Theory into Practice: Choice of Law in the Courts

by Herma Hill Kay*

I. INTRODUCTION

On June 14, 1982, the Michigan Supreme Court handed down its decision in the companion cases of Sexton v. Ryder Truck Rental, Inc.1 and Storie v. Southfield Leasing, Inc.2 Both cases concerned routine problems in choice of law: Michigan residents had been injured or killed in other states by the negligence of Michigan defendants under conditions in which recovery would be available to the plaintiffs under Michigan law but not under the law of the place of wrong.3 The law-fact pattern of both cases fits the mold of the 'false conflict' problem, a category in which, according to Professor Brainerd Currie's governmental interest analysis, all courts hearing the case would come to the conclusion that the law of the only interested state—here, Michigan—should be applied.4 Yet the

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2. Id.

3. Plaintiff Richard Sexton, a Michigan resident, was injured while riding as a passenger in a truck owned by defendant Ryder Truck Rental, Inc., and leased to plaintiff’s employer, a Michigan corporation, when the truck overturned in Virginia. No other vehicles were involved and no other persons were injured. Michigan, but not Virginia, has a statute imposing liability on the owner of a motor vehicle for any injury occasioned by its negligent operation. Id. at 414-15, 320 N.W.2d at 845.

4. Charles Storie, a Michigan resident and plaintiff’s decedent, was killed when an airplane, which was owned by defendant Southfield Leasing, Inc., a Michigan corporation, and in which he was a passenger, crashed in Ohio. Michigan, but not Ohio, has a statute imposing liability on the owner of an aircraft for any injury occasioned by its negligent operation. Id. at 417-18, 320 N.W.2d at 846-47.


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Supreme Court of Michigan pondered its decision for more than two years after having heard oral argument, and that decision, when released, turned out to feature four separate opinions that lacked a clear majority on anything except the result that Michigan law applied. Why should a legal problem with a solution so clearly perceived by the academic community prove so difficult for a court to resolve? To that simple question there is an equally simple answer: because the academic community, while in agreement about the outcome in false conflict cases, is not in agreement about the rationale that supports it. Many judges, watching the scholars vie among themselves to produce a universally acceptable choice of law system that would replace the largely discredited traditional vested rights approach, have been understandably reluctant to discharge their responsibility for deciding cases by committing themselves to an approach that may work well in easy cases but not in more difficult ones. The Michigan court's dilemma was no doubt intensified by the fact that it had handed down, in 1969, one of the leading cases criticizing the academic onslaught against the traditional approach.

Still, when it granted leave to appeal in Sexton and Storie, the Michigan Supreme Court was not loath to consider the question of choosing a new approach to choice of law questions. It instructed the parties to address in their briefs whether the doctrine of lex loci delicti should be abandoned in favor of the dominant or substantial contacts test for determining the law to be applied in a conflict of laws context; or whether, in lieu of abandoning the doctrine of lex loci delicti, the public policy of this state mandates

Laws 77, 107 (1963) [hereinafter cited as Currie, Married Women's Contracts] [Editor's Note: Since most of Currie's articles are reprinted in Selected Essays on the Conflict of Laws, a corresponding page reference to this work will appear throughout this article in brackets immediately after the citation to the appropriate page in Currie's originally published article.]; Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 Duke L.J. 171, 178 [177, 184] [hereinafter cited as Currie, Methods and Objectives]; see generally Comment, False Conflicts, 55 Calif. L. Rev. 74 (1967). Currie himself did not use the term 'false conflict'; rather, he spoke of 'false problems.' See Currie, Methods and Objectives, supra, at 174 [180].

5. Sexton and Storie were argued on April 15, 1980. 413 Mich. at 406, 320 N.W.2d at 843.

6. The academic community has largely accepted Currie's distinction between true conflicts and false problems. See, e.g., R. Leflar, American Conflicts Law 187-89 (3d ed. 1977) [hereinafter cited as Leflar, American Conflicts Law]; R. Weintraub, Commentary on the Conflict of Laws 267-69 (2d ed. 1980) [hereinafter cited as Weintraub, Commentary].


This instruction, of course, did not exhaust the possible choices. Courts willing to consider the adoption of new choice of law theory in the United States today are faced with a bewildering array of academic theories, many with loyal judicial adherents. In the last three years alone, five other states have confronted Michigan's dilemma: three have adopted one or another version of modern, policy-oriented choice of law theory, while two have decided to continue working, for the time being, within the traditional approach. As it turned out, the Michigan Supreme Court was unable to make a selection. Justice Williams's plurality opinion frankly states that "we presently adopt no extant methodology outright." I shall return later to an analysis of the court's rationales, as set out in its various opinions, for the result in Sexton and Storie. For the moment, I want to concentrate on the court's inability to choose among the competing theories of choice of law.

The reader may wish to object that my emphasis upon what choice of law theory courts claim to be adopting or following is misplaced: that I should, instead, follow the example of Walter Wheeler Cook and suggest that we "focus our attention upon what courts have done, rather than upon the description they have given of the reasons for their action." Such an objection would be well placed, for there is much benefit to be gained from using the analytical method of the legal realists. Indeed, Professor Sedler has already examined the choice of law torts cases decided in fourteen selected states through the middle 1970s from this perspective and has concluded that the courts have fashioned coherent and reliable "rules of choice of law" that have replaced any need for choice of law rules. I do not disagree with Sedler's observations—rather, I welcome

10. In chronological order, the three states are: Texas, Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979) (adopts Restatement (Second) of Conflict of Laws §§ 6, 145 (1971) in a common-law tort action); Florida, Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980) (adopts Restatement (Second) of Conflict of Laws §§ 6, 145-146 (1971) in torts cases); and Hawaii, Peters v. Peters, 63 Hawaii 653, 634 P.2d 586 (1981) (adopts a unique analysis of policy factors and interests to arrive at desirable results in torts cases).
11. In chronological order, the two states are: Virginia, McMillan v. McMillan, 219 Va. 1127, 253 S.E.2d 662 (1979) (declines invitation to adopt the 'center of gravity' or 'grouping of contacts' theory as illustrated in Restatement (Second) of Conflict of Laws § 145 (1971)); Utah, Rhodes v. Wright, 622 P.2d 343 (Utah 1980), cert. denied, 454 U.S. 897 (1981) (disposition of wrongful death case makes consideration of governmental interest analysis as illustrated in decisions of California Supreme Court unnecessary).
12. 413 Mich. at 413, 320 N.W.2d at 845.
them—but I am not convinced that an analysis of this kind, standing alone, affords sufficient guidance to practicing lawyers and lower court judges in this mercurial area of the law. Nor is it an adequate substitute for a coherent theory of choice of law: the capacity to predict results correctly does not provide a reasoned justification for the body of law produced.

I propose, instead, to examine in this article the reported choice of law cases decided since the mid-1950s from the perspective of what the courts say they are doing, rather than the actual results they reach. My purpose in doing so is four-fold. First, I want to identify all of the theories that the various states claim to be using in choice of law cases. Second, I am curious whether courts that claim to be following a particular academic approach are using that approach correctly. Third, I am interested in determining whether it is possible to judge, from an examination of the decisional output of the fifty states and the District of Columbia, which academic theories work well in practice in the sense of producing intellectually sound results with a minimum of confusion to bench and bar, and which do not. Finally, I hope, with the help of the data produced by this analysis, to take up once again the question I have posed earlier: "[U]nder what circumstances is a departure from local law justified?"

In order to maintain a sense of historical development and to facilitate examination of the interplay between judges and scholars in this field, I will begin by discussing the first modern approach that emerged in the early 1950s to challenge the traditional, vested rights theory of the original Restatement: the 'center of gravity' approach, which was given

Conflicts Torts Cases, 44 Tenn. L. Rev. 975 (1977) [hereinafter cited as Sedler, Rules]. Indeed, two members of the Michigan Supreme Court in Sexton wanted to limit the court's holding to an acceptance of Sedler's 'universal' rule of choice of law in torts cases, namely, that "[w]hen two residents of the forum are involved in an accident in another state, the law of the forum applies." Id. at 1033. Cf. Justice Williams's opinion in Sexton, 413 Mich. at 438, 320 N.W.2d at 856: "We have now decided that where two parties to an accident in another state are both Michigan citizens or are doing business in Michigan, the lex fori controls." Justices Moody and Levin signed this opinion, but, as we shall see later, Justice Levin explained in a separate concurring opinion that he preferred to go beyond this formulation. See infra text accompanying notes 369-370.

15. See Dym v. Gordon, 16 N.Y.2d 120, 134-35, 209 N.E.2d 792, 801, 262 N.Y.S.2d 463, 475 (1965) (Desmond, C.J., dissenting) ("It is our duty as the highest court of our State to formulate and announce the law, otherwise how can the lower courts decide cases and how can lawyers advise their clients?").


17. Restatement of Conflict of Laws (1934) [hereinafter cited as Restatement]. A chart showing the choice of law theory adopted in each state and the District of Columbia is
currency as a choice of law theory by the New York Court of Appeals. I will then take up, in order, the governmental interest analysis proposed by Professor Brainerd Currie\(^\text{18}\) in a series of articles published between 1958 and 1965; the methodology of the Restatement Second of Conflict of Laws as it evolved from 1953 to its publication in 1971;\(^\text{19}\) and Professor Robert Leflar's 'choice-influencing considerations,'\(^\text{20}\) which were first announced in 1966. States that have combined two or more of the modern theories\(^\text{21}\) will be discussed separately, as will those jurisdictions that have adopted other approaches to choice of law.\(^\text{22}\) Finally, I will canvass those states that still follow the traditional approach to choice of law,\(^\text{23}\) as well as those that have rejected it only in part.\(^\text{24}\) This plan involves the reexamination of much familiar territory, but I hope the new insights gained through looking at the cases from a different perspective will repay the effort. Throughout, the primary emphasis will be on choice of law theory as it is understood and developed by courts deciding conflict of laws cases.

II. Choice of Law Theories Identified and Evaluated

A. The Center of Gravity

Development of the Theory. The ‘center of gravity’ theory was not

set out infra Appendix.


19. Professor Currie's major articles are collected in B. Currie, SELECTED ESSAYS ON THE CONFLICT OF LAWS, supra note 4. See infra text accompanying notes 100-105.

20. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter cited as RESTATEMENT (SECOND)]. See infra text accompanying notes 197-266.


23. E.g., Kentucky. See Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972); Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968) (applying lex fori whenever 'enough' contacts exist). See infra text accompanying notes 353-375.


advanced as an academic creation. Rather, it appears to have been the joint product of judicial and academic interaction. Today, it is generally viewed as having been incorporated into the 'most significant relationship' approach of the Restatement Second. There are some indications in the New York lower and intermediate court cases, however, that the center of gravity theory retains an independent viability.

The term itself was discovered in a casebook by the Indiana Supreme Court and rephrased in the following 'rule' in *W.H. Barber Co. v. Hughes:* "The court will consider all acts of the parties touching the transaction in relation to the several states involved and will apply as the law governing the transaction the law of that state with which the facts are in most intimate contact." Although the rule, as stated, could apply to any choice of law problem, both the casebook writers and the Indiana court had in mind contracts cases. In particular, the center of gravity notion was launched as a description of judicial behavior in cases in which the court sought to identify the state whose law had been intended by the parties to govern their contract. The term was used in this manner by Chief Judge Magruder in his well-known opinion in *Jansson v. Swedish American Line,* but it was expanded subsequently into an independent test of validity by the New York Court of Appeals in *Rubin v. Irving*

26. *See, e.g., Leflar, American Conflicts Law, supra* note 6, at 277-78; *Weintraub, Commentary, supra* note 6, at 363.


Many courts purport to find the most significant contact point, with respect to contractual transactions, at the place intended by both parties. It seems, rather, that these courts examine all the circumstances which could be supposed to have influenced the actions of the parties, and find the most intimate contact at that place which might be characterized as the center of gravity of the circumstances.

29. 223 Ind. 570, 63 N.E.2d 417 (1945). In addition to the passage quoted *supra* note 28, the court in *Barber* also cited E. Cheatham, N. Dowling, H. Goodrich, & E. Griswold, *Cases and Materials on Conflict of Laws* 411, 478, 511 (2d ed. 1941). These authors, however, do not use the term 'center of gravity.'

30. 223 Ind. at 586, 63 N.E.2d at 423.


32. At issue in *Barber* was the validity of a note containing a cognovit provision that was invalid in Indiana, where the promisors resided and did business, but valid in Illinois, where the promisee did business and where the note was payable. 223 Ind. at 573, 63 N.E.2d at 418-19.

33. 185 F.2d 212, 218-19 (1st Cir. 1950).
Trust Co., in part on Jansson.

Described interchangeably as the 'center of gravity' or the 'grouping of contacts' theory of conflict of laws, this approach was adopted by the New York Court of Appeals in Auten v. Auten as the chosen method for choice of law in contracts. The chief merit of the new approach, said the court, "is that it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction 'most intimately concerned with the outcome of [the] particular litigation.'"

The center of gravity theory as expounded in Auten was cited prominently by the American Law Institute1 as authority for the Restatement Second's proposed 'most significant relationship' standard for choice of law in contracts cases. The New York Court of Appeals, in turn, duly noted in Babcock v. Jackson that its approach had "supplanted the prior rigid and set contract rules in the most current draft of the Restatement of Conflict of Laws" and went on to extend the method to torts cases as a rationale for refusing to apply an Ontario guest statute to a New York guest's suit against her New York host arising from an injury in Ontario.

The following year, Tentative Draft No. 9 of the Restatement Second also extended the most significant relationship approach to torts problems: Babcock was cited as supporting the rule on the issue of a


35. 308 N.Y. 155, 124 N.E.2d 99 (1954). Judge Van Voorhis, who had introduced the theory into New York law, see supra note 34, was then a member of the court of appeals.

36. 308 N.Y. at 161, 124 N.E.2d at 102 (quoting Note, Choice of Law Problems in Direct Actions Against Indemnification Insurers, 3 UTAH L. REV. 490, 498-99 (1953)). Applying this theory, the court in Auten chose English law to measure the rights of English nationals under a separation agreement entered into in New York.

37. RESTATEMENT (SECOND) (Tent. Draft No. 6, 1960), ch. 8, reporter's note at 6 (Contracts, introductory note). The 'most significant relationship' test was introduced in § 332.

38. 12 N.Y.2d 473, 479, 191 N.E.2d 279, 282, 240 N.Y.S.2d 743, 746 (1963). Judge Van Voorhis, who had sponsored the 'center of gravity' terminology in contracts cases, see supra note 34, now objected to its appearance as an independent theory in torts cases: "[t]he expressions 'center of gravity,' 'grouping of contacts,' and 'significant contacts' are catchwords which were not employed to define and are inadequate to define a principle of law, and were neither applied to nor are they applicable in the realm of torts." 12 N.Y.2d at 486, 191 N.E.2d at 286, 240 N.Y.S.2d at 753 (Voorhis, J., dissenting).


The center of gravity theory seemed well on its way to wide acceptance.

But between Auten and Babcock a case appeared that led academic observers to question whether the center of gravity approach might not turn into a mathematical exercise rather than a qualitative evaluation of the relationship between the various states and the conflicting laws. In Haag v. Barnes, the New York Court of Appeals had used the new method to uphold under Illinois law a contract providing for the support of an illegitimate New York child. It had included in the calculus several factors, including the place from which the payments were to be mailed, the residence of the persons designated to act as principals for the parties, and the residence of the parties' attorneys, that were unrelated to the underlying policy conflict over whether judicial approval of child support contracts was essential to their validity. Professor David Cavers had made clear his view that the arithmetic of the center of gravity approach was not interchangeable with the more qualitative 'most significant relationship' approach of the Restatement Second even before Babcock was decided. And Professor Currie, for his part, was eager to isolate his governmental interest approach from the contamination of a 'grouping of contacts' theory that provided "no standard for determining what 'contacts' are significant, or for appraising the relative significance of the respective groups of 'contacts.'"

These same critics perceived in Babcock a substantial alteration in the

41. Restatement (Second) (Tent. Draft No. 9, 1964), ch. 9, (Wrongs, reporter's note to § 379, at 15-16). Despite this apparent harmony between the two approaches, Currie argued that Babcock's emphasis on judging the significance of contacts in terms of the policies and interests of the states involved, rightly understood, spells the doom of all attempts, such as that of the Restatement, to solve the problems of conflict of laws by a compendium of choice-of-law rules and in particular of the Restatement (Second)'s attempt to solve them by reference to the 'law of the state which has the most significant relationship with the occurrence and with the parties.'


42. 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961).
43. Id. at 560, 175 N.E.2d at 444, 216 N.Y.S.2d at 69.
44. See Currie, Conflict, Crisis and Confusion in New York, 1963 Duke L.J. 1, 45-47 [690, 732-34] [hereinafter cited as Currie, Conflict, Crisis and Confusion].
45. Cavers, Re-Restating the Conflict of Laws: The Chapter on Contracts, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 349 (1961): Metaphors such as the 'center of gravity,' among others, "suggest that some physical calculation is called for, a process of counting, weighting, measuring. But surely none of these processes is involved in determining the significance of a legal relationship." Id. at 355.
46. Currie, Conflict, Crisis and Confusion, supra note 44, at 39 [727].
center of gravity approach. Both Cavers\textsuperscript{47} and Currie\textsuperscript{48} remarked with satisfaction that the New York Court of Appeals had abandoned the arithmetic of contact-counting for an analysis of the policies underlying the conflicting laws concerning a host's duty to guests and an evaluation of the interests of New York and Ontario in having those policies applied in a given case. Others agreed.\textsuperscript{49}

Subsequent developments in New York, however, showed that the court of appeals was divided over the meaning of the Babcock approach. Between 1963, when Babcock was decided, and the 1976 decision in Towley v. King Arthur Rings, Inc.,\textsuperscript{50} the New York Court of Appeals was faced with a series of four cases\textsuperscript{51} that dealt with the claims of automobile guest passengers against New York hosts. In each case, the injury occurred elsewhere. This extraordinary collection of six cases, all raising essentially the same issue, put the center of gravity theory to a severe test and greatly influenced the approach taken in other states to choice of law problems.\textsuperscript{52}

\textsuperscript{48} Currie, Comments on Babcock v. Jackson, supra note 41, at 1233-34.
\textsuperscript{50} 40 N.Y.2d 129, 351 N.E.2d 728, 386 N.Y.S.2d 80 (1976).
\textsuperscript{52} Several states have cited the New York guest statute cases negatively (some including Kell v. Henderson, 47 Misc. 2d 992, 263 N.Y.S.2d 552 (1966), as well) as a reason for not abandoning the traditional lex loci delicti approach. See, e.g., First Nat'l Bank v. Benson, 89 N.M. 481, 485, 553 P.2d 1288, 1289-90 (N.M. Ct. App. 1976), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976); Heidemann v. Rohl, 86 S.D. 250, 259, 194 N.W.2d 164, 169 (1972); Winters v. Maxey, 481 S.W.2d 755, 756-57 (Tenn. 1972); McMillan v. McMillan, 219 Va. 1127, 1130, 253 S.E.2d 662, 664 (1979). Cf. Judge Friendly's observation that "in the light of fifteen years of experience under Babcock, the departure from the certainty of the lex loci delictus rule was not such a famous victory as it first appeared to be." O'Connor v. Lee-Way Paving Corp., 579 F.2d 194, 205 (2d Cir. 1978). Other states, in rejecting the traditional approach, have noted that New York's experience has not been entirely harmonious, but have not been deterred by it. See, e.g., Fox v. Morrison Motor Freight, Inc., 25 Ohio St. 2d 193, 197, 267
In *Dym v. Gordon,* the second guest statute case to arise, members of the New York Court of Appeals were unable to agree on which factors were central to the *Babcock* analysis. In applying Colorado law to prevent plaintiff's recovery, the majority placed great weight on the fact that the guest-host relationship between the New York parties had been formed in Colorado, where both had been attending summer school and where the injury had occurred. Judge Fuld, the author of *Babcock* (and *Auten* and *Haag,* as well), in dissent, found this factor irrelevant.

