The Value of the Restatement of Employment Law, Based on 50-State Empirical Analyses and the Importance of Clarifying Disputed Issues – But with Caveats About the Restatement’s Imperfect Work Product

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THE VALUE OF THE RESTATEMENT OF EMPLOYMENT LAW, BASED ON 50-STATE EMPIRICAL ANALYSES AND THE IMPORTANCE OF CLARIFYING DISPUTED ISSUES – BUT WITH CAVEATS ABOUT THE RESTATEMENT’S IMPERFECT WORK PRODUCT

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I. INTRODUCTION

This article analyzes the Restatement of Employment Law\(^1\) as a whole, using mostly (though not entirely) Chapter 3 for examples. Part II addresses the core question about the Restatement: can it succeed at “restating” employment law, or is the effort doomed from the start? Part II argues that criticisms of the Restatement are based in sound legal realist theory but are overstated as a case against the entire concept of a restatement, particularly for certain fields, like the compensation and benefits law of Chapter 3 that, moreso than other fields, are based on established law.

Part III(A), notes that Chapter 3 does a strong job restating established common law, but undertakes several empirical analyses to answer a key question: Is there any value in restating established law? The findings from a series of ordinary least-squares regressions show that restatements do appear useful to certain states.

(1) *Caselaw volume varies substantially across states.* A fifty-state comparison of the caselaw volume in several Westlaw searches, spanning different areas of commercial and employment contract law, show that many states have one-tenth as much caselaw as others.

(2) *Caselaw volume varies predictably with state characteristics.* State caselaw volume is not random, because almost all of the variation is predictable by three state characteristics: population, income per capita, and years existing as a state—they though with interesting differences between employment caselaw and basic

\(^1\) Unless otherwise noted, “the Restatement” refers to the *Restatement of EMP’T Law* (AM. LAW. INST. 2015).
contract caselaw.

(3) Low-caselaw states cite Restatement provisions significantly more. States with less caselaw, and with qualities predicting less caselaw, actually do cite Restatements significantly more – confirming that lower-population, and to an extent lower-income and younger states, do use Restatements to fill gaps in their low-volume caselaw.

Part III(B) notes that Chapter 3 takes clear stances for broader employee rights on several important compensation law points on which states vary: enforceability of policy statements; rights to deferred compensation (like commissions) unpaid as of termination; and implied covenant of good faith rights against terminations depriving imminently due pay. Two key caveats as to this employee-rights orientation are (a) that, unsurprisingly for a Restatement, Chapter 3 is more of a subtle nudge than an aggressive push toward broader employee rights, and (b) that while some other chapters similarly nudge in a pro-employee direction, such as Chapter 5 on discharges in violation of public policy, others do not, such as Chapter 1 on volunteers and Chapter 8 on employee loyalty and non-competition.

After Part III(B) discusses the merits of the Restatement's positions, Part III(C) levies two criticisms of the quality of its work. First, it occasionally cites inapt caselaw, undercutting the Restatement's role as persuasive authority that is useful only to the extent it persuades that its work is sound and well-supported. Second, like all Restatements, it scatters its points across a mix of (a) boldfaced black-letter text, (b) "comments," (c) "illustrations," and (d) "reporters' notes" – leaving the hierarchy of authority far less clear than the authors presumably intended, and even leaving unclear which categories the authors as a whole actually adopted.

The Conclusion notes that the Restatement's imperfections, however, do not doom the project. The simple errors are material limitations on the persuasiveness of the work, but none undercut the Restatement's substantive points; and the half-way nature of the Restatement's assertions of law are inevitable by-products of needing an ideologically diverse author team. Despite its imperfections, the Restatement of Employment Law makes a material contribution to clarifying employment law and nudging, on the whole, toward more robust employee rights.
II. IN FAVOR OF A RESTATMENT OF EMPLOYMENT LAW, AND AGAINST IT'S -ALL-INDETERMINATE NIHILISM – ESPECIALLY AS TO SUBJECTS, LIKE THE CONTRACT-BASED COMPENSATION LAW OF CHAPTER 3, NOT AS INDETERMINATE AS OTHERS

Is the Restatement of Employment Law a success? Answering that requires first asking a more fundamental question: Is “restating” employment law even possible? Specifically: can existing law be described in an authoritative treatise, or does such an effort inevitably just choose favored policy views? The simplest answer might be “both”: “As with any Restatement, Employment Law reflects a tension between faithfully reflecting the prevailing law and improving that law by choosing the better rule.”2 But this is a big question deserving serious analysis, not just the usual shrug that both sides in any debate probably have some validity.

One side argues the Restatement well-describes existing law – the view of its authors and advisors, such as Justice Christine M. Durham:

The benefits of... Restatements, and this Restatement in particular, are... the doctrinal organization, the identification of issues, the bringing of order to the process, and the identification... of areas which are open and evolving.... Restatements are more descriptive than prescriptive[,...] a collection of the judicial thinking[,...] the classic definition of black letter.

On the other side are critics who see the Restatement as not neutral description, but policy advocacy favoring the status quo. Some, like Professor Charles Sullivan, are nuanced, delineating how on some issues the Restatement adopts “dubious... policy choices” yet on others it “fail[s] to address issues of potential importance where it could have made some improvements or at least offered useful guidance.”3 Professor Reuel Schiller more broadly declares the project doomed from the start, answering his rhetorical question, “is there a law to restate,” in the negative:

[T]he real “problem”... the Restatement raises: is there a law to restate, or do we simply have the “laws” of employment... competing for adherents, justified by political preferences and differing conceptions of social justice?... [C]reation of the Restatements [is] a political process, cloaked with and informed by

4. Sullivan, supra note 2, at 1421.
expertise, but essentially politics.\(^5\)

This is no new debate. In law as in science fiction, "[a]ll this has happened before – and will happen again, again, again . . . ."\(^6\) Whether describing "objective, black-letter" law is just politics echoes the century-old formalism-versus-realism debate.

[In] the 1920s and 1930s, . . . Legal Realists were skeptical of the old formalis[m] . . . [L]aw was not a value-free system of objective, black-letter rules . . . Legal rules [and] decisions . . . were hardly neutral . . . despite the Formalists’ claim . . . [to apply] timeless legal principles . . . “scientifically” discovered . . . Realists took a[n] . . . instrument view . . . [that] principles are not carved in stone but are malleable . . . . In the words of the proto-realist Justice Oliver Wendell Holmes, Jr.: "The life of the law has not been logic: it has been experience. The felt necessities of the time, . . . moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share . . ., have had a good deal more to do than the syllogism in determining . . . law[, which] cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."\(^7\)

Given this history, debate over the Restatement’s success or failure must acknowledge the deep roots of the debate over whether its law-describing mission is even possible. This in one sense makes the debate more interesting, but in another sense less so: If is-describing-law-possible is a century-old debate, it would be stunning if someone actually conjured a new point missed by everyone from Holmes and Llewellyn to a slew of brilliant modern scholars whom, for fear of omitting someone I admire, I will mostly not name.\(^8\) While I will not resolve a century-old debate, I take a generally supportive view of the Restatement, in particular of the compensation-and-benefits chapter I analyze in depth, Chapter 3. Because I agree that, given the “now uncontroversial notion that many cases pose indeterminate questions, . . . we’re ‘all legal realists now,’’\(^9\) I must


\(^8\) One example: Pierre Schlag’s brilliant deconstruction of so many debates – formalism and realism, transaction cost analysis, etc. – makes me feel that he is Morpheus in The Matrix, killing my worldview by showing that the reality I knew never existed. E.g., Pierre Schlag, Formalism and Realism in Ruins (Mapping the Logics of Collapse), 95 IOWA L. REV. 195 (2009).

\(^9\) Edward Cantu, Posner’s Pragmatism and the Turn Toward Fidelity, 16 LEWIS & CLARK
explain why I still view the Restatement as, overall, a useful contribution, albeit an imperfect one due to the limits of diverse authors coalescing around specific positions.

Most, but not all, adherents to legal realism, and to the critical legal studies movement echoing realism's view that indeterminacy makes policy pervade law, offer more than "a nihilistic response to the attempt to assign to law any discernible content independent of the moral and political desires of those . . . mak[ing] decisions in the name of the law." But some edge toward nihilism in espousing "the indeterminacy thesis" that "the existing body of legal doctrines . . . permits a judge to justify any result she desires in any particular case. . . . [A] competent adjudicator can square a decision in favor of either side in any given lawsuit with the existing body of legal rules."

Professor Mark Tushnet argues, for example, that "each decision reworks its precedents," "constraints on judges . . . are clearly not terribly restrictive," and "in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants." Saying he speaks of "interesting" cases arguably avoids pure nihilism, but a passing caveat hardly weakens multiple strong declarations of indeterminacy. Professor David Kairys declares that "legal reasoning does not provide concrete, real answers to particular legal or social problems," law is just "a variety of stylized rationalizations that a judge may freely choose from [because] . . . [t]hese rationalizations go every which way," and thus "nothing [in the law . . . determines which rationalization a judge should choose in particular situations]."

Kairys might try to caveat out of nihilism by briefly admitting, "[a]ll outcomes are not equally likely." Yet he then clarifies that "it is only the social context in a particular situation that makes one outcome more likely than another." If only social whim makes one outcome more likely than another, then handicapping outcomes is no more feasible than handicapping social whim.

L. Rev. 69, 72 (2012)
15. Id.
Realist theorists deserve credit for anticipating the Restatement debate a century ago – but in one key way they have it easy, which is how they descend into I-get-it-you-don't nihilism. Pure theorists are freed from the tough tasks facing practicing lawyers, judges, and some other scholars:

(1) actually setting legal doctrine – as appellate judges commonly do;
(2) actually deciding individual cases – as trial judges commonly do;
(3) actually advising clients that they can do X freely, that they cannot do Y without consequence Z, or that Z is probabilistic because of ambiguity in applicable law – as lawyers must do; and
(4) analyzing work of the above types by judges and lawyers alike – as done by the subset of scholars engaged with actual cases.

Those dealing with actual cases know that while “many cases pose indeterminate questions,”16 many do not, as Professor Frederick Schauer has noted:

Law is not only about hard cases. There are easy ones.... Understanding law requires awareness not only of litigated and... appealed disputes, but... routine application of legal rules.... [T]he everyday determinacy of law [includes] the production of clear guidance and uncontested outcomes by straightforward legal language, black-letter law, and... conventional... reasoning.... Realism’s skepticism about the constraints of... law applies only to... [a] sliver of legal events....

That law is determinate in the many easy cases theorists rarely address can hardly be denied by any realistic form of realism. Holmes himself, an early “proto-realist,”17 was no nihilist rejecting any project of accurately describing the law. While spurring early legal realism by observing that “[t]he life of the law has not been logic... as if... a book of mathematics,” instead deriving from “necessities of the time,” morality, politics, and prejudices, Holmes placed a high priority on describing law so as to predict outcomes: “The object of our study,” Holmes wrote at the start of The Path of the Law, “is prediction, the prediction of the incidence of the public force through

16. Cantu, supra note 9, at 72.
the instrumentality of the courts.\textsuperscript{19} Such work requires both describing the law as it is and deciding what the law should be in the face of case-specific ambiguities and controversies between multiple legal rules.

