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OFFICIOUS INTERMEDDLING, INTERLOPING CHAUVINISM, RESTATEMENT (SECOND), AND LEFLAR: WISCONSIN'S CHOICE OF LAW MELTING POT

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I. INTRODUCTION

Until the 1960s, a court's choice of law in the United States was fairly predictable. As with personal jurisdiction until the mid-twentieth century,¹ the physical boundaries of states in which key events took place determined choice of law outcomes. Courts applied the law of the place where the particular right "vested," and several principles determined where vesting occurred and hence which state's law applied in a dispute involving more than one state. Under the principle of *lex loci delicti* in tort cases, the right vested at the place of injury, and courts therefore applied the law of that place.² For contract cases, the principle of *lex loci contractus* directed courts to apply the law of the place where the contract was made.³ Cases involving property disputes were governed by *lex situs*, the law of the place where the property was situated.⁴ The 1934 Restatement of Conflict of Laws reflected these com-

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1. Compare *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . [N]o State can exercise direct jurisdiction and authority over persons or property without its territory.") with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (both of which permitted states to reach beyond their boundaries and exercise personal jurisdiction over nonresidents).

2. See, e.g., *Alabama Great Southern R.R. Co. v. Carroll*, 11 So. 803 (Ala. 1892).

3. See, e.g., *Milliken v. Pratt*, 125 Mass. 374 (1878). This determination was not always easy. According to contract principles, the place of the contract's formation often depended upon whether the contract was unilateral or bilateral and upon whether or not a contract was formed when acceptance was sent or received.

4. This determination could easily be made for real property, but not for movable property. See, e.g., *In re Barrie's Estate*, 35 N.W.2d 658 (Iowa 1949) (real property); *Cammell v. Sewell*, 157 Eng. Rep. 1371 (Ex. Ch. 1860) (movable property).

mon law principles.⁵

But as the United States population became more mobile and corporations increasingly conducted interstate business, state borders lost some of their territorial significance. Improvements in transportation and communication made travel faster, cheaper, and less burdensome. States began to reach beyond their own borders, often in an attempt to expand their power over property and persons situated in other states. An increase in interstate commerce necessitated an expansion of personal jurisdiction over nonresidents. Personal jurisdiction jurisprudence began to focus on the "minimum contacts" a defendant had with a state, rather than on the defendant's physical "presence" within a state. "Fair play and substantial justice" became important factors in the personal jurisdiction determination.⁶

Similarly, the physical events which took place within state borders no longer automatically and unquestionably marked that state's law as the applicable law. Traditional territorial choice of law principles often led to questionable results which seemed unfair. For example, a train might cross several states, with tortious conduct committed in each, yet if the injury resulting from the tortious conduct finally occurred just after the train crossed into State X, State X's law would apply as the law of the place of injury (*lex loci delicti*).⁷

Before courts ultimately rejected traditional choice of law analysis, they developed a variety of methods to avoid absurd results. These included characterization of a set of facts in such a way as to permit the court to apply the preferred state law. For example, if a person executed a promissory note and mortgage of real property to secure her debt and the creditor sought to collect, a court might determine that the case sounded in contract because of the promissory note and therefore would apply *lex loci contractus*—the law of the place of contracting. But the court might instead determine that the mortgage of real property mandates *lex situs*—the law of the property's location.⁸ In a study of eight Arkansas cases—all decided within a period of ten years, all re-

5. See, e.g., RESTATEMENT OF CONFLICT OF LAWS §§ 214-254, 332, 358, 384 (1934).

6. See *International Shoe Co. v. Washington*, 326 U.S. at 316, 320.

7. See, e.g., *Alabama Great Southern R.R. Co. v. Carroll*, 11 So. at 803 (applying Mississippi law to a case between an Alabama employee and his Alabama corporate employer (an employment relationship formed in Alabama) for injuries resulting from negligence in Alabama. The employee was injured when a previously defective train link finally broke and caused the injury in Mississippi).

8. Compare *Swank v. Hufnagle*, 12 N.E. 303 (Ind. 1887) (*lex situs*) with *Burr v. Beckler*, 106 N.E. 206 (Ill. 1914) (*lex loci contractus*).

questing damages for mental anguish caused by failure to deliver a telegram—one scholar noted that Arkansas courts inevitably applied Arkansas law regardless of where the injury occurred. If the telegram was to be sent *from* Arkansas, the case was characterized as a contract case and Arkansas law applied as the place of the contract. If the telegram was to be sent *to* Arkansas, the case was characterized as a tort case and Arkansas law applied as the place of injury.⁹

In other instances, courts avoided the harsh rigidity of traditional analysis by reliance on the distinction between procedure and substance. Traditionally, forum law governed procedural issues on the theory that procedural rules by definition do not affect outcomes. Thus, a court could freely apply its own procedural rules for convenience and efficiency, and choice of law analysis was required only for substantive issues. The 1934 Restatement specifically provided: "All matters of procedure are governed by the law of the forum."¹⁰ At the same time, "[t]he court at the forum determines according to its own Conflict of Laws rule whether a given question is one of substance or procedure."¹¹

In *Grant v. McAuliff*¹² the California court applied California law to determine whether a tort action survives the California tortfeasor's death. Rather than apply the law of the place of injury—Arizona—the court determined that survival of causes of action "is not an essential part of the cause of action itself but relates to the *procedures* available for the enforcement of the legal claim for damages. Basically the question is one of the administration of decedents' estate, which is a purely local proceeding."¹³

In another equally famous case, *Kilberg v. Northeast Airlines, Inc.*,¹⁴ a New York court rejected Massachusetts's cap for wrongful death actions in a case arising from an airplane crash in Massachusetts. Instead, the court found that a damages limitation "pertains to the remedy,

9. See ROBERT A. LEFLAR, *THE LAW OF CONFLICT OF LAWS* 95 (1962) (citing *Western Union Tel. Co. v. Chilton*, 140 S.W. 26 (Ark. 1911)); *Arkansas & L.R. Co. v. Stroude*, 100 S.W. 760 (Ark. 1907); *Gentle v. Western Union Tel. Co.*, 100 S.W. 742 (Ark. 1907); *Arkansas & La. P. Co. v. Lee*, 96 S.W. 148 (Ark. 1906); *Western Union Tel. Co. v. Ford*, 92 S.W. 528 (Ark. 1906) (telegrams sent *to* Arkansas: tort); and *Western Union Tel. Co. v. Flannagan*, 167 S.W. 701 (Ark. 1914); *Western Union Tel. Co. v. Griffin*, 122 S.W. 489 (Ark. 1909); *Western Union Tel. Co. v. Woodard*, 105 S.W. 579 (Ark. 1907) (telegrams sent *from* Arkansas: contract).

10. RESTATEMENT OF CONFLICT OF LAWS § 585 (1934).

11. *Id.* § 584.

12. 264 P.2d 944 (Cal. 1953).

13. *Id.* at 949 (emphasis added).

14. 172 N.E.2d 526 (N.Y. 1961).

rather than the right," that is, procedure rather than substance, and the court could therefore apply its own law.¹⁵

Public policy served as yet another escape mechanism.¹⁶ If traditional choice of law analysis directed a court to apply foreign law that "would violate [the forum's] fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal,"¹⁷ the court could reject the foreign law outright as violative of the forum's public policy. It might then dismiss the case altogether¹⁸ or simply apply its own law.¹⁹

By the 1950s, a number of scholars had suggested that traditional choice of law analysis ought to be retired, rather than adhere to an outdated methodology that invited manipulation. By 1983 only twenty-nine states continued to follow traditional analysis.²⁰ By the end of 1996, only fifteen states used a substantial part of the First Restatement.²¹ Of these fifteen states, "12 jurisdictions continue to adhere to the *lex loci delicti* rule, and 10 jurisdictions continue to adhere to the *lex loci contractus* rule."²² Even within this listing, states carve out exceptions, rejecting the First Restatement methodology for certain types of cases, such as U.C.C., insurance, and workers' compensation.²³

15. *Id.* at 528 (quoting *Wooden v. Western N.Y. & Pa. R. Co.*, 126 N.Y. 10, 16, 26 N.E. 1050, 1051 (1891)). The court also based its decision upon the public policy exception, discussed below.

16. The public policy exception, unlike the characterization and substance-procedure mechanisms, is a true "escape device" designed to permit courts to overtly reject an otherwise obvious result.

17. *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918).

18. The court in *Loucks*, while rejecting the public policy exception in that case, stated that courts would be "free to refuse to enforce a foreign right," to "close their doors," if it found that enforcement of the right violated the forum's public policy. *Id.* at 201.

19. *See, e.g., Paul v. National Life*, 352 S.E.2d 550 (W. Va. 1986) (applying traditional analysis, the court rejected the guest statute of the place of injury, because it violated West Virginia's public policy. The court instead applied its own law and permitted the case to continue).

20. William M. Richman & David Riley, *The Restatement (First) of Conflict of Laws on the Twenty-Fifth Anniversary of its Successor: Contemporary Practice on Traditional Courts*, paper presented at the Association of American Law Schools Annual Meeting, Washington, D.C. (Jan. 6, 1997), at 10.

21. Symeon C. Symeonides, *Choice of Law in the American Courts in 1996: Tenth Annual Survey*, 45 AM. J. COMP. L. 447, 459-60 (1997). The states are: Alabama, Florida (contracts only), Georgia, Kansas, Maryland, Montana (torts only), New Mexico, North Carolina (torts only), Rhode Island (contracts only), South Carolina, Tennessee (contracts only), Vermont (torts only), Virginia, West Virginia (torts only), and Wyoming (torts only).

22. *Id.* at 458.

23. Richman & Riley, *supra* note 20, at 11.

The Restatement (Second) Conflict of Laws²⁴ is clearly the major replacement of traditional analysis. After a seventeen year effort, the American Law Institute approved the Restatement (Second) in 1969.²⁵ It is now employed by approximately half the states.²⁶

Described by its Reporter as "eclectic and territorial,"²⁷ the Second Restatement incorporates several different approaches to conflicts analysis. Section 6 lists "factors relevant" to the choice of law in all substantive areas; they include: "the needs of the interstate and international systems;" "the relevant policies of the forum" and "of other interested states and the relative interests of those states in the determination of the particular issue;" "the protection of justified expectations;" "the basic policies underlying the particular field of law;" "certainty, predictability and uniformity of result;" and "ease in the determination and application of the law to be applied."²⁸ Other Restatement sections target specific areas of law and provide both a presumptive rule plus a list of relevant "contacts" that are to be considered. For example, the law applicable to a tort issue is presumed to be the law of the place of injury, "unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6."²⁹ To determine which state has the most significant relationship to the occurrence and the parties, one is to consider certain "contacts."³⁰ "[C]ontacts to be taken into account in applying the principles of § 6" include the place of injury, place of injury-causing conduct, the parties' "domicil, residence, nationality, place of incorporation and place of business," and "the place where the relationship, if any, be-

24. Restatement (Second) Conflict of Laws (1971).

25. Willis Reese, *Choice of Law and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679, 680 (1963); W. Noel Keyes, *The Restatement (Second): Its Misleading Quality and a Proposal for Its Amelioration*, 13 PEPP. L. REV. 23, 38 (1985).

26. Twenty states follow Restatement (Second) for Tort Conflicts: Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Maine, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Washington. Another three—Indiana, North Dakota, and Puerto Rico—use the similar "significant contacts" test. Twenty-five states follow Restatement (Second) for contract conflicts: Alaska, Arizona, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kentucky, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Oklahoma (doubtful), South Dakota, Texas, Utah, Vermont, Washington, West Virginia, and Wyoming. Another five use the "significant contacts" test: Arkansas, Indiana, Nevada, North Carolina, Puerto Rico. See Symeon C. Symeonides, *supra* note 21, at 459-60.

27. Willis M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 507 (1983).

28. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

29. *Id.* § 146 (1971).

30. *Id.* § 145 (1971).

tween the parties is centered."³¹

The Second Restatement provides similar presumptive rules and key contacts for a host of legal issues, including contract,³² defamation³³ wrongful death,³⁴ charitable immunity,³⁵ the right to contribution,³⁶ and many others.

Although the First and Second Restatements continue to dominate the fifty states' choice-of-law methodologies, other approaches have not gone unnoticed. One of the early critics of traditional analysis, law professor Brainerd Currie, introduced the appealing notion of governmental interest analysis. In a significant 1958 law journal article,³⁷ he demonstrated that in the context of married women's contracts, traditional analysis not only failed to achieve its greatest value, uniformity, but also frequently led to indefensible results.³⁸ He proposed policy-based governmental interest analysis as a means of producing more satisfactory choice of law results.

Currie's analysis begins with identifying the policy or purpose behind each of the arguably applicable state laws. For example, assume that States A, B, and C all have some connection with the cause of action and that the laws of each state differ materially. Currie proposes that the court examine the policy or purpose behind each law. If the purpose of State A's law would be advanced by the application of that law, State A has an interest in having its law apply. If State A is the only state with an interest, the conflict is false and the court will apply the law of State A.³⁹ But if more than one state has an interest that would be advanced by the application of its law, the "sensible and clearly constitutional thing for any court to do . . . is to apply its own law."⁴⁰ If no state has such an interest, Currie suggested that a state also

31. *Id.*

32. *Id.* § 188. The Restatement (Second) also provides rules for particular kinds of contracts. *See, e.g.*, § 189 (contracts for the transfer of interests in land), § 192 (life insurance contracts), § 193 (contracts of fire, surety or casualty insurance).

33. *Id.* § 149.

34. *Id.* § 175.

35. *Id.* § 168.

36. *Id.* § 173.

37. Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Law Method*, 25 U. CHI. L. REV. 227 (1958). He published another influential article the following year, based on a paper presented at the 1958 Association of American Law Schools annual conference. *See* Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171.

38. Currie, *Married Women's Contracts*, *supra* note 37, at 246-47.

39. *See, e.g.*, *Tooker v. Lopez*, 249 N.E.2d 394 (N.Y. 1969).

40. Currie, *Married Women's Contracts*, *supra* note 37, at 261.

apply its own law simply because this is "rational and convenient."⁴¹ Today, Currie's analysis has found wide acceptance among conflicts scholars, but it is the dominant conflicts methodology of only a few courts.⁴²

Other scholarly voices offered alternatives to the Restatement methodologies. Professor Albert A. Ehrenzweig proposed forum law as the "starting point with some or most of our traditional conflicts rules functioning as exceptions."⁴³ He also identified and weighed a variety of considerations which influence a court's choice of law.⁴⁴ Professor David Cavers proposed that true conflicts be resolved by seven "principles of preference."⁴⁵ Professor Russell Weintraub, like Brainerd Currie, favored a "policy-oriented approach."⁴⁶ He rejected forum law preference, contact counting and the most significant relationship approach, and the "better rule" theory, proposed by, among others, Robert Leflar.⁴⁷

But it is Professor Leflar's methodology that completes the choice-of-law picture in the United States today. In addition to those states that follow the first Restatement, Restatement (Second), Currie's governmental interest analysis, *lex fori* (law of the forum),⁴⁸ or a mixed modern methodology,⁴⁹ five states, including Wisconsin, have adopted Leflar's choice-of-law methodology for tort, and two states, including (arguably)⁵⁰ Wisconsin, have adopted it for contract.

41. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 153-56 (1963).

42. See Symeonides, *supra* note 21, at 459-60. The three are California, District of Columbia, and New Jersey.

43. Albert A. Ehrenzweig, *Guest Statutes in the Conflict of Laws—Towards a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws,"* 69 YALE L.J. 595, 595 (1960).

44. Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U.L. REV. 267, 269 (1966) (citing Albert A. Ehrenzweig, *Conflict of Laws* (1962)).

45. See DAVID CAVERS, *THE CHOICE OF LAW PROCESS* 114-203 (1965).

46. See Russell J. Weintraub, *A Method for Solving Conflict Problems*, 21 U. PITT. L. REV. 573, 576 (1960).

47. See *id.* at 580, 585 - 86.

48. Three states, Kentucky, Michigan, and Nevada, follow *lex fori* for tort conflicts. See Symeonides, *supra* note 21, at 459. In addition, Nevada adopted a modified *lex fori* methodology in *Motenko v. MGM Dist.*, 921 P.2d 933 (Nev. 1996).

49. Hawaii, Louisiana, Massachusetts, New York, Oregon, and Pennsylvania follow a mixed approach for both tort and contract conflicts; and California, District of Columbia, New Jersey, and North Dakota follow a mixed approach for contract conflicts. See Symeonides, *supra* note 21, at 459-60.