In his view, only the New York domicile of both parties and the fact that the host's vehicle was garaged, registered, and insured in New York were significant contacts, and these contacts required a decision that the policy underlying the New York common-law negligence rule should apply. Judge Fuld also tried to salvage his 'center of gravity' terminology, which had not been used in the majority opinion, by arguing, in response to Chief Judge Desmond's objection that the phrase did not provide a satisfactory guide to the decision of actual cases, that words such as 'due process' or 'traditional notions of fair play' were no more precise. But the effort was not a success. After *Dym,* the New York Court of Appeals abandoned the


53. Id. at 124-25, 209 N.E.2d at 798, 262 N.Y.S.2d at 466-67.
54. Id. at 131, 209 N.E.2d at 798, 262 N.Y.S.2d at 472 (Fuld, J., dissenting).
55. Id. at 130, 209 N.E.2d at 798-99, 262 N.Y.S.2d at 471.
56. Judge Burke thus stated the *Babcock* approach:
   Following our approach in *Babcock,* it is necessary first to isolate the issue, next to identify the policies embraced in the laws in conflict, and finally to examine the contacts of the respective jurisdictions to ascertain which has a superior connection with the occurrence and thus would have a superior interest in having its policy or law applied.

16 N.Y.2d at 124, 209 N.E.2d at 794, 262 N.Y.S.2d at 466.
57. Id. at 135, 209 N.E.2d at 801, 262 N.Y.S.2d at 475. Chief Judge Desmond indicated his agreement with Judge Van Voorhis, who had made similar objections in his dissent in *Babcock.* See supra note 38.
58. Id. at 132 n.4, 209 N.E.2d at 798 n.4, 262 N.Y.S.2d at 472 n.4 (Fuld, J., dissenting).
term 'center of gravity' in favor of a shorthand reference to the "Babcock rule" or a more qualitative description of the approach taken in Babcock, using other language in the opinion.

Disagreement between the adherents of Dym and the supporters of Babcock was held in check by the court's reversion to contact-counting (but not to the terminology 'center of gravity') in Macey v. Rozbicki, the third case in the guest statute series. Macey featured an injury in Ontario to a New York plaintiff, who was visiting her sister and brother-in-law at their Ontario summer home. The car in which she was a guest was driven by her sister and owned by her brother-in-law. Macey's phrasing of the Babcock test avoided the use of words like 'policy' or 'interest.' Instead, the rule was said to be "that in such conflict situations controlling effect is to be given 'to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.'" Applying this test to the facts in Macey, and picking its way carefully between Dym and Babcock, the majority concluded that New York law applied because "the relationship of two sisters living permanently in New York was not affected or changed by their temporary meeting together in Canada for a short visit there, especially since the arrangements for that visit had undoubtedly been made in New York State." Judge Keating, concurring in Macey, would have preferred to rest the matter on an analysis of policy and interest modelled on Professor Brai-nerd Currie's governmental interest analysis. Stating flatly that "[t]he only facts having any significant bearing on the applicable choice of law in guest statute cases are the residence of the parties and the place in which the automobile is insured and registered," Keating argued that both New York and Ontario should desire the application of New York law in Macey. Although his opinion gathered no votes in Macey, during

[Babcock] adopted for tort cases with multi-state settings the flexible principle that the law to be applied to resolve a particular issue is 'the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern' with the matter in issue and 'the strongest interest' in its resolution.
63. Id. at 291, 221 N.E.2d at 381, 274 N.Y.S.2d at 592 (quoting Babcock, 12 N.Y.2d at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749).
64. Id. at 292, 221 N.E.2d at 381, 274 N.Y.S.2d at 593.
65. Id. at 296, 221 N.E.2d at 384, 274 N.Y.S.2d at 597 (Keating, J., concurring).
66. Id. at 295, 221 N.E.2d at 383, 274 N.Y.S.2d at 595.
the three years that elapsed before the advent of the fourth case in the guest statute series, *Tooker v. Lopez*, Keating was able to persuade a majority of his colleagues that the center of gravity test should be reinterpreted in terms akin to those used in governmental interest analysis. Thus, in his opinion for the court in *Miller v. Miller*, a wrongful death case involving an asserted conflict between the laws of Maine and New York over the limitation of damages, Judge Keating said:

While this approach has been denominated under such various headings as 'grouping of contacts' and 'center of gravity', and while candor requires the admission that our past decisions have lacked a precise consistency, the rule which has evolved clearly in our most recent decisions is that the law of the jurisdiction having the greatest interest in the litigation will be applied and that the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict.

*Tooker* itself again presented a guest-host relationship between New Yorkers formed elsewhere: in this case, in Michigan, where both parties were attending college. As in the other cases, the automobile was registered and insured in New York. Seizing the opportunity to "resolve [the] inconsistencies" in this group of "particularly troublesome" cases, Judge Keating reformulated *Babcock* in interest analysis terms, recognized that *Macey* and *Dym* were "indistinguishable," noted that *Macey*’s "contact counting" method of analysis had been "rejected in subsequent opinions," and concluded that, in the present case,

[i]f the facts are examined in the light of the policy considerations which underlie the ostensibly conflicting laws it is clear that New York has the only real interest in whether recovery should be granted and that the application of Michigan law "would defeat a legitimate interest of the forum State without serving a legitimate interest of any other State."

*Tooker* was the high-water mark of Judge Keating’s effort to wed the New York Court of Appeals to interest analysis. Judge Burke, the author of *Dym*, made a telling comparison of the two approaches in his concur-

69. Id. at 15-16, 237 N.E.2d at 879, 290 N.Y.S.2d at 737.
70. 24 N.Y.2d at 572, 249 N.E.2d at 396, 301 N.Y.S.2d at 521.
71. Id. at 572-73, 249 N.E.2d at 396, 301 N.Y.S.2d at 521-22.
72. Id. at 574, 249 N.E.2d at 397, 301 N.Y.S.2d at 523.
ring opinion in Tooker: the same results would have been reached in four nonguest statute cases in which the court had used interest analysis if it had instead used its grouping of contacts or center of gravity approach. Tooker, he maintained, would not: it would have required the same outcome as Dym—application of the guest statute of the place of injury—if the center of gravity approach had been followed. He therefore viewed Tooker as "the first case wherein the determination will vary with the selection of a choice-of-law analysis," and accordingly, he regarded Dym as having been overruled. After Tooker, it appeared that the center of gravity approach finally had been abandoned in New York.

The court's attraction to interest analysis, however, was short-lived. Within two years, in the fifth case in the guest statute series, Neumeier v. Kuehner, the court abandoned its policy and interest analysis for a set of rules governing guest statute cases that had first been proposed by Judge Fuld in his concurring opinion in Tooker. The facts in Neumeier differed in one important respect from the pattern of the earlier cases: while the host was a New York resident and the car was registered, insured, and garaged in New York, the guest was a domiciliary of the place of injury, Ontario.

Judge Fuld's three rules are:
1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.
2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.
3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred, but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants. (Cf. Restatement, 2d, Conflict of Laws, P.O.D., Pt. II, §§ 146, 159.)
Although this factual difference would not have required a different outcome from that reached in *Tooker* under governmental interest analysis,\textsuperscript{79} Chief Judge Fuld, writing for the court, thought the difference in facts meant that New York "has no legitimate interest in ignoring the public policy of a foreign jurisdiction—such as Ontario—and in protecting the plaintiff guest domiciled and injured there from legislation obviously addressed, at the very least, to a resident riding in a vehicle traveling within its borders."\textsuperscript{80} Noting that Professor Willis Reese, the Reporter for the Restatement Second, had expressed approval for rules of the sort Fuld had suggested in *Tooker*, Fuld proceeded to apply his third rule to the *Neumeier* case, with the result that the law of Ontario was chosen because "the plaintiff has failed to show that this State’s connection with the controversy was sufficient to justify displacing the rule of *lex loci delictus*."\textsuperscript{81} Although Judge Breitel, concurring, objected that the formation of rules was premature,\textsuperscript{82} *Neumeier* appears to have ended New York’s experiment with interest analysis in guest statute cases.\textsuperscript{83} In the last case in the series of six, *Towley v. King Arthur Rings, Inc.*,\textsuperscript{84} the court of appeals found it possible to apply the guest statute of the place of wrong and deny recovery to an Iowa guest injured by a New York host in Colorado without any discussion whatsoever of choice of law theory.\textsuperscript{85}

But the tale does not end with *Towley*. Although the New York Court of Appeals has cited *Neumeier* outside the guest statute context for the proposition that "*lex loci delicti* remains the general rule in tort cases to be displaced only in extraordinary circumstances,"\textsuperscript{86} it did so in a case

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\textsuperscript{79} *Neumeier* is an illustration of the ‘unprovided-for’ case, in which neither state has an interest in applying its policy to the particular facts at issue. In such cases, Professor Brai-nerd Currie’s preferred solution was that the forum should apply its own law because there is no reason to apply any other law. Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 232 [128, 156] (1958) [hereinafter cited as Currie, *Survival of Actions*]. See also Kay, *The Use of Comparative Impairment, supra* note 16, at 611-12.

\textsuperscript{80} 31 N.Y.2d at 125-26, 286 N.E.2d at 456, 335 N.Y.S.2d at 68.

\textsuperscript{81}  Id. at 129, 286 N.E.2d at 458, 335 N.Y.S.2d at 71.

\textsuperscript{82}  Id. at 130, 286 N.E.2d at 459, 335 N.Y.S.2d at 71 (Breitel, J., concurring).


\textsuperscript{84} 40 N.Y.2d 129, 351 N.E.2d 728, 386 N.Y.S.2d 80 (1976).

\textsuperscript{85} Although the court did not mention it, Iowa had a guest statute at the time of the accident in *Towley*. See Keasling v. Thompson, 217 N.W.2d 687 (Iowa 1974) (upholding Iowa guest statute against a claim of unconstitutionality).

\textsuperscript{86} Cousins v. Instrument Flyers, Inc., 44 N.Y.2d 698, 699, 376 N.E.2d 914, 915, 405
that declined to permit plaintiff to change his strategy and rely on lex loci
delicti after the evidence was in but before the jury was charged. The
lower court cases have gone even further in limiting Neumeier to its facts.
In conflicts cases involving contracts, Auten and its center of gravity or
grouping of contacts approach is followed. And in torts conflicts cases in-
volving issues such as the measure of recovery in wrongful death suits,
charitable immunity, and contribution in interstate workers’ compensa-
tion cases, the center of gravity or grouping of contacts approach is also
used, often without bothering to cite Neumeier. It remains to be seen
whether the New York Court of Appeals will in the future return to the
approach it helped to produce.

North Dakota appears to be the only state that has adopted New
York’s center of gravity approach without merging it into the ‘most sig-

1982); American Home Assurance Co. v. Employers Mut. of Wausau, 77 App. Div. 2d 421,
continues to be the test in contract actions. . .”) aff’d, “for reasons stated in the opinion,”
ing of contacts’ rule to determine the rights of the parties under an insurance policy).

88. E.g., Wood v. American Airlines, Inc., 103 Misc. 2d 431, 433, 426 N.Y.S.2d 193, 194
(N.Y. Sup. Ct. 1979) (“However, New York as the forum state applies the principle of
grouping of contacts.”).

89. E.g., Rakaric v. Croatian Cultural Club, 76 App. Div. 2d 619, 430 N.Y.S.2d 829
(1980). After reviewing the court of appeals cases from Rubin to Neumeier, the court con-
cluded that:

[m]easured against this background of Babcock and its progeny, which reflect the
rationale that the choice of law will be determined by the ‘center of gravity’ or
‘grouping of contacts’ doctrine where the protection was required “for our own
State’s people against unfair and anachronistic treatment” (Kilberg v. Northeast
Airlines, 9 N.Y.2d 34, 39, 211 N.Y.S.2d 133, 135, 172 N.E.2d 526, 528, supra) of
foreign laws, the question squarely presented here is whether, under the circum-
stances of this case, Babcock should be applied or whether the old rule of lex loci
delicti should prevail, solely because the accident happened on the defendant’s
land in New Jersey.

Id. at 624, 430 N.Y.S.2d at 833 (emphasis in original).

90. E.g., Chandler v. Northwest Eng’g Co., 111 Misc. 2d 433, 435-36, 444 N.Y.S.2d 398,
400 (N.Y. Sup. Ct. 1981) (“While courts in cases subsequent to Babcock have sometimes
struggled with its doctrine, and at times have sought a more structured rule in its appli-
cation (e.g., Neumeier v. Kuehner, 31 N.Y.2d 121, 335 N.Y.S.2d 64, 286 N.E.2d 454 (1972)) it is
the opinion of this court that its principle is still the law of this state.”); Vermont Constr.,
376, 378 (1981) (“Application of the ‘center of gravity’ or ‘grouping of contacts’ doctrine
 inexorably leads to the conclusion that Vermont, not New York, has the greater relationship
and contact with the occurrence of the event and the issues raised thereby.”).
Olson, the North Dakota Supreme Court adopted the 'significant contacts' rule developed in Babcock and used that approach to apply its own law of contributory negligence to an action between two North Dakota residents based on an injury in Minnesota, a comparative negligence state. In Mager v. Mager, the court held that the 'significant contacts' rule required application of Minnesota's then extant spousal immunity law to bar a suit by a Minnesota wife, injured in Minnesota, against her husband. Neither Issendorf nor Mager refers to the Restatement Second. A federal district court has interpreted these two cases as adopting the New York approach and has concluded that North Dakota would follow New York's lead in Auten and apply the method to contracts cases as well.

Evaluation of the Theory. Because the center of gravity theory lacked an academic sponsor, no body of writing exists on the basis of which one can judge whether the courts of New York and North Dakota have applied it correctly. We can turn instead to an examination of how well or badly the theory worked in practice.

Reflection on New York's thirty years of experience with this choice of law method reveals its primary defect: the center of gravity or grouping of contacts theory lacks identifiable content. The flexibility it provided that seemed so attractive by comparison to the rigidity of the traditional approach also left it open to manipulation. Taken literally as a weight-

91. 194 N.W.2d 750, 756 (N.D. 1972). Babcock was described as "a New York court of appeals decision which established the significant-contacts or center-of-gravity rule as the choice-of-law rule to be applied in tort litigation." Id. at 753.
92. 197 N.W.2d 626, 628 (N.D. 1972). North Dakota's only connection with the case was the fact that plaintiff had been hospitalized there. The question of whether North Dakota had sufficient connections with the case to justify application of North Dakota law on constitutional grounds apparently was not raised. Under the Supreme Court precedents touching constitutional control of choice of law as they stood in 1972, e.g., Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964); John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936); Home Ins. Co. v. Dick, 281 U.S. 397 (1930), it seems clear that a postaccident hospitalization in another state would not have been enough to sustain application of that state's law. In the wake of Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981), the possibility that North Dakota's choice of its own law would be upheld on constitutional grounds is much greater. Even in Hague, however, there were some preaccident connections between the decedent and Minnesota, even though they were unrelated to the policy conflict concerning stacking of uninsured motorist coverage on various automobiles. In Mager there appear to be no preaccident contacts whatsoever, and plaintiff returned to her home in Minnesota after being discharged from the North Dakota hospital. But see the plurality opinion in Hague, which suggests that North Dakota's interest in ensuring payment for its medical creditors would be constitutionally sufficient to justify application of its law. 449 U.S. at 316 n.22. The Minnesota Supreme Court's decision in Hague, which was affirmed by the United States Supreme Court, is discussed infra notes 295 and 334-335.
scale, the method produced results like that in Haag, in which marginally relevant factual contacts were multiplied into uneven masses of material related only tangentially to the underlying conflict of law and policy. In the hands of a judge committed to interest analysis, like Keating, the theory could be turned into a sensitive tool capable of dissecting policy and identifying state interests in guest statute cases as well as nonguest statute cases. As Chief Judge Fuld demonstrated in Neumeier, it was even capable of accommodating rules. What the theory could not do, left to its own resources, was provide guidance about which factors were to be put on the scale and why: the result was that its use created the sharp disagreement over outcome that marked Dym and the necessity for backtracking in Macey. In short, the theory lacked predictive power. One is reminded of Professor Rosenberg's sally that "[a] New York lawyer with a guest statute case has more need of an ouija board today than a copy of Shepard's citations."

But the center of gravity theory did more than fail to guide the bench and bar to sound choice of law decisions. It also produced confusion when none should have existed. Judge Keating, setting out in Tooker to reformulate the guest statute cases, characterized its law-fact pattern as "one of the simplest in the choice-of-law area." Indeed, it was. The first four guest statute cases were all false conflict problems: Babcock, Dym, Macey, and Tooker were all cases in which New York was the only state with a policy that would be advanced by the application of its law. The two earliest center of gravity cases were false conflict problems as well: Rubin and Auten were cases in which no conflict of interest was involved. Haag, Neumeier, and Towley were not false conflict problems, but a decision applying New York law in all three easily could have been reached under interest analysis.

98. 24 N.Y.2d at 576, 249 N.E.2d at 394, 301 N.Y.S.2d at 525.
99. Neumeier and Towley were both cases in which the host driver was a New York resident and the guest passenger was a resident of a jurisdiction that had a guest statute. In Neumeier, but not in Towley, the injury occurred in the jurisdiction of the guest's residence. Both cases fall within the category termed by Currie the 'unprovided-for' case, and he suggested that forum law be applied. See supra note 79. Haag is a case in which both states
scuring the connection between the facts of the cases and the policies of the conflicting laws, made these cases unnecessarily difficult for the New York court to decide. The North Dakota court has not yet been put to the test of such difficult cases: Issendorf was a false conflict case; and while the Mager plaintiff's hospitalization in North Dakota following her injury in Minnesota may have given rise to a North Dakota interest in reimbursement of its medical creditors, that factor alone seems a doubtful basis for application of North Dakota law on interspousal suits to an otherwise entirely local tort between two Minnesota spouses.

B. Governmental Interest Analysis

Development of the Theory. Professor Brainerd Currie announced his governmental interest analysis for choice of law problems in 1958. Conceived during what must have been an extraordinary period of scholarly productivity, the theory appeared in four major articles\(^{100}\) published in that year, followed by three in 1959,\(^{101}\) four more (three with co-authors) in 1960,\(^{102}\) two (including a reply to an early critic) in 1961,\(^{103}\) three (including a brief comment in a symposium on Babcock) in 1963,\(^{104}\) and a final piece on the full faith and credit clause in 1964.\(^{105}\) Most of these


\(^{104}\) Currie, Comments on Babcock v. Jackson, supra note 41, at 1233; Currie, Conflict, Crisis and Confusion in New York, 1963 DUKE L.J. 1 [690]; Currie, The Disinterested Third State, 28 LAW & CONTEMP. PROBS. 764 [1853] [hereinafter cited as Currie, Third State].

\(^{105}\) Currie, Full Faith and Credit, Chiefly to Judgments: A Role for Congress, 1964 SUP. CT. REV. 89.
papers were collected in a book, *Selected Essays on the Conflict of Laws*, which won the first Coif Triennial Book Award for outstanding legal scholarship.\(^{108}\) Currie’s death in 1965 prevented his further development of the theory, but his academic followers\(^{107}\) have continued to work within the framework he established, and his academic critics\(^{108}\) still probe its assumptions.