Thus the strongest Restatement criticism—that trying to restate indeterminate law is just choosing values—reprises the nihilistically strong form of indeterminacy theory that lacks real-world nuance. True, describing law in a tome courts accept might make current law persist. Yet with most cases not in the grey area of “interesting case[s]” theorists address,\textsuperscript{20} but instead requiring “routine application” of law,\textsuperscript{21} clarifying the law has real value to the Holmesian project of “prediction of the incidence of the public force through the instrumentality of the courts.”\textsuperscript{22}

Further, assume a nihilist all-is-indeterminate theory is right: if the law is so indeterminate that judges can decide cases in any way, then a Restatement hardly binds future judges who may disagree with its choices. If law is too indeterminate for a Restatement, it is too indeterminate for a Restatement to ossify law.

As in many theoretical debates, is-describing-law-possible is a far too general framing of the question. Some fields feature far more indeterminacy than others, and those seeing “law” as indeterminate use examples disproportionately from highly charged areas of constitutional law, like reproductive, speech, and criminal defense rights.\textsuperscript{23} Many areas of employment and labor law are just as highly charged, and thus infused with too much politics to restate neutrally, such as certain statutes and common-law doctrines on labor rights.\textsuperscript{24} But the reality that politics may dominate those fields proves little about the determinacy of common-law contract and tort rights, which can be quite clear in the run of everyday cases.

Where do the topics within the Restatement of Employment Law fit into the spectrum of how indeterminate various legal fields are? The short answer is, “middle”; the longer answer is that employment law is such a heterogeneous mix that some subfields are far more

\begin{itemize}
\item \textsuperscript{19} Oliver Wendell Holmes, \textit{The Path of the Law}, 10 Harv. L. Rev. 457, 457 (1897).
\item \textsuperscript{20} Tushnet, supra note 12, at 819.
\item \textsuperscript{21} Schauer, supra note 17, at 749.
\item \textsuperscript{22} Holmes, supra note 19, at 457.
\item \textsuperscript{23} See, e.g., Tushnet, supra note 12, at 815-20 (citing constitutional law examples in those areas).
\item \textsuperscript{24} See, e.g., Kairys, supra note 13, at 248, 258-60 (citing labor and employment examples in those areas).
\end{itemize}
heavily laden with indeterminacy-driven policy choices than others. As the Restatement acknowledges, states vary greatly on major issues such as to what extent states should bar discharges against public policy\textsuperscript{25} or non-competition agreements,\textsuperscript{26} just to pick two issues earning whole or nearly whole chapters. But employment law features a great many cases that well-settled law can dispose of with clarity, given (for example) the nearly universal employment-at-will rule that makes the vast majority of terminations perfectly lawful\textsuperscript{27} and the uncontroversial applicability of basic contract principles to most compensation disputes.\textsuperscript{28} Thus not all, but much, of employment law is a field that well-typifies “the everyday determinacy of law,” as Schauer put it, because the field “is not only about hard cases,” but also about those susceptible to “clear guidance” based on “straightforward legal language [and] black-letter law.”\textsuperscript{29}

In sum, I find overstated the argument that a Restatement cannot succeed because all it can do is ossify current policy choices. That risk exists, but varies: in areas with less indeterminacy, like employment contracts and compensation, a Restatement is most feasible; in more indeterminacy-driven areas, a Restatement likely would not stop states from choosing differently. I take a relatively positive view of a Restatement not as a reflexive supporter of existing doctrine; I have long agreed with Restatement critics on substantive employment law, such as arguing for a broader range of at-will exceptions,\textsuperscript{30} for wage law to protect earned pay against forfeiture,\textsuperscript{31} and for protecting deferred pay against opportunistic firing with an implied covenant of good faith.\textsuperscript{32} The latter two points – compensation and benefits – are

\begin{footnotes}
\footnote{25. See generally RESTATEMENT OF EMP’T LAW ch. 5 (AM. LAW INST. 2015).}
\footnote{26. See generally id. ch. 8.}
\footnote{27. See, e.g., Rachel Arnow-Richman, Response to Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Putting the Restatement in Its Place, 13 EMP. RTS. & EMP. POL’Y J. 143, 154 (2009) (seeing “little value in expending political capital over whether employment at will is in fact the default rule, a decided point”).}
\footnote{28. E.g., Soderlun v. Pub. Serv. Co. of Col., 944 P.2d 616, 619 (Colo. 1997) (holding that the common law “has not purported to create any special rules . . . [for] employee claims of contract breach[.] Hence, our analysis . . . must comport with . . . traditional contract precepts”).}
\footnote{29. Schauer, supra note 17, at 749.}
\footnote{30. Scott A. Moss, Where There’s at-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will, 67 U. PITT. L. REV. 295 (2005) (arguing to harmonize states’ at-will exceptions: implied covenant; fraudulent inducement; public policy discharge).}
\footnote{31. Reyes v. Snowcap Creamery, Inc., No. 11-CV-02755-JLK-KMT, 2014 WL 1101446, at *1 (D. Colo. Mar. 20, 2014) (denying Defendant’s motion for new trial after unpaid wage judgment for Plaintiff: “Mr. Reyes was entitled to recover for his last five days . . . Snowcap had no legal setoff . . . for $5103 . . . loaned to Mr. Reyes to fund his efforts to obtain a work visa”).}
within Restatement Chapter 3, which Section III now analyzes.

III. THE SUCCESSES OF CHAPTER 3: STRENGTHENING RIGHTS TO DEFERRED PAY AND CLARIFYING CONTRACT AND COMPENSATION LAW THAT, EMPIRICAL ANALYSIS SHOWS, IS SPARSE IN MANY STATES THAT THUS RELY MORE ON RESTATEMENTS

Chapter 3 of the Restatement covers compensation issues that, because they base on relatively well-established contract law, are among the fields most readily susceptible to a Restatement. Yet even Chapter 3 features policy-based decision-making on key disputed issues, and its need to delve into disputed policy-making results in a somewhat confusing mix of different types of guidance.

As subpart A notes, Chapter 3 does a strong job describing existing consensus law – which can help states lacking a strong body of relevant precedent. Several empirical analyses in subpart A confirm the striking dearth of caselaw in certain types of states, including on compensation law – and that such states do cite Restatements especially often to fill in their caselaw gaps.

As subpart B details, Chapter 3 does a strong job taking stands on important issues on which states are split: (1) enforceability of employer policy statements; (2) rights to deferred compensation (especially commissions) not yet paid when employment ends; and (3) implied covenant of good faith rights against an employer terminating an employee to avoid some imminently due payment. Notably, the Restatement resolved all three of those issues in favor of broader employee rights – which the Restatement as a whole arguably did, but to a modest degree, and with other chapters adopting more pro-employer stances.

As subpart C details, the Restatement as a whole suffers from two weaknesses in its craftsmanship: on several key points, cited caselaw is inapt or overstated; and all Restatements engender confusion by splitting their points among a mix of black-letter text, "comments," "illustrations," and "reporters' notes" – leaving unstated the hierarchy of authority, or which ones the authors actually adopted.
A. Fifty-State Empirical Analysis Confirms the Value of Restating the Law: Some States Have Far Less Caselaw and Rely More on Restatements

Much compensation law applies established contract law, just with occasional ambiguities and departures in some states. Chapter 3 recites prevailing law clearly, adding clarity by rejecting arguments that fail in most, but not all, states.

- **Sanctity of earned pay.** Even at-will employees enjoy basic contract rights to compensation they already did the work to earn, sections 3.01-3.03 confirm, including the undisputed part of any pay under dispute.

- **Policy statements can bind.** Per sections 3.01-3.02, employees can rely on policy statements short of formal contracts as long as circumstances show intent to bind to a commitment definite enough to enforce.

- **Ability to modify or revoke prior binding statements.** While employer promises and policy statements can bind, they differ from individual or collectively bargained agreements, in that employers can modify or revoke them, but only upon reasonable notice, and not if an individual employee reasonably, detrimentally relied upon the commitment.

But the straightforwardness of much compensation and benefits law is a mixed bag: it makes a restatement more feasible and legitimate, yet less useful. What is the point of restating law so well-established it is easy to restate? One answer is that where law is relatively uniform, **Restatements** help states with less caselaw. I have practiced in Colorado, where caselaw can be sparse, so lawyers

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33. Restatement of Emp't Law § 3.01(a) (Am. Law Inst. 2015) (as to compensation generally: "Whether the employment relationship is terminable at will or terminable only for cause, employees have a right to be paid the wages, salary, commissions, and other forms of compensation they have earned"); id. § 3.02(a) (same for bonuses and incentive pay); id. § 3.03(a) (same for benefits).

34. Id. § 3.01(c) (as to compensation generally: "Employees have a right to be timely paid the wages, salary, and other compensation they have earned. If there is a bona fide dispute as to whether all . . . has been earned, the employee has a right to be timely paid any part . . . not in dispute"); id. § 3.02(c) (same, bonuses and incentive pay); id. § 3.03(c) (same, benefits).

35. Id. § 3.01(b) (as to compensation generally: "Whether compensation has been earned is determined by the agreement . . . or any relevant binding employer promise or . . . policy statement"); id. § 3.02(b) (same, bonuses and incentive pay); id. § 3.03(a) (same, benefits).

36. (a) . . . employer may prospectively modify or revoke any prior binding employer promise or . . . policy statement on compensation by providing reasonable notice . . .

(c) . . . modifications and revocations cannot, absent agreement with the affected employees: (1) adversely affect rights under any agreement between the employer and the employee (including any collective-bargaining agreement); or (2) adversely affect any vested or accrued employee rights . . . created by a binding employer policy statement, or by reasonable detrimental reliance on a binding employer promise.

Id. §§ 3.04(a),(c) (citations to other Restatement sections omitted).
commonly research other states and secondary sources, and in New York, where there is so much caselaw that other citations are less often needed, and thus less common.

But serious analysis cannot be based on unproven, anecdotal conventional wisdom such as that some states have much less caselaw than others and use Restatements to fill in caselaw gaps. I undertook a series of empirical analyses to examine whether the following hypotheses supporting the utility of a restatement are true:

(1) that caselaw volume varies substantially across states;
(2) that caselaw volume varies not randomly, but predictably by state characteristics, making certain states reliably low- or high-caselaw;
(3) that low-caselaw states do cite Restatements more, rather than cite other states’ cases, other secondary sources, or less authority overall.

Each of the four subparts below details the data, methodology, and findings of the empirical tests of each of the four hypotheses above.

1. Finding #1: States Caselaw Volume Varies Quite Substantially

The first empirical analysis simply attempted to measure the volume of caselaw in each state on employment contracts and compensation, as well as on basic contract law generally (for comparison, and because employment contract/compensation law is, to a large extent, a subset of basic contract law).

