 285 (applying both interest analysis and center-of-gravity approaches).

11. *See* Griffith v. United Air Lines, Inc., 203 A.2d 796, 805 (Pa. 1964) (applying interest analysis). Later decisions have adopted a mixed approached that includes interest analysis as well as reliance on the *Restatement (Second)* and Professor Cavers's "principles of preference." *See, e.g.*, Miller v. Gay, 470 A.2d 1353, 1354-56 (Pa. 1984) (applying interest analysis and the *Restatement (Second)*); Cipolla v. Shaposka, 267 A.2d 854, 856-57 (Pa. 1970) (applying Cavers's "principles of preference").

12. *See* Wilcox v. Wilcox, 133 N.W.2d 408, 415 (Wis. 1965) (adopting interest analysis). Later cases have switched to Leflar's choice-influencing considerations. *See, e.g.*, Lichter v. Fritsch, 252 N.W.2d 360, 363 (Wis. 1977); Heath v. Zellmer, 151 N.W.2d 664, 672 (Wis. 1967).

13. *See* Widow of Fornaris v. American Sur. Co., 93 P.R.R. 28, 46 (1966) (adopting a "significant-contacts" or "dominant-contacts" approach).

14. *See* Clark v. Clark, 222 A.2d 205, 210 (N.H. 1966) (adopting Leflar's choice-influencing considerations).

Year	*Restatement (Second)*	Significant Contacts Approach	Other Approaches
1967	Kentucky,[15] Oregon,[16] District of Columbia[17]		California,[18] New Jersey[19]
1968	Alaska,[20] Arizona,[21] Iowa,[22] Mississippi[23]		Rhode Island[24]
1969	Missouri[25]		
1970	Illinois,[26] Maine[27]		
1971			
1972		North Dakota[28]	
1973	Colorado[29]		Louisiana,[30] Minnesota[31]
1974	Oklahoma,[32] Washington[33]		
1975			
1976	Massachusetts[34]		

15. *See* Wessling v. Paris, 417 S.W.2d 259, 259-61 (Ky. 1967) (adopting the *Restatement (Second)* for cases in which its application would yield a clear result). One year later, the Supreme Court of Kentucky abandoned this approach in favor of the *lex fori* approach in *Arnett v. Thompson*, 433 S.W.2d 109, 113 (Ky. 1968).

16. *See* Casey v. Manson Constr. & Eng'g Co., 428 P.2d 898, 907 (Or. 1967) (adopting the *Restatement (Second)*). Later cases abandoned the *Restatement (Second)* in favor of a mixed approach that includes reliance on the *Restatement (Second)*.

17. *See* Myers v. Gaither, 232 A.2d 577, 583 (D.C. 1967). Later cases have applied interest analysis. *See, e.g.*, Rong Yao Zhou v. Jennifer Mall Restauraunt, Inc., 534 A.2d 1268, 1270 (D.C. 1987).

18. *See* Reich v. Purcell, 432 P.2d 727, 730-31 (Cal. 1967) (applying interest analysis).

19. *See* Mellk v. Sarahson, 229 A.2d 625, 629-30 (N.J. 1967) (applying interest analysis).

20. *See* Ehredt v. DeHavilland Aircraft Co. of Canada, Ltd., 705 P.2d 446, 453 (Alaska 1985) (relying exclusively on the *Restatement (Second)*); Armstrong v. Armstrong, 441 P.2d 699, 701-03 (Alaska 1968) (relying partly on the *Restatement (Second)*).

21. *See* Schwartz v. Schwartz, 447 P.2d 254, 257 (Ariz. 1968).

22. *See* Fuerste v. Bemis, 156 N.W.2d 831, 833 (Iowa 1968).

23. *See* Mitchell v. Craft, 211 So. 2d 509, 515 (Miss. 1968).

24. *See* Woodward v. Stewart, 243 A.2d 917, 923 (R.I. 1968) (adopting Leflar's choice-influencing considerations).

25. *See* Kennedy v. Dixon, 439 S.W.2d 173, 184 (Mo. 1969) (en banc).

26. *See* Ingersoll v. Klein, 262 N.E.2d 593, 596 (Ill. 1970).

27. *See* Beaulieu v. Beaulieu, 265 A.2d 610, 616 (Me. 1970); *see also* Adams v. Buffalo Forge Co., 443 A.2d 932, 934 (Me. 1982) (reiterating the court's adoption of the *Restatement (Second)*).

28. *See* Issendorf v. Olson, 194 N.W.2d 750, 755 (N.D. 1972) (adopting a significant-contacts approach).

29. *See* First Nat'l Bank v. Rostek, 514 P.2d 314, 320 (Colo. 1973) (en banc).

30. *See* Jagers v. Royal Indem. Co., 276 So. 2d 309, 311-13 (La. 1973) (resolving a false conflict through interest analysis, but also quoting the *Restatement (Second)*).

31. *See* Milkovich v. Saari, 203 N.W.2d 408, 413 (Minn. 1973) (adopting Leflar's choice-influencing considerations).

32. *See* Brickner v. Gooden, 525 P.2d 632, 637 (Okla. 1974).

33. *See* Johnson v. Spider Staging Corp., 555 P.2d 997, 1000 (Wash. 1976); Werner v. Werner, 526 P.2d 370, 376 (Wash. 1974) (en banc).

34. *See* Pevoski v. Pevoski, 358 N.E.2d 416, 418 (Mass. 1976) (creating exceptions to the *lex loci delicti* rule but later interpreted as having endorsed the *Restatement (Second)*).

Year	*Restatement (Second)*	Significant Contacts Approach	Other Approaches
1977			Arkansas[35]
1978			
1979	Texas[36]		
1980	Florida[37]		
1981			Hawaii[38]
1982			Michigan[39]
1983			
1984	Ohio[40]		
1985	Idaho[41]		
1986	Connecticut[42]		
1987	Nebraska[43]	Indiana[44]	
1988			
1989	Utah[45]		
1990			
1991	Delaware[46]		
1992	South Dakota,[47] Tennessee[48]		
1993			
1994			
1995			
1996			Nevada[49]

Subsequent decisions follow a mixed approach that includes reliance on the *Restatement (Second)*. *See infra* note 139.

35. *See* Wallis v. Mrs. Smith's Pie Co., 550 S.W.2d 453, 458-59 (Ark. 1977) (in banc) (adopting Leflar's choice-influencing considerations).

36. *See* Gutierrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979).

37. *See* Bishop v. Florida Specialty Paint Co., 389 So. 2d 999, 1001 (Fla. 1980).

38. *See* Peters v. Peters, 634 P.2d 586, 593-94 (Haw. 1981) (applying a blend of interest analysis and Leflar's choice-influencing considerations).

39. *See* Sexton v. Ryder Truck Rental, Inc., 320 N.W.2d 843, 857 (Mich. 1982) (adopting the *lex fori* approach).

40. *See* Morgan v. Biro Mfg. Co., 474 N.E.2d 286, 288 (Ohio 1984).

41. *See* Johnson v. Pischke, 700 P.2d 19, 22 (Idaho 1985).

42. *See* O'Connor v. O'Connor, 519 A.2d 13, 21-22 (Conn. 1986) (adopting the *Restatement (Second)* "for those cases in which application of the doctrine of lex loci [delicti] would produce an arbitrary, irrational result").

43. *See* Crossley v. Pacific Employers Ins. Co., 251 N.W.2d 383, 386 (Neb. 1977) (relying alternatively on the *Restatement (Second)* and the *lex loci delicti* with the same result); Harper v. Silva, 399 N.W.2d 826, 828 (Neb. 1987) (interpreting *Crossley* as having adopted the *Restatement (Second)*).

44. *See* Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071, 1073-74 (Ind. 1987) (holding that "when the place of the tort is an insignificant contact," the court will turn to the *Restatement (Second)*, but stopping short of embracing the policy-analysis component of the *Restatement (Second)* or of abandoning the *lex loci* rule in general).

45. *See* Forsman v. Forsman, 779 P.2d 218, 220 (Utah 1989).

46. *See* Travelers Indem. Co. v. Lake, 594 A.2d 38, 47 (Del. 1991).

47. *See* Chambers v. Dakotah Charter, Inc., 488 N.W.2d 63, 67 (S.D. 1992).

48. *See* Hataway v. McKinley, 830 S.W.2d 53, 59 (Tenn. 1992).

49. *See* Motenko v. MGM Dist., Inc., 921 P.2d 933, 935 (Nev. 1996) (adopting a *lex fori* approach in tort cases unless "another State has an overwhelming interest").

Year	*Restatement (Second)*	Significant Contacts Approach	Other Approaches
1997	Vermont[50]		
Total	25	3	13

As Table 1 indicates, of the forty-one jurisdictions that have abandoned the *lex loci delicti* rule for tort conflicts, twenty-five jurisdictions originally adopted the approach of the *Restatement (Second)*, three jurisdictions originally adopted the kindred "significant contacts" approach,[51] and thirteen jurisdictions originally adopted another approach, such as governmental interest analysis, Professor Leflar's choice-influencing considerations, the *lex fori* approach, or a combination of these approaches (which will be referred to as the "mixed approach"), with or without reliance on the *Restatement (Second)*.[52] Thus, one could say that the *Restatement (Second)* has merely filled much of the vacuum left by the abandonment of the *lex loci delicti* rule, or one could say that the *Restatement (Second)* has contributed greatly to persuading American courts to abandon that rule. I believe that the latter statement is closer to the truth.

B. Contract Conflicts

In contract conflicts, forty-two jurisdictions have abandoned the *lex loci contractus* rule in the chronological order shown in Chart 2 and documented in Table 2 below.[53]

50. *See* Amiot v. Ames, 693 A.2d 675, 677 (Vt. 1997).

51. The "significant-contacts" approach is also referred to as "grouping of contacts" or "center of gravity."

52. *See infra* notes 137-146 and accompanying text.

53. Again, included in the forty-two jurisdictions are the District of Columbia and the Commonwealth of Puerto Rico. The remaining ten jurisdictions that still adhere to the *lex loci contractus* rule are listed in Table 4, *infra*.

