

METHOD OR MADNESS?: THE LEFLAR APPROACH TO CHOICE OF LAW AS PRACTICED IN FIVE STATES

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INTRODUCTION

In 1966, Professor Robert Leflar published two articles that recast the debate on choice of law in America.¹ Leflar argued that courts should decide what law to apply in multi-state actions by considering five factors—(1) “[p]redictability of results”; (2) “[m]aintenance of interstate and international order”; (3) “[s]implification of the judicial task”; (4) the forum state’s governmental interests; and (5) “the better rule of law.”² Leflar did not claim that his five factors were original.³ Indeed, he argued that judges already applied the factors to resolve choice-of-law disputes.⁴ Leflar’s goal was not to pioneer some novel choice-of-law theory, but, rather, to refocus scholarly and judicial attention on choice of law as it actually worked in the real world.⁵

Leflar’s five factor framework—which came to be called the “Leflar method” for choice of law or the “better law” method—met with mixed reviews in the courts and academia.⁶ Just a few decades after Leflar’s articles were published, five states had officially

1. Robert Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966) [hereinafter *NYU Article*]; Robert Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966) [hereinafter *Cal Article*].

2. *NYU Article*, *supra* note 1, at 282; *Cal Article*, *supra* note 1, at 1586-87.

3. *NYU Article*, *supra* note 1, at 327.

4. *Id.*

5. *Id.*; *Cal Article*, *supra* note 1, at 1586.

6. See SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 26-28 (2006).

adopted the better law method for torts cases, and two states had adopted it in contracts cases.⁷ Other states, while not expressly adopting the better law method, nevertheless incorporated the five factors—called “choice-influencing considerations”—into their own choice-of-law systems.⁸ The supreme courts of several other states, however, outright rejected the better law method,⁹ and critics hammered it as an unprincipled and dangerous abdication of traditional choice-of-law values.¹⁰ They argued that Leflar’s choice-influencing considerations—particularly the better rule of law criterion—failed to adequately constrain judicial decisionmaking, leaving judges to choose a given law based on bare preference for a particular outcome or party.¹¹

Missing from the debate about the Leflar method has been a comprehensive study of how the method actually works when applied by the courts.¹² Most analyses of the subject concentrate on the

7. *Id.* at 64.

8. See Robert L. Felix, *Leflar in the Courts: Judicial Adoptions of Choice-Influencing Considerations*, 52 ARK. L. REV. 35, 39 & n.12 (1999) (listing states that “do not purport to have adopted the approach, but nevertheless employ it ‘eclectically’ in combination with another approach, usually the Second Restatement, or as an alternative to the explanation of the decision”).

9. See, e.g., *Hataway v. McKinley*, 830 S.W.2d 53, 58-59 (Tenn. 1992) (declining to apply the better law method because it is “plagued by excessive forum favoritism” (quoting Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1049 (1987))); *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 46-47 (Del. 1991) (expressly preferring the Second Restatement’s choice-of-law method over the better law method in torts cases); *Tower v. Schwabe*, 585 P.2d 662, 664 (Or. 1978) (refusing to apply the better law method because doing so would lead to application of forum law in every case); *Fuerste v. Bemis*, 156 N.W.2d 831, 834 (Iowa 1968) (noting criticisms of the better law method).

10. See, e.g., KERMIT ROOSEVELT, *CONFLICT OF LAWS* 92-93 (Foundation Press 2010); EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 52-58 (4th ed. 2004); Arthur Taylor von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 952-53 (1975); David F. Cavers, *The Value of Principled Preferences*, 49 TEX. L. REV. 211, 212-15 (1971).

11. See, e.g., Ralph U. Whitten, *Improving the “Better Law” System: Some Impudent Suggestions for Reordering and Reformulating Leflar’s Choice-Influencing Considerations*, 52 ARK. L. REV. 177, 202-03 (1999); Stanley E. Cox, *Back to Conflicts Basics: Choice of Law and Multistate Justice by Friedrich K. Juenger*, 44 CATH. U. L. REV. 525, 537 (1995) (“I am ultimately troubled by unfettered discretion to formulate better law, not because I am against better law, but because I am wary of unfettered discretion.”) (book review); John D. Faucher, *Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases*, 26 U.C. DAVIS L. REV. 1045, 1066 (1993) (“Leflar’s theory allows this discretion at the expense of the litigants’ ability to foresee a result.”); see also BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 104-06 (Duke Univ. Press 1963) (arguing that a better-law-type preference “attributes to courts a freedom and a competence that they do not possess”).

12. See, e.g., Hillel Y. Levin, *What Do We Really Know About the American Choice-of-Law Revolution?*, 60 STAN. L. REV. 247, 248-49 (2007) (book review); Courtland H. Peterson, *Restating Conflicts Again: A Cure for Schizophrenia?*, 75 IND. L.J. 549, 551

method as Leflar described it.¹³ That presents two problems, however. First, none of the states that apply the Leflar method adheres rigidly to Leflar's description of the method.¹⁴ Consequently, many of the criticisms of Leflar's vision of the method do not necessarily translate to its "real-world" application.¹⁵

The second problem is that the few analyses of the Leflar method that actually consider real-world application are inadequate, mostly because they are based on unrepresentative samples of the universe of better law decisions.¹⁶ Courts and scholars rely on this small, inaccurate universe of studies, probably for lack of a better option.¹⁷ Anyone looking for an accurate and comprehensive analysis of how different states apply the Leflar method will not find one.

This Article offers the most thorough analysis to date of how the five states that have adopted the Leflar method actually apply it. It proceeds in three parts. Part I describes the Leflar approach and provides an overview of some of the most persistent criticisms of it. Part II examines how each of the five states currently using the Leflar method has applied the choice-influencing considerations, with

(2000).

13. *E.g.*, Harold P. Southerland, *A Plea for the Proper Use of the Second Restatement of Conflict of Laws*, 27 VT. L. REV. 1, 24-26 (2002) (conjecturing about the drawbacks of the better law method, without reference to any real-world applications); Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 893 (2002) (listing some "obvious problems" with a "better rule of law" approach, but not mentioning any empirical evidence confirming that those problems exist); Geoffrey J. Ritts, *Professional Responsibility and the Conflict of Laws*, 18 J. LEGAL PROF. 17, 67-68 (1993) (noting some theoretical criticisms of the better law method); Russel J. Weintraub, *A Method for Solving Conflict Problems*, 21 U. PITT. L. REV. 573, 585-86 (1960) (describing the "better rule" standard as amorphous, but failing to support that assertion with real-world examples).

14. *See infra* Part II.

15. *Compare, e.g.*, SCOLES ET AL., *supra* note 10, at 53 ("Although the better-law criterion is 'only one of five,' it can easily become the controlling criterion. Indeed, by not expressly assigning to it a residual role, Leflar allowed it to become the decisive criterion in all the close cases."), *with* Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co., 604 N.W.2d 91, 96 (Minn. 2000) ("Regarding the fifth factor, application of the better rule of law, we note that this court has not placed any emphasis on this factor in nearly 20 years and conclude that it is likewise unnecessary to reach it here.").

16. *E.g.*, Felix, *supra* note 8, at 39 & nn.12-13 (evaluating the better law method by considering only a limited number of state supreme court decisions); Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 358 n.11 (1992) (summarizing the data set used in the empirical study that did not include decisions from the past twenty years); Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49, 81-89 (1989) (analyzing the "pro-forum and pro-recovery" biases in the better law method, based only on consideration of state supreme court and federal appellate court decisions).

17. *See* Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT'L L.J. 559, 564 (2002) (noting that two studies comprise "the only existing empirical works that directly investigate the operation of U.S. conflicts doctrine").

particular emphasis on the variations adopted by each state. Part III explores what the states' applications of the Leflar method reveal about the method itself as well as the scholarship and criticisms surrounding it. The Leflar method, as applied, bears little resemblance to the simple, organized choice-of-law system Leflar first described. Rather, it is a tangle of vague and ambiguous standards that offer little by way of guidance to courts or practitioners.

I. THE LEFLAR METHOD IN THEORY

"Choice of law" is the branch of conflict-of-laws doctrine that seeks to identify the appropriate law to apply in disputes with connections to more than one jurisdiction.¹⁸ In some cases—i.e., those in which federal law conflicts with state law—the Constitution's Supremacy Clause¹⁹ resolves the problem, mandating that state laws yield to contrary federal laws.²⁰ But where a court is asked to resolve a dispute that has multi-state aspects, the Constitution does not prescribe the means for deciding what law to apply.²¹ Instead, courts must choose for themselves.²² The choice is often difficult and is further complicated by the need to first select a method to use in choosing the appropriate law. Not surprisingly, given the magnitude and significance of the problem, courts and scholars have spent considerable time and effort attempting to devise better choice-of-law systems.

18. DAVID P. CURRIE ET. AL., *CONFLICT OF LAWS: CASES-COMMENTS-QUESTIONS* 2 (8th ed. 2010).

19. U.S. CONST. art. VI, cl. 2.

20. See *Maryland v. Louisiana*, 451 U.S. 725, 746-47 (1981).

21. The Supreme Court has said that, "for a State's substantive law to be selected in a constitutionally permissible manner," a state need only have "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)) (internal quotation marks omitted); see also Mark J. Kelson, Note, *Choice-of-Law, Venue, and Consent-to-Jurisdiction Provisions in California Commercial Lending Agreements: Can Good Draftmanship Overcome Bad Choice-of-Law Doctrine?*, 23 LOY. L.A. L. REV. 1337, 1356 (1990) (referencing "the now-prevalent view among commentators that there are no true constitutional limitations on choice of law"); Courtland H. Peterson, *Jurisdiction and Choice of Law Revisited*, 59 U. COLO. L. REV. 37, 59-60 (1988) (noting the general lack of faith "in the willingness of the Supreme Court to impose constitutional limits on state choice of law"); Harold W. Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 HARV. L. REV. 806, 807 (1971) ("[D]ue to the acceptance of the proposition that a state has the power to give effect to its own law if it has a legitimate interest in doing so, these constitutional provisions have not been significant limitations on state choice-of-law principles.").

22. See *Phillips Petroleum Co.*, 472 U.S. at 823-24 (Stevens, J., concurring in part and dissenting in part).

The past seventy-five years, in particular, have witnessed a proliferation of choice of law theories.²³ *Lex loci delicti* and *lex loci contractus*, the traditional choice-of-law methods dominant until the early 1960s, mandated that the law of the place of the injury or of the contract, respectively, should govern the entire action, since a plaintiff's right to compensation vested at the moment of injury or at the moment the contract was made.²⁴ Starting around the 1950s, however, alternative theories began to emerge that urged courts to decide choice-of-law questions by considering the policies underlying the conflicting laws, rather than by blindly applying the law of the place of wrong.²⁵ One such theory, reflected in the Second Restatement of Conflict of Laws (by far the most popular choice of law method in the United States²⁶), advocates for applying the law of the jurisdiction having the "most significant relationship"²⁷ or the most significant contacts to the facts of the case.²⁸

A. The Leflar Method As Leflar Described It

The "better law" method, first outlined by Professor Robert Leflar in 1966,²⁹ is a relatively recently developed choice of law system. In two articles, and, later, in his treatise on conflicts law,³⁰ Leflar sought to identify the factors that judges actually consider in deciding multi-state choice-of-law disputes.³¹ By making explicit the "real reasons" underlying choice-of-law decisions, Leflar hoped to promote a more candid discussion of choice of law, which he felt would ultimately lead to a more workable body of case law in the field.³²

The product of Leflar's efforts was a non-weighted list of five "choice-influencing considerations" for judges to consider in deciding choice-of-law questions.³³ The five factors were: (1) "[p]redictability of

23. See generally SYMEONIDES, *supra* note 6, at 9-35.

24. JOSEPH BEALE, A TREATISE ON CONFLICT OF LAWS 311-12 (1934) (arguing that, because "the power of a state is supreme within its own territory, no other state can exercise power there[.]" so "[i]t follows generally that no statute has force to affect any person, thing, or act . . . outside the territory of the state that passed it").

25. See Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1278-80 (1989).

26. See SYMEONIDES, *supra* note 6, at 65.

27. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (1971) ("All that can presently be done in these areas is to state a general principle, such as application of the local law 'of the state of most significant relationship' . . .").

28. See *id.* § 145(2).

29. See NYU Article, *supra* note 1; Cal Article, *supra* note 1.

30. ROBERT LEFLAR ET AL., AMERICAN CONFLICTS LAW §§ 95, 102-08 (4th ed. 1986).

31. Cal Article, *supra* note 1, at 1584; see also ROOSEVELT, *supra* note 10, at 90 (describing Leflar's perspective as "positive, rather than normative").

32. Cal Article, *supra* note 1, at 1585.

33. See *id.*

results,” (2) “[m]aintenance of interstate and international order,” (3) “[s]implification of the judicial task,” (4) “[a]dvancement of the forum’s governmental interests,” and (5) preference for the better rule of law.³⁴

1. Predictability of Results

Leflar listed predictability of results as the first choice-influencing consideration,³⁵ though he made clear that the order of presentation was insignificant.³⁶ He claimed that predictability serves two important functions in choice of law: (1) it promotes planning and reliance by parties to consensual transactions,³⁷ and (2) it discourages wasteful litigation and forum shopping.³⁸ Because predictability is an important factor in the way parties structure planned transactions, Leflar ascribed special significance to it in cases involving contracts, wills, marriages, and other mutually agreed-upon relationships.³⁹ Conversely, predictability is a less important consideration in those cases—principally involving torts—where planning is of comparatively little importance.⁴⁰

2. Maintenance of Interstate and International Order

Leflar proposed his second factor, maintenance of interstate and international order, as a check on states’ “mutual interference with claims or aspirations to sovereignty,” which he believed could pose a particular threat to social and economic commerce among states.⁴¹ Reflexively applying the local law of the forum, “unaccompanied by independent justification,” created the risk that courts would improperly disregard the potentially strong interests of a non-forum state in a particular matter.⁴² Leflar imputed special importance to this factor in commercial law cases since interstate order is especially necessary to facilitate interstate business transactions.⁴³

34. *NYU Article*, *supra* note 1, at 282.

35. *Id.* at 282-85; *Cal Article*, *supra* note 1, at 1586.

36. *LEFLAR ET AL.*, *supra* note 30, at 279 (order of presentation does not matter).

37. *NYU Article*, *supra* note 1, at 283.

38. *Id.* at 282-83.

39. *See Cal Article*, *supra* note 1, at 1596 (“Predictability . . . is always important in contracts cases.”); *NYU Article*, *supra* note 1, at 283 (emphasizing the importance of predictability in consensual and planned transactions).

40. *See, e.g., NYU Article*, *supra* note 1, at 311, 315; *Cal Article*, *supra* note 1, at 1594.

41. *Cal Article*, *supra* note 1, at 1586.

42. *LEFLAR ET AL.*, *supra* note 30, at 293.

43. *See NYU Article*, *supra* note 1, at 286; *see also LEFLAR ET AL.*, *supra* note 30, at 293.

3. Simplification of the Judicial Task

"Simplicity and ease of application," Leflar wrote, are not ends in themselves, but are nevertheless desirable in a choice-of-law system.⁴⁴ For example, the need to expedite litigation and conserve scarce judicial resources justifies the longstanding rule permitting a forum to apply its own procedural laws even where it applies another state's substantive law.⁴⁵ The same concerns support a court's decision to apply the simpler of two competing laws, at least where there is a real risk the court might misapply the more complicated one.⁴⁶ Leflar emphasized, however, that simplification of the judicial task "is ordinarily not of first importance among the choice-influencing considerations."⁴⁷

4. Advancement of the Forum's Governmental Interests

Leflar believed that his fourth choice-influencing consideration, the forum's governmental interest, was an important objective in almost every choice-of-law decision.⁴⁸ But he cautioned that consideration of the forum's governmental interests was only part of the overall analysis, and should not serve as an "unreasoning fallback" for courts to use in resolving-choice of-law disputes.⁴⁹ In particular, courts should not reflexively apply forum law merely because a forum domiciliary is involved.⁵⁰ Leflar emphasized that states' basic policies (as opposed to rules) are rarely in conflict, and that differences between states' rules are more often the result of happenstance than substantive policy disagreements.⁵¹ Therefore, courts applying this consideration should take care not to conflate applying forum law and effectuating the forum's interests, especially in cases where the forum's interests are not strongly implicated.⁵²

5. Better Rule of Law

The "better law" consideration is by far the most famous, as well as the most controversial, of Leflar's five choice-influencing considerations.⁵³ Leflar was not the first scholar to observe that choice-of-law decisions are influenced by the judges' desire to apply

44. *NYU Article*, *supra* note 1, at 288-89.

45. *See id.* at 288.

46. *See id.*

47. *Cal Article*, *supra* note 1, at 1587.

48. *Id.*

49. *NYU Article*, *supra* note 1, at 291, 295; *LEFLAR ET AL.*, *supra* note 30, at 295.

50. *Cal Article*, *supra* note 1, at 1597; *LEFLAR ET AL.*, *supra* note 30, at 296.

51. *See NYU Article*, *supra* note 1, at 294.

52. *Id.* at 291.

53. *SCOLES ET AL.*, *supra* note 10, at 53; John J. Watkins, *Forward*, 52 *ARK. L. REV.* 1, 3-4 (1999).

the better law,⁵⁴ and he was explicit that this choice-influencing consideration should be no more important than the others.⁵⁵ Nevertheless, the vast majority of scholarly consideration of Leflar's choice of law method has focused on the better law component.⁵⁶

Leflar identified a number of criteria by which to determine whether one law is better than another. First, a law is "better" if it is superior to another law in light of "socioeconomic jurisprudential standards."⁵⁷ Next, a law that is sound in view of present-day conditions is better than an anachronistic one.⁵⁸ Finally, a law supporting enforcement of fair, consensual transactions is better than one invalidating such transactions.⁵⁹ Leflar argued that judges already consider these criteria in resolving choice-of-law questions, but that they do so covertly, by manipulating conflicts rules, cleverly maneuvering around precedents, and using other judicial "gimmicks."⁶⁰ Openly recognizing the propriety of applying the better rule eliminates the need to resort to such subterfuges, leading to a more honest and thoughtful discourse and improving predictability and fairness in the process.⁶¹

B. Criticism of the Choice-Influencing Considerations

Leflar was explicit that the weight attached to each choice-influencing consideration would vary with the facts of each case.⁶² But inconstancy of that sort did not trouble him; rather, he embraced it as a necessary element of any practicable choice-of-law system.⁶³

Leflar's critics have not been so understanding, arguing that the Leflar method gives judges too much room for discretion in deciding choice-of-law questions.⁶⁴ Some say that courts will exploit this

54. See, e.g., Hessel E. Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721, 735 (1957) (identifying "justice of the end result[s]" as an important objective in choice of law systems); David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 193 (1933) ("The choice . . . would not be the result of the automatic operation of a rule or principle of selection but of a search for a just decision in the principal case.").

55. NYU Article, *supra* note 1, at 304.

56. See SYMEONIDES, *supra* note 7, at 27; SCOLES ET AL., *supra* note 10, at 52-53; see also Cal Article, *supra* note 1, at 1587 ("The better rule of law is the most controversial of the considerations.").

57. LEFLAR ET AL., *supra* note 30, at 297; Cal Article, *supra* note 1, at 1588.

58. NYU Article, *supra* note 1, at 299-300.

59. *Id.* at 297-98; see also Cal Article, *supra* note 1, at 1588.

60. NYU Article, *supra* note 1, at 300-04; see also Cal Article, *supra* note 1, at 1588.

61. See NYU Article, *supra* note 1, at 303-02.

62. See *id.*, at 282, 304; Cal Article, *supra* note 1, at 1598.

63. See NYU Article, *supra* note 1, at 304-05, 324-25; Cal Article, *supra* note 1, at 1598.

64. E.g., Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT'L L. 975, 1011 (1994) ("Professor

fluidity by preferring the better rule of law criterion at the expense of the other choice-influencing considerations.⁶⁵ Others maintain that courts will take advantage of the flexibility inherent in the Leflar method to favor plaintiffs and apply forum law.⁶⁶ And still others claim that courts will be so totally unconstrained in choosing what law to apply that any sense of predictability and consistency in choice of law will be destroyed.⁶⁷

What all of these criticisms have in common is to suggest that the Leflar method fails to serve the essential function of a choice-of-law system: guiding judges in deciding what law to apply in multi-jurisdiction cases.⁶⁸ Critics maintain that, because the choice-influencing considerations are so inherently ambiguous, courts will be free to choose what law applies based entirely on their own subjective perspective.⁶⁹ And, they say, since the choice-influencing considerations can be cited to support almost any decision in a given case, they collectively fail to provide the level of guidance required of a workable choice-of-law system.⁷⁰ The result of such a vague and amorphous approach, many argue, will be to diminish consistency and predictability in choice of law and increase the number of erratic choice-of-law precedents.⁷¹

Leflar introduced a system that provides extreme flexibility to the judge in balancing vague and possibly contradictory factors"); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 339 (1990) ("Leflar's 'better law' approach . . . direct[s] judges to choose the better law according to some undefined, objective theory of the good."); David P. Granoff, Comment, *Legislative Jurisdiction, State Policies and Post-Occurrence Contacts in Allstate Insurance Co. v. Hague*, 81 COLUM. L. REV. 1134, 1141 n.54 (1981) (criticizing the better law method as a "vague approach" that is "relative, and varies with the facts and circumstances").

65. *E.g.*, SCOLES ET AL., *supra* note 10, at 53-54.

66. *E.g.*, Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1090 (1987); Note, *Post Transaction or Occurrence Events in Conflict of Laws*, 69 COLUM. L. REV. 843, 849-50 (1969).

67. *See, e.g.*, Trachtman, *supra* note 64, at 1011, 1013-14.

68. *E.g.*, Symeon Symeonides, *Maritime Conflicts of Law from the Perspective of Modern Choice of Law Methodology*, 7 MAR. LAW. 223, 259 (1982) ("To the extent [the better law method and other] result-oriented theories purport to guide judicial practice they deserve severe criticism for misjudging the whole purpose of the science of choice-of-law and prejudging the results of the choice-of-law process."); DAVID CAVERS, *THE CHOICE OF LAW PROCESS*, 22-23 (Univ. of Mich. Press 1965) ("[T]o say that each state must seek the result which it regards as just under all circumstances, including the extra-state elements and laws, is simply to deny the existence and purpose of the conflict of laws. . . . Not only is this denial of true justice . . . but also it is a denial of law itself.").