50. The five states that follow Leflar for tort conflicts are Arkansas, Minnesota, New Hampshire, Rhode Island, and Wisconsin. Minnesota and Wisconsin follow it for contract conflicts. See Symeonides, *supra* note 21, at 459-60. As illustrated in this article, Professor Symeonides's conclusion that Wisconsin follows Leflar's theory in contract cases is not accu-

II. LEFLAR'S CHOICE-INFLUENCING CONSIDERATIONS

Professor Robert A. Leflar first discussed his approach in two influential articles published in 1966.⁵¹ Building on the work of others who had focused on the "true reasons that underlie choice-of-law adjudication,"⁵² Leflar identified "major considerations that should influence choice of law," observing that they "have always been present and operative in the cases," although "[t]hey have not always been identified clearly, nor has the weight given to one or another among them always been logical or sensible."⁵³ In identifying these considerations, Leflar noted that they come into play only when the facts of a case present a "true," rather than a "false" conflict.⁵⁴ He also cautioned against forum law preference: "[I]t is important that the controlling power of forum law be emphasized, and that this emphasis be appropriately confined."⁵⁵

Leflar then provides a list of those five "considerations that have, expressly or impliedly, always underlain common-law choice-of-law decisions":⁵⁶

- A. Predictability of results;
- B. Maintenance of interstate and international order;
- C. Simplification of the judicial task;
- D. Advancement of the forum's governmental interests;
- E. Application of the better rule of law.⁵⁷

Leflar notes that the list does not prioritize; rather the "relative importance" of each consideration "varies according to the area of the law involved, and all should be considered regardless of area."⁵⁸ He then offers explanations for each of the five considerations.

rate.

51. See Leflar, *supra* note 44; Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966).

52. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. *id.* at 1585. Leflar cites earlier works by Professors Brainerd Currie, Elliott Cheatham and Willis Reese, Hessel Yntema, Albert Ehrenzweig, and David F. Cavers. See *id.*

53. Leflar, *supra* note 44, at 267.

54. *Id.* at 270 n.19. "This does not refer to the 'false conflicts' cases, as to which Currie . . . performed the tremendous service of pointing out that there are no real choice-of-law problems in them Though there is no agreement on exactly how far the 'false conflicts' category is to be extended, it is intended that the present discussion relate to 'true conflicts' cases only, whatever these may be" (citation omitted). See *infra* text accompanying notes 71-72.

55. Leflar, *supra* note 44, at 270.

56. *Id.* at 282.

57. *Id.*

58. *Id.*

A. Predictability of Results

Two ideals underlie this consideration. First, "the decision in the litigation on a given set of facts should be the same regardless of where the litigation occurs, so that 'forum shopping' will benefit neither party."⁵⁹ Second, "parties to a *consensual* transaction [i.e., contract cases] should be able to know *at the time they engage upon it* that it will produce, by way of legal consequences, the same set of socio-economic consequences . . . regardless of where disputes occur. They should be able to plan their transaction as one with predictable results."⁶⁰

B. Maintenance of Interstate and International Order

Interstate order can best be achieved by "systematization" and "an orderliness that will make our federal system work with reasonable efficiency in the complicated choice-of-law field."⁶¹ The law must ensure "free and unpenalized movement of people and goods from state to state, and freedom in commercial intercourse."⁶² This means that when a "sister state's substantial concern with the problem gives it a real interest in having its law applied, even though the forum state also has an identifiable interest," the forum court should give deference to sister state law.⁶³ Leflar thus rejects "deliberate employment of forum preference . . . since on its face it leaves interstate and international concerns out of account."⁶⁴

International concerns are often addressed by federal constitutional provisions and "the inherent federal control over foreign and national affairs" which place "outer limits on the states beyond which they must not go in interfering with basic requisites to international and interstate orderliness."⁶⁵ Where such limits do not exist, courts should properly consider sovereignty claims and "factors affecting relationships between states and nations."⁶⁶

C. Simplification of the Judicial Task

"An easy cliché is that law does not exist for the convenience of the

59. *Id.* at 282-83.

60. *Id.* at 283 (emphasis added).

61. *Id.* at 286.

62. *Id.* (citation omitted).

63. *Id.* at 286-87.

64. *Id.* at 287.

65. *Id.* at 286.

66. *Id.*

court that administers it, but for society and its members; therefore, simplification of the judicial task should be a minor consideration in determining what any rule of law should be."⁶⁷ Despite this platitude, Leflar acknowledges that complicated, complex rules of law may contribute to the very real problem of overcrowded dockets and may result in misapplication even by "reasonably competent courts."⁶⁸ Ease of application "is without question a good reason for a court's applying its own *procedural* rules, since it would be utterly impracticable for a court in *F* [forum] to import the whole procedural machinery and technique of *X* even in a case that is otherwise clearly governed by *X* law."⁶⁹ But when the rule is "an outcome-determinative one that would be no harder for the *F* court to apply than any other *X* rule of substantive law," the court should not rely upon ease of application and simplification merely to apply its own law.⁷⁰

"[O]ne of the most fruitful and expandable methods of simplifying choice of law" is to minimize conflicts problems by eliminating false conflicts, Leflar suggests.⁷¹ False conflicts occur when "the laws of both states, relevant to the set of facts, are the same, or would produce the same decision in the lawsuit."⁷² Thus only conflicting outcome-determinative rules present true conflicts.

D. Advancement of the Forum's Governmental Interests

When a court is able to identify the governmental interests of its own state and can "effectuate these interests," it is reasonable for a court to do so.⁷³ Identifying these interests requires "thoughtful and intelligent analysis of the legal materials in the light of current socioeconomic, cultural, and political attitudes in the community" and should not be lightly undertaken.⁷⁴ Courts must put "together (a) the reasons supporting the rule of law in question (*F*'s or *X*'s law) and (b) the state's (*F*'s or *X*'s) factual contacts with a case, or the issue in a case, to see if

67. *Id.* at 288.

68. *Id.*

69. *Id.* (emphasis added).

70. *Id.*

71. *Id.* at 289.

72. *Id.* at 290. In contrast, "where one state's contacts with a set of facts are few and relatively insignificant as compared with those of another state whose law is different," a true conflict exists, and a choice of law, albeit an easy one, will need to be made. "That is an easy conflicts case, not a false one." *Id.* at 289-90.

73. *Id.* at 290.

74. *Id.* at 291.

they match.”⁷⁵ If, after careful analysis, the court finds that two (or more) states “really have opposing governmental interests, then advancement of the forum’s interests as against those of the other state must be accepted as a legitimate part (*but not all*) of the choice-of-law process.”⁷⁶

E. Application of the Better Rule of Law

This consideration is the most controversial. Professor Weintraub writes, “To tell a court to select the ‘better’ rule, the ‘more just’ rule, is to give the court a standard which may be all things to all men, to direct it to rest its decision upon ‘a slender and treacherous reed.’”⁷⁷

Yet Leflar asserts that that is exactly what courts do. “Superiority of one rule of law over another, in terms of socio-economic jurisprudential standards, is far from being the whole basis for choice of law, yet it is without question one of the relevant considerations.”⁷⁸ After all, “[j]ustice . . . has always been one of the objectives of law.”⁷⁹ And a choice between competing *rules of law* is preferable—“more impersonal, less subjective”—than a choice between competing *parties* in the litigation.⁸⁰

Although a search for the “better law” may well lead a court to its own law, “it does not amount to an automatic preference for local law, nor is an automatic preference justifiable.”⁸¹ Judges may in fact recognize their own laws as anachronistic and choose to apply the law of their sister state. In any event, “[e]very judge and lawyer knows that our courts have engaged in [this choice of one set of laws over another] from time immemorial, and that it was right for them to do so.”⁸² Far better to manipulate results through the substance/procedure distinction, or other escape devices, than to “disregard superiority in rules of law altogether.”⁸³ Better yet to openly address and apply this consideration, along with the others included in Leflar’s list. Leflar cautions,

75. *Id.*

76. *Id.* at 295 (emphasis added).

77. Russell J. Weintraub, *A Method for Solving Conflict Problems*, *supra* note 46, at 585 (quoting Elliot E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 980 (1952)).

78. Leflar, *supra* note 44, at 296.

79. *Id.*

80. *Id.* at 296-97.

81. *Id.* at 299.

82. *Id.* at 302.

83. *Id.* at 302-03.

however, that this consideration should not outweigh the other four; "it is only one of the five, more important in some types of cases than in others, almost controlling in some but far in the background in others."⁸⁴

Leflar's five choice-influencing considerations are not to be prioritized. "Their relative importance varies according to the area of law involved. Some will be more important in one area of law, others in another. But all should be considered regardless of the area."⁸⁵

III. WISCONSIN'S REJECTION OF TRADITIONAL CHOICE OF LAW PRINCIPLES

Initially, Wisconsin did not follow traditional choice of law principles. In 1875 it affirmed its adherence to *lex fori*—the law of the forum—"almost too familiar a principle for discussion or authority."⁸⁶ But in 1904, the Wisconsin Supreme Court joined the majority of states in adopting the traditional principles set forth above and later adopted in the first Restatement, *Conflict of Laws*.⁸⁷ For sixty-one years, Wisconsin courts followed this mainstream territorial approach to choice of law.

But the choice of law revolution in the 1960s did not pass Wisconsin courts unnoticed. In 1965, the Wisconsin Supreme Court joined the revolution, rejecting traditional choice of law analysis in *Wilcox v. Wilcox*.⁸⁸ Although the court was clear in its rejection, it was not so clear in articulating a new analytical standard.

The facts in *Wilcox* were straightforward. The plaintiff, Mrs. Wilcox, a Wisconsin resident, sued her husband, also a Wisconsin resident, and his insurer, American Family Mutual Insurance Company, "organized, licensed, and domiciled in the state of Wisconsin," under an insurance policy "issued and delivered" in Wisconsin on a car "usually garaged in and used in Wisconsin."⁸⁹ She sued for injuries suffered as a passenger in an automobile driven by Mr. Wilcox in Nebraska.⁹⁰ Nebraska's guest statute precluded a host's liability unless the guest could prove "gross negligence or intoxication of the host,"⁹¹ factors notably

84. *Id.* at 304.

85. ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* 195 (3d ed. 1977).

86. *Anderson v. Milwaukee & St. Paul R.R.*, 37 Wis. 321, 322 (1875).

87. *Bain v. Northern Pacific R.R.*, 120 Wis. 412, 98 N.W. 241 (1904).

88. 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

89. *Id.* at 619, 133 N.W.2d at 409.

90. *Id.*

91. *Id.*

absent in the complaint. Wisconsin has never had a guest statute, and therefore ordinary negligence would suffice for a finding of liability.

Under the traditional principle of *lex loci delicti*, the trial court had no difficulty in determining that Nebraska law would apply as the place of injury, and it sustained a demurrer to the complaint. But on appeal, the Wisconsin Supreme Court reversed, holding that Wisconsin law should govern. It specifically overruled prior cases "that hold that the proper choice-of-law rule invariably is *lex loci delicti*."⁹² Instead, it called for "a reasonable and flexible approach that will allow the use of *lex loci delicti*, *lex fori*, or a combination of the two or the law of a third state if it is in the interests of sound legal administration and justice to do so."⁹³ The court asserted, hopefully but prematurely, that its new approach would be "practical and workable."⁹⁴

The court rejected traditional principles for two reasons: the absurd results they produced and their failure to provide certainty of result. The Wisconsin court noted the "absurd and unjust" result in *Walton v. Arabian American Oil Co.*⁹⁵ In that case an American employee sued his American employer for injuries sustained while driving his employer's vehicle in Saudi Arabia. Even though neither party had pled foreign law, the court held that Saudi Arabian law should apply.⁹⁶

The Wisconsin court also cited its own case of *Haumschild v. Continental Casualty Co.*⁹⁷ to demonstrate that traditional principles failed to produce the certainty that presumably sustained their efficacy. There, the court just six years earlier had held that Wisconsin law governed an automobile accident dispute that had taken place in California.⁹⁸ In so holding, the court cast the dispute not as a tort, which would have required application of *lex loci delicti*, but as an interspousal immunity question, involving family law.⁹⁹ Thus recharacterized, the court found that the law of the domicile (here, Wisconsin) "governs the capacity of one spouse to sue the other in tort."¹⁰⁰

The Wisconsin court in *Wilcox* additionally noted that traditional

92. *Id.* at 621, 133 N.W.2d at 410.

93. *Id.*

94. *Id.*

95. *Id.* at 622, 133 N.W.2d at 411 (citing *Walton v. Arabian American Oil Co.*, 233 F.2d 541 (2d Cir. 1956)).

96. *Walton*, 233 F.2d at 541.

97. 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

98. *Id.*

99. *Id.* at 137-38, 95 N.W.2d at 815-18.

100. *Id.* at 138, 95 N.W.2d at 818.

principles often gave way to a state's "public policy"¹⁰¹ and that "[c]ourts have resorted to characterization of the action as one of contract rather than tort or one involving matters of procedure rather than substance in order to [reach] . . . a just result."¹⁰²

The decision in *Wilcox* appears to be restricted to tort cases, where predictability is not very important: "persons will rarely, if ever, give advance thought to the legal consequences of their actions."¹⁰³ The court noted that "the rule being discarded is one lying in the field of conflict of laws as applied to torts,"¹⁰⁴ as it appeared in the then-current first Restatement, section 378, i.e., *lex loci delicti*.¹⁰⁵

The court, having thoroughly rejected *lex loci delicti*, now had to provide an alternative method of analysis. In doing so, it conducted a fairly exhaustive, albeit unreliable,¹⁰⁶ survey of modern conflicts law. The court also cautioned, "In discussing these theories, we do not mean to intimate that we intend to follow any of them in their entirety."¹⁰⁷

The court began with Brainerd Currie's governmental interest analysis, "which requires the forum state to apply its law if it has any legitimate policy interest."¹⁰⁸ The court continued: "The *lex loci* [law of the place of injury] should be applied only if the forum has no interest."¹⁰⁹ But then the court plainly misstated Currie's theory: "[I]f the forum state has no legitimate interest and if other states have competing interests, then the law of the forum should govern."¹¹⁰ This can only be deemed a clerical error. The court could not have meant that forum law should apply in the absence of any legitimate forum interest and when another state has a legitimate interest. In such cases, Currie advocates the application of the other state's law.

101. 26 Wis. 2d at 623, 133 N.W.2d at 411.

102. *Id.* at 624-25, 133 N.W.2d at 412 (quoting James R. Bridges & William D. Segal, Comment, *The Second Conflicts Restatement of Torts: A Caveat*, 51 CALIF. L. REV. 762, 770 (1963)).

103. *Id.* at 624, 133 N.W.2d at 412 (quoting Willis Reese, *Comments on Babcock v. Jackson, A Recent Development in Conflicts of Law*, 63 COLUM. L. REV. 1212, 1254 (1963)).

104. *Id.* at 625, 133 N.W.2d at 412 (quoting *Haumschild v. Continental Casualty Co.*, 7 Wis. 2d at 137-38, 95 N.W.2d at 818).

105. *Wilcox*, 26 Wis. 2d at 625, 133 N.W.2d at 412 (citing RESTATEMENT OF CONFLICT OF LAWS § 378 (1934)).

106. See *infra* text accompanying n.110.

107. 26 Wis. 2d at 626 n.12, 133 N.W.2d at 413 n.12.

108. *Id.* at 626, 133 N.W.2d at 413 (citing Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171).

109. *Id.*

110. *Id.*

The Wisconsin court then reviewed the choice of law theories of Professor Albert A. Ehrenzweig¹¹¹ and Russell Weintraub.¹¹² Finally, the court discussed the then-tentative draft of the Restatement (Second) of the Conflict of Laws, which adopted the "most significant relationship" test.¹¹³ The court focused on two sections of the Restatement. The first provides that the "local law of the state which has the most-significant relationship with the occurrence and with the parties determines' the [parties'] rights and liabilities."¹¹⁴ That section also provides a list of the relevant contacts which contribute to that relationship.¹¹⁵ The second section provides a presumption that the law of the place of injury shall apply in tort cases, "unless some other state has a more significant relationship with the occurrence and the parties."¹¹⁶

The court next attempted to articulate its own choice of law theory, drawing from several of the approaches. It incorporated the "most significant relationship" standard from the Restatement (Second). But "the mere counting of contacts should not be determinative of the law to be applied. It is rather the relevancy of the contact in the terms of policy considerations important to the forum, vis-a-vis, other contact states."¹¹⁷ In other words, "in order to determine the 'most-significant relationship' consideration should be given to the *policies and interests* of the forum state, the tort state, and of other states that may have an interest."¹¹⁸

This reference to policy considerations implicates Currie's govern-

111. *Id.* at 626-27, 133 N.W.2d at 413 (citing Albert A. Ehrenzweig, *Guest Statutes in the Conflict of Laws: Towards a Theory of Enterprise Liability under "Foreseeable and Insurable Laws,"* 69 YALE L.J. 595 (1960)).