CHART 2

The Erosion of the *Lex Loci Contractus* Rule

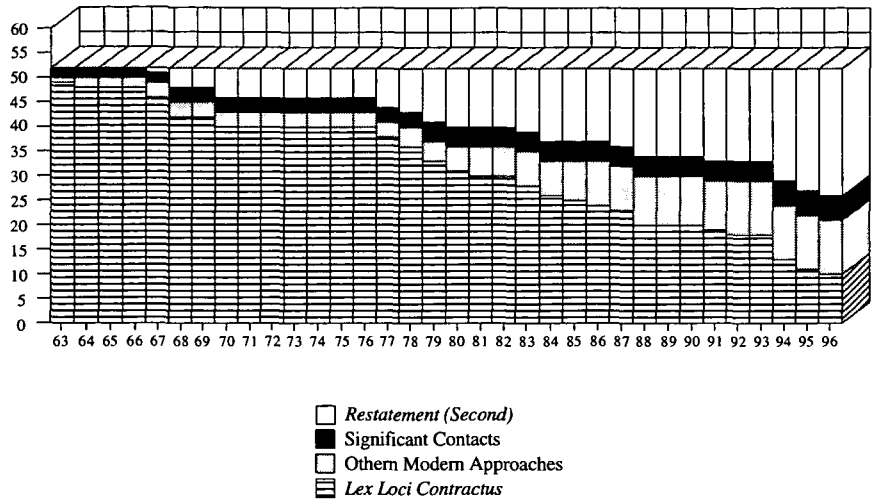


TABLE 2. CHRONOLOGICAL TABLE OF DEPARTURES FROM THE *LEX LOCI CONTRACTUS* RULE

Year	*Restatement (Second)*	Significant Contacts Approach	Other Approaches
1945		Indiana[54]	
1954			New York[55]
1961		Puerto Rico[56]	
1964			Oregon[57]

54. *See* W.H. Barber Co. v. Hughes, 63 N.E.2d 417, 423 (Ind. 1945) (following a significant-contacts approach), *discussed in* Geri J. Yonover, *The Golden Anniversary of the Choice of Law Revolution: Indiana Fired the First Shot*, 29 IND. L. REV. 1201 (1996). Among recent cases, see Dohm & Nelke v. Wilson Foods Corp., 531 N.E.2d 512, 513 (Ind. Ct. App. 1988) (applying a significant-contacts approach); Barrow v. ATCO Mfg. Co., 524 N.E.2d 1313, 1314-15 (Ind. Ct. App. 1988) (following a significant-contacts approach, but also relying on the *Restatement (Second)*).

55. *See* Auten v. Auten, 124 N.E.2d 99, 101 (N.Y. 1954) (adopting the center-of-gravity approach). Later cases have combined this approach with interest analysis. *See infra* note 144.

56. *See* Maryland Cas. Co. v. San Juan Racing Ass'n, 83 P.R.R. 538 (1961) (adopting a significant-contacts approach); *see also* Green Giant Co. v. Tribunal Superior, 104 P.R. Dec. 489 (1975).

57. *See* Lilienthal v. Kaufman, 395 P.2d 543, 549 (Or. 1964) (adopting interest analysis).

Year	*Restatement (Second)*	Significant Contacts Approach	Other Approaches
1967	Washington[58]		California[59]
1968	Idaho,[60] New Hampshire,[61] Vermont[62]	Wisconsin[63]	
1969			District of Columbia[64]
1970	Arizona,[65] Delaware[66]		
1971			
1972			
1973			
1974			
1975			
1976			
1977	Iowa,[67] Kentucky[68]		

58. *See* Baffin Land Corp. v. Monticello Motor Inn, Inc., 425 P.2d 623, 627-28 (Wash. 1967) (en banc) (relying on a tentative draft of the *Restatement (Second)* in adopting a most-significant-relationship test).

59. *See* Travelers Ins. Co. v. Workmen's Compensation Appeals Bd., 434 P.2d 992, 994 (Cal. 1967) (applying interest analysis). Later cases have also relied in part on the *Restatement (Second)*.

60. *See* Rungee v. Allied Van Lines, Inc., 449 P.2d 378, 382 (Idaho 1968).

61. *See* Consolidated Mut. Ins. Co. v. Radio Foods Corp., 240 A.2d 47, 49 (N.H. 1968).

62. *See* Pioneer Credit Corp. v. Carden, 245 A.2d 891, 894 (Vt. 1968) (relying in part on § 188 of the *Restatement (Second)* but not actually applying it). Later cases have assumed adoption of the *Restatement (Second)*. *See, e.g.*, Amiot v. Ames, 693 A.2d 675, 677 (Vt. 1997).

63. *See* Urhammer v. Olson, 159 N.W.2d 688, 689 (Wis. 1968) (adopting a grouping-of-contacts approach). Later cases have abandoned that approach in favor of Leflar's choice-influencing considerations. *See* Schlosser v. Allis-Chalmers Corp., 271 N.W.2d 879, 885-86 (Wis. 1978); Haines v. Mid-Century Ins. Co., 177 N.W.2d 328, 333 (Wis. 1970).

64. *See* McCrossin v. Hicks Chevrolet, Inc., 248 A.2d 917, 921 (D.C. 1969) (taking an interest-analysis approach). Later cases have adopted a mixed approach. *See, e.g.*, District of Columbia Ins. Guar. Ass'n v. Algernon Blair, Inc., 565 A.2d 564 (D.C. App. 1989) (per curiam) (combining interest analysis with the *Restatement (Second)*); Owen v. Owen, 427 A.2d 933, 937 (D.C. 1981) (following a mixed approach—described as a search for the "more substantial interest," but reduced to contact counting).

65. *See* Burr v. Renewal Guar. Corp., 468 P.2d 576, 577 (Ariz. 1970).

66. *See* Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc., 394 A.2d 1160, 1166 (Del. 1978) (relying in part on § 188 of the *Restatement (Second)*).

67. *See* Joseph L. Wilmotte & Co. v. Rosenman Bros., 258 N.W.2d 317, 327 (Iowa 1977).

68. *See* Lewis v. American Family Ins. Group, 555 S.W.2d 579, 581-82 (Ky. 1977).

Year	*Restatement (Second)*	Significant Contacts Approach	Other Approaches
1978	Missouri[69]		Minnesota[70]
1979	Colorado,[71] Illinois[72]	Arkansas[73]	
1980	Mississippi[74]		New Jersey[75]
1981			
1982			
1983	Maine[76]		Pennsylvania[77]
1984	Ohio,[78] Texas[79]		
1985			Massachusetts[80]
1986			North Dakota[81]

69. *See* National Starch & Chem. Corp. v. Newman, 577 S.W.2d 99, 102 (Mo. Ct. App. 1978). Although the Missouri Supreme Court has not expressly adopted the *Restatement (Second)* for contract conflicts, the court has declined to review the several lower court cases that have consistently applied the *Restatement (Second)* to such conflicts. *See, e.g.*, Hartzler v. American Family Mut. Ins., 881 S.W.2d 653, 655 (Mo. Ct. App. 1994) (applying the *Restatement (Second)* to contract conflict); Protective Cas. Ins. Co. v. Cook, 734 S.W.2d 898, 905 (Mo. Ct. App. 1987) (applying the *Restatement (Second)* to insurance contract dispute); Crown Ctr. Redevelopment Corp. v. Occidental Fire & Cas. Co., 716 S.W.2d 348, 358 (Mo. Ct. App. 1986) (adopting the *Restatement (Second)* in casualty insurance cases, if it "is not adopted already by implication").

70. *See* Hague v. Allstate Ins. Co., 289 N.W.2d 43, 48-49 (Minn. 1979) (applying Leflar's choice-influencing considerations).

71. *See* Wood Bros. Homes, Inc. v. Walker Adjustment Bureau, 601 P.2d 1369, 1372 (Colo. 1979) (en banc).

72. *See* Champagnie v. W.E. O'Neil Constr. Co., 395 N.E.2d 990, 997 (Ill. App. Ct. 1979). Although Illinois's highest court has not yet encountered a contract conflict, the court has not disturbed the holdings of several intermediate courts that have consistently interpreted *Ingersoll v. Klein*, 262 N.E.2d 593 (Ill. 1970), *see supra* tbl.1 note 26, as having adopted the *Restatement (Second)* for contract conflicts. *See, e.g.*, Olsen v. Celano, 600 N.E.2d 1257, 1260 (Ill. App. Ct. 1992) (noting that the most-significant-contacts test applies to contract conflicts); Illinois Tool Works v. Sierracin Corp., 479 N.E.2d 1046, 1050 (Ill. App. Ct. 1985) (applying the *Restatement (Second)* to contract conflict and characterizing the *Restatement (Second)* approach as a "'most significant contacts' test").

73. *See* Standard Leasing Corp. v. Schmidt Aviation, Inc., 576 S.W.2d 181, 184 (Ark. 1979) (applying a significant-contacts approach).

74. *See* Boardman v. United Servs. Auto. Ass'n, 470 So. 2d 1024, 1032-33 (Miss. 1985); Spragins v. Louise Plantation, Inc., 391 So. 2d 97 (Miss. 1980).

75. *See* State Farm Mut. Auto. Ins. Co. v. Estate of Simmons, 417 A.2d 488, 493 (N.J. 1980) (adopting a mixed approach).

76. *See* Baybutt Constr. Corp. v. Commercial Union Ins. Co., 455 A.2d 914, 918-19 (Me. 1983).

77. *See* Guy v. Liederbach, 459 A.2d 744, 753 (Pa. 1983) (stating that Pennsylvania has adopted a mixed approach that includes reliance on the *Restatement (Second)*).

78. *See* Gries Sports Enters. v. Modell, 473 N.E.2d 807, 810 (Ohio 1984).

79. *See* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex.), *judgment rev'd on other grounds sub nom.* Smithson v. Cessna Aircraft Co., 665 S.W.2d 439, 445 (Tex. 1984).

80. *See* Bushkin Assocs., Inc. v. Raytheon Co., 473 N.E.2d 662, 668-69 (Mass. 1985) (adopting a mixed approach).

81. *See* Apollo Sprinkler Co. v. Fire Sprinkler Suppliers & Design, Inc., 382 N.W.2d 386, 390 (N.D. 1986) (adopting a mixed approach).

Year	*Restatement (Second)*	Significant Contacts Approach	Other Approaches
1987	Wyoming[82]		
1988	West Virginia[83]	N. Carolina[84]	Hawaii[85]
1989			
1990			
1991	Oklahoma[86]		
1992			Louisiana[87]
1993			
1994	Connecticut,[88] Montana,[89]	Nevada[92]	

82. *See* Cherry Creek Dodge, Inc. v. Carter, 733 P.2d 1024, 1027 (Wyo. 1987) (citing the *Restatement (Second)* favorably but relying mostly on the "reasonable forum relationship" language of Wyoming's version of the U.C.C.); Amoco Rocmount Co. v. Anschutz Corp., 7 F.3d 909, 920 (10th Cir. 1993) (interpreting *Cherry Creek* as having adopted the *Restatement (Second)* for contract conflicts).