The problem is that there is no plausible way to count all contract cases, or all employment contract/compensation cases, in a state: there are far too many; and any caselaw search would be both overinclusive (e.g., decisions on any subject may have the word “contract” appear once) and underinclusive (e.g., cases about employment “handbooks,” “manuals,” “policies,” or other words sometimes used to characterize contractually binding documents). Thus, any count of cases appearing in a search would be merely a proxy for the state’s total caselaw volume, not a full count of the state’s cases. Accordingly, the goal was to find searches that would be reliable proxies for the state’s caselaw volume in the area (employment contracts/compensation or basic contracts). If multiple different searches yielded highly correlated results – that is, if two searches generated similar lists of which states had high or low caselaw volume – then those searches are reliable proxies.
I ran searches counting each state's number of reported decisions in each of four Westlaw searches: two broad searches on employee contracts or compensation – one on when employee bonuses or commissions become guaranteed (search 1a below), the other on employment contract modification (search 1b); and two similarly broad Westlaw searches on more basic contract doctrines not limited to the context of employment – consequential damages (search 2a) and anticipatory breach (search 2b). The results showed that caselaw volume does not vary greatly by subtopic, in that the results of each of the two topics correlation proved very high between each pair of searches:

- the number of cases in each of the employment compensation and contract searches (1a and 1b) was 77.8 percent correlated (i.e., \( r = .778 \)); and
- the number of cases in each of the two basic contract searches (2a and 2b) was 96.2 percent correlated (i.e., \( r = .962 \)).

Thus, the quantity of contract caselaw, and of employment contract/compensation caselaw, is highly consistent across different search topics; for states with many anticipatory breach cases, for example, almost all have many consequential damages cases too. Searches 1a and 1b therefore are fair proxies for the quantity of *employment contract and compensation* caselaw in a state, while 2a and 2b are fair proxies for the quantity of *basic contract* caselaw in a state.

A tally of the search results in both areas, employment contracts/compensation law and basic contract law, confirms that states vary widely, not just modestly, in their caselaw volume – and the ranges were quite similar in both areas:

- in employment contract/compensation, the top 25 percent of states averaged *almost ten times* more cases (300) than the bottom 25 percent (31); and
- in basic contract law, the top 25 percent of states averaged *just over eleven times* more cases (428) than the bottom 25 percent (38).

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37. Following were the exact terms in each search:

- #1a: (bonus! commission!) /s (vest! guarantee!) /s (employee worker sales!)
- #1b: (modification novation revoc! revok! rescil) /s (contract! agreement) /s (employee worker)
- #2a: anticipat! /2 (breach! repudiat!)
- #2b: "consequential damages" /s (contract! agreement).
Below, Table 1 shows the range of variation among states, then the populations of the states in the top 25 percent and bottom 25 percent by caselaw volume.

**TABLE 1:**
State Caselaw Volume, with Averages of Top & Bottom 25 percent of States

<table>
<thead>
<tr>
<th>Search</th>
<th>1a+1b</th>
<th>Search</th>
<th>2a+2b</th>
</tr>
</thead>
<tbody>
<tr>
<td>#cases</td>
<td>#stat</td>
<td>#cases</td>
<td>#stat</td>
</tr>
<tr>
<td>11(minimum)</td>
<td>8</td>
<td>25(min.)</td>
<td>7</td>
</tr>
<tr>
<td>43 - 57</td>
<td>7</td>
<td>42 - 48</td>
<td>5</td>
</tr>
<tr>
<td>67 - 79</td>
<td>5</td>
<td>50 - 69</td>
<td>6</td>
</tr>
<tr>
<td>83 - 88</td>
<td>6</td>
<td>75 - 100</td>
<td>5</td>
</tr>
<tr>
<td>90 - 97</td>
<td>4</td>
<td>101 - 145</td>
<td>8</td>
</tr>
<tr>
<td>101 - 150</td>
<td>7</td>
<td>154 - 179</td>
<td>7</td>
</tr>
<tr>
<td>152 - 180</td>
<td>6</td>
<td>201 - 380</td>
<td>8</td>
</tr>
<tr>
<td>230</td>
<td>7</td>
<td>451</td>
<td>4</td>
</tr>
</tbody>
</table>

**Avg. #cases, bottom** | **Avg. #cases, bottom**
| **Avg. #cases, top** | **Avg. #cases, top**

423
TABLE 2:
States with Top & Bottom 25 percent Caselaw Volume & Their State Population Rank

<table>
<thead>
<tr>
<th>State</th>
<th>Rank in: Contract Caselaw</th>
<th>State Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Texas</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>California</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Ohio</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>Connecticut</td>
<td>5</td>
<td>29</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td>Illinois</td>
<td>7</td>
<td>5</td>
</tr>
<tr>
<td>Georgia</td>
<td>8</td>
<td>9</td>
</tr>
<tr>
<td>New Jersey</td>
<td>9</td>
<td>11</td>
</tr>
<tr>
<td>Missouri</td>
<td>10</td>
<td>18</td>
</tr>
<tr>
<td>Florida</td>
<td>11</td>
<td>4</td>
</tr>
<tr>
<td>Washington</td>
<td>12</td>
<td>13</td>
</tr>
<tr>
<td>New Mexico</td>
<td>39</td>
<td>36</td>
</tr>
<tr>
<td>North Dakota</td>
<td>40</td>
<td>48</td>
</tr>
<tr>
<td>Montana</td>
<td>41</td>
<td>44</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>42</td>
<td>42</td>
</tr>
<tr>
<td>Wyoming</td>
<td>43</td>
<td>50</td>
</tr>
<tr>
<td>Vermont</td>
<td>44</td>
<td>49</td>
</tr>
<tr>
<td>West Virginia</td>
<td>45</td>
<td>37</td>
</tr>
<tr>
<td>Nevada</td>
<td>46</td>
<td>35</td>
</tr>
<tr>
<td>Maine</td>
<td>47</td>
<td>41</td>
</tr>
<tr>
<td>South Dakota</td>
<td>48</td>
<td>46</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>49</td>
<td>43</td>
</tr>
<tr>
<td>Hawaii</td>
<td>50</td>
<td>40</td>
</tr>
</tbody>
</table>

Thus, states vary in caselaw volume greatly – more than I, at least, had assumed – and consistently across different areas of law.
Table 2 shows one clear pattern: the top 25 percent of states by caselaw volume were almost all high-population states; the bottom 25 percent were all low-population. But the caselaw-to-population correlation is high, not perfect, warranting further analysis of whether other identifiable state characteristics, beyond population, predict caselaw volume.

2. Finding #2: Caselaw Variance is Not Random: Nearly Three-Quarters of Variance is Predicted by Three Characteristics—Population, Income Per Capita, and Years Existing as a State

I ran multivariate ordinary least-squares regressions to examine whether the number of cases in those searches correlated with three characteristics that, I hypothesized, might influence the caselaw volume of a state.

- **Hypothesis 1**: State population correlates positively with caselaw volume, simply because there will be more lawsuits where there are more people. The dependent variable for this hypothesis was state population as of 2010, the most recent year with full census data.  
  
- **Hypothesis 2**: State age correlates positively with caselaw volume; states must exist to issue decisions, and new states' bars and courts are less developed. The dependent variable was years the state has existed since 1850, because few reported decisions precede the mid-1800s.  
  
- **Hypothesis 3**: State income correlates positively with caselaw volume, because high-income states have more lawyers and affluent businesses funding caselaw-generating appeals. The dependent variable for this hypothesis was per capita income in 2000, a year chosen to avoid possible skewing effects of the recessions of 2001 and 2008.

---


I tested other cutoffs: years since admission, since 1861, or since 1900; and a dummy variable of whether a state was admitted before 1800, 1850, 1861, or 1900. The year that most strongly correlated with number of decisions was 1850, though for the dummy variable, a cutoff of 1861 was more heavily correlated — but the superiority of both to a “total years since admission as a state” variable confirm that years since the mid-1800s are most relevant.

The regression findings indicate that caselaw volume does vary with each of the hypothesized variables, but to different extents, and differently by subfield.

- **Population** is the strongest predictor of caselaw volume, highly significant for both basic contract and employment caselaw. The significance rose after replacing the population and caselaw volume variables with their natural logs, to correct for the skewed distribution of each. The population-to-caselaw relationship is essentially linear, confirming that the relationship is simple: more people generate proportionately more caselaw.

- **State income** predicted basic contract but not employment caselaw, while **state age** predicted employment but not basic contract caselaw – a surprising yet logical split: employment cases base on the number of workers (i.e., state age and population); contract cases may depend on businesses and lawyers funding commercial suits through appeal.

---

I chose 2000, rather than 2010, because I wanted to avoid income being skewed by recent events because what is under study is caselaw from long ago to present. The 2008 recession was deep, so it easily could have changed state incomes; the 2001 recession was mild but, by centering around the tech sector, could have impacted income in certain states more than others.
## TABLE 3:

OLS Regression Results, Caselaw Volume – Employment Contract/Compensation (Models 1a-1e) & Basic Contracts (2a-2c)

<table>
<thead>
<tr>
<th></th>
<th>Model 1a</th>
<th>Model 1b</th>
<th>Model 1c</th>
<th>Model 1d</th>
<th>Model 1e</th>
<th>Model 2a</th>
<th>Model 2b</th>
<th>Model 2c</th>
</tr>
</thead>
<tbody>
<tr>
<td>#Cases, Emp. Contract &amp; Compensation</td>
<td>1.493E-05***</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2.306E-05***</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(9.84)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(8.91)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ln(Population)</td>
<td>0.667***</td>
<td>0.686***</td>
<td>0.649***</td>
<td>0.670***</td>
<td></td>
<td>0.651***</td>
<td>0.666***</td>
<td></td>
</tr>
<tr>
<td>(8.66)</td>
<td>(9.16)</td>
<td>(8.46)</td>
<td>(9.04)</td>
<td></td>
<td></td>
<td>(8.66)</td>
<td>(9.81)</td>
<td></td>
</tr>
<tr>
<td>State age (since 1850)</td>
<td>0.441</td>
<td>5.631E-03*</td>
<td></td>
<td></td>
<td></td>
<td>5.676E-03**</td>
<td>7.562E-03</td>
<td>1.360E-03</td>
</tr>
<tr>
<td>(1.17)</td>
<td>(1.98)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(2.02)</td>
<td>(0.01)</td>
<td>(0.49)</td>
</tr>
<tr>
<td>State, pre-1850?</td>
<td></td>
<td>0.267*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(1.77)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Income (per capita)</td>
<td>4.914E-04</td>
<td>2.717E-06</td>
<td>2.675E-06</td>
<td>9.702E-07</td>
<td></td>
<td>8.861E-03**</td>
<td>5.139E-05***</td>
<td>5.217E-05***</td>
</tr>
<tr>
<td>(0.21)</td>
<td>(0.16)</td>
<td>(0.16)</td>
<td>(0.06)</td>
<td>(2.23)</td>
<td></td>
<td>(3.17)</td>
<td>(3.26)</td>
<td></td>
</tr>
<tr>
<td>Constant</td>
<td>-44.27</td>
<td>-6.564***</td>
<td>-6.159***</td>
<td>-5.602***</td>
<td>-6.540***</td>
<td>-221.8</td>
<td>-6.820***</td>
<td>-6.866***</td>
</tr>
<tr>
<td>(-0.56)</td>
<td>(-6.37)</td>
<td>(-5.67)</td>
<td>(-5.03)</td>
<td>(-6.49)</td>
<td>(-1.67)</td>
<td>(-6.79)</td>
<td>(-6.92)</td>
<td></td>
</tr>
<tr>
<td>Observations</td>
<td>50</td>
<td>50</td>
<td>50</td>
<td>50</td>
<td>50</td>
<td>50</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>Adjusted R²</td>
<td>0.717</td>
<td>0.715</td>
<td>0.710</td>
<td>0.725</td>
<td>0.721</td>
<td>0.693</td>
<td>0.732</td>
<td>0.737</td>
</tr>
</tbody>
</table>