112. *Id.* at 627, 133 N.W.2d at 413 (citing Russell J. Weintraub, *A Method for Solving Conflict Problems: Torts*, 48 CORNELL L.Q. 215 (1963)).

113. *Id.* at 628, 133 N.W.2d at 415 (citing Tentative Draft No. 9 of the Restatement of Conflict of Laws (2d), § 379). The Restatement provisions discussed in *Wilcox* were adopted as §§ 145 and 146 in the final Restatement, with minor changes in wording. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 146 (1971).

114. *Id.* at 628, 133 N.W.2d at 413 (quoting Tentative Draft No. 9 of the RESTATEMENT OF CONFLICTS OF LAWS (2d), § 379. This section now appears as § 145 in the Restatement (Second) of CONFLICT OF LAWS (1971)).

115. *Id.*, 133 N.W.2d at 413-14. The relevant contacts are: place of injury; place of conduct; domicile, nationality, place of incorporation, place of business; place where the relationship is centered. The Restatement as later adopted also includes the parties' residence. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2)(c)(1971).

116. *Id.*, 133 N.W.2d at 414 (quoting Tentative Draft No. 9, RESTATEMENT (SECOND) OF CONFLICT OF LAWS (2d) § 379a). This provision was adopted as § 146 in the final draft. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971).

117. 26 Wis. 2d at 633-34, 133 N.W.2d at 416.

118. *Id.* at 631, 133 N.W.2d at 415 (emphasis added).

mental interest analysis, and, in fact, the court's own reasoning demonstrated this analysis. The court examined the policy underlying Nebraska's guest statute and Wisconsin's policy of liability for ordinary negligence. It asked whether either of these state policies would be served by the application of their own law and found that "Wisconsin is the state most intimately and significantly concerned with the disposition of [the] issue."¹¹⁹

But, in addition to the combination of Restatement (Second) and governmental interest analysis, the court continued: "We start with the premise that if the forum state is concerned it will not favor the application of a rule of law repugnant to its own policies, and that the law of the forum should presumptively apply unless it becomes clear that non-forum contacts are of the greater significance."¹²⁰ Here, the court replaced the Restatement's presumptive place-of-injury law with Ehrenzweig's presumptive forum law.

In the end, the court applied Wisconsin law to this dispute, adopting what it called the "most significant relationship" or "center of gravity" or "grouping of contacts" test.¹²¹ It envisioned that "generalizations will soon become apparent" and that the new standard would serve as "a guide to the future to provide a uniform common law of conflicts."¹²² That vision did not last long. In fact, it took nearly ten years—and a dozen cases—for the court to articulate a fairly well-defined, precise choice-of-law methodology. And that methodology still has not led to a uniform Wisconsin common law of conflicts.

IV. WISCONSIN'S ADOPTION OF LEFLAR'S THEORY

Just two years later, the state's highest court had before it another case involving a negligent host driver and her ungrateful guest. But the facts seemed to represent the flip side of *Wilcox*. In *Wilcox*, the host-guest relationship arose in Wisconsin between two Wisconsin residents, with the accident occurring in Nebraska. The court applied Wisconsin law. Now, two years later, in *Heath v. Zellmer*,¹²³ both host and guest

119. *Id.* at 633, 133 N.W.2d at 415-16. Currie would call this a false conflict.

120. *Id.* at 634, 133 N.W.2d at 416.

121. *See id.* at 634-35, 133 N.W.2d at 416-17. "Other courts applying a similar reasoning have referred to their solution as a 'center of gravity' or a 'grouping of contacts.' . . . [T]hey are . . . meaningful 'short-hand' phrases for the expression of the rule that we adopt." *Id.* at 635, 133 N.W.2d at 417.

122. *Id.* at 635, 133 N.W.2d at 417.

123. 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

were non-residents,¹²⁴ and the relationship was formed in Indiana, which at that time had a guest statute precluding host liability except where the conduct was "wanton or wilful."¹²⁵ The accident occurred in Wisconsin. Relying on the analysis and holding in *Wilcox*, the host-driver moved for summary judgment, assuming that Indiana's guest statute was the proper governing law.¹²⁶

She certainly had reason to rely on the court finding in her favor. In *Wilcox*, the court had noted:

All of the parties, including the liability insurer, are domiciled in Wisconsin. None of them can claim surprise upon permitting a suit for ordinary negligence between host and guest. This is the law that in the ordinary course of events would have been applied if the accident had occurred in Wisconsin. That it occurred outside was merely fortuitous, and should not now inure as a windfall to any of the defendants. The policy was issued for a Wisconsin-garaged automobile in contemplation of possible liability under Wisconsin law, and we find that the insurer in this case is bound by his bargain. The law of Wisconsin is the law of the place whose application was "anticipated and insured against."¹²⁷

But in *Heath*, the relevant parties were non-residents, the driver from Ohio, the passengers from Indiana. Both Ohio and Indiana had guest statutes. The automobile was licensed and insured in Indiana by an Indiana insurer.¹²⁸ That the accident occurred in Wisconsin was merely fortuitous¹²⁹; the Indiana residents were visiting Wisconsin relatives.¹³⁰ But the Wisconsin court again applied Wisconsin law in an opinion authored by Justice Heffernan, the same judge who wrote the opinion in *Wilcox*.

The court distinguished *Wilcox* by noting that in this case another driver, a Wisconsin resident, was involved and that three additional passengers (non-parties) were Wisconsin residents. The court then clearly

124. The host was domiciled in Ohio, the guest in Indiana. However, Ohio's law was the same as Indiana's and so was not given separate consideration. See *id.* at 585, 589 n.3, 151 N.W.2d at 666-67, 669 n.3.

125. *Id.* at 586, 151 N.W.2d at 667 (quoting IND. CODE ANN. § 47-1021).

126. *Id.* at 586, 588; 151 N.W.2d at 667, 668.

127. *Wilcox v. Wilcox*, 26 Wis. 2d at 632-33, 133 N.W.2d at 416 (quoting Albert A. Ehrenzweig, *Guest Statutes in the Conflict of Laws: Towards a Theory of Enterprise Liability Under "Foreseeable and Insurable Laws,"* 69 YALE L.J. 595, 603 (1960)).

128. *Heath*, 35 Wis. 2d at 585, 151 N.W.2d at 666.

129. *Id.* at 589, 151 N.W.2d at 668.

130. See *id.* at 585, 151 N.W.2d at 666.

applied Currie's governmental interest analysis to determine if this case involved a "true conflict."¹³¹ It examined the policies underlying Wisconsin and Indiana law, found that "each [state] has important policies that it believes will be furthered by the application of its law,"¹³² and thus a true conflict existed.

Significantly absent from this opinion was any mention of the Restatement (Second). Now the court appeared to back away from the *Wilcox* analysis, finding that "[t]he *Wilcox Case*, although pointing to a methodology for making a choice of law where a conflict exists, was primarily pointed to the *Wilcox* determination, *i.e.*, does a serious conflict in fact exist?"¹³³

Suggesting that the "most significant interest" test adopted by the court just two years earlier had proven unsuccessful elsewhere,¹³⁴ the court stated that it "should be expected to approach conflicts problems in a consistent manner so that its decisions will not only have precedential value for its own decision making but also can serve as a guide to the bench and bar as well."¹³⁵ Citing a law review article published just one year earlier, the court adopted the choice-influencing considerations proposed by Robert A. Leflar in that article.¹³⁶

Carefully applying Leflar's five considerations, the court concluded that Wisconsin law applied. First, it asserted that "predictability of results" rarely has relevance to automobile accidents or other unplanned and unintentional torts.¹³⁷ Leflar would agree, at least "in the sense of serving as a guide to the conduct of the parties Parties do not plan this sort of tort."¹³⁸ But Leflar noted that *two* ideals underlie this con-

131. *Id.* at 592, 151 N.W.2d at 670.

132. *Id.*, 151 N.W.2d at 670.

133. *Id.* at 593, 151 N.W.2d at 671.

134. Since rejection of traditional analysis, "legal commentators have sought some method that preserves the certainty of the old rule and the rationality of the 'center of gravity'—'grouping of contracts [sic]'—'most significant interest' series of cases that followed it. They have not succeeded, nor is it likely that they will." *Id.* at 594, 151 N.W.2d at 671.

135. *Id.*, 151 N.W.2d at 671.

136. *Id.* at 595-96, 151 N.W.2d at 671-72 (citing Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, *supra* note 44, at 267). The five considerations are: (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; (5) application of the better rule of law. *Heath v. Zellmer*, 35 Wis. 2d at 596, 151 N.W.2d at 672 (citing Leflar, *Choice-Influencing Considerations in Conflicts Law*, *supra* note 44, at 282). See *supra* note 52-85 and text accompanying notes for a discussion of these considerations.

137. *Id.* at 596, 151 N.W.2d at 672.

138. Leflar, *supra* note 44, at 310-11.

sideration,¹³⁹ and the Wisconsin court ignored the first: "the decision in the litigation on a given set of facts should be the same regardless of where the litigation occurs, so that 'forum shopping' will benefit neither party." Leflar himself suggested, in an example included in the article cited by the Wisconsin court, that "[p]redictability of the territorial scope of liability might have had bearing on liability insurance premiums" before the event, and "[a]fter the event, if the governing law were clearly known, forum shopping would be inhibited, which is of some importance."¹⁴⁰ The Wisconsin court ignored these aspects of predictability.

It may well be that the Indiana insurance company, in establishing insurance premiums for the car (garaged and insured in Indiana), did not consider Indiana's guest statute. But it may have, and the decision reached by this Wisconsin court disserved the ability to predict results and set insurance premiums accordingly. Although forum shopping most likely played no role in this case,¹⁴¹ the court might also have at least considered it.

Second, concerning the "maintenance of interstate and international order," the court recognized that a "state whose interest is negligible should not attempt to displace the law of a state whose interest is substantial, and the choice of law should not be a mere forum preference in disregard of the competing rationales behind diverse foreign and forum laws."¹⁴² But such was not the case here, as Leflar also recognized in the context of a guest statute hypothetical provided in his earlier work.¹⁴³ In his hypothetical, he recognized that "[i]nterstate relationships . . . in the federal system, including interstate travel by residents of various states, will not be appreciably affected whichever law is applied."¹⁴⁴

Third, relying again on Leflar's examples, the court found that

139. See *supra* text accompanying notes 59-60.

140. Leflar, *supra* note 44, at 311.

141. Plaintiffs were two Indiana passengers—a mother and her daughter—in the Indiana car. They sued the Wisconsin driver of the other vehicle. The Wisconsin driver pleaded the driver of the Indiana car—a second daughter—for contribution. *Heath*, 35 Wis. 2d at 589-90, 151 N.W.2d at 668-69. If Indiana's guest statute applied, this family member would receive protection for her ordinary negligence. Thus, in the initial suit, had the plaintiffs foreseen the guest statute issue, they likely would have chosen to file suit in Indiana, to protect their own driver. However, they may not have been able to choose a forum even if they wanted to, since it is unlikely that Indiana would have had personal jurisdiction over the Wisconsin driver.

142. *Id.* at 596-97, 151 N.W.2d at 672.

143. See Leflar, *supra* note 44, at 314-15 (demonstrating an application of his considerations in twelve hypothetical cases).

144. *Id.* at 315.

"simplification of the judicial task" is a consideration of "minimal importance" in an automobile accident case. But the court added, "Nevertheless, a court's task is rarely simplified when the lawyers and judges must apply themselves to foreign rather than forum law."¹⁴⁵ Leflar recognized such a temptation and cautioned against it: "[T]he reasons of practicality . . . stop short when the rule in question is an outcome-determinative one that would be no harder for the [forum] court to apply than any other [state's] rule of substantive law."¹⁴⁶ And in his guest statute hypothetical, Leflar found that a forum court could apply either law "with about equal ease."¹⁴⁷

Fourth, the court considered "advancement of the forum's governmental interest." The court could not resist favoring its own law, a sound position given the trend away from guest statutes. But that was not the reason provided for forum preference. Instead, the court referred to *Wilcox*, in which it said "that the forum law is presumptively applicable unless there are nonforum contacts that are of greater significance."¹⁴⁸ Here, the driver and passengers of the Indiana car were not residents of Wisconsin, and the car was garaged and insured in Indiana. The court must—and did—admit that Indiana was also a concerned jurisdiction, yet "forum law should continue to be a primary concern of the forum court for 'Courts are instruments of state policy . . . ' and it is the duty of a Wisconsin court to identify and effectuate Wisconsin policies."¹⁴⁹

The court was quick to note that nonforum law may, in some cases, "best serve the interest of the state as a justice-seeking jurisdiction," as, for example, when the forum's law consisted of anachronistic common law.¹⁵⁰ But, "[i]f it appears that the application of forum law will advance the governmental interest of the forum state, this fact becomes a *major*, though not in itself a determining, factor in the ultimate choice of law."¹⁵¹ What is the governmental interest in this case? Wisconsin apparently cares about compensating the Indiana passengers, about deterring the Ohio driver's negligent conduct on Wisconsin roads, and about providing contribution to the Wisconsin driver, if he is found

145. 35 Wis. 2d at 597, 151 N.W.2d at 673.

146. Leflar, *supra* note 44, at 288.

147. *Id.* at 315.

148. 35 Wis. 2d at 597, 151 N.W.2d at 673.

149. *Id.* (quoting *Wilcox*, 26 Wis. 2d at 633, 133 N.W.2d at 416).

150. *Id.* at 597-98, 151 N.W.2d at 673.

151. *Id.* (emphasis added).

negligent.¹⁵²

Finally, the court addressed the fifth consideration, "application of the better rule of law." By now, it was apparent which law this court believed to be "better." "The Indiana law is an anachronism,"¹⁵³ a conclusion that other courts had reached about guest statutes in general.

Thus, the Wisconsin court in *Heath v. Zellmer* adopted a new choice of law analysis, joining the courts of only one other state at that time, New Hampshire.¹⁵⁴ In doing so, the Wisconsin court utilized Currie's governmental interest analysis to first determine whether a true conflict existed, then seemed to cling to its strong forum law preference, while at the same time attempting to carefully apply Leflar's five choice-influencing considerations.

V. WISCONSIN'S EVOLVING APPLICATION OF LEFLAR'S THEORY

The Wisconsin Supreme Court had the opportunity to revisit its newly-adopted choice of law analysis three times within the next year. In the first case, *Zelinger v. State Sand & Gravel Company*,¹⁵⁵ the court attempted to explain the current state of conflicts law in Wisconsin. It correctly observed that Wisconsin had rejected both *lex loci delicti* and *lex fori*.¹⁵⁶ But it also asserted that the traditional rule "was abandoned in its entirety as a mechanically determinative rule in conflict cases *whether such cases involved torts or contracts or other subject matter*,"¹⁵⁷ despite language to the contrary in *Wilcox* that seemed to restrict its application to tort cases.¹⁵⁸

The court stated: "We then adopted the rule contemplated by Tentative Draft No. 9 of the Restatement 2d . . . commonly referred to as the 'center of gravity,' 'grouping of contacts,' or 'dominant interest' rule or the 'interest oriented' or 'interest analysis' approach."¹⁵⁹ The court failed to draw distinctions between Restatement (Second) and Currie's

152. *Id.* at 592, 599-601, 151 N.W.2d at 670, 674-75.

153. *Id.* at 602, 151 N.W.2d at 675.

154. See *Clark v. Clark*, 222 A.2d 205 (N. H. 1966).

155. 38 Wis. 2d 98, 156 N.W.2d 466 (1968).

156. *Id.* at 103-04, 156 N.W.2d at 468.

157. *Id.* at 105, 156 N.W.2d at 469 (emphasis added).

158. *Wilcox* involved only tort issues. See *Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). Throughout the opinion, the court's references are to tort cases only. And in rejecting *lex loci delicti*, the court quoted from *Haumschild v. Continental Casualty Co.*, 7 Wis. 2d 130, 137; 95 N.W.2d 814, 818: "... the rule being discarded is one lying in the field of conflict of laws *as applied to torts* so that there can hardly have been any action taken by the parties in reliance upon it." 26 Wis. 2d at 625, 133 N.W.2d at 412 (emphasis added).