69. *E.g.*, Trachtman, *supra* note 64, at 1012-13; Steven M. Siros, Comment, *Borders, Barriers, and Other Obstacles to a Holistic Environment*, 13 N. ILL. U.L. REV. 633, 654 (1993).

70. *See* SCOLES ET AL., *supra* note 10, at 106-08.

71. *E.g., id.* at 107-08; SYMEONIDES, *supra* note 7, at 27; Kimberly Jade Norwood, *Double Forum Shopping and the Extension of Ferens to Federal Claims That Borrow*

C. Previous Scholarship Regarding the Better Law Method

However plausible these criticisms may seem in theory, there is little empirical scholarship by which to test them. Indeed, there are only a handful of published studies evaluating how states actually apply the better law method.⁷² More problematic is that the vast majority of these studies are patently unreliable. Most are outdated, having been published over two decades ago.⁷³ Even the more recent studies are too old to account for important opinions issued in the last decade.⁷⁴ Moreover, many empirical analyses of the Leflar method rely on unrepresentative samples selected from a narrow cross-section of the available decisions.⁷⁵ Consequently, their results do not accurately reflect how courts really apply the Leflar method.⁷⁶

A more systematic problem is that many studies of the Leflar method gloss over important nuances in the ways different states apply the better law method.⁷⁷ Many of the nuances thus omitted are so important as to be all but dispositive in whole categories of cases, and yet they are ignored in most analyses.⁷⁸ A handful of studies are even less reliable—at least on some points—in that they misrepresent the facts.⁷⁹

State Limitation Periods, 44 EMORY L.J. 501, 561-62 (1995); James A. White, Comment, *Stacking the Deck: Wisconsin's Application of Leflar's Choice-Influencing Considerations to Torts Choice-of-Law Cases*, 1985 WIS. L. REV. 401, 402 (1985) (criticizing Wisconsin's decisions applying the better law method as inconsistent and creating uncertainty).

72. See *supra* notes 16-17 and accompanying text.

73. E.g., Borchers, *supra* note 16 (published in 1992); Solimine, *supra* note 16 (published in 1989).

74. E.g., Stuart E. Thiel, *Choice of Law and the Home-Court Advantage: Evidence*, 2 AM. L. & ECON. REV. 291 (2000).

75. See, e.g., Felix, *supra* note 8, at 39 & n.12 (considering only state supreme court opinions).

76. See McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1643-44 (1995) (explaining that lower courts do not always adhere to Supreme Court doctrine, so that Supreme Court precedent is not always an accurate proxy for the law as applied).

77. E.g., Borchers, *supra* note 16, at 367-370 (lumping together Rhode Island, Minnesota, Arkansas, New Hampshire, and Wisconsin, without any attempt to differentiate their approaches to the better law method).

78. For example, none of the published studies gives any meaningful consideration to the impact that Rhode Island's use of the Second Restatement "significant contacts" approach has on that state's application of Leflar's choice-influencing considerations. See *infra* Part II.C. At most, the studies acknowledge that the Second Restatement plays a role in Rhode Island's choice-of-law jurisprudence, without bothering to seriously analyze the consequences of its use.

79. See, e.g., SYMEONIDES, *supra* note 7, at 27 (claiming that "in the five states that adopted Leflar's approach for tort conflicts, one finds only five supreme court cases that have applied foreign law"). There are actually dozens of state supreme court cases applying foreign law under the better law method. See, e.g., *Guertin v. Harbour Assurance Co. of Berm.*, 415 N.W.2d 831, 834-35 (Wis. 1987) (analyzing choice-of-law

None of these studies offers a comprehensive and accurate account of the Leflar method as it functions in the real world. In particular, there is a serious lack of published scholarship identifying the many different ways states apply the Leflar method. With almost a half-century of precedents now on the books, there is certainly enough case law from which to meaningfully assess how the better law method actually functions as a choice-of-law system. Doing so, however, requires a more comprehensive and rigorous approach to the subject than has yet been applied.

D. The Methodology Behind this Article

Previous analyses of judicial applications of the Leflar method have been confined to relatively small sample sizes.⁸⁰ This article, by contrast, synthesizes every case available on Westlaw in which a state or federal court purported to apply some version of the Leflar method to resolve a choice-of-law question, a universe of 245 decisions.⁸¹

One reason for the larger sample size is that this article considers federal court decisions applying the Leflar method, in addition to state court decisions doing so. Almost all of the prior studies of the method ignored choice-of-law decisions from federal courts on the ground that state courts, alone, are supposed to be responsible for adopting and refining choice-of-law rules.⁸² In one sense, the reluctance to consider federal courts' choice-of-law decisions is understandable. Federal courts sitting in diversity are

issue under better law method and ultimately applying foreign law); *Lichter v. Fritsch*, 252 N.W.2d 360, 364 (Wis. 1977) (same); *Hunker v. Royal Indem. Co.*, 204 N.W.2d 897, 908 (Wis. 1973) (same); *Ganey v. Kawasaki Motors Corp., U.S.A.*, 234 S.W.3d 838, 847 (Ark. 2006) (same); *Gomez v. ITT Educ. Servs., Inc.*, 71 S.W.3d 542, 548 (Ark. 2002) (same); *Schlemmer v. Fireman's Fund Ins. Co.*, 730 S.W.2d 217, 219 (Ark. 1987) (same); *Lessard v. Clarke*, 736 A.2d 1226, 1229 (N.H. 1999) (same); *Boucher v. Boucher*, 553 A.2d 313, 316 (N.H. 1988) (same); *LaBounty v. Am. Ins. Co.*, 451 A.2d 161, 164 (N.H. 1982) (same); *Taylor v. Mass. Flora Realty, Inc.*, 840 A.2d 1126, 1128 (R.I. 2004) (same); *Najarian v. Nat'l Amusements, Inc.*, 768 A.2d 1253, 1255 (R.I. 2001) (same); *Victoria v. Smythe*, 703 A.2d 619, 621 (R.I. 1997) (same); *Bigelow v. Halloran*, 313 N.W.2d 10, 12-13 (Minn. 1981) (same).

80. See, e.g., *Borchers*, *supra* note 16, at 374 (analyzing sixty-eight decisions applying the Leflar method); *Solimine*, *supra* note 16 (analyzing eight decisions applying the Leflar method).

81. Of these 245 decisions, seventy-three are from Minnesota, fifty-eight are from Wisconsin, forty-four are from Rhode Island, thirty-five are from Arkansas, and thirty-five are from New Hampshire. Most are tort cases, which is to be expected since three of the five Leflar states—Arkansas, New Hampshire, and Rhode Island—apply the method only in tort disputes. See *infra* Part II.A-C. Even in Minnesota and Wisconsin, however, where courts apply the Leflar method to both contract and tort disputes, most of the case law comes from tort cases. See *infra* Part II.D-E.

82. See, e.g., *Felix*, *supra* note 8, at 38-39 (considering only "a representative number of decisions by state courts of last resort").

tasked only with applying the forum state's choice-of-law precedents, rather than developing new law, and their choice-of-law opinions do not bind state courts.⁸³ In another sense, though, considering precedents from federal diversity cases makes good sense for anyone interested in a more comprehensive picture of how courts apply the Leflar method. In all five of the states that apply the method, federal decisions make up a sizable percentage of the total number of choice-of-law decisions reported on Westlaw,⁸⁴ and serve as important precedents in subsequent choice-of-law cases in federal courts.⁸⁵ Even state courts rely on federal courts' applications of the better law method to support their decisions.⁸⁶ Thus, consideration of federal cases applying the Leflar method is essential to understanding how that method works in practice.

The larger and more complete sample on which this article is based helps provide a more comprehensive picture of how courts actually go about applying the Leflar method. So too does the uniquely detailed qualitative analysis of each decision. Whereas many previous analyses of the Leflar method have focused only on the results of cases decided in particular states, this study looks more closely not just at the results, but at the methodology employed by courts in reaching those results.⁸⁷ In particular, it breaks each decision down into the particular steps taken by the court in deciding the choice-of-law question. Not only does this article look at the

83. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (holding that a federal court sitting in diversity must apply the forum state's choice-of-law rules).

84. See *infra* Part II. That so many choice-of-law disputes are decided in federal court should not come as a surprise. Choice-of-law cases are, by definition, multi-jurisdictional. See *supra* text accompanying note 18. Many, though not all, multi-jurisdictional disputes, involve domiciliaries of different states, and cases involving domiciliaries of different states qualify for federal diversity jurisdiction so long as the amount in controversy exceeds \$75,000. See 28 U.S.C. § 1332(a).

85. See, e.g., *Hughes v. Wal-Mart Stores, Inc.*, 250 F.3d 618, 621 (8th Cir. 2001) (citing the Eighth Circuit's decision in *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 740-41 (8th Cir. 1995), for choice-of-law precedent); *Nw. Airlines, Inc. v. Astraeva Aviation Servs., Inc.*, 111 F.3d 1386, 1394 (8th Cir. 1997) (same).

86. See, e.g., *Pardey v. Boulevard Billiard Club*, 518 A.2d 1349, 1352 (R.I. 1986) (citing the First Circuit's decision in *Turcotte v. Ford Motor Co.*, 494 F.2d 173, 178 n.6 (1st Cir. 1974), for choice-of-law precedent); *Faegre & Benson, LLP v. Lee*, No. 27-CV-09-13602, 2010 WL 5293453, at *1 (Minn. Ct. App. Dec. 28, 2010) (citing the Eighth Circuit's decision in *Nesladek*, 46 F.3d at 737, for choice-of-law precedent).

87. To the limited extent such results-focused raw data is independently useful, the data compiled for this article suggest a moderate bias in favor of applying forum law and in favor of applying the law that maximizes the plaintiff's potential recovery. Of the 245 cases analyzed for this article in which courts applied the Leflar method, courts applied forum law in 140 cases and the law maximizing plaintiff's potential recovery in 142 cases. Those results, however, could be skewed by a number of factors, including the types of disputes at issue, the laws to be chosen from, and the merits of each individual case. Those limitations do not similarly handicap a more qualitative analysis.

specific questions different courts ask in resolving choice-of-law questions, but it also picks out the many different factors they consider in answering those questions and what result they reach based on those factors. In many cases, courts applying the Leflar method follow familiar analytical paths to address choice-of-law problems; that is, they apply the same steps in more or less the same ways. In many more cases, however, courts—even courts within the same state—take wildly divergent tacks in addressing the similar choice-of-law fact patterns. The differences—not only as to how or when courts go about applying the choice-influencing considerations but also as to what factors they consider in doing so—offer a more intricate and varied depiction of the Leflar method in action than do the numerous studies that simply classify all Leflar cases based on outcome, without looking at the mechanics of how the court reached that outcome.

The picture provided after all this study is a murky one, full of seeming inconsistencies or outright contradictions. But it is only by describing and cataloguing all the different ways courts apply the Leflar method that scholars and students can finally obtain a truly accurate understanding of the method's benefits and drawbacks as a choice-of-law system.

II. THE LEFLAR METHOD IN REALITY

Five states—Arkansas, New Hampshire, Rhode Island, Minnesota, and Wisconsin—currently apply the Leflar method to help resolve at least some choice-of-law questions.⁸⁸ While these states purportedly use the same choice-of-law methodology, there are actually considerable discrepancies in how and when each of them interprets and applies the choice-influencing considerations. Further complicating matters, courts in these states do not always apply the Leflar criteria in the same way from case to case. Rather, there are significant variations and inconsistencies in how courts within the same state interpret and apply parts of Leflar's approach.

In short, anyone looking for clarity, consistency, or an intelligible blueprint for how these five states apply the Leflar method will not find it in the case law. Quite the opposite, a survey of the relevant state and federal cases reveals just how inconsistent and unpredictable each of these states is in applying the Leflar method. Nevertheless, there is value in examining exactly how courts in Arkansas, New Hampshire, Rhode Island, Minnesota, and Wisconsin have used (or avoided using) the choice-influencing considerations. Each of these states has created or exploited dozens of ambiguities in the Leflar method. Individually, these ambiguities would introduce a worrisome degree of subjectivity into what is supposed to be an

88. See SYMEONIDES, *supra* note 7, at 64.

objective choice-of-law inquiry; taken together, they all but eviscerate any shred of consistency in these states' approaches to choice of law. Understanding these ambiguities and the role they play in each of the states applying the Leflar criteria is important to appreciating some significant shortcomings in both the Leflar method and the body of scholarship surrounding it.

A. Arkansas

In 1977, Arkansas officially adopted the better law method for use in deciding choice-of-law questions in tort cases.⁸⁹ The better law method, however, is not the only choice-of-law system Arkansas courts apply in tort cases. Instead, Arkansas cases—especially the more recent ones—intermittently reference the *lex loci delicti* choice-of-law approach as a guiding standard.⁹⁰ In fact, however, the use of the term *lex loci delicti* (which translates literally to “law of the place of the wrong”⁹¹) is misleading, since Arkansas courts frequently use this phrase to refer not exclusively to the law of the place of the wrong but rather to the law of the state having the most significant relationship to the case.⁹²

89. See *Wallis v. Mrs. Smith's Pie Co.*, 550 S.W.2d 453, 456-58 (Ark. 1977) (in banc). In contracts cases, by contrast, Arkansas applies the law of the state having the most “significant contacts” with the case. See, e.g., *Threlkeld v. Worsham*, 785 S.W.2d 249 (Ark. Ct. App. 1990).

90. E.g., *Miller v. Pilgrim's Pride Corp.*, 366 F.3d 672, 674 (8th Cir. 2004) (“Accordingly, we must consider the *lex loci delicti* rule within the framework of the five Leflar factors.”); *Tyler v. Alltel Corp.*, 265 F.R.D. 415, 425 (E.D. Ark. 2010) (“Arkansas has not, however, altogether discarded the traditional approach of *lex loci delicti*, so a court ‘must consider the *lex loci delicti* rule within the framework of the five Leflar factors.’” (quoting *Miller*, 366 F.3d at 674)); *Chen Hain Lin v. Dyrone Beavers*, No. 08-CV-4033, 2009 WL 2998934, at *1 (W.D. Ark. Sept. 14, 2009) (“Courts should consider both the doctrine of *lex loci delicti* and the Leflar factors.”); *Ganey v. Kawasaki Motors Corp., U.S.A.*, 234 S.W.3d 838, 847 (Ark. 2006) (“[T]he trial court properly considered both the doctrine of *lex loci delicti* and the five choice-influencing considerations promulgated by Professor Leflar and determined that Louisiana had a more significant relationship to the parties and subject litigation and that Leflar’s five factors also favored application of Louisiana law.”); *S. Farm Bureau Cas. Ins. Co. v. Craven*, 89 S.W.3d 369, 373 (Ark. Ct. App. 2002) (“[O]ur supreme court has recognized that the *lex loci delicti* rule need not be mechanically applied, and has considered, in addition to that rule, five choice-influencing considerations established by Professor Leflar.”).

91. BLACK’S LAW DICTIONARY 995 (9th ed. 2009).

92. E.g., *Ganey*, 234 S.W.3d at 847 (*lex loci delicti* deemed to support application of Louisiana law, though court recognized Arkansas as the location of the accident at issue); *Williams v. Carr*, 565 S.W.2d 400, 403-04 (Ark. 1978) (“[I]n 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”). But see *Weary v. Strong Mfg. Co.*, No. 5:09CV00225 BSM, 2011 WL 1159069, at *1-2 (E.D. Ark. Mar. 29, 2011) (noting that the *lex loci* doctrine dictates that courts apply the law of the state where the injury occurred).

Regardless of the nomenclature attached to it, the continued vitality of this *lex loci* or significant contacts standard is clear. The Arkansas Supreme Court has pointedly refused to overrule earlier precedents applying the *lex loci delicti* approach⁹³ and, instead, has recently reaffirmed that it “adopted the choice-influencing factors . . . to soften the formulaic application of *lex loci delicti*.”⁹⁴ The Court did not specify precisely how the better law method should be applied to “soften” application of Arkansas’ version of *lex loci delicti*, resulting in inconsistencies in the way the lower courts have applied the two standards. Some courts have suggested that the better law method and the most significant relationship standard should both be applied to a case, but each standard should be applied independently.⁹⁵ Others have said that courts “must consider the *lex loci delicti* rule within the framework of the five Leflar factors.”⁹⁶ Still others have said the two tests are the same, so that applying one is the functional equivalent of applying the other.⁹⁷

The effect of this eclectic approach, whatever its exact form, is more pronounced in some cases than in others. In most cases, especially those decided by Arkansas’ lower courts, there is hardly a mention of the *lex loci delicti* standard, and, instead, the courts proceed exclusively using the better law method.⁹⁸ Even when a court

93. *E.g.*, *Tyler*, 265 F.R.D. at 425; *Schubert v. Target Stores, Inc.*, 201 S.W.3d 917, 921-22 (Ark. 2005); *Gomez v. ITT Educ. Servs., Inc.*, 71 S.W.3d 542, 546 (Ark. 2002).

94. *Schubert*, 201 S.W.3d at 922.

95. *E.g.*, *Ganey*, 234 S.W.3d at 847 (noting that Arkansas’ choice-of-law analysis “ha[s] evolved from a simple application of the doctrine of *lex loci delicti* into a consideration of both that doctrine and Leflar’s five choice-influencing factors.”); *S. Farm Bureau Cas. Ins. Co.*, 89 S.W.3d at 373 (“[O]ur supreme court has recognized that the *lex loci delicti* rule need not be mechanically applied, and has considered, in addition to that rule, five choice-influencing considerations established by Professor Leflar to determine which state’s law should govern.”).

96. *Miller v. Pilgrim’s Pride Corp.*, 366 F.3d 672, 674 (8th Cir. 2004); *see, e.g.*, *Williams v. Carr*, 565 S.W.2d 400, 403-04 (Ark. 1978) (“[I]n 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”); *Weary v. Strong Mfg. Co.*, No. 5:09CV00225 BSM, 2011 WL 1159069, at *1 (E.D. Ark. Mar. 29, 2011) (“When determining choice-of-laws questions, Arkansas courts apply the doctrine of *lex loci delicti* and the five choice-influencing factors Under [that doctrine], the law of the place where the wrong took place is the proper choice of law.”).

97. *E.g.*, *Hughes v. Wal-Mart Stores, Inc.*, 250 F.3d 618, 620 (8th Cir. 2001) (noting that Arkansas has abandoned the *lex loci* rule, but that, using the better law method, “an Arkansas 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.’” (quoting *Williams*, 565 S.W.2d at 404)); *Simpson v. Liberty Mut. Ins. Co.*, 28 F.3d 763, 764 (8th Cir. 1994) (“To determine which state has the most significant relationship, an Arkansas court will weigh the following choice-influencing considerations”).

98. *E.g.*, *In re Air Disaster at Little Rock, Arkansas on June 1, 1999*, 125 F. Supp. 2d 357, 360 (E.D. Ark. 2000); *Sanders v. Lakin*, No. 3:04CV00307 SWW, 2006 WL

does invoke the *lex loci delicti* standard, it is often solely for the purpose of noting that other considerations require the court to reach the result opposite to the one suggested by the *lex loci* standard.⁹⁹ In a number of cases, including several decided by the Arkansas Supreme Court,¹⁰⁰ the courts have relied heavily on *lex loci delicti* to explain their decisions.¹⁰¹ Illustrative of this approach is *F.D.I.C. v. Deloitte & Touche*, in which the United States District Court for the Eastern District of Arkansas noted that there was “no need to discuss or even to mention the five ‘choice influencing considerations,’” since Arkansas so clearly had the most significant relationship to the facts.¹⁰² The significance of the better law factors thus varies from case-to-case, with the factors sometimes being all-important and sometimes being balanced against other considerations.

1. Predictability of Results

Where the Arkansas courts have applied the better law factors—sometimes in connection with the most significant relationship analysis, sometimes by themselves—the results have been less than consistent. Many cases, for example, hold that predictability of results—the first choice-influencing consideration—is not a significant factor in unplanned torts cases; that it applies almost exclusively to planned transactions.¹⁰³ There are exceptions, however. Where a case involves both tort and contract principles—for example, a case involving payments made under an insurance contract following a car accident,¹⁰⁴—the courts have invoked the

827835, at *3 (E.D. Ark. Mar. 30, 2006); *Schlemmer v. Fireman’s Fund Ins. Co.*, 730 S.W.2d 217, 218-19 (Ark. 1987).

99. *E.g.*, *S. Farm Bureau Cas. Ins. Co.*, 89 S.W.3d at 373.

100. *See Schubert v. Target Stores, Inc.*, 201 S.W.3d 917, 921-22 (Ark. 2005) (listing a number of Arkansas Supreme Court decisions that relied on the Arkansas *lex loci* analysis to reach their conclusions).

101. *E.g.*, *Ray v. Am. Airlines, Inc.*, No. 08-5025, 2009 WL 921124, at *2-3 (W.D. Ark. Apr. 2, 2009); *Norton v. Luttrell*, 257 S.W.3d 580, 582-83 (Ark. Ct. App. 2007); *Threlkeld v. Worsham*, 785 S.W.2d 249, 253 (Ark. Ct. App. 1990).

102. 834 F. Supp. 1129, 1134 n.3 (E.D. Ark. 1992).

103. *See, e.g.*, *Simpson v. Liberty Mut. Ins. Co.*, 28 F.3d 763, 765 (8th Cir. 1994) (“The first two considerations [including predictability of results] seem to us to have only marginal relevance to this case.”); *Harris v. City of Memphis*, 119 F. Supp. 2d 893, 896 (E.D. Ark. 2000) (“The first factor, the predictability of results, is unimportant in a tort action and does not apply.”); *Tyler v. Alltel Corp.*, 265 F.R.D. 415, 426 (E.D. Ark. 2010) (“[T]he predictability of results, ‘is most relevant when parties have expectations about the applicable law, such as in “consensual transactions where people should know in advance what law will govern their act”’” (quoting *Nw. Airlines, Inc. v. Astraea Aviation Servs., Inc.*, 111 F.3d 1386, 1394 (8th Cir.1997))); *Schlemmer*, 730 S.W.2d at 219 (“As with other accident cases, the predictability consideration had no bearing on the unplanned injury.”).