Governmental interest analysis was developed against the background of what former Chief Justice Roger Traynor of the California Supreme Court has termed the “petrified forest”\(^{109}\) of choice of law rules contained in the 1934 Restatement. Currie’s major insight was that these rules “create problems that did not exist before,”\(^{110}\) and that they solve the false problems in irrational ways, by nullifying capriciously the interest of one state or another whose laws were said to be in conflict without analysis of their underlying policies. He therefore suggested that choice of law rules be abandoned\(^{111}\) and vigorously opposed the ongoing effort of the American Law Institute to produce a new set of such rules in the Restatement Second.\(^{112}\)

Currie’s ultimate hope was that congressional legislation might provide a solution for truly conflicting state interests.\(^{113}\) In the meantime, however, he offered a method for courts faced with the need to decide conflicts cases. His initial suggestion was that a forum, faced with a choice of law problem, should investigate the foreign law only when asked to do so by the parties, and should apply that law only in cases in which the fo-


\(^{110}\) Currie, *Methods and Objectives*, supra note 4, at 174 [180].

\(^{111}\) Id. at 177 [183].


\(^{113}\) Currie, *Methods and Objectives*, supra note 4, at 177 [183].
rum had no interest in applying its own law. This method was subsequently modified to take account of cases in which the ostensibly conflicting interests of two or more states created an apparent true conflict: in such cases, he suggested, a "more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate purpose" might avoid the conflict. If the conflict of policy and interest persisted, however, the forum was faced with a true conflict case, and it should choose its own law in order to advance its state's interest.

Currie's suggestions found an early judicial ally in Justice Roger Traynor of the California Supreme Court. Traynor already had written three opinions that had defied the traditional approach to choice of law before Currie's articles began appearing in 1958. In Grant v. McAuliffe, he had characterized California's survival statute as procedural rather than substantive and had applied it to permit recovery to a Californian injured in Arizona by a deceased California tortfeasor. Traynor's manipulation of the usual approach to characterization in Grant was widely criticized by the traditionalists; Currie defended its result, if not its reasoning, in

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114. *Id.* Currie thus phrased his "basic method" in 1959:
1. Normally, even in cases involving foreign elements, the court should be expected, as a matter of course, to apply the rule of decision found in the law of the forum.
2. When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum. It should then inquire whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy. This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.
3. If necessary, the court should similarly determine the policy expressed by the foreign law, and whether the foreign state has an interest in the application of its policy.
4. If the court finds that the forum state has no interest in the application of its policy, but that the foreign state has, it should apply the foreign law.
5. If the court finds that the forum state has an interest in the application of its policy, it should apply the law of the forum, even though the foreign state also has an interest in the application of its contrary policy, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.

*Id.* at 178 [183-84].


116. *Id.* at 758.

117. 41 Cal. 2d 859, 264 P.2d 944 (1953).

118. *E.g.*, Sumner, *Choice of Law Governing Survival of Actions,* 9 HASTINGS L.J. 128 (1958); *Note,* *Survival Statutes in the Conflict of Laws,* 68 HARV. L. REV. 1260, 1263-64 (1955) (urging application of law of decedent's domicile); *Note,* *Conflict of
one of his early articles.\textsuperscript{119} In \textit{Emery v. Emery,}\textsuperscript{120} Traynor wrote one of the leading opinions characterizing the problem of intrafamily immunity in tort as a matter of family status, rather than tort, resulting in the application of California law to permit recovery among family members domiciled in California for injuries sustained in Idaho. \textit{Emery} was widely followed by courts in other states\textsuperscript{121} seeking some modest relief from the strict lex loci delicti rule of the Restatement. And in \textit{People v. One 1953 Ford Victoria,}\textsuperscript{122} a case concerning the objections of a Texas mortgagor to the proposed forfeiture of his interest in a vehicle sold in Texas and seized in California after it had been used illegally to transport narcotics, he had engaged in an analysis of the policy underlying California’s automobile forfeiture statute and had concluded that the legislature had intended it to apply only to “California mortgagors and mortgagees.”\textsuperscript{123}

Speaking for himself and not for the Supreme Court of California in a Law Day address in 1959, Traynor took the opportunity to hail Currie for “a series of articles that brilliantly set forth an affirmative new approach to conflict of laws”\textsuperscript{124} and to reformulate the three cases discussed above in terms of governmental interest analysis.\textsuperscript{125} Two years later, writing for a unanimous court in \textit{Bernkrant v. Fowler,}\textsuperscript{126} Traynor analyzed state policy and interest to uphold an oral promise to forgive indebtedness by will, which he found valid when tested against the ‘common policy’ of California and Nevada. Currie, in turn, cited \textit{Bernkrant} as an example of his subsequently developed “moderate and restrained interpretation” step\textsuperscript{127} that had successfully avoided an asserted conflict between the two states.

Although Traynor did not expressly adopt governmental interest analysis in \textit{Bernkrant}, his use of the method was sufficiently striking to permit the conclusion that California was following Currie’s theory.\textsuperscript{128}
Reich v. Purcell, again without saying so directly, Traynor's analysis of the policies underlying the creation of wrongful death statutes and the decision to limit damages under such statutes led him to the conclusion that what had appeared to be a three-state conflict among California, Ohio, and Missouri was really a case in which only Ohio had an interest in advancing its policy of full recovery. All commentators in a symposium on the case, with the exception of Professor Albert Ehrenzweig, agreed that Traynor's reasoning was consistent with governmental interest analysis. It was not until Traynor had left the California Supreme Court, however, that Justice Sullivan acknowledged in Hurtado v. Superior Court that California had adopted the governmental interest approach for choice of law cases. The court has continued to proclaim its adherence to this theory in subsequent cases.

After placing California with some confidence in the Currie camp, however, there is some uncertainty in naming other jurisdictions that properly fall within that category. Many states, in rejecting the traditional approach in whole or in part, did so in terms consistent with Currie's method. Thus, Professor David Currie, writing in 1968, offered a list
"not meant to be exhaustive" of five states\textsuperscript{138} whose highest courts had
"explicitly employed" interest analysis (to which Reich added California as a sixth) as well as the federal court speaking for the District of Columbia.\textsuperscript{136} In the same year, the Supreme Court of Arizona, adopting the Restatement Second in a spousal immunity case,\textsuperscript{137} listed six states\textsuperscript{138} as having employed the 'rhetoric' of interest analysis. Theoretical developments since the mid-1960s have made the classification even more tentative; both the Restatement Second\textsuperscript{139} and Professor Leflar's 'choice-influencing considerations'\textsuperscript{140} expressly incorporate policy and interest.

\begin{quote}

135. Currie, \textit{Comments on Reich v. Purcell}, 15 U.C.L.A. L. Rev. 595 (1968). The states named and the cases cited were: New Hampshire, Johnson v. Johnson, 107 N.H. 30, 216 A.2d 781 (1966); New York, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Oregon, Lilienthal v. Kaufman, 239 Or. 1, 395 P.2d 543 (1964); Pennsylvania, Griffith v. United Air Lines, 416 Pa. 1, 203 A.2d 796 (1964); and Wisconsin, Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). As we have seen, New York's attachment to interest analysis as illustrated in \textit{Babcock} did not survive \textit{Dym}, and its resurgence under the guidance of Judge Keating was stifled in the guest statute cases by the court's acceptance of Judge Fuld's rules in \textit{Neumeier}. See supra text accompanying notes 53-61 & 77-83. It remains to be seen whether the New York Court of Appeals will continue to build on its interest analysis opinions in the nonguest statute cases decided under Keating's influence. See supra note 96. Of the other states cited by Currie, both New Hampshire, Clark v. Clark, 107 N.H. 351, 353-57, 222 A.2d 205, 208-10 (1966), and Wisconsin, Heath v. Zellmer, 35 Wis. 2d 578, 596, 151 N.W.2d 664, 672 (1967), subsequently adopted Professor Leflar's 'choice-influencing considerations' as a choice of law methodology. See infra text accompanying note 311. Interest analysis still plays a prominent part in conflict of laws decisions in both Oregon and Pennsylvania, but it has been combined with other modern approaches in the latter state, and submerged into the Restatement Second in the former state. See infra text accompanying notes 255-56 & 347.  


138. \textit{Id.} at 564 n.2. 447 p.2d at 256 n.2. The Arizona court added California and New Jersey to Currie's list, see supra note 135 (citing Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967) and Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967)) but did not list Oregon.  

139. Section 6 of the Restatement Second, which expressly incorporates as "factors relevant to the choice of the applicable rule of law" subsections (b) and (c), dealing with the "relevant policies of the forum" and "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue," respectively, was added to the Proposed Official Draft in 1967. \textit{See Restatement (Second), Foreword at vii (Proposed Official Draft Part I, 1967).}  

140. Leflar's list of the five 'choice-influencing considerations' includes as the fourth factor "advancement of the forum's governmental interests." \textit{See Leflar, Choice-Influencing Considerations, supra note 21, at 282; Leflar, More, supra note 21, at 1587.}
analysis. But, as we shall see, both of these theories differ in important respects from governmental interest analysis in the scope and significance of their reliance on state interests. Courts working within the framework of those theories may borrow parts of the interest analysis methodology, but they cannot be counted as having adopted its theoretical basis. In this section of my paper, I have set myself the task of identifying only those jurisdictions that claim to be following Currie's version of governmental interest analysis. Under that limitation, I can add to the name of California that of New Jersey, but no longer that of the District of Columbia.

141. See infra text accompanying notes 217-22 & 276-78.


143. See infra text accompanying notes 145-61.

144. The District of Columbia has been identified as a jurisdiction that follows governmental interest analysis. See Milhollin, The New Law of Choice of Law in the District of Columbia, 24 Cath. U. L. Rev. 448 (1975) [hereinafter cited as Milhollin, The New Law]. At the time, this identification was supported primarily by a series of cases decided by the United States Court of Appeals for the District of Columbia: e.g., Gaither v. Myers, 404 F.2d 216, 223-24 (D.C. Cir. 1968) (applying law of District of Columbia in a 'false conflicts' situation); Roscoe v. Roscoe, 379 F.2d 94, 99 (D.C. Cir. 1967) ("[b]alancing the respective interests" of the District of Columbia and North Carolina to permit the continued prosecution following the husband's death of an interspousal suit by a wife resident in the District of Columbia to recover for injuries she had suffered in North Carolina during her husband's lifetime); Dovell v. Arundel Supply Corp., 361 F.2d 543, 544 (D.C. Cir. 1966) ("The rule in the District of Columbia is that where a conflict of law exists as to a particular issue, the law of the jurisdiction with the more substantial interest in the resolution of the issue is applied"); Williams v. Rawlings Truck Line, Inc., 357 F.2d 581, 586 (D.C. Cir. 1965) (applying New York law in a 'classic 'false conflicts' situation in which [a]doption of the New York doctrine of estoppel will further the interests of New York, but will not interfere with any of the articulated policies of the District of Columbia"); Tramontana v. S. A. Empresa De Viacao Aerea Rio Grandense, 350 F.2d 468, 471 (D.C. Cir. 1965), cert. denied sub nom. Tramonta Varig Airlines, 383 U.S. 943 (1966) ("Our conclusion that the District Court properly applied the Brazilian limitation rests upon an examination of the respective relationships of Brazil and the District of Columbia with the accident, and with the parties here involved; and a consideration of their respective interests in the resolution of this issue").

After Congress eliminated the power of the United States Court of Appeals for the District of Columbia to review judgments of the District of Columbia Court of Appeals in 1971, see Milhollin, The New Law, supra, at 448 n.1, the District of Columbia cases have reverted to a traditional approach in torts cases almost without any discussion. Thus, in Carr v. Biomedical Applications, 366 A.2d 1089, 1093 n.3 (D.C. 1976), the court affirmed a dismissal on the ground of forum non conveniens of a District plaintiff's suit against a Maryland professional corporation and the doctors who composed it based on negligent conduct occurring in Maryland that caused the death of plaintiff's husband in the District. The court noted in
The New Jersey Supreme Court announced in Pfau v. Trent Aluminum Co.\(^\text{145}\) that it had adopted "the governmental interest analysis approach that the case is clearly governed by Maryland law," adding in footnote 3 that "we are convinced that the governing substantive law of the case is that of the lex loci, the State of Maryland, where the alleged tortious acts transpired." 366 A.2d at 1093 n.3. Cited as authority for this proposition were two cases involving civil suits for false arrest that had occurred in other states, and a third based on personal injuries suffered in Maryland, all three applying the lex loci delicti without discussing choice of law theory: May Dep't Stores Co. v. Devercelli, 314 A.2d 767, 770 (D.C. 1973) ("The governing substantive law of this case is that of the lex loci, the State of Virginia, where the alleged tortious acts transpired"); Shaw v. May Dep't Stores Co., 268 A.2d 607, 609 (D.C. 1970) ("In determining whether the grant of summary judgment was proper in this case, however, it is necessary to apply the law of Maryland as the allegedly tortious conduct occurred there"); Hardy v. Hardy, 197 A.2d 923, 925 (D.C. 1964) ("Although District of Columbia law controls procedural matters in the trial, Maryland law governs substantive questions when the accident occurs in that state"). Following these citations, the court in Carr added that "[m]oreover, we reach this same result applying the various 'choice of law' theories discussed in Myers v. Gaither, D.C. App., 232 A.2d 577, 583-84 (1967)." 366 A.2d at 1093 n.3. In its opinion in Myers, which was remanded by the United States Court of Appeals for the District of Columbia in Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968), the District of Columbia Court of Appeals had discussed only the 'contact' or 'grouping of contacts' theory espoused by Babcock and the RESTATEMENT (SECOND) § 379 (Tent. Draft No. 9, 1964) as new choice of law approaches. Governmental interest analysis was not mentioned by name, nor were any of Currie's writings cited. The court did refer, however, to the decisions in Tramontana, Williams, and Roscoe.

More recently, the District of Columbia Court of Appeals assumed the application of the lex loci delicti in another false arrest case without reference to modern theory. In Washington v. May Dep't Stores Co., 388 A.2d 484, 487 (D.C. 1978), the court reversed an order dismissing on grounds of forum non conveniens the suit of a District of Columbia resident against a New York corporation for false arrest in its Maryland store, noting that "[m]oreover, although Maryland law will govern tortious conduct allegedly occurring in that state, . . . District of Columbia courts are not unfamiliar with the Maryland law of false arrest."

The United States Court of Appeals in Semler v. Psychiatric Inst., 575 F.2d 922 (D.C. Cir. 1978) cited its prior decisions in Tramontana, Gaither, Roscoe, and Williams, together with Milhollin's article, for the proposition that the District of Columbia "has increasingly applied an 'interest analysis' approach in determining the law applicable in tort cases in general and wrongful death cases in particular." Id. at 924. Semler was decided nearly three months earlier than Washington; it does not discuss Carr.

Based on this review of the cases, I am unable to conclude, at the time of this writing, that the District of Columbia's local courts still follow governmental interest analysis, despite their failure to reject the theory in formal terms. For the moment, the District of Columbia is properly counted with those states that adhere to the traditional approach. See infra text accompanying notes 376-385.

approach'" to replace the lex loci delicti rule for determining choice of law in torts cases in its earlier opinion in Mellk v. Sarahson. Both cases involved suits against New Jersey host drivers arising out of injuries in states with guest statutes; New Jersey had no guest statute. In Mellk, a classic false conflict case in the Babcock pattern, the plaintiff guest was also a New Jersey resident; the host's automobile was registered, garaged, and insured in New Jersey; and the trip began and was expected to end there. In Pfau, the guest was a resident of Connecticut, a state which, like New Jersey, had no guest statute, and the host-guest relationship had been formed in Iowa, where both parties were attending college. Relying heavily on Babcock, the court in Mellk carefully distinguished among the various reasons advanced by several scholars for supporting the Babcock result, and chose for itself the rationale closest to that it had attributed to Currie: that "New Jersey has the paramount interest in fixing the rights and liabilities arising from this host-guest relationship, and that Ohio has no real interest in having its guest statute applied so as to bar recovery here for ordinary negligence." The law-fact pattern in Pfau closely resembled that of Dym, and the New Jersey Supreme Court was aided by the reasoning of Judge Keating in Tooker to avoid attributing to Iowa any interest in applying its guest statute based on the parties' temporary residence there or on the fact that Iowa was the "seat of the relationship." The fact that Connecticut, plaintiff's residence, would have followed the traditional lex loci delicti rule to choose Iowa law and bar the suit somewhat troubled the court. It perceived, however, that applying Connecticut's choice of law rule "would frustrate the very goals of governmental-interest analysis," which calls for an examination of the substantive policies of the conflicting laws.

The New Jersey courts in torts conflicts cases following Mellk and Pfau have continued to proclaim adherence to Professor Currie's governmental interest approach, although not always in the most precise of terms.

146. 55 N.J. at 515, 263 A.2d at 131.
147. 49 N.J. 226, 229 A.2d 625 (1967).
148. Id. at 234, 229 A.2d at 629.
149. 55 N.J. at 521, 263 A.2d at 134.
150. Id. at 526, 263 A.2d at 136-37.
152. See, e.g., Rose v. Port Auth., 61 N.J. 129, 139-40, 293 A.2d 371, 376-77 (1972) ("But we... have adopted, as has New York, the more flexible doctrine that applies the law of the jurisdiction having the most significant relationship and closest contacts with the occurrence and the parties"); Litarowich v. Wiederkehr, 170 N.J. Super. 144, 147, 405 A.2d 874, 875-76 (1979) ("All parties agree that New Jersey's choice-of-law rules invoke the local law of that state which has the most significant contacts and greatest governmental interest in the dispute and the parties").
The New Jersey Supreme Court faltered badly, however, when the occasion arose in *State Farm Mutual Automobile Insurance Co. v. Estate of Simmons* to extend the new method to contracts. *Estate of Simmons* was an action brought by an automobile insurance company for a declaration that its policy did not cover an accident in which the insured automobile was allegedly being operated without the permission of the insured owner. The policy had been placed in Alabama while the insured was domiciled there and the car was garaged there. The insured was present in New Jersey because of military service duties. The driver operating the insured’s car at the time of the injury in New Jersey, as well as the four passengers who died, were his fellow servicemen. The insured had given the driver permission to use his car for less than an hour to go to the bank; the car had not been returned when the injury occurred, more than twelve hours later, while the driver and passengers were following home women they had met in a bar. Under New Jersey’s ‘initial permission’ rule, coverage might have been available; but under Alabama’s ‘minor deviation’ rule, the driver had far exceeded the scope of the insured’s permitted use. The majority drew on a 1957 case treating the law of the place where the insurance contract was made as the normally governing law, the ‘most significant relationship’ approach of the Restatement Second, and New Jersey’s ‘governmental interest’ test to produce the following rule:

[I]n an action involving the interpretation of an automobile liability insurance contract, the law of the place of the contract will govern the determination of the rights and liabilities of the parties under the insurance policy. This rule is to be applied unless the dominant and significant relationship of another state to the parties and the underlying issue dictates that this basic rule should yield.