159. 38 Wis. 2d at 105, 156 N.W.2d at 469.

interest analysis.

In dealing with *Heath v. Zellmer*,¹⁶⁰ the court explained that it "moved to the next problem since *Wilcox* only involved Wisconsin residents in a one-car accident in Nebraska."¹⁶¹ The court then noted that it adopted Leflar's analysis.¹⁶² Now, the court offered this confusing directive:

All these guides [the Leflar choice-influencing considerations] should be considered in each case regardless of its area in the law and their relative importance will vary according to the precise issue involved. Under this approach the *lex fori* is not a choice-influencing consideration as such but is a weak presumption to be used as a starting point in applying the conflict-of-law rule adopted in *Wilcox* but which is not a part of the five choice-influencing considerations adopted in *Heath*. This analysis is somewhat analogous to the determination of the comparison of causal negligence under our doctrine of comparative negligence in that it is not the number of respects in which negligence may be found (quantitative) but the contribution (qualitative) of the negligence to the cause which determines the outcome.¹⁶³

The court then analyzed the instant case which involved Illinois plaintiffs, a Wisconsin defendant and its Wisconsin insurer, and a third party Illinois insurer. The relevant issues concerned interspousal immunity, parental immunity, and the guest statute. The court applied an abbreviated version of interest analysis¹⁶⁴ to arrive at the conclusion that this case represented a true conflict, and it then applied the five Leflar choice-influencing considerations, concluding that Wisconsin law applied.¹⁶⁵ In doing so, the court focused primarily on the last two considerations, advancement of the forum state's interest and application of the better law.

Regarding the first, the court noted that Illinois had a guest statute, interspousal immunity, and parental immunity, none of which Wiscon-

160. 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

161. 38 Wis. 2d at 105, 156 N.W.2d at 469.

162. *Id.* at 106, 156 N.W.2d at 469.

163. *Id.* at 106-07, 156 N.W.2d at 469-70 (footnote omitted). The author of the opinion, Chief Justice Hallows, noted that he would abandon the forum presumption "and would apply the standards of *Heath* from scratch." *Id.* at 106 n.1, 156 N.W.2d at 470 n.1.

164. The court said only: "there is no question that both Illinois and Wisconsin have contacts with the tortious occurrence. Unlike in *Wilcox*, we here are presented with a serious conflict because of the basic and significant repugnance of the underlying state interests involved." *Id.* at 107, 156 N.W.2d at 470.

165. *Id.* at 107, 156 N.W.2d at 470.

sin had, nor did it ever have.¹⁶⁶ Thus, the court asserted, "Wisconsin public policy in this area is to the contrary,"¹⁶⁷ and Wisconsin's "moral considerations"—"to promote the spreading of the risk and fasten liability in torts on a moral basis of fault"—"leave little room for a justification of immunity for collateral reasons."¹⁶⁸

As for the better law, the court agreed with *Heath*¹⁶⁹ that guest statutes are archaic, and it believed the same could be said of interspousal immunity, which "was based upon the common-law theory of unity of person and that person was the husband."¹⁷⁰ As for parental immunity, "its existence works an injustice to the child. In fact, a child needs more protection and rights from a socioeconomic view than his adult parent."¹⁷¹ Not surprisingly, then, the court found that Wisconsin had the better law in all three areas and Wisconsin law applied.¹⁷²

Less than six weeks later, in *Conklin v. Horner*,¹⁷³ the court again faced tort issues involving choice of law. Justice Heffernan, the author of the opinions in both *Wilcox*¹⁷⁴ and *Heath*,¹⁷⁵ authored this opinion as well. Again, the court applied Wisconsin law, this time in a case involving (1) only Illinois parties, (2) an Illinois car insured by an insurance policy issued in Illinois, (3) an Illinois guest statute, and (4) a trip originating and ending in Illinois, which "fortuitously" occurred in Wisconsin.¹⁷⁶

This case, like *Heath v. Zellmer*,¹⁷⁷ appeared to represent the flip side of *Wilcox*, where all the parties and their insurers were connected with Wisconsin and the only Nebraska connection was as the place of injury. The court in that case applied the law of the only state that had an interest: Wisconsin. But in *Conklin*, all the parties and their insurers were connected with Illinois.

The court once again attempted to articulate its newly adopted

166. *Id.* at 110-11, 156 N.W.2d at 471-72.

167. *Id.* at 111, 156 N.W.2d at 472.

168. *Id.* at 112, 156 N.W.2d at 472. The "collateral" reasons for Illinois immunity law are the promotion of family peace and avoidance of collusive suits (for interspousal and parental immunity), and protection of the good Samaritan (for guest statute). *Id.*

169. 35 Wis. 2d 578, 602; 151 N.W.2d 664, 675.

170. 38 Wis. 2d at 112, 156 N.W.2d at 472.

171. *Id.*, 156 N.W.2d at 473.

172. *Id.* at 113-14, 156 N.W.2d at 473.

173. 38 Wis. 2d 468, 157 N.W.2d 579 (1968).

174. 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

175. 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

176. 38 Wis. 2d at 474, 157 N.W.2d at 582.

177. 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

choice of law analysis. It again asserted that it adopted a modified version of the Second Restatement, also known as the "center of gravity," 'grouping of contacts,' 'dominant interest,' 'interest oriented,' or 'interest analysis' approach."¹⁷⁸ But the court also noted that it did "not follow the methodology of the Restatement";¹⁷⁹ and that what it "adopted was not a rule, but a method of analysis that permitted dissection of the jural bundle constituting a tort and its environment to determine what elements therein were relevant to a reasonable choice of law."¹⁸⁰

If the court had approached this case as it did the facts in *Wilcox*, it would first have applied governmental interest analysis. Unlike the facts in *Wilcox*, where the accident occurred on the roads of a state which had a guest statute, in *Conklin* the accident occurred on a Wisconsin road, in a state without a guest statute. Thus, here the court might have found that, although in *Wilcox* Nebraska had no policy that would be advanced by application of its law,¹⁸¹ Wisconsin in the instant case *did* have an interest—deterrence of negligent driving—that *would* be advanced by the application of its law. Thus, both Illinois and Wisconsin had policies that would be advanced by application of their laws, and a true conflict existed. The court then would have had to apply the true conflict analysis adopted in *Heath*, i.e., Leflar's choice-influencing considerations.

Instead, the court in *Conklin* unnecessarily began its analysis with a strong forum law presumption: "Wisconsin is a seriously concerned jurisdiction" because "it is the forum as well. Thus, this court is specially charged as an instrument of the Wisconsin government to further the interests of Wisconsin, if to do so furthers the underlying policies of our law."¹⁸² Although the court just weeks earlier referred to the "weak" forum law presumption,¹⁸³ this court asserted that

the strength of the presumption is irrelevant, since its only pur-

178. 38 Wis. 2d at 473, 157 N.W.2d at 581 (quoting *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d at 105, 156 N.W.2d at 469).

179. 38 Wis. 2d at 473 n.1, 157 N.W.2d at 581 n.1.

180. *Id.* at 474, 157 N.W.2d at 581.

181. In *Wilcox*, all the parties and their insurers were from Wisconsin. See 26 Wis. 2d 617, 133 N.W.2d 408 (1965). The accident occurred in Nebraska; therefore, Nebraska's only interest would have been highway safety and the deterrence of negligent driving. But its guest statute protected negligent drivers, thereby undermining whatever deterrence policy might otherwise have been advanced. Nebraska had no policy which would be *advanced* by application of its guest statute.

182. 38 Wis. 2d at 475, 157 N.W.2d at 582.

183. *Zelinger*, 38 Wis. 2d at 106, 156 N.W.2d at 469.

pose is to trigger the responsibility of the court to carry out the forum state's policy unless it appears that the forum state's policies are *unaffected* by using a nonforum rule, or unless the facts show that the contacts with the tort are so minimal that the use of forum law would be clearly the result of *interloping chauvinism*.¹⁸⁴

In other words, the forum should favor its policy if competing policies are in any way outcome determinative. And yet the court asserted that the forum presumption can be overcome if "it becomes clear that nonforum contacts are of the greater significance,"¹⁸⁵ apparently even if the forum's policy would be affected.

The court then examined the policies underlying the law of each state to determine whether a conflict existed and found that Wisconsin did indeed have a deterrent interest to protect, in addition to its concern for compensating all injured persons, even nonresidents. It was easy, then, to find "that a serious conflict arises,"¹⁸⁶ necessitating application of the Leflar considerations.

The first consideration, predictability of result, received little consideration because people do not plan to commit torts. Insurance planning also played little role, because 1) the parties' Illinois county borders Wisconsin and interstate travel must therefore have been contemplated; 2) the insurance company's name was "Nationwide Mutual," "hardly indicative that [the company] relied solely upon local laws for setting its rates"; and 3) the accident occurred at a time when *lex loci delicti* was the rule and the parties would have contemplated the application of Wisconsin law, if they contemplated it at all.¹⁸⁷ The court did mention the possibility of forum shopping, but noted that the case was filed prior to *Wilcox*,¹⁸⁸ the court did not acknowledge that a strong forum law presumption may contribute to forum shopping in the future.

The second consideration, maintenance of interstate order and comity, received much of the court's attention, as it must in this case of strong Illinois contacts. The court noted that the two states' competing policies may in fact not be as outcome determinative as might be expected, because recent Illinois cases and scholarship demonstrated that Illinois's negligence standard under its guest statute (willful and wan-

184. 38 Wis. 2d at 475 n.2, 157 N.W.2d at 582 n.2 (emphasis added).

185. *Id.* at 475, 157 N.W.2d at 582 (quoting *Wilcox*, 26 Wis. 2d at 634, 133 N.W.2d at 416).

186. *Id.* at 477, 157 N.W.2d at 583.

187. *Id.* at 478, 157 N.W.2d at 584.

188. *Id.* at 479 n.6, 157 N.W.2d at 584 n.6.

ton) was "used to define a vague and somewhat shadowy area close to ordinary negligence."¹⁸⁹ In addition, Wisconsin's interests were more than "minimal," and application of Wisconsin law to Illinois drivers was "not likely to reduce the likelihood that Illinois hosts will continue to drive into Wisconsin with their guests."¹⁹⁰ The court found "no burden upon interstate movement."¹⁹¹ Nor did the court believe that Illinois courts would retaliate, subjecting Wisconsin drivers and their guests to Illinois law in an Illinois forum.¹⁹²

The court then applied the last three factors. As in *Heath* and *Zelinger*, the court noted that "simplification of the judicial task" plays little role in guest statute cases, and that it believed Wisconsin had the "better law."¹⁹³ As for "advancement of the forum's governmental interests," the court deemed this, not surprisingly, "[o]ne of the most relevant considerations."¹⁹⁴ The court even considered that applying Illinois law might violate equal protection, providing a remedy for ordinary negligence to its own citizens, but denying it to others.¹⁹⁵ And, finally, the court wished to deter the drivers of those 21,699 out-of-state vehicles who were involved in accidents on Wisconsin roads in 1966, including the 3,655 from Illinois.¹⁹⁶

After this case, it is difficult to see why the court continued to believe that the Restatement (Second) played any role at all in its choice-of-law methodology. As the dissent noted, "If we were to follow the Restatement 2d . . . we would apply the law of Illinois to the present facts for the reason that Illinois has more significant relationships to the particular issue here involved than Wisconsin."¹⁹⁷ But in fact the court did not follow the Restatement. It applied interest analysis to determine if a true conflict existed, and, if so, the court began with a strong forum preference, supplemented with Leflar's choice-influencing considerations.

Two-and-a-half months after *Conklin*, the court had to decide whether its choice of law analysis applied as well to contract issues. In

189. *Id.* at 480, 157 N.W.2d at 585 (quoting *Spivack v. Hara*, 216 N.E.2d 173, 175 (Ill. App. 1966)).

190. 38 Wis. 2d at 481, 157 N.W.2d at 585.

191. *Id.*

192. *Id.* at 479, 157 N.W.2d at 584.

193. *Id.* at 481, 483, 157 N.W.2d at 585, 586.

194. *Id.* at 481, 157 N.W.2d at 585.

195. *Id.* at 482, 157 N.W.2d at 586.

196. *Id.* at 483, 157 N.W.2d at 586.

197. *Id.* at 491, 157 N.W.2d at 590 (Hallows, C.J., dissenting).

Urhammer v. Olson,¹⁹⁸ JoAnn Urhammer, a Minnesota plaintiff-passenger in one car, sued Charles Olson, the Wisconsin driver of another car and his insurer. The defendants impleaded Edward Urhammer, JoAnn's Minnesota husband and driver of the first car, and his insurer. Mr. Urhammer's insurance policy, written and delivered in Minnesota, contained a family-exclusion clause, valid in Minnesota but not in Wisconsin. The key issue involved the validity of this clause.¹⁹⁹

The court now asserted that it had not yet had an opportunity to decide choice of law methodology for contracts,²⁰⁰ despite statements to the contrary in *Zelinger*.²⁰¹ It affirmed its rejection of *lex loci contractus* and adopted the "grouping-of-contacts" methodology,²⁰² which it had earlier equated with the Restatement (Second).²⁰³ But the court made no mention of the Restatement (Second), no mention of its applicable presumptive rule for contract issues²⁰⁴ nor its choice-of-law principles²⁰⁵

198. 39 Wis. 2d 447, 159 N.W.2d 688 (1968).

199. *Id.* at 448-49, 159 N.W.2d at 688-89.

200. *Id.* at 450, 159 N.W.2d at 689.

201. See *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d 98, 105; 156 N.W.2d 466, 469: In *Wilcox*, the traditional "rule was abandoned in its entirety . . . whether such cases involved torts or contracts or other subject matter. We then adopted the rule contemplated by Tentative Draft No. 9 of the Restatement 2d . . . commonly referred to as the 'center of gravity,' 'grouping or contacts,' or 'dominant interest' rule or the 'interest oriented' or 'interest analysis' approach."

202. 39 Wis. 2d at 450, 159 N.W.2d at 689.

203. See *Conklin v. Horner*, 38 Wis. 2d at 473, 157 N.W.2d 581 (the Restatement (Second) "may be denominated as the 'center of gravity,' 'grouping of contacts' . . . approach"); *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d at 105; 156 N.W.2d at 469 (the Restatement (Second) is "commonly referred to as the 'center of gravity,' 'grouping of contacts' . . . approach").

204. "If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided" in some other section. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(3). For casualty insurance, Section 193 provides: "The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship to the transaction and the parties . . ." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193. However, when the insured risk covers moving vehicles, "the location of the risk can play little role" and Section 188, rather than § 193, governs. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193 cmt. a.

The Restatement (Second) of Conflict of Laws was not officially adopted until 1971, so the court's references to the Restatement are to Tentative Draft No. 9. This draft was similar to the current Restatement, although the section numbers vary. See *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965), in which the court discusses the substantive provisions of Draft No. 9. *Id.* at 628, 133 N.W.2d at 413. Sections 379 and 379a, discussed therein, are now sections 145 and 146 of the Restatement (Second).

205. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6.

nor its "contacts to be taken into account in applying the" choice-of-law principles.²⁰⁶ The court engaged in no interest analysis. Nor did it demonstrate the least concern for Wisconsin as the forum. Instead, the court found that all relevant contacts were with Minnesota and applied Minnesota law.²⁰⁷ Clearly, the court reached the right result, but it failed to provide a well-reasoned, analytical methodology for courts to follow in subsequent cases.

Two years later, the court had an opportunity to supplement its deficient decision and attempted to do so thoroughly and carefully. *Haines v. Mid-Century Insurance Co.*²⁰⁸ involved the same contract issue as *Urhammer*, namely, whether Wisconsin or Minnesota law governed a Minnesota family exclusion clause. But this time, the court, at least initially, relied exclusively upon the Restatement (Second) to analyze its "grouping-of-contacts" methodology.²⁰⁹

Although the court ignored the Restatement's general Section 6 choice-of-law principles,²¹⁰ it carefully applied Sections 188 and 193.²¹¹ It evaluated the contacts of both Wisconsin and Minnesota, considering as well the policies underlying the law of each. In contrast to *Urhammer*, the court here found significant Wisconsin contacts. Here, the insured lived in Minnesota but was employed in Wisconsin. The insurance policy was written and delivered in Wisconsin, premiums were paid there, and accident reports were made there. The court concluded, "[a]t best the significant contacts are split between the two states."²¹²

If the court were following the Restatement (Second), the logical conclusion would be to follow the presumptive law provided in Section 188.²¹³ The court instead concluded that the facts presented a true con-

206. See *id.* § 188(2).

207. 39 Wis. 2d at 450-51, 159 N.W.2d at 689-90. The court recognized that the accident took place on a Wisconsin road and that one of the defendants and his insurer are Wisconsin residents. But these contacts had "nothing to do with the contract question." *Id.* at 451, 159 N.W.2d at 690.