83. The West Virginia Supreme Court of Appeals has not adopted the *Restatement (Second)* for contracts in general but has drawn heavily from it in insurance contract conflicts. *See* Cannelton Indus., Inc. v. Aetna Cas. & Sur. Co. of America, 460 S.E.2d 1 (W. Va. 1994); Adkins v. Sperry, 437 S.E.2d 284 (W. Va. 1993); Clark v. Rockwell, 435 S.E.2d 664 (W. Va. 1993); Nadler v. Liberty Mut. Fire Ins. Co., 424 S.E.2d 256 (W. Va. 1992); Lee v. Saliga, 373 S.E.2d 345 (W. Va. 1988); *see also* New v. Tac & C Energy, Inc., 355 S.E.2d 629 (W. Va. 1987) (applying § 196 of the *Restatement (Second)* to an employment contract).

84. *See* Boudreau v. Baughman, 368 S.E.2d 849 (N.C. 1988) (interpreting the phrase "appropriate relation" in the forum's version of U.C.C. art. 1-105 as being equivalent to the phrase "most significant relationship" as used in the *Restatement (Second)*).

85. *See* Lewis v. Lewis, 748 P.2d 1362 (Haw. 1988) (contract conflict interpreting Peters v. Peters, 634 P.2d 586 (Haw. 1981), a tort conflict, as having adopted a significant-relationship test—also applicable to contracts—with primary emphasis on the state with the "strongest interest").

86. *See* Bohannan v. Allstate Ins. Co., 820 P.2d 787, 797 (Okla. 1991) (stating that the court would be willing to apply the law of a state other than that of the *locus contractus* upon a showing that such other state "has the most significant relationship with the subject matter and the parties"). Many commentators believe that Oklahoma should be listed as a *lex loci contractus* state, however, because an Oklahoma statute, although often disregarded, compels adherence to that approach. *See* Symeonides, *From the Trenches*, *supra* note 5, at 3 n.6.

87. *See* LA. CIV. CODE ANN. arts. 3537-40 (West 1994) (enacted in 1992) (providing rules based on the notion that the applicable law should be the law of that state whose policies would be most seriously impaired if its law were not applied).

88. *See* Williams v. State Farm Mut. Auto. Ins. Co., 641 A.2d 783 (Conn. 1994).

89. *See* Casarotto v. Lombardi, 886 P.2d 931 (Mont. 1994), *judgment rev'd on other grounds*, 116 S. Ct. 1652 (1996).

90. *See* Powell v. American Charter Fed. S & L Ass'n, 514 N.W.2d 326 (Neb. 1994) (explicitly adopting the *Restatement (Second)*). An earlier case, *Shull v. Dain, Kalman & Quail, Inc.*, 267 N.W.2d 517 (Neb. 1978), had also applied the *Restatement (Second)*. *Id.* at 520-21.

Year	*Restatement (Second)*	Significant Contacts Approach	Other Approaches
	Nebraska,[90] South Dakota[91]		
1995	Alaska,[93] Michigan[94]		
1996	Utah[95]		
Total	25	6	11

As Table 2 indicates, of the forty-two jurisdictions that have abandoned the *lex loci contractus* rule, twenty-five originally adopted the *Restatement (Second)*, six originally adopted the kindred significant-contacts approach, and eleven originally adopted a mixed approach, with or without reliance on the *Restatement (Second)*. Again, one could say that the *Restatement (Second)* has simply filled the vacuum left by the abandonment of the *lex loci contractus* rule, or one could say that the *Restatement (Second)* was instrumental in the abandonment of that rule. I believe that the latter is true. In fact, if one were to focus on contracts containing a choice-of-law clause,[96] the contribution of the *Restatement (Second)* in abandoning the traditional theory is undeniable and major.

91. *See* Stockmen's Livestock Exch. v. Thompson, 520 N.W.2d 255 (S.D. 1994) (per curiam).

92. *See* Hermanson v. Hermanson, 887 P.2d 1241 (Nev. 1994) (adopting a "substantial relationship test").

93. *See* Palmer G. Lewis Co. v. ARCO Chem. Co., 904 P.2d 1221, 1227 (Alaska 1995) (interpreting Ehredt v. DeHavilland Aircraft Co. of Canada, Ltd., 705 P.2d 446 (Alaska 1985), *supra* tbl.1 note 20, a case involving a tort conflict, as having adopted the *Restatement (Second)* for contract conflicts as well).

94. *See* Chrysler Corp. v. Skyline Indus. Servs., Inc., 528 N.W.2d 698 (Mich. 1995).

95. *See* American Nat'l Fire Ins. Co. v. Farmers Ins. Exch., 927 P.2d 186 (Utah 1996).

96. Unlike the *First Restatement*, the *Restatement (Second)* assigns a major role to party autonomy in selecting the law applicable to contracts. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). Section 187 of the *Restatement (Second)*, which defines the limits of party autonomy, has had an almost universal appeal among courts and has been followed even in states that do not follow the *Restatement (Second)* in other respects. *See, e.g.*, Cherry, Bekaert & Holland v. Brown, 582 So. 2d 502, 507-08 (Ala. 1991) (relying on *Restatement (Second)* § 187 even though Alabama follows the traditional rules in both contract and tort conflicts); Nedlloyd Lines B.V. v. Superior Court, 834 P.2d 1148, 1150-56 (Cal. 1992) (relying on § 187 of the *Restatement (Second)* even though in other conflicts California follows a combination of interest analysis with comparative impairment); National Glass, Inc. v. J.C. Penney Properties, Inc., 650 A.2d 246, 248-51 (Md. 1994) (relying on *Restatement (Second)* § 187 even though Maryland follows the traditional rules in both contract and tort conflicts); Kronovet v. Lipchin, 415 A.2d 1096, 1106 (Md. 1980) (same); Prows v. Pinpoint Retail Sys., Inc., 868 P.2d 809, 811 (Utah 1993) (relying on *Restatement (Second)* § 187 before Utah adopted the *Restatement (Second)* for other contractual issues).

III. THE JUDICIAL ACCEPTANCE OF THE *Restatement (Second)* to Date

How many of the above jurisdictions still adhere to the *Restatement (Second)*? Where do the other jurisdictions stand today? These questions are answered by Tables 3 and 4, below, for tort and contract conflicts, respectively.[97] Before reading these tables, however, three warnings or caveats are in order: First, pigeonholing states into methodological camps is inherently difficult and can be the object of disagreement among reasonable people; second, such a tabular pigeonholing cannot show the degree of a state's commitment to a particular methodology; and third, adherence to a particular methodology may be only marginally relevant in explaining the result reached in actual cases.

A. Caveats

1. Classification Problems.—As has been explained elsewhere, the classification of states within one or another methodological camp is not an exact science.[98] In some choice-of-law cases, the existing precedents are equivocal or even irreconcilable. For example, the precedents from North Carolina,[99] Oklahoma,[100] West Virginia,[101] and Wyoming[102] are susceptible to different interpretations and thus raise legitimate doubts as to whether these states properly belong in the *Restatement (Second)* column.[103]

In other cases, there is simply no recent state supreme court precedent. For example, the supreme courts of Illinois and Missouri have yet to decide a contract conflict after having adopted the *Restate-*

---

97. For other classifications of jurisdictions according to conflicts methodology, see Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 367-76 (1992); Herma H. Kay, *Theory into Practice, Choice of Law in the Courts*, 34 MERCER L. REV. 521, 591-92 (1983); Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1172-74 (1987); Symeonides, *Six Previous Years*, *supra* note 5, at 600-12; Symeonides, *A Year in Review*, *supra* note 5, at 193-203.

98. *See* Symeonides, *A Year in Review*, *supra* note 5, at 193-97.

99. *See supra* tbl.2 note 84.

100. *See supra* tbl.2 note 86.

101. *See supra* tbl.2 note 83.

102. *See supra* tbl.2 note 82.

103. Similarly, Arkansas's classification as a significant-contacts state for contract conflicts is not entirely safe. In both *McMillen v. Winona National & Savings Bank*, 648 S.W.2d 460, 462 (Ark. 1983), and *Standard Leasing Corp. v. Schmidt Aviation, Inc.*, 576 S.W.2d 181, 184 (Ark. 1979), the Arkansas Supreme Court applied a significant-contacts approach. In *Stacy v. St. Charles Custom Kitchens, Inc.*, 683 S.W.2d 225, 227 (Ark. 1985), however, the court seems to revert to the *lex loci contractus* rule. Writing in 1987, one commentator classified Arkansas as a *First Restatement* (*lex loci contractus*) state. *See* Smith, *supra* note 97, at 1053-55, 1172. In *Threlkeld v. Worsham*, 785 S.W.2d 249 (Ark. Ct. App. 1990), a lower court applied the "better-law" approach to a sale contract. *Id.* at 252-53.

ment (Second) for tort conflicts in 1970 and 1969, respectively.[104] Nevertheless, because these courts' endorsements of the *Restatement (Second)* for tort conflicts have been wholehearted, and because these courts have also failed to disturb the several lower court decisions that have applied the *Restatement (Second)* to contract conflicts,[105] it seems reasonable and safe to classify these two states in the *Restatement (Second)* column for contract conflicts.[106]

Perhaps the same should be done for the state of Tennessee. The Tennessee Supreme Court has not encountered a contract conflict since its 1992 abandonment of the traditional theory in tort conflicts.[107] Because the court's endorsement of the *Restatement (Second)* in tort conflicts was wholehearted, it may be only a matter of time before that court adopts the *Restatement (Second)* for contract conflicts as well. Nevertheless, it is better to err on the side of caution and to keep Tennessee in the traditional column for contract conflicts.[108]

The above are only some of the examples of the difficulties encountered in any attempt to draw bright demarcation lines between the various methodological camps. Because of these difficulties, it would not be surprising if some readers disagree about the placement of a particular state in a particular column in Tables 3 and 4, below. Despite the potential for difference of opinion regarding individual states, however, there will likely be less disagreement on the overall count at the end of each column.

2. Gradations of Commitment to the Restatement (Second).—The second caveat about tables like the ones reproduced below is that they give the misleading impression that all of the jurisdictions listed in the *Restatement (Second)* column share an equal commitment to the *Restatement (Second)*. Yet even a cursory reading of the cases suggests otherwise. For example, some cases use the *Restatement (Second)* solely as an escape from a traditional choice-of-law rule that coexists with the *Restatement (Second)*.[109] Some cases use the *Restatement (Second)* as a cam-

104. *See supra* tbl.1 note 25 (Missouri) and note 26 (Illinois).