Stressing the temporary nature of the insured’s residence in New Jersey and the fact that he intended to return to Alabama, as well as the common policy of both states to limit coverage to situations in which the insured’s automobile was being driven with his permission, the majority concluded that “there are no sufficiently cogent countervailing considerations which dictate that Alabama insurance law not be followed to settle

154. *Id.* at 41 n.1, 417 A.2d at 494-95 n.1. The dissent argued that New Jersey law would permit recovery. *Id.* at 54-55, 417 A.2d at 502-03 (Pashman, J., dissenting).
155. 84 N.J. at 50-54, 417 A.2d at 500-02 (Pashman, J., dissenting).
157. 84 N.J. at 37, 417 A.2d at 491.
158. *Id.* at 37, 417 A.2d at 492.
159. *Id.* at 37, 417 A.2d at 493.
the claims in this litigation.\textsuperscript{160}

Justice Pashman, in dissent, urged the majority to adopt governmental interest analysis in contract cases "in substance—not simply in name."\textsuperscript{161} He argued that close scrutiny of the policies and interests of New Jersey would lead to an application of New Jersey law to allow recovery.\textsuperscript{162}

Evaluation of the Theory. Do California and New Jersey, the two states that claim to be using governmental interest analysis in choice of law cases, apply the theory correctly? In answering that question, I will refer to the model of interest analysis advanced by Currie, not the extremely valuable, but divergent, reformulation proposed by Sedler.\textsuperscript{163}

The California Supreme Court has meticulously followed the steps set out in Currie's analysis. Unless the court is requested by one of the parties to consider the application of foreign law, it applies forum law, even in cases involving foreign elements.\textsuperscript{164} When a party suggests that the law of another state should provide the rule of decision, the California Supreme Court has, with a single exception,\textsuperscript{165} examined the policy underlying its own law and inquired whether California has an interest in the application of its policy before turning to make similar examinations of the policy and interest of the foreign state.\textsuperscript{166} If only one state has an interest in the application of its policy, the California Supreme Court has recognized the false conflict and has applied the law of the only interested state.\textsuperscript{167} When the inquiry discloses an apparent true conflict between the policies and interests of both states, the court has reconsidered the matter. As I have pointed out elsewhere,\textsuperscript{168} it is at the point of identifying and resolving true conflicts that the California Supreme Court has made a

\begin{itemize}
  \item \textsuperscript{160} Id. at 38, 417 A.2d at 493.
  \item \textsuperscript{161} Id. at 48, 417 A.2d at 499 (Pashman, J., dissenting).
  \item \textsuperscript{162} Id. at 56, 417 A.2d at 496.
  \item \textsuperscript{163} See Sedler, \textit{Governmental Interest Approach, supra} note 107.
  \item \textsuperscript{164} Glickman v. Collins, 13 Cal. 3d 852, 857 n.1, 533 P.2d 204, 207 n.1, 120 Cal. Rptr. 76, 79 n.1 (1975); \textit{Hurtado}, 11 Cal. 3d at 581, 522 P.2d at 670, 114 Cal. Rptr. at 110.
  \item \textsuperscript{165} Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 163-64, 583 P.2d 721, 724-25, 148 Cal. Rptr. 867, 870-71 (1978) (court assumes, without analysis of underlying policy, an interpretation of California law that creates a true conflict with the law of Louisiana). I have suggested elsewhere that this failure to analyze the policy underlying California law is inconsistent with governmental interest analysis. \textit{See} Kay, \textit{The Use of Comparative Impairment, supra} note 16, at 589-90.
  \item \textsuperscript{166} \textit{E.g.}, Bernhard v. Harrah's Club, 16 Cal. 3d 313, 317, 546 P.2d 719, 721, 128 Cal. Rptr. 215, 217, \textit{cert. denied}, 429 U.S. 859 (1976); \textit{Hurtado}, 11 Cal. 3d at 580, 522 P.2d at 669, 114 Cal. Rptr. at 109; \textit{Reich}, 67 Cal. 2d at 555-56, 432 P.2d at 730-31, 63 Cal. Rptr. at 34-35.
  \item \textsuperscript{167} \textit{E.g.}, \textit{Hurtado}, 11 Cal. 3d at 582, 522 P.2d at 671, 114 Cal. Rptr. at 111; \textit{Reich}, 67 Cal. 2d at 555-56, 432 P.2d at 730-31, 63 Cal. Rptr. at 34-35 (false conflict case in a disinterested forum).
  \item \textsuperscript{168} \textit{See} Kay, \textit{The Use of Comparative Impairment, supra} note 16.
\end{itemize}
significant departure from Currie's approach. It has merged a variant of Professor Baxter's "comparative impairment" analysis with interest analysis both as a means of performing the reconsideration step to determine whether a true conflict exists and as a guide to choosing which of the conflicting state interests should prevail in a true conflicts case. The California Supreme Court has thus rejected Currie's view that the forum should apply its own law in a true conflicts case.

The New Jersey courts have not attained the precision of their California counterparts in following the steps that Currie proposed. Apparently guided by Currie's comments on Babcock, the New Jersey Supreme Court in Mellik recognized that the case posed a false conflict and applied New Jersey law. More surely in Pfau, the court followed interest analysis to undertake a searching examination of the policies and interests of the three states involved, leaning heavily on Judge Keating's analysis in Tooker. Again, a false conflict was identified, and the common policy of New Jersey and Connecticut prevailed over the Iowa guest statute. For the ten years following Pfau, no choice of law cases were presented to the New Jersey Supreme Court. In 1980, in Estate of Simmons, it faced a true conflicts case for the first time; and, as we have seen,


174. 49 N.J. at 234, 229 A.2d at 629.

175. 55 N.J. at 516-23, 263 A.2d at 131-35.

176. Id. at 525, 263 A.2d at 136.

it did not take the opportunity to extend the substance of its governmental interest approach from torts to contracts. The rule that it did announce, which gives priority to the place of contracting, may be limited to automobile liability insurance cases. If so, New Jersey may be able to distinguish the case in dealing with other contracts conflicts problems in the future.

What conclusions can be drawn from the experience of California and New Jersey with governmental interest analysis about its utility as a choice of law theory? Here I must focus only on the courts' use of the theory, not on recent academic criticisms of the theory. Bearing in mind the cases from California and New Jersey, and using as a comparison the New York center of gravity model, I think several points stand out.

First, Currie's conception of state policy as limited to the purposes that can reasonably be attributed to the rule maker in the domestic context, which has been so severely criticized, serves to focus the initial inquiry solely on the interpretation of local law and tends to make that interpretation uniform in both domestic and interstate settings. The failure to abide by this stricture, I suggest, led the California Supreme Court into conjectural and possibly needless conflict with another state in Offshore Rental Co. v. Continental Oil Co.

Second, by firmly rejecting the relevance of all factual contacts except those that provide a reasonable basis for the state to assert an interest in

178. See supra text accompanying notes 153-161.
179. The court began its analysis by discussing Buzzone, 23 N.J. 447, 129 A.2d 561, which it characterized as "the leading case in New Jersey dealing with choice-of-law principles in insurance policy controversies." Estate of Simmons, 84 N.J. at 33, 417 A.2d at 490. The rule it announced covered only "an action involving the interpretation of an automobile liability insurance contract." Id. at 37, 417 A.2d at 493.
180. E.g., Brilmayer, supra note 108; Ely, supra note 108; Note, Comparative Impairment Reformed, supra note 169; Rosenberg, Comeback, supra note 108. These thoughtful, if ultimately misguided, critics deserve a fuller response than I can provide in the context of this Article. [Editor's Note: See Sedler, Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics,' 34 MERCER L. REV. 593, 606-635, for a fuller response to Brilmayer and Ely.]
181. See supra text accompanying notes 26-99.
183. See, e.g., Note, Comparative Impairment Reformed, supra note 169, at 1087-89.
184. 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978). See Kay, The Use of Comparative Impairment, supra note 16, at 589-91. I am not impressed with the observation that the outcome in Offshore Rental was not parochial because it resulted in the application of Louisiana law. See Note, Comparative Impairment Reformed, supra note 169, at 1093 n.71. What is parochial is the conjecture that California would exert her policy to its broadest extent, thus creating a true conflict, without first determining whether the policy of California's law was different from that of Louisiana. Id. at 606.
advancing the policy underlying its local law, interest analysis prevents the use of irrelevant factors such as the seat of the guest-host relationship and the geographical location of various activities that are unrelated to the purposes of the laws being examined. Interest analysis thus enabled the New Jersey Supreme Court in Pfau to avoid the mistakes of the New York Court of Appeals in Dym.

Third, when used properly, the step of 'moderate and restrained interpretation' seeks to avoid a true conflict of interests by reexamination of those local and foreign policies and interests already identified by the preliminary analysis in the light of the asserted true conflict, not by bringing in new and unrelated factors such as whether a given policy is strong or weak on the local scene or waxing or waning on the national one. Thus, having reached this step of the analysis in Bernkrant, the California Supreme Court considered the common policy underlying the contract laws of both California and Nevada of protecting the reasonable expectations of parties to a contract; California's interest in applying its statute of frauds only to promises made by persons who died domiciled in California; and the inability of the plaintiffs to know where the promisor might be domiciled at the time of his death. An analysis of these factors, all specific to the law-fact pattern of the particular case, permitted the court to conclude that California's statute of frauds was not applicable.

Finally, the California and New Jersey cases suggest that Currie's proposal that the forum court, as an instrument of state policy, should apply forum law to advance its own state's interests in true conflicts cases is unacceptable even to courts otherwise committed to interest analysis. California, as we have seen, has rejected the proposal outright, and New Jersey, faced with a true conflict, returned to primary reliance on territorial contacts in automobile liability insurance cases.

How well has governmental interest analysis worked in practice? Since I have accepted the analytical framework of Currie's theory as the starting point of my own work, I am not an impartial observer. By the same token, I have previously made clear my agreement with Bernkrant and

186. Id. at 45-47 [732-35]; Tooker, 24 N.Y.2d at 579 n.2, 249 N.E.2d at 400 n.2, 301 N.Y.S.2d at 527 n.2.
187. 55 N.J. at 521, 263 A.2d at 134.
188. See, e.g., Note, Comparative Impairment Reformed, supra note 169, at 1097.
189. Bernkrant, 55 Cal. 2d at 595-96, 360 P.2d at 910, 12 Cal. Rptr. at 270.
190. Offshore Rental, 22 Cal. 3d at 164, 583 P.2d at 725-26, 148 Cal. Rptr. at 871-76 (1978).
191. See supra text accompanying notes 178-179.
Reich and have voiced criticisms of the turn away from Currie's method represented by *Offshore Rental* and *Bernhard v. Harrah's Club*. I have noted as well the confusion that these latter cases have caused in the California appellate courts when they deal with apparent true conflicts and true conflicts cases. The present examination has not changed my view that Currie's proposed forum law solution to true conflicts cases remains the one most consistent with his approach. As a proposition easily translated into action, it is also the solution most likely to provide accurate guidance to bench and bar. By refusing to adopt that course, the courts in California and New Jersey have, in my view, dissipated a great part of the advantage they gained by adopting governmental interest analysis as a choice of law method.

C. The 'Most Significant Relationship' of the Restatement Second

**Development of the Theory.** Professor Willis Reese, the Reporter for the Restatement Second, has provided a succinct account of the reasons that motivated the members of the American Law Institute to commence a second effort to restate the law of conflict of laws in 1953, less than twenty years after the first version had been published in 1934. It seems that the vested rights theory on which the Restatement was based had come under a "devastating attack" from Walter Wheeler Cook and other scholars, and that only a brief exposure of its doctrine to the courts was required to make apparent the conclusion that "many of the rules stated in this Restatement are wrong or at least so over-simplified as to be misleading."

The drafters of the Restatement Second did not, however, eschew the attempt to formulate choice of law rules, nor did they abandon entirely the vested rights theory. One gathers from Reese's account that their more modest goal in the beginning was to state relatively narrow, precise, and definite rules in areas, such as status, corporations, and property, in which some consensus existed among the courts about what choice of law policies were entitled to the greatest weight. In areas in which disagree-

195. *Id.* at 591-603.
196. *Id.* at 614.
198. *Id.*
199. *Id.* at 680.
200. *Id.* at 681, 692-99.
201. *Id.* at 694.
ment was evident, such as contracts, and in which the rules of the first Restatement were being eroded, such as torts, it was thought unwise to do more than provide broad, flexible rules, such as the 'most significant relationship' formulation\textsuperscript{203} that might guide the courts to sound results without impeding 'constructive progress.'\textsuperscript{203}

In addition, Reese stressed that the Restatement Second was to contain rules, not policies, in its black letter formulations, and that it was being written "from the viewpoint of a neutral forum which has no interest of its own to protect and is seeking only to apply the most appropriate law."\textsuperscript{204} Thus, choice of law policies like those Reese himself had identified earlier,\textsuperscript{205} such as the policy that a court should consider the purpose of its relevant local law rule in determining whether to apply its own law or the law of another state, would be irrelevant in the vast majority of conflicts cases.\textsuperscript{206}

The Restatement Second was more than seventeen years in the making\textsuperscript{207} and it was no less immune from academic criticism during its preparation than its predecessor had been.\textsuperscript{208} Professor Albert Ehrenzweig, a particularly vocal critic, repeatedly urged that the effort be abandoned\textsuperscript{209} and noted in 1965 that the draft failed to respond to the ideas being advanced by many of the leading conflict of laws scholars.\textsuperscript{210} A notable omission was the failure of the draft to take into account the governmental interest analysis suggested by Professor Brainerd Currie.\textsuperscript{211} In 1965 the drafters introduced a new section, under the title "A Basic Principle of Conflict of Laws,"\textsuperscript{212} that had the effect of incorporating part of Currie's approach. Section 6 provided that "[i]n formulating rules of Conflict of Laws, a state will give consideration to the interests of other states as

\textsuperscript{202} See infra text accompanying notes 201-202.
\textsuperscript{203} Reese, Conflict of Laws, supra note 197, at 699.
\textsuperscript{204} Id. at 692.
\textsuperscript{205} Cheatham & Reese, Choice of the Applicable Law, 52 Colum. L. Rev. 959 (1952).
\textsuperscript{206} See Reese, Conflict of Laws, supra note 197, at 693-94.
\textsuperscript{207} Tentative Draft No. 1 appeared in 1953; the Restatement Second was published in 1971.
\textsuperscript{208} See, e.g., Currie, Comments on Babcock v. Jackson, supra note 41, at 1242: "If I were asked to restate the law of conflict of laws I would decline the honor. A descriptive restatement with any sort of internal consistency is impossible."
\textsuperscript{211} See supra text accompanying notes 100-196.
\textsuperscript{212} Restatement (Second) (Tent. Draft No. 12, 1965), ch. 1, Introduction, § 6 at 16.
well as to its own interests."\textsuperscript{218}

By the time the Proposed Official Draft was circulated in 1967, section 6 had grown to its present proportions and included policy analysis as well as consideration of state interests.\textsuperscript{214} The Institute's mode of integrating the principles of section 6 into the draft may be illustrated by comparing section 6 with section 379 of Tentative Draft No. 9\textsuperscript{218} and by comparing both sections with section 145 of the Proposed Official Draft.\textsuperscript{216}

\textsuperscript{213} Section 6 was included, along with § 7 on Characterization and § 8 on Renvoi, under the Topic Heading "Basic Principles" in Tentative Draft No. 12.

\textsuperscript{214} \textsc{Restatement (Second)} § 6 reads as follows:

\textbf{Choice of Law Principles.}

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

\begin{itemize}
  \item the needs of the interstate and international systems,
  \item the relevant policies of the forum,
  \item the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
  \item the protection of justified expectations,
  \item the basic policies underlying the particular field of law,
  \item certainty, predictability and uniformity of result, and
  \item ease in the determination and application of the law to be applied.
\end{itemize}

\textsuperscript{215} \textsc{Restatement (Second)} § 379 (Tent. Draft No. 9, 1964). Section 379 reads as follows:

\textbf{The General Principle.}

(1) The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort.

(2) Important contacts that the forum will consider in determining the state of most significant relationship include:

\begin{itemize}
  \item the place where the injury occurred,
  \item the place where the conduct occurred,
  \item the domicil, nationality, place of incorporation and place of business of the parties, and
  \item the place where the relationship, if any, between the parties is centered.
\end{itemize}

(3) In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort, and the relevant purposes of the tort rules of the interested states.

\textsuperscript{216} \textsc{Restatement (Second)} § 145 (Proposed Official Draft 1968). Section 145 reads as follows:

\textbf{The General Principle.}

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties under the
It was evident that a compromise had been reached: the state policy and interest considerations so central to governmental interest analysis were to be incorporated into the Restatement Second's structure to be used in conjunction with its black letter choice of law rules. One year after the publication of the Restatement Second, its Reporter forecast the difficulties created by the compromise. Announcing that "[t]he principal question in choice of law today is whether we should have rules or an approach,"11 Reese made clear that section 6 is not a rule, but an approach. It does not do what rules do; it does not provide "a formula which once applied will lead the court to a conclusion,"118 instead, it "lists factors relevant to the choice of the applicable rule of law," but neither states how a particular choice of law question should be decided in light of these factors nor what relative weight should be accorded them.119 But the 'most significant relationship' formula is not a rule, either; it is a general principle that provides some guidance to a court, but which "frequently fail[s] to detail exactly when some other state will be that of most significant relationship and hence the state of the applicable law."120 Experience with ad hoc decisions generated through the use of these general principles may ultimately permit the formulation of precise rules.121

The Restatement Second was thus promulgated with two vastly different conceptions about how a choice of law problem should be addressed. The original draft followed the 'jurisdiction-selecting' method of the firstRestatement but sought to broaden its range by increasing the number of connecting factors and by allowing a measure of discretion through the generality of its 'most significant relationship' formula. Section 6, on the other hand, contains some factors that focus immediately on the forum's

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112 Id.
111 Id. (quoting RESTATEMENT (SECOND) § 6).
1122 Reese, Choice of Law, supra note 217, at 325.
1123 Id.
decision on whether to displace its law, not on which law to apply. To make matters worse, there was very little guidance in the Reporter's Comments\(^{222}\) about how these different concepts could be used together. If one is dealing with a torts conflicts case, and if one begins the analysis with section 6, and if emphasis is placed on factors 6(b) and 6(c), the problem may be solved without any need to consult the general principle of section 145. On the other hand, if the contacts in section 145(2) point to a particular state, such as the place of conduct and injury when that place is also the domicile of one of the parties, the court may conclude that the place of injury has the most significant relationship without consulting the section 6 factors. The drafters may, with justification, respond that neither of these two methods is what they intended. The consumers of their hybrid product, however, may find it difficult to follow two separate paths at once. Let us now examine how the Restatement Second has fared in the courts.

Thirteen states\(^{223}\) have expressly adopted the Restatement Second as their guide to choice of law, and one other state\(^{224}\) has implicitly done so by relying on one of its sections in deciding a conflicts case. Four of the thirteen states chose the approach of the Restatement Second while it was still in the drafting stage: of these, three relied on Tentative Draft No. 9 on Wrongs,\(^{222}\) while one cited Tentative Draft No. 6 on Con-
tracts. Three states initially relied on the Proposed Official Draft in adopting the Restatement Second, but did not refer to section 6. One state may have attempted to adopt the Restatement Second while rejecting section 6.

A few states in adopting or relying on the Restatement Second, treat its doctrine as indistinguishable from the center of gravity or grouping of contacts approach developed by the New York Court of Appeals. Several states have discussed the necessity of choosing from among the


230. See supra text accompanying notes 26-99.

231. E.g., Schwartz v. Schwartz, 103 Ariz. 562, 563-65, 447 P.2d 254, 255-57 (1968) (discussing the lex domicilii rule created especially for intrafamily tort actions; the theory of governmental interest or interest analysis ("[p]ropounded by Professors David Cavers and Brainerd Currie, this theory holds that the forum court must apply its own law unless another jurisdiction has a greater 'interest' in having its law applied"); and the 'contacts' theory, the 'grouping of contacts,' or the 'center of gravity' accepted by the Restatement Second); First Nat'l Bank v. Rostek, 182 Colo. 437, 445, 514 P.2d 314, 318 (1973) (mentioning the law of the forum, the expectations of the parties, and the interests of the various govern-
competing scholarly theories a suitable replacement for the rejected traditional approach. One of these states, citing Reese's distinction between 'rules' and an 'approach,' adopted Judge Fuld's first two rules for choice of law in guest statute cases together with section 145 of the Restatement Second for tort cases generally. Some states, in adopting the Restatement Second, have expressly rejected Currie's governmental interest analysis and Leflar's 'choice-influencing considerations.' One state chose the Restatement Second in part because it includes "'most of the substance' of all the modern theories."  