208. 47 Wis. 2d 442, 177 N.W.2d 328 (1970).

209. *Id.* at 446, 177 N.W.2d at 330.

210. See Restatement (Second) of Conflict of Laws § 6.

211. See *supra* note 204. The court is now able to cite to the Proposed Official Draft of the Restatement (Second), rather than to Draft No. 9, as it had previously. Thus, the sections correspond to the current Restatement. See 47 Wis. 2d at 446 n.6, 177 N.W.2d at 330 n.6.

212. 47 Wis. 2d at 450, 177 N.W.2d at 332.

213. "If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied . . ." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(3). Application of this presumption might well have led to Wisconsin law, since the plaintiff alleged in her complaint that at the time the lawsuit was

flict, requiring application of the five choice-influencing considerations adopted by the court for tort issues in *Heath v. Zellmer*.²¹⁴

The court then, without explanation, ignored the first four considerations: "The only relevant factor here in making our choice of law is the fifth factor, namely, the 'application of the better rule of law.'"²¹⁵ Wisconsin's rule protecting injured persons was found to be a better rule than Minnesota's, which protects insurance companies.²¹⁶ Additionally, Minnesota had since passed legislation prohibiting family-exclusion clauses, so that "Minnesota law is now the same as Wisconsin."²¹⁷

The court thus set forth an unusual choice-of-law analysis for contract issues, relying upon selected Restatement (Second) provisions to determine whether a true conflict exists. If so, the court then will apply Leflar's choice-influencing considerations, though in the instant case, it relied solely upon the fifth—better law. In many ways, the court mirrors its choice-of-law analysis for tort issues, except that interest analysis determines whether a true conflict exists in tort, and Restatement (Second) determines whether a true conflict exists in contract. In both situations, once it finds a true conflict, the court applies Leflar's considerations (or some of them).

VI. OFFICIOUS INTERMEDDLING, INTERLOPING CHAUVINISM AND CONSTITUTIONAL CONCERNS

Two years later, the court revisited its choice-of-law methodology, again introducing novel elements and modifying its previous analysis. *Hunker v. Royal Indemnity Company*²¹⁸ would appear to be an easy case. It involved two Ohio employees of an Ohio corporation on a business trip. Hunker, a passenger in a car driven by his co-employee, Brown, sued Brown's insurer for injuries he suffered in a two-car accident on a Wisconsin road. The court had to determine whether Hunker, who had collected an award under Ohio's workers' compensation law, could sue his co-employee. Ohio's workers' compensation law

commenced, she was living in Wisconsin. One could therefore argue that the contract was both negotiated and would be performed in Wisconsin. It is likely, though, that when the contract was "negotiated" in Wisconsin, the insurer anticipated performance in Minnesota, where the insured then resided. The court did not address this issue.

214. 47 Wis. 2d at 450-51, 177 N.W.2d at 332-33.

215. *Id.* at 451, 177 N.W.2d at 333.

216. *Id.* at 447-48, 451, 177 N.W.2d at 331, 333.

217. *Id.* at 451, 177 N.W.2d at 333.

218. 57 Wis. 2d 588, 204 N.W.2d 897 (1973).

prohibited such suits.²¹⁹ Clearly, Ohio law should govern this case.

The court concluded that Ohio law applied, but in the process it once again modified its choice-of-law analysis. As in *Wilcox*, *Heath*, and *Conklin*, Justice Heffernan authored the opinion. The court now rejected as "inappropriate" the "loose use of language" in prior cases, which categorized a case as a "true conflict" or not.²²⁰ The court rejected the "two-step technique" employed since *Heath* as "a redundancy. No useful purpose is served by a preliminary analysis that only tells us our problem is difficult" (as in *Heath*, a "true conflict") or "easy" (as in *Wilcox*).²²¹ The court instead held that it should first determine whether or not "an outcome-determining conflict" exists,²²² that is, whether "the selection of law will affect the outcome."²²³ The court thus discarded both interest analysis (for tort) and Restatement (Second) (for contract) as a preliminary step to determining whether a true conflict exists.

If the selection of law will affect the outcome, the next logical step would be to apply Leflar's five choice-influencing considerations. But the court instead introduced a new element into its analysis. As noted above, it first determined

whether there is a conflict, i.e., will the choice of one law as compared to another determine the outcome. Once that is decided *and the facts on their face reveal that to apply any of multiple choices of law would not constitute mere officious intermeddling, in the constitutional sense*, the analysis should proceed with the law-selecting process based on the five factors approved in *Heath*.²²⁴

The court also minimized the forum law presumption. Repeating its assertion in *Conklin* that "the strength of the presumption is irrelevant,"²²⁵ the court explained, "[t]his court, as an instrument of governmental policy of the state of Wisconsin, is obligated to find the law of its forum controlling unless it can be demonstrated that the law derived from another jurisdiction is more appropriate."²²⁶ Furthermore,

219. *Id.* at 591-92, 204 N.W.2d at 898-99.

220. *Id.* at 597, 204 N.W.2d at 901-902.

221. *Id.* at 597-98, 204 N.W.2d at 902.

222. *Id.* at 597, 204 N.W.2d at 902.

223. *Id.* at 596, 204 N.W.2d at 901.

224. *Id.* at 598, 204 N.W.2d at 902 (emphasis added).

225. *Id.* at 599, 204 N.W.2d at 902 (quoting *Conklin v. Horner*, 38 Wis. 2d 468, 475 n.2, 157 N.W.2d 579, 582 n.2 (1968)).

226. 57 Wis. 2d at 599, 204 N.W.2d at 903.

"[w]hile it may be difficult to dispel innate parochial preference, the resolution of a conflict ought not be skewed by a forum preference."²²⁷ If, after applying the choice-influencing considerations, the court did not find "that the foreign law is appropriate, the conflict should be resolved by the application of forum law."²²⁸ This is a far cry from the strong forum preference seen in earlier cases where forum law presumably applied unless it would clearly constitute "interloping chauvinism."²²⁹

But what can one make of the new references to "mere officious intermeddling, in the constitutional sense"? How does one decide if the "facts on their face reveal" that application of the law of one state or another might constitute such intermeddling? The court offered no answer.

A legal definition of "intermeddling" is "[t]o interfere wrongly with property or the conduct of business affairs officiously or without right or title."²³⁰ In tort law, an "officious intermeddler" refers to a rescuer, a volunteer who "officiously confers a benefit upon another" and is therefore "not entitled to restitution therefor."²³¹ Both definitions allude to one's unwarranted interference in the affairs of another. "In the constitutional sense" can only mean that the court must ensure that a state has adequate contacts with a case (judging by the "facts on their face") so that application of its law would not be unconstitutional.

Clearly, a court cannot engage in unconstitutional choice-of-law analysis. The court in *Hunker* now appeared to focus on this obvious conclusion and, at the same time, to eliminate Currie's interest analysis from its choice-of-law methodology. Rather than focus on the policies underlying each interested state's law and asking whether that interest will be furthered by application of that state's law, we are now to focus instead on the competing laws (to determine whether they are outcome-determinative) and on the facts (to guard against an unconstitutional choice of law).

The constitutional question presumably should be answered by reference to well-established United States Supreme Court decisions.

These decisions focus primarily on both the due process and equal

227. *Id.* at 600, 204 N.W.2d at 903.

228. *Id.*

229. *See Conklin*, 38 Wis. 2d at 475 n.2, 157 N.W.2d at 582 n.2.

230. BLACK'S LAW DICTIONARY 815 (6th ed. 1990).

231. *See* RESTATEMENT (SECOND) OF RESTITUTION § 2.

protection clauses. Beginning with *Home Insurance Co. v. Dick*²³² and culminating in *Allstate Insurance Co. v. Hague*²³³ and *Phillips Petroleum Co. v. Shutts*,²³⁴ the United States Supreme Court has established constitutional limits on choice of law. In *Hague*, the Court noted that it "has taken a similar approach in deciding choice-of-law cases under both the Due Process Clause and the Full Faith and Credit Clause."²³⁵ Under both clauses, the Court examines "the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation."²³⁶ The Court will invalidate "the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction."²³⁷ But if the state whose law is applied has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair,"²³⁸ the Court will uphold the choice-of-law decision.

In *Phillips Petroleum Co. v. Shutts*²³⁹ the Court recognized that the forum may be most inclined to apply its own law. But the due process and full faith and credit clauses provide at least "modest restrictions on the application of forum law."²⁴⁰ Thus, before a Wisconsin court applies its own law or the law of another state, it must first find that that state has a *significant* contact or *significant aggregation* of contacts with the parties and the subject matter. To do otherwise would not only be unconstitutional, but would constitute "mere officious intermeddling, in the constitutional sense."²⁴¹

In *Hunker*,²⁴² although the court failed to conduct a careful constitutional analysis, it is clear that constitutional restraints posed no real problem in the application of Ohio law. Two employees of an Ohio corporation were involved, both of them covered by Ohio workers' compensation law, and a workers' compensation award had already been made under that law. The court could easily find that Ohio had

232. 281 U.S. 397 (1930).

233. 449 U.S. 302 (1981).

234. 472 U.S. 797 (1985).

235. *Hague*, 449 U.S. at 308 n.10.

236. *Id.* at 308.

237. *Id.*

238. *Id.* at 313.

239. 472 U.S. 797 (1985).

240. *Id.* at 818.

241. See *Hunker v. Royal Indemnity Co.*, 57 Wis. 2d 588, 598, 204 N.W.2d 897, 902 (1973).

242. *Id.* at 588, 204 N.W.2d at 897.

significant contacts with the case. Application of *Wisconsin* law might have posed greater constitutional danger.

It is unclear why the court chose to introduce constitutional concerns in this choice-of-law case. Although "[t]he Full Faith and Credit, Due Process, Equal Protection, Privileges and Immunities, and Commerce Clauses all can easily be read to protect nonforum state interests, or the interest of nonforum litigants, that are disrupted by parochial state conflicts decisions . . . , the Supreme Court rarely intervenes under the Constitution to protect these interests. For choice of law, ours is a forgiving Constitution."²⁴³

In *Hunker*, after its brief mention of "mere officious intermeddling, in the constitutional sense,"²⁴⁴ the court applied Leflar's five choice-influencing considerations as it has done in prior cases. It acknowledged that the predictability factor plays a role even in cases involving unintentional conduct. Although this factor may have been misapplied in earlier cases, the court now noted that "the question is not whether parties plan to commit [a tort] but whether . . . the result, *i.e.*, the legal consequence of the unintended act, comports with the predictions or expectations of the parties."²⁴⁵ In this case, the court believed the parties would have expected Ohio law to govern.²⁴⁶

The court found that the second consideration, maintenance of interstate and international order, which "requires that a state that is minimally concerned defer to the interests of a state that is substantially concerned,"²⁴⁷ is of minimal importance. Although application of *Wisconsin* law would not be absurd or unconstitutional or lead to retaliation,²⁴⁸ Ohio's interest far outweighed *Wisconsin's* interest.²⁴⁹

The third factor, simplification of the judicial task, had no significance here. "The application of Ohio law would not complicate the task of *Wisconsin* judges."²⁵⁰ It would simply mean that the *Wisconsin* court would proceed no further.²⁵¹

243. Gene R. Shreve, *Choice of Law and the Forging Constitution*, 71 IND. L.J. 271, 271 (1996).

244. 57 Wis. 2d at 598, 204 N.W.2d at 902.

245. *Id.* at 600, 204 N.W.2d at 903.

246. *Id.*

247. *Id.* at 601, 204 N.W.2d at 903-04 (quoting *Conklin*, 38 Wis. 2d 468, 479, 157 N.W.2d 574, 584 (1968)).

248. 57 Wis. 2d at 601, 204 N.W.2d at 904.

249. *Id.* at 602, 204 N.W.2d at 904.

250. *Id.* at 603, 204 N.W.2d at 904.

251. *Id.* at 603, 204 N.W.2d at 904.

The court next considered the forum's interests, which included the "admonitory and deterrent effect of tort liability," but focused primarily on compensating those who are injured.²⁵² Here, the victim had been compensated and his medical creditors reimbursed, under Ohio's workers' compensation scheme, leaving Wisconsin with no "serious governmental interest."²⁵³

Finally, the court turned its attention to the better law consideration, concluding that Ohio's law is reasonable and may, in fact, be part of a trend toward barring suits against co-employees. "We cannot say Wisconsin's law, under these facts, is the better law."²⁵⁴ The court applied Ohio's law.

Hunker represents the last time the Wisconsin Supreme Court attempted to clarify its choice-of-law analysis. During the next twenty-four years and up to the present time, the court attempted merely to apply its analysis. And the novel *Hunker* court reference to "officials intermeddling" failed to reappear in supreme court decisions, although it can frequently be found in lower court decisions, as demonstrated below.

The Wisconsin Supreme Court has decided few cases since *Hunker* which specifically address choice of law.

In *Air Products and Chemicals, Inc. v. Fairbanks Morse, Inc.*,²⁵⁵ decided the same year as *Hunker*, the Supreme Court focused on only two of the five considerations. And in *Slawek v. Stroh*,²⁵⁶ decided less than a year after *Hunker*, the court gave cursory (and inconsistent) attention to its choice of law analysis. In a case involving the tort of seduction, the court followed what it termed the "grouping of significant contacts" test coupled with a strong forum presumption. Inasmuch as the laws of two other states were repugnant to Wisconsin law, Wisconsin had significant contacts with the tort, and Wisconsin had a strong interest, the court concluded that "the law of Wisconsin is the better choice and applies."²⁵⁷ The court failed to mention constitutional concerns, nor did it give close attention to any of the Leflar factors. It focused primarily on Wisconsin's strong connection with the tort: the father-seducer chose the Wisconsin forum, the mother-seducee now lives in Wisconsin, and

252. *Id.* at 604-605, 204 N.W.2d at 905.

253. *Id.* at 606, 204 N.W.2d at 906.

254. *Id.* at 610, 204 N.W.2d at 908.

255. 58 Wis. 2d 193, 206 N.W.2d 414 (1973).

256. 62 Wis. 2d 295, 215 N.W.2d 9 (1974).

257. *Id.* at 313, 215 N.W.2d at 19.

the product of the seduction—the child—is a resident of Wisconsin.²⁵⁸

The court adhered more closely to its *Hunker* analysis in *Lichter v. Fritsch*,²⁵⁹ decided a few years later. The case arose from an accident involving a stolen vehicle. Under Wisconsin law the car's owner would not be liable to third parties for injury caused by the thief. But under Illinois law, "the owner who leaves his keys in the unattended vehicle [as here] may be liable to the injured third parties depending upon where he left the car."²⁶⁰

The court determined that the choice of one law as compared to another would be outcome determinative, thus requiring an analysis of the five choice-influencing considerations.²⁶¹ By conducting a thoughtful application of the considerations, the court concluded that Illinois law should be applied, even though application of Wisconsin law would simplify the court's task and despite the court's conclusion that Wisconsin law represented the majority view. Illinois law would provide compensation to the injured defendant, an interest which "is consistent with the policy and theory of Wisconsin law to compensate the victim."²⁶² The court gave no attention either to forum law presumption nor to constitutional concerns (officious intermeddling).

That same year, the Wisconsin Supreme Court decided *Handal v. American Farmers Mutual Casualty Co.*,²⁶³ a case involving insurance contract interpretation. The court, relying on *Haines v. Mid-Century Insurance Co.*,²⁶⁴ another insurance contract case, noted that Wisconsin follows the "grouping of contacts rule" for contract cases, which involves analysis under the Restatement (Second).²⁶⁵ Although the court reached the correct conclusion that Iowa law should govern this dispute involving an Iowa insured and a car garaged in Iowa, it gave little attention to analysis, citing only section 188 of the Restatement (Second).²⁶⁶ And, unlike its analysis in *Haines*,²⁶⁷ the court made no mention of the

258. *Id.*

259. 77 Wis. 2d 178, 252 N.W.2d 360 (1977).