104. *E.g.*, *Lee v. Overbey*, No. 08-2115, 2009 WL 2386095, at *1 (W.D. Ark. July 31, 2009); *Schlemmer*, 730 S.W.2d at 219.

predictability consideration (because of the parties' contractual agreement), even where the case is characterized as sounding in tort.¹⁰⁵ And there are pure tort cases, lacking any relationship to a contract, where Arkansas courts have nevertheless weighed predictability of results in reaching a choice-of-law decision.¹⁰⁶ Thus, while predictability is generally not a factor in torts cases, courts make an exception where the tort relates to a contract between the parties.

Arkansas courts alternately focus on two concerns when applying the predictability consideration: preventing forum shopping and ensuring uniform results.¹⁰⁷ How Arkansas courts effectuate each of these aims, however, varies greatly depending on the case. In cases where a tort is linked to a contract, ensuring uniform results often means divining and effectuating the expectations of the contracting parties at the time of contracting.¹⁰⁸ But, on occasion, the predictability inquiry devolves into a standard that resembles a significant contacts test, with courts cumulating meaningful contacts to determine the state whose law would most advance predictability.¹⁰⁹ Earlier cases also held that predictability of results militated in favor of enforcing the primary conduct laws (e.g., speed limits) of the place where a tort occurred, though no Arkansas court has applied this reasoning in over thirty years.¹¹⁰

2. Maintenance of Interstate Order

Arkansas courts have been even less uniform in applying the second better law criterion, maintenance of interstate and international order. In some types of tort cases—principally involving accidents—courts have held that this criterion is of little or no

105. *E.g.*, *Schlemmer*, 730 S.W.2d at 219; *S. Farm Bureau Cas. Ins. Co. v. Craven*, 89 S.W.3d 369, 373 (Ark. Ct. App. 2002) (“While an insurer and an insured may not be able to predict where an automobile accident may occur, they will always know the state where the contract was entered into, where the insured resides, and where the insured automobiles are registered.”).

106. *E.g.*, *Ray*, 2009 WL 921124, at *3 (analyzing predictability consideration in a case between parties with no contractual relationship); *Gomez v. ITT Educ. Servs., Inc.*, 71 S.W.3d 542, 547 (Ark. 2002) (same).

107. *Schubert v. Target Stores, Inc.*, 201 S.W.3d 917, 922 (Ark. 2005); *Gomez*, 71 S.W.3d at 547; *Bourgeois v. Vanderbilt*, 639 F. Supp. 2d 958, 963 (W.D. Ark. 2009).

108. *E.g.*, *Lane v. Celadon Trucking, Inc.* 543 F.3d 1005, 1010-11 (8th Cir. 2008) (emphasizing that employees could reasonably foresee that Indiana law would apply to their contracts with employer); *Tyler*, 265 F.R.D. at 426 (“A person who enters into a consumer transaction in his home state may reasonably expect any issues arising from the transaction to be governed by the laws of his home state.”).

109. *E.g.*, *Lee*, 2009 WL 2386095, at *1 (predictability in car crash case hinges, at least partially, on where the car was registered and insured and where the driver was domiciled).

110. *See Williams v. Carr*, 565 S.W.2d 400, 404 (Ark. 1978); *Wallis v. Mrs. Smith's Pie Co.*, 550 S.W.2d 453, 458-59 (Ark. 1977).

significance, because unplanned torts are unlikely to affect interstate relationships.¹¹¹ The courts have said that maintenance of interstate order is a significant consideration, however, where applying a particular law will lessen or impair the flow of interstate commerce and social traffic or impermissibly interfere with a state's sovereignty.¹¹² Before applying this criterion to favor one state's law over another's, courts usually require that the state whose law is chosen have, at minimum, a significant relationship with the case.¹¹³ Applying the law of a state without a significant relationship to the case, they reason, would be unfair and arbitrary and could potentially upset commercial and political relationships between states.¹¹⁴

3. Simplification of the Judicial Task

Arkansas courts often summarily dismiss the third better law criterion—simplification of the judicial task—as a major consideration in their choice-of-law analyses.¹¹⁵ In many of the

111. *E.g.*, *Miller v. Pilgrim's Pride Corp.*, 366 F.3d 672, 674 (8th Cir. 2004); *In re Air Disaster at Little Rock, Arkansas* on June 1, 1999, 125 F. Supp. 2d 357, 360 (E.D. Ark. 2000); *Schlemmer v. Fireman's Fund Ins. Co.*, 730 S.W.2d 217, 219 (Ark. 1987).

112. *E.g.*, *Schlemmer*, 730 S.W.2d at 219 ("Free highway traffic between the states will not be lessened, nor will either states' concern with its sovereignty be affected by the choice of either states' law. Neither of the states' laws is favored under this consideration."); *Lee*, 2009 WL 2386095, at *2.

113. *See, e.g.*, *Hughes v. Wal-Mart Stores, Inc.*, 250 F.3d 618, 620-21 (8th Cir. 2001) ("The factor is generally not implicated if the state whose law is to be applied has 'sufficient contacts with and interest in the facts and issues being litigated.'" (quoting *Myers v. Gov't Emps. Ins. Co.*, 255 N.W.2d 238, 242 (Minn. 1974))); *Jones v. Ford*, No. 4:06CV00542-WRW, 2008 WL 2986411, at *3 (E.D. Ark. July 31, 2008) ("Maintenance of interstate order is not normally implicated if the state whose law is to be applied has sufficient contacts with and interest in the facts and issues being litigated." (quoting *Hughes*, 250 F.3d at 620) (internal quotations omitted)); *Ganey v. Kawasaki Motors Corp., U.S.A.*, 234 S.W.3d 838, 847 (Ark. 2006) ("The second factor . . . favors the application of Louisiana law because Louisiana has a more significant relationship to the parties.").

114. *See Harris v. City of Memphis*, 119 F. Supp. 2d 893, 896 (E.D. Ark. 2000) ("Certainly, the harmonious relationship between the two states would not be enhanced if this Court were to ignore the immunity granted under Tennessee law simply because the accident occurred a few yards on this side of the state line. Therefore, Tennessee has a more significant interest in this case than does Arkansas." (citation omitted)).

115. *E.g.*, *Miller*, 366 F.3d at 674 ("As for simplification of the judicial task, application of either state's laws will not simplify our task and, by their very nature, federal courts regularly apply the laws of foreign jurisdictions, which relegates this factor to a minor concern at most."); *In re Air Disaster*, 125 F. Supp. 2d at 360 ("The third consideration . . . may have some slight relevance but is not a major consideration."); *Schubert v. Target Stores, Inc.*, 201 S.W.3d 917, 922 (Ark. 2005) ("[S]implication of the judicial task . . . is not a paramount consideration, because the law at issue does not exist for the convenience of the court that administers it, but for society and its members.").

instances in which they actually address the criterion, they typically find that it is satisfied so long as “[t]he [c]ourt is capable of determining, interpreting, and applying” a given law.¹¹⁶ Not surprisingly, in none of the Arkansas cases surveyed did the court admit it was incapable of understanding or applying a law.

In the handful of cases where Arkansas courts have accorded this factor some actual weight, they have held that it militates in favor of applying outcome-determinative laws over laws that are not immediately outcome determinative.¹¹⁷ So, for example, the third factor supports applying laws barring an action, rather than laws allowing an action to proceed, since barring the action spares the court the difficulties of actually considering the merits of the case.¹¹⁸ Not all Arkansas courts have accepted or applied this outcome-determinative analysis, however, and many have expressly rejected it in favor of simply minimizing the significance of the third consideration.¹¹⁹

That said, simplification of the judicial task does play a role in Arkansas choice-of-law analysis even when it is nominally dismissed as a significant choice-of-law factor: Arkansas applies this criterion through use of the familiar substance-procedure distinction.¹²⁰ Like most states, Arkansas still follows the rule that a forum may always apply its own procedural and remedial rules, regardless of what substantive law it applies.¹²¹ This rule is largely justified on the ground that it saves courts from having to learn the oftentimes

116. *State Farm Mut. Auto. Ins. Co. v. Shelby Cnty. Health Care Corp.*, No. 3:10CV00169, 2011 WL 5508854, at *4 (E.D. Ark. Nov. 10, 2011) (quoting *Harris*, 119 F. Supp. 2d at 896); *see also* *Lane v. Celadon Trucking, Inc.*, 543 F.3d 1005, 1011 (8th Cir. 2008) (“It is easy to apply Indiana’s subrogation statute. Likewise, it is easy to apply the Arkansas made-whole rule.”); *Sanders v. Lakin*, No. 3:04CV00307 SWW, 2006 WL 827835, at *3 (E.D. Ark. Mar. 30, 2006) (“[S]implification of the judicial task is not a paramount consideration as this Court is able to apply the law of either state without difficulty.”).

117. *E.g.*, *Simpson v. Liberty Mut. Ins. Co.*, 28 F.3d 763, 765 (8th Cir. 1994) (applying outcome-determinative laws simplifies the judicial task); *Schubert*, 201 S.W.3d at 922 (third criterion encourages courts to apply an out-of-state law when it is outcome-determinative and easy to apply).

118. *E.g.*, *Weary v. Strong Mfg. Co.*, No. 5:09CV00225 BSM, 2011 WL 1159069, at *2 (E.D. Ark. Mar. 29, 2011); *Ganey*, 234 S.W.3d at 847; *Gomez v. ITT Educ. Servs., Inc.*, 71 S.W.3d 542, 547 (Ark. 2002).

119. *See supra* note 115.

120. *See, e.g.*, *Doan v. Consumer Testing Labs., Inc.*, 2 F. Supp. 2d 1209, 1214 (W.D. Ark. 1998) (applying Arkansas’ direct action statute because direct action statutes are procedural); *Middleton v. Lockhart*, 139 S.W.3d 500, 502-03 (Ark. 2003) (because statutes of limitations are procedural, the forum’s statute of limitations applies); *Norton v. Luttrell*, 257 S.W.3d 580, 582 (Ark. Ct. App. 2007) (“Under traditional conflicts-of-law analysis, procedural matters are governed by the law of the forum . . .”).

121. *See supra* note 115.

highly-technical and complicated procedural and remedial rules of sister states; in other words, it simplifies the judicial task.¹²² Although some Arkansas courts have analyzed traditionally procedural laws (e.g., statutes of limitations) under the better law analysis,¹²³ many others have simply declared such laws to be procedural and applied the Arkansas rule of law.¹²⁴ Even more confusing is the fact that laws treated as procedural in some instances are elsewhere treated as substantive.¹²⁵

In often dismissing the significance of simplifying the judicial task, the Arkansas courts have ignored Leflar's insistence that this criterion, in fact, has significance, apart from any role it might play in resolving actual conflicts of law, because of its potential to eliminate false conflicts. Leflar defined such conflicts as those where "the laws of both states, relevant to the set of facts, are the same, or would produce the same result in the lawsuit."¹²⁶ He suggested that consideration of the third criterion dictates that courts should short-circuit a complex choice-of-law analysis where it is clear that the choice of one state's law over another's would not change the outcome.¹²⁷ But there is only one reported case in which an Arkansas court found a false conflict and thereafter ceased its choice-of-law analysis.¹²⁸ More often, Arkansas courts simply factor the consistency of the laws of two states into a continuing conflicts analysis, treating the absence of any conflict between the states' laws not as dispositive with respect to the need for any further choice-of-law analysis, but instead as evidence only that the result of the case will, by definition, be uniform and predictable, regardless of what law is chosen.¹²⁹ An

122. See *NYU Article*, *supra* note 1, at 289.

123. *E.g.*, *Weary*, 2011 WL 1159069, at *2.

124. *E.g.*, *Doan*, 2 F. Supp. 2d at 1214 (applying Arkansas' direct action statute because direct action statutes are procedural); *Middleton*, 139 S.W.3d at 502-03 (applying Arkansas' statute of limitation because statutes of limitations are procedural); *Norton*, 257 S.W.3d at 582 (applying Arkansas' standing rules because standing rules are procedural).

125. Compare, *e.g.*, *Middleton*, 139 S.W.3d at 502-03 (holding that statutes of limitations are procedural and that, consequently, Arkansas' statute of limitations applies), with *Gomez v. ITT Educ. Servs., Inc.*, 71 S.W.3d 542, 546-48 (Ark. 2002) (applying substantive choice-of-law principles to conflict between statutes of limitations).

126. *NYU Article*, *supra* note 1, at 290.

127. *Id.*

128. *Bettis v. Bettis*, 239 S.W.3d 5, 6 (Ark. Ct. App. 2006).

129. *E.g.*, *Miller v. Pilgrim's Pride Corp.*, 366 F.3d 672, 674 (8th Cir. 2004) ("Because . . . the laws of Texas and Arkansas would yield substantially the same result, this factor does not weigh heavily in the balance."); *Weary v. Strong Mfg. Co.*, No. 5:09CV00225 BSM, 2011 WL 1159069, at *2 (E.D. Ark. Mar. 29, 2011) (observing that predictability of results was not implicated because the two laws at issue did not conflict on the question of recovery at issue in that case); *Jones v. Ford*, No. 4:06CV00542-WRW, 2008 WL 2986411, at *3 (E.D. Ark. July 31, 2008) (noting that

Arkansas court finding a false conflict is more likely to say that the false conflict renders predictability of results (the first choice-influencing consideration) a moot point than it is to say that the choice-of-law issue is itself mooted.¹³⁰

Unlike many states, which make false conflicts analysis the first step of their choice-of-law analysis,¹³¹ Arkansas does not do so. In states where a check for false conflicts is a more significant threshold inquiry, with the potential to put an early end to the whole choice-of-law inquiry, simplifying the judicial task effectively plays a more significant role than it does in Arkansas.

4. Forum's Governmental Interests

Arkansas courts have said that the forum's governmental interests—the fourth choice-influencing consideration—are especially important in torts cases.¹³² The name attached to this criterion, though, is something of a misnomer to the extent it suggests that courts will look only to the *forum's* interests, and not to the interests of other states. In Arkansas—and as well in other states¹³³—this criterion isn't limited to consideration of Arkansas' interests; instead, most Arkansas courts have expressly considered foreign states' interests under this criterion.¹³⁴ These courts undertake a sort of balancing test under the fourth criterion, weighing the interests of

the supposedly conflicting state laws actually required the same elements for fraud, obviating the need for further analysis under the predictability criterion).

130. See *supra* note 129 and accompanying text.

131. See *infra* Parts II.D, II.E.

132. See *Harris v. City of Memphis*, 119 F. Supp. 2d 893, 896 (E.D. Ark. 2000) ("The fourth factor, advancement of the forum's governmental interest, is often considered the most significant in tort actions."); *In re Air Disaster at Little Rock, Arkansas* on June 1, 1999, 125 F. Supp. 2d 357, 360 (E.D. Ark. 2000) ("A state's strong policy concerns, represented by [advancement of the forum's governmental interests], can arise in connection with almost any area of the law, but are especially important in personal injury and other torts cases." (quoting Robert A. Leflar, *Conflict of Laws: Arkansas—The Choice-Influencing Considerations*, 28 ARK. L. REV. 199, 203–04 (1974)) (alteration in original) (emphasis removed)); see also *Schlemmer v. Fireman's Fund Ins. Co.*, 730 S.W.2d 217, 219 (Ark. 1987) (relying extensively on the last two choice-influencing considerations in a personal injury case).

133. See *infra* Parts II.B.4, II.C.4, II.D.4, II.E.4.

134. *E.g.*, *Tyler v. Alltel Corp.*, 265 F.R.D. 415, 426–27 (E.D. Ark. 2010) (considering Wisconsin's interests under the fourth choice-influencing consideration); *Lin v. Beavers*, No. 08-CV-4033, 2009 WL 2998934, at *3 (W.D. Ark. Sept. 14, 2009) (weighing Louisiana's minimal contacts with the case against Arkansas' more substantial contacts with the case); *Ray v. Am. Airlines, Inc.*, No. 08-5025, 2009 WL 921124, at *3 (W.D. Ark. Apr. 2, 2009) ("While Arkansas obviously has an interest in protecting its residents; Texas, too, has an interest in protecting residents of all states who travel inside its borders."); *Ganey v. Kawasaki Motors Corp., U.S.A.*, 234 S.W.3d 838, 847 ("Louisiana's right to protect its citizens through application of its products liability laws is a significant factor that outweighs any interest Arkansas might have in this case.").

Arkansas against the interests of the foreign state.¹³⁵

Arkansas courts generally determine a state's governmental interests by counting contacts (i.e., the more contacts a case has with a particular state, the more of an interest that state has in the matter).¹³⁶ Thus, courts weigh factors like site of the tort, domicile of the parties, and the site of any agreements or other relevant interactions between the parties as important under this category.¹³⁷ The more these contacts are concentrated in Arkansas, the more likely a court is to hold that the fourth criterion militates in favor of applying Arkansas law.¹³⁸ Arkansas courts also occasionally find an interest for Arkansas simply because of Arkansas' role as a "justice-administering state," a term meaning that Arkansas has an interest in its courts adjudicating cases in a manner consistent with Arkansas' standards of justice.¹³⁹ This characterization is so amorphous as to permit Arkansas courts to assert an interest in virtually any case commenced in the state, regardless of whether the action has any other contacts with the forum.¹⁴⁰

5. Better Rule of Law

With respect to the fifth choice-influencing consideration—better rule of law—the Arkansas courts have, in general, been reluctant to decide what laws are "better"—either because they don't believe courts should make that sort of policy determination,¹⁴¹ or because

135. See *supra* note 134 and accompanying text; see also *Miller v. Pilgrim's Pride Corp.*, 366 F.3d 672, 674-75 (8th Cir. 2004) (holding that "it is in Arkansas' interest to have the case decided by applying Texas law in order to vindicate Texas's interest in having its workers compensation scheme applied in a uniform manner."); *Harris*, 119 F. Supp. 2d at 896 ("Arkansas has an interest in protecting its residents who are victims of torts. Yet, Tennessee also has an interest in protecting its municipalities through its sovereign immunity." (citation omitted)).

136. *E.g.*, *Bourgeois v. Vanderbilt*, 639 F. Supp. 2d 958, 964 (W.D. Ark. 2009) (noting the paucity of Arkansas contacts relative to Louisiana contacts under the fourth consideration); *Schubert v. Target Stores, Inc.*, 201 S.W.3d 917, 923 (Ark. 2005) (applying Arkansas law, in part, because Arkansas had an interest in the case based on its connections with the litigation); *Gomez v. ITT Educ. Servs., Inc.*, 71 S.W.3d 542, 547 (Ark. 2002) (suggesting that Arkansas had no interest in the case because it lacked significant contacts with the case).

137. *E.g.*, *Schubert*, 201 S.W.3d at 923; *Gomez*, 71 S.W.3d at 547; *Sanders v. Lakin*, No. 3:04CV00307 SWW, 2006 WL 827835, at *3 (E.D. Ark. Mar. 30, 2006).

138. See *supra* note 137.

139. *E.g.*, *Lee v. Overbey*, No. 08-2115, 2009 WL 2386095, at *3 (W.D. Ark. July 31, 2009); *In re Air Disaster at Little Rock, Arkansas on June 1, 1999*, 125 F. Supp. 2d 357, 360-62 (E.D. Ark. 2000).

140. See *Lee*, 2009 WL 2386095, at *3 ("Arkansas has a governmental interest as the forum state, regardless of the domiciles of the parties, because this Court is located in the Western District of Arkansas.").

141. *E.g.*, *Lane v. Celadon Trucking, Inc.*, 543 F.3d 1005, 1011 (8th Cir. 2008) ("[Because] laws do not necessarily lend themselves to being labeled either 'better' or 'worse,' we have counseled that courts should refrain from pronouncing the better law

they do not believe they can make a principled decision in favor of one law or another.¹⁴² Interestingly, the one court that does not seem to have any compunction in deciding what law is “better” is the Arkansas Supreme Court, which has picked a “better” law in almost all of its seminal choice-of-law cases.¹⁴³ These opinions—and the lower court opinions that do reach the fifth criterion—identify a handful of factors for courts to consider in deciding what law is better: (1) laws that are “archaic and unfair” are worse than laws that make “good socio-economic sense for the time when the court speaks;”¹⁴⁴ (2) laws that give plaintiffs their days in court and do not immediately foreclose the possibility of recovery are better than the alternative;¹⁴⁵ and (3) laws that promote fair commercial transactions and further the parties’ intent are better than laws that do not.¹⁴⁶ But any objectivity introduced (or sought to be introduced) by these considerations¹⁴⁷ is diminished insofar as most Arkansas courts conveniently omit any mention of them when they suggest a result different from the one reached by the court.¹⁴⁸

when the other Leflar factors point decidedly toward the application of one state’s law.” (quoting *Hughes v. Wal-Mart Stores, Inc.*, 250 F.3d 618, 621 (8th Cir. 2001)) (internal quotation marks omitted); *Harris v. City of Memphis*, 119 F. Supp. 2d 893, 896 (E.D. Ark. 2000) (“This Court also finds that it is not in the position to decide which is the better rule of law.”).

142. *E.g.*, *Miller v. Pilgrim’s Pride Corp.*, 366 F.3d 672, 675 (8th Cir. 2004) (refusing to address which law is better); *Hughes*, 250 F.3d at 622 (“Because our subjective view of which law represents the more reasoned approach would not persuade us that Arkansas law should apply in light of the considerations already discussed, we too decline to address the factor any further.”); *State Farm Mut. Auto Ins. Co. v. Shelby Cnty. Health Care Corp.*, No. 3:10CV00169, 2011 WL 5508854, at *4 (E.D. Ark. Nov. 10, 2011) (“The court is not in a position to say which state has the better law regarding hospital liens.”); *Sanders*, 2006 WL 827835, at *3 (noting that, because the conflicting state laws were substantially the same, “the Court cannot say one is ‘better’ than the other”).

143. *E.g.*, *Ganey v. Kawasaki Motors Corp., U.S.A.*, 234 S.W.3d 838, 847 (Ark. 2006); *Schubert v. Target Stores, Inc.*, 201 S.W.3d 917, 923 (Ark. 2005); *Gomez v. ITT Educ. Servs., Inc.*, 71 S.W.3d 542, 548 (Ark. 2002); *Schlemmer v. Fireman’s Fund Ins. Co.*, 730 S.W.2d 217, 219 (Ark. 1987); *Wallis v. Mrs. Smith’s Pie Co.*, 550 S.W.2d 453, 457 (Ark. 1977).

144. *See Miller*, 366 F.3d at 675; *Hughes*, 250 F.3d at 621-22; *Harris*, 119 F. Supp. 2d at 896; *Schlemmer*, 730 S.W.2d at 219.