Evaluation of the Theory. Do the thirteen states that claim to be following the Restatement Second in conflicts cases apply its doctrine correctly? Since there is so much looseness in its apparatus, that judgment is not an easy one. It is possible, however, to identify certain patterns in the cases that indicate how the Restatement Second is being used.

mental entities involved); Casey v. Manson Constr. & Eng’g Co., 247 Or. 274, 277-78, 428 P.2d 898, 900 (1967) (citing observations of Chief Judge Sobeloff and Professor Robert Leflar about the difficulty of making a choice of choice of law theory). In Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979), the court stated:

The search for an alternative to the lex loci delicti rule reveals almost as many theories as there are theorists. There is Currie's 'governmental interests' test, Von Mehren and Trautman's 'functional approach,' Cavers' 'principles of preference,' Leflar's 'choice-influencing considerations' or 'better law' theory, and the Restatement (Second)’s 'most significant relationship' analysis. Ehrenzweig rejects all of these as being inappropriate for international conflicts cases, opting instead for a lex fori approach. Each theory has its own group of adherents and detractors.

Id. at 318.


233. See Reese, Choice of Law, supra note 217, at 325.


235. Casey v. Manson Constr. & Eng’g Co., 247 Or. 274, 293-94, 428 P.2d 898, 907-08 (1967) (declining to follow Currie’s suggestion that the forum should apply its own law “if both the forum state and the foreign state have legitimate interests in the application of their laws” on grounds that such an approach would be intolerant, chauvinistic, and invite retaliation). The Casey statement represents something of an about-face for the Oregon Supreme Court, since its previous decision in Lilienthal v. Kaufman, 239 Or. 1, 395 P.2d 543 (1964), which applied Oregon law to invalidate a contract made by an Oregon spendthrift in California with a California business man, was widely viewed as adopting Currie’s approach and his suggested solution for true conflicts cases. See, e.g., LEFLAR, AMERICAN CONFLICTS LAW, supra note 6, at 309 n.1; WEINTRAUB, COMMENTARY, supra note 6, at 370-72. But see Kay, Book Review, 18 J. LEGAL EDUC. 341, 347 (1966).

236. Fuerste v. Bemis, 156 N.W.2d 831, 834 (Iowa 1968) (declining to avoid application of forum’s guest statute to suit between forum residents injured in nonguest statute state on the ground that the state of injury had the ‘better law’).

237. Gutierrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979) (citing Leflar’s observation that the Restatement Second, in § 6 and elsewhere, “includes most of the substance of all the modern thinking on choice of law.” LEFLAR, AMERICAN CONFLICTS LAW, supra note 6, at 284).
in the courts. These patterns cut across state lines, and, not infrequently, they disclose lower courts trying to nudge the highest state court into combining the doctrine of the Restatement Second with other theoretical approaches.238

Despite the fears of academic critics239 that the Restatement Second, like the center of gravity approach,240 might lend itself to a mechanical weighing of arbitrary contacts, several of the courts adopting its doctrine have indicated their understanding that mere contact-counting is not sufficient.241 Even before section 6, with its express adoption of policy and interest analysis, was added to the draft in 1967,242 some states243 were routinely examining the policies underlying the conflicting laws. But it is not always clear why a court has chosen the particular contacts it puts into the ‘most significant relationship’ formula. While a few courts244 have refused to include contacts suggested by the parties that are not relevant to the specific issue being decided, others245 have identified contacts not.

238. See infra notes 252-253.

239. See supra note 45.

240. See supra text accompanying notes 26-99.


242. See supra note 214.


contained in the lists in the Restatement Second and not clearly related to the underlying policy conflict. In several cases, the choice of one state or another as having the most significant relationship is stated in such conclusory terms that one suspects no more than contact-counting was considered.²⁴⁶ Nor is it always clear that the contacts have been given the weight intended by the restaters: in particular, the double contacts of place of injury and place of conduct, which make up two of the four contacts listed for tort cases in section 145,²⁴⁷ are frequently counted as a single contact and viewed as being outweighed by the factor of the parties' common domicile.²⁴⁸

When a court concludes that the contacts it has identified are evenly divided between two states, some other method must be employed to decide the case. Some courts have relied on other, more specific Restatement Second sections as a guide,²⁴⁹ while other courts have discounted some contacts as not closely related to the specific issue being decided.²⁵⁰ The Supreme Court of Washington, however, has turned to governmental interest analysis to resolve this dilemma.²⁵¹ Its initiative has been followed by an intermediate court in Illinois to create what that court chooses to call the "'interest analysis' construction of the Restatement."²⁵²

Other courts²⁵³ have relied on the policy and interest factors contained in sections 6(b) and (c) of the Restatement Second²⁵⁴ to engage in a governmental interest analysis without giving that name to their reasoning.

²⁴⁶ E.g., Ingersoll v. Klein, 46 Ill. 2d 42, 48, 262 N.E.2d 593, 596 (1970); Mitchell v. Craft, 211 So. 2d 509, 516 (Miss. 1968).
²⁴⁷ RESTATEMENT (SECOND) § 145 (1971).
²⁵⁴ RESTATEMENT (SECOND) § 6(b), (c) (quoted supra note 214).
The Supreme Court of Oregon in *Erwin v. Thomas*, apparently having second thoughts about its adoption of the Restatement Second, has decided to determine whether an actual conflict exists between the differing laws, using a method consistent with governmental interest analysis, before resorting to the Restatement Second to choose the applicable law.

The commitment of the thirteen states to the method of the Restatement Second varies enormously. Some state courts routinely list its relevant sections in their opinions and try to follow them; this task is easiest when the case is controlled by one of the Restatement Second's specific, narrow rules. Other state courts have not been consistent in their terminology about what approach they are following, and others...
have retained primary emphasis on the place of wrong in tort cases, even while abandoning the lex loci delicti for the Restatement Second. As we have seen, the highest courts of two states have expressly combined governmental interest analysis with the Restatement Second formulation, and lower courts in other states are pushing in that direction. One intermediate court has suggested that Professor Leflar’s ‘better law’ approach be combined with the Restatement Second, but other courts have been unwilling to follow that course.

This review of the cases suggests that, if the original Restatement was unsuccessful because of its dogmatic rigidity and its insistence on the uncritical application of a few specific rules, the Restatement Second may fail to provide enough guidance to the courts to produce even a semblance of uniformity among the states following its method. In the drafters’ attempt to mollify their critics, they have created an umbrella for traditionalist and modern theorist alike: a fragile shelter that may prove itself unable to survive any but the most gentle of showers.

D. Choice-Influencing Considerations

Development of the Theory. Professor Robert A. Leflar announced his ‘choice-influencing considerations’ in two law review articles published in 1966. Drawing on lists previously prepared by other scholars, including Professor Reese, of policy factors that influence choice of law deci-

261. See supra text accompanying notes 251-55.
262. Washington and Oregon. See supra notes 251, 255.
265. E.g., Fuerste v. Bemis, 156 N.W.2d 831, 834 (Iowa 1968); Tower v. Schwabe, 284 Or. 105, 110, 585 P.2d 662, 664 (1978). But see Haines v. Mid-Century Ins. Co., 47 Wis. 2d 442, 177 N.W.2d 328 (1970) (using Leflar’s choice-influencing considerations to supplement the Restatement Second in a contract case when the contacts were evenly divided).
266. See supra text accompanying note 197.
267. See supra note 21.
sions and on more recent academic insights, Leflar produced a list of five 'choice-influencing considerations' in the belief that the considerations 'themselves can be used as a practical (though not a mechanical) test of the rightness of choice-of-law rules and decisions.' The effort, he added modestly, 'can make no claim to originality nor much to new insight'; it was instead a recognition of the 'need to reduce the choice-influencing considerations to a manageable compact form, a form in which it is realistically practical to make use of them in the day-to-day process of deciding conflicts cases.' The five considerations were phrased as follows:

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.

With the exception of the last item, application of the better rule of law, Leflar's list bears a striking resemblance to the factors identified a year later as relevant to choice of law in section 6 of the Restatement Second. While Leflar proposed in his fourth factor that the forum take account only of the advancement of its own governmental interests, not that of other states, he directed courts following his approach to take account of the conflicting interests of sister states under the second consideration. But Leflar's conception of governmental interest was much broader than Currie's: he pointed out that '[a] state's governmental int-

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Law Process]. All these scholars are discussed in Leflar, Choice-Influencing Considerations, supra note 21, at 279-81.

269. Leflar mentions, in addition to the authors cited supra note 268, Albert Ehrenzweig and Brainerd Currie. See Leflar, Choice-Influencing Considerations, supra note 21, at 269-70.

270. Id. at 281.

271. Id. at 282.

272. Leflar, More, supra note 21, at 1585.

273. See Leflar, Choice-Influencing Considerations, supra note 21, at 282; Leflar, More, supra note 21, at 1586-87. See also LEFLAR, AMERICAN CONFLICTS LAW, supra note 6, at 193-95. Leflar applied his choice-influencing considerations to specific cases in order to illustrate how his approach should be used. Leflar, Choice-Influencing Considerations, supra note 21, at 310-24; Leflar, More, supra note 21, at 1588-98.

274. See supra text accompanying note 214. Cited in support of § 6 by Reese in the Reporter's Note are Leflar's 1966 articles, see supra note 21, and his own co-authored piece, supra note 205, as well as his article explaining why the policy factors set forth there are not all appropriate for use in the Restatement Second, see Reese, Conflict of Laws, supra note 197, and Traynor's article, see supra note 109, praising Currie's governmental interest analysis. Currie himself is not cited. RESTATEMENT (SECOND), ch. I. Introduction, Reporter's Note at 20 (Proposed Official Draft, 1967).

275. Leflar, Choice-Influencing Considerations, supra note 21, at 286-87.
terests in the choice-of-law sense need not coincide with its rules of local law, especially if the local rules, whether statutory or judge-made, are old or out of tune with the times. For Currie, the identification of a forum interest in applying the policy of its law to a particular case was decisive in a false conflict case, and in a true conflicts case as well if the step of ‘moderate and restrained reinterpretation’ failed to eliminate the conflict of interests. For Leflar, the identification of such a forum interest was simply one factor among others to be considered.

As Leflar himself recognized, his inclusion of application of the better rule of law as one consideration that should influence a choice of law decision was “the most controversial” of his proposals. As we have seen, several courts have declined to adopt Leflar's approach for inconsistent reasons: either because they feared that use of the ‘better law’ approach would require them to give inadequate deference to the judgment of the forum’s legislature, or because they thought it would lead too frequently to the uncritical application of forum law. While he seemed to accept the first objection, Leflar rejected the second. In his view, “the local law is sometimes not better, and most judges are perfectly capable of realizing this.” The better law consideration was intended to give judges in conflicts cases the freedom to ignore disfavored local law that would bind them in domestic cases.

But if some courts were wary of Leflar’s approach, others welcomed the flexibility it offered. Under the leadership of Chief Justice Kenison, who performed for Leflar’s approach the same function of judicial advocacy that Traynor had undertaken for Currie’s theory, New Hampshire became the first state to adopt the choice-influencing considerations. In *Clark v. Clark*, a New Hampshire wife had been injured in Vermont by her husband’s negligence during the course of a trip that had begun and was to end in New Hampshire. Vermont, but not New Hampshire, had a

277. See supra note 275.
278. Leflar, *Choice-Influencing Considerations*, supra note 21, at 295:

It does no harm to say that this policy analysis is a continuing search for governmental interests, provided we recognize that what we ought to do in any event is to analyze the problem in terms of all the relevant choice-of-law considerations, of which the interest behind the forum’s internal rule is only one. If we classify the process as a search for and effectuation of the state’s governmental interests, we should think of them in terms of the total governmental concerns of a justice-dispensing court in a modern American state.

280. See supra note 236 and accompanying text.
guest statute. The case thus presented a classic false conflict in the Babcock pattern. But although Chief Justice Kenison had demonstrated in an earlier opinion that he understood the distinction between true and false conflicts, he chose not to rest the decision applying New Hampshire law in Clark on that basis. Instead, drawing extensively from Leflar's initial article announcing the choice-influencing considerations, Kenison proceeded to adopt them as New Hampshire's approach to choice of law. Nor did he shrink from the implications of the better law factor:

We prefer to apply the better rule of law in conflicts cases just as is done in non-conflicts cases, when the choice is open to us. If the law of some other state is outmoded, an unrepealed remnant of a bygone age, "a drag on the coattails of civilization,"... we will try to see our way clear to apply our own law instead. If it is our own law that is obsolete or senseless (and it could be) we will try to apply the other state's law.

This point having been made clear, the outcome in Clark was not difficult to predict under the Leflar approach: a lawyer advising either party, said Kenison, "could anticipate with reasonable certainty that the law suit would be brought in a New Hampshire court under New Hampshire law." This result followed primarily from the fourth and fifth of Leflar's considerations, for the first two were found by the court to be largely irrelevant in tort cases and the third, simplification of the judicial task, could be achieved by applying either law. But New Hampshire had a clear interest in applying its law to New Hampshire residents, and as for the guest statute, though still on the books, it "contradicts the spirit of the times." Accordingly, "[u]nless other considerations demand it, we should not go out of our way to enforce such a law of another state as against the better law of our own state."

New Hampshire has continued to use Leflar's choice-influencing con-

285. Johnson v. Johnson, 107 N.H. 30, 32, 216 A.2d 781, 783 (1966), a case in which a husband and wife were domiciled in a spousal immunity state (Massachusetts) but were involved in an accident that resulted in an injury to the wife in a spousal liability state (New Hampshire), was identified as a "true conflict." Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963), a case in which the spouses were domiciled in a liability state (New Hampshire) but the injury occurred in an immunity state (Massachusetts), was distinguished as a "false conflict." 107 N.H. at 32, 216 A.2d at 782.

286. 107 N.H. at 353-55, 222 A.2d at 208-09 (citing Leflar, Choice-Influencing Considerations, supra note 21).

287. Id. at 353, 222 A.2d at 208.


289. 107 N.H. at 355, 222 A.2d at 209.

290. Id.

291. Id. at 357, 222 A.2d at 210.

292. Id.
Two other states have followed its lead: Wisconsin in 1967294 and Minnesota in 1973.295 Other states have


294. Heath v. Zellmer, 35 Wis. 2d 578, 595-96, 151 N.W.2d 664, 672 (1967) (guest statute). In its previous opinion in Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965), the Wisconsin court had rejected the lex loci delicti in a Babcock-style guest statute case and had adopted the 'center of gravity' or 'grouping of contacts' approach. Id. at 635, 133 N.W.2d at 417. When Leflar's approach was adopted in Heath, Wilcox was not repudiated. The two theories coexisted uneasily in Wisconsin through several opinions (e.g., Zelinger v. State Sand & Gravel Co., 38 Wis. 2d 98, 106-07, 156 N.W.2d 466, 469-70 (1968) (contribution among tortfeasors), in which Chief Justice Hallows noted that he would prefer to abandon the Wilcox presumption of forum law and begin the analysis with the Heath considerations, id. at 106 n.1, 156 N.W.2d at 470 n.1; Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (1968) (guest statute)) until the Wilcox analysis was finally abandoned as an independent standard in Hunker v. Royal Indem. Co., 57 Wis. 2d 588, 597, 204 N.W.2d 897, 901-02 (1973) (coemployee tort suit). Hunker adopted a procedure of determining in the first instance whether the choice of one law over another would determine the outcome. If so, the choice-influencing considerations would be used to determine whether another state's law should displace that of the forum. Id. at 598-99, 204 N.W.2d at 902-03. This approach has been followed in later cases, e.g., Lichter v. Fritsch, 77 Wis. 2d 178, 182-84, 252 N.W.2d 360, 362-63 (1977) (owner liability for damage caused by thief of car), although not always with the same attention to precision of statement, see, e.g., Slawek v. Stroh, 62 Wis. 2d 295, 312-13, 215 N.W.2d 9, 19 (1974) (recovery for seduction).

In Urhhammer v. Olson, 39 Wis. 2d 447, 450, 159 N.W.2d 688, 689 (1968) (application of family exclusion clause in automobile liability policy), Wisconsin initially adopted the 'grouping of contacts' approach as its choice of law method for contract conflicts cases without discussing whether Leflar's approach, which it had adopted for torts cases, would be appropriate there as well. In Haines v. Mid-Century Ins. Co., 47 Wis. 2d 442, 446, 449, 177 N.W.2d 328, 330, 333 (1970), the court explained that the 'grouping of contacts' approach had been embodied in § 188 of the Restatement Second, but since the contacts turned out to be evenly divided between Wisconsin and Minnesota, Leflar's choice-influencing considerations were used to break the tie and apply Wisconsin's 'better law' prohibiting family exclusion clauses. The choice of law principles listed in § 6 of the Restatement Second were not used in the analysis. In its reformulation of Wisconsin's choice of law method in Hunker, the Wisconsin court cited Haines as well as its earlier torts cases, Zelinger and Conklin, as following the Leflar approach. Hunker v. Royal Indem. Co., 57 Wis. 2d 588, 597, 204 N.W.2d 897, 902 (1973). Thereafter, in Handal v. American Farmers Mut. Cas. Co., 79 Wis. 2d 67, 74, 255 N.W.2d 903, 906 (1977), the Wisconsin court relied only on the Restatement Second for the governing law in an automobile insurance contract coverage case. But in its most recent contracts opinion, Schlosser v. Allis-Chalmers Corp., 86 Wis. 2d 226, 239-40, 271 N.W.2d 879, 885-86 (1978) (employer's liability under pension plan), the Wisconsin court used both the Restatement Second and Leflar's choice-influencing considerations to decide the case. Again, there was no effort to use the factors listed in the Restatement Second § 6.

295. Milkovich v. Saari, 295 Minn. 155, 164, 203 N.W.2d 408, 413 (1973) (guest statute). Before Milkovich, the Minnesota court had declined to apply the lex loci delicti in six torts cases. The first of these, Schmidt v. Driscoll Hotel, Inc., 249 Minn. 376, 382, 82 N.W.2d 365, 369 (1957), which featured one of the early judicial interpretations of a local statute in policy and interest terms, made no effort to do more than create an exception to the lex loci
cited Leflar's theory with approval and some have combined it with other
delicti when all parties were Minnesota residents and defendant's violation of the Minnesota statute had occurred there. The next two cases, both decided on April 1, 1966, also based their holdings on relatively narrow grounds. Baits v. Baits, 273 Minn. 419, 423-24, 142 N.W.2d 66, 69 (1966), relied on the family domicile rule suggested by § 390g of the Second Restatement's Tentative Draft No. 9 for family immunity cases, while Kopp v. Rechtzigel, 273 Minn. 441, 443, 141 N.W.2d 526, 528 (1966), a guest statute in the Babcock pattern, contented itself with the statement that Minnesota had "an overriding concern in the relationship of the parties and in the adjudication of their rights." In both Baits and Kopp the parties were all Minnesota residents and the injuries occurred in the course of trips that had begun and were to end in Minnesota. Both cases were false conflicts.