105. *See supra* tbl.2 note 69 (Missouri) and note 72 (Illinois).

106. *See infra* tbl.4.

107. *See supra* tbl.1 note 48.

108. *See infra* tbl.4.

109. *See, e.g.*, O'Connor v. O'Connor, 519 A.2d 13, 21 (Conn. 1986) (adopting the *Restatement (Second)* "for those cases in which application of the doctrine of lex loci [delicti] would produce an arbitrary, irrational result"); Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071, 1073 (Ind. 1987) (holding that, "when the place of the tort is an insignificant contact," the court will turn to the *Restatement (Second)*).

ouflage for a "grouping-of-contacts" approach,[110] while other cases use it as a vehicle for merely restraining but not avoiding interest analysis.[111] Moreover, examples of such disparate treatment of the *Restatement (Second)* can often be found in the same jurisdiction.[112]

3. The Marginal Relevance of Methodology.—The final caveat about these tables is that they may give the impression that methodology is more important than it actually is in explaining choice-of-law decisions. Academics tend to take methodology seriously, as perhaps we should. Choice-of-law chapters in some casebooks are organized by methodology rather than by subject matter,[113] and many of us teach that way. I would not argue that methodology should not matter, either in the way in which we teach our students or in the way in which we try to hone our own thinking about choice of law. At the same time, the reality of the case law cannot be ignored. That reality suggests that methodology plays a relatively minor role in explaining the results in actual cases. As one other observer put it, "the result in the case often appears to have dictated the judge's choice of law approach at least as much as the approach itself generated the result."[114]

---

110. *See, e.g.*, Palmer G. Lewis Co. v. ARCO Chem. Co., 904 P.2d 1221 (Alaska 1995); Powell v. American Charter Fed. S & L Ass'n, 514 N.W.2d 326 (Neb. 1994); Stockmen's Livestock Exch. v. Thompson, 520 N.W.2d 255 (S.D. 1994) (per curiam); Selle v. Pierce, 494 N.W.2d 634 (S.D. 1992); Hataway v. McKinley, 830 S.W.2d 53 (Tenn. 1992); American Nat'l Fire Ins. Co. v. Farmers Ins. Exch., 927 P.2d 186 (Utah 1996); Forsman v. Forsman, 779 P.2d 218 (Utah 1989).

111. *See, e.g.*, Williams v. State Farm Auto. Mut. Ins. Co., 641 A.2d 783 (Conn. 1994); O'Connor v. O'Connor, 519 A.2d 13 (Conn. 1986); Esser v. McIntire, 661 N.E.2d 1138 (Ill. 1996); Nelson v. Hix, 522 N.E.2d 1214 (Ill. 1988); Veasley v. CRST Int'l, Inc., 553 N.W.2d 896 (Iowa 1996); Chrysler Corp. v. Skyline Indus. Servs., Inc., 528 N.W.2d 698 (Mich. 1995); Gilbert Spruance Co. v. Pennsylvania Mfrs. Ass'n Ins. Co., 629 A.2d 885 (N.J. 1993).

112. Compare *Stockmen's Livestock Exchange v. Thompson*, 520 N.W.2d 255 (S.D. 1994) (per curiam), and *Selle v. Pierce*, 494 N.W.2d 634 (S.D. 1992), both of which relied more on state contacts than on state interests, with *Chambers v. Dakotah Charter, Inc.*, 488 N.W.2d 63 (S.D. 1992), which relied more on state interests and less on state contacts.

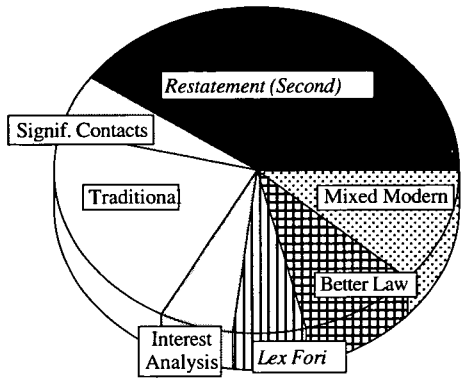
113. *See, e.g.*, LEA BRILMAYER, CONFLICT OF LAWS, CASES AND MATERIALS (4th ed. 1995); ROGER CRAMTON ET AL., CONFLICT OF LAWS, CASES-COMMENTS-QUESTIONS (5th ed. 1993); ANDREAS F. LOWENFELD, CONFLICT OF LAWS: FEDERAL, STATE, AND INTERNATIONAL PERSPECTIVES (1986); GARY J. SIMSON, ISSUES AND PERSPECTIVES IN CONFLICT OF LAWS, CASES AND MATERIALS (3d ed. 1997); DAVID H. VERNON ET AL., CONFLICT OF LAWS: CASES, MATERIALS AND PROBLEMS (1990).

114. Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 951 (1994); *see also* Sutherland v. Kennington Truck Serv., Ltd., 562 N.W.2d 466, 468 (Mich. 1997) ("[I]n practice, all the modern approaches to conflicts of law are relatively uniform in the results they produce."); Sterk, *supra*, at 962 ("[C]itation to academic theory has served more as window dressing than as a dispositive factor in deciding choice of law cases.").

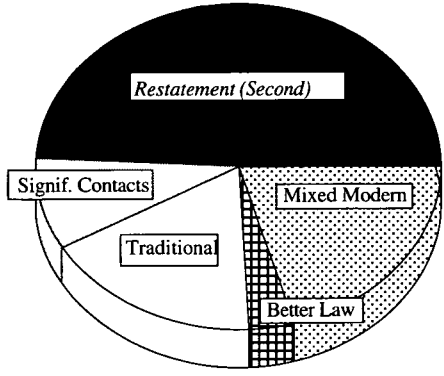
B. The Numbers

In any event, none of the above caveats should render useless the chart and tables reproduced below. The caveats simply suggest that these tables should be read with appropriate caution. Despite these caveats, the tables are fairly accurate portrayals of the *Restatement (Second)*'s position in the contemporary American conflicts landscape.[115]

CHART 3
THE METHODOLOGICAL CAMPS IN 1997: TORT CONFLICTS AND CONTRACT CONFLICTS



Tort Conflicts



Contract Conflicts

115. For maps showing the geographical distribution of the *Restatement (Second)* states, see Symeonides, *A Year in Review*, *supra* note 5, at 195-96.

TABLE 3. THE METHODOLOGICAL CAMPS IN 1997: TORT CONFLICTS

Traditional	Significant Contacts	*RESTATEMENT (SECOND)*	Interest Analysis	*Lex Fori*	Better Law	Mixed
Alabama	Indiana	Alaska	California	Kentucky	Arkansas	Hawaii
Georgia	N. Dakota	Arizona	Dist. of Colum.	Michigan	Minnesota	Louisiana
Kansas	Puerto Rico	Colorado	New Jersey	Nevada	New Hamp.	Massachusetts
Maryland		Connecticut			Rhode Isl.	New York
Montana		Delaware			Wisconsin	Oregon
New Mex.		Florida				Pennsylvania
N. Carolina		Idaho				
S. Carolina		Illinois				
Virginia		Iowa				
W. Virginia		Maine				
Wyoming		Mississippi				
		Missouri				
		Nebraska				
		Ohio				
		Oklahoma				
		S. Dakota				
		Tennessee				
		Texas				
		Utah				
		Vermont				
		Washington				
Total 11	3	21	3	3	5	6

TABLE 4
THE METHODOLOGICAL CAMPS IN 1997: CONTRACT CONFLICTS

Traditional	Significant Contacts	*RESTATEMENT (SECOND)*	Interest Analysis	*Lex Fori*	Better Law	Mixed
Alabama	Arkansas	Alaska			Minnesota	California
						Dist. of
Florida	Indiana	Arizona			Wisconsin	Colum.
Georgia	Nevada	Colorado				Hawaii
Kansas	N. Carolina	Connecticut				Louisiana
Maryland?	Puerto Rico	Delaware				Massachusetts
New Mex.		Idaho				New Jersey
Rhode Isl.		Illinois				New York
S. Carolina		Iowa				N. Dakota
Tennessee		Kentucky				Oregon
Virginia		Maine				Pennsylvania
		Michigan				
		Mississippi				
		Missouri				
		Montana				
		Nebraska				
		New Hampshire				
		Ohio				
		Oklahoma				
		S. Dakota				
		Texas				
		Utah				
		Vermont				
		Washington				
		W. Virginia				
W. Virginia		Wyoming				
Total 10	5	25	0	0	2	10

C. Restatement (Second) *States*

As Tables 3 and 4 indicate, as of December 1997, twenty-one jurisdictions follow the *Restatement (Second)* in tort conflicts and twenty-five do so in contract conflicts.[116] With regard to tort conflicts, these numbers are lower by four than the numbers shown in the *Restatement (Second)* column in Table 1.[117] This is because some states that had initially adopted the *Restatement (Second)* have since moved to a different methodological camp. Thus, Kentucky has moved to the *lex fori* camp,[118] the District of Columbia has moved to the interest analysis camp,[119] and Oregon and Massachusetts have moved to the mixed approach camp.[120] The reverse movement has not occurred. No state has abandoned a "modern" approach to adopt exclusively the *Restatement (Second).*[121] In contract conflicts, however, two jurisdictions have abandoned interest analysis in favor of a mixed approach that includes either the *Restatement (Second)* or a significant-contacts approach.[122]

D. *States That Follow the* Restatement (Second) *in Tort or Contract Conflicts Only*

Tables 1 and 2, above, show that many of the jurisdictions that have adopted the *Restatement (Second)* have done so first for tort conflicts and then for contract conflicts,[123] apparently because tort conflicts are more frequent and because many contract conflicts depend on local statutes.[124] Similarly, Tables 3 and 4, above, show that some

---

116. *See supra* tbls.3 and 4.

117. *See supra* tbl.1.

118. *See supra* tbl.1 note 15 and tbl.3.

119. *See supra* tbl.1 note 17 and tbl.3.

120. *See supra* tbl.1 notes 16 (Oregon), 34 (Massachusetts) and tbl.3. On the other hand, Michigan, which had adopted the *lex fori* approach for tort conflicts, but had not applied that approach to contract conflicts, eventually adopted the *Restatement (Second)* for contract conflicts. *See supra* tbl.1 note 39 and tbl.2 note 94, respectively.