145. *See Tyler v. Alltel Corp.*, 265 F.R.D. 415, 427 (E.D. Ark. 2010); *Jones v. Ford*, No. 4:06CV00542-WRW, 2008 WL 2986411, at *3 (E.D. Ark. July 31, 2008); *In re Air Disaster at Little Rock, Arkansas on June 1, 1999*, 125 F. Supp. 2d 357, 362 (E.D. Ark. 2000); *Schubert*, 201 S.W.3d at 921-23; *Wallis*, 550 S.W.2d at 455-59.

146. *See Miller*, 366 F.3d at 675; *Weary v. Strong Mfg. Co.*, No. 5:09CV00225 BSM, 2011 WL 1159069, at *2 (E.D. Ark. Mar. 29, 2011).

147. *See Miller*, 366 F.3d at 675 (noting that the use of objective criteria is designed to limit the extent to which the better rule criterion reflects “a subjective judicial preference for one state’s more or less elegant law”); *Hughes*, 250 F.3d at 621 (same).

148. *See, e.g.*, *Sanders v. Lakin*, No. 3:04CV00307 SWW, 2006 WL 827835, at *3 (E.D. Ark. Mar. 30, 2006) (declining to say what immunity rule was preferable, even

B. New Hampshire

New Hampshire was the first state to apply the better law method to choice-of-law problems, with the New Hampshire Supreme Court officially adopting the better law method for torts cases in 1966.¹⁴⁹ Unlike Arkansas courts, New Hampshire courts do not purport to apply any considerations other than the five better law considerations in deciding choice-of-law questions in tort cases.¹⁵⁰

1. Predictability of Results

The predictability of results consideration functions in New Hampshire much as it does in Arkansas, the general rule being that it “is usually implicated only in suits involving contractual or similar consensual transactions.”¹⁵¹ Thus, in most negligence cases (e.g., car accidents), predictability of results is largely irrelevant, since the parties are not presumed to have planned the conduct giving rise to the litigation.¹⁵² Where the parties have any sort of contractual relationship that relates to the tort at issue (e.g., an employment relationship), New Hampshire courts will consider the predictability factor,¹⁵³ and where a dispute relates to land, New Hampshire courts ascribe primary importance to the predictability factor.¹⁵⁴ In such

though one rule (the one not chosen by the court) was both more consistent with modern social concerns and did not foreclose the plaintiff's opportunity to recover).

149. *Clark v. Clark*, 222 A.2d 205, 208 (N.H. 1966). In contracts cases, New Hampshire applies the Second Restatement. *See Glowski v. Allstate Ins. Co.*, 589 A.2d 593, 594-95 (N.H. 1991).

150. *See Ferren v. General Motors Corp.*, 628 A.2d 265 (N.H. 1993); *Boucher v. Boucher*, 553 A.2d 313, 316 (N.H. 1988); *Gagne v. Berry*, 290 A.2d 624, 625 (N.H. 1972).

151. *Keeton v. Hustler Magazine, Inc.*, 549 A.2d 1187, 1194 (N.H. 1988) (citing *Clark*, 222 A.2d at 208); *see also Lessard v. Clarke*, 736 A.2d 1226, 1227-28 (N.H. 1999); *LaBounty v. Am. Ins. Co.*, 451 A.2d 161, 163 (N.H. 1982); *Clark*, 222 A.2d at 208.

152. *Sinclair v. Brill*, 815 F. Supp. 44, 47 (D.N.H. 1993); *Dunlap v. Aulson Corp.*, 90 F.R.D. 647, 650 (D.N.H. 1981); *Lessard*, 736 A.2d at 1226; *In re Wood*, 453 A.2d 1251, 1252 (N.H. 1982); *Clarke*, 222 A.2d at 208-09.

153. *E.g.*, *Benoit v. Test Sys., Inc.*, 694 A.2d 992, 995 (N.H. 1997) (“Though predictability usually has little import in accident cases because accidents are not planned, it is of more import here because the accident occurred in an established employment context.” (internal citation omitted)); *Mellitt v. Schrafft Candy Co.*, No. 80-513-D, 1981 WL 27284, at *3 (D.N.H. Dec. 21, 1981) (“Predictability of results and the justified expectations of the parties are best served by applying New Hampshire law to all aspects of the employment relationship”); *Ferren*, 628 A.2d at 267 (emphasizing the predictability consideration because the “underlying factual basis for this lawsuit is the employment relationship between GMC and Mr. Ferren.”); *LaBounty*, 451 A.2d at 163 (“[Predictability] carries more weight in this case because of additional factors [i.e., the parties’ employment relationship] not ordinarily present in automobile or airplane accidents.”).

154. *See, e.g., Boucher*, 553 A.2d at 316 (“In the instant case [involving an interest in property], by far the strongest consideration will be which law will ensure the

cases, New Hampshire courts have held that the center of the contractual relationship and the situs of the land are the best indicators of what law the parties reasonably expected would apply to a dispute.¹⁵⁵ In assessing predictability, the New Hampshire courts focus on the parties' *reasonable* expectations rather than trying to account for any specific individualized or idiosyncratic expectations of the parties before them.¹⁵⁶ Of course, what a party might reasonably expect is largely dependent on the particulars of a given case, so that what courts understand to be the parties' reasonable expectations varies with the case.

Besides facilitating the parties' reasonable expectations, New Hampshire courts occasionally list prevention of forum shopping as an objective under the predictability criterion.¹⁵⁷ Only once, however, has any New Hampshire court actually invoked the need to prevent forum shopping as the justification for its conclusion as to predictability.¹⁵⁸ Moreover, one of the seminal better law decisions in New Hampshire goes out of its way to justify a blatant example of forum shopping.¹⁵⁹ It's unclear, then, how much of a role forum shopping actually plays in New Hampshire courts' assessment of predictability.

2. Maintenance of Interstate Order

New Hampshire courts have sometimes said that maintenance of interstate order requires only that courts "apply the law of no state which does not have [a] substantial connection with the total facts and with the particular issue being litigated."¹⁶⁰ Indeed, the New

greatest predictability of the result."); *see also* Barrett v. Foster Grant Co., 450 F.2d 1146, 1152 (1st Cir. 1971) (giving substantial weight to the site of the property at issue).

155. *Barrett*, 450 F.2d at 1152 ("Predictability does not point to the place of origin of the visitor. We believe in any broad sense it points directly to where the land from which the duty arose is located."); *Guardian Angel Credit Union v. MetaBank*, No. 08-CV-261-PB, 2010 WL 1794713, at *9 (D.N.H. May 5, 2010) (predictability points to Iowa law because the business relationship between the parties "was confined to Iowa"); *Ferren*, 628 A.2d at 268 ("The underlying factual basis for this lawsuit is the employment relationship between GMC and Mr. Ferren. Surely, neither Mr. Ferren nor GMC contemplated that anything but Kansas law would govern their employment relationship [where Kansas was the site of Ferren's workplace at GMC].").

156. *E.g., Lessard*, 736 A.2d at 1227-28 ("We conclude that there are no reasonable expectations of the parties to be protected through application of either jurisdiction's law. It is doubtful that the parties considered this matter at all.").

157. *E.g., Benoit*, 694 A.2d at 995; *Ferren*, 628 A.2d at 267; *Clark*, 222 A.2d at 208.

158. *Doiron v. Doiron*, 241 A.2d 372, 374-75 (N.H. 1968).

159. *Keeton v. Hustler Magazine, Inc.*, 549 A.2d 1187, 1194 (N.H. 1988) (struggling to explain why the Court's decision would not encourage forum shopping).

160. *Lessard*, 736 A.2d at 1228; *see also* *Sinclair v. Brill*, 815 F. Supp. 44, 47-48 (D.N.H. 1993); *Keeton*, 549 A.2d at 1194; *LaBounty v. Am. Ins. Co.*, 451 A.2d 161, 164 (N.H. 1982).

Hampshire Supreme Court “has expressly rejected the argument that this factor favors the state of ‘greatest’ significance,”¹⁶¹ suggesting that this factor does not always militate in favor of a particular state, but, rather, more often serves as a bar that any state must meet in order for its law to be considered under the other factors.¹⁶² This view is consistent with the idea that the second criteria furthers the goal of preventing a court from choosing a law so unrelated to a case or issue as to offend a state having a close relationship to the case or issue.¹⁶³

A significant number of New Hampshire decisions, however, have used this factor to weigh states’ contacts against each other.¹⁶⁴ Indeed, these decisions have often disregarded the seemingly considerable interests of one state in favor of effectuating the even greater interests of another state.¹⁶⁵ In doing so, they treat “maintenance of interstate order” less as a threshold hurdle to be cleared and more as a balancing test, seeking to identify the state with the most significant contact or contacts with a case (as opposed

161. *Stonyfield Farm, Inc. v. Agro-Farma, Inc.*, No. 08-CV-488-JL, 2009 WL 3255218, at *7 (D.N.H. Oct. 7, 2009); *see also Keeton*, 549 A.2d at 1187; *LaBounty*, 451 A.2d at 163. *But see Sinclair*, 815 F. Supp. at 47-48 (weighing the relevant contacts of Massachusetts and New Hampshire and applying New Hampshire law in part because New Hampshire’s contacts were “more substantial”).

162. *See Stonyfield Farm, Inc.*, 2009 WL 3255218, at *6 (“Multiple states can be—and in this case are—‘sufficiently connected . . . to warrant further scrutiny’ under the other factors.” (quoting *LaBounty*, 451 A.2d at 164)); *Dupre v. G.D. Searle & Co.*, No. C84-146-L, 1987 WL 158107, at *2 (D.N.H. Apr. 28, 1987); *LaBounty*, 451 A.2d at 163 (identifying three states that met this hurdle).

163. *See Barrett v. Foster Grant Co.*, 450 F.2d 1146, 1152 (1st Cir. 1971) (noting that the second factor is concerned with the “good relationship among the states”); *Barrett v. Ambient Pressure Diving, Ltd.*, No. 06-CV-240-SM, 2008 WL 4934021, at *4 (D.N.H. Nov. 17, 2008) (“The operative principle is comity.”); *Gagne v. Berry*, 290 A.2d 624, 627 (N.H. 1972) (asking, under this consideration, whether “the maintenance of reasonable and good relationship among the States would . . . be impaired” based on application of either state’s law); *Clark v. Clark*, 222 A.2d 205, 208 (N.H. 1966) (“Open disregard of another state’s clear interests might have bad effects.”).

164. *See, e.g., Sinclair*, 815 F. Supp. at 47 (“The court recognizes that Massachusetts has a connection to this action as the acts at issue took place there. The court finds, however, that New Hampshire’s interests are more substantial.”); *Dunlap v. Aulson Corp.*, 90 F.R.D. 647, 650-51 (D.N.H. 1981) (applying Maine law under the second criterion on grounds that plaintiff’s Maine employment was a more significant contact in a workman’s compensation case than his New Hampshire domicile); *Mellitt v. Schrafft Candy Co.*, No. 80-513-D, 1981 WL 27284, at *3 (D.N.H. Dec. 21, 1981) (“Any interest Massachusetts might have in preventing wrongful corporate action is outweighed by New Hampshire’s interest in seeing that those who reside and work within its borders are not wrongfully discharged.”).

165. *See, e.g., Lessard*, 736 A.2d at 1228 (finding that the site of the accident was an insignificant contact relative to the domicile of the parties and the place of vehicle registration); *Mellitt*, 1981 WL 27284, at *3 (finding that Massachusetts’ interest in preventing corporate malfeasance was outweighed by New Hampshire’s interest in preventing the wrongful discharge of its domiciliaries).

to simply ensuring that, before a state's law is even considered, the state itself be shown to have some substantial contact with the matter).¹⁶⁶

Regardless of how they have interpreted the number or type of contacts necessary to satisfy this factor, New Hampshire courts have alternately looked at a wide variety of "contacts" in determining whether a state has significant contacts with a case. The contacts variously considered have ranged from parties' domiciles,¹⁶⁷ to the place where at least part of the tortious conduct occurred,¹⁶⁸ to the site of performance for an agreement,¹⁶⁹ to companies' sales locations.¹⁷⁰ New Hampshire courts have also held that certain contacts are not significant enough to give a state a "substantial connection" with a case—for example, a decedent's ownership of property in a given state at the time of her death,¹⁷¹ or a plaintiff's subsequent move to a particular state after the acts giving rise to litigation took place.¹⁷² And there is no apparent consensus on the significance of some other types of contacts, most notably whether the fact that an accident occurred in a given state automatically gives that state a substantial connection to a case.¹⁷³

3. Simplification of the Judicial Task

As is true in Arkansas, the third consideration—simplification of the judicial task—is sometimes treated by the New Hampshire courts as less significant than the other considerations.¹⁷⁴ Unlike some

166. See generally *supra* notes 164-165.

167. See, e.g., *Sinclair*, 815 F. Supp. at 47-48; *Lacaillade v. Loignon Champ-Carr, Inc.*, No. 10-CV-68-JD, 2011 WL 4738654, at *2 (D.N.H. Oct. 7, 2011); *Dupre*, 1987 WL 158107, at *2.

168. See, e.g., *Dupre*, 1987 WL 158107, at *3.

169. See, e.g., *Ferren v. Gen. Motors Corp.*, 628 A.2d 265, 268 (N.H. 1993); *Allot Commc'ns, Ltd. v. Cullen*, No. 10-E-0016, 2010 WL 6620308, at *5 (N.H. Super. Ct. Feb. 7, 2010).

170. See, e.g., *Keeton v. Hustler Magazine, Inc.*, 549 A.2d 1187, 1194-95 (N.H. 1988).

171. See *Burke v. Platt*, No. 06-C-113, 2006 WL 4640051, at *7 (N.H. Super. Ct. Sep. 19, 2006).

172. See *Ferren*, 628 A.2d at 268; *Sinclair*, 815 F. Supp. at 47-48.

173. Compare *Lessard v. Clarke*, 736 A.2d 1226, 1228 (N.H. 1999) (holding that the fact that an accident occurred in New Hampshire does not give New Hampshire a substantial interest in the case for purposes of damages), and *Sinclair v. Brill*, 815 F. Supp. 44, 47 (D.N.H. 1993) (holding that the fact that acts giving rise to litigation occurred in Massachusetts does not give Massachusetts a sufficiently substantial interest in the case), with *Benoit v. Test Sys., Inc.*, 694 A.2d 992, 995 (N.H. 1997) (listing site of injury as one of the factors giving rise to New Hampshire's substantial connection to the case), and *Dupre*, 1987 WL 158107, at *2 ("New Hampshire is connected because plaintiff's injury . . . occurred within New Hampshire.").

174. See, e.g., *Ferren*, 628 A.2d at 268 ("While it may be simpler for a court to apply its own substantive law, we think that the application of Kansas law to these issues is

Arkansas courts, however, the courts of New Hampshire typically do not dismiss this consideration altogether but instead analyze it in some depth, occasionally even according the factor predominant weight.¹⁷⁵ Most of the time, however, the New Hampshire courts, having considered this factor, determine that the desirability of simplifying the judicial task does not really favor either state's law, or that the courts are sufficiently capable of applying either state's law so that the third criterion should not be determinative.¹⁷⁶

There are two major exceptions to the generally indeterminate effect of the third criterion. First, New Hampshire generally applies its own statutes of limitations to cases involving New Hampshire residents or where the cause of action arose in New Hampshire.¹⁷⁷ Significantly, this practice is not justified on the basis of the substance-procedure distinction used in other states. Rather than apply a blanket preference for forum procedural rules, New Hampshire has determined that its statutes of limitation apply in such situations because "the sum of [New Hampshire's] forum interests in applying [its] own statute, in combination with the benefit of simplification afforded by [New Hampshire's] regular application of [its] own rule, will tip the choice of law balance in favor of the application of [its] own limitations period to cases tried here."¹⁷⁸ Where the party seeking to take advantage of New Hampshire's statute is not a New Hampshire resident, and where the cause of action did not accrue in New Hampshire, however, New Hampshire courts still apply the full, five-factor analysis.¹⁷⁹

not so difficult an undertaking as to outweigh opposing considerations." (internal citation omitted)); *Clark v. Clark*, 222 A.2d 205, 208 (N.H. 1966) ("But simplification of the judicial task is not the whole end of law, and opposing considerations may outweigh it.").

175. See, e.g., *Stonyfield Farm, Inc. v. Agro-Farma, Inc.*, No. 08-CV-488-JL, 2009 WL 3255218, at *7 (D.N.H. Oct. 7, 2009) ("The factor that weighs most heavily in favor of applying New Hampshire law is the third one: simplification of the judicial task."); *Clark & Lavey Benefits Solutions, Inc. v. Educ. Dev. Ctr., Inc.*, No. 05-C-132, 2006 WL 4671185, at *9 (N.H. Super. Ct. Nov. 9, 2006) ("[T]he only factor to consider is simplification of the judicial task.").

176. E.g., *Lessard*, 736 A.2d at 1228 (finding that applying foreign law is not so difficult as to outweigh other considerations, especially where the forum court still applies its own procedural rules); *Ferren*, 628 A.2d at 268 (same); *Clark*, 222 A.2d at 209 ("We are accustomed to applying our own . . . rule, and our judges could administer a trial under it a bit more confidently than under Vermont's . . . rule, but they could with relative ease use either rule.").

177. See *Keeton v. Hustler Magazine, Inc.*, 549 A.2d 1187, 1192 (N.H. 1988).

178. *Id.*; see also *Sinclair*, 815 F. Supp. at 46 ("Because the defendants are New Hampshire residents, the court must apply New Hampshire's statutes of limitations to the allegations in the plaintiff's complaint.").

179. E.g., *Waterfield v. Meredith Corp.*, 20 A.3d 865, 871 (N.H. 2011) ("Should the trial court determine that the plaintiff was not a New Hampshire resident at the time of the alleged defamation . . . we now hold that under such circumstances, our customary balancing test applies."); *Burke v. Platt*, No. 06-C-113, 2006 WL 4640051,

The other way in which concern with simplification of the judicial task plays a prominent role in New Hampshire choice-of-law cases is in screening for false conflicts. In contrast to Arkansas courts, New Hampshire courts aggressively screen for false conflicts at the outset of a case.¹⁸⁰ Where they find such a conflict, they almost invariably end any further choice-of-law analysis and simply decide the case on the rule common to both states.¹⁸¹ As in Arkansas, New Hampshire courts do not specifically associate a false conflicts analysis with simplification of the judicial task, but it nevertheless serves that purpose, as Leflar suggested it should.¹⁸²

4. Advancement of the Forum's Governmental Interests

In analyzing the fourth choice-influencing consideration, a slight majority of New Hampshire cases look exclusively at New Hampshire's interests in the case,¹⁸³ though a number of courts have compared and weighed the competing interests of all involved states.¹⁸⁴ New Hampshire courts generally give this criterion significant weight in their choice-of-law analysis only if they find that New Hampshire has a substantial or "particularly strong policy in reference to local rules of law," which the other state's laws under consideration would "fail[] to achieve."¹⁸⁵ New Hampshire courts have not defined what makes an interest sufficiently strong to merit consideration under this criterion but have found such strong interests in New Hampshire's interests in enforcing its workers' compensation laws,¹⁸⁶ "providing redress for injuries which occur on

at *5-6 (N.H. Super. Ct. Sep. 19, 2006) (finding that because "neither party is a citizen of New Hampshire" and the cause of action arose outside New Hampshire, "the court must proceed to analyze which statute of limitations applies").

180. See, e.g., *Aftokinito Props., Inc. v. Millbrook Ventures, LLC*, No. 09-CV-415-JD, 2010 WL 3168295, at *3 (D.N.H. Aug. 9, 2010); *Barrett v. Ambient Pressure Diving, Ltd.*, No. 06-CV-240-SM, 2008 WL 4934021, at *1 (D.N.H. Nov. 17, 2008); *Clark & Lavey Benefits Solutions, Inc.*, 2006 WL 4671185, at *8.

181. E.g., *Rochester Ford Sales, Inc. v. Ford Motor Co.*, 287 F.3d 32, 42 (1st Cir. 2002); *LaBounty v. Am. Ins. Co.*, 451 A.2d 161, 164 (N.H. 1982).

182. See *NYU Article*, *supra* note 1, at 290.

183. E.g., *Sinclair*, 815 F. Supp. at 48-49; *Lessard v. Clarke*, 736 A.2d 1226, 1229 (N.H. 1999); *In re Wood's Estate*, 453 A.2d 1251, 1252 (N.H. 1982).

184. E.g., *Ambient Pressure Diving, Ltd.*, 2008 WL 4934021, at *4-5; *Dupre v. G.D. Searle & Co.*, No. C84-146-L, 1987 WL 158107, at *3 (D.N.H. Apr. 28, 1987); *Benoit v. Test Sys., Inc.*, 694 A.2d 992, 995-96 (N.H. 1997); *Clark v. Clark*, 222 A.2d 205, 209-10 (N.H. 1966).

185. *Stonyfield Farm, Inc. v. Agro-Farma, Inc.*, No. 08-CV-488-JL, 2009 WL 3255218, at *8 (D.N.H. Oct. 7, 2009) (alteration in original) (citations omitted); see also *Lessard*, 736 A.2d at 1229; *Maguire v. Exeter & Hampton Elec. Co.*, 325 A.2d 778, 779-80 (N.H. 1974); *Clark*, 222 A.2d at 208.

186. See *Wise v. Kentucky Fried Chicken Corp.*, 555 F. Supp. 991, 994 (D.N.H. 1983); *Benoit*, 694 A.2d at 995-96; *Ferren v. Gen. Motors Corp.*, 628 A.2d 265, 268-69 (N.H. 1993); *Maguire*, 325 A.2d at 780.

its highways,”¹⁸⁷ and the orderly administration of New Hampshire estates.¹⁸⁸ One factor that is sometimes considered substantial is the forum’s interest “in the fair and efficient administration of justice,”¹⁸⁹ although most decisions make no mention of it. Additionally, except as it drives the court’s decision to apply New Hampshire’s statute of limitations,¹⁹⁰ New Hampshire courts do not consider a party’s New Hampshire domicile to be, by itself, a significant enough consideration to give New Hampshire an interest in the case.¹⁹¹

5. Better Rule of law

The fifth consideration—preference for the better rule of law—is sometimes referred to as a tie-breaker in New Hampshire cases,¹⁹² but more often courts consider it regardless of the closeness of the case.¹⁹³ In identifying the better rule of law, New Hampshire courts consider many of the same criteria as do Arkansas courts: modern rules are better than archaic ones,¹⁹⁴ rules that further prevailing socio-economic standards are better than rules that do not,¹⁹⁵ and rules that facilitate the parties’ intentions are better than rules that contravene those intentions.¹⁹⁶ Additionally, in rare instances, New

187. *Taylor v. Bullock*, 279 A.2d 585, 587 (N.H. 1971); *see also* *Labounty v. Am. Ins. Co.*, 451 A.2d 161, 164 (N.H. 1982); *Gagne v. Berry*, 290 A.2d 624, 626 (N.H. 1972); *Clark*, 222 A.2d at 208.