Three guest statute cases with more complicated factual settings complete the series of six. In Schneider v. Nichols, 280 Minn. 139, 145-46, 158 N.W.2d 254, 258-59 (1968), the guest was a Minnesota resident, but the host was a resident of North Dakota, the place where the injury occurred and a guest statute state. The court found it necessary to resort to Judge Kenison's opinion in Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966), and his use of the 'better law' to avoid application of the North Dakota guest statute. The court rephrased Leflar's choice-influencing considerations, but it did not use that term, nor did it cite Leflar directly. In Bolgrean v. Stich, 293 Minn. 8, 196 N.W.2d 442 (1972), in which the guest was from one guest statute state (North Dakota), the injury was in another (South Dakota), and the host was from Minnesota, the court announced that it had been following the 'center of gravity' approach all along: "In determining the applicable law, Minnesota courts must group the contacts of the different states with the controversy in order to find the 'center of gravity'." Id. at 10, 196 N.W.2d at 443. Schneider, Kopp, and Baits were cited as authority for this statement. But the court did not stop there; it buttressed its opinion with references to two other theories as well. "In addition to the fact that Minnesota is the center of gravity of the contacts," said Justice Kelly for the court, "this state has the greater interest in applying its law." Bolgrean, 293 Minn. at 11, 196 N.W.2d at 444. And, finally, "[t]he fact that we believe that Minnesota has the better law reinforces our decision." Id. at 10-11, 196 N.W.2d at 444. In Allen v. Gannaway, 294 Minn. 1, 5, 199 N.W.2d 424, 427 (1972), a guest statute case in which the court had great difficulty determining where the five young men who set out from Minnesota to visit a friend in Washington were domiciled at the time of the injury in Nevada, the court contented itself with the statement that "[i]n a number of cases Minnesota has adopted the 'center of gravity of the contacts' theory of conflicts of law." Id. at 5, 199 N.W.2d at 427. Cited as authority for this statement were Bolgrean, Schneider, Kopp, and Baits.

In Milkovich itself, the Minnesota court split over whether the 'center of gravity of the contacts' approach would point to the application of Minnesota's common-law negligence rule or Ontario's guest statute in a reverse-Babcock case in which the host and guest had their common domicile in the guest statute jurisdiction, and their trip had begun and was to end there. Justice Peterson, dissenting, thought Ontario was the 'center of gravity,' and the fact that the injury had occurred in Minnesota was not a sufficient contact to sustain application of Minnesota law. Milkovich v. Saari, 295 Minn. 155, 171, 203 N.W.2d 408, 417 (Peterson, J., dissenting). Justice Todd, writing for the majority, abandoned the 'center of gravity' language and placed the holding that allowed plaintiff to recover under Minnesota law squarely on Leflar's choice-influencing considerations, which he claimed the court had adopted in Schneider. Id. at 164, 203 N.W.2d at 413. The greatest weight was placed on factors four and five, advancement of the forum's governmental interests and application of the better law. Id. at 170, 203 N.W.2d at 417. Justice Todd has detailed the circumstances surrounding Minnesota's adoption of the Leflar approach in a law review symposium on
approaches. Thus, the Mississippi Supreme Court, whose early citation of Leflar in *Mitchell v. Craft*\(^{296}\) was relied on by the Arkansas Supreme Court,\(^{297}\) now appears to be following the Restatement Second.\(^{298}\) Rhode Island, also an early Leflar admirer,\(^{299}\) has increasingly supplemented his approach with that of the Restatement Second.\(^{300}\) Arkansas as well seems to combine Leflar with other approaches.\(^{301}\) Hawaii has recently announced its departure from lex loci delicti in favor of an approach that draws on both Leflar's choice-influencing considerations and Currie's governmental interest analysis.\(^{302}\)

**Evaluation of the Theory.** Do the courts in New Hampshire, Wisconsin, and Minnesota apply Leflar's choice-influencing considerations

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After *Milkovich*, the Minnesota Supreme Court has consistently followed Leflar's approach. *E.g.*, Bigelow v. Halloran, 313 N.W.2d 10, 12 (Minn. 1981) (survival of causes of action for intentional tort); *In re* Estate of Congden, 309 N.W.2d 261, 271 (Minn. 1981) (effect of homicide on beneficiary succession); Hague v. Allstate Ins. Co., 289 N.W.2d 43, 46-47 (Minn.), aff'd, 449 U.S. 302 (1981) (stacking of insurance coverage); Hime v. State Farm Fire & Casualty Co., 284 N.W.2d 829, 833 (Minn. 1979) (application of family exclusion clause in automobile liability insurance policy) (rejecting 'seat of relationship' as an alternative approach to the resolution of conflicts questions); Blamey v. Brown, 270 N.W.2d 884, 890 (Minn. 1978) (civil liability of tavern owner for damage caused by person to whom alcoholic beverages had been furnished); Myers v. Government Employees Ins. Co., 302 Minn. 359, 363, 225 N.W.2d 238, 241 (1974) (direct action statute); Schwartz v. Consolidated Freightways Corp., 300 Minn. 487, 491, 221 N.W.2d 665, 668 (1974) (comparative negligence) ("Adoption of this methodology by this court in *Milkovich* has in effect replaced the traditional choice-of-law rules with a flexible approach which takes into account policy as well as factual considerations in arriving at a choice of law in a given situation").

\(^{297}\) 211 So. 2d 509, 513-14 (Miss. 1968).


\(^{299}\) See supra note 259.


\(^{302}\) See *Williams v. Carr*, 263 Ark. 326, 333, 565 S.W.2d 400, 403-04 (1978). In measuring damages for wrongful death, the court stated:

[In] *Wallis v. Mrs. Smith's Pie Company*, 261 Ark. 622, 550 S.W.2d 453, we held that in a tort action involving a resident or residents of another state and/or a resident of Arkansas, our courts are free to apply the rule based on the 'most significant relationship' as affected by the following named choice-influencing considerations: [Leflar's list omitted]. In other words, the Arkansas Court, as the forum court, is free to apply the substantive law of a sister state where it finds that such state has a significant interest in the outcome of the issues involved."

*Id.* at 333, 565 S.W.2d at 403-04.

correctly? Leflar has cited Chief Justice Kenison's opinion in Clark as illustrative of the 'sound results' that can be produced by courts using his method. More recently, he defended the reasoning of the Minnesota court in Hague v. Allstate Insurance Co. as a matter of state conflicts law when many of his fellow contributors to a symposium on the United States Supreme Court's opinions upholding its constitutionality were harshly critical of the Minnesota decision. Despite these points of agreement, however, there is some question about whether the courts consistently use Leflar's considerations as he intended.

In first announcing his approach, Leflar offered a few sentences on how the considerations should be used: "No priority among the considerations is intended from the order of listing. Their relative importance varies according to the area of the law involved, and all should be considered regardless of area." The considerations have had their greatest use in torts conflicts cases. The courts of all three states have found the first three considerations to be relatively unimportant in torts cases. When the case has mixed

303. See LEFLAR, AMERICAN CONFLICTS LAW, supra note 6, at 217.
305. Symposium: Choice-of-Law Theory After Allstate Insurance Co. v. Hague, 10 Hofstra L. Rev. 1 (1981). Several of the commentators agreed with Justice Stevens's statement that the Minnesota Supreme Court's decision was "plainly unsound as a matter of normal conflicts law." 449 U.S. at 324 (Stevens, J., concurring). See, e.g., Reese, The Hague Case: An Opportunity Lost, 10 Hofstra L. Rev. 195, 200 [hereinafter cited as Reese, The Hague Case] ("Minnesota's interest in the application of its stacking rule seems tenuous indeed"); Silberman, Can the State of Minnesota Bind the Nation? Federal Choice-of-Law Constraints after Allstate Insurance Co. v. Hague, 10 Hofstra L. Rev. 103, 104 ("There is little doubt that the decision of the Minnesota court to apply its own law was wrong, and would be condemned by most choice-of-law theories."); von Mehren & Trautman, Constitutional Control of Choice of Law: Some Reflections on Hague, 10 Hofstra L. Rev. 35, 43 ("under all three of the general choice-of-law approaches that have been utilized in the last two centuries in the United States, the choice of law in Hague was unprincipled and arbitrary"); Weintraub, Who's Afraid of Constitutional Limitations on Choice of Law, 10 Hofstra L. Rev. 17, 24 (expressing agreement with Stevens).
307. See Leflar, Choice-Influencing Considerations, supra note 21, at 282.
elements of contract and tort, as in automobile liability insurance problems, however, all five factors become relevant. There is some confusion about the correct point in the analysis to take account of the competing interests of other jurisdictions. Leflar suggested that this be considered under the second heading, maintenance of interstate and international order. Wisconsin has followed this direction, but Minnesota takes account of competing state interests under the fourth heading, that of advancement of the forum's governmental interests. Moreover, Minnesota has developed a practice of not reaching the fifth, 'better law,' consideration if the problem can be resolved at the stage of the fourth consideration. In cases in which the first three considerations are ignored, and the case is resolved at the fourth step, Minnesota has used the Leflar method to approximate Currie's governmental interest analysis.

As one might expect, some states have found Leflar's approach incompatible with the use of specific choice of law rules. Before adopting his approach, both New Hampshire and Wisconsin had characterized the problem of spousal immunity from suit as a matter of status, rather than tort, and had adopted a choice of law rule pointing to the law of the family domicile as the governing law. After a period of experience with the Leflar approach, both states abandoned the domicile rule in cases when its use would have prevented recovery in favor of the forum's 'better law' permitting the interspousal suits.

310. Leflar, Choice-Influencing Considerations, supra note 21, at 286-87.
314. E.g., cases cited supra note 313. In Hime v. State Farm Fire & Casualty Co., 284 N.W.2d 829 (Minn. 1979), the court considered all five factors, but the fourth factor was determinative. Id. at 833-34. Minnesota's identification of factual contacts that may give rise to a Minnesota state interest in advancing its policy is not as precise as it should be under Currie's governmental interest analysis; frequently, contacts are cited that are unrelated to the policy under consideration. See, e.g., Hague, 289 N.W.2d 43; Reese, The Hague Case, supra note 305, at 199-200.
The better law consideration has seen frequent use, especially in true conflict cases, in which the decision is a difficult one. Examples of laws that have been displaced by ‘better’ laws include spousal immunity rules, guest statutes, the failure to hold tavern owners liable for damages caused by persons to whom they had furnished alcoholic beverages, the validity of a family exclusion clause in an automobile insurance policy, and the failure to permit stacking of uninsured motorist coverage in automobile liability insurance policies. While the ‘better law’ has most often been that of the forum, Minnesota has applied the law of another state permitting survival of causes of action for intentional tort as ‘better’ than the forum’s contrary law. New Hampshire noted that it found Maine’s law of unlimited recovery for wrongful death preferable to its own limitation on recovery, but concluded that Maine had such a slight factual connection with the case that the better law consideration was outweighed by other factors.

The considerations have not been applied in all areas. In Wisconsin they are used in tandem with the Restatement Second in contracts cases. Both Minnesota and Wisconsin have developed a practice of making an initial inquiry into whether the choice of one state’s law over that of another will determine the outcome of the case. If there is no difference in outcome, presumably forum law will be applied. If the choice of law decision will be outcome-determinative, however, the Leflar

Gravel Co., 38 Wis. 2d 98, 156 N.W.2d 466 (1970).
324. See supra notes 319-323.
327. See supra note 294.
330. Id. at 599, 204 N.W.2d at 902-03.
considerations are called into play. 331

How effective are the choice-influencing considerations as a choice of law theory? New Hampshire's experience does not sustain the expectation that predictability has been achieved: in Maquire v. Exeter & Hampton Electric Co., 332 the court noted that “transfers [to the supreme court] in advance of trial to determine the applicable law have become commonplace” 333 since it abandoned lex loci delicti in tort cases. A Minnesota observer 334 is critical of the parochialism he sees intruding upon the choice of law process through the Minnesota court's use of the method. Others are unwilling to support the result Leflar's method produced in the Hague case. 335 But from the point of view of Leflar himself, it seems fair to conclude that the three states that have adopted his approach are deciding choice of law cases justly, even though he may not always agree with specific results reached. Whether continued use of the method will “produce some improvement in the results of adjudication along with a substantial improvement in understanding the results,” 336 as Leflar hoped, remains to be seen.

E. Modern Approaches Combined

Professor Leflar has argued that a new law of choice of law has evolved in which courts cite the modern theories interchangeably, but arrive at broadly consistent results that can be supported, in different language, by most of the academic writers. 337 That many current scholars 338 have rejected the result obtained through an application of his theory by the Minnesota Supreme Court in the Hague case 339 should prompt Leflar to reconsider his argument. But beyond that, I have so far shown that about a third of the states have selected a specific choice of law theory and are trying, with more or less consistent results, to follow that theory in their conflicts decisions. I come now to a group of states that more nearly fits Leflar's description: they have rejected the traditional approach, but have not yet settled on a single theory to replace it. Even here, however,

331. See supra notes 328-29.
333. Id. at 590, 325 A.2d at 779.
334. Davies, A Legislator's Look at Hague and Choice of Law, 10 Hofstra L. Rev. 171 (1981). Davies’s attempt to persuade the Minnesota Court to abandon Leflar's approach and adopt instead what he calls the “seat of the relationship” methodology, id. at 188-90, was rejected. See Todd, A Judge's View, 31 S.C.L. Rev. 435, 440 (1980).
335. See supra note 305.
336. Leflar, Choice-Influencing Considerations, supra note 21, at 327.
337. LEFLAR, AMERICAN CONFLICTS LAW, supra note 6, at 197-98, 219-22.
338. See supra note 305.
339. See supra note 295.
it is possible in many cases to identify which modern theories the courts claim to be using in tandem to arrive at their decisions.

This category contains six states that have used a combination of modern approaches in their choice of law cases. It should be distinguished from the subcategory of states identified earlier as adopting the Restatement Second while using section 6 to incorporate a version of interest analysis. By contrast, all six states in this category use more than one theoretical approach. Thus, Arkansas was earlier identified as using Leflar's choice-influencing considerations in conjunction with the Restatement Second.

Hawaii recently has chosen an approach that draws both on Currie's governmental interest analysis and on Leflar's theory, but

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340. See supra notes 262-263, discussing the use of governmental interest analysis by courts committed to the Restatement Second.

341. See supra notes 297 & 301. In Wallis v. Mrs. Smith's Pie Co., 261 Ark. 622, 626-29, 550 S.W.2d 453, 456-57 (1977), the Arkansas court cited cases from other states rejecting the lex loci delicti, including Babcock, and quoted the Leflar considerations, noting that they had also been relied upon by the Supreme Court of Mississippi in Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968). It concluded that "[t]his State's governmental interest in its citizens is best served by application of our comparative fault statute rather than Missouri's contributory negligence law." Wallis v. Mrs. Smith's Pie Co., 261 Ark. at 632, 550 S.W.2d at 458. But in Williams v. Carr, 263 Ark. 326, 333, 565 S.W.2d 400, 404 (1978), the Arkansas court used the terminology of the Restatement Second in rephrasing the Wallis test. Both cases are criticized for theoretical imprecision in Hogue, Arkansas' New Choice of Law Rule for Interstate Torts: A Critique of Wallis, Williams, and "Better Rule of Law," 1978 WASH. U.L.Q. 713.

342. See Peters v. Peters, 63 Hawaii 653, 634 P.2d 586 (1981). A New York husband and wife, vacationing in Hawaii, collided in their 'U-Drive' rented car with a truck owned by the Hawaiian Commercial & Sugar Company. The wife, who was injured, sued her husband for damages. New York permits interspousal suits; Hawaii does not. The Hawaii Supreme Court noted the shift away from the lex loci delicti under the criticisms of modern scholars, but commented that "a verdict on a generally acceptable 'approach' to replace the unsatisfactory 'rule' is yet to be returned by the scholarly jury." Id. at 661, 634 P.2d at 592. It reviewed the theories proposed by Cavers, Currie, Leflar, and the Restatement Second, specifically declining to adopt the 'lex fori' approach of Kentucky, which was championed by defendant. Id. at 663-64, 634 P.2d at 592-93. Instead, it concluded that "[t]he preferred analysis, in our opinion, would be an assessment of the interests and policy factors involved with a purpose of arriving at a desirable result in each situation." Id. at 664, 634 P.2d at 593. Although this method was not further identified, its use produced application of Hawaii's law. Important steps in the court's reasoning included the recognition that New York had an interest in the marital welfare of the spouses, while Hawaii had an interest in keeping insurance premiums low for Hawaii's residents who, because of the state's geographical status as a group of islands, also must frequently lease cars from U-Drive. Id. at 664-66, 634 P.2d 593-94. In addition, the court noted that one purpose of the enactment of its no-fault insurance law (the benefits of which plaintiff had already received) was to regulate the cost of insurance. Faced with what governmental interest analysis would call an 'apparent true conflict,' the court decided to apply its own law: "a judicial decision that has a result of expanding insurance coverage for non-residents partly at the expense of residents, would be at odds with that policy."Id. at 667, 634 P.2d at 595.
which expressly rejects Kentucky’s lex fori approach. Louisiana began by adopting Currie’s analysis in false conflict cases; its approach in

The court noted that its decision was not in harmony with the Restatement Second’s ‘family domicile’ rule in spousal immunity cases. In a statement fully consistent with either Currie’s governmental interest analysis or Leflar’s fourth consideration, the court explained, “considerations of public policy and the demonstrated interests of the State of Hawaii impel the approval of the circuit court’s choice of lex fori over lex domicili.” Id. at 667-68, 634 P.2d at 595. One wonders if the case would have been decided differently if Mr. and Mrs. Peters had been wealthy enough to have had their New York licensed and insured car air-lifted to Hawaii for their vacation use. See also Jenkins v. Whittaker Corp., 545 F. Supp. 1117, 1118 (D. Hawaii 1982), shading the Peters approach toward the factors of simplification of the judicial task found in Leflar’s choice-influencing considerations, see supra text accompanying note 258, and predictability of result found in the Restatement Second § 6(2)(f), see supra note 200. This combined approach resulted in the application of Hawaiian law to an action for the wrongful death of a California serviceman stationed in Hawaii.