Thus, not only do some states have an order of magnitude less caselaw, but the variance among states is not random: having less caselaw is a predictable result of being a smaller state (as to both basic contract and employment contract/compensation caselaw), a poorer state (as to basic contract caselaw), and a newer state (as to employment caselaw). So there is reason to suspect that a Restatement, even as to law well-established in high-caselaw states, might be of more use to many states – those with less caselaw, and those that by their basic characteristics (population, income, age) are less likely to generate much caselaw.
3. Finding #3: States with Low Caselaw, and Qualities Predicting Low Caselaw, Do Cite Restatement Provisions Significantly More

But the evidence of sparser caselaw in lower-population, lower-income, and newer states shows only that such states *might*, or *should*, rely on *Restatements* — not that they *do*. The two small “V” jurisdictions instructively differ:

- Vermont legislatively declared its preferred persuasive authority in the late 1700s — the common law of neighboring states: “the legislature adopted ‘that common law, as it is generally practiced and understood in the New England states. . . . as the common law of this state.”[^41]

- The Virgin Islands legislatively declared that *all Restatements* are not only preferred persuasive authority, but *binding* authority: “[R]ules of the common law, as expressed in the restatements . . . ., shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.”[^42]

I ran regressions to examine whether lower-population or younger states rely more on *Restatements*. Unfortunately, we will not have enough data on citation to the *Restatement of Employment Law* until years, or perhaps decades, after its 2015 publication.[^43] Rather than wait until 2035 to attempt a study, however, I approached the question another way: examining states’ usage of a different *Restatement* on related common law — the *Restatement of Contracts*, which dates to 1932.

Because low-population states have far less caselaw, they have fewer cites to all authorities, including *Restatements* — so the question is whether lower-caselaw states cite *Restatements* more *per case*. As a measure of state caselaw that might cite the *Restatement of Contracts*,


[^43]: As of late September, 2017, a Westlaw search showed only twenty cases, state or federal, citing the *Restatement of Employment Law*: between 2009 and mid-2015, seven cited a pre-publication draft; from mid-2015 to mid-September 2017, thirteen cited the published version.
I did searches on two basic contract law issues that vary little by state: consequential damages and anticipatory breach. Broad searches for state cases on each doctrine yielded over 4000 on each, and the number of cases in each search was highly correlated across the fifty states (r = .962, or a 96.2 percent correlation) – confirming that basic contract caselaw volume is highly consistent across different searches. So while these searches do not exhaustively tally all contract law, they are a reliable proxy for the volume of contract caselaw.

I ran a regression to examine whether states cite the Restatement of Contracts at a higher rate when they have less caselaw or when they have the characteristics predicting caselaw volume – population, income, and age. The findings indicate that low-caselaw states do cite the Restatement at a significantly higher rate, as do states with various of the characteristics correlated with caselaw volume:

- **Caselaw volume** significantly predicts Restatement cite rate negatively, as expected: low-caselaw states cite the Restatement more; high-caselaw states cite it less (Models 3a-3b in Table 4).
- **Population** significantly predicts Restatement cite rate negatively, as expected: low-population states cite the Restatement more; high-population states cite it less (Models 4-4d in Table 5). The relationship held whether the model included both other relevant state characteristics (income and age, in

---

44. While subtle state differences exist, all fifty recognize the doctrine and apply the rule from the same leading case: “Hadley v. Baxendale has been recognized in American jurisprudence as the definitive source for... when consequential damages may be recovered. ... [It] is cited with approval by the highest court of 43 states. ... The rule of Hadley is accepted by the highest court of three states, but not by name. ... In the remaining four states, appellate decisions have referred to and accepted Hadley.” Thomas A. Diamond & Howard Foss, *Consequential Damages for Commercial Loss: An Alternative to Hadley v. Baxendale*, 63 FORDHAM L. REV. 665, 665-66 & n.3 (1994).


46. Following were the searches: anticipat! /2 (breach! repudiat!) and “consequential damages”/s (contract! agreement).

47. As expected, the statistical significance was higher, and the model was a better fit, after replacing the number of cases (the variable in Model 3a) with the natural log of the number of cases (the variable in Model 3b), to correct for the non-normal distribution of the variable due to larger states having an order of magnitude more caselaw.

48. As expected, the statistical significance was higher, and the model was a better fit, after replacing population (the variable in Model 4a) with the natural log of population (the variable in Models 4b-4d), to correct for the non-normal distribution of the variable due to larger states having an order of magnitude higher population.
Model 4b) or just one of the other state characteristics (just age in Model 4c, just income in 4d).

- **State age** significantly predicts *Restatement* citation rate – negatively, as expected: newer states cite the *Restatement* more; older states cite it less (Models 4b & 4c in Table 4).

- **Income** significantly predicts *Restatement* citation rate – positively, which was neither expected nor unexpected: on the one hand, higher-income states have more caselaw, which predicts fewer *Restatement* cites; on the other hand, these regressions control for population (the variable most strongly driving caselaw volume), so they find only that, other things being equal, higher-income states cite *Restatements* more. A possible explanation is that, just as more income drives more litigation, it also drives more deeply-researched briefings with more citations, including to *Restatements* (Models 4b & 4d in Table 4).
TABLE 4

OLS Regression Results, Restatement of Contracts Citation Rate – by State Caselaw Volume (Models 3a-3b) & State Characteristics (4a-4d)

<table>
<thead>
<tr>
<th></th>
<th>Model 3a</th>
<th>Model 3b</th>
<th>Model 4a</th>
<th>Model 4b</th>
<th>Model 4c</th>
<th>Model 4d</th>
</tr>
</thead>
<tbody>
<tr>
<td>Restatement Cites per Contract Case (same dependent variable, Model 3a-4c)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>#Cases, basic contract</td>
<td>-2.723E-03***</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(2.82)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>In(#Cases, basic contract)</td>
<td></td>
<td>-0.678***</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(3.94)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Population</td>
<td></td>
<td></td>
<td>-9.914E-08***</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(-3.94)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>In(Population)</td>
<td></td>
<td></td>
<td></td>
<td>-0.722**</td>
<td>-0.538***</td>
<td>-0.899***</td>
</tr>
<tr>
<td>(-4.08)</td>
<td></td>
<td></td>
<td></td>
<td>(-2.65)</td>
<td>(-5.31)</td>
<td></td>
</tr>
<tr>
<td>State age (since 1850)</td>
<td></td>
<td></td>
<td>-0.020***</td>
<td>-0.016**</td>
<td>-0.013*</td>
<td></td>
</tr>
<tr>
<td>(3.20)</td>
<td></td>
<td></td>
<td>(-2.43)</td>
<td>(-3.20)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Income (per capita)</td>
<td>1.692E-04***</td>
<td>1.687E-04***</td>
<td>1.596E-04***</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(4.38)</td>
<td>(4.42)</td>
<td>(4.00)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constant</td>
<td>3.080***</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(12.05)</td>
<td>(5.602)</td>
<td>(1.184)</td>
<td>(4.762)</td>
<td>(4.619)</td>
<td>(4.767)</td>
<td></td>
</tr>
<tr>
<td>Observations</td>
<td>50</td>
<td>50</td>
<td>50</td>
<td>50</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>Adjusted R²</td>
<td>0.124</td>
<td>0.152</td>
<td>0.445</td>
<td>0.455</td>
<td>0.241</td>
<td>0.398</td>
</tr>
</tbody>
</table>
For the Top- & Bottom-10 Restatement-Citing States, Comparison of States’ Ranks by Restatement Citations, by Population, by Age, & by Income

Table 5 lists the top and bottom ten states by rate of *Restatement of Contracts* citation, and it shows each of those states’ ranks among the fifty states in contract caselaw volume, population, income, and state age. The shaded ranks for caselaw volume, population, income, or age show where the state is in the top half of what would be expected to predict its *Restatement* citation rate. Several examples and patterns illustrate that the top and bottom states largely reflect
the regression findings about what state characteristics predict high or low restatement cite rates – with some notable exceptions that appear to have historical explanations.

- Alaska is first, and Hawaii third, in Restatement cites – as is predicted by their rank in the bottom half of the states by caselaw, population, and age, as well as their rank in the top half of the states by income.
- Most states in the top ten do have low caselaw, low population, and either a low state age or a high state income; most in the bottom ten have the opposite. The bottom row shows that seventeen out of twenty of these states are where their population predicts, fifteen out of twenty are where their caselaw volume predicts, and twelve out of twenty are where their state age and population predict.
- The most striking exceptions are Massachusetts and Pennsylvania having top five Restatement cite rates despite being high-caselaw, high-population, and old states – qualities significantly predicting low rates.

The Massachusetts/Pennsylvania defiance of otherwise strong patterns in which states cite Restatements is curious, but possibly explicable by history. As of the 1930s creation of the Restatement of Contracts, Massachusetts and Pennsylvania had a disproportionate share of the east coast legal establishment, and thus the national legal establishment at the time. Perhaps courts in those states were early adopters of the Restatement, making it logical that later courts in those states would continue to rely on authority their states endorsed and cited very early. Westlaw searches seem to confirm this hypothesis: in the first decade after the Restatement's 1932 publication, it was cited by mid- to large-sized states from the east coast to the midwest (i.e., states comparable to Massachusetts and Pennsylvania) the following number of times:
TABLE 6:

Selected States’ Cites to the *Restatement of Contracts* (RST-K) in Its First Decade

<table>
<thead>
<tr>
<th>State</th>
<th>#RST-K Cites (through 1942)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pennsylvania</td>
<td>115</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>62</td>
</tr>
<tr>
<td>New York</td>
<td>32</td>
</tr>
<tr>
<td>Maryland</td>
<td>15</td>
</tr>
<tr>
<td>Illinois</td>
<td>11</td>
</tr>
<tr>
<td>New Jersey</td>
<td>10</td>
</tr>
<tr>
<td>Ohio</td>
<td>7</td>
</tr>
<tr>
<td>Michigan</td>
<td>2</td>
</tr>
<tr>
<td>Virginia</td>
<td>2</td>
</tr>
</tbody>
</table>

Overall, the statistical findings in this subpart, summarized in the below table, all corroborate each other.

(1) Some states have not just less caselaw, but much less caselaw, often 90 percent less than other states – and that high variance was nearly identical for basic contract law and for employment contract/compensation law.

(2) The states with less caselaw are no random mix – they tend to be lower-population, poorer, and younger states; so a *Restatement* is especially useful to an identifiable set of states.

(3) The states with lower caselaw really do cite *Restatement* provisions significantly more, showing that states do use *Restatements* to fill the gaps when their caselaw is sparse.

The caveat on the above findings – that basic state characteristics like population, age, and income do predict *Restatement* usage is – is that *Restatement* usage depends as well on historical factors. Specifically, some state courts start citing *Restatement* provisions soon after that *Restatement*’s publication, which makes those states as early adopters more likely to continue citing that *Restatement*. That path-dependence of *Restatement* usage means that while we will not know for many years or decades whether the *Restatement of Employment Law* will prove to be widely used, its usage may well depend on
whether many or few state courts start citing it in its first few years.