188. *In re Wood’s Estate*, 453 A.2d at 1252.

189. *E.g.*, *Guardian Angel Credit Union v. MetaBank*, No. 08-CV-261-PB, 2010 WL 1794713, at *9 (D.N.H. May 5, 2010) (quoting *Clark*, 222 A.2d at 208) (internal quotation marks omitted); *Keeton v. Hustler Magazine, Inc.*, 549 A.2d 1187, 1195 (N.H. 1988) (“[O]ur interest in applying our own statute to cases generally stems from our concern to insure the orderly administration of our courts and to protect the respective interests of defendants and plaintiffs.”); *Clark*, 222 A.2d at 208-09 (“In most private litigation, the only real governmental interest that the forum has is in the fair and efficient administration of justice.”).

190. *See Keeton*, 549 A.2d at 1196.

191. *See LaBounty*, 451 A.2d at 164 (“Clearly, domicile is not enough standing alone to warrant application of New Hampshire law.”); *see also* *Barrett v. Foster Grant Co.*, 450 F.2d 1146, 1152 (1st Cir. 1971); *Gordon v. Gordon*, 387 A.2d 339, 342 (N.H. 1978); *Maguire*, 325 A.2d at 780.

192. *E.g.*, *Lacaillade v. Loignon Champ-Carr, Inc.*, No. 10-CV-68-JD, 2011 WL 4738654, at *3 (D.N.H. Oct. 7, 2011); *Aftokinito Props., Inc. v. Millbrook Ventures, LLC*, No. 09-CV-415-JD, 2010 WL 3168295, at *11 (D.N.H. Aug. 9, 2010); *Stonyfield Farm, Inc. v. Agro-Farma, Inc.*, No. 08-CV-488-JL, 2009 WL 3255218, at *8 (D.N.H. Oct. 7, 2009).

193. *E.g.*, *Keeton*, 549 A.2d at 1195-96 (analyzing the fifth consideration even though all considerations in that case pointed to the same rule); *LaBounty*, 451 A.2d at 164 (same); *Clark*, 222 A.2d at 209-10 (same).

194. *See, e.g.*, *Gordon*, 387 A.2d at 341; *Taylor v. Bullock*, 279 A.2d 585, 586-87 (N.H. 1971); *Doiron v. Doiron*, 241 A.2d 372, 374-75 (N.H. 1968); *Clark*, 222 A.2d at 209-10.

195. *See, e.g.*, *Taylor*, 279 A.2d at 586.

196. *See, e.g.*, *In re Wood’s Estate*, 453 A.2d 1251, 1252 (N.H. 1982).

Hampshire courts have said that statutes protecting New Hampshire citizens are better than statutes not having that effect.¹⁹⁷ New Hampshire courts have not specified when each of these criteria controls the better rule determination, or what should happen when (as is often the case) the criteria for choosing the better rule conflict with one another.

C. *Rhode Island*

Most conflicts analysts say that Rhode Island applies Leflar's method to torts cases.¹⁹⁸ And the Leflar method is, indeed, part of Rhode Island's standard tort analysis.¹⁹⁹ But Rhode Island courts also rely very heavily on a significant contacts approach (based on the Second Restatement) in deciding what law to apply in multi-jurisdiction tort cases.²⁰⁰ The significant contacts that Rhode Island courts consider are: "(a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered."²⁰¹

The exact relationship between the two choice-of-law methodologies is difficult to discern. In some cases, Rhode Island courts apply the significant contacts approach first and apply the Leflar approach only when the significant contacts approach does not yield a clear answer.²⁰² Other Rhode Island courts treat the two standards as coextensive, so that the court analyzes the five factors in light of the significant contacts mentioned in the Second

197. *E.g.*, *Sinclair v. Brill*, 815 F. Supp. 44, 49 (D.N.H. 1993).

198. *E.g.*, *SYMEONIDES*, *supra* note 7, at 64.

199. *See, e.g.*, *Harodite Indus., Inc. v. Warren Elec. Corp.*, 24 A.3d 514, 534 (R.I. 2011); *Najarian v. Nat'l Amusements, Inc.*, 768 A.2d 1253, 1255 (R.I. 2001); *Woodward v. Stewart*, 243 A.2d 917, 923 (R.I. 1968).

200. *See, e.g.*, *Harodite Indus., Inc.*, 24 A.3d at 534; *Najarian*, 768 A.2d at 1255; *Brown v. Church of the Holy Name of Jesus*, 252 A.2d 176, 178-79 (R.I. 1969).

201. *Najarian*, 768 A.2d at 1255 (quoting *Brown*, 252 A.2d at 179); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971).

202. *See, e.g.*, *La Plante v. Am. Honda Motor Co.*, 27 F.3d 731, 742 (1st Cir. 1994) ("Because the number of contacts claimed by each state is equivalent, we examine the additional factors enumerated by the Rhode Island courts, beginning with 'predictability of results.'"); *Gravina v. Brunswick Corp.*, 338 F. Supp. 1, 7 (D.R.I. 1972) ("[T]he court does not feel that there is any basis for proclaiming the aggregate interests of either of the two states . . . to be superior or inferior to those of the other. Looking to *Woodward* for a 'tie-breaking' procedure, the court finds it . . ."); *Hart Eng'g Co. v. FMC Corp.*, 593 F. Supp. 1471, 1481 (D.R.I. 1984) ("If several states have a legitimate stake in the elements of a particular case [based on an analysis of significant contacts] . . . the selection of substantive law is determined according to [the better law considerations]."); *Cribb v. Augustyn*, 696 A.2d 285, 288 (R.I. 1997) (analyzing only significant contacts of the parties in deciding that Rhode Island's statute of limitations should apply).

Restatement.²⁰³ And sometimes courts apply the Leflar method immediately, with nary a mention of the significant contacts approach.²⁰⁴ To make matters even more complicated, Rhode Island sometimes employs a presumption in favor of the law where an injury was sustained.²⁰⁵ In other words, while almost every Rhode Island court purports to apply an “interest-weighting approach,”²⁰⁶ the exact nature of that approach differs significantly from case-to-case, so much so that it is not possible to identify a single predominant approach used by the Rhode Island courts in assessing choice-of-law issues in tort.

1. Predictability of Results

Where Rhode Island courts apply the better law factors, their approach is multivariate, similar to that of the other states that apply the better law method. In applying the predictability of results consideration, for example, Rhode Island courts have said that it carries almost no weight where the tort is unplanned and has no connection to any sort of contractual relationship between the parties—for example, in car accident cases.²⁰⁷ Where the tort involves planned activity or the parties have a relationship that is related to the tort, Rhode Island courts take two distinct approaches in analyzing the predictability consideration. A majority of Rhode Island courts ask what the parties expected (or should have expected), with the goal of effectuating the parties’ pre-tort

203. *E.g.*, *Montaup Elec. Co. v. Ohio Brass Corp.*, 561 F. Supp. 740, 744-45 (D.R.I. 1983) (significant contact factors should be assessed “in light of five guidelines [i.e., the better law considerations] promulgated for weighing the competing interests in each case”); *Najarian*, 768 A.2d at 1255 (“In applying [the better law considerations] in tort cases, contacts to be considered are [those listed in the Second Restatement].”); *Dodson v. Ford Motor Co.*, No. C.A. PC 96-1331, 2006 WL 2642199, at *3 (R.I. Super. Ct. Sept. 5, 2006) (“Factors which must be weighed in determining which law applies are [the five better law considerations]. In tort cases, the following contacts are also to be considered: [list of Second Restatement’s significant contacts factors].”).

204. *E.g.*, *Roy v. Star Chopper Co.*, 584 F.2d 1124, 1128 (1st Cir. 1978) (mentioning only better law considerations, without reference to significant contact factors); *Victoria v. Smythe*, 703 A.2d 619, 620-21 (R.I. 1997) (same).

205. *E.g.*, *Blais v. Aetna Cas. & Sur. Co.*, 526 A.2d 854, 856-57 (R.I. 1987) (“[I]n an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless with respect to the particular issue, some other state has a more significant relationship” (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1971) (internal quotation marks omitted)); *Berkshire Mut. Ins. Co. v. Marchikov*, No. P.C. 00-5284, 2004 WL 2823030, at *1 (R.I. Super. Ct. Oct. 12, 2004) (same).

206. *E.g.*, *Harodite Indus., Inc. v. Warren Elec. Corp.*, 24 A.3d 514, 534 (R.I. 2011); *Taylor v. Mass. Flora Realty, Inc.*, 840 A.2d 1126, 1128 (R.I. 2004); *Berardi, U.S.A., Ltd. v. Emp’rs Mut. Cas. Co.*, 526 A.2d 515, 516 (R.I. 1987).

207. *E.g.*, *Tiernan v. Westext Transp., Inc.*, 295 F. Supp. 1256, 1263 (D.R.I. 1969) (“Because of the high degree of fortuity in accident cases, predictability of result is of little consequence.”).

predictions about what law would apply.²⁰⁸ This inquiry focuses on the individual facts of the case, and it looks backward at what the parties anticipated before the alleged tort occurred.²⁰⁹ In a sizable minority of decisions, however, Rhode Island courts take a different approach to predictability, asking what ruling will best advance predictability in similar transactions going forward.²¹⁰ This forward-looking approach emphasizes the effect of a given decision on events that have not yet occurred, as opposed to focusing on events leading up to the lawsuit.

The significant contacts method plays an important role in evaluating the first Leflar criterion. Where the parties have an existing relationship, Rhode Island courts have generally held that predictability of results favors the law of the state where that relationship was centered, especially where that state is also where the injury occurred.²¹¹ Rhode Island courts have also looked to the domicile of the parties and, in business cases, the place of incorporation and the place of manufacture of any products as significant contacts in the predictability analysis.²¹² The more these contacts are centered in a particular state, the more predictable it is, according to Rhode Island courts, that that state's law should apply.²¹³

Finally, when the parties should expect a particular state to

208. *E.g., Roy*, 584 F.2d at 1129 ("It was foreseeable that the corporation would be placed at risk for its manufacture of products and, as a corporation doing business in Rhode Island, would reasonably guide its actions by the liability imposed under Rhode Island law."); *Najarian*, 768 A.2d at 1255 ("Moreover, the parties might reasonably have expected . . ."); *Barger v. Pratt & Whitney*, No. PC 05-5370, 2006 WL 2988458, at *3 (R.I. Super. Ct. Oct. 19, 2006) ("There is no reason that either Mr. Barger or Pratt should have expected that Tennessee law would be chosen over the laws of the other states in this case . . .").

209. *See, e.g., Barger*, 2006 WL 2988458, at *3.

210. *Pardey v. Boulevard Billiard Club*, 518 A.2d 1349, 1352 (R.I. 1986) ("If this court were to allow Rhode Island liquor vendors to escape the [statutory liability] simply because the resulting accident occurred outside state borders, the consequences of title 3 violations would be unpredictable indeed."); *Berkshire Mut. Ins. Co.*, 2004 WL 2823030, at *2 ("Massachusetts citizens and their insurers must be able to count on the applicability of a statute that seeks to protect all involved and make more efficient the often tangled and consuming process of insurance reimbursement.").

211. *See, e.g., Najarian*, 768 A.2d at 1255.

212. *E.g., Roy*, 584 F.2d at 1129 (finding that company incorporated in Rhode Island should have expected Rhode Island law to apply); *Harodite Indus., Inc. v. Warren Elec. Corp.*, 24 A.3d 514, 527 (R.I. 2011) (quoting lower court's finding that, "it should not be a surprise to a Rhode Island domiciled corporation that it may be sued in a Rhode Island court, under Rhode Island law, for a product manufactured in Rhode Island" (internal quotation marks omitted)); *Providence v. Davol, Inc.*, Trial Order, No. P.C. 07-4701, 2011 WL 496532, at *10 (R.I. Super. Ct. Feb. 9, 2011) ("[T]he place where the injury occurred should weigh strongly in favor of predictability in applying that forum's law.").

213. *See, e.g., Providence*, 2011 WL 496532, at *10.

have an interest in regulating certain conduct, Rhode Island courts have sometimes said that it is predictable for that state's law to apply.²¹⁴ Thus, for example, an injury that occurred at a Massachusetts movie theater was governed by Massachusetts law, not just because the case had significant contacts to Massachusetts, but because the theater operator might "reasonably have expected . . . that Massachusetts has a significant interest in regulating premises liability of a Massachusetts premises."²¹⁵ This emphasis on state interests links predictability of results with the second and fourth choice-influencing considerations.²¹⁶

2. Maintenance of Interstate Order

Rhode Island courts ask two questions to decide whether application of a particular law would offend interstate order.²¹⁷ First, they consider the significant interests of the states involved.²¹⁸ Rhode Island courts have recognized any number of legitimate state interests—ranging from deterring reckless driving,²¹⁹ to protecting citizens from excessive litigation,²²⁰ to providing a remedy for harm suffered in one state as a result of wrongful conduct that took place in another²²¹—but have not clearly delineated when a particular interest does or does not apply. The relative uncertainty in this factor is compounded by the fact that Rhode Island courts rarely reject an interest as being too insignificant to be considered, though they have

214. *E.g., Najarian*, 768 A.2d at 1255 ("Moreover, the parties might reasonably have expected Massachusetts law to apply to an injury that occurred at a site in that state and that Massachusetts has a significant interest in regulating premises liability of a Massachusetts premises."); *Chain Store Maint., Inc. v. Nat'l Class & Gate Serv., Inc.*, No. CIV.A. P.B. 01-3522, 2004 WL 877599, at *7 (R.I. Super. Ct. Apr. 21, 2004) ("Finally, the parties might reasonably expect Rhode Island law to apply [given] that Rhode Island has a significant interest in regulating the access and taking of certain information at a Rhode Island premises.").

215. *Najarian*, 768 A.2d at 1255.

216. *See, e.g., Providence*, 2011 WL 496532, at *11 (linking predictability of results and maintenance of interstate order); *Chain Store Maint., Inc.*, 2004 WL 877599, at *7 (same).

217. *See, e.g., La Plante v. Am. Honda Motor Co.*, 27 F.3d 731, 742-43 (1st Cir. 1994) ("To perform this analysis, we must identify the purposes or policies which underlie each state's rule of law, and the degree to which the purposes underlying each rule would be furthered by the rule's application.").

218. *E.g., id.*; *Gravina v. Brunswick Corp.*, 338 F. Supp. 1, 4-5 (D.R.I. 1972) (identifying interests of Illinois and Rhode Island as precursor to analysis under second choice-influencing consideration); *Tiernan v. Westtext Transp., Inc.*, 295 F. Supp. 1256, 1263-64 (D.R.I. 1969) ("A firm desire to render to a non-forum state what properly belongs to that state invites consideration of Massachusetts' interests in the application of its law in the circumstances of this case.").

219. *See Tiernan*, 295 F. Supp. at 1263-64.

220. *See Gravina*, 338 F. Supp. at 4-5.

221. *See Pardey v. Boulevard Billiard Club*, 518 A.2d 1349, 1352 (R.I. 1986).

occasionally done so where the proffered interest is extremely tenuous.²²²

After identifying the significant state interests at play in a case, Rhode Island courts next ask which states' laws will further those interests.²²³ This inquiry does not automatically lead exclusively to the law of the state whose interest is at stake; indeed, Rhode Island courts often find that another state's interests will be better advanced by application of Rhode Island law.²²⁴

3. Simplification of the Judicial Task

In Rhode Island, the third better law factor, simplification of the judicial task, is almost never significant in courts' choice-of-law determinations.²²⁵ Even where courts recognize that application of a particular state's law would increase the burden on the judiciary, they have been reluctant to give the third factor any weight.²²⁶

As in most states that apply the better law method, Rhode Island simplifies the judicial task, at least somewhat, by following the rule that forum procedural rules always apply.²²⁷ Rhode Island, however,

222. See, e.g., *La Plante*, 27 F.3d at 742-43 (Colorado has no significant interest in applying its damage cap to a suit against a multi-national, Japanese corporation not based in Colorado); *Cribb v. Augustyn*, 696 A.2d 285, 288 (R.I. 1997) (New Hampshire lacks a significant interest in applying its statute of limitations to a dispute between Rhode Island parties).

223. E.g., *La Plante*, 27 F.3d at 743 ("The crucial question, then, is whether, on the facts of this particular case, Colorado's policy will be advanced by the application of its damages cap."); *Pardey*, 518 A.2d at 1352 (determining that "application of Rhode Island law . . . effectuates, rather than frustrates, the policies of both states").

224. E.g., *Roy v. Star Chopper Co.*, 584 F.2d 1124, 1129 (1st Cir. 1978) ("[Massachusetts'] interest is served by adhering to the stricter standard of liability imposed by Rhode Island."); *Turcotte v. Ford Motor Co.*, 494 F.2d 173, 179 (1st Cir. 1974) ("At the same time, application of Rhode Island law would not appear to offend Massachusetts law and policy."); *Harodite Indus., Inc. v. Warren Elec. Corp.*, 24 A.3d 514, 527, 535 (R.I. 2011) (affirming the lower court's determination that applying Rhode Island law would actually further Massachusetts' interests in protecting its citizens against corporate malfeasance).

225. E.g., *Roy*, 584 F.2d at 1129 ("The court felt that the judicial task would be neither more nor less simplified by application of either state's rule."); *Gravina*, 338 F. Supp. at 5 ("Only in those cases in which foreign law is either very complex or very obscure is simplification of the judicial task entitled to very serious consideration."); *La Plante*, 27 F.3d at 743 ("As to [simplification of the judicial task], we cannot see how the judicial task would be more or less simplified by application of one rule as opposed to the other.").

226. E.g., *Brown v. Church of the Holy Name of Jesus*, 252 A.2d 176, 180-81 ("Negligence actions add substantially to the judicial burden, but this fact is without significance when weighed against the long established right of parties to litigate such claims.").

227. *Israel v. Nat'l Bd. of Young Men's Christian Ass'n*, 369 A.2d 646, 650 (R.I. 1977) ("In conflict of laws cases, this court had adopted a flexible, interest-weighting approach but has generally recognized the principle that the procedural law of the forum state applies even if a foreign state's substantive law is applicable.").

has not always been clear as to what constitutes a “procedural” rule. Statutes of limitation, for example, are commonly regarded as procedural for choice-of-law purposes,²²⁸ yet Rhode Island has frequently treated them as substantive.²²⁹ Indeed, the only class of rules that Rhode Island courts have consistently treated as procedural is evidentiary rules.²³⁰ Thus, Rhode Island courts make sparing and inconsistent use of the procedural classification.

4. Forum’s Governmental Interests

Of all the Leflar considerations, Rhode Island courts devote the most attention to the forum’s governmental interests. Most Rhode Island decisions treat this factor as inviting a weighing of Rhode Island’s interests against the interests of other states,²³¹ though a significant number of Rhode Island cases analyze only Rhode Island’s interest in the litigation.²³² Like Arkansas and New Hampshire, Rhode Island courts consider a wide variety of interests under this factor, including compensation of injured Rhode Islanders,²³³ protecting Rhode Island businesses from unfair trade practices,²³⁴ promoting the safe design of consumer products,²³⁵ and reducing automobile insurance rates.²³⁶ Occasionally, Rhode Island courts will resort to a contact-counting approach to this factor, based on the significant contact considerations from the Second Restatement.²³⁷

228. *See* *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722-29 (1988) (explaining that statutes of limitations are procedural for choice-of-law purposes).

229. *E.g.*, *Montaup Elec. Co. v. Ohio Brass Corp.*, 561 F. Supp. 740, 744 (D.R.I. 1983) (treating statutes of limitations as substantive for choice of law purposes); *Harodite Indus., Inc.*, 24 A.3d at 534-35 (same).

230. *See* *State v. Briggs*, 756 A.2d 731, 735-36 (R.I. 2000) (listing evidentiary rules deemed procedural by Rhode Island courts).

231. *E.g.*, *Thayer v. Perini Corp.*, 303 F. Supp. 683, 688 (D.R.I. 1969) (“While Rhode Island has significant interest in this case, it is my opinion that Massachusetts has the most significant interest in this case”); *Woodward v. Stewart*, 243 A.2d 917, 923 (R.I. 1968) (weighing Rhode Island’s interests against Massachusetts’); *Carlson v. 84 Lumber Co.*, Trial Order, No. PC 09-3298, 2011 WL 1373508, at *20-21 (R.I. Super. Ct. Apr. 7, 2011) (weighing the interests of Pennsylvania and Michigan).

232. *E.g.*, *Roy v. Star Chopper Co.*, 584 F.2d 1124, 1129-30 (1st Cir. 1978) (analyzing only Rhode Island’s “interest in holding manufacturers of defective products to a standard of strict liability”); *Pardey v. Boulevard Billiard Club*, 518 A.2d 1349, 1351-52 (R.I. 1986) (analyzing only Rhode Island’s interest in regulating Rhode Island liquor stores).

233. *See* *Tiernan v. Westtext Transp., Inc.*, 295 F. Supp. 1256, 1264 (D.R.I. 1969).

234. *See* *Crellin Techs., Inc. v. Equipmentlease Corp.*, 18 F.3d 1, 12-13 (1st Cir. 1994).

235. *See* *Providence v. Davol, Inc.*, Trial Order, PC 07-4701, 2011 WL 496532, at *11 (R.I. Super. Ct. Feb. 9, 2011); *Carlson*, 2011 WL 1373508, at *20-21.

236. *See* *Berkshire Mut. Ins. Co. v. Marchikov*, No. P.C. 00-5284, 2004 WL 2823030, at *2 (R.I. Super. Ct. Oct. 12, 2004).