260. *Id.* at 182-83, 252 N.W.2d at 362. The defendant here left his vehicle in the parking lot of an institution for the mentally ill. A patient stole the car, drove to Wisconsin, and injured a third party. *Id.* at 179, 252 N.W.2d at 361.

261. *Id.* at 182-83, 252 N.W.2d at 363.

262. *Id.* at 186, 252 N.W.2d at 364.

263. 79 Wis. 2d 67, 255 N.W.2d 903 (1977).

264. 47 Wis. 2d 442, 177 N.W.2d 328 (1970).

265. 79 Wis. 2d at 73, 255 N.W.2d at 906.

266. See *id.* at 74 n.2, 255 N.W.2d at 906 n.2. The court failed to apply Section 6 or Section 193.

267. See *supra* text accompanying notes 208-17.

choice-influencing considerations.

The Wisconsin Supreme Court's most recent decision involving choice of law was *Schlosser v. Allis-Chalmers Corp.*,²⁶⁸ another contract case. In an opinion which can only create confusion, the court asserted that it follows the "grouping of contacts" test for contract cases: "By this method the law of the state with which the contract has its most significant relationship applies."²⁶⁹ The court cited the Restatement (Second). It continued: "In Haines . . . this court . . . cited five factors generally considered by the court in making choice of law determinations."²⁷⁰ The court then ignored Restatement analysis entirely, instead relying upon the five choice-influencing considerations, plus an implied forum law preference,²⁷¹ to conclude that Wisconsin law should be applied.

VII. CURRENT STATE OF WISCONSIN SUPREME COURT ANALYSIS

Several conclusions can be drawn from this analysis of Wisconsin Supreme Court choice-of-law decisions. First, choice-of-law decisions in this state have traveled a very bumpy road. The court's desire for a "practical and workable" approach²⁷² which will serve as "a guide to the future to provide a uniform common law of conflicts" has not yet been achieved.

Second, it seems clear that in tort cases, the court must first determine whether the selection of one state's law over another state's law will affect the outcome. Obviously, if the outcome will not be affected, there is no relevant conflict of laws. In that instance, it is convenient and efficient to apply forum law. But if the selection is outcome determinative, the court will apply Leflar's five choice-influencing considerations. The court has not, however, applied the considerations consistently.

Third, the court has cautioned against "interloping chauvinism,"²⁷³ an "innate parochial preference" for forum law.²⁷⁴ Leflar's theory, of course, includes advancement of the forum's governmental interest as

268. 86 Wis. 2d 226, 271 N.W.2d 879 (1978).

269. *Id.* at 239, 271 N.W.2d at 885.

270. *Id.* at 239-40, 271 N.W.2d at 885-86.

271. "We observe finally that the defendant has simply not shown any persuasive reason to displace the law of the forum." *Id.* at 241, 271 N.W.2d at 886.

272. *See Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

273. *See Conklin v. Horner*, 38 Wis. 2d 468 n.2, 157 N.W.2d 579, 582 n.2 (1968).

274. *See Hunker v. Royal Indemnity Co.*, 57 Wis. 2d 588, 600, 204 N.W.2d 897, 903 (1973).

one legitimate consideration, but he also noted that the interests must be thoughtfully and intelligently identified. The policies underlying competing rules must be carefully examined to see if those policies bear a sufficient relationship to the case's factual contacts. A court should weigh this consideration in favor of forum law only if, after careful analysis, the court finds that the forum has a governmental interest which would be effectuated by application of its law. In addition, all of the four other choice-influencing considerations must also be examined.

And fourth, the court favors compensation for tort victims. In six of the seven primary cases involving conflict of laws issues,²⁷⁵ the court ruled in favor of the law which would allow compensation. In the seventh case²⁷⁶ it did not; however, the victim there had already received a workers' compensation recovery, and the court refused to permit double recovery.²⁷⁷ The court has not been reticent in admitting that Wisconsin's governmental interest includes compensating injured victims, resident and non-resident alike.²⁷⁸

What is not clear about the Wisconsin court's choice of law analysis relates to two separate issues: 1) the constitutional principles underlying choice-of-law decisions and 2) its treatment of contract cases.

The only reference to constitutional concerns is found in *Hunker*, and then in the court's cryptic language of "officious intermeddling." The court's cursory reference in *Hunker* does not suggest that a rigorous examination of "officious intermeddling" is necessary in subsequent cases. But as the United States Supreme Court has made clear, constitutional concerns may be raised any time the court seeks to apply the law of a state which lacks contacts with or an interest in the case.²⁷⁹ The Wisconsin Supreme Court should eliminate "officious intermeddling" language and replace it with clearly defined constitutional analysis, as set forth in United States Supreme Court constitutional decisions.²⁸⁰

275. See *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965); *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967); *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d 98, 156 N.W.2d 466 (1968); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968); *Slawek v. Stroh*, 62 Wis. 2d 295, 215 N.W.2d 9 (1974); *Lichter v. Fritsch*, 77 Wis. 2d 178, 252 N.W.2d 360 (1977).

276. See *Hunker v. Royal Indemnity Co.*, 57 Wis. 2d 588, 204 N.W.2d 897 (1973).

277. See *id.* at 606, 204 N.W.2d at 906.

278. See, e.g., *Heath*, 35 Wis. 2d at 592, 599-601, 151 N.W.2d at 670, 674-75; *Zelinger*, 38 Wis. 2d at 112, 156 N.W.2d at 472; *Conklin*, 38 Wis. 2d at 477, 157 N.W.2d at 583; *Hunker*, 57 Wis. 2d at 604-05, 204 N.W.2d at 905; *Lichter*, 77 Wis. 2d at 186, 252 N.W.2d at 364.

279. See, e.g., *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

280. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), *Allstate Ins. Co. v.*

In its treatment of contract issues, the court professes to follow the most significant relationship test, embodied in the Restatement (Second).²⁸¹ Instead it applies a vague "grouping of contacts" test,²⁸² or selected sections of the Restatement (Second),²⁸³ or Leflar's choice-influencing considerations,²⁸⁴ or a combination of the last two.²⁸⁵

VIII. WISCONSIN'S COURTS OF APPEAL AND CHOICE OF LAW ANALYSIS

Perhaps the best test to determine whether the court's choice of law analysis has given adequate guidance to the bench and bar is to examine choice of law decisions made by lower court judges since the highest court's last word on choice of law.

A. Tort

In the area of tort, the supreme court cases would suggest a uniform, predictable, workable choice of law analysis. First, determine whether the selection of one state's law over another state's law will affect the outcome. If not, there is no relevant conflict of laws. If so, apply Leflar's five choice-influencing considerations. The court of appeals has applied this analysis in several cases.²⁸⁶

But more frequently (and in ways clearly out of step with United States Supreme Court constitutional choice-of-law analysis),²⁸⁷ the lower court quickly concludes its inquiry with a determination that the law of only one jurisdiction could be applied; application of any other law would constitute officious intermeddling.

Hague, 449 U.S. 302 (1981); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

281. See *Schlusser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 271 N.W.2d 879 (1978).

282. See *Urhammer v. Olson*, 39 Wis. 2d 447, 159 N.W.2d 688 (1968).

283. See *Handal v. American Farmers Mut. Cas. Co.*, 79 Wis. 2d 67, 255 N.W.2d 903 (1977).

284. See *Schlusser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 271 N.W.2d 879 (1978).

285. See *Haines v. Mid-Century Ins. Co.*, 47 Wis. 2d 442, 177 N.W.2d 328 (1970).

286. See *Schlusser v. Amer. Family Mut. Ins. Co.*, 157 Wis. 2d 516, 460 N.W.2d 756 (Ct. App. 1990); *Edward E. Gillen Co. v. Valders Stone and Marble*, 1990 WL 262093 (Ct. App. Dec. 26, 1990); *Pitts v. Mutual Service Cas. Ins. Co.*, 1981 WL 139103 (Ct. App. Dec. 21, 1981). In *Marsh v. Farm Bureau Mutual Ins.*, 179 Wis. 2d 42, 505 N.W.2d 162 (Ct. App. 1993), the court did not reach choice-of-law issues, basing its holding instead on a lack of personal jurisdiction. However, the dissent would have found jurisdiction and noted that tort issues should be decided by application of the choice-influencing considerations. *Id.* at 61, 505 N.W.2d at 169 (Cane, P.J., dissenting in part, concurring in part).

287. See *supra* text accompanying notes 232-41.

Thus, in *American Standard Insurance Co. v. Cleveland*,²⁸⁸ the court held that application of Minnesota law would constitute officious intermeddling, where Minnesota had only "a minimal interest."²⁸⁹ The Wisconsin plaintiff and Wisconsin defendant were involved in an automobile accident case in Minnesota. Under Minnesota's no-fault law, "a plaintiff cannot recover from a tortfeasor for benefits paid by his own insurer Also, the plaintiff's insurer generally has no subrogation right to recover from the tortfeasor for benefits paid to the plaintiff." But in Wisconsin, "a plaintiff may recover from a tortfeasor for damages paid by the plaintiff's insurer unless the insurer has a contractual subrogation right to recover such amounts." In any event, "the tortfeasor is liable under Wisconsin law to either the plaintiff or his insurer for amounts paid by collateral sources."²⁹⁰

The court agreed that Minnesota had an interest in promoting highway safety, but that interest was unrelated to the "economic and social consequences of the tortious conduct"²⁹¹ involving the two Wisconsin residents. Yet the court acknowledged that Minnesota's interest was implicated. "Wisconsin's collateral source rule is intended to deter negligent conduct by placing the full cost of the wrongful conduct on the tortfeasor. Application of Wisconsin's law actually promotes *Minnesota's interest in assuring highway safety*."²⁹²

Once the court finds that application of Minnesota law would constitute officious intermeddling, its task is completed. Nevertheless, this court inexplicably conducted a brief analysis of Leflar's five choice-influencing considerations. Again it acknowledged Minnesota's interest. It admitted that the "[m]aintenance of interstate order is not implicated by the application of either state's law because neither choice would be totally unreasonable."²⁹³ But Wisconsin's compensation interest, combined with the court's clear conviction that Wisconsin's law is better, leads to the court's predictable conclusion that Wisconsin law applies.

A finding of officious intermeddling in subsequent cases terminates the court's inquiry more quickly. For example, in three slip and fall cases, all of them occurring outside Wisconsin, the court quickly finds that an application of Wisconsin law would constitute officious inter-

288. 124 Wis. 2d 258, 369 N.W.2d 168 (Ct. App. 1985).

289. *Id.* at 264, 369 N.W.2d at 172.

290. *Id.* at 261, 369 N.W.2d at 170-71.

291. *Id.* at 264, 369 N.W.2d at 172.

292. *Id.* at 264, 369 N.W.2d at 172 (citation omitted) (emphasis added).

293. *Id.* at 265, 369 N.W.2d at 172.

meddling, even though all of them involved injury to a Wisconsin resident.²⁹⁴ In all three cases, Wisconsin law offered more protection than foreign law.²⁹⁵ Gone now is any mention of Wisconsin's interest in compensating victims, even its own residents. Although the court in each case might well have arrived at the conclusion that foreign law should apply, given its concern for the owners of real property in other states, a finding that Wisconsin has no constitutionally adequate interest is simply inconsistent with its prior decisions and with United States Supreme Court decisions.²⁹⁶

A recent court of appeals case demonstrates an additional problem. In *Sharp v. Case Corp.*,²⁹⁷ the court of appeals attempted to apply the choice-influencing considerations to a tort case, but focused only on the forum's interest in providing "full compensation to persons who are injured by negligent conduct and to deter such conduct. . . ."²⁹⁸ The court relied heavily on a "presumption that the forum law applies."²⁹⁹ None of the considerations received attention.

B. Contract

Cases involving contract choice-of-law issues also demonstrate lower court confusion. The court at times applies Leflar's choice-influencing considerations,³⁰⁰ the Restatement (Second), a combination of both, or an alternative.

Two contract cases, both decided in 1984, demonstrate differing

294. See *Scott v. Pilot Corp.*, 1996 WL 588038 (Ct. App. Oct. 15, 1996) (slip and fall by Wisconsin resident in Illinois gas station) (this opinion arose from a District I panel, but the state's highest court has made it clear that the appellate court is a "unitary" court and functions "as a single court administered by a single chief judge. . . . The published decision of any one of the panels has binding effect on all panels of the Court." *In re Court of Appeals*, 82 Wis. 2d 369, 370-71, 263 N.W.2d 149, 149-50 (1978)); *Johnson v. The Travelers Ins. Co.*, 1992 WL 142249 (Ct. App. Apr. 14, 1992) (slip and fall by Wisconsin resident at Illinois motel); *Burns v. Geres*, 140 Wis. 2d 197, 409 N.W.2d 428 (Ct. App. 1987) (slip and fall by Wisconsin resident at the Frank Lloyd Wright School of Architecture in Arizona).

295. In both *Johnson* and *Burns*, the court noted that Wisconsin's safe place statute, Wis. Stats. sec. 101.11, requires a higher standard of care than Illinois' and Arizona's standards of ordinary care. *Johnson*, 1992 WL 142249, at ***2; *Burns*, 140 Wis. 2d at 200-01, 409 N.W.2d at 430. In *Scott*, although the court did not specifically discuss the conflicting rules, it affirmed the trial court's decision that, under Illinois law, the gas station had breached no duty. 1996 WL 588038, at ***1 - ***2.

296. See *supra* text accompanying notes 232-41.

297. 1997 WL 757498 (Ct. App. Dec. 10, 1997).

298. *Id.* at *2.

299. *Id.*

300. Wisconsin cases rarely mention Robert Leflar as the creator of its choice of law analysis. Instead, courts refer only to the five choice-influencing considerations.

methodologies. In *Gavers v. Federal Life Insurance Co.*,³⁰¹ the court had to determine whether California or Wisconsin law governed a life insurance policy presumption-of-death question, when a Wisconsin insured left the state, arrived in California, and was never heard from again. California law required that "a diligent effort be made to locate the absentee before the presumption [of death] can apply."³⁰² Wisconsin had no similar requirement.

The court began its analysis with the methodology usually reserved for tort choice-of-law questions. It would first determine "whether a genuine conflict exists. If so, an application of the choice-influencing considerations should proceed unless it is decided that application of any of the multiple choices of law would constitute mere 'officious intermeddling.'"³⁰³ Despite the evidence that the absentee arrived in California and may have disappeared there, the court held that application of California law would constitute officious intermeddling.³⁰⁴

Two months later, the court of appeals applied a different choice-of-law analysis. In *Ziemba v. Anagnos*,³⁰⁵ the court had to decide whether Wisconsin's motor vehicle repair law controlled a conflict between an Illinois auto repairman and a Wisconsin car owner. Illinois had no specific motor vehicle repair law, but under Wisconsin law, "there can be no valid contract for auto repairs following a face-to-face meeting unless a choice of written estimate alternatives is given to a customer before any repair is commenced."³⁰⁶ When the Wisconsin resident took his car to the Illinois garage for repairs, he was not provided with a choice of written estimate alternatives.

In finding that Wisconsin law applied to the Illinois repair shop, the court first followed the Restatement (Second) or most significant relationship test. But the court concluded "that the significant contacts, both quantitatively and qualitatively, fail to favor one state over another."³⁰⁷ The court then "turn[ed] to an additional analysis referred to as the 'choice-influencing analysis,'"³⁰⁸ and purported to apply Leflar's five factors, arriving at the questionable conclusion that Wisconsin law

301. 118 Wis. 2d 113, 345 N.W.2d 900 (Ct. App. 1984).

302. *Id.* at 118, 345 N.W.2d at 902 (citations omitted).

303. *Id.* at 115-16, 345 N.W.2d at 901-02 (citation omitted).

304. *Id.* at 118, 345 N.W.2d at 903.

305. 1984 WL 180669 (Ct. App. Apr. 25, 1984).

306. *Id.* at ***1.

307. *Id.* at ***5.

308. *Id.*

applies.³⁰⁹ The court thus followed the analysis set forth in *Haines v. Mid-Century Insurance Co.*,³¹⁰ which involved both the Restatement (Second) and Leflar's choice-influencing considerations.