**TABLE 7:**

Summary of Variables & Findings in All OLS Regressions

<table>
<thead>
<tr>
<th>Hypothesis</th>
<th>Model</th>
<th>Dependent Variable</th>
<th>Independent Variables</th>
<th>Adj.R²</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Caselaw Volume, in Employment Contract &amp; Compensation, Varies by State Population, Age, &amp; Income</td>
<td>1(a)</td>
<td>#Cases, Employment Contract &amp; Compensation</td>
<td>Population*** (t=9.84, p&lt;0.01)</td>
<td>0.717</td>
</tr>
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## B. Chapter 3 Takes Clear and Pro-Employee Stances on Disputed Issues (Policy Statements, Deferred Pay, and Implied Covenants) – But with Modest Nudges, and Contrary to Other Chapters’ Pro-Employer Stances

One key critique of the *Restatement* overall was that, by accepting the existing legal regime, it adopted the pro-employer viewpoints that pervade the modern employment-at-will regime and that support aggressive remedies for employers suing employees.\(^{49}\)

\(^{49}\) See, e.g., Kenneth G. Dau-Schmidt, *A Conference on the American Law Institute’s Proposed Restatement of Employment Law*, 13 EMP. RTS. & EMP. POL’Y J. 1, 17 (2009) (reporting criticisms of *Restatement* by a Committee of the Labor Law Group that the author chaired: “On the . . . presentation of the employment at will rule as the default rule . . . , the working committee argues that this is the wrong time to construct a general Restatement in this regard because there is significant diversity among the jurisdictions on default rules and because this doctrine is in flux. The committee members worry that a Restatement enshrining such a simple statement of the employment at will rule will chill further development of the law.” (citing Matthew W. Finkin et al., *Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination*, 13 EMP. RTS. & EMP. POL’Y J. 93, 94-95 (2009)).

\(^{50}\) See, e.g., Sullivan, *supra* note 2, at 1392 (noting that, “[i]t perhaps more than most Restatements, . . . *Employment Law* was resisted at the outset precisely because of concerns that it would faithfully reflect at least the dominant themes of the current law, thereby tending to ‘freeze’ the law in undesirable forms . . . because, in the view of the opponents, the case law was overly deferential to employers,” and finding this critique valid as to the *Restatement’s* chapters on privacy and remedies law in particular).
Yet even many Restatement critics admit that it "it is actually more progressive than most of the decided cases" in many areas\textsuperscript{51} – just not as progressive as critics would have liked, because the Restatement was bound to "faithfully reflect at least the dominant themes of the current . . . case law."\textsuperscript{52}

Chapter 3 resolves several important, unsettled issues in compensation law by siding with employees' arguments over employers', as subpart 1 notes. Two key caveats to this observation about the Restatement's pro-employee stances, however, are detailed in subpart 2: (a) unsurprisingly for a Restatement, Chapter 3 is more a subtle nudge than an aggressive push toward broader employee rights; and (b) while some other chapters similarly lean pro-employee, like Chapter 5 on discharge in violation of public policy, others arguably lean pro-employer, such as Chapter 1 on volunteers and Chapter 8 on employee loyalty and non-competition.

1. Disputed Issues on which Chapter 3 Endorses Broader Employee Rights

a. The Enforceability of Binding Policy Statements

The enforceability of "any . . . binding employer policy statement" under Restatement sections 3.01-3.02\textsuperscript{53} may seem uncontroversially circular – a statement binds if it is binding – but it actually is contrary to established caselaw in numerous states that "view handbook pronouncements as mere statements of policy without any enforceable effect."\textsuperscript{54} Most notably, the New York high court repeatedly has rejected claims that employer "policies" and "policy manuals" bind, cautioning courts against "lightly" ruling them contractual so as to "convert" them into something "binding":

Routinely issued employee manuals, handbooks and policy statements should not lightly be converted into binding employment agreements. That would . . . subject employers who have developed written policies to liability for breach of employment contracts upon the mere allegation of reliance on a particular provision.\textsuperscript{55}

\textsuperscript{51} Id. at 1392 (so noting as to privacy and remedies law).
\textsuperscript{52} Id. at 1392.
\textsuperscript{53} RESTATEMENT OF EMP'T LAW § 3.01(b) (AM. LAW INST. 2015) (as to earned compensation); id. § 3.02(a),(b) (as to bonuses and other incentive compensation).
\textsuperscript{55} Lobosco v. N.Y. Tel. Co./NYNEX, 96 N.Y.2d 312, 317, 751 N.E.2d 462, 465 (2001); see
As to benefits, *Restatement* section 3.03 does more than reject New York’s presumption of non-bindingness, opining in a comment that policy statements are how employers often “set . . . terms,” so they are “generally intend[ed]” to bind:

In the benefits context, employers are likely to set the plan terms through unilateral policy statements rather than bilateral agreements with employees. Employers generally intend these statements to establish binding commitments while the terms are in effect.56

b. Entitlement to Deferred Compensation – Especially Commissions – Not Yet Paid as of the End of Employment

What happens when at-will employment ends just before the due date of some compensation other than a basic paycheck covering all days and weeks worked – most typically, a commission on already-made sales, or a bonus for a nearly-completed year? The boldfaced main *Restatement* text says nothing on this issue other than that the terms of the parties’ agreement govern.57 Yet the whole problem is that employer-employee agreements often are silent about a fired or departing employee’s entitlement to some imminently due lump sum, like a commission due when a sales period ends, or some fixed-date bonus or deferred compensation.

While the main text is unhelpful, one of the comments notes that even absent clear agreement between the parties as to what becomes of a terminated employee’s impending deferred pay, the employer may be liable in “quantum meruit . . . to prevent unjust enrichment”:

Even if no agreement, binding employer promise, or binding employer policy statement covers the compensation dispute, principles of quantum meruit may apply. These equitable principles are invoked, when needed, to prevent unjust enrichment.

The above is the comment’s entire mention of quantum meruit and unjust enrichment, but a reporters’ note declares more

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56. *RESTATEMENT OF EMP’T LAW* § 3.03 cmt. d.
57. E.g., *id.* § 3.01 cmt. d (“In the case of commissions, the employee is paid for sales made or other unit of output produced, and whether the compensation is earned depends on whether the sales have been made or other unit of output has been produced in accordance with the parties’ agreement.”).
58. *id.* § 3.01 cmt. a.
categorically that an employee may bring a quantum meruit claim "for the value of the services rendered":

On quantum meruit, see, e.g., Reilly v. NatWest Markets Group Inc., 181 F.3d 253, 262-263 (2d Cir. 1999) ("Under New York law, the existence of an express contract governing a particular subject matter ordinarily precludes recovery in quantum meruit for events arising out of the same subject matter. New York courts, however, have recognized an exception to this general rule and have held that in some circumstances the non-breaching party 'may timely rescind and seek recovery' in quantum meruit. Thus, in the employment context, an employee who is wrongfully discharged and prevented from completing the performance of his contract may choose between suing for breach of contract or for the value of the services rendered.").

The Restatement offers further authority for protecting employees' commission rights in particular, at least in one common situation: when an employee's tenure ends after a commission-generating sale, but before the later date when the employer typically pays the employee's commission. This is a common situation because while some commission-paid employees make sales that customers pay immediately (e.g., in much retail), others receive their commission weeks or months after closing the deal because they sign up customers who pay later – e.g., a salesperson of high-end goods in which a deal is followed by payment weeks later, or a salesperson at a distributor that sells to other businesses who buy more and more over time. Whenever a commissioned salesperson's employ ends, she or he likely has some commission payments upcoming on sales recently made, but not yet paid for by the customers – which is most likely to lead to a dispute when one or more of the recent sales was especially large.

In this common situation of a commission-paid employee’s tenure ending post-sale, yet pre-commission payment, the reporters' notes take a strong stance in favor of protecting the employee's commissions. A note to section 3.01 begins by uncontroversially noting that the "employment agreement... controls when commissions become 'earned.'" Yet that note then endorses relatively recent New York and Massachusetts holdings that that if parties never expressly address whether departing employees remain entitled to impending commissions on recent sales, then the employee is entitled to the commissions – because as long as the deal was closed,

59. Id. § 3.01 cmt. a, reporters' notes.
60. Id. § 3.01 cmt. b, reporters' notes.
the commission is “determinable” and “the employee[] produc[ed] . . . a ready, willing and able purchaser”:

Commissions are, as a general matter, subject to wage-payment laws when earned under the employment agreement. *Myrych v. May Dep’t Stores Co.*, 260 Conn. 152, 165, 793 A.2d 1068, 1075 (2002) (employment agreement, not state wage-payment law, controls when commissions become “earned.”). For example, the New York high court has held that “when a commission is ‘earned’ and becomes a ‘wage’ for purposes of [the wage-payment statute] is regulated by the parties’ express or implied agreement; or, if no agreement exists, by the default common-law rule that ties the earning of a commission to the employee’s production of a ready, willing and able purchaser of the services.” *Pachter v. Bernard Hodes Grp., Inc.*, 10 N.Y.3d 609, 618, 891 N.E.2d 279, 285 (2008).

Similarly, Massachusetts’s wage-payment law applies to “commissions when the amount of such commissions . . . has been definitely determined and has become due and payable to such employee . . . “ *Mass. Gen. Laws Ann. ch. 149, § 148*. The Massachusetts Supreme Judicial Court has held that “the statutory requirement that commissions be paid when they are ‘definitely determined’ means when they become ‘arithmetically determinable.’” *Weems v. Citigroup Inc.*, 453 Mass. 147, 151, 900 N.E.2d 89, 92 (2009).

The Restatement goes even further in noting that if a commissioned salesperson brings the employer a customer who “did not accept” the offered sale “until after [the] employment terminated,” the salesperson still gets the sale commission. Illustration 5 of § 3.01 so states, and a reporters’ note cites the caselaw supporting that conclusion:

Illustration 5 is drawn from *McFeely v. The Seneca Wire & Manufacturing Co.*, 2008 WL 2355602 (E.D. Mich. 2008) (applying Michigan law). In the absence of an agreement on whether the salesperson was entitled to receive commissions on post-termination sales, the general rule is that “an agent is entitled to a commission when his efforts were the procuring cause of sale . . . “ *Id.*, at *16; see *Pachter v. Hodes*, 10 N.Y.3d 609, 617, 891 N.E.2d 279, 284, 861 N.Y.S.2d 246, 251 (2008) (on certified questions from the U.S. Court of Appeals for the Second Circuit: “Under the common law, a broker who produces a person ready and willing to enter into a contract upon his employer’s terms . . . has earned his commissions”) (internal quotation marks omitted).

61. *Id.*
62. *Id.* § 3.01 illus. 5.
63. *Id.* § 3.01 cmt. d, reporters’ notes.
c. Recognizing an Implied Covenant of Good Faith and Fair Dealing
to Bar Terminating to Deprive Imminently Due Pay

The implied covenant of good faith and fair dealing exists, including in at-will relationships, and bars employers from firing employees to prevent impending compensation, such as an imminently due bonus or commission, from vesting:

(c) The employer's duty of good faith and fair dealing includes the duty not to terminate . . . or effect other adverse employment action for the purpose of:

(1) preventing the vesting or accrual of . . . [a] right or benefit; or

(2) retaliating against the employee for refusing to consent to a change in earned compensation or benefits.