237. *E.g.*, *Najarian v. Nat’l Amusements, Inc.*, 768 A.2d 1253, 1255 (R.I. 2001) (applying Massachusetts law, in part, because the parties’ “relationship was centered

Such cases, however, are rare, and most Rhode Island courts look purely at interests without trying to tally up contacts.²³⁸

5. Better Rule of Law

Concerning the better rule of law consideration, Rhode Island courts generally favor the same sorts of rules as do other Leflar states, preferring rules that reflect prevailing socioeconomic standards over rules that are outmoded,²³⁹ rules that effectuate party expectations over rules that might lead to unfair surprise or hardship,²⁴⁰ and rules that promote recovery over rules that do not.²⁴¹ The salient feature of Rhode Island's consideration of this fifth factor, compared to other states', is that Rhode Island courts have not demonstrated any sort of aversion to pronouncing one rule better than another. While other better law states have increasingly minimized the significance of this fifth factor,²⁴² Rhode Island courts consider the better rule criterion in deciding most cases.

D. Minnesota

Minnesota is one of only two states—the other being Wisconsin—to apply the better law method in both torts and contracts cases.²⁴³ Many contracts include choice-of-law provisions, designating the law

in Massachusetts"); *Brown v. Church of the Holy Name of Jesus*, 252 A.2d 176, 181 (R.I. 1969) (listing relevant contacts and quoting the Second Restatement).

238. *E.g.*, *Turcotte v. Ford Motor Co.*, 494 F.2d 173, 177-79 (1st Cir. 1974) (considering states' interests without express reference to significant contact factors); *Cribb v. Augustyn*, 696 A.2d 285, 288 (R.I. 1997) (same).

239. *See, e.g.*, *Brown*, 252 A.2d at 181 (noting that charitable immunity is an outdated and disfavored doctrine).

240. *See, e.g.*, *Roy v. Star Chopper Co.*, 584 F.2d 1124, 1130 (1st Cir. 1978) (noting that one of the bases for preferring strict products liability is the public's expectation that manufacturers and sellers "will stand behind their goods"); *Victoria v. Smythe*, 703 A.2d 619, 621 (R.I. 1997) (favoring foreign law recognizing vicarious liability because doing so corresponded with language in the parties' agreement).

241. *See, e.g.*, *Tiernan v. Westtext Transp., Inc.*, 295 F. Supp. 1256, 1264 (D.R.I. 1969) (deciding that wrongful death limitations are generally not the better rules of law, since they limit recovery without serving any purpose); *Harodite Indus., Inc. v. Warren Elec. Corp.*, 24 A.3d 514, 528, 534-35 (R.I. 2011) (favoring a longer limitations period so long as evidentiary issues are not likely to arise). *But see Hart Eng'g Co. v. FMC Corp.*, 593 F. Supp. 1471, 1484 (D.R.I. 1984) (declining to apply rule allowing recovery of purely economic losses in tort, on grounds that such losses should—at least where they stem from a bargain-gone-wrong—derive from the agreement itself, rather than from the "vagaries of negligence law").

242. *See, e.g.*, *Miller v. Pilgrim's Pride Corp.*, 366 F.3d 672, 675 (8th Cir. 2004) (court finds no basis for determining which law is better); *Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co.*, 604 N.W.2d 91, 96 (Minn. 2000) ("Regarding the fifth factor, application of the better rule of law, we note that this court has not placed any emphasis on this factor in nearly 20 years and conclude that it is likewise unnecessary to reach it here.").

243. *See SYMEONIDES, supra* note 7, at 64 tbl.4.

that is to be applied in the event of a dispute between the parties. In such cases, Minnesota courts give effect to these clauses, without even applying the Leflar considerations.²⁴⁴ Where there is no applicable choice-of-law clause, however, Minnesota courts analyze all choice-of-law cases according to a three-step inquiry: first asking whether there is a true conflict between the laws at issue, then determining whether the laws at issue are substantive or procedural, then, where the laws at issue are substantive, applying the Leflar factors.²⁴⁵

The first step in this process, deciding whether there is a true conflict, is a relatively simple inquiry. As one Minnesota court put it, “[a] conflict exists if application of the law of either state would be outcome determinative.”²⁴⁶ In other words, where the choice of one law will potentially result in a different outcome compared to the choice of the other law, there is a true conflict.²⁴⁷ This consideration seldom disposes of the conflicts analysis, since most choice-of-law litigation comes up precisely because the parties seek to take advantage of differences in the law. In a handful of cases, however, Minnesota courts have found false conflicts and thereby obviated the need for further choice-of-law analysis.²⁴⁸

244. *E.g.*, *Minn. Mining and Mfg. Co. v. Kirkevold*, 87 F.R.D. 324, 331 (D. Minn. 1980) (“Thus, as two Minnesota residents entered into an employment agreement in Minnesota which specified that Minnesota law should govern, well established conflicts principles require that this Court apply Minnesota law to plaintiff’s breach of contract claim.”); *Premier Indus. Corp. v. Jensen*, 3-90 CIV 52, 1990 WL 264485, at *2 (D. Minn. Dec. 27, 1990) (“The longstanding rule under Minnesota law is that parties to a contract may control the choice of law by express contractual provision. Minnesota courts will respect the parties’ choice so long as the parties act ‘in good faith and without intent to evade the law.’” (quoting *Combined Ins. Co. v. Bode*, 77 N.W.2d 533, 536 (Minn. 1956))).

245. *See, e.g.*, *Nw. Airlines, Inc. v. Astraea Aviation Servs., Inc.*, 111 F.3d 1386, 1393 (8th Cir. 1997) (applying better law method in contracts case); *Ferris, Baker Watts, Inc. v. Deutsche Bank Sec. Ltd.*, 02-3682, 2004 WL 2501563, at *1-3 (D. Minn. Nov. 5, 2004) (applying better law method in torts case). Note that Minnesota courts—like courts in other better law states—also inquire as to the constitutionality of applying a state’s law. Because this inquiry is independent of the better law analysis, this article does not consider it. For a more thorough analysis of the constitutional aspects of choice of law, see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (discussing the Constitution’s requirements for choice of law); Terry S. Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity*, 62 N.Y.U. L. REV. 651 (1987) (analyzing and criticizing the United States Supreme Court’s current choice-of-law jurisprudence); James R. Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws*, 60 S. CAL. L. REV. 1299 (1987) (considering the history and purposes of the Full Faith and Credit clause in conflicts law).

246. *Matoga v. Christopher*, CIV 08-2404 DSD/JJG, 2010 WL 4450545, at *1 (D. Minn. Nov. 1, 2010).

247. *See, e.g.*, *Myers v. Gov’t Emp. Ins. Co.*, 225 N.W.2d 238, 241 (Minn. 1974) (“Before applying the [better law criteria], it must first be determined that a conflict exists, i.e., will the choice of one law as compared to another determine the outcome?”).

248. *E.g.*, *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 30 (Minn. 1996)

The second part of Minnesota's choice-of-law analysis—consideration of whether the laws at issue are substantive or procedural—functions much as it does in other Leflar states: “matters of procedure and remedies [are] governed by the law of the forum,”²⁴⁹ while the applicable substantive law is determined through application of the Leflar factors.²⁵⁰ Minnesota courts define substantive law as law that “creates, defines, and regulates rights,” and distinguish it from “adjective or remedial law,” which prescribes a method for enforcing rights or redressing a violation of rights.²⁵¹ This can be a fine distinction in some cases. For instance, in Minnesota, statutes of limitation are procedural,²⁵² while statutes of repose are substantive,²⁵³ even though the two types of law serve essentially identical purposes.²⁵⁴ A limitations period incorporated into a contract is deemed substantive,²⁵⁵ even though a statutory limitations period is procedural.²⁵⁶ Besides statutes of limitations, Minnesota courts have also found rules governing prejudgment interest²⁵⁷ and punitive damages²⁵⁸ to be procedural, while finding things like damage caps²⁵⁹ and laws establishing liability²⁶⁰ to be

(“[W]hether we apply New York or Minnesota law in this case, we would impose a reputational harm prerequisite. Thus . . . no actual conflict exists between the law of the two states and we therefore need not reach the issue of which law should be applied.”); *Allete, Inc. v. GEC Eng'g, Inc.*, 726 N.W.2d 520, 522 (Minn. Ct. App. 2007) (“There is also no claim that either the UCC or the caselaw in the various states differs with respect to the issue before us Under the circumstances, this is what is often called a ‘false conflict.’ Accordingly, we apply Minnesota law.”).

249. *Davis v. Furlong*, 328 N.W.2d 150, 153 (Minn. 1983).

250. *See, e.g., Nesladek v. Ford Motor Co.*, 46 F.3d 734, 736-38 (8th Cir. 1995) (“[Because the statutes at issue are substantive, rather than procedural,] [w]e must now go forward and, applying Minnesota's choice-of-law rules, determine whether Nebraska or Minnesota law applies.”).

251. *See Stern v. Dill*, 442 N.W.2d 322, 324 (Minn. 1989).

252. *See Davis*, 328 N.W.2d at 153; *Christian v. Birch*, 763 N.W.2d 50, 58 (Minn. Ct. App. 2009). *But see Nesladek*, 46 F.3d at 738 (treating statutes of limitation as substantive).

253. *See Nesladek*, 46 F.3d at 737; *Nelson v. Delta Int'l Mach. Corp.*, CIV. 05-63(DSD/JJG), 2006 WL 1283896, at *3 (D. Minn. May 9, 2006).

254. *Compare* BLACK'S LAW DICTIONARY 1546 (9th ed. 2009) (defining “statute of limitations” as “[a] law that bars claims after a specified period”), *with* BLACK'S LAW DICTIONARY 1546 (9th ed. 2009) (defining “statute of repose” as “[a] statute barring any suit that is brought after a specified time since the defendant acted”).

255. *See Honeywell, Inc. v. Ruby Tuesday, Inc.*, 43 F. Supp. 2d 1074, 1078 (D. Minn. 1999).

256. *See Fleeger v. Wyeth*, 771 N.W.2d 524, 528 (Minn. 2009).

257. *See Schwan's Sales Enters., Inc. v. SIG Pack, Inc.*, 476 F.3d 594, 596-97 (8th Cir. 2007).

258. *See In re Levaquin Prods. Liab. Litig.*, MDL 08-1943 JRT, 2010 WL 7852346, at *7-8 (D. Minn. Nov. 9, 2010).

259. *See Dodds v. St. Jude Med., Inc.*, Trial Order, C3-04-1619, 2005 WL 6336316, at *4 (D. Minn. Oct. 20, 2005).

substantive.

The inquiry is further complicated because Minnesota courts often start from different baselines in determining when a law is substantive and when it is procedural. Thus, many decisions note that forum law (that is, Minnesota law) is to be used in deciding whether a law is substantive or procedural.²⁶¹ The result is that if a Minnesota court would consider a legal rule substantive, then the Wisconsin version of that law is deemed substantive, even if the Wisconsin courts, applying Wisconsin law, would consider the law procedural. In contrast to this line of cases, there is another line of cases which hold that a foreign state's characterization of its own laws as either substantive or procedural is effective in Minnesota courts. Consistent with this precedent, a Minnesota court accepts a foreign state's characterization of its law as procedural, regardless of how the same law would be viewed applying Minnesota forum law.²⁶² And there is even a third line of cases which holds that Minnesota courts are not obligated to give effect to foreign states' characterizations of their own laws, but that such characterizations nevertheless function as persuasive evidence in answering the characterization question.²⁶³ In short, Minnesota's use of the substance-procedure distinction is far from a model of clarity.

1. Predictability of Results

Assuming a law is characterized as substantive, Minnesota courts then apply the Leflar factors to decide which state's substantive law to apply, starting with predictability of results.²⁶⁴ Minnesota courts have often maintained that predictability of results

260. See *Schumacher v. Schumacher*, 676 N.W.2d 685, 690 (Minn. Ct. App. 2004).

261. *E.g.*, *Anderson v. State Farm Mut. Auto. Ins. Co.*, 24 N.W.2d 836, 839 (Minn. 1946) (holding that the court of the forum determines if a given question is one of substance or procedure); *Gate City Fed. Sav. & Loan Ass'n v. O'Connor*, 410 N.W.2d 448, 450 (Minn. Ct. App. 1987) (same).

262. *E.g.*, *Fee v. Great Bear Lodge of Wisconsin Dells, LLC*, CIV.03-3502 (PAM/RLE), 2004 WL 898916, at *2 (D. Minn. Apr. 9, 2004) ("Because Wisconsin regards its statutes of limitations as substantive, comity dictates that this Court treat the law as substantive . . ."); *Lutheran Ass'n of Missionaries & Pilots, Inc. v. Lutheran Ass'n of Missionaries & Pilots, Inc.*, CIV.03-6173 PAM/RLE, 2004 WL 1212083, at 1* (D. Minn. May 20, 2004) ("Therefore, because Minnesota regards its statutes of limitations as procedural while Canada regards such statutes as substantive in nature, comity dictates that the Court engage in the choice-of-law analysis [i.e., treat the statutes as substantive].").

263. *E.g.*, *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 736-38 (8th Cir. 1995) ("Nebraska's characterization of its own statute, while not dispositive because we are applying Minnesota law, is to be considered under the choice-of-law analysis used by the Minnesota courts."); *Myers v. Gov't Emps. Ins. Co.*, 225 N.W.2d 238, 241 (Minn. 1974) (considering Louisiana case law in deciding whether a Louisiana statute was substantive or procedural).

264. See, *e.g.*, *Milkovich v. Saari*, 203 N.W.2d 408, 412 (Minn. 1973).

is irrelevant in torts cases; that it only applies to disputes over contracts and other consensual interactions.²⁶⁵ In some tort cases, though, especially where courts determine that the parties likely acted with an eye to their own exposure to risk of liability, Minnesota courts have given the predictability consideration substantial weight.²⁶⁶ Where the predictability consideration applies, Minnesota courts have said that it serves two important goals: (1) protecting the parties' justified expectations;²⁶⁷ and (2) ensuring that the same law will be applied to the case, regardless of where litigation occurs.²⁶⁸ Historically, effectuating these two goals has meant considering some combination of the following: (1) adhering to the choice-of-law provisions in otherwise enforceable contracts;²⁶⁹ (2) where there is no contractual choice-of-law clause, applying the law of the state having the most significant relationship with the contract;²⁷⁰ (3) looking at the parties' subjective expectations of what law would apply;²⁷¹ (4)

265. *E.g.*, *Cargill, Inc. v. Prods. Eng'g Co.*, 627 F. Supp. 1492, 1496 (D. Minn. 1986) ("In *Milkovich* and in later cases, however, the Minnesota Court has stressed that only the last two of these considerations, the advancement of the forum's governmental interests and the application of the better rule of law, are relevant in tort cases."); *Milkovich*, 203 N.W.2d at 412 (noting that predictability of results "relates to consensual transactions where people should know in advance what law" applies to their actions); *Lommen v. City of E. Grand Forks*, 522 N.W.2d 148, 150 (Minn. Ct. App. 1994) ("The objective of the predictability factor is to fulfill the parties' justified expectations.").

266. *See, e.g.*, *Schumacher v. Schumacher*, 676 N.W.2d 685, 690 (Minn. Ct. App. 2004) ("The business-related nature of the activity makes this case somewhat more like a contract case, in which predictability of result is recognized to be significant. In choosing to participate in such an activity, it is reasonable that the participants would like to be able to predict their exposure to risk of liability."); *Standal v. Armstrong Cork Co.*, 356 N.W.2d 380, 382 (Minn. Ct. App. 1984) (predictability consideration is significant in determining what law applies to successor liability question relating to parties' agreement).

267. *See, e.g.*, *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 454 (Minn. Ct. App. 2001) ("This factor . . . is intended to protect the 'justified expectations of the parties to a transaction.'" (quoting *Richie v. Paramount Pictures Corp.*, 532 N.W.2d 235, 241 (Minn. Ct. App. 1995))).

268. *See, e.g.*, *Honeywell, Inc. v. Ruby Tuesday, Inc.*, 43 F. Supp. 2d 1074, 1079 (D. Minn. 1999); *Mid-Continent Eng'g Inc. v. Toyota Mach. USA, Corp.*, 676 F. Supp. 2d 823, 831-32 (D. Minn. 2009).

269. *E.g.*, *Medtronic, Inc.*, 630 N.W.2d at 454 (finding that predictability factor favors enforcing choice of law provision in employment contract); *St. Jude Med. S.C., Inc. v. Hasty*, CIV 06-4547, 2007 WL 128856, at *4 (D. Minn. Jan. 12, 2007) (same).

270. *E.g.*, *Honeywell*, 43 F. Supp. 2d at 1079 (observing that Alabama had a more significant relationship with the agreements at issue in the case than did Minnesota, suggesting that applying Alabama law would be more predictable); *SCM Corp. v. Deltak Corp.*, 702 F. Supp. 1428, 1430-31 (D. Minn. 1988) ("Because Deltak is a Minnesota corporation and the superheater was designed and manufactured in Minnesota, both of the parties in this case could reasonably anticipate that warranty disputes . . . would be determined by Minnesota law.").

271. *E.g.*, *Mooney v. Allianz Life Ins. Co. of N. Am.*, 244 F.R.D. 531, 536 (D. Minn.

considering what law other states would likely apply to the case;²⁷² and (5) determining which state's law would lead to more uniform results.²⁷³ Which of these standards for predictability ultimately applies varies from case-to-case, so that the same court might emphasize the parties' expectations in one case, and uniformity of future results in another.²⁷⁴

2. Maintenance of Interstate Order

Maintenance of interstate order, like predictability of results, is sometimes said by Minnesota courts to be a factor only in cases involving agreements between the parties (e.g., contract cases, land deals, etc.).²⁷⁵ There are, however, more Minnesota cases expressly considering maintenance of interstate order in torts cases than there are torts cases expressly declining to consider this criterion,²⁷⁶ and, in some such cases, courts note that maintenance of interstate order should be a significant consideration.²⁷⁷

In tort and contract cases, Minnesota courts applying the maintenance of interstate order criterion ask three related questions.

2007) ("However, the Court finds that both non-Minnesota class members and Allianz could have predicted that Minnesota law would govern claims based on Allianz's allegedly fraudulent activities that emanated from Minnesota."); *Hime v. State Farm Fire & Cas. Co.*, 284 N.W.2d 829, 833 (Minn. 1979) (applying Minnesota law to insurance case, in part, because insurer could have predicted that insured would drive to visit his former home in Minnesota).

272. *E.g.*, *Jepson v. Gen. Cas. Co. of Wis.*, 513 N.W.2d 467, 470-71 (Minn. 1994) ("It is, however, desirable for the courts of different states to reach similar conclusions on the choice of law in a given dispute. We think it unlikely most other courts would apply Minnesota law on the facts before us.").

273. *E.g.*, *Hoffman v. Henderson*, 355 N.W.2d 322, 324 (Minn. Ct. App. 1984) ("The application of Alaska law also yields predictable results. Outstate attorneys and instate attorneys will be compensated uniformly for similar services.").

274. *Compare, e.g.*, *Lommen v. City of E. Grand Forks*, 522 N.W.2d 148, 150 (Minn. Ct. App. 1994) (analyzing the predictability factor according to which law will promote the parties' justified expectations), *and Medtronic, Inc.*, 630 N.W.2d at 454 ("[Defendant] should have reasonably expected that Minnesota law would be applied . . . and it is clear that [Plaintiff] had a justified expectation that Minnesota law would apply to any such dispute."), *with Hoffman*, 355 N.W.2d at 324 (analyzing the predictability factor according to which law will promote uniformity of results in the future), *and Schumacher v. Schumacher*, 676 N.W.2d 685, 690 (Minn. Ct. App. 2004) ("Application of Iowa law to out-of-state domestic animal owners engaged in a domesticated animal activity in Iowa could affect [future] participation.").

275. *E.g.*, *Hughes v. Wal-Mart Stores, Inc.*, 250 F.3d 618, 620-21 (8th Cir. 2001); *U.S. Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 491 (8th Cir. 1990).

276. *See, e.g.*, *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 739 (8th Cir. 1995) ("We reject Nesladek's contention that Minnesota law *per se* precludes the application of any of the five Leflar factors in tort cases.").

277. *E.g.*, *Jepson*, 513 N.W.2d at 472 ("On the facts of this case, however, our choice of law is influenced more by our analyses of predictability and maintenance of interstate order than it is by our governmental interest in compensating a tort victim.").

First, they consider whether applying a particular state's law "would manifestly disrespect" another state's sovereignty.²⁷⁸ This inquiry essentially asks whether a state has sufficient contacts with a case such that applying its law would be reasonable.²⁷⁹ Not surprisingly, the factors considered by courts in this context closely resemble the contacts considered under the Second Restatement's significant contacts approach,²⁸⁰ for example the parties' places of residence,²⁸¹ the place where the events giving rise to the litigation occurred,²⁸² and the parties' places of business.²⁸³

The second inquiry under the maintenance of interstate order assessment is whether applying a particular law would "impede the interstate movement of people and goods."²⁸⁴ No Minnesota court has ever found that application of a particular state's law in a particular case would so severely affect interstate order as to defeat application of that state's law, even in cases involving interstate carriers (where one would most expect to find such a claim upheld).²⁸⁵ Rather, Minnesota courts seem to view this inquiry as simply a means of confirming that the second choice-influencing consideration does not preclude application of a particular law.²⁸⁶

Finally, the courts consider whether applying one state's law or another would have the effect of encouraging or rewarding forum shopping.²⁸⁷ To answer this question, courts ask whether there is any evidence that one of the parties is seeking to have a particular law

278. See, e.g., *Mooney v. Allianz Life Ins. Co. of N. Am.*, 244 F.R.D. 531, 536 (D. Minn. 2007); *Jepson*, 513 N.W.2d at 471; *Hosch v. Levings*, A09-437, 2009 WL 3427084, at *4 (Minn. Ct. App. Oct. 27, 2009).

279. See *Nw. Airlines, Inc. v. Astraea Aviation Servs., Inc.*, 111 F.3d 1386, 1394 (8th Cir. 1997); *Fee v. Great Bear Lodge of Wis. Dells, LLC*, CIV. 03-3502 (PAM/RLE), 2004 WL 898916, at *2 (D. Minn. Apr. 9, 2004); *Hime v. State Farm Fire & Cas. Co.*, 284 N.W.2d 829, 833 (Minn. 1979); *Stenzel v. State Farm Mut. Auto Ins. Co.*, 379 N.W.2d 674, 676 (Minn. Ct. App. 1986).

280. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971).