121. *See supra* tbl.1 notes 10-50, tbl.2 notes 54-95, tbls.3 and 4.

122. These jurisdictions are California and the District of Columbia. *See supra* tbl.2 notes 59 (California), 64 (District of Columbia). Similarly, Wisconsin, which had initially adopted the significant-contacts approach, has since switched to Professor Leflar's choice-influencing considerations. *See supra* tbl.2 note 63.

123. The following fifteen states first adopted the *Restatement (Second)* for torts and then for contract conflicts: Alaska, Arizona, Colorado, Connecticut, Illinois, Iowa, Kentucky, Maine, Mississippi, Missouri, Nebraska, Oklahoma, South Dakota, Texas, and Utah. *See supra* tbls.1 and 2.

124. Four states, Delaware, Idaho, Vermont, and Washington, first adopted the *Restatement (Second)* for contract conflicts and then for tort conflicts. *See supra* tbls.1 and 2. One state, Ohio, adopted the *Restatement (Second)* for tort and contract conflicts in the same year on the same day. *See supra* tbl.1 note 40 and tbl.2 note 78.

jurisdictions have adopted the *Restatement (Second)* for torts but not for contracts.[125] These states are Florida[126] and Tennessee.[127] With regard to Florida, this is a matter of deliberate choice. After adopting the *Restatement (Second)* for tort conflicts, Florida's highest court had several opportunities to do likewise for contract conflicts, but specifically refused to do so.[128] In contrast, Tennessee has not had this opportunity. The Tennessee Supreme Court adopted the *Restatement (Second)* for tort conflicts only recently,[129] but has not since encountered a contract conflict.

Similarly, six states—Kentucky, Michigan, Montana, New Hampshire, West Virginia, and Wyoming—have adopted the *Restatement (Second)* for contract conflicts but not for tort conflicts.[130] Kentucky at first abandoned the traditional theory in tort conflicts in favor of the *Restatement (Second)*,[131] but one year later opted for the *lex fori* approach in another tort conflict.[132] Many years later, when that state's highest court encountered a contract conflict, the court found that its earlier adoption of the *Restatement (Second)* was appropriate for contract conflicts.[133] In Michigan, the reverse sequence was followed. In 1982, the Michigan Supreme Court first abandoned the traditional theory for tort conflicts in favor of the *lex fori* approach,[134] and for many years it did not encounter a contract conflict. In 1995, when the court encountered such a conflict, the court opted for the *Restatement (Second)* for contract conflicts,[135] perhaps because by that time the novelty of the *lex fori* approach had worn off. The remaining four states simply have not had the opportunity to consider the *Restatement (Second)* for tort conflicts.

---

125. *See supra* tbls.3 and 4.

126. *See supra* tbls.3 and 4.

127. *See supra* tbls.3 and 4.

128. *See, e.g.*, Sturiano v. Brooks, 523 So. 2d 1126, 1129 (Fla. 1988).

129. *See supra* tbl.1 note 48.

130. *See supra* tbls.3 and 4.

131. *See* Wessling v. Paris, 417 S.W.2d 259, 259-61 (Ky. 1967) (adopting the *Restatement (Second)* for cases in which its application would yield a clear result).

132. *See* Arnett v. Thompson, 433 S.W.2d 109, 113 (Ky. 1968); *see also* Foster v. Leggett, 484 S.W.2d 827, 829 (Ky. 1972).

133. *See* Lewis v. American Family Ins. Group, 555 S.W.2d 579, 581-82 (Ky. 1977) (adopting the *Restatement (Second)* for contract conflicts); *see also* Bonnlander v. Leader Nat'l Ins. Co., 949 S.W.2d 618, 620 (Ky. 1977) (rejecting plaintiffs' reliance on the *lex fori* approach in a contract conflict).

134. *See supra* tbl.1 note 39.

135. *See* Chrysler Corp. v. Skyline Indus. Servs., Inc., 528 N.W.2d 698, 703 (Mich. 1995).

E. States That Rely Partly on the Restatement (Second)

Tables 3 and 4 also show that three jurisdictions follow the significant-contacts approach for tort conflicts and five do so for contract conflicts.[136] This approach is largely based on or resembles the *Restatement (Second).* In addition, of the jurisdictions that are listed in the mixed-approach column,[137] Hawaii,[138] Massachusetts,[139] Oregon,[140] and Pennsylvania[141] rely in part on the *Restatement (Second)* for tort and contract conflicts, while California,[142] the District of Columbia,[143] New York,[144] New Jersey,[145] and North Dakota[146] do so with regard to contract conflicts.

F. The Dominance of the Restatement (Second)

To date, a plurality of twenty-one jurisdictions follow the *Restatement (Second)* in tort conflicts and twenty-five do so in contract con-

---

136. *See supra* tbls.3 and 4. These jurisdictions are Indiana, North Dakota, and Puerto Rico for tort conflicts and Arkansas, Indiana, Nevada, North Carolina, and Puerto Rico for contract conflicts. *See supra* tbls.3 and 4.

137. *See supra* tbls.3 and 4.

138. Hawaii follows a combination of interest analysis, the *Restatement (Second),* and Leflar's choice-influencing considerations. *See* Lewis v. Lewis, 748 P.2d 1362, 1365 (Haw. 1988) (interpreting an earlier Hawaii case, Peters v. Peters, 634 P.2d 586 (1981), as having adopted a "significant relationship" test with primary emphasis on the state with the "stronger interest"). Borchers classifies Hawaii as an interest analysis state, *see* Borchers, *supra* note 97, at 371, whereas Smith classifies Hawaii as a state that follows Leflar's choice-influencing considerations. *See* Smith, *supra* note 97, at 1067-68.

139. Massachusetts follows a combination of interest analysis, "functional analysis," and the *Restatement (Second).* *See* Bushkin Assocs., Inc. v. Raytheon Co., 473 N.E.2d 662, 668-69 (Mass. 1985).

140. Oregon follows a combination of interest analysis and the *Restatement (Second)* "'coupled with an almost irresistible forum presumption.'" Symeonides, *From the Trenches, supra* note 5, at 3 n.6 (quoting Professor James Nafziger).

141. Pennsylvania follows a combination of interest analysis and the *Restatement (Second),* but also draws from Professor Cavers's principles of preference. *See supra* tbl.1 note 11 and tbl.2 note 77.

142. *See* Nedlloyd Lines B.V. v. Superior Court, 834 P.2d 1148, 1150-52 (Cal. 1992) (relying heavily on the *Restatement (Second)* but without abandoning interest analysis).

143. *See* District of Columbia Ins. Guar. Ass'n v. Algernon Blair, Inc., 565 A.2d 564, 568 n.2 (D.C. 1989) (per curiam) (using a combined interest analysis and *Restatement (Second)* approach).

144. New York follows interest analysis combined with a significant-contacts analysis in contract conflicts. *See* Allstate Ins. Co. v. Stolarz, 613 N.E.2d 936, 939-40 (N.Y. 1993).

145. *See* Gilbert Spruance Co. v. Pennsylvania Mfrs. Ass'n Ins. Co., 629 A.2d 885, 893-94 (N.J. 1993) (combining interest analysis with the *Restatement (Second)*).

146. North Dakota follows a combination of interest analysis, the *Restatement (Second),* and Leflar's choice-influencing considerations. *See* Starry v. Central Dakota Printing, Inc., 530 N.W.2d 323, 325-26 (N.D. 1995); American Family Mut. Ins. Co. v. Farmers Ins. Exch., 504 N.W.2d 307, 308-09 (N.D. 1993).

flicts.[147] If one adds the jurisdictions that follow the kindred approach of significant contacts and the jurisdictions that follow the *Restatement (Second)* in part, this plurality becomes a majority. In addition, if one keeps in mind that the *Restatement (Second)* is followed by many federal courts in federal question cases,[148] the domination of the *Restatement (Second)* becomes even more apparent. In light of the many early criticisms the *Restatement (Second)* encountered, this is no small accomplishment for its drafters. I am sure that Willis Reese, the *Restatement (Second)*'s chief drafter, who is no longer with us, is looking down upon us with that familiar, somewhat mischievous smile.

Two obvious questions are: Why has the *Restatement (Second)* enjoyed such a success; and is that success good or bad for American conflicts law? These questions are addressed in the next two sections.

IV. REASONS FOR THE *RESTATEMENT (SECOND)*'S APPEAL TO JUDGES

Why has the *Restatement (Second)* enjoyed such a success in winning the hearts and minds of most American judges? The reasons are many and varied, and some of them are not necessarily complimentary. They include the following:

A. *The* Restatement (Second) *Provides the Judge with Virtually Unlimited Discretion*

Of the 423 sections of the *Restatement (Second)*, all of which are printed in "black letter," only a handful contain anything that comes close to qualifying as a black letter rule in the sense of a rule that is not subject to exceptions. All of these sections are confined to property and succession issues,[149] which are outside the scope of this Arti-

147. *See supra* tbls.3 and 4.

148. *See, e.g.*, Bickel v. Korean Air Lines Co., 83 F.3d 127, 130-31 (6th Cir.) (applying the *Restatement (Second)* to a case arising under the Warsaw Convention), *superseded on other grounds*, 96 F.3d 151 (6th Cir. 1996); *In re* Lindsay, 59 F.3d 942, 948 (9th Cir. 1995) (relying on the *Restatement (Second)* in a bankruptcy proceeding), *cert. denied*, 116 S. Ct. 778 (1996); Schoenberg v. Exportadora de Sal, 930 F.2d 777, 782 (9th Cir. 1991) ("Federal common law follows the approach of the Restatement (Second) of Conflict of Laws . . . ."); Edelmann v. Chase Manhattan Bank, N.A., 861 F.2d 1291, 1295 (1st Cir. 1988) (relying on the *Restatement (Second)* for a case involving the Edge Act); Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1003-04 (9th Cir. 1987) (relying on the *Restatement (Second)* to determine the applicable law for a case arising under the Foreign Sovereign Immunities Act); Aaron Ferer & Sons v. Chase Manhattan Bank, N.A., 731 F.2d 112, 121 (2d Cir. 1984) (applying the *Restatement (Second)* to determine which state's law would apply); Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786, 795 (2d Cir. 1980) (applying the *Restatement (Second)* test to a case arising under the Edge Act).

149. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 223, 225-232 (1971) (inter vivos transactions involving land); *id.* §§ 236, 239-242 (succession to land); *id.* §§ 245-255

cle. The remaining sections of the *Restatement (Second)* allow the judge wide latitude in choosing the applicable law, ranging from mildly limited to virtually unlimited discretion. Depending on the degree of discretion vested in the judge, the remaining sections can be divided into three groups: (1) those that contain presumptive rules, (2) those that contain mere pointers, and (3) those that leave the choice entirely to the judge.

The first group consists of those sections that provide presumptive but easily displaceable rules that instruct the judge to apply the law of one state, "unless . . . some other state has a more significant relationship under the principles stated in [section] 6."[150] This "unless" clause is one of the most repeated phrases in the entire *Restatement (Second).* It is repeated in all ten of the sections devoted to particular types of torts,[151] and in most sections devoted to particular contracts.[152] The second group consists of those sections that do not designate the applicable law, not even in a presumptive manner, but rather provide gentle pointers mildly suggesting that the state of the applicable law will "usually" be one particular state. Eleven of the nineteen sections devoted to important tort issues contain such an equivocal pointer.[153] The third group consists of those residual sections, such as section 145 for torts and section 188 for contracts, in which the drafters make no suggestion whatsoever as to the applicable law but leave the choice to the judge to be made on an ad hoc basis, guided only by a deliberately malleable list of contacts contained in

---

(inter vivos transactions involving movables); *id.* §§ 260-265 (succession to movables); *id.* § 285 (divorce); *id.* § 286 (nullity of marriage); *id.* § 289 (adoption).

150. *Id.* § 146; *see also id.* §§ 146-155, 175, 189-193, 196.

151. *See id.* §§ 146-155.

152. *See, e.g., id.* §§ 189-193, 196.

153. *See id.* §§ 156 (tortious character of conduct), 157 (standard of care), 158 (interest entitled to legal protection), 159 (duty owed to plaintiff), 160 (legal cause), 162 (specific conditions of liability), 164 (contributory fault), 165 (assumption of risk), 166 (imputed negligence), 172 (joint torts). All of these sections conclude with the adage that "[t]he applicable law will usually be the local law of the state where the injury occurred." *See, e.g., id.* § 172; *see also id.* § 169(2) (providing that for intra-family immunity the applicable law "will usually be the local law of the state of the parties' domicil").

In contract conflicts, section 188(3) provides that, subject to some exceptions, "[i]f 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." *Id.* § 188(3). Similarly, section 198(2) provides that "[t]he capacity of a party to contract will usually be upheld if he has such capacity under the local law of the state of his domicil," *id.* § 198(2), while section 199(2) provides that contractual "[f]ormalities which meet the requirements of the place where the parties execute the contract will usually be acceptable." *Id.* § 199(2). Similar language is to be found in many other sections of the *Restatement (Second).*

sections 145[154] and 188,[155] respectively, and by the policies listed in section 6.[156]

On the surface, it would seem that the sections of the last group allow judges more discretion than the sections of the second group, which in turn allow more discretion than the sections of the first group. In reality, however, all three groups are capable of providing as much discretion as a judge is willing to extract. Thus, if the particular case falls within the scope of a presumptive rule of the first group, the judge may avoid the rule by invoking the "unless" clause contained in that rule. If the particular issue fits within the scope of one of the sections of the second group that provides a "pointer," the judge may disregard the pointer by underscoring the word "usually" contained in that pointer. As for the many cases that do not fall within the scope of either a presumptive rule or a pointer, the judge need not evade anything because the *Restatement (Second)* does not purport to dictate a particular choice of law. For example, in a case that falls within the general, ad hoc sections of the *Restatement (Second)*, such as section 145, the judge will determine the state of the most significant relationship "under the principles stated in §6" by "tak[ing] into account" the contacts listed illustratively in section 145.[157] If the "principles stated in §6" were intended to limit the judge's discretion, that message was lost on the vast majority of judges who have applied section 6.

Even more indicative of the judiciary's inclination to retain as much discretion as possible is the tendency of some courts expressly to bypass the specific sections of the *Restatement (Second)* that contain the mild restraints described above and directly to resort to the general, laissez faire section 6.[158] By so doing, these courts do not even have to explain why a presumptive rule can be displaced or a pointer ignored. In at least one respect, these courts differ little from the courts that follow the significant-contacts approach or Leflar's choice-influencing considerations. Although the latter two approaches differ

---

154. *Id.* § 145.

155. *Id.* § 188.

156. *Id.* § 6.

157. *Id.* § 145.

158. *See, e.g.*, Dawson-Austin v. Austin, 920 S.W.2d 776, 790-91 (Tex. App. 1996) (using § 6 to resolve a marital property conflict and refusing to apply the more specific sections the *Restatement (Second)* provides for such conflicts), *wnt. granted.* For a discussion of *Dawson-Austin*, see Symeonides, *Tenth Annual Survey*, *supra* note 5, at 495-99. *See also* Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1242-49 (1997).

on the specifics from section 6 of the *Restatement (Second)*,[159] they nevertheless provide the judge with the same virtually unlimited discretion as does section 6. The truth is that, as much as the *Restatement (Second)* can be rightfully accused of giving judges too much discretion, all other modern approaches, except one,[160] give judges even more discretion. In this sense, the whole conflicts revolution can be described by a cynic as a judicial movement to attain and retain more power in choice-of-law decisions. The main reason the *Restatement (Second)* may be more appealing to judges is that it provides them with as much discretion as the other modern approaches, but at the same time, it gives the *appearance* of an orderly system.

B. *The* Restatement (Second), *As Applied by Judges, Does Not Require Hard Thinking*

Despite the drafters' contrary intentions and their instructions contained in the very valuable "comments," the *Restatement (Second)* has been applied by judges in a way that does not require hard thinking. As explained above, in the great majority of cases, the *Restatement (Second)* instructs the judge to determine the state of the most significant relationship "under the principles stated in §6" by "taking into account" the contacts listed in the pertinent section of the *Restatement (Second)* for the type of conflict in question.[161] This is supposed to be a sophisticated, dialectical process of evaluating the policies listed in section 6 in light of the pertinent factual contacts. It is not supposed to be a quantitative counting, or even a so-called qualitative assessment, of the factual contacts. Yet many judicial decisions do just that. They engage in an impressionistic counting of contacts which concludes with the statement that the state with the most contacts is the state with the most significant relationship. Even the cases that go through the trouble of examining the policies of section 6 do so more

159. The significant-contacts approach differs from section 6 of the *Restatement (Second)* in that it calls for a consideration of the factual contacts alone, rather than of a set of policies in light of the factual contacts as does the *Restatement (Second)*. Leflar's list of choice-influencing considerations resembles the list of policies contained in section 6(2) of the *Restatement (Second)*, but differs in some respects, especially in calling for the application of the "better rule of law." *See* ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW § 96 (4th ed. 1986).

160. The only exception is New York's *Neumeier* rules for certain tort conflicts. *See* Neumeier v. Kuehner, 286 N.E.2d 454, 458 (N.Y. 1972). Of the three *Neumeier* rules, the first one designates the applicable law without any exception, the second rule contains a narrow escape ("in the absence of special circumstances"), while the third rule contains a broader escape.

161. *See supra* note 157 and accompanying text.

in order to confirm, rather than to test, the conclusion reached on the basis of contacts counting.

Professor Willis Reese, the chief drafter of the *Restatement (Second)*, observed: "[C]ourts which purport to take a 'governmental interest' approach frequently engage in a judicial masquerade. In actual practice, they decide first upon the particular rule they wish to apply and then attribute policies to that rule that call for its application."[162] Ironically, the same is equally true of courts that apply the *Restatement (Second)*.

C. *The* Restatement (Second) *Is Not Ideologically "Loaded"*

It is well known that many of the other "modern" approaches are vulnerable to the criticism that they either contain built-in biases or they provide judges with the opportunity to rationalize certain biases. For example, interest analysis has been accused, to some extent justifiably, of a distinct pro-forum, and, therefore, pro-plaintiff, pro-recovery bias.[163] Professor Leflar's approach openly advocates the application of the "better law" in certain circumstances,[164] and Professor Weintraub's rule for tort conflicts calls for the application of the law that favors the plaintiff in certain cases.[165]

In contrast, the *Restatement (Second)* does not contain any such biases. The laundry list of policies contained in section 6 is an innocuous list, but it is also a balanced and ideologically unbiased one. The list begins with "the needs of the interstate and international systems" and includes "the protection of justified expectations," and "certainty, predictability and uniformity of result."[166] These are policies with which no one would seriously disagree. They are policies that appeal

---

162. Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 510, 511 (1983) (footnote omitted).

163. *See, e.g.*, Symeon Symeonides, *Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground?*, 46 OHIO ST. L.J. 549, 566-67, 558-60 (1985) (citing authorities).

164. *See* Robert A. Leflar, *The Tort Provisions of the Restatement (Second)*, 72 COLUM. L. REV. 267, 272 (1972) ("Whether acknowledged or not, judicial preference for the 'better law' is tangibly present in many choice-of-law situations. For this reason, the 'better law' preference must be added to the choice-influencing factors like in section 6.").

165. *See* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 6.32 (2d ed. 1980) (proposing a rule with a rebuttable presumption that the law favoring the plaintiff shall be applied in true conflict and no interest cases).

166. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). The complete list includes:

> (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

to judges who do not want to be perceived as pro-plaintiff or result oriented.

Here again, however, one must distinguish between the drafters' pronouncements and the degree to which these pronouncements are actually followed by judges. For example, despite the *Restatement (Second)*'s reminder that the decisionmaker should keep in mind the "needs of the interstate and international systems,"[167] it does not seem that cases applying the *Restatement (Second)* are any more "internationalist" than cases applying other approaches. In conclusion, therefore, it can be said that one of the reasons for the *Restatement (Second)*'s appeal to judges is that it provides an approach that is ideologically neutral, yet provides ample room for accommodating almost any judicial ideology.

D. The Restatement (Second) *Is a Complete "System"*

When Brainerd Currie denounced the traditional choice-of-law rules, he also denounced any efforts to develop new rules.[168] Instead, he proposed an ad hoc method of conflicts resolution: the method of statutory construction and interpretation employed by courts in fully domestic cases.[169] In Currie's words: "Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic [cases], so we may determine how it should be applied to cases involving foreign elements."[170] Currie provided some general prescriptions of how to resolve false and true conflicts as identified by that method, but consistent with his wholesale rejection of rules, he did not provide any specific prescriptions for conflicts in the various areas of the law. He thought that his method was as capable of resolving tort conflicts as it was of resolving contract conflicts or conflicts in any other area of the law.[171] The same basic thesis—that a methodol-

---

field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Id.