This doctrine has been controversial. Supporting the Restatement's recognition of the claim, the reporters' notes endorses a leading early case recognizing the claim in Massachusetts, Fortune v. National Cash Register Co., plus another leading federal appellate decision recognizing the claim under New York and New Jersey law, Wakefield v. Northern Telecom, Inc., and caselaw from other states as well. Yet those same reporters' notes acknowledge that "[a] number of jurisdictions have declined to recognize the implied duty in the at-will employment context," offering a string cite to such decisions in six states.

Despite implied covenant doctrine being highly disputed, the Restatement's endorsement is unequivocal, strongly endorsing its dual policy bases - "fairness" and "enabl[ing]" deferred-pay relationships by protecting "expectations":

The implied duty of good faith and fair dealing not only promotes basic notions of fairness but also enables the parties to enter into . . . relationships where performance is not simultaneous . . . for example, the employee renders services but the employer's obligation to pay for those services does not ripen until certain conditions subsequent have been satisfied. The implied duty helps effectuate the [parties'] reasonable expectations . . .

64. Id. §§ 3.05(a), (b).
65. Id. § 3.05(c).
67. 769 F.2d 109, 112 (2d Cir. 1985) (applying both New York and New Jersey law).
68. RESTATEMENT OF EMP'T LAW § 3.05 cmt. b, reporters' notes.
69. Id.
70. Id. § 3.05 cmt b.
2. Two Limits on the Pro-Employee Orientation of the Restatement

The import of Chapter 3 endorsing the pro-employee side of several disputed issues should not be overstated, for two reasons. As subpart (a) below notes, Chapter 3 applies modest nudges, not hard shoves, toward broader employee rights, as several other commentators have noted. As subpart (b) below notes, while enough chapters incline pro-employee to make the Restatement overall a nudge toward broader employee rights, as the plaintiff's bar has noted, other chapters incline pro-employer, making the Restatement a mixed bag ideologically.

a. Only Modest Nudges Toward Broader Employee Rights – As Shown by the Limited Scope of the Implied Covenant Claim

While resolving several jurisdictional splits by endorsing broader employee rights, the Restatement does so modestly, declining to adopt the broadest forms of employee rights pressed by many commentators and a few states. Others have noted several such examples. Professor Stephen Befort criticizes Chapter 2 for declaring that “policy statements” bind (as Chapter 3 also declared) based on not “unilateral contract” doctrine but “estoppel” doctrine, which requires showing “reliance,” even if some courts “dispense with the requirement of individual reliance in favor of a rule requiring a showing only of objectively established group reliance.” Following is a detailed discussion of one other such example: the endorsement in Chapters 2 and 3 of a more limited implied covenant of good faith than exists in some employment caselaw and in commercial contracts.

While endorsing implied covenant doctrine, “[the] Restatement's odd presentation of the implied duty – only within chapters on termination and compensation and benefits – possibly limits the . . . application to those two terms,” Professor Nadelle Grossman notes, comparing that limited implied covenant in employment to the far broader one recognized in commercial contracts. In the latter, the Restatement of Contracts declares the implied covenant to bar both a wider range of “bad faith” conduct and any failure to perform in “good faith”:

[T]he implied duty . . . refer[s] to definitions of “good faith” and “fair dealing” under the Uniform Commercial Code. There, good

71. Befort, supra note 54, at 312.
faith means “honesty in fact.” That test looks subjectively at the parties, . . . obligates them to make honest judgments[,] . . [and] also means “observance of reasonable commercial standards of fair dealing in the trade” . . .

“A complete catalogue . . . of bad faith is impossible, but the following . . . [are] recognized . . .: evasion of the spirit of the bargain, lack of diligence . . ., abuse of a power to specify terms, and interference with or failure to cooperate in the other’s . . . performance.”74 . . . “[V]iolations . . . [include] conjuring up a pretended dispute, . . . falsification of facts, . . . taking advantage of the necesitous circumstances of the other party to extort a modification[,] . . . rejection of performance for unstated reasons, . . . and abuse of a power to determine compliance or to terminate . . . .”75

Few jurisdictions ever have adopted a broader version of the implied covenant than what Professor Lea VanderVelde calls the “weak, sickly” version in the Restatement.76 But Alaska comes closest, having adopted “the most comprehensive and best developed concept” of an implied covenant in employment. Professor VanderVelde notes: “Under Alaska law, . . . [t]he implied covenant has an objective component requiring that the employer act in a manner that a reasonable person would regard as fair,” and thus one leading case held that “[i]f one employee is accorded a particular treatment, then others who are discharged but denied that treatment may be able to allege that they have been denied the protection of the [implied covenant].”77

b. The Various Chapters’ Ideological Heterogeneity: Some Decidedly Pro-Employee, Others Decidedly Pro-Employer

While Chapter 3 inclines pro-employee overall, given its mix of consensus law and nudges toward broader employee rights, the Restatement overall is not uniformly pro-employee. Other provisions similarly incline pro-employee. One notable example is Chapter 5, which declares that “public policy” supporting wrongful discharge claims may exist in not only (a) state constitutions, statutes, and regulations, as in most states, but also – unlike in many states – (b)

73. Id. at 382 (citing Restatement (Second) of Contracts § 205 cmt. a (Am. Law Inst. 1981)).
74. Id. at 388-89 (quoting Restatement (Second) of Contracts § 205 cmt. d).
75. Id. at 389 (quoting Restatement (Second) of Contracts § 205 cmt. e).
77. Id. at 370 (citing Mitchell v. Teck Cominco Alaska, 193 P.3d 751 (Alaska 2008)).
similar provisions of federal law, (c) common-law "decisional law," (d) local ordinances and regulations, and (e) potentially private sources of "public policy" if they amount to "well-established principles in a professional or occupational code of conduct protective of the public interest."\textsuperscript{78} This breadth of sources of "public policies" barring discharges is far from universal, the reporters' notes concede, citing caselaw finding insufficient local law\textsuperscript{79} and private occupational codes,\textsuperscript{80} and further elaborating as follows:

Other courts ... insist that an employee ... claiming wrongful discharge in violation of public policy identify a specific constitutional, legislative, or administrative provision embodying or articulating the policy ... \textsuperscript{81}

Some courts reject federal law ... as a ... source of state public policy ... \textsuperscript{82}

Some courts are reluctant to predicate a public-policy tort action only on judge-made law.\textsuperscript{83}

Yet other chapters incline pro-employer. One such example appears near the very start of the Restatement: Chapter 1 takes a surprisingly strong pro-employer stance on an issue highly disputed in the caselaw – "employee" status for those voluntarily working unpaid. Section 1.02 all but presumes the answer in its title:

§ 1.02. Volunteers Are Not Employees. An individual is a volunteer and not an employee if the individual renders uncoerced services to a principal without being offered a material inducement.\textsuperscript{84}

A comment elaborates that unpaid "interns" fall into this declaration of non-employee status: "Interns who provide services without compensation or a clear promise of future employment generally are not employees."\textsuperscript{85}

Most of the disputes about "employee" status for the unpaid are under not the common law, but statutes, most notably wage rights under the Fair Labor Standards Act (FLSA)\textsuperscript{86} and unionization rights

\textsuperscript{78} Restatement of Emp't Law § 5.03 (Am. Law Inst. 2015).\textsuperscript{79} Id. § 5.03 cmt. c, reporters' notes (collecting cases).

80. Id. § 5.03 cmt. f, reporters' notes (citing Wright v. Shriners Hosp., 589 N.E.2d 1241, 1244 (Mass. 1992) ("We would hesitate to declare that the ethical code of a private professional organization can be a source of recognized public policy.").

81. Id. § 5.03 cmt. a, reporters' notes (collecting cases).

82. Id. § 5.03 cmt. c, reporters' notes (collecting cases).

83. Id. § 5.03 cmt. d, reporters' notes (collecting cases).

84. Id. § 1.02.

85. Id. § 1.02 cmt. g.

86. See, e.g., Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528 (2d Cir. 2016).
under National Labor Relations Act (NLRA)\(^87\) – so a reporters’ note declares them distinguishable: “Particular legislation may provide for a different treatment of volunteers than the common-law rule stated in this Section.”\(^88\) That note proceeds to concede that the FLSA grants minimum and overtime wage rights to various interns and trainees who might not qualify as common-law employees.\(^9\) But the Restatement’s cursory statutes-are-different declaration defies the extent to which caselaw, and the Restatement itself, apply statutory precedents in common-law cases, and vice-versa: “[T]he NLRB already purports to use the common law test for NLRA cases, and the Restatement takes for its own illustrations two Title VII cases,” Professors Charlotte Garden and Joseph Slater observe.\(^90\) A recent leading FLSA case, Glatt v. Fox Searchlight Pictures, Inc.,\(^91\) does not apply anything like the blunt “not employees” announcement of section 1.02, instead listing seven factors relevant to the “primary beneficiary” analysis, but then noting that even those seven factors are not enough, because the inquiry is so highly context- and fact-specific:

> [T]he context of unpaid internships . . . requires weighing and balancing all of the circumstances. No one factor is dispositive and every factor need not point in the same direction . . . In addition, the factors we specify are non-exhaustive – courts may consider relevant evidence beyond the specified factors in appropriate cases. . . . [T]he touchstone of this analysis is the “economic reality” of the relationship . . . .\(^92\)

So the Restatement decides by fiat in declaring that, despite how fact-specific the “employee” status of the unpaid is in the statutory

\(^87\). See generally Charlotte Garden & Joseph Slater, Comments on Restatement of Employment Law (Third), Chapter I, 21 EMP. RTS. & EMP. POL. L. REV. 265 (2017) (discussing NLRA cases on “employee” status for college athletes, research assistants, and others).

\(^88\). RESTATEMENT OF EMP’T LAW § 1.02 cmt. g, reporters’ notes.

\(^89\). Particular legislation may provide for a different treatment of volunteers than the common-law rule stated in this Section. For example, the FLSA broadly defines the term “employ” to include “to suffer or permit to work.” 29 U.S.C. § 203(q) [2012]. In Walling v. Portland Terminal Co., 330 U.S. 148, 152-153 (1947), the Court held this language did not encompass a private railroad company’s training program because the trainees worked “for their own advantage” and “the railroads receive[d] no immediate advantage” from that work. The Wage and Hour Division of the Department of Labor since 1970 has interpreted the Walling decision to limit any FLSA exemption for training programs to those meeting six requirements, including that the training be “for the benefit of the trainee” and that “the employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his operations may actually be impeded.” Id.

\(^90\). Garden & Slater, supra note 87, at 284.

\(^91\). 811 F.3d 528 (2d Cir. 2016).

\(^92\). Id. at 536-37.
cases, the unpaid are simply "not employees" under the common law—even though the common-law and statutory analyses are not separate in the caselaw, or even in the Restatement itself.