343. See infra text accompanying notes 353-359.

344. In Jagers v. Royal Indem. Co., 276 So. 2d 309, 311-12 (La. 1973), the Louisiana Supreme Court rejected lex loci delicti in false conflict cases and reversed its earlier holding in Johnson v. St. Paul Mercury Ins. Co., 256 La. 289, 236 So. 2d 216 (1970). Jagers concerned a suit by a mother against her adult son, both Louisiana domiciliaries, arising from an automobile accident in Mississippi. In reaching its decision, the Louisiana Supreme Court cited a law review article by Couch that discussed Currie’s treatment of false conflicts and the court used that analysis in deciding the case. Jagers v. Royal Indem. Co., 276 So. 2d 309, 311 n.2 (La. 1973) (quoting Couch, Choice-of-Law, Guest Statutes, and the Louisiana Supreme Court: Six Judges in Search of a Rulebook, 45 Tul. L. Rev. 100, 106 (1970)). Beyond a reference in footnote 3 to § 6 of the Restatement Second as containing “choice-of-law principles,” the Jagers opinion gave no guidance for deciding cases that did not present false conflicts. Since the Louisiana Supreme Court has not spoken further on the matter, the lower state courts and the federal courts in diversity cases have been left to piece together for themselves Louisiana’s choice of law approach. The federal courts have read Jagers as adopting the “interest analysis principles embodied in the Second Restatement,” see Brinkley & West, Inc. v. Foremost Ins. Co., 499 F.2d 928, 932 (5th Cir. 1974); accord Cooper v. American Express Co., 593 F.2d 612, 613 (5th Cir. 1979); Karavokiros v. Indiana Motor Bus Co., 524 F. Supp. 385, 386-88 (E.D. La. 1981); Ardoyno v. Kyzar, 426 F. Supp. 78, 80-81 (E.D. La. 1976), and have applied various sections of the Restatement in addition to § 6. The different circuits of the Louisiana Court of Appeal, on the other hand, have continued to limit themselves to the interest analysis and ‘false conflict’ language in Jagers without significant reliance on the Restatement Second. See, e.g., Champion v. Panel ERA Mfg. Co., 410 So. 2d 1230, 1237 (La. Ct. App. 1982) (notice to insurance company in products liability case) (“Louisiana courts have now adopted the interest analysis approach in choice of laws with respect to both torts and contracts, in preference to the former rigid approach of applying the law of the place where the tort was committed or where the contract was executed”); Powell v. Warner, 398 So. 2d 22, 24 (La. Ct. App. 1981) (underinsurance coverage) (“The ‘interest analysis’ is not applicable since we are not confronted with a choice of law under Restatement 2nd, Conflict of Laws, Sec. 6.”); Wickham v. Prudential Ins. Co. of America, 366 So. 2d 951, 954 (La. Ct. App. 1978) (change of beneficiary on life insurance policy) (“Once it has been determined that Louisiana has the most substantial interest in the controversy, then Louisiana law should be applied.”); Murdock Acceptance Corp. v. S & H Distrib. Co., 331 So. 2d 870, 872 (La. Ct. App. 1976) (deficiency judgment) (“We conclude that this case presents a false conflict of laws question.”); Sutton
other cases is presently being worked out by the lower state and federal courts. Massachusetts has managed to follow what it calls a 'func-

v. Langley, 330 So. 2d 321, 326, 327 (La. Ct. App. 1976) (guest statute; stacking of uninsured motorist coverage) ("[T]he 'interest analysis' theory for resolving choice of law problems in Louisiana is now the proper approach"); 

[W]here the interests of Louisiana outweigh the interests of the foreign state as in the case here. ; . ; . we hold Louisiana tort law to be applicable.").; Trahan v. Girard Plumbing & Sprinkler Co., 299 So. 2d 835, 839 (La. Ct. App. 1974) (exclusivity of workers' compensation) (Jager enunciates the 'false conflict' exception to the lex loci delicti rule'). None of these state court cases cite Currie, nor do they employ his suggested methodology apart from 'false conflict' cases. The interest-weighing language quoted from Sutton is inconsistent with Currie's approach. The federal courts have kept open, however, the possibility that Louisiana may some day decide to revert to the traditional approach or adopt Currie's theory in true conflict cases as well. See, e.g., Brinkley & West, Inc. v. Foremost Ins. Co., 499 F.2d 928, 932 n.14 (5th Cir. 1974) (traditional approach); Ardoyno v. Kyzar, 426 F. Supp. 78, 80 (E.D. La. 1976) (Currie or traditional approach).

345. The move away from the traditional approach in Massachusetts began in Pevoski v. Pevoski, 371 Mass. 358, 358 N.E.2d 416 (1976), a spousal immunity case that concerned an injury in New York to a Massachusetts wife riding as a passenger in a car driven by her husband. Two other vehicles involved in the three-car collision also were operated by Massachusetts residents; all three cars were registered, insured, and garaged in Massachusetts. At the time of the injury, Massachusetts did not permit interspousal suits, while New York did. Incorrectly reading Babcock for the proposition that "the State of New York would assert no interest on the facts of this accident," id. at 360, 358 N.E.2d at 417, the Massachusetts court proceeded to "agree with the conflicts approach suggested by the Babcock case and thus conclude that the issue of interspousal immunity should be governed in the present case by the law of this Commonwealth." Id. at 361, 358 N.E.2d at 418. As it turned out, the conflicts decision was irrelevant: the Massachusetts court interpreted its prior decision (in Lewis v. Lewis, 370 Mass. 619, 351 N.E.2d 526 (1976)) abolishing spousal immunity to apply retroactively in Pevoski. There was no difference between the laws of New York and Massachusetts. A federal district court has advanced the tenuous interpretation that the Massachusetts court's reliance on the Babcock analysis in Pevoski was in reality an "endorsement of the tort approach of the Restatement (Second)." Schulhof v. Northeast Cellulose, Inc., 545 F. Supp. 1200, 1203 (D. Mass. 1982).

In Choate, Hall & Stewart v. SCA Serv., Inc., 378 Mass. 535, 392 N.E.2d 1045 (1979) (suit to enforce settlement agreement), the court listed three theories as 'functional' approaches that had been adopted for conflicts problems in other states: interest analysis, the Restatement Second, and Leflar's choice-influencing considerations. Adding that "[s]imilar ideas have been at work in our recent decisions transforming the rule applying to a tort the law of the place of the happening," and citing Pevoski, the Massachusetts court regretfully declared itself deprived of "an opportunity to elect among the extant doctrines" in a case in which the contract was executed in Massachusetts between a Massachusetts plaintiff and a defendant incorporated in Delaware but with its principal place of business in Massachusetts. 378 Mass. at 541, 392 N.E.2d at 1049. Nor have the court's more recent decisions brought it closer to the selection of a choice of law theory. In First Nat'l Bank v. Shawmut Bank, 378 Mass. 137, 146-48, 389 N.E.2d 1002, 1007-08 (1979), the case was remanded for trial in the hope that evidence might be developed that would aid in choosing between competing laws on the issue of whether the executors of a decedent's estate or the trustees of her revocable trust should pay the inheritance taxes and expense of administration. And in Kearsarge Metallurgical Corp. v. Peerless Ins. Co., 383 Mass. 162, 166, 418
tional’ approach through several opinions without making an express choice among competing theories. Pennsylvania appears to use a comp-

N.E.2d 580, 582 n.7 (1981), the court noted that both the traditional approach and the Restatement Second identified New Hampshire law as controlling defendant’s liability under a performance and payment bond. Reviewing these cases, the Massachusetts Court of Appeals concluded in Rudow v. Fogel, 81 Mass. App. Ct. Adv. Sh. 1621, 1627, 1629-30, 426 N.E.2d 155, 159, 161 (1981) (constructive trust) that “[w]e think these recent Massachusetts cases suggest that a trial court should examine the interests of both concerned jurisdictions, here Massachusetts and New York, and the interest of our interstate system before deciding what law is appropriate for Massachusetts to apply.” It then applied the law of New York, where all parties were domiciled and where the land, which was situated in Massachusetts, had been conveyed to defendant by plaintiff’s mother, rather than the law of the situs, to determine whether defendant held the land in trust for plaintiff.


347. Pennsylvania was one of the earliest states to follow New York’s lead in abandoning lex loci delicti and adopting a modern approach. In Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964) (measure of recovery in wrongful death), the court reviewed academic criticisms of the place of injury rule, noted that scholars disagreed about the successor to that rule, discussed the approaches of Currie, Ehrenzweig, Leflar, and the drafters of the Restatement Second, cited Babcock and other cases that had departed from the traditional view, and concluded that “after careful review and consideration of the leading authorities and cases, we are of the opinion that the strict lex loci delicti rule should be abandoned in Pennsylvania in favor of a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court.” Id. at 21, 203 A.2d at 805. The court had high hopes for its new approach: “We are at the beginning of the development of a workable, fair and flexible approach to choice of law which will become more certain as it is tested and further refined when applied to specific cases before our courts.” Id. at 22, 203 A.2d at 806. In Griffith, the approach led to application of the law of Pennsylvania, where plaintiff and decedent were domiciled, and where decedent’s flight on defendant’s airline commenced, rather than the law of Colorado, where the plane crashed.

Although Justice Roberts, who wrote the Griffith opinion, did not attempt a further separation of the theories on which he relied, he was able to guide the Pennsylvania court to applications of Pennsylvania law with the help of the Griffith approach in two subsequent cases. In McSwain v. McSwain, 420 Pa. 86, 215 A.2d 677 (1966) (spousal immunity), Justice Roberts stated: “What should be sought is an analysis of the extent to which one state rather than another has demonstrated, by reason of its policies and their connection and relevance to the matter in dispute, a priority of interest in the application of its rule of law.” Id. at 94, 215 A.2d at 682. In Kuchinic v. McCrory, 422 Pa. 620, 623-24, 222 A.2d 897, 899 (1966) (airplane guest statute) the Griffith approach was identified as “the policy and interest analysis” and Griffith, McSwain, and Kuchinic were termed “false conflict” cases.

This unanimity, however, did not survive the court’s first encounter with an apparent true conflict case. In Cipolla v. Shaposka, 439 Pa. 563, 267 A.2d 854 (1970) (guest statute), a Pennsylvania plaintiff had been injured in Delaware while riding in a car driven by his Delaware host and registered and insured in Delaware. Delaware, but not Pennsylvania, had a guest statute. The majority viewed the critical question as “whether Delaware or Pennsylvania has the greater interest in the application of its law to the question now before us.” Id. at 565, 267 A.2d at 855. The court offered two rationales for its conclusion that Delaware had the ‘greater’ interest. The first was to see which state had more contacts, relevant to the policies underlying the conflicting laws, with the case. Here the majority counted Pennsylvania as having one contact, plaintiff’s residence in the state, and Delaware
bination of the New York ‘center of gravity’ approach, governmental in-
terest analysis, the Restatement Second, and Professor David Cavers’s
‘principles of preference.’ Rhode Island, after initially adopting Leflar’s
‘choice-influencing considerations,’ has added to that method parts of the
as having two: defendant’s residence there and the registration and insuring of the car
there. No weight was given to the place of the injury since it was not relevant to the ques-
tion of guest-host liability. In addition, the majority relied on Professor Cavers’s principle of
preference that allows a defendant acting within his home state to rely on that state’s law.
Chief Justice Bell, concurring, would have preferred to apply Delaware law as that of the
lex loci delicti, but agreed that Delaware’s “contacts were more important and both qualita-
tively and quantitatively greater than Pennsylvania’s.” Id. at 568, 267 A.2d at 857 (Bell,
C.J., concurring). Justice Roberts, the author of the court’s earlier conflicts cases, dissenting.
He disagreed that Delaware had two contacts, for the “domicile of the automobile” was
irrelevant to the policy of the guest statute, and he thought the emphasis on territoriality in
Cavers’s theory misplaced. Id. at 573, 267 A.2d at 859 (Roberts, J., dissenting). But with the
“interests of both states evenly balanced,” id., he advocated the adoption of Leflar’s ‘better
rule of law’ consideration to decide the case. Id. This approach, he argued, would require
application of Pennsylvania law.

Several of the participants in a symposium on Cipolla treated the opinion as a victory for
Cavers’s principles of preference. See Sedler, The Territorial Imperative: Automobile Acci-
cidents and the Significance of a State Line, Symposium on Cipolla v. Shaposka—An
Application of “Interest Analysis,” 9 DUQ. L. REV. 394 (1971); Twerski, Enlightened Territori-
alism and Professor Cavers—The Pennsylvania Method, Symposium on Cipolla v. Shaposka—
An Application of “Interest Analysis,” 9 DUQ. L. REV. 373 (1971). Cavers himself called the decision one that advanced the search for “conflicts justice.” Cavers, Cipolla
and Conflicts Justice, Symposium on Cipolla v. Shaposka—An Application of “Interest
The Pennsylvania Supreme Court has decided only one choice of law case since
Cipolla. In In re Estate of Lenherr, 455 Pa. 225, 314 A.2d 255 (1974), it applied the most significant
relationship test of the Restatement Second to determine the validity, for inheritance tax
purposes, of a marriage between two Pennsylvania residents valid in West Virginia but invali-
d in Pennsylvania.

Lower court cases are not in agreement about choice of law theory. In Gillan v. Gillan,
236 Pa. Super. 147, 345 A.2d 742 (1975), the court applied the Restatement Second to deter-
mine the rights of the parties under a marital separation agreement made in New York,
stating that Griffith had “overruled a substantial body of Pennsylvania case law and
adopted the new Restatement’s approach to conflicts problems.” Id. at 150, 345 A.2d at 744.
persons injured on the land), the court characterized Griffith as having “adopted the prin-
iple that torts should be governed by the law of the state which has the greater interest in
the application of its law, bearing in mind the policies and interests underlying the particu-
lar issue before the Court.” Id. at 419, 408 A.2d at 858. The most recent case, Nationwide
automobile liability insurance policy), followed the Third Circuit’s lead in extending Griffith
to contracts cases. See Melville v. American Home Assurance Co., 584 F.2d 1306, 1311-13
(3d Cir. 1978), in turn relying heavily on Gillan. The court in Walter was careful to note,
however, that its choice of New Jersey law also was supported by the traditional analysis
since the contract was made there. Nationwide Mutual Ins. Co. v. Walter, 290 Pa. Super.

Restatement Second and interest analysis.\textsuperscript{349}

The six states in this category are in various stages of transition. Two of them, Hawaii and Massachusetts, are late in beginning an experimentation with modern theory that other states, like Pennsylvania, experienced early in the choice of law revolution. Their future development is difficult to predict from the data at hand. In Louisiana, the state's highest court has failed to provide adequate guidance to the bench and bar. It has denied review in several court of appeal cases\textsuperscript{350} that might have given it the opportunity to develop its choice of law theory further. Arkansas and Rhode Island are in mid-course, having added the more concrete method of the Restatement Second to Leflar's fluid approach. Both may ultimately join the followers of the Restatement Second or may choose to retain Leflar's choice-influencing considerations to decide close cases, as Wisconsin has done with contracts problems.\textsuperscript{351} Pennsylvania, as the federal courts have noted in despair,\textsuperscript{352} is something of an enigma. Fresh guidance is needed there as well.

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\textsuperscript{349} In Woodward \textit{v.} Stewart, 104 R.I. 290, 243 A.2d 917 (1968), Rhode Island expressly followed New Hampshire and Wisconsin by adopting Leflar's approach. But it relied on the Restatement Second as well in Brown \textit{v.} Church of Holy Name of Jesus, 105 R.I. 322, 326-27, 252 A.2d 176, 179 (1969) (limitations on liability and charitable immunity) and Busby \textit{v.} Perini Corp., 110 R.I. 49, 290 A.2d 210 (1972). More recently, in Labree \textit{v.} Major, 111 R.I. 657, 668-73, 306 A.2d 808, 815-18 (1973) (guest statute), the court used what it termed 'interest analysis' to reject Chief Judge Fuld's third rule for guest statute cases, see supra note 78, in favor of its own rule in cases in which the host and guest are from different states: Where a driver is from a state which allows a passenger to recover for ordinary negligence, the plaintiff should recover, no matter what the law of his residence or the place of the accident. We adopt this rule because the only state with an interest in protecting the driver and his insurer does not do so. \textit{Id.} at 673, 306 A.2d at 818. The \textit{Labree} opinion does not cite either Leflar or the Restatement Second. Chief Justice Roberts thought that the rule he had formulated in \textit{Labree} would be supported by, among others, Sedler and Currie. \textit{Id.} I do not claim that \textit{Labree} converted Rhode Island to governmental interest analysis as a method, but it seems clear that the state's original adoption of Leflar, still relied on as authoritative by the federal courts, \textit{e.g.,} Roy \textit{v.} Star Chopper Co., 584 F.2d 1124, 1128 (1st Cir. 1978), has been considerably widened.


\textsuperscript{351} See Haines \textit{v.} Mid-Century Ins. Co., 47 Wis. 2d 442, 177 N.W.2d 328 (1970).

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F. Other Approaches: The Lex Fori

Two states, Kentucky and Michigan, have adopted unique approaches to the choice of law question. Kentucky’s ‘enough contacts’ lex fori approach was evolved in the course of deciding a series of guest statute cases presenting more variations than those decided by the New York Court of Appeals. Like New York, Kentucky began with a Babcock-pattern false conflict case in which residents of Kentucky, a nonguest statute state, were injured in Ohio, a guest statute state. The court in Wessling v. Paris\(^3\) relied on Babcock and adopted its ‘center of gravity,’ ‘grouping of contacts,’ or ‘most significant contacts’ standard only in ‘a very clear case, such as we have here.’\(^4\) A year later, it confronted a less clear-cut case. In Arnett v. Thompson\(^5\) the guest and host were also wife and husband, and they were domiciled in Ohio, a state with a guest statute and the doctrine of spousal immunity. The wife was injured in Kentucky, where recovery against her host-husband was permitted. The Kentucky court decided not to adopt what it called the interests-weighing approach of the Restatement Second, but rather to apply its own law when it had enough contacts to do so.\(^6\) The Arnett formula was reaffirmed in Foster v. Leggett,\(^7\) a case in which the guest was from Kentucky and the host was domiciled in Ohio, the state where the injury occurred. Reiterating that it was not following the Restatement Second, the court rephrased its approach in terms of the primacy of forum law: ‘The basic law is the law of the forum, which should not be displaced without valid reasons.’\(^8\)

In view of Kentucky’s contacts with the parties, including the host’s employment and extensive social life in Kentucky, the facts that he was domiciled in Ohio and that the accident occurred there were considered insufficient to displace forum law.\(^9\)

Professor Sedler has praised the Kentucky court for its use of ‘judicial
method' in establishing what he calls "the policy-centered conflict of laws."\textsuperscript{360} He subsequently urged the Michigan Supreme Court to "embrace the policy-centered approach to choice of law, with its emphasis on considerations of policy and fairness to the parties and on the real interests of the involved states."\textsuperscript{361}

In \textit{Sexton v. Ryder Truck Rental, Inc.},\textsuperscript{362} the Michigan court responded to this invitation by taking its first cautious step away from lex loci delicti. Like other courts before it, the Michigan court traced the academic criticisms of the traditional approach,\textsuperscript{363} cited the many cases rejecting the doctrine,\textsuperscript{364} noted Michigan's inconsistent application of the rule,\textsuperscript{365} and decided not to apply the law of the place of wrong in the cases before it.\textsuperscript{366} Unlike many of its predecessors, however, the Michigan court did not adopt a choice of law theory to replace the traditional approach, nor did it rely on a combination of theories to support its result. The plurality opinion of Justice Williams scarcely went beyond the facts presented in \textit{Sexton}:

As a consequence of these premises, in the normal common-law tradition, we hold that where Michigan residents or corporations doing business in Michigan are involved in accidents in another state and appear as plaintiffs and defendants in Michigan courts, the courts will apply the \textit{lex fori}, not the \textit{lex loci delicti}, and we do so without reference to any particular state policy. We reach this conclusion on the facts and reasoning herein developed. We do not here adopt the law of dominant contacts or any other particular methodology, although any such reasoning may, of course, be argued where persuasive and appropriate.\textsuperscript{367}

Justice Kavanagh, concurring, noted simply that in a case in which the Michigan court is asked to give effect to a Michigan statute, the fact that the accident occurred in another state is not "controlling or even of great significance."\textsuperscript{368} Justice Levin, who signed both the plurality and the concurring opinions, thus interpreted Kavanagh's meaning: Michigan's ap-


\textsuperscript{361} Sedler, Choice of Law in Michigan: A Time to Go Modern, 24 WAYNE L. REV. 829, 832 (1978) [hereinafter cited as Sedler, Choice of Law in Michigan].

\textsuperscript{362} 413 Mich. 406, 320 N.W.2d 842 (1982).

\textsuperscript{363} \textit{Id.} at 419-21, 320 N.W.2d 847-50.

\textsuperscript{364} \textit{Id.} at 421 n.10, 320 N.W.2d at 849 n.10.