167. *Id.* § 6(2)(a).

168. *See* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 180 (1963). Currie observed:

> The rules [of the traditional theory] . . . have not worked and cannot be made to work. . . . But the root of the trouble goes deeper. In attempting to use the rules we encounter difficulties that stem not from the fact that the particular rules are bad, . . . but rather from the fact that we have such rules at all.

Id. (footnotes omitted). Currie concluded: "We would be better off without choice-of-law rules." *Id.* at 183.

169. *See id.* at 183-84.

170. *Id.* at 184.

171. *See id.* at 183-84.

ogy or approach is all that the courts need and that a single methodology is capable of resolving conflicts in any and all areas of the law—has been adopted by all those contemporary theorists who reject choice-of-law rules.

This thesis may fare well in academic halls, but it cannot be very popular among busy practitioners and judges. When they encounter a complicated problem of insurance, agency, or marital property law, these practitioners or judges do not have the time or patience to analyze the problem in terms of any single, overarching choice-of-law theory. They would rather start from somewhere down to earth. The *Restatement (Second)* always provides them with a starting point. Although the *Restatement (Second)* does not subscribe to fixed choice-of-law rules, it also rejects the notion that a mere list of general principles, such as those provided in section 6, is sufficient to yield solutions to conflicts in all areas of the law. Instead, the *Restatement (Second)* provides choice-of-law rules not only for various types of specific tort and contract conflicts, but also for conflicts in the areas of property, marital property, succession, trusts, status, agency and partnership, business corporations, and others.[172] Although most of these rules are open-ended or displaceable, they provide a starting point in the court's search for a solution. These rules are accompanied by thoughtful comments and illustrations, both of which can further aid the court's analysis. Thus, the fact that the *Restatement (Second)* offers a complete system of rules for almost every conceivable case or issue can only increase its usefulness to judges.[173] At the same time, the fact that these rules are almost never confining explains the judges' willingness to use them.

---

172. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145-423 (1971); *see also supra* notes 149-153 and accompanying text.

173. For example, in *NUCOR Corp. v. Aceros y Maquilas de Occidente*, 28 F.3d 572 (7th Cir. 1994), decided under Indiana conflicts law, Judge Ripple applied the *Restatement (Second)* to an issue of agency law, although the Indiana Supreme Court had not had occasion to apply the *Restatement (Second)* to agency issues and had not expressly adopted it with regard to generic contract issues, because the *Restatement (Second)* "offers a provision that can be adapted to areas for which particularized rules have not yet been developed." *Id.* at 583; *see also* Fasa Corp. v. Playmates Toys, Inc., 869 F. Supp. 1334, 1344 (N.D. Ill. 1994) (predicting that the Illinois Supreme Court would adopt the *Restatement (Second)* with regard to agency issues, and applying same); Stockmen's Livestock Exch. v. Thompson, 520 N.W.2d 255, 257-58 (S.D. 1994) (per curiam) (applying the *Restatement (Second)* to an agency issue although the court had not previously done so for contracts in general).

E. The Restatement (Second) *Carries the Prestige of the American Law Institute*

Unlike approaches proposed by individual scholars, whose persuasive power depends entirely on the inherent soundness of the proposed approach, the *Restatement (Second)* carries the imprimatur of the American Law Institute (ALI), a prestigious, collective body with a record of success in reforming other sectors of American law. The process of approving an ALI project contains several layers of collective scrutiny that not only contribute to the overall quality of the final product, but also militate against adoption of extreme or one-sided views. Occasionally, as was the case with the *Second Conflicts Restatement*, the end result may be the product of too many compromises among opposing philosophies and too much of an effort to please everybody.[174] From the judge's perspective, however, this alone is very rarely a handicap. A judge who chooses to adopt the position advocated by a restatement has much less explaining to do than a judge who chooses to adopt the views advocated by any individual academic author, even one who is considered an intellectual giant.

F. The Restatement (Second) *Has "Momentum"*

Anyone who follows American electoral politics understands the meaning and power of momentum. As Tables 1 and 2, above, indicate, before the 1969 promulgation of the *Restatement (Second)*, the jurisdictions that had abandoned the traditional approach were evenly split between those that adopted the *Restatement (Second)* and those that adopted other approaches.[175] Since then, the ratio between the jurisdictions that adopted the *Restatement (Second)* and those that adopted other approaches has been 2:1.[176] During the last ten years, the ratio has been even higher.[177] Thus, as time passed, the appeal of other approaches, such as interest analysis or the better-law approach,

---

174. *See supra* notes 3-4 and accompanying text.

175. In tort conflicts, eight jurisdictions had adopted the *Restatement (Second)* by 1969 and eight had adopted other approaches. In contract conflicts, four jurisdictions had adopted the *Restatement (Second)* by 1969 and seven jurisdictions had adopted other approaches. *See supra* tbls.1 and 2.

176. After 1969, seventeen jurisdictions adopted the *Restatement (Second)* for tort conflicts, as compared to eight jurisdictions that have adopted other approaches. *See supra* tbls.1 and 2. During that same time, twenty-one jurisdictions embraced the *Restatement (Second)* for contract conflicts, while ten jurisdictions chose other approaches. *See supra* tbls.1 and 2.

177. From 1988 to 1997, five jurisdictions adopted the *Restatement (Second)* in tort conflicts as compared to one jurisdiction that adopted another approach, and nine jurisdictions adopted the *Restatement (Second)* for contract conflicts as compared with four jurisdictions that adopted other approaches. *See supra* tbls.1 and 2.

has subsided, and the appeal of the *Restatement (Second)* has increased. It seems that, at this point, the *Restatement (Second)* has enough momentum to justify a prediction that, if any of the jurisdictions that continue to adhere to the traditional theory chooses to abandon that theory, it will likely adopt the *Restatement (Second).*[178]

V. ASSESSMENT OF THE CONTRIBUTION OF THE *RESTATEMENT (SECOND)* TO AMERICAN CONFLICTS LAW

Because the dominance of the *Restatement (Second)* in the American conflicts scene is now demonstrably clear, the question arises: Is this a positive development for American conflicts law? As this Article's title suggests, I consider the *Restatement (Second)*'s contribution to be a mixed blessing.

The contribution of the *Restatement (Second)* has been positive to the extent that it has facilitated the abandonment of the traditional rules of *lex loci delicti* and *lex loci contractus* and all the artificial and mechanical logic on which those rules were based and with which they were surrounded. It is of course true that the traditional theory had come under severe academic attacks even before 1953, the year the ALI began the process of drafting a new conflicts restatement, and certainly before 1969, the year the *Restatement (Second)* was officially promulgated. Before 1953, however, these academic attacks had made only marginal inroads in judicial opinions. From 1953 and thereafter, these inroads increased sufficiently, so that by 1966 five jurisdictions had abandoned the traditional theory in tort conflicts, led by the New York Court of Appeals in *Babcock v. Jackson.*[179] Although none of these jurisdictions adopted the *Restatement (Second),*[180] *Babcock* was at least influenced in part by the *Restatement (Second),* which was then in "Tentative Draft" form.[181] More importantly, between 1967 and 1969, when the ALI publicized the *Proposed Official Drafts of the Restatement (Second),* eleven more jurisdictions abandoned the traditional theory for torts and eight of them adopted these

178. The states more likely to do so in the near future are: Maryland and Tennessee for contract conflicts, West Virginia for tort conflicts, and Kansas for both contract and tort conflicts.

179. 191 N.E.2d 279 (N.Y. 1963); *see supra* note 8 and accompanying text. The other four jurisdictions were Pennsylvania, Wisconsin, New Hampshire, and Puerto Rico. *See supra* tbl.1.

180. *See supra* tbl.1.

181. *See Babcock,* 191 N.E.2d at 283-84 (relying on a 1960 Tentative Draft of the *Restatement (Second)*).

drafts.[182] This is not to say that the *Restatement (Second)* caused the conflicts revolution. The *Restatement (Second)* was certainly a major contributing factor in the decisions of many courts to abandon the traditional theory, however. It is entirely possible that, had the ALI not abandoned the *First Restatement*, the ranks of the revolutionaries during the 1960s would have been much more sparse. They would have included New York, California, and perhaps a few other "progressive" states, but most probably they would not have included states as diverse as Alaska, Arizona, Idaho, Iowa, or Mississippi. It is unlikely that these states would have adopted interest analysis or the better-law approach. It is more likely that they would have retained the traditional theory while increasing their use of traditional escape devices.

Thus, the contribution of the *Restatement (Second)* in the decisions of the majority of states to abandon the traditional theory should not be questioned. It should also be beyond question that the abandonment of the traditional theory was a positive and necessary development in American conflicts law. What is not beyond question, however, is whether the decision of these states to adopt as a replacement the particular approach of the *Restatement (Second)* is a positive development. Naturally, the answer depends on one's opinion of the *Restatement (Second)*. Because my overall opinion of the *Restatement (Second)* is tempered by its various flaws, my assessment of this development cannot be entirely positive.

I would like to continue with the positive, however. One other positive contribution of the *Restatement (Second)* is that it has helped to avoid polarization among American courts and has laid the foundation for a new synthesis to be formed from competing choice-of-law theories. Unlike the *First Restatement*, whose rigidity and dogmatism caused the revolution, the *Restatement (Second)*, because of its lack of dogmatism and its flexible and compromissory content, has helped to produce a benign, albeit uncertain, evolution. Had the *Restatement (Second)* aspired for ideological purity rather than philosophical pluralism, it would have pleased some of its academic critics but it would have been far less attractive to judges. Its followers would have been more devoted, but fewer, and polarization among American courts would have been inevitable.

To date, this polarization has been avoided. As the majority of American courts abandoned the old dogma, they have not moved in a

182. These eight jurisdictions were: Kentucky, Oregon, and the District of Columbia in 1967; Alaska, Arizona, Iowa, and Mississippi in 1968; and Missouri in 1969. *See supra* tbl.1. The first three jurisdictions later abandoned the *Restatement (Second)* in favor of other approaches. *See supra* notes 118-120 and accompanying text.

single direction, but at least they have moved in parallel, and in their minds fungible, directions, one of which is that of the *Restatement (Second)*. As much as we academics tend to accentuate the differences between these directions, the courts tend to do the opposite. For example, the fact that judges tend to move so easily from the *Restatement (Second)* to other policy-based analyses suggests that in their minds, correctly or not, these analyses do not differ in essential respects. Although this phenomenon of eclecticism or *pluralism des methods* has been vilified by academic critics,[183] it is a fact of life. We can continue to decry this phenomenon, or we can exploit its positive aspects.