281. See, e.g., *Nesladek*, 46 F.3d at 739.

282. See, e.g., *Schmelzle v. ALZA Corp.*, 561 F. Supp. 2d 1046, 1048-49 (D. Minn. 2008).

283. See, e.g., *Meir v. Auto Owners Ins., Co.*, C4-88-2092, 1989 WL 14913, at *1 (Minn. Ct. App. Feb. 28, 1989).

284. See *Smith v. Stonebridge Life Ins. Co.*, No. CIV. 03-1006 (RHK/AJB), 2003 WL 21909567, at *4 (D. Minn. Apr. 9, 2004); *Lommen v. City of E. Grand Forks*, 522 N.W.2d 148, 151-52 (Minn. Ct. App. 1994).

285. See, e.g., *Nw. Airlines, Inc. v. Astraea Aviation Servs., Inc.*, 111 F.3d 1386, 1394 (8th Cir. 1997) (making no mention of potentially negative impact on interstate movement of people or goods).

286. E.g., *Heldt v. Truck Ins. Exch.*, No. C7-94-1009, 1995 WL 1496, at *2 (Minn. Ct. App. Jan. 3, 1995) (noting that application of Minnesota law would not "impede the interstate movement of people or goods").

287. E.g., *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 738-39 (8th Cir. 1995); *Schwartz v. Consol. Freightways Corp. of Del.*, 221 N.W.2d 665, 669 (Minn. 1974).

applied because that law promises greater recovery.²⁸⁸ Unlike other Leflar states, which rarely, if ever, find forum shopping to be a major concern, Minnesota courts have occasionally found forum shopping to be all but dispositive.²⁸⁹

3. Simplification of the Judicial Task

The third better law consideration—simplification of the judicial task—plays no part in most Minnesota choice-of-law analyses.²⁹⁰ In the few instances in which Minnesota courts have considered this criterion, however, it is generally used to justify application of Minnesota law, on the ground that it is almost always easier for a Minnesota court to apply Minnesota law.²⁹¹ In fact, there is only one reported case in Minnesota in which a court held that the judicial task would be simplified by applying foreign law.²⁹² As such, to the extent Minnesota courts have considered this factor at all, they have done so in a way that renders it very forum-centric.

4. Forum's Governmental Interests

The fourth Leflar consideration—the forum's governmental interests—is often held to be one of the most important considerations in both tort and contract cases.²⁹³ Sometimes courts assessing this factor look solely at Minnesota's interests in the litigation,²⁹⁴ but other times they look at the interests of all relevant

288. *E.g.*, *Nesladek*, 46 F.3d 738-39; *Jepson v. Gen. Cas. & Ins. Co. of Wis.*, 513 N.W.2d 467, 471 (Minn. 1994).

289. *E.g.*, *Nesladek*, 46 F.3d at 738 (“Both Nesladek and her husband admitted that they moved to Minnesota in part because they . . . were aware that under Nebraska law their case was a non-starter, whereas Minnesota’s law was much more favorable to a suit against Ford. Thus forum shopping clearly is a factor in this case”); *Jepson*, 513 N.W.2d at 471 (“If the law of North Dakota promised Jepson a greater recovery than Minnesota, we doubt very much that he would be litigating this coverage dispute in our courts.”).

290. *E.g.*, *Schumacher v. Schumacher*, 676 N.W.2d 685, 691 (Minn. Ct. App. 2004) (“This factor is not particularly relevant where the competing laws are straightforward and the law of either state could be applied without difficulty.”); *Lommen v. City of E. Grand Forks*, 522 N.W.2d 148, 152 (Minn. Ct. App. 1994) (“Since the immunity issue is not procedural, the ‘judicial task’ consideration is of little or no weight in our analysis.”).

291. *See Gimmestad v. Gimmestad*, 451 N.W.2d 662, 666 (Minn. Ct. App. 1990) (“[T]his factor is obviously advanced when a Minnesota court applies Minnesota law.”); *Schiele v. Charles Vogel Mfg. Co., Inc.*, 787 F. Supp. 1541, 1553 (D. Minn. 1992) (citing *Gimmestad* language endorsing application of forum law); *H Enters. Int’l, Inc. v. Gen. Elec. Capital Corp.*, 833 F. Supp. 1405, 1417 (D. Minn. 1993) (same).

292. *Reed v. Univ. of N.D.*, 543 N.W.2d 106, 109 (Minn. Ct. App. 1996).

293. *See, e.g.*, *Schiele*, 787 F. Supp. at 1553-54 (“Consideration of the fourth and fifth factors carry the most weight in choice of law analysis.”); *Milkovich v. Saari*, 203 N.W.2d 408, 412 (Minn. 1973) (noting that the fourth and fifth factors are the most significant for purposes of the better law analysis).

294. *E.g.*, *Matoga v Christopher*, No. CIV 08-2404 (DSD/JJG), 2010 WL 4450545, at

states.²⁹⁵ When courts look only at Minnesota's interests, the forum's governmental interest criterion is usually said to require only that "Minnesota courts should not be required to decide cases under rules which are inconsistent with Minnesota's concepts of fairness and equity."²⁹⁶ Phrased differently, the inquiry considers Minnesota's interests as a "justice administering state,"²⁹⁷ as reflected in its public policies.²⁹⁸ Among the state policies credited by Minnesota courts in applying this criterion are ensuring that state courts are open to enforcing citizens' rights,²⁹⁹ compensating tort victims,³⁰⁰ and shielding taxpayers from increased government expenditures.³⁰¹ Where Minnesota courts have concluded that a foreign law serves an important state interest better than a Minnesota law, the courts have been willing to hold that the forum's governmental interest favors application of the foreign law, even though Minnesota's policy, as declared in its law, might be otherwise.³⁰²

To the extent Minnesota courts consider other states' interests in assessing the forum's governmental interests, they must first identify the state interests involved and then weigh those interests against each other. A survey of Minnesota case law does not suggest any sort of obvious method for weighing interests, nor does there appear to be some established hierarchy of interests. Indeed, Minnesota courts considering the same interests have on different occasions reached different conclusions as to which interest should predominate over

*2 (D. Minn. Nov. 1, 2010); *Erickson v. Hertz Corp.*, No. CIV 05-1690, 2006 WL 1004385, at *5 (D. Minn. Apr. 17, 2006); *Danielson v. Nat'l Supply Co.*, 670 N.W.2d 1, 8-9 (Minn. Ct. App. 2003).

295. *E.g.*, *Lutheran Ass'n of Missionaries & Pilots, Inc. v. Lutheran Ass'n of Missionaries & Pilots, Inc.*, No. CIV 03-6173 PAM/RLE, 2004 WL 1212083, at *3 (D. Minn. May 20, 2004); *Lommen*, 522 N.W.2d at 152.

296. *Heldt v. Truck Ins. Exch.*, No. C7-94-1009, 1995 WL 1496, at *2 (Minn. Ct. App. Jan. 3, 1995); *see also* *Hime v. State Farm Fire & Cas. Co.*, 284 N.W.2d 829, 833 (Minn. 1979) ("Our concern here . . . is that Minnesota courts not be called upon to determine issues under rules, which, however accepted they may be in other states, are inconsistent with our own concept of fairness and equity.").

297. *See* *SCM Corp. v. Deltak Corp.*, 702 F. Supp. 1428, 1431-32 (D. Minn. 1988) (quoting *Hime*, 284 N.W.2d at 833-34) (internal quotation marks omitted).

298. *See, e.g.*, *Hime*, 284 N.W.2d at 833-34 (holding that application of Florida law would contravene Minnesota's policy against household immunity clauses in contracts).

299. *See* *Myers v. Gov't Emps. Ins. Co.*, 225 N.W.2d 238, 242-44 (Minn. 1974).

300. *See* *Milkovich v. Saari*, 203 N.W.2d 408, 417 (Minn. 1973).

301. *See* *Hodges v. Hodges*, 415 N.W.2d 62, 68 (Minn. Ct. App. 1987).

302. *See, e.g.*, *Boatwright v. Budak*, 625 N.W.2d 483, 489-90 (Minn. Ct. App. 2001) ("In this case, Iowa law best serves Minnesota's interest in compensating tort victims. This interest outweighs the state's interest in providing a cap on the liability of rental-car owners . . ."); *see also* *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 739-40 (8th Cir. 1995) (preferring Nebraska's statute of repose under the fourth consideration).

the other.³⁰³

5. Better Rule of Law

The final choice-influencing consideration is largely insignificant in Minnesota.³⁰⁴ Minnesota courts use the fifth factor almost exclusively as a tie-breaker, meaning that it has no effect when the first four factors point to a particular result.³⁰⁵ Even where courts have found it necessary to reach the better rule consideration, moreover, they often decide that they cannot say what law is “better,” meaning that, even as a tiebreaker, the criterion still is not dispositive in determining choice of law.³⁰⁶

On the few occasions where Minnesota courts have opined on the relative merits of conflicting laws, the sole consideration applied has been the degree to which the laws at issue make “good socio-economic sense.”³⁰⁷ Along those lines, Minnesota courts have held that laws allowing for fair compensation of Minnesota residents make better socio-economic sense than laws designed to prevent stale legal claims;³⁰⁸ that laws allowing insureds to receive the protection they bargained for from their insurers make better socio-economic sense than laws upholding familial exclusions in insurance contracts;³⁰⁹ and that laws requiring physical contact in order to make a claim under an automobile insurance plan do not make good socio-economic sense.³¹⁰

303. *Compare, e.g., Nesladek*, 46 F.3d at 740 (Nebraska’s and Minnesota’s shared interests in repose and limiting liability outweigh Minnesota’s interest in compensating tort victims), *with Boatwright*, 625 N.W.2d at 489-90 (Minnesota’s interest in compensating tort victims outweighs its interest in limiting liability).

304. *See Nodak Mut. Ins. Co. v. American Family Mut. Ins. Co.*, 604 N.W.2d 91, 96 (Minn. 2000) (“Regarding the fifth factor . . . we note that this court has not placed any emphasis on this factor in nearly 20 years and conclude that it is likewise unnecessary to reach it here.”).

305. *See, e.g., Schumacher v. Schumacher*, 676 N.W.2d 685, 691-92 (Minn. Ct. App. 2004) (“Generally, this factor is addressed only when the other four factors are not dispositive as to which state’s law should be applied. Here, the other factors lead us to conclude that Iowa law applies, and therefore, we need not determine which state has the better rule of law . . .”); *Danielson v. Nat’l Supply Co.*, 670 N.W.2d 1, 9 (Minn. Ct. App. 2003) (“This factor should be addressed when the other factors are not conclusive as to which state’s law should be applied.”).

306. *E.g., Jepson v. Gen. Cas. Co. of Wis.*, 513 N.W.2d 467, 473 (Minn. 1994) (“Sometimes different laws are neither better nor worse in an objective way, just different.”); *Lommen v. City of E. Grand Forks*, 522 N.W.2d 148, 152-53 (Minn. Ct. App. 1994) (“We think the rules of the two states simply differ, neither is necessarily better or worse than the other. Accordingly, this consideration is of no relevance in our analysis.”).

307. *E.g., Smith v. Stonebridge Life Ins. Co.*, No. CIV 03-1006 (RHK/AJB), 2003 WL 21909567, at *6 (D. Minn. Aug. 8, 2003).

308. *Danielson*, 670 N.W.2d at 9.

309. *Hime v. State Farm Fire & Cas. Co.*, 284 N.W.2d 829, 834 (Minn. 1979).

310. *Heldt v. Truck Ins. Exch.*, No. C7-94-1009, 1995 WL 1496, at *3 (Minn. Ct.

E. Wisconsin

Wisconsin's courts purport to apply a two-step test to determine choice-of-law questions: first, they consider whether applying a particular state's law would constitute officious intermeddling, and, second, if it would not, they apply the Leflar factors to determine which state's law should apply.³¹¹ This seemingly straightforward test, however, is an extremely oversimplified version of the state's better law method as it is actually applied.

Before even getting to the officious intermeddling determination, Wisconsin courts must determine whether an actual conflict exists, i.e., whether a difference in the law applied will be outcome-determinative.³¹² If there is no actual conflict, Wisconsin courts automatically apply Wisconsin law.³¹³ If there is a true conflict, Wisconsin courts proceed to the two-stage inquiry—officious intermeddling and then use of the choice-influencing considerations—described in most Wisconsin court opinions.³¹⁴

When the laws at issue actually conflict, Wisconsin courts ask whether application of either law would constitute officious intermeddling. Application of a state's law constitutes officious intermeddling when that state's contacts with the case are so minimal and limited that the state cannot be said to have a legitimate interest in having its law applied.³¹⁵ Wisconsin courts have repeatedly noted that "this is not a pure contacts-balancing test,

App. Jan. 3, 1995).

311. See, e.g., *Beloit Liquidating Trust v. Grade*, 677 N.W.2d 298, 307 (Wis. 2004) ("[T]here are two applicable tests when deciding which forum's laws apply. [Lays out officious intermeddling and better law standards]."); *Am. Standard Ins. Co. of Wis. v. Cleveland*, 369 N.W.2d 168, 171 (Wis. Ct. App. 1985) ("First, we consider whether the contacts of one state to the facts of the case are so obviously limited and minimal that application of that state's law constitutes officious intermeddling. Second, if no officious intermeddling would result, then we apply the choice-influencing considerations . . .").

312. See, e.g., *Lichter v. Fritsch*, 252 N.W.2d 360, 362 (Wis. 1977) ("In a conflict of law situation, the first step is to determine whether there is a conflict, that is, will the choice of one law as compared to another determine the outcome."); *Gavers v. Fed. Life Ins. Co.*, 345 N.W.2d 900, 901-02 (Wis. Ct. App. 1984) ("The threshold determination . . . is whether a genuine conflict exists. If so, an application of the choice-influencing considerations should proceed unless it is decided that application of any of the multiple choices of law would constitute mere 'officious intermeddling.'" (quoting *Hunker v. Royal Indem. Co.*, 204 N.W.2d 897, 902 (Wis. 1973))).

313. See, e.g., *Am. Family Life Ins. Co. v. Busjahn*, 622 N.W.2d 769, at *3 (Wis. Ct. App. Dec. 12, 2000) ("The parties have not identified a true conflict of law and, therefore, we apply Wisconsin law.").

314. See *Gavers*, 345 N.W.2d at 901-02.

315. See, e.g., *Burns v. Geres*, 409 N.W.2d 428, 430-31 (Wis. Ct. App. 1987) (holding that application of Wisconsin law to a dispute over Arizona property would constitute officious intermeddling where Wisconsin has no "legitimate interest in regulating property in Arizona").

but an approach that says merely minuscule contacts with another state will not justify the application of that state's law."³¹⁶ Wisconsin courts have not offered a more precise definition of what sorts of contacts are sufficient to overcome this low bar, though the case law does provide some indication. Deliberate conduct that occurs in a state and is related to the litigated dispute, for example, has been held to be sufficient to overcome the officious intermeddling barrier to application of that state's law.³¹⁷ By contrast, the mere fact that a plaintiff is domiciled in a state,³¹⁸ that a business is incorporated in a state,³¹⁹ or that a business has advertised or operated a facility in a state³²⁰ is not enough to give that state a cognizable interest in having its laws applied.

In a number of cases, the officious intermeddling inquiry operates in tandem with Wisconsin's preference for applying forum law.³²¹ In this regard, while Wisconsin courts recognize a presumption in favor of forum law,³²² it is not entirely clear how strong the presumption is. On at least one occasion, the Wisconsin Supreme Court has said that it is a "weak" presumption.³²³ In another subsequent case, the Court

316. *Love v. Blue Cross and Blue Shield of Ga., Inc.*, 439 F. Supp. 2d 891, 892 (E.D. Wis. 2006).

317. *See, e.g., Clorox Co. v. S.C. Johnson & Son, Inc.*, 627 F. Supp. 2d 954, 965-66 (E.D. Wis. 2009) (listing the ways in which the particulars of the litigation implicate both Wisconsin and California law); *Love*, 493 F. Supp. 2d at 893 ("Georgia's relationship to the plaintiff and the insured was not a matter of mere happenstance; instead, Nicholls applied for and was issued an insurance policy from Blue Cross and Blue Shield of Georgia. She lived in the state at the time, bought a policy that said Georgia law would apply, and could only expect that the state's insurance law might have some impact on any claim she might have against her insurer.").

318. *See Brooks v. Gen. Cas. Co. of Wis.*, No. 06-C-0996, 2007 WL 4305577, at *3 (E.D. Wis. Dec. 7, 2007) ("Wisconsin courts have held that a plaintiff's residency is an insufficient contact to support the application of the law of the plaintiff's home state.").

319. *See Beloit Liquidating Trust v. Grade*, 677 N.W.2d 298, 307 (Wis. 2004) ("While Beloit Corporation was incorporated under Delaware laws and filed bankruptcy in Delaware, that comprised the extent of Beloit Corporation's contact with Delaware.").

320. *See Johnson v. Travelers Ins. Co.*, 486 N.W.2d 37, at *2-3 (Wis. Ct. App. Apr. 14, 1992) (finding that application of Wisconsin law constitutes officious intermeddling where the "only Wisconsin contacts are [plaintiff's] residence, and the facts that [defendant] advertises and has a facility in Wisconsin").

321. *See, e.g., Coady v. Cross Country Bank*, 729 N.W.2d 732, 738 (Wis. Ct. App. 2007) ("[W]hen performing a choice of law analysis, courts first presume that the law of the forum applies unless . . . the nonforum state's contacts are 'so obviously limited and minimal that application of that state's law constitutes officious intermeddling.'" (quoting *Beloit Liquidating Trust*, 677 N.W.2d at 307)); *Gavers v. Fed. Life Ins. Co.*, 345 N.W.2d 900, 902-03 (Wis. Ct. App. 1984).

322. *State Farm Mut. Auto. Ins. Co. v. Gillette*, 641 N.W.2d 662, 676 (Wis. 2002); *Hunker v. Royal Indem. Co.*, 204 N.W.2d 897, 902 (Wis. 1973).

323. *See Zelinger v. State Sand & Gravel Co.*, 156 N.W.2d 466, 469-70 (Wis. 1968) ("Under this approach the *lex fori* is not a choice influencing consideration as such but is a weak presumption to be used as a starting point in applying the conflict-of-law rule adopted in *Wilcox* but which is not a part of the five choice influencing

explained:

[T]he strength of the presumption is irrelevant, since its only purpose is to trigger the responsibility of the court to carry out the forum state's policy unless it appears that the forum state's policies are unaffected by using a nonforum rule, or unless the facts show that the contacts with the [case] are so minimal that the use of forum law would be clearly the result of interloping chauvinism.³²⁴

Where Wisconsin is one of the purportedly interested states, then, a foreign state's law will be applied only where it can overcome both the bar to officious intermeddling and the preference for Wisconsin law.

Where there is a true conflict and application of neither state's law would constitute officious intermeddling, Wisconsin subjects the two conflicting laws to a choice-of-law analysis. Wisconsin is the only state besides Minnesota to apply the Leflar law method to both contract and tort cases.³²⁵ Wisconsin uses the method unquestionably in torts cases.³²⁶ And courts apply the same method (without pairing it or combining it with any other method) in a sizable number of contracts cases, too.³²⁷ In a majority of Wisconsin contract cases, however, courts also apply, in differing ways, the Second Restatement's most significant relationship approach.³²⁸ In a handful

considerations adopted in *Heath*.").

324. *Conklin v. Horner*, 157 N.W.2d 579, 582 n.1 (Wis. 1968).

325. See *SYMEONIDES*, *supra* note 7, at 64.

326. See, e.g., *Decker v. Fox River Tractor Co.*, 324 F. Supp. 1089, 1090-91 (E.D. Wis. 1971) ("It is not appropriate to decide which state's negligence law shall apply in the case at bar simply by counting the number of contacts. Instead, it is necessary to resolve the issue of choice of law by resort to the choice-influencing factors . . ."); *Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc.*, 206 N.W.2d 414, 418-19 (Wis. 1973) ("[T]his court . . . abandon[ed] the . . . lex loci rule in matters involving the appropriate torts law to be applied when [Wisconsin's law conflicts with another jurisdiction's]. . . . [T]his court should base its conclusions upon the following choice-influencing considerations . . .").

327. See, e.g., *Hammer v. Rd. Am., Inc.*, 614 F. Supp. 467, 469 (E.D. Wis. 1985) ("In choosing the applicable law [in a contracts dispute], five factors are surveyed . . ."); *Schlusser v. Allis-Chalmers Corp.*, 271 N.W.2d 879, 886 (Wis. 1978) (applying the better law criteria to a class action concerning enforcement of employment contracts); *Emp'rs Ins. of Wausau v. Certain Underwriters at Lloyd's London*, 552 N.W.2d 420, 427 (Wis. Ct. App. 1996) ("Wisconsin uses a 'grouping of contacts' test to determine choice of law. Under that doctrine, the choice of law is based on [the five better law criteria].").

328. E.g., *State Farm Mut. Auto. Ins. Co. v. Gillette*, 641 N.W.2d 662, 670-71 (Wis. 2002) ("In contractual disputes, Wisconsin courts apply the 'grouping of contacts' rule, that is, that contract rights must be 'determined by the law of the jurisdiction with which the contract has its most significant relationship.'" (internal citations omitted)); *Glaeske v. Shaw*, 661 N.W.2d 420, 427-28 (Wis. Ct. App. 2003) ("Wisconsin courts employ two choice of law methodologies. The first, applied in contract cases, provides that contract rights are to be determined by the law of the [jurisdiction] with which the contract has its most significant relationship.").

of these cases, Wisconsin courts applying the most significant relationship approach do so to the total exclusion of the Leflar considerations (i.e., they only consider the Second Restatement factors).³²⁹ In most contracts cases in which Wisconsin courts apply the Second Restatement, however, they hold the Leflar criteria in reserve as a way to reach a decision where the most significant relationship approach does not yield a clear result.³³⁰

Because Wisconsin courts taking this approach do not often actually engage in a Leflar analysis,³³¹ it seems a stretch to say that Wisconsin applies the Leflar approach unequivocally in contracts cases. At most, the Leflar method is a sometimes important, but oftentimes unimportant, component of Wisconsin's choice-of-law approach to contracts, in contrast to its predominance in Wisconsin's choice-of-law approach to torts.