\textsuperscript{365} \textit{Id.} at 425-32, 320 N.W.2d at 850-53. The court here relied heavily on Sedler's article. See Sedler, Choice of Law in Michigan, supra note 361.

\textsuperscript{366} 413 Mich. at 432-33, 320 N.W.2d 854.

\textsuperscript{367} \textit{Id.} at 433, 320 N.W.2d at 854.

\textsuperscript{368} \textit{Id.} at 440, 320 N.W.2d at 857 (Kavanagh, J., concurring).
lication of its own law in conflicts cases should not be limited by the residence of the parties. Rather:

we should go the distance and declare that Michigan law will apply in all personal injury and property damage actions without regard to whether the plaintiffs and defendants are all Michigan persons unless there is compelling reason for applying the law of some other jurisdiction, and that merely because the injury arose out of an occurrence in another state is not such a reason.

Michigan thus recognizes the primacy of forum law in torts cases, subject to its displacement under as yet unspecified conditions. Two members of the court think displacement is improper in all cases in which the parties are Michigan residents or businesses. Three members are willing to consider displacement even in that case, but are also willing to apply forum law when some or all of the parties are nonresidents. In making the displacement determination in future cases, all five judges appear to agree that little significance should be given to the place of injury itself.

Neither the Kentucky nor the Michigan lex fori approach is explicitly tied to an analysis of the policies underlying forum law. The Kentucky court in Foster simply added up the contacts and decided that it had enough to apply its own law, commenting as it did so that “if there are significant contacts—not necessarily the most significant contacts—with Kentucky, the Kentucky law should be applied.” The plurality opinion in Sexton never once mentioned the policy underlying Michigan’s owner liability statutes in the context of its choice of law discussion. Only when it turned to the second issue in the case—whether the statutes were being given an extraterritorial application—did the court discuss the purpose of those statutes. The fact that the outcome in both Foster and Sexton can be supported by an analysis of the policy underlying forum law does not fill the gap left by the failure of both courts to undertake such an analysis. A lex fori approach not informed even by an inquiry into the purpose of forum law (let alone that of competing laws) is likely to become as rigid as lex loci delicti ever was.

369. Id. at 441, 320 N.W.2d at 857 (Levin, J., concurring).
370. Id. at 442, 320 N.W.2d at 858.
371. Both the plurality and Justice Levin stress that the Sexton holding does not go beyond personal injury and property damage cases. See 413 Mich. at 437-39, 442-43, 320 N.W.2d at 856, 858.
374. Foster, 484 S.W.2d at 829.
375. Sexton, 413 Mich. at 437-38, 320 N.W.2d at 856.
G. The Traditional Approach

An unexpected result of this study of the modern American choice of law cases from the perspective of theory rather than outcome is the discovery that the choice of law theory followed by the largest number of states is the traditional, vested rights approach. Sixteen states and the District of Columbia still adhere to the traditional view that looks to the lex loci delicti in torts cases. Three other states have rejected the traditional approach in part in specific types of cases. No modern choice of law cases have been found for two states.


The Nevada Supreme Court has not reexamined its earlier decisions that adhered to the traditional approach, e.g., Mitrovich v. Pavlovich, 61 Nev. 62, 114 P.2d 1084 (1941) (guest statute), in light of modern theory. In Tab Constr. Co. v. Eighth Judicial Dist. Ct., 83 Nev. 384, 432 P.2d 90 (1967), however, the Nevada court broadened the theoretical basis for its application of Nevada law as that of the place of the injury in a workers' compensation setting to include the "significant" fact that Nevada was a "concerned" forum whose law will "presumptively apply, unless it becomes clear that nonforum incidents are of greater significance." Id. at 366, 432 P.2d at 91. The court cited as support for this proposition
The sixteen states that follow the traditional approach vary in their commitment to its doctrine. Nine have considered, and rejected, adoption of modern theory. Five have left the matter open for future consideration in an appropriate case. Two simply apply lex loci delicti without any discussion of modern theory. The three states that have already rejected traditional analysis in part are presumably open to further persuasion.

Of the nine states that have chosen to retain the traditional doctrine over more modern approaches, five appear to have been more impressed by the perceived inadequacies of modern theories than by the strength of the older view, but several still point to the certainty and simplicity of

Wilcox v. Wilcox, 26 Wis. 2d 517, 133 N.W.2d 408 (1965), discussed supra note 294, one of the early cases following Babcock. The Nevada court has shown no further interest in modern theory, and the federal courts treat Nevada as adhering to the traditional approach, even after Tab. See Southern Pacific Transp. Co. v. United States, 462 F. Supp. 1227, 1245 (E.D. Calif. 1978) (after an exhaustive analysis of the Nevada choice of law cases, including Tab, concludes that "Nevada’s choice of law rule remains the lex loci rule.")); accord Cambridge Filter Corp. v. Int’l Filter Co., 548 F. Supp. 1301, 1305 (D. Nev. 1982) (combining Tab with traditional analysis to apply the law of California as that of the place of wrong in a case involving alleged disclosure of trade secrets).


382. See supra note 377.

the lex loci delicti rule.\textsuperscript{384} In view of Cook's efforts,\textsuperscript{385} further academic criticism of the effectiveness of the traditional approach as a choice of law theory would be superfluous.

III. Conclusions

In announcing its holding in \textit{Piper Aircraft Co. v. Reyno}\textsuperscript{386} that the possibility of an unfavorable change in the applicable law would not, by itself, preclude dismissal in the federal courts on the ground of forum non conveniens, the United States Supreme Court pointed to the "substantial practical problems" that would arise from a contrary decision.\textsuperscript{387} "Choice-of-law analysis would become extremely important," Justice Marshall noted for the Court, "and the courts would frequently be required to interpret the law of foreign jurisdictions."\textsuperscript{388} Rather than require judges to conduct "complex exercises in comparative law,"\textsuperscript{389} the Court reaffirmed its earlier position\textsuperscript{390} that public interest factors support dismissal on forum non conveniens grounds if the trial court otherwise would be required to "untangle problems in conflict of laws."\textsuperscript{391}

As we have seen,\textsuperscript{392} a similar concern for the plight of judges faced with choice of law problems prompted the American Law Institute to commence in 1953 a second attempt to restate the law of conflict of laws. The thirty years that have elapsed since that effort began have seen an enormous intellectual ferment in choice of law. The academic turmoil has spilled over into the courts and has been returned by the judges to the classroom in the form of innovative opinions that have served as the basis for further scholarly comment in symposia.\textsuperscript{393} The United States Supreme

\textsuperscript{385} \textit{E.g.}, \textit{W. Cook, The Logical and Legal Bases of the Conflict of Laws} (1942).
\textsuperscript{386} 454 U.S. 235 (1981).
\textsuperscript{387} \textit{Id.} at 251.
\textsuperscript{388} \textit{Id.}
\textsuperscript{389} \textit{Id.}
\textsuperscript{390} Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947).
\textsuperscript{391} 454 U.S. at 251.
\textsuperscript{392} \textit{See supra text accompanying notes} 197-199.
\textsuperscript{393} Cavers, \textit{Introduction, Symposium on Conflict-of-Laws Theory After Allstate Insur-
Court surely is not alone in its perception that today each of the fifty American jurisdictions "applies its own set of malleable choice-of-law rules" to decide conflicts cases. In this article I have tried to impose some sense of order on this apparent chaos by examining the theoretical approaches to choice of law apparently being used by each of the fifty states and the District of Columbia. It is appropriate now to ask what conclusions can be drawn from the data.

First, the attempt to classify the American jurisdictions by theoretical approach is instructive in itself. We have learned that there are not fifty different choice of law approaches in use but, at most, about ten. Without exception, the American courts follow, either singly or in combination, a 'center of gravity,' 'governmental interest,' 'comparative impairment,' 'most significant relationship,' 'better law,' 'principles of preference,' 'functional,' 'lex fori,' or 'traditional vested rights' approach to choice of law questions. That such variation exists is not surprising except from the perspective of the rigidly limited territorial view that had prevailed earlier. Some continental scholars, perhaps driven by the necessity of producing written opinions for their courts on 'American conflicts law,' may despair at the lack of uniformity they find here. But as the United States Supreme Court has made amply clear, conflicts law is largely state law that may be developed, for the most part, free of any constitutional control. Variation is normal in any common-law subject; it is to be expected when the field historically has been largely theoretical and recently has been freed of constraints that earlier had stifled judicial creativity.

Second, it is possible to make some judgments about which choice of law theories have withstood the test of practical application and which have not. The 'center of gravity' approach soon proved itself incapable of consistently distinguishing between factors relevant and irrelevant to the choice of law decision. To the extent that this approach has been built in to the 'most significant relationship' standard of the Restatement Second, it too will lose predictive power. The more general choice of law principles found in section 6 of the Restatement Second have been used by the courts to incorporate choice of law concepts that are fundamentally inconsistent with its jurisdiction-selecting approach. To the extent that the Restatement Second is transformed by the courts into a compendium of all the modern approaches, whatever usefulness it might have had as a
catalyst for the creation of narrow choice of law rules will be lost. Leflar's 'better law' factor, his unique contribution to choice of law theory, has shown itself to be a powerful incentive for the use of value judgments in conflicts cases that would be thought impermissible in domestic cases. Still, since this is what he intended, Leflar's theory has survived the test of practical application virtually intact. 'Governmental interest analysis' has been successful in convincing most courts that the distinction between true and false conflicts is a valid one that can be used in conjunction with all modern theories, but it has been unsuccessful in persuading even its most faithful followers to apply forum law without further inquiry in true conflicts cases. Despite its persistence, the traditional approach has been sufficiently discredited so that its adherents are kept in place largely by the lack of what they perceive as an adequate substitute.

Third, it is futile to expect the courts to develop, or even to follow consistently, a coherent choice of law theory when so much scholarly disagreement exists over fundamental questions. There emerges from many of the opinions an air of dissatisfaction with the academics; the Oregon Supreme Court hesitates to "[wander] off into the jungle with a compass which everyone but its maker says is defective;"397 the Hawaii Supreme Court, looking about for guidance, complains that "a verdict on a generally acceptable 'approach' to replace the unsatisfactory 'rule' is yet to be returned by the scholarly jury."398 It is not so much that the judges would like the academics to agree on a common manifesto of choice of law as that they seem to think a cease-fire agreement would be profitable. After all, there is scholarly disagreement in other common-law subjects, too, but usually a majority and a minority view emerge from the case law. In choice of law theory, that has happened only around retention or rejection of the traditional approach; and even there, as this Article shows, the numbers are closer than is commonly thought.399

What, then, should a court that has become dissatisfied with the results obtained in litigated cases under the traditional approach do? In my view—and here I return briefly to the question I have raised earlier400—it should decide to begin the analysis of a choice of law problem by asking

397. Erwin v. Thomas, 264 Or. at 458, 506 P.2d at 496.
399. The scorecard is twenty-one states and the District of Columbia adhering to the traditional approach: sixteen expressly; three having abandoned it only in part; one, the District of Columbia, apparently having returned to it; and two having no cases on point in the last thirty years; compared to twenty-nine states that have rejected the traditional approach in favor of various modern theories. The latter include 'center of gravity,' two; governmental interest analysis, two; the Restatement Second, fourteen, including Vermont; Leflar's choice-influencing considerations, three; lex fori, two; and a combination of the above, six. See infra Appendix.
400. See supra note 16.
itself when a departure from local law is justified. In approaching that question, a court should bear several things in mind. First, the court should remember that, for the most part, what it does it will do voluntarily and not as a matter of constitutional compulsion. Second, it should reflect that the reason the question is raised at all is that the court thinks that appropriate reasons exist for taking account of facts linking some aspects of the legal problem before it to a system of justice other than its own. At one time, that belief would have been based on the notion that territorial factors were decisive in the creation of legal rights and duties. But that perception is no longer widely held, and by preparing to depart from the traditional view, the court has ceased to act on that belief. Why, then, does the court think it just in a conflicts case to look beyond its own local law for the rule of decision?

It is at this point in the analysis that the competing theories of choice of law stand ready to provide a variety of rationales. As we have seen, those include at least the following: Another state has an interest in advancing its policy in the case before the court, and the forum has none; the other state has a more significant relationship to the parties and the transaction than does the forum; the 'center of gravity' lies elsewhere; the other state's law is 'better' than that of the forum, and so on. If the court is persuaded that one of these theories will lead it to what Professor Cavers has termed "conflicts justice," then by all means it should adopt that approach and try to work within its precepts. But if it is not so persuaded, as the Michigan Supreme Court apparently was not in Sexton, then it should make a more modest beginning, not unlike what the Michigan court did in Sexton.

It should be observed that the question of when a departure from local law is justified usually comes up in litigation in reverse form: when is the forum justified in applying its own law, rather than that of the jurisdiction selected as controlling by the traditional view? This is the form in which the question was addressed by the Michigan court in Sexton; and the answer given was that the forum is justified in applying its owner liability statutes when the owner and the injured party are Michigan residents suing in the Michigan courts. Stated the other way, the question would have produced the answer that Michigan is not justified in refusing to apply the owner liability statute to Michigan parties suing in Michigan merely because the accident occurred elsewhere.

Regardless of the form in which it is stated, this way of looking at the choice of law question makes clear that local law is the normally applica-

402. 413 Mich. at 406, 320 N.W.2d at 843.
403. Id. at 433, 320 N.W.2d at 854.
ble law in conflicts cases, as in other cases, and that the burden of persuasion is placed on the party wishing to displace local law. This insight is not a new one, but I think it has gained in importance as a result of the failure of any one of the modern approaches to commend itself to the majority of courts as an adequate and just guide to choice of law. By asking itself the right question, the Michigan Supreme Court has made a new beginning in an old and troubled field.

How should Michigan continue its choice of law development after Sexton? As I have suggested, it should incorporate, early on, the practice of interpreting the local policies underlying the laws that are asserted to be in conflict. Beyond that, it would do well to consider how Sexton should have been decided in the courts of the state where the injury did occur: Virginia. Since Virginia adheres to the traditional approach, it, as forum, would have applied its own law as that of the place of injury and the Michigan owner liability statute would not have been used. But if instead Virginia had asked itself whether a departure from local law was justified in Sexton, how would the case have been decided?

Given the opportunity afforded by looking at the matter in this way, a Michigan plaintiff suing a Michigan defendant in the Virginia courts might have pointed out that the law of their common domicile would hold an owner responsible for the injury without regard to personal negligence, and that Virginia should give effect to the Michigan law in its courts. If Virginia were to accept this argument, it would be creating an exception to the lex fori analogous to the exception to the lex loci delicti carved out earlier by some states in the family immunity and guest-host cases. What is the rationale for creating such an exception? It need not be, I suggest, that a return to the personal law of torts is desirable or even that a choice of law rule pointing to the state of common domicile should be created in all cases. Rather my notion is that a particular state, the one in which the parties reside and, if they are competent adults, have the right of self-government through their right to vote in local elections, has been designated by the federal constitution as the state of their citizenship and accordingly as the government responsible for regulating their legal affairs in certain types of cases. When that state has acted to fix the rights of the parties between themselves, other states in a federal union should be willing to give its actions prima facie validity in their courts. If all states

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404. See generally A. Ehrenzweig, Private International Law 75-110 (1967) (discussing the choice of law problem in terms of interpretation of the applicability of forum law).
405. See supra text accompanying notes 374-375.
406. The injury in Storie, Sexton's companion case, occurred in Ohio. Since that state has recognized an exception to the lex loci delicti in false conflict cases (see supra note 134), presumably it would have applied Michigan law had the case been brought in Ohio.
adopted this course, a sort of tacit common law of full faith and credit to the local laws of sister states might evolve in the form of exceptions to the lex fori in choice of law cases.

How would this suggestion work in the hypothetical Sexton case brought in Virginia? Virginia as the forum might well conclude that a departure from its law is justified because Michigan has already regulated by statute the legal aspects of the owner-passenger relationship between the parties. That regulation would be recognized regardless of where the actual relationship itself was formed or where the injury occurred. In turn, Virginia might expect Michigan to refrain from imposing liability under its statute on the Virginia owner of a vehicle in which Virginia passengers were injured in Michigan. In such a case, this approach will require that states limit the full realization of their own interests in their own courts in order to gain the cooperation of their sister states. By expecting Michigan to forego the advancement of its interest in providing a fund for recovery of its medical creditors in such a case, I depart from Currie's original analysis, which stressed advancement of all forum interests. But I suggest that this is a situation in which Michigan's longer-range interests in securing Virginia's willingness to apply Michigan law if Sexton were brought there should prevail over its immediate concern for its medical creditors consistent with Currie's more mature recognition of the importance of restraint in asserting interests.408

To be sure, this rationale for justifying departures from local law in choice of law cases will encounter difficulties when the residence of the parties is mixed and when the sister state's regulation trenches too closely on the forum's fundamental policies. I suppose that Virginia could not be expected, for example, to recognize a hypothetical marriage between homosexuals performed in the state of their common domicile where such unions are legal. But even in the days of miscegenetic marriages, it was thought possible to recognize certain incidents of the relationship (for example, inheritance) while refusing to recognize others (for example, the right to live together in the community).409 The forum is surely entitled to take account of its own local policies, as well as those of the other state or states, in determining whether a departure from local law is justified, but its definition of those policies should be drawn in light of the need for

408. If the case of the Virginians injured in Michigan were viewed as an apparent true conflict, as I think it should be, Michigan might well take account of its long-range interests, discussed in the text, as a basis for refusing to assert its more immediate interests in allowing recovery. See supra note 16.

409. See, e.g., Miller v. Lucks, 203 Miss. 824, 36 So. 2d 140 (1948) (allowing white husband of deceased black wife to inherit her Mississippi property; after the parties had left Mississippi under threat of prosecution if they cohabited together there, they were married in Illinois).
interstate cooperation.

What I suggest here is offered as a rationale that can be used to justify departures from local law in a limited set of cases—primarily those dealing with preexisting or commonly created relationships between people living in the same state that may nonetheless give rise to conflict of laws problems.410 How much more widely it can or should be applied requires further analysis, for the frank recognition in conflicts cases of a state's right to control certain relationships and the concomitant delegation of control in like cases to sister states may be limited by constitutional provisions such as the commerce clause411 or even the privileges and immunities clause.412 But these and other implications of this approach413 to the choice of law question must await further exploration.

410. See also Williams v. Riley, 56 N.C. App. 427, 289 S.E.2d 102 (1982) (applying law of South Carolina, when tenant was injured while occupying landlord's property in South Carolina, to determine what duty of repairing the premises is owed to a North Carolina tenant by a North Carolina landlord). It is possible that a North Carolina court, applying the approach suggested in the text rather than the lex loci delicti, might have refused to conclude that a departure from forum law was justified on these facts.

411. U.S. Const. art. I, § 8, cl. 3.

412. U.S. Const. art IV, § 2.

413. I do not believe that the approach suggested here is precluded by the Supreme Court's decisions interpreting the full faith and credit clause, U.S. Const. art. IV, § 1, in the workers' compensation cases, e.g., Pacific Employers Ins. Co. v. Industrial Acc. Comm'n, 306 U.S. 493 (1939); Alaska Packers Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935). In these cases, the Court recognized that the full faith and credit clause did not require the state where a worker had been hired to displace its law by deferring to the state where the worker had been injured, or vice versa. But the Court did not hold that either state was precluded from voluntarily displacing its own law if it chose to do so.
# APPENDIX

## CHOICE OF LAW THEORIES IN THE STATES

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<th>Choice-Influencing Factors</th>
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* Rejects traditional approach in part. ** No modern cases found.
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</table>

* Rejects traditional approach in part.  ** No modern cases found (for Nevada, see supra note 378).  *** See supra note 224.