For my part, I continue to subscribe to the hope that this eclecticism can become the basis for a productive synthesis of the American conflicts experience of the last twenty-five years. Seventeen years ago, in my first written critique of the *Restatement (Second)*, I wrote that the *Restatement (Second)* was "broad enough to encompass almost all modern American approaches,"[184] and that it could provide the most appropriate forum for a compromise among these approaches. I concluded: "Far from being regretable, this feature of the Restatement may, in the long run, prove its basic virtue. In time it may appear that eclecticism, perhaps not necessarily the particular eclecticism of the Restatement Second, . . . is the only way out of the conflicts crisis."[185]

The crisis to which I referred was the crisis that brought about the revolution. Now we are in the midst of another, less obvious crisis, brought about by the revolution's apparent victory and the anarchy that tends to follow many revolutions. That victory will be wasted if we allow anarchy to set in for too long, if we continue to behave like revolutionary chieftains rather than statesmen, if we do not proceed to the next step of consolidating the gains of the revolution.

VI. WHERE DO WE GO FROM HERE?

In 1972, one year after the *Restatement (Second)* was published, its chief drafter, Professor Willis Reese, postulated that the principal question of that time in American conflicts law was "whether we should have rules or an approach."[186] His own answer was that "the

183. *See, e.g.*, William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645, 646 (1983).

184. SYMEON C. SYMEONIDES, AN OUTSIDER'S VIEW OF THE AMERICAN APPROACH TO CHOICE OF LAW 39 (1980).

185. *Id.* at 45-46 (footnote omitted).

186. Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 315 (1972).

formulation of rules should be as much an objective in choice of law as it is in other areas of law."[187] Reese also knew, however, that at that time tort and contract conflicts were not yet ripe for such rules.[188] This is why in these two areas the *Restatement (Second)* attempted no more than to "provide formulations that . . . were broad enough to permit further development in the law."[189] Reese retained the firm hope, however, that in due time these formulations would permit the development of "more definite"[190] or "precise"[191] choice-of-law rules.

That same year, Professor Robert Leflar, another legend of American conflicts law and one of the drafters of the *Restatement (Second)*'s chapter on torts, acknowledged that, although the *Restatement (Second)* "looked forward"[192] and was "firm[ly] dedicat[ed] to continuing growth,"[193] it did not state the law of the future. Leflar said: "[The *Restatement (Second)*] does not state the law of 1980, and we may have to wait until after 1980 to see what that law is to be. . . . Wherever it leaves us, we go on from there."[194]

Well, we are "there" now! What we see cannot be too pleasing to those who believe in "continuing growth." The *Restatement (Second)* has facilitated the break away from the traditional rules of *lex loci delicti* and *lex loci contractus*, but as the *Restatement (Second)*'s critics predicted and as its drafters acknowledged, it has also brought about an increased degree of unevenness and unpredictability. The question, therefore, is: Where do we go from "here?"

I submit that the next natural step is to begin the process of preparing for a third conflicts restatement. This restatement will contain rules derived from the experience of the first twenty-five years, the rules for which Reese had aspired. To be sure, these rules cannot be like the rules of the *First Restatement*, but they should be more than the nonrules of the *Restatement (Second)*. The new rules should be narrow, issue-by-issue, content-oriented rules, grounded on experience rather than on dogma. They should contain appropriate escapes, but they

---

187. Willis L.M. Reese, *General Course on Private International Law*, 150 RECUEIL DES COURS 1, 61 (1976-II).

188. *See* Reese, *supra* note 162, at 518-19.

189. *Id.* at 519.

190. *Id.* at 518 (stating that tort and contract conflicts were not as yet susceptible to "hard and fast rules," but expressing the hope that "it will be possible to state more definite rules at some time in the future"); *see also id.* at 508.

191. Reese, *supra* note 187, at 62.

192. Leflar, *supra* note 164, at 267.

193. *Id.* at 268.

194. *Id.* at 278.

should not be as easily displaceable as the "rules" of the *Restatement (Second).*[195]

Is it too early for such an endeavor? The *First Conflicts Restatement* was in existence for only nineteen years before the ALI publicized the first tentative draft of what later became the *Restatement (Second).* The *Restatement (Second)* has already been in existence for twenty-seven years, and we must acknowledge, it has been vastly more successful than its predecessor. Ironically, however, although the *First Restatement* was rightfully replaced because it was unsuccessful, the *Restatement (Second)* should be replaced because it has been successful. The *Restatement (Second)* was intended to be and was "a transitional work."[196] It was "written during a time of turmoil and crisis . . . when rival theories were being fiercely debated, and when serious doubt was expressed about the practicality, and indeed the desirability, of having any rules at all."[197] The *Restatement (Second)* has accomplished this transitional task of leading American courts away from the traditional dogma and through the first stages of experimentation with the new ideas generated by the conflicts revolution, many of which were incorporated into the *Restatement (Second).* Now is the time to move to the next step.

Nevertheless, even if we could hope for a consensus about the desirability of attempting to articulate new rules, can we hope for any consensus of what these rules will be? If the process of drafting a new restatement will be as open and as long as that of the *Restatement (Second),* this consensus should not be beyond our reach. A careful analysis of the results reached by cases in the last couple of decades can produce several rules that are likely to win wider endorsement. As a starting point, I can suggest the following rules for tort conflicts: (1) applying the law of the parties' common domicile in loss-distribution conflicts;[198] (2) applying the law of the place where both the conduct and the injury occurred in conduct-regulation conflicts;[199] and (3) allowing punitive damages if such damages are imposed by the law of

---

195. *See supra* notes 188-191 and accompanying text.

196. Reese, *supra* note 162, at 519.

197. *Id.* at 518-19.

198. For a statutory expression of such a rule, see LA. CIV. CODE ANN. art. 3544(1) (West 1994). For supporting rationale, and precodification cases supporting such a rule, see the cases discussed in Symeon C. Symeonides, *Louisiana's Choice of Law for Tort Conflicts: An Exegesis,* 66 TUL. L. REV. 677, 715-25 (1992) [hereinafter Symeonides, *An Exegesis*]. For cases decided since the effective date of the Louisiana codification, see Symeon C. Symeonides, *Louisiana Conflicts Law: Two "Surprises,"* 54 LA. L. REV. 497, 505-13 (1994) [hereinafter Symeonides, *Two Surprises*]; *see also supra* note 160 (discussing the first *Neumeier* rule).

199. For a statutory expression of this rule, see LA. CIV. CODE ANN. art. 3543(1) (West 1994). For supporting rationale, see Symeonides, *An Exegesis, supra* note 198, at 705-12.

any two of the following places: the place of conduct, place of injury, or the defendant's domicile.[200] A few other rules, also derived from current judicial practice, can win wider acceptance, provided they are armored with appropriate escapes.

The last question is whether these or any other rules are likely to be accepted by the courts. After all, the main reason so many courts endorsed the *Restatement (Second)* is because it gave them almost unlimited discretion. If the third restatement is to be a "rule" system, are the courts likely to adopt it and thus surrender the vast discretion they have enjoyed under the *Restatement (Second)*?

First, the third restatement should not be envisioned as a system of rigid, inflexible rules, but rather as a network of less easily displaceable rules—rules that provide more predictability than the *Restatement (Second)*, yet authorize deviations in appropriate cases.

Second, the courts' current infatuation with flexible, rudderless approaches should not be expected to last forever. If history is any indication, that too shall pass.[201] History does not move in complete cycles, but it does move in spirals. Even Joseph Beale acknowledged that "[t]he whole history . . . of law is the history of alternate efforts to render the law more certain and to render it more flexible."[202] Cur-

---

For cases decided since the effective date of the Louisiana codification, see Symeonides, *Two Surprises*, *supra* note 198, at 513-17.

200. For a statutory expression of this rule, see LA. CIV. CODE ANN. art. 3546 (West 1994). For supporting rationale, see Symeonides, *An Exegesis*, *supra* note 198, at 735-42. In the meantime, this rule has also been adopted by the ALI in its complex litigation project. *See* American Law Institute, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS § 6.06 (1994). For pertinent discussion, see Symeon C. Symeonides, *The ALI's Complex Litigation Project: Commencing the National Debate*, 54 LA. L. REV. 843, 868-71 (1994).

201. A good example on point is the experience of the New York courts in tort conflicts. After initiating the revolution in *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963), the New York Court of Appeals became disillusioned with the uncertainty experienced by the lower courts and took it upon itself to articulate a set of choice-of-law rules in *Neumeier v. Kuehner*, 286 N.E.2d 454, 458 (N.Y. 1972). For a discussion of a more general trend to return to rules, or perhaps of a nostalgia for rules, see Symeon C. Symeonides, *Exception Clauses in American Conflicts Law*, 42 AM. J. COMP. L. 813, 817-18, 861-64 (1994).

202. 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 50 (1935). Beale continued in language which, although intended to describe the pre-Beale era, could also describe the post-Beale era:

> [T]o a period of strict law, where the one purpose of law is to secure exactness and certainty, succeeds a period of equity and natural law in which the purpose is to infuse law with an element of justice and morality and therefore to temper the exactness of the strict law with a flexibility that may enable it to perform its function more justly. This in turn is succeeded by a period of maturity in which the flexibility of the period of equity and natural law is to a degree restrained by legalizing the broadness of equitable relief and bringing that too under precepts consisting of standards and principles so as to make it more certain. It is to be noticed that in this period the law does not go back to its earlier exactness, but

rently, we are at a point where conflicts law is too flexible. There will come a point, however, at which the courts will be receptive to, perhaps even crave for, more certainty. Although they would not want a return to the artificial and superficial certainty of Beale's *First Restatement*, they will be receptive to a new restatement that provides an appropriate equilibrium between certainty and flexibility.

By beginning now the process of drafting a third conflicts restatement, the ALI can position itself at the right place at the right time to provide the pole around which American courts will congregate in building the conflicts law of the twenty-first century.

In the meantime, let us give the *Restatement (Second)* its due by answering the rhetorical question posed at the beginning of this Article: Thanks in large part to the *Restatement (Second)*, we can say that "we *are* better off today than we were twenty-five years ago." Can we do better? I believe that we can, and we should try.

---

remains with a more flexible content than the strict law, although it has gained in certainty over the period of natural law. This in turn is followed by a period in which again the freer administration of law is emphasized; a period in which we now live, where the rules and principles of law cause impatience if too fixed in their application, and a desire exists to individualize their operation.

Id.