Subsequent contract cases reflect a variety of approaches as well. The court in *Martin v. State Farm Mutual Automobile Insurance Co.*³¹¹ returned to the *Haines* analysis: "Contract rights are to be determined by the local law of the state with which the contract has its most significant relationship."³¹² But when "each of the two jurisdictions has 'relatively equally significant contacts,'" then "[a]dditional guides for the court in making the choice of law determination are the 'choice-influencing considerations.'"³¹³ But the court found it had no need to rely on "additional guides," because Michigan contacts predominated under sections 188 and 193 of the Restatement (Second).³¹⁵

Two weeks later, the court of appeals decided *American Standard Insurance Co. v. Cleveland*,³¹⁶ which involved both tort and contract choice-of-law issues.³¹⁷ After deciding that Wisconsin law would apply

309. The court misapplied Leflar's analysis primarily by focusing only on the substantive aspects of Wisconsin's motor vehicle repair law. It did not consider general choice-of-law principles and ignored Illinois substantive law altogether. For example, the court claimed that "[t]he predictability criterion definitely favors Wisconsin law," because a written contract, as required by Wisconsin law, better informs the parties of the terms of their agreement. *Id.* The court thus focuses, not on the parties' reliance on one body of law over another as Leflar envisioned, but on the substantive law itself.

The court next correctly articulated the second factor: maintenance of interstate and international order. But then seemingly disregarding the fact that this case involved an Illinois repairman in an Illinois repair shop, the court asserted that Illinois ought to "welcome" Wisconsin's requirement for written estimate alternatives, since "[t]he more written estimate alternatives given, the less likely are disputes concerning alleged unauthorized repairs." *Id.* at ***6.

Simplification of the judicial task is also served by application of Wisconsin law, the court asserted, because a written agreement is easier to enforce. The court made no mention of whether Illinois or Wisconsin law generally would facilitate a resolution in this case.

It is thus no surprise that the Wisconsin court found that the last two factors—advancement of the forum's governmental interests and application of the better law—favored Wisconsin law.

310. 47 Wis. 2d 442, 177 N.W.2d 328 (1970). See *supra* text accompanying notes 209-17.

311. 1985 WL 188035 (Ct. App. Mar. 26, 1985).

312. *Id.* at ***4.

313. *Id.* (quoting *Haines v. Mid-Century Ins. Co.*, 47 Wis. 2d 442, 450-51, 177 N.W.2d 328, 332-33 (1970)).

314. 1985 WL 188035, at ***4.

315. *Id.*, 368 N.W.2d at 847 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 188, 193).

316. 124 Wis. 2d 258, 369 N.W.2d 168 (Ct. App. 1985).

317. The tort issue is discussed *supra* text accompanying notes 288-93.

to the tort issue, the court turned to the contract issue: "Contract rights are determined by the law of the state with which the contract has its most significant relationship."³¹⁸ Because everything having to do with the automobile insurance policy occurred in Wisconsin³¹⁹ and both parties were from Wisconsin, the court predictably applied Wisconsin law.³²⁰

Several subsequent court of appeals decisions relied solely upon the Restatement (Second) in resolving contract choice of law issues.³²¹ Some cases make no mention of the Restatement (Second), instead referring only to the "grouping-of-contacts" or "most significant contacts" theory.³²² Some relied solely upon Leflar's choice-influencing considerations.³²³ And in one case, the court asserted: "Wisconsin uses a 'groupings of contacts' test to determine choice of law. . . . Under that doctrine, the choice of law is based on [Leflar's choice influencing considerations]."³²⁴ The court thereby merges the two tests, focusing only on Leflar's analysis which it incorrectly designates the "groupings of contacts" test. The Restatement (Second) vanishes.

Although the Wisconsin Supreme Court had hoped for a "practical and workable" approach³²⁵ which would serve as "a guide to the future to provide a uniform common law of conflicts,"³²⁶ lower court decisions demonstrate that this vision has not yet been achieved.

IX. FEDERAL COURTS' APPLICATION OF WISCONSIN CHOICE OF LAW ANALYSIS

It is well accepted that federal courts sitting in diversity must apply the substantive law of the forum state,³²⁷ including that state's choice of

318. 124 Wis. 2d at 267, 369 N.W.2d at 173.

319. The only foreign element in this case is that the accident occurred in Minnesota.

320. 124 Wis. 2d at 267, 369 N.W.2d at 173.

321. See, e.g., *Utica Mut. Ins. Co. v. Klein & Son, Inc.*, 157 Wis. 2d 552, 460 N.W.2d 763 (Ct. App. 1990); *Berington v. Wausau Underwriters Ins. Co.*, 1996 WL 363560 (Ct. App. July 2, 1996).

322. See, e.g., *American Family Mut. Ins. Co. v. Powell*, 169 Wis. 2d 605, 609, 486 N.W.2d 537, 538 (Ct. App. 1992); *Belland v. Allstate Ins. Co.*, 140 Wis. 2d 391, 397-98, 410 N.W.2d 611, 613-14 (Ct. App. 1987) ("most significant relationship").

323. See, e.g., *Employers Ins. of Wausau v. Pelczynski*, 153 Wis. 2d 303, 309, 451 N.W.2d 300, 302 (Ct. App. 1989); *Wyss v. Albee*, 183 Wis. 2d 245, 263, 515 N.W.2d 517, 524 (Ct. App. 1994).

324. *Employers Ins. of Wausau v. Certain Underwriters at Lloyd's of London*, 202 Wis. 2d 673, 691, 552 N.W.2d 420, 427 (Ct. App. 1996) (citation omitted).

325. See *Wilcox v. Wilcox*, 26 Wis. 2d 617, 621, 133 N.W.2d 408, 410 (1965).

326. *Id.* at 635, 133 N.W.2d at 417.

327. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

law rules.³²⁸ Thus, a federal court sitting in Wisconsin must apply Wisconsin choice of law methodology. Federal decisions therefore reveal the federal judiciary's interpretation of Wisconsin's choice of law methodology.

For example, as early as 1968, the Eastern District Court of Wisconsin noted that Wisconsin had become "a leader in adopting the relatively new 'center of gravity' approach to conflict problems."³²⁹ As defined by the court, this approach involved an initial determination as to whether two or more states have strong policies which would be furthered by their application. If so, the court will apply Leflar's choice-influencing considerations.

Ten years later, another federal court, this one in Michigan,³³⁰ was called upon to interpret Wisconsin choice of law analysis. By now, Wisconsin's analysis had become a melting pot of methodologies, and this court's opinion reflects that confusion:

Wisconsin first adopted a two-tiered analysis which began with a combination of "significant contacts" and "interest analysis" theories and then proceeded to "qualitative analysis," beginning with a "weak presumption" in favor of *lex fori* and guided by Professor Robert Leflar's five choice-influencing factors. . . .

In *Hunker v. Royal Indemnity Co.*, the Wisconsin Supreme Court recognized that this method of analysis was a "redundancy."³³¹

Thus, after *Hunker*, the court would first determine 1) whether an outcome-determinative conflict exists; and 2) if so, whether application of any of the state's laws would "constitute mere officious intermeddling, in the constitutional sense."³³² If neither law would constitute officious

328. *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487 (1941).

329. *Satchwill v. Vollrath Co.*, 293 F. Supp. 533, 535 (E.D. Wis. 1968) (citing *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965)); *Heath v. Zellmer*, 35 Wis. 2d 578, 151 N.W.2d 664 (1967); *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d 98, 156 N.W.2d 466 (1968); *Conklin v. Horner*, 38 Wis. 2d 468, 157 N.W.2d 579 (1968); *Urhammer v. Olson*, 39 Wis. 2d 447, 159 N.W.2d 688 (1968)). See also *Snow v. Continental Products Corp.*, 353 F. Supp. 59 (E.D. Wis. 1972); *Decker v. Fox River Tractor*, 324 F. Supp. 1089 (E.D. Wis. 1971).

330. *Reminga v. United States*, 448 F. Supp. 445 (W.D. Mich. 1978). This case arose under the Federal Tort Claims Act, 28 U.S.C. § 1346 et seq. The United Supreme Court in *Richards v. United States*, 369 U.S. 1, 8-10 (1962), held that federal courts adjudicating claims under the F.T.C.A. must apply the choice-of-law rules of the state where the act or omission occurred, rather than the rules of the state in which the court sits, as is the usual practice under *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487 (1941).

331. 448 F. Supp. at 457 (citations omitted).

332. *Id.* (quoting *Hunker v. Royal Indemnity Co.*, 57 Wis. 2d 588, 598, 204 N.W.2d 897,

intermeddling, the analysis would then turn to Leflar's choice-influencing considerations, according to the district court.³³³

The court in one federal case ignored Wisconsin's "officious intermeddling" language and instead, without explanation, focused on choice-of-law constitutionality as defined by the United States Supreme Court.³³⁴ And the court in another case articulated the Wisconsin choice of law methodology for contract cases, as it perceived it: the grouping of contacts approach as reflected in the Restatement (Second) sections 188, 6, and others relating to contract disputes.³³⁵ Another asserted that in tort cases, Wisconsin follows the "center of gravity" or "grouping of contacts" test and equated those tests with Leflar's choice-influencing considerations.³³⁶

The Seventh Circuit Court of Appeals has also been drawn into Wisconsin's choice of law arena.³³⁷ The most informative of these cases is *Diesel Service Co. v. Ambac International Corp.*,³³⁸ a fairly recent case in which the court applied its best guess as to Wisconsin choice of law analysis for contract cases.³³⁹ The court asserted that Wisconsin courts apply the Restatement (Second) most significant contacts test.³⁴⁰

However, the Seventh Circuit also recognized the state court's confusion in such application. Although Wisconsin courts place reliance on section 188 of the Restatement (Second),³⁴¹ they tend to ignore other

902 (1973)).

333. *Id.*

334. See *Grabski v. Finn*, 630 F. Supp. 1037, 1043 (E.D. Wis. 1986) ("While it would not offend due process to apply either state's laws to this issue, see *Allstate Insurance Company v. Hague*, 449 U.S. 302 . . . (1940), the Michigan contacts are more significant.")

335. See *CSS-Wisconsin Office v. Houston Satellite Systems*, 779 F. Supp. 979, 984 (E.D. 1991).

336. See *Select Creations, Inc. v. Paliafito America, Inc.*, 852 F. Supp. 740, 767 (E.D. Wis. 1994).

337. See, e.g., *Hystro Products, Inc. v. MNP Corp.*, 18 F.3d 1384, 1387 (7th Cir. 1994) ("In contract cases, Wisconsin courts apply the law of the state with which the contract has the most significant relationship"); *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985) (court agrees that lower court properly applied Wisconsin choice of law analysis; it determined whether an outcome determinative conflict existed and applied Leflar's choice-influencing considerations).

338. 961 F.2d 635 (7th Cir. 1992).

339. The case was brought under the Wisconsin Fair Dealership Law, Wis. Stat. § 135.01 et seq. (1996). The court treats the disputed issue as one of contract, although it recognizes the characterization problem which exists: "While this is not a breach of contract case, neither is it a tort case; anyway, the factors are similar." 961 F.2d at 639 n.4.

340. 961 F.2d at 639-40 (citing *Haines v. Mid-Century Ins. Co.*, 47 Wis. 2d 442, 177 N.W.2d 328 (1970)).

341. Section 188 provides that the "rights and duties of the parties with respect to an

Restatement sections, including the choice-of-law principles set forth in section 6.³⁴² Instead, according to the court, "when the significant contacts from § 188 were split between two states,"³⁴³ Wisconsin courts turn to the choice-influencing factors relied upon in tort cases, rather than to Restatement (Second) section 6.³⁴⁴ And this is what the district court in *Diesel Service Company* had done, noting the similarity between Leflar's factors and section 6 of the Restatement (Second).³⁴⁵ The Seventh Circuit followed the same analysis.

But two cases decided in 1997 take a different—and better—approach. In *Kuehn v. Children's Hospital, Los Angeles*,³⁴⁶ a tort case, the Seventh Circuit carefully and thoroughly conducted a straightforward application of all five of Leflar's choice-influencing considerations.³⁴⁷ The court made no mention of "officious intermeddling." In

issue in contract are determined by the local law of the state which . . . has the most significant relationship to the transaction and the parties under the principles stated in § 6." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1).

The second part of § 188 lists "the contacts to be taken into account in applying the principles of § 6." They include place of contracting, negotiation, and performance; location of the contract's subject matter; and the parties' domicile, residence, nationality, place of incorporation and place of business. *Id.* at § 188(2). When the place of negotiation and place of performance are in the same state, the law of that state applies. *Id.* at § 188(3).

342. "[I]n practice Wisconsin courts do not seem to have relied upon these [§ 6] factors." 961 F.2d at 640.

Restatement (Second) § 6 sets forth general choice-of-law principles. "[F]actors relevant to the choice of the applicable rule of law include"

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2).

343. 961 F.2d at 640.

344. *Id.*

345. Leflar's factors are:

- Predictability of results;
- Maintenance of interstate and international order;
- Simplification of the judicial task;
- Advancement of the forum's governmental interests;
- Application of the better rule of law.

See *Heath v. Zellmer*, 35 Wis. 2d 578, 596, 151 N.W.2d 664, 672 (1967). Section 6 of the Restatement (Second) is set forth at *supra* note 342.

346. 119 F.3d 1296 (7th Cir. 1997).

347. See *id.* at 1300-1303. Chief Judge Posner considers the choice-of-law issue

reversing the district court, the court applied Wisconsin law.³⁴⁸

In *Sybron Transition Corp. v. Security Ins. Co.*,³⁴⁹ a contract case decided the same year, the Seventh Circuit relied solely on Restatement (Second).³⁵⁰ The court, however, failed to consider Section 6, focusing almost exclusively on Section 188 of the Restatement.³⁵¹

In summary, federal courts have reached different conclusions about Wisconsin's choice of law analysis. The Wisconsin Supreme Court would greatly assist the state's lower courts, federal courts, and the practicing bar by adopting a clear, workable choice of law methodology.

X. A UNIFORM, PRACTICAL AND WORKABLE APPROACH

Designing a practical and workable common law³⁵² approach to choice of law can be daunting, as witnessed in the various approaches taken by Wisconsin courts over the past thirty years. It is clear that attempting to combine two or more approaches in any one case can lead only to confusion. Judges need an approach that is as simple as possible yet provides adequate guidelines. Lawyers require predictability in the sense that they should be able to determine which state's law the court is most likely to apply in any given set of facts. As it now stands, lawyers are not even able to predict the *methodology* which a court will follow, much less the result.

The Restatement (Second) has not well served Wisconsin courts. It inevitably involves application of at least three separate Restatement sections: the general choice of law principles,³⁵³ the presumptive applicable rule,³⁵⁴ and the relevant contacts for the specific area of law.³⁵⁵ If a

"complicated," because "Wisconsin uses a laundry-list approach to conflicts questions." *Id.* at 1300.

348. *Id.* at 1303.

349. 107 F.3d 1250 (7th Cir. 1997).

350. *See id.* at 1255.

351. *See id.* at 1255-56. *But see id.* at 1256 n.5, in which the court refers to § 193 as the presumptive rule for insurance contracts.

352. Some scholars have suggested that federal choice of law statutes might resolve much uncertainty. *See* Robert A. Leflar, *Choice-of-Law Statutes*, 44 TENN. L. REV. 951 (1977). One state—Louisiana—recently adopted a broad Conflict of Laws code. *See* LA. CIV. CODE ANN. art. 3515-3556 (1997). Most states have adopted statutes for particular choice of law issues. *See, e.g.*, Wis. Stat. §§ 632.09 (insurance contracts), 853.05 (wills), 893.07 (statute of limitation) (1997). Statutory choice of law will be the subject of a subsequent article.

353. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6.

354. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (place of injury for personal injury), § 169 (place of domicile for intra-family immunity), § 175 (place of injury for wrongful death), § 188 (place of negotiating and performing a contract if the same), §

court carefully considers each of these applicable Restatement sections, it is possible to arrive at a reasonable, justifiable choice of law. But thirty years of Wisconsin jurisprudence have demonstrated that courts are unwilling to wade through the Restatement (Second) and instead focus on one or another of its provisions in a way which adds to the choice-of-law confusion and unpredictability.

Although at least twenty other states employ the Restatement (Second), they have done so with no more success than Wisconsin. Scholars have long criticized the Restatement (Second), generally because it attempts to incorporate traditional analysis (in its presumptive rules), interest analysis, plus a plethora of factors and contacts for courts to consider. "Trying to be all things to all people, it produced mush."³⁵⁶ Professor Larry Kramer, a renowned conflicts scholar, writes: "...it hardly comes as news that the Second Restatement is flawed. But one needs to read a lot of opinions in a single sitting fully to appreciate just how badly the Second Restatement works in practice."³⁵⁷

Furthermore, the Second Restatement poses problems of characterization. Chapter 7 offers principles and presumptive rules for tort, chapter 8 for contracts, chapter 9 for property.³⁵⁸ Before the court can even begin to apply the appropriate sections, it must characterize each issue as tort or contract or property, presenting the same opportunities for manipulation or mistake demonstrated under the first Restatement.³⁵⁹

But where the Second Restatement fails to provide a solution because of its over-reaching complexity, Leflar's choice-influencing methodology offers the distinct advantage of simplicity. Five factors comprise the entire analysis.