C. Imperfections in the Craftsmanship of the Restatement: Inapt Cases; and a Confusing Mix of Text, Comments, Illustrations, and Notes

1. Inapt and Overstated Caselaw

I am somewhat uncomfortable criticizing the caselaw citations of the Restatement—a sufficiently massive and lengthy undertaking that perfection is unrealistic. So I do not mean for the following to be criticisms of the ability, care, or effort of any author of the Restatement. Yet to the extent that the Restatement is a serious effort to offer courts persuasive authority, imperfections in its caselaw citations limit how persuasive it can be, at least as to the topics on which its caselaw does not persuasively support, or even apply well to, its conclusions.

a. Inapt Quantum Meruit Caselaw: Reilly v. NatWest Markets Group

After a comment declares with no case citations that "[e]ven if no agreement . . . covers the compensation dispute, principles of quantum meruit may apply . . . to prevent unjust enrichment,"93 a reporters' note cites Reilly v. Natwest Markets Group,94 with a parenthetical and no further elaboration of the case or its relevance.

On quantum meruit, see, e.g., Reilly v. NatWest Markets Group Inc., 181 F.3d 253, 262-263 (2d Cir. 1999) ("Under New York law, the existence of an express contract governing a particular subject matter ordinarily precludes recovery in quantum meruit for events arising out of the same subject matter. New York courts, however, have recognized an exception to this general rule and have held that in some circumstances the non-breaching party 'may timely rescind and seek recovery' in quantum meruit. Thus, in the employment context, an employee who is wrongfully discharged and prevented from completing the performance of his contract may choose between suing for breach of contract or for the value of the services rendered.").95

Reilly is inapt authority for the comment it is cited to support. Reilly follows up on the comment on quantum meruit: that (a) "if no agreement" applies, then (b) employees may claim quantum meruit.

93. RESTATEMENT OF EMP’T LAW § 3.01 cmt. a.
94. 181 F.3d 253 (2d Cir. 1999).
95. RESTATEMENT OF EMP’T LAW § 3.01 cmt. a, reporters’ notes.
Mr. Reilly, however, (a) *did* have an “express contract” guaranteeing compensation for a specified period and thus (b) *lost* a quantum meruit claim. When the Restatement asserts the *availability* of a claim (quantum meruit) in a particular situation (an employee *without* a contract), it should do better than citing one case in which that claim was *unavailable* because the situation was the opposite (an employee *with* a contract).

b. Unexplained Citations to Conflicting Cases in a State: *Brockmeyer v. Dun & Bradstreet* and *Zwolanek v. Baker Manufacturing*

After section 3.05 recognizes implied covenant of good faith claims when employers terminate employees to deprive them of deferred pay about to come due, comment b elaborates most of the substance of the rationale for the claim (the other comments elaborate secondary points), and the reporters’ note on comment b does the heavy lifting of surveying the split among states on the issue:

- the note begins with a paragraph on the leading case recognizing such implied covenant claims, *Fortune v. National Cash Register Co.*;
- the second to third paragraphs cite “similar rulings” – including Wisconsin’s *Zwolanek v. Baker Manufacturing*; and
- the fourth paragraph cites how “[a] number of jurisdictions have declined to recognize the implied duty in the at-will employment context” – including Wisconsin’s *Brockmeyer v. Dun & Bradstreet.*

The note never tries to harmonize the two opposing cases from the same state supreme court, nor to show how the pro-implied covenant case from 1912 supporting the Restatement’s position (*Zwolanek*) might have survived the anti-implied covenant case from 1983 contravening the Restatement’s position (*Brockmeyer*). In all fairness, the incoherence is the original sin of the Wisconsin judiciary,

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96. *Reilly*, 181 F.3d at 259 ("The parties entered into an express contract guaranteeing Reilly’s employment for 1994 and 1995 under the following terms.").
97. *Id.* at 263 ("[T]he jury determined that Reilly had an enforceable contract that governed his termination. Once that jury found that Reilly had an enforceable contract, he could not seek to recover under quantum meruit . . . .")
98. 364 N.E.2d 1251 (Mass. 1977), cited in RESTATEMENT OF EMP’T LAW § 3.05 cmt. b, reporters’ notes.
99. 137 N.W. 769, 773 (Wis. 1912), cited in RESTATEMENT OF EMP’T LAW § 3.05 cmt. b, reporters’ notes.
100. 335 N.W.2d 834, 838 (Wis. 1983), cited in RESTATEMENT OF EMP’T LAW § 3.05 cmt. b, reporters’ notes.
not of the Restatement: the 1983 decision (Brockmeyer) does not even cite the contrary 1912 one (Zwolanek); and literally no Wisconsin decisions cite both decisions, so none try either to harmonize them or to note the extent to which Brockmeyer abrogated Zwolanek. But while the Restatement did not create the mess, Restatements have value mainly to the extent that they clean up courts’ messes, such as caselaw gaps where courts have not addressed a point or caselaw conflicts such as this Wisconsin incoherence. The persuasive power of the Restatement suffers from its citation to flatly conflicting holdings from the same court with no attempt to harmonize, nor to recognize that the more recent case undercuts the Restatement’s position.

Chapter 3 is not alone in its infrequent, yet material, mis-steps in citing authority for the positions it takes on important issues that are contested among the states. Chapters 1 and 2 suffer similar shortcomings, as an example from each shows.

c. Citing a District Court Decision While an Appeal Was Pending – Which Ultimately Reversed the Decision the Restatement Cited: Glatt v. Fox Searchlight Pictures

In Chapter 1, section 1.02 discusses the distinction between “volunteers” and “employees” covered by various employment laws, with comments collecting and fleshing out the caselaw applying various employee-versus-volunteer tests. One of its citations was to a district court decision from 2013:


The June 2013 Glatt district court decision was not final enough to cite as the Restatement did: within weeks, the defense filed a request for interlocutory appeal, which was granted by the district court in September and by the circuit in November. Established citation rules bar citing a district court opinion without disclosing a pending appeal, and for good reason: the circuit reversed the Glatt

101. Restatement of Emp’t Law § 1.02.
102. Id. § 1.02 cmt. g.
105. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 533 (2d Cir. 2015) (noting dates that the court of appeals granted Defendant’s motion for leave to file an interlocutory appeal).
106. See, e.g., The Bluebook: A Uniform System of Citation R. 10.1, at 88 (Columbia
district court decision, applying a form of the "primary beneficiary" test—exactly contrary to how the Restatement described the Glatt holding. 108

This failure to note the pending appeal that left the status of a cited decision unsettled was not only bad practice, but surprising. Glatt was one of the highest-profile, most widely-covered employment cases of 2013-2015; the pendency of the appeal was noted in much 2013-2014 coverage, not just locally but in national mass media, 109 legal media, 110 business media, 111 and entertainment media 112 alike. The Chief Reporter of the Restatement, moreover, is a professor with an active management-side employment litigation and consulting practice in the same state and jurisdiction as Glatt, including in claims of allegedly misclassified wage plaintiffs, 113 so he


108. I thank Joseph Slater and Charlotte Garden for their article in this symposium that called my attention to the Restatement's citation to the district court decision in Glatt.


110. E.g., Renee Choy Ohlendorf, Employer Violates Labor Laws by Failing to Pay Interns, ABA Litigation News (Oct. 4, 2013), <https://apps.americanbar.org/litigation/litigationnews/top_stories/100413-employment-law-intern.html> ("Defendants have petitioned the U.S. Court of Appeals for the Second Circuit for leave to appeal. The appeal is still pending... The case highlights a split between the U.S. Courts of Appeals over the proper test.").

111. E.g., Susan Adams, Employers Should Pay Their Interns. Here's Why, Forbes (June 9, 2014, 10:39 AM), <https://www.forbes.com/sites/susanadams/2014/06/09/employers-should-pay-their-interns-heres-why/> ("The confusion may clear up a bit over the coming months, when the Second Circuit Court of Appeals will make a decision on the appeal of the Fox Searchlight case.").

112. E.g., Eriq Gardner, The Future of Hollywood Internships Now in Hands of Appeals Court, Hollywood Rep. (Nov. 27, 2013, 8:13 AM PT), <http://www.hollywoodreporter.com/thr-esq/hollywood-internships-future-hands-appeals-660558> (entire article on circuit grant of interlocutory appeal, beginning as follows: "[N]ext year, the... Court of Appeals will likely hand down a ruling that could determine the fate of internships in the entertainment and media sector. On Tuesday, the appellate circuit agreed to review two cases - one involving former interns on Fox Searchlight's Black Swan... Because the disputes are ongoing, the 2nd Circuit had discretion on whether to grant the interlocutory appeal"); The Latest in Those Pesky Unpaid Intern Lawsuits, The Fashion Law (Nov. 27, 2013), <http://www.thefashionlaw.com/home/the-latest-in-those-pesky-unpaid-intern-lawsuits> ("[T]he Second Circuit... agreed to hear Fox's appeal in its... unpaid internship lawsuit[,]... Glatt v. Fox Searchlight Pictures Inc.").

113. E.g., Manigault v. Macy's E., 318 F. App'x 6, 6 (2d Cir. 2009) (Estreicher appearing as
surely was aware of the notable *Glatt* decision in favor of allegedly misclassified wage plaintiffs, including the widely-reported appellate order allowing an unusual interlocutory appeal to review that decision.

The *Restatement* is not a regularly updated treatise or casebook; each edition typically remains in its published form for decades – so that is how long the *Restatement* can expect to be stuck with its incorrect-from-the-start *Glatt* description and citation. Given this omission, and the lack of citation-checking it shows, it is hard to trust any citations in the *Restatement* from the 2010s.

d. Inapt Citation for Holding “Cause” Includes “Economic Circumstances”: *Ohanian v. Avis Rent A Car System*

Section 2.04, “Cause for Termination of Employment Agreements,” defines “cause” more broadly for indefinite-term than for fixed-term agreements. For fixed-term agreements, “cause” exists only “if the employee has materially breached.” But for indefinite-term agreements, “cause” can be either “material breach” or “when a significant change in the employer’s economic circumstances means that the employer no longer has a business need for the employee’s services.” As support for “economic circumstances” as cause, a reporters’ note quotes *Ohanian v. Avis Rent A Car System, Inc.*:

[I]t would be possible that despite plaintiff’s best efforts the results achieved might prove poor because of adverse business conditions[,]... forcing Avis to make a change... perhaps reducing or closing an operation. That... would be just cause for plaintiff’s dismissal.

For many reasons, *Ohanian* is very weak support for declaring that “cause” to terminate without liability includes economic conditions not the employee’s fault.

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defense counsel in sex harassment and retaliation case); Vidal v. Metro-N. Commuter Ry., Co., No. 12 CV 0248, 2014 WL 413952, at *1 (D. Conn. Feb. 4, 2014) (“Following resolution of the [race discrimination] Class Action, as required by the settlement agreement, Metro-North retained Samuel Estreicher... to provide advice concerning... human resources policies.”); Davis v. J.P. Morgan Chase & Co., 775 F. Supp. 2d 601, 603 (W.D.N.Y. 2011) (Samuel Estreicher appearing as defense counsel in wage class action pressing claims that defendant “misclassified plaintiffs as exempt from the overtime requirements” of federal and New York law).

115. *Id.* § 2.04 (emphases added).
116. 779 F.2d 101 (2d Cir. 1985).
• The facts were inapt. Ohanian's was not the sort of indefinite-employment promise that possibly could be interpreted as letting the employer cite market conditions to avoid any liability: the deal was that Ohanian would receive “severance” even if he breached. A

• The holding was inapt. The decision affirmed a verdict that the employer did breach because it “had not proven... just cause.” A

• The holding was dicta as to “cause.” The conditions-as-cause discussion was part of only a statute of frauds holding on whether the agreement could end within a year for “cause” without “breach.” A

• The New York caselaw has not followed Ohanian. In the ensuing thirty-five years, no New York state cases appear to have followed Ohanian, a federal decision merely predicting New York law: no New York cases cite Ohanian to hold that “conditions” can be “cause” to fire under an indefinite agreement; and broad caselaw searches turn up no New York cases, whether or not they cite Ohanian, reaching that holding. A

Ohanian is a much-cited case for varied reasons: its notable statute of frauds holding that an indefinite oral agreement is binding because it could end within a year without breach; and its large verdict for an employee during the 1970s-1980s period when some, but not all, courts began enforcing oral promises of job security. Even if deservedly prominent, Ohanian is an extraordinarily weak case for the Restatement to quote and rely upon for the proposition

118. Ohanian, 779 F.2d at 110 (“[T]he severance package was to be given plaintiff... if he 'screwed up' in some manner that would constitute a breach of the contract and defeat his contract of lifetime employment.”).

119. Id. at 103 (affirming judgment for “$ 304,693 in damages to plaintiff... for lost wages and pension benefits... from defendant's breach of a lifetime employment contract”).

120. Id. at 104.

121. Id. at 108 (“To illustrate, under the terms of the contract it would be possible that despite plaintiff's best efforts the results achieved might prove poor because of adverse market conditions... That... would be just cause for plaintiff's dismissal. But if this is what occurred, it would not constitute a breach.”).

122. In addition to reviewing all New York state caselaw citing Ohanian, I did the following Westlaw searches on the issue.

• (cause:/s terminat!)/p employ!/p (insolven!/solven!)

• (cause:/s terminat!)/p employ!/p (condition!/s (advers! market econom!))

that "cause" to fire can include "economic circumstances" that are not the employee's fault.

2. Boldface, and Comments, and Illustrations, and Notes – Oh My: "Won't the Real [Restatement] Please Stand Up?"124

Chapter 3's stances on many disputed issues were bold – except in the way this Restatement, like other Restatements, scattered its positions across a byzantine array of different categories of text.

• **The Restatement Text, Set Apart in Boldface.** The endorsement of the implied covenant of good faith and fair dealing is in the boldfaced Restatement text of section 3.05, but the boldfaced Restatement text is mostly sparse and equivocal, leaving the heavy lifting to the array of other authorities: comments; illustrations; and reporters' notes.

• **Comments Elaborating Upon Sparse Text.** The text of sections 3.01-3.02 recognizes "binding policy statements," but the stronger declaration as to benefits policy statements – that they are "generally intend[ed]" to bind because they are how employers commonly "set... terms" – is in only the "comments" following the more sparse main text.125

• **Comments Adding Doctrines Absent from the Text.** The availability of "quantum meruit" claims to prevent "unjust enrichment appears only in a comment to section 3.01, not in the section 3.01 text itself.126

• **Reporters' Notes Taking the Boldest Stances.** Reporters' notes are stylistically similar to comments but state stronger, more detailed positions – such as, after a comment's cryptic reference to "quantum meruit... to prevent unjust enrichment," adding that employees may recover commissions from sales finalized after their departures.127

The Restatement of Employment Law is not transparent as to why its authors decided which points go into which category; other Restatements generally say similarly little, other than to praise themselves for helpfully offering so many categories of guidance. The

125. RESTATEMENT OF EMP'T LAW § 3.03 cmt. d (AM. LAW INST. 2015).
126. Id. § 3.01 cmt. a.
127. Id. § 3.01 cmt. b, reporters' notes.
Restatement of Contracts, for example, expressly noted with pride in 1981 how the new second edition, unlike the first edition from 1932, added the smorgasbord of categories we now commonly see in Restatements: "... the profound shift in style inaugurated by Restatement, Second: the introduction of extensive commentary explaining and expounding the black letter; [and] the publication of Reporter's Notes canvassing the leading authoritative sources..." That is not much explanation, beyond basic description, of how a "comment" differs from a "reporter's note."

Some descriptive differences between the categories are apparent. The reporters' notes go furthest in taking strong positions; the illustrations go further than the comments in which they merely serve as illustrative examples; and the comments go much further than the sparse Restatement text. And each section is printed in reverse order of how committal the categories are: each starts with the sparse Restatement text, then elaborates in comments, then offers illustrations of what the comments just said, and then states the most in the reporters' notes.

What does this unnecessarily divided scheme imply? Likely the reporters' notes are the bolder points for which there was not enough consensus to put into comments, which in turn were the points too bold to enact as the sparse text of "the Restatement." But it is in no way obvious, or mandatory, that the judges, lawyers, scholars, or insomniacs reading the Restatement must adopt that sequencing as a hierarchy of authority within the Restatement. I can think of three ways to interpret the relative authoritativeness of the different categories.

(1) All categories are equal because none of the Restatement binds anyone, so all points published in a Restatement, in whatever categories, are just persuasive authorities, with no one of them more binding on anyone than the other, and with each influential only to the extent that its merits earn it purchasers in the marketplace of ideas.

(2) The categories appear in order of authority: actual Restatement text is what was enacted; comments are what the authors could not agree to make official text but, in a compromise, agreed to call the official "comment[ary]" on their text; illustrations appear within comments but have a different title

to note that they merely "illustrate"; and reporters' notes take
the strongest positions because they reflect what there was not
enough consensus to put in either the main text or the
comments.

(3) Only the boldfaced Restatement text binds as "the
Restatement"; all other categories are mere interpretations of
what actually was enacted, like law reviews or the Talmud.

I have no idea which of the above three views is correct. The
experts on such resources - law librarians - do not appear committed
to any one view either.129 I sense the answer is that of a Freudian
therapist: "what do you think it should be?" Take judges: one judge
might view only the main text as "the Restatement"; another might
prefer the more detailed, more committal categories - comments and
reporters' notes - on the theory that persuasive authority has value
only to the extent that it takes a position and gives supporting
authority and reasoning.

Yet if the Restatement's categories are a Rorschach test of seeing
each category however you want, then why have so many categories?
Why segregate reporters' notes from comments, and why arguably
lessen the weight of the useful examples in the comments by declaring
them mere "illustrations" of those comments? Restatement authors
could make their work stronger by either (a) being more transparent
about what each category means, and why certain points (for
example) make it into only reporters' notes, not comments or the
main text, or (b) consolidating into fewer categories, such as
Restatement text plus only a broadened "comments" category that
could include what currently is relegated to sadder "illustration" or
"reporter's note" status.

129. See, e.g., GEORGETOWN LAW LIBRARY, SECONDARY SOURCES: RESTATEMENTS,
<http://stream.law.georgetown.edu/librarymedia/secondary_sources/5_restatements.html> (last
visited Oct. 9, 2017) (tutorial describing Restatements, explaining that each "section of a
restatement... [is] laid out in a very specific way. First the general principles of the law will be
clearly spelled out. The comment portion... then goes into greater detail and provides
illustrations as examples. The reporters' notes give examples from and citations to
caselaw... "); SUZANNE EHRENBERG & SUSAN VALENTINE, WHAT ARE RESTATEMENTS
edu/academics/lrw/tutorials/restate.htm> (Chicago-Kent Law Library lecture, similarly
explaining differences between the text, comments, illustrations, and reporters' notes, without
explaining any hierarchy of authority).
IV. CONCLUSION: NOT THE BEST OF ALL POSSIBLE WORLDS, JUST THE BEST OF ALL FEASIBLE WORK – WITH THE IMPACT OF THE RESTATEMENT YET TO BE SEEN

Ultimately, the authors' difficulties reaching enough consensus to avoid hedging by splitting points among various categories was probably an inevitability, or the least bad alternative. One alternative could have been to write only points there was enough consensus about to enact as Restatement text – but that would have deprived the Restatement of the far more substantial guidance in the comments and reporters’ notes. Another alternative could have been to choose authors with more homogeneous views, to allow more bold declarations, including within the Restatement text itself – but that would have yielded a document lacking the credibility of a Restatement, yielding something more akin to a multi-author law review article written by ideologically simpatico comrades in arms.

In the end, all the compromises in the Restatement – as to not only the breakdown of categories but also the lack of more resolutions of disputed issues – were the inevitable result of a large author group with diverse perspectives. The Restatement moved the ball forward in clarifying employment law for states with sparse precedent, in resolving a surprising number of disputed issues, and in nudging the law more toward employee rights in many areas. The policy choices reflected by the latter choice may be good or a bad, depending on one’s perspective. But in response to criticisms that the Restatement should have added more clarity, or should have shoved rather than nudged the law more toward employee rights, my view is that the Restatement did as much as any written-by-committee Restatement could to add clarity and greater employee rights to employment law.

Even if the Restatement has enough merit that it could improve employment law, will it be used enough to have a real impact? As of September 2017, it has been cited by twenty judicial decisions: seven cites to pre-publication versions from 2009 to 2015; thirteen cites to the published version since mid-2015.130 This post-publication citation rate, about six per year, is far lower than for many other Restatements.131

130. The count of twenty is from a Westlaw search for “Restatement of Employment Law” among all state and federal decisions.
131. The Restatements in Table 6 are from a list of prominent Restatements followed in the Virgin Islands, as detailed in a judicial opinion noting the initial date of publication for each.
TABLE 8:
Average Number of Cites Per Year in Caselaw (State or Federal), in the Past Five Years, to Various Restatements

<table>
<thead>
<tr>
<th>Restatement</th>
<th>Cites per</th>
</tr>
</thead>
<tbody>
<tr>
<td>Restatement of Torts</td>
<td>255</td>
</tr>
<tr>
<td>Restatement of Contracts</td>
<td>75</td>
</tr>
<tr>
<td>Restatement of Agency</td>
<td>52</td>
</tr>
<tr>
<td>Restatement of Restitution</td>
<td>44</td>
</tr>
<tr>
<td>Restatement of Trusts</td>
<td>39</td>
</tr>
<tr>
<td>Restatement of Conflicts</td>
<td>19</td>
</tr>
<tr>
<td>Restatement of Employment Law</td>
<td>6</td>
</tr>
</tbody>
</table>

It would be unfair to expect the Restatement of Employment Law to match the above three. The others all are seventy-five to eighty-five years old, so while many judges and lawyers may not know the new Restatement of Employment Law, there is likely no still-active judge or lawyer who ever practiced before those other Restatements existed. Most of the other Restatements also cover broader subjects than employment; it is logical that the two most-cited ones cover areas as broad as tort and contract, followed closely by agency, a topic relevant to many fields. Still, a mere six cites a year seems low for as major a publication as any ALI Restatement, and two years after publication, the Restatement is not yet showing any signs of increasing citations. Ultimately, if the Restatement of Employment Law remains so lightly cited, that would be unfortunate, because although it is far from perfect, the Restatement has enough merit that various fields


132. Id.
within employment law could benefit from greater reliance upon it as persuasive authority.