Although this analysis has not achieved the popularity of the Second Restatement,³⁶⁰ several other states have adopted Leflar's choice-

189 (location of land for determining validity of a contract for the transfer of land), § 193 (principal location of the insured risk for determining validity of a fire, surety or casualty insurance contract).

355. See, e.g., Restatement (Second) of Conflict of Laws § 145 (tort), § 188 (contracts), § 222 (property).

356. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 253 (1992).

357. Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 486-87 (1992).

358. Restatement (Second) of Conflict of Laws chap. 6, 7, 8.

359. See *supra* text accompanying notes 8-9.

360. Judges may prefer the Second Restatement precisely because it is wide-ranging and permits them the widest latitude possible. Indeed, judges seem to love it and scholars to

influencing considerations to varying degrees. An examination of their common law demonstrates the wide-ranging approaches that courts employ in choice-of-law analysis.

For example, Rhode Island purports to follow Leflar's methodology.³⁶¹ But it includes in this analysis both "interest-weighting" and application of portions of the Restatement (Second).³⁶² Arkansas has also adopted Leflar's analysis, at least for tort issues,³⁶³ drawing mixed reviews.³⁶⁴ Hawaii uses Leflar's analysis combined with other modern approaches.³⁶⁵ And North Dakota relies heavily on Leflar's choice-influencing considerations, referring to its analysis as the "significant contacts" test, and utilizing other modern approaches as well.³⁶⁶

hate it. See, e.g., Roger C. Cramton et al., *Conflict of Laws* 132 (5th ed. 1993).

361. See *Cribb v. Augustyn*, 696 A.2d 285, 288 (R.I. 1997).

362. *Id.*

363. See *Schlemmer v. Fireman's Fund Ins. Co.*, 730 S.W.2d 217 (Ark. 1987). But the Eighth Circuit Court of Appeals, in attempting to apply Arkansas choice of law rules, found that for contract cases, Arkansas followed a traditional analysis but had recently begun to apply a "significant contacts" test. See *Whirlpool Corp. v. Ritter*, 929 F.2d 1318, 1321 (8th Cir. 1991). See *Ducharme v. Ducharme*, 872 S.W.2d 392, 394 (Ark. 1994) (in a contract dispute, the court applies the "most significant relationship" test, then refers to Leflar but without mentioning any choice-influencing considerations). See also Symeon C. Symeonides, *Choice of Law in the American Courts in 1995: A Year in Review*, 44 AM. J. COMP. L. 181, 199 n.105 (1996) (expressing uncertainty about Arkansas' choice-of-law methodology for contract cases, based on an examination of several Arkansas cases using at various times a significant contacts test, Restatement Second, *lex loci contractus*, and Leflar's better law approach).

364. Compare Note, *Conflict of Laws—Multistate Torts—Arkansas Relies on Choice-Influencing Considerations and the 'Better Rule of Law': Schlemmer v. Fireman's Fund Insurance Co.*, 10 U. ARK. LITTLE ROCK L.J. 511, 522 (1988) (the court's adoption of Leflar's methodology "is a positive development in Arkansas law") with L. Lynn Hogue, *Schlemmer v. Fireman's Fund Insurance Co.: A Case for Rethinking Arkansas' Choice-of-Law Rule for Interstate Torts*, 12 U. ARK. LITTLE ROCK L.J. 459, 461, 468 (1989) (arguing that Leflar's methodology is "bankrupt" and that the court should adopt interest analysis as its choice-of-law analysis).

365. *Beals v. Kiewit Pacific Co.*, 825 F. Supp. 926, 930 (D. Haw. 1993). Compare *Lewis v. Lewis*, 748 P.2d 1362 (Haw. 1988) and *Peters v. Peters*, 634 P.2d 586 (Haw. 1981) (combined modern approach) with *California Fed. Sav. & Loan Ass'n v. Bell*, 735 P.2d 499 (Haw. Ct. App. 1987) (Leflar approach). Hawaii's choice-of-law analysis has not been definitively articulated. See, e.g., Symeonides, *supra* note 363, at 202, 202 n. 129 (1996) (listing Hawaii as a jurisdiction following a "combined modern" approach to choice of law); Patrick J. Borchers, *Choice of Law in the American Courts in 1992: Observations and Reflections*, 42 AM. J. COMP. L. 125, 129 n.33 (1994) (suggesting that Hawaii follows interest analysis, "but there is clearly room for disagreement here").

366. See *Plante v. Columbia Paints*, 494 N.W.2d 140, 141-43 (N.D. 1992); *Vigen Construction Co. v. Millers Nat'l Ins. Co.*, 436 N.W.2d 254, 256-57 (N.D. 1989); *Apollo Sprinkler Co. v. Fire Sprinkler Suppliers & Design, Inc.*, 382 N.W.2d 386, 389-91 (all applying the five choice-influencing considerations but referring to its analysis as the "significant contacts" test, with heavy reliance on the Second Restatement as well).

Minnesota was one of the earliest states to adopt Leflar's analysis and currently follows that analysis for both tort and contract.³⁶⁷ Like Wisconsin courts, Minnesota courts have also had difficulty with the analysis. One observer has noted: "The Minnesota Supreme Court...has repeatedly held that only the last two factors of Professor Leflar's test were to be considered in tort situations."³⁶⁸ Another has been more blunt: "Minnesota opinions in this area have often appeared shallow, ill-explained, and well, just not very good."³⁶⁹ But that is true of many choice-of-law analyses. When William Prosser described the study of conflicts law as "a dismal swamp filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon,"³⁷⁰ he could well have been describing conflicts analysis in the 1990s.

But Minnesota courts have shown on occasion that they knew how to properly apply Leflar's methodology. In *Jepson v. General Casualty Company of Wisconsin*,³⁷¹ the Minnesota Supreme Court carefully and thoughtfully applied each of the five choice-influencing considerations to reach a sound result. The court thereby demonstrated that questionable choice-of-law analysis cannot necessarily be attributed to the methodology itself.

The state which best illustrates a sound, thorough application of Leflar's choice-influencing considerations is the state which first adopted the methodology: New Hampshire. In *Clark v. Clark*,³⁷² the New Hampshire Supreme Court adopted Leflar's analysis the same year in which Leflar published his influential article, *Choice Influencing Considerations in Conflicts Law*.³⁷³ Since that time, New Hampshire courts have adhered to the analysis in tort cases, although adopting the Restatement

367. See *Milkovich v. Saari*, 203 N.W.2d 408, 414 (Minn. 1973) (tort); *Milbank Mut. Ins. Co. v. United States Fidelity & Guaranty Co.*, 332 N.W.2d 160, 163 (Minn. 1983) (contract). See also *Symeonides*, *supra* note 363, at 202.

368. Note, *Disregarding Precedent in Minnesota Choice of Law: Nesladek v. Ford Motor Company*, 29 CREIGHTON L. REV. 1237, 1269 (1996).

369. James R. Pielemeier, *Some Hope for Choice of Law in Minnesota*, 18 Hamline L. Rev. 8, 8 (1994). Critics, of course, recognize that busy judges must rely on the briefs and arguments provided by counsel, and that assistance is often not forthcoming. See *id.* at 8 n.5. "And, of course, it is the role of law professors to provide the necessary teaching to their students to enable that assistance." *Id.*

370. William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953). See also Pielemeier, *supra* note 369, at 9 ("Many courts have had problems developing principled, modern approaches to choice of law").

371. 513 N.W.2d 467 (Minn. 1994).

372. 222 A.2d 205, 208-09 (N.H. 1966).

373. 43 N.Y.U.L. REV. 267 (1966).

Second for contract.³⁷⁴

In *Benoit v. Test Systems, Inc.*,³⁷⁵ the New Hampshire Supreme Court most recently applied Leflar's choice-influencing considerations. The court quickly concluded that a true conflict existed because application of one state's law would bar the plaintiff's suit, while application of another state's law would allow the plaintiff to continue.³⁷⁶ The court also properly concluded that the United States Constitution would permit application of either state's law, because both states "have significant contacts necessary to justify the application of that State's law to this dispute."³⁷⁷ Finally, the court considered each of the five choice-influencing considerations to conclude that its own law should apply. Just four years earlier, New Hampshire's highest court applied the same analysis, considering all five choice-influencing considerations, and concluded that nonforum law should govern.³⁷⁸

Obviously, Wisconsin courts have not always successfully applied Leflar's analysis, but that does not mean that the method should be rejected. It offers too many advantages over other methodologies.

In addition to its simplicity—application of five choice-influencing considerations—the analysis can be as easily applied to contract as to tort, thereby eliminating the initial requirement of characterization. For example, in *Diesel Service Co. v. AMBAC International Corp.*,³⁷⁹ the Seventh Circuit Court of Appeals was able to bypass the contract-tort distinction by finding that Wisconsin courts apply "similar" choice-of-law factors to both contract and tort, even though they profess to use different methodologies for the two issues.³⁸⁰ But one Wisconsin judge, in a dissenting opinion,³⁸¹ found that, in a claim against an insurance company for bad faith by failing to defend, both choice-of-law analyses—one for tort and a different one for contract—would have to be applied.³⁸²

374. See *Glowinski v. Allstate Ins. Co.*, 589 A.2d 593, 595 (N.H. 1991).

375. 694 A.2d 992 (N.H. 1997).

376. *Id.* at 994.

377. *Id.*

378. See *Ferren v. General Motors Corp. Delco Battery Division*, 628 A.2d 265 (N.H. 1993).

379. 961 F.2d 635 (7th Cir. 1992).

380. *Id.* at 639-40. "While this is not a breach of contract case, neither is it a tort case; anyway, the factors are similar." *Id.* at 639 n.4.

381. See *Marsh v. Farm Bureau Mut. Ins. Co.*, 179 Wis. 2d 42, 505 N.W.2d 162 (Ct. App. 1993) (Cane, P.J., concurring in part, dissenting in part).

382. *Id.* at 61, 505 N.W.2d at 169. But see *Schlussler v. American Family Mut. Ins. Co.*, 157 Wis. 2d 516, 526-27; 460 N.W.2d 756, 761 (Ct. App. 1990) (applying the choice-influencing considerations to "this tort cause of action to compensate for an insurer's bad

Another advantage of Leflar's methodology is that if applied as intended, it also obviates the necessity of determining whether an issue is substantive or procedural when it has characteristics of both. Traditionally, courts have applied forum law for procedural issues and applied choice-of-law analysis only to substantive issues. But the distinction is not always clear.³⁸³ Professor Leflar himself argued that his choice-influencing considerations could be applied to such borderline issues: "Rules asserted to be procedural for conflicts purposes ought to be analyzed, in their factual contexts, in terms of the relevant choice-influencing considerations, just as rigorously as other rules of law are analyzed in their own contexts in terms of the considerations."³⁸⁴ "[I]nstead of continuing to apply relatively mechanical tests to separate substance and procedure, which have no clear logical relationship to choice of law concerns,"³⁸⁵ courts might instead apply Leflar's considerations to those issues as well. Employing Leflar's analysis to these issues recognizes the complexity of choice of law decisionmaking and its use requires a court to consider fully the implications of alternative outcomes before reaching a conclusion. The use of a procedural categorization, on the other hand, makes the outcome of a case depend not on thorough analysis, but rather on a single bipolar inquiry which must necessarily be artificial and inaccurate. Further, because the effort to categorize a legal question as substantive or procedural in the conflicts setting eludes principled analysis, the basis for the outcome must rest not on the simple label attached to the case but rather on some unexplained decision-making process. The absence of forthright articulation of the real reasons for a decision makes the results in future cases unpredictable and deprives the public of the confidence in the process that can be achieved by full disclosure.³⁸⁶

The Second Restatement has also abandoned the bright-line distinction between substance and procedure, instead replacing it with factors for courts to consider.³⁸⁷ And "[c]ontemporary choice of law scholars ... have uniformly advocated abandonment of the traditional sub-

faith failure to perform as promised").

383. See *supra* text accompanying notes 10-15. See also *Marten Transport, Ltd. v. Rural Mutual Ins. Co.*, 198 Wis. 2d 738, 543 N.W.2d 541 (Ct. App. 1995) (whether a contribution claim is mandatory or permissive is a procedural issue and Wisconsin law thus applies).

384. Leflar, *supra* note 85, at 240.

385. Pielemeier, *supra* note 369, at 33.

386. Laura Cooper, *Statutes of Limitation in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction*, 71 MINN. L. REV. 363, 371-72 (1986).

387. See Restatement (Second) of Conflict of Laws sec. 122 (comment b).

stance-procedure distinction.”³⁸⁸ Applying Leflar’s analysis to all issues which may affect the outcome of a case removes the artificial distinction between substance and procedure.

The wisest course for Wisconsin courts is to return to Leflar analysis, re-learn its principles, focus on its choice-influencing considerations—all of them—and eliminate references to Restatement (Second), significant contacts, and forum preference. Furthermore, although constitutional concerns may arise in choice of law decisions, the court should refrain from employing such concerns as a means of avoiding difficult choice of law decisions. Use of language like “officious intermeddling” and “interloping chauvinism,” albeit colorful, add nothing to choice-of-law analysis and serve only to obfuscate.

An abstract notion of forum preference likewise should play no role in choice-of-law analysis. It can be accommodated easily within Leflar’s fourth choice-influencing consideration: advancement of the forum’s governmental interest. In this context, Professor Leflar recognized that “a court has a natural and largely justifiable concern with advancement of the governmental interests of its own state.”³⁸⁹ But he cautions:

True governmental interests of a state are not discoverable by blind matching with any old law that may be on the state’s books. They can be identified . . . only by thoughtful and intelligent analysis of the legal materials in the light of current socioeconomic, cultural, and political attitudes in the community. Ascertainment of a state’s governmental interests is no small task, not one to be solved by locating a statutory section or a paragraph in an old judicial opinion.³⁹⁰

Leflar explains: “A governmental interest . . . is discoverable by putting together (a) the reasons supporting the rule of law in question [the forum’s or other state’s law] and (b) the state’s [forum’s or other state’s] factual contacts with a case, or the issue in a case, to see if they match.”³⁹¹

While focusing less on forum preference, Wisconsin courts are well advised to focus more on the interests of other states, under the “maintenance of interstate order” consideration. This consideration requires an understanding of the interest a state may have in any given dispute. The court must attempt to determine the state’s interest and query whether that interest may be affected in any given case.

388. Cooper, *supra* note 386, at 378.

389. Leflar, *supra* note 44, at 290.

390. *Id.* at 291.

391. *Id.*

Wisconsin courts have demonstrated on occasion that they are capable of applying Leflar's choice-influencing considerations in a thorough, principled manner. Professor Leflar himself cited *Hunker v. Royal Indemnity Co.*³⁹² as a good example of his analysis.³⁹³ In that 1973 case, the court clarified its analysis. A court must first determine whether an outcome-determining conflict exists. If so, the court should conduct a constitutional inquiry, to ensure that the court could constitutionally apply the law of any of the potentially interested states.³⁹⁴ Then the court should consider all five of the choice-influencing considerations, including giving due "[d]eference to the interests of the [other state's] law."³⁹⁵ In *Hunker*, the Wisconsin court applied Ohio law.

Wisconsin should return to the careful analysis demonstrated in this early case. Leflar's choice-influencing considerations represent an analysis that is familiar to most courts, it can be utilized for all outcome-determinative issues, and it would provide lower courts, federal courts, and practicing lawyers alike with the kind of guidance required to resolve difficult choice-of-law questions.

392. 57 Wis. 2d 588, 204 N.W.2d 897 (1973).

393. See Robert A. Leflar, *Choice of Law: States' Rights*, 10 HOFSTRA L. REV. 203, 210 n.41 (1981).

394. Here, the court employed the unfortunate language of "officious intermeddling," rather than relying on well-settled constitutional doctrine. *Hunker*, 57 Wis. 2d. at 598, 204 N.W.2d at 902. See *supra* text accompanying notes 224-43.

395. *Hunker*, 57 Wis. 2d at 602, 204 N.W.2d at 904.