In addition to distinguishing between cases arising in contract versus tort, Wisconsin courts also follow the familiar practice of differentiating between matters that are substantive as opposed to procedural.³³² As is true of other states previously discussed, Wisconsin applies its own procedural rules even where it applies another state's substantive law. While Leflar found a basis for this distinction in the application of his third choice-influencing consideration, Wisconsin courts recognize a procedural/substantive distinction even before they address the choice-influencing considerations.³³³ In Wisconsin, "all matters relating to the remedy,

329. *E.g.*, *Kender v. Auto-Owners Ins. Co.*, 793 N.W.2d 88, 94 (Wis. Ct. App. 2010) (applying the significant contacts test without any consideration of the better law factors); *Glaeske*, 661 N.W.2d at 428 ([W]e will apply the law of the state with which the trust has its most significant relationship.”).

330. *E.g.*, *In re Jafari*, 569 F.3d 644, 649-50 (7th Cir. 2009) (“In a close contracts case, if it is not clear that the nonforum contacts are of greater significance, then the court typically analyzes as a tie-breaker the five choice-influencing factors developed in *Heath v. Zellmer*.”); *Henderson v. U.S. Bank, N.A.*, 615 F. Supp. 2d 804, 808 (E.D. Wis. 2009) (“If, after applying the grouping of contacts approach the court cannot clearly identify a state having the most significant relationship with the contract, then the court applies five choice-influencing considerations”); *Ziemba v. Anagnos*, 350 N.W.2d 740, at *5 (Wis. Ct. App. 1984) (“We conclude that the significant contacts . . . fail to favor one state over another. We, therefore, turn to an additional analysis referred to as the ‘choice-influencing analysis.’”).

331. *E.g.*, *Kender*, 793 N.W.2d at 94-95 (“After considering the relevant contacts under the [Second Restatement criteria], we conclude that Minnesota has the more significant relationship with the Auto-Owners policy.”); *Coady v. Cross Country Bank*, 729 N.W.2d 732, 739 (Wis. Ct. App. 2007) (deciding choice of law question based solely on significant contacts, even though the court referenced the better law approach one page earlier).

332. *See, e.g.*, *Witt v. Realist, Inc.*, 118 N.W.2d 85, n.3 (Wis. 1962); *Ladish Co., Inc. v. Armco, Inc.*, 514 N.W.2d 724, at *2 (Wis. Ct. App. 1993).

333. *See, e.g.*, *Marten Transp., Ltd. v. Rural Mut. Ins. Co.*, 543 N.W.2d 541, 544 (Wis. Ct. App. 1995) (“Because we conclude that the question when a contribution action may be brought is remedial or procedural and subject to the law of the forum,

the conduct of the trial, and the rules of evidence” are procedural and thus governed by Wisconsin law.³³⁴

1. Predictability of Results

If Wisconsin courts decide that a particular issue is substantive, they will then frequently apply the Leflar criteria, beginning with predictability of results. Like courts in the other Leflar states, Wisconsin courts initially held that predictability of results was unimportant in cases involving unplanned torts.³³⁵ Shortly thereafter, however, the Wisconsin Supreme Court did an about-face and clarified that “[i]n a tort action, the question is not whether the parties planned to commit an unintentional act but whether, in the event the unintended contingency occurs, the result, that is, the legal consequence of the unintended act, comports with predictions or expectations of the parties.”³³⁶ Today, then, many Wisconsin courts give the predictability consideration significant weight in both tort and contract cases,³³⁷ though in a significant minority of cases, the courts have continued to maintain that predictability is only important in the context of planned relationships.³³⁸

Predictability of results has also been held to mean different things in different Wisconsin cases. Much like Rhode Island courts, Wisconsin courts have sometimes adopted a forward-looking approach—asking what ruling will best promote certainty in future cases involving similarly-situated parties³³⁹—and have sometimes adopted a retrospective approach—asking what the actual parties’

we need not apply the substantive choice of law ‘dominant interest’ or ‘grouping of contacts’ method of analysis . . .”).

334. *Id.* (“It is clear that the law of the forum [] governs all matters relating to the remedy, the conduct of the trial, and the rules of evidence.”).

335. *See Conklin v. Horner*, 157 N.W.2d 579, 584 (Wis. 1968) (“[A] tort which is not intended can never, by definition, be the subject of advance planning with reference to a particular state’s law.”).

336. *Lichter v. Fritsch*, 252 N.W.2d 360, 363 (Wis. 1977).

337. *E.g.*, *Cowley v. Abbott Labs., Inc.*, 476 F. Supp. 2d 1053, 1057-58 (W.D. Wis. 2007) (applying the predictability consideration in a tort case); *Finch v. Southside Lincoln-Mercury, Inc.*, 685 N.W.2d 154, 166 (Wis. Ct. App. 2004) (applying the predictability consideration in a contract case).

338. *E.g.*, *Decker v. Fox River Tractor Co.*, 324 F. Supp. 1089, 1091 (E.D. Wis. 1971) (“Both parties agree that the first two factors are not significant in deciding whether Wisconsin’s or Pennsylvania’s negligence law shall apply.”).

339. *E.g.*, *Diesel Serv. Co. v. AMBAC Int’l Corp.*, 961 F.2d 635, 642 (7th Cir. 1992) (“Applying Wisconsin law in this case would create uncertainty and unpredictability. While Wisconsin may have had a greater proportion of AMBAC sales in 1989, this could change from year to year—determining if Wisconsin law applied on that basis would be a nightmare.”); *Beloit Liquidating Trust v. Grade*, 677 N.W.2d 298, 307-08 (Wis. 2004) (“Thus, we conclude that applying Wisconsin law to the present case will enhance predictability of results for corporations doing business in this state.”).

intentions or expectations were prior to the litigation.³⁴⁰ The challenge under both approaches is to identify reasonable party expectations—whether in the past or in the future—and to determine what choice of law will best effectuate such expectations.³⁴¹

2. Maintenance of Interstate Order

Maintenance of interstate order functions much like the predictability consideration in tort cases, with Wisconsin courts sometimes saying it is important and other times saying it is not.³⁴² But, in contrast to the predictability consideration, where maintenance of interstate order is found to be unimportant, the determination is usually based not on a finding that the criterion is intrinsically without merit in certain kinds of cases, but because it is associated with such a low threshold that almost any state law at issue can satisfy this criterion.³⁴³ As construed by the Wisconsin courts, satisfaction of the maintenance of interstate order criterion requires only that application of a particular state's law be reasonable.³⁴⁴ In turn, application of a state's law is reasonable so long as that state has at least a minimal connection with the facts of the case and no other state has a notably greater interest in having its laws applied.³⁴⁵ Because this factor equates to a significant degree with a state's relationship to a litigated dispute, the court's analysis

340. *Cowley*, 476 F. Supp. 2d at 1057 (“The first factor . . . concerns the parties’ expectations. This factor clearly favors North Carolina [since] . . . Cowley had to assume that any dispute concerning Dr. Cervený’s prescription of Humira would be resolved under North Carolina law.”); *Am. Standard Ins. Co. of Wis. v. Cleveland*, 369 N.W.2d 168, 172 (Wis. Ct. App. 1985) (deciding that the first factor weighs in favor of applying Wisconsin law because all the parties’ “expectations presumably were that Wisconsin law would apply in the event of an accident”).

341. *E.g.*, *State Farm Mut. Auto Ins. Co. v. Gillette*, 641 N.W.2d 662, 676 (Wis. 2002) (“The question here is what legal consequence . . . comports with the predictions or expectations of the parties.”).

342. *Compare Decker*, 324 F. Supp. at 1091 (“Both parties agree that the first two factors are not significant in deciding whether Wisconsin’s or Pennsylvania’s negligence law shall apply.”), with *Beloit Liquidating Trust*, 677 N.W.2d at 308 (giving substantial consideration to the second criterion).

343. *E.g.*, *Thiele v. N. Mut. Ins. Co.*, 36 F. Supp. 2d 852, 855 (E.D. Wis. 1999) (“Maintenance of interstate order is only implicated if application of either state’s law is unreasonable, which is not the case with either Wisconsin’s or Michigan’s law related to the tort of bad faith.”); *Sawyer v. Midelfort*, 579 N.W.2d 268, 276 (Wis. Ct. App. 1998) (“The second factor . . . requires that a minimally concerned state defer to the interests of a substantially concerned state.”).

344. *See Am. Standard Ins. Co. of Wis.*, 369 N.W.2d at 172 (“Maintenance of interstate order is not implicated by the application of either state’s law because neither choice would be totally unreasonable.”).

345. *See, e.g.*, *Drinkwater v. Am. Family Mut. Ins. Co.*, 714 N.W.2d 568, 577 (Wis. 2006) (“This factor requires that a jurisdiction which is minimally concerned defer to a jurisdiction that is substantially concerned.”); *Lichter v. Fritsch*, 252 N.W.2d 360, 363 (Wis. 1977) (same).

often involves contact or interest counting,³⁴⁶ although the threshold for contacts and interests is so minimal that this factor is often found to be satisfied by application of either state's law.³⁴⁷

Wisconsin courts pay comparatively little attention to forum shopping as a consideration in assessing the potential impact of choice of law on the maintenance of interstate order. While states like Arkansas³⁴⁸ and Minnesota³⁴⁹ attach considerable significance to forum shopping, Wisconsin courts make almost no mention of it. And, in the few cases where Wisconsin courts have considered forum shopping in this context,³⁵⁰ they have never found that applying a particular state's law would actually promote interstate order.

3. Simplification of the Judicial Task

Wisconsin courts often find that simplification of the judicial task is of minimal relevance to their choice-of-law analysis. Typically, they minimize this factor's significance because they do not think the inconvenience associated with applying a particular law is so substantial that it should be considered in choice-of-law decisions.³⁵¹ In other words, these courts find that this factor is a wash, so that the comparative ease of applying familiar forum rules is of little consequence because of the equal ease of applying foreign rules.³⁵²

346. See, e.g., *Kuehn v. Childrens Hosp., L.A.*, 119 F.3d 1296, 1300 (7th Cir. 1997) (comparing the significant contacts of Wisconsin and California and finding them to be of relatively equal weight); *Love v. Blue Cross & Blue Shield of Ga., Inc.*, 439 F. Supp. 2d 891, 894-95 (E.D. Wis. 2006) ("As noted earlier, neither jurisdiction is 'minimally concerned' here, so the factor is a wash.").

347. See, e.g., *Schimpf v. Gerald, Inc.*, 52 F. Supp. 2d 976, 1003 (E.D. Wis. 1999) (finding that Wisconsin and Illinois both have cognizable interests in protecting their citizens' rights, a standard that would seem to create a sufficient interest for every state whose domiciliary is involved in litigation).

348. See *supra* Part II.A.2.

349. See *supra* Part II.D.2.

350. E.g., *Love*, 439 F. Supp. 2d at 895 ("Application of one state's law over another's would not upset interstate order, and there is no indication of forum shopping."); *Zelinger v. State Sand & Gravel Co.*, 156 N.W.2d 466, 471 (Wis. 1968) ("On these facts, forum shopping played no part and probably will not in many cases until the plaintiff can predict with certainty how a choice of law will be resolved.").

351. See, e.g., *Thiele v. N. Mut. Ins. Co.*, 36 F. Supp. 2d 852, 855 (E.D. Wis. 1999) ("Simplification of the judicial task is likewise not a major factor because this court could apply either the Wisconsin or Michigan laws without great difficulty."); *Am. Standard Ins. Co. of Wis. v. Cleveland*, 369 N.W.2d 168, 172 (Wis. Ct. App. 1985) ("Simplification of the judicial task is also not a factor in this case. Wisconsin courts already are familiar with the collateral source rule, while rejection of the rule simply requires that recovery be denied for damages paid by a collateral source.").

352. E.g., *Decker v. Fox River Tractor Co.*, 324 F. Supp. 1089, 1091 (E.D. Wis. 1971) ("Furthermore the third factor . . . also is not decisive, for this court's greater familiarity with Wisconsin's comparative negligence law is balanced by the arguably easier applicability of [foreign law] . . ."); *Sawyer v. Midelfort*, 579 N.W.2d 268, 276 (Wis. Ct. App. 1998) ("It is true that application of Minnesota law, which would result

Indeed, Wisconsin is unusual in the frequency with which its courts have found foreign rules easier to apply than forum rules.³⁵³

4. Advancement of the Forum's Governmental Interests

The fourth factor—advancement of the forum's governmental interests—is just as multivariate in Wisconsin as it is in the other Leflar states. Wisconsin courts recognize most of the familiar governmental interests typically associated with this criterion: fully compensating forum residents who are the victims of wrongdoing;³⁵⁴ limiting damages in wrongful death cases;³⁵⁵ and apportioning damages on the basis of the parties' comparative fault.³⁵⁶ It is not always clear, however, how Wisconsin's courts decide when these interests (and not others) apply.

There are two major ways in which Wisconsin's approach to the fourth choice-influencing consideration differs from the approaches of other Leflar states. First, Wisconsin courts generally do not invoke the forum's interest as a "justice-administering state" in applying this criterion.³⁵⁷ Second, Wisconsin courts limit the scope of their inquiry under the fourth consideration almost exclusively to Wisconsin's interests.³⁵⁸ Unlike courts in other Leflar states, Wisconsin courts seldom consider a foreign state's interests in the context of this fourth consideration.³⁵⁹

in the denial of the Estate's action, would not complicate the task of Wisconsin judges. It is also true, however, that Wisconsin courts are well equipped to apply Wisconsin law.").

353. See, e.g., *Buchel-Rueggsegger v. Buchel*, No. 06-C-544, 2007 WL 2052817, at *4 (E.D. Wis. July 16, 2007) ("The third factor . . . ordinarily would weigh in favor of applying Wisconsin law. Wisconsin law is far more accessible and familiar to the court than Swiss law. However, in the present case, the manner in which Swiss law would apply is clear.").

354. See, e.g., *Love*, 439 F. Supp. 2d at 895; *Stupak v. Hoffman-La Roche*, 287 F. Supp. 968, 973-74 (E.D. Wis. 2003); *Heath v. Zellmer*, 151 N.W.2d 664, 674 (Wis. 1967).

355. See, e.g., *Snow v. Cont'l Prods. Corp.*, 353 F. Supp. 59, 61 (E.D. Wis. 1972); *Brooks v. Gen. Cas. Co. of Wis.*, No. 06-C-0996, 2007 WL 4305577, at *5 (E.D. Wis. Dec. 7, 2007).

356. See, e.g., *Decker*, 324 F. Supp. at 1091; *Lichter v. Fritsch*, 252 N.W.2d 360, 364 (Wis. 1977).

357. See, e.g., *State Farm Mut. Auto Ins. Co. v. Gillette*, 641 N.W.2d 662, 678 (Wis. 2002).

358. See, e.g., *id.*; *Hunker v. Royal Indem. Co.*, 204 N.W.2d 897, 904 (Wis. 1973) ("It is the duty of this court to favor Wisconsin's governmental interests."); *Sawyer v. Midelfort*, 579 N.W.2d 268, 276-77 (citing and quoting *Hunker* in dismissing Minnesota's interest in a dispute involving a Wisconsin resident).

359. See, e.g., *Gillette*, 641 N.W.2d at 677-78 (considering only Wisconsin's interests in the case); *Hunker*, 204 N.W.2d at 904-06 (same); *Conklin v. Horner*, 157 N.W.2d 579, 585-86 (Wis. 1968) (same).

5. Better Rule of Law

In contrast to the courts of other Leflar states, Wisconsin courts have not shied away from analyzing state laws under the better rule of law consideration.³⁶⁰ The criteria they use to decide what law is better, however, vary from case to case. In some cases, Wisconsin courts refer to the criteria mentioned in Leflar's articles, checking to see whether one state's law "is anachronistic or fails to reflect modern trends."³⁶¹ Other Wisconsin courts have emphasized that this criterion "does not ask judges to exercise a sort of Solomonic superlegislative judgment," but rather "asks whether the *state* has made such a determination."³⁶² Still other courts have said that a law satisfies this criterion so long as it is "founded on a rational basis and [it] serves a discernible purpose."³⁶³ Not surprisingly, most courts applying this last definition find that the better law criterion is neutral in the ultimate choice-of-law determination.³⁶⁴

In determining the better rule of law, Wisconsin courts have sometimes looked to the prevailing trends in the laws of other states, so that rules adopted by a majority of states are generally deemed better than rules adopted by a minority of states.³⁶⁵ So too laws allowing for recovery are usually thought of as better than laws that

360. *E.g.*, *Decker*, 324 F. Supp. at 1091 ("It is perhaps too easy to let the 'better rule of law' factor dominate the other four and be solely determinative of the choice of law. Notwithstanding this admonition, I am of the opinion that Wisconsin's law of comparative negligence should be used in the case at bar."). *But see* *Cowley v. Abbott Labs., Inc.*, 476 F. Supp. 2d 1053, 1059 (W.D. Wis. 2007) ("The Court is not in a position to determine which jurisdiction's policy better serves justice and the public interest. Such a determination is 'entrusted to the legislatures of the respective states.'" (quoting *Stupak v. Hoffman-La Roche*, 287 F. Supp. 968, 974 (E.D. Wis. 2003))); *Sentry Ins. v. Novelty, Inc.*, No. 09-CV-355-SLC, 2009 WL 5087688, at *5 (W.D. Wis. Dec. 17, 2009) ("[A]pplication of the better rule of law . . . d[oes] not weigh for or against applying Wisconsin law. . . . [B]oth [Wisconsin and Indiana law] are founded on a rational basis and serve discernible principles.").

361. *Gillette*, 641 N.W.2d at 678; *see also* *Kuehn v. Childrens Hosp., L.A.*, 119 F.3d 1296, 1302-03 (7th Cir. 1997) (calling California's rule on survival of causes of action "quaintly vestigial," and, so, the worse rule of law).

362. *Love v. Blue Cross & Blue Shield of Ga., Inc.*, 439 F. Supp. 2d 891, 897 (E.D. Wis. 2006); *see also* *Brooks v. Gen. Cas. Co. of Wis.*, 06-C-0996, 2007 WL 4305577, at *6 (E.D. Wis. Dec. 7, 2007).

363. *Cowley*, 476 F. Supp. 2d at 1059 (quoting *Gillette*, 641 N.W.2d at 678) (internal quotation marks omitted); *Hunker*, 204 N.W.2d at 906-08.

364. *E.g.*, *Cowley*, 476 F. Supp. 2d at 1059 (finding that the better rule of law criterion favored neither state's law); *Hunker*, 204 N.W.2d at 908 (same); *Gillette*, 641 N.W.2d at 678 (same).

365. *E.g.*, *Lichter v. Fritsch*, 252 N.W.2d 360, 364 (Wis. 1977) ("This consideration may indicate that Illinois law is not the better rule of law because it is a minority view."); *Sawyer v. Midelfort*, 579 N.W.2d 268, 277 (Wis. Ct. App. 1998) ("Midelfort cites no authority to show us the extent to which the Minnesota law is followed in other jurisdictions. The estate, on the other hand, cites [American Jurisprudence] to show a general trend to permit the survival of actions.").

do not allow recovery.³⁶⁶ No single method of identifying the better rule of law is predominant enough to have been used in a majority of Wisconsin decisions, however.

III. WHAT DOES THIS MESS SAY ABOUT THE LEFLAR METHOD?

The case law from the five Leflar states suggests a few important things about the method as courts have applied it and commentators have construed it.

A. “Leflar States”

The very notion of “Leflar states” is misleading. While Arkansas, New Hampshire, Rhode Island, Minnesota, and Wisconsin all purport to consider the same five factors in deciding choice-of-law questions, they employ notably different approaches in deciding how and when to apply those factors. The Rhode Island Supreme Court, for example, relied exclusively upon the Second Restatement’s significant relationship factors to support its decision to apply a foreign state’s law barring recovery of non-economic damages in tort cases, rather than the forum’s law allowing recovery of non-economic damages in tort cases.³⁶⁷ But the Wisconsin Supreme Court, faced with virtually identical facts, analyzed the issue under the Leflar criteria and applied the forum’s law allowing recovery of non-economic damages in tort cases, rather than the foreign state’s law barring recovery of non-economic damages.³⁶⁸

Even where courts applying the choice-influencing considerations reach similar results on similar facts, their reasons for doing so are often markedly different. For instance, in rejecting a “guest statute” in favor of a rule allowing automobile passengers to sue drivers, the Minnesota Supreme Court relied almost exclusively on the last two Leflar choice-influencing considerations to support its holding.³⁶⁹ Reaching the same conclusion on similar facts, the Arkansas Supreme Court examined each of the five considerations, declining to prefer any of them over the others.³⁷⁰

It is an oversimplification, then, to treat Arkansas, New Hampshire, Rhode Island, Minnesota, and Wisconsin as though they apply the same method to resolve choice-of-law disputes. Each differs

366. *E.g.*, *Drinkwater v. Am. Family Mut. Ins. Co.*, 714 N.W.2d 568, 579 (Wis. 2006) (“[T]his court’s repeated affirmations of Wisconsin’s made-whole doctrine must to some extent be taken as an indication of Wisconsin’s view that our made-whole doctrine constitutes the better rule.”); *Zelinger v. State Sand & Gravel Co.*, 156 N.W.2d 466, 472-73 (Wis. 1968) (“In our view the existence of parental immunity in torts is not the better law.”).

367. *Berardi, U.S.A., Ltd. v. Emp’rs Mut. Cas. Co.*, 526 A.2d 515 (R.I. 1987).

368. *Gillette*, 641 N.W.2d at 662.

369. *Milkovich v. Saari*, 203 N.W.2d 408, 417 (Minn. 1973).

370. *Schlemmer v. Fireman’s Fund Ins. Co.*, 730 S.W.2d 217, 219 (Ark. 1987).

from the others in: (1) what other choice-of-law systems, besides the choice-influencing considerations, it considers in answering choice-of-law questions; (2) the priority it accords the Leflar method in its overall choice-of-law methodology; and (3) which of the choice-influencing considerations it weighs when applying the Leflar method.³⁷¹ Some might suggest that these differences are simply variations on a theme, but even that is an overstatement. To have “variations on a theme,” there must first be a central, identifiable, coherent theme from which variations may emanate. To reference a “theme” in the context of the choice-of-law analyses employed by the five “Leflar states,” however, exaggerates the degree of consistency with which courts apply the choice-influencing considerations, as opposed to other methodologies, for resolving conflicts of laws. Thus, for example, Arkansas sometimes substitutes *lex loci delicti* for the Leflar criteria.³⁷² Rhode Island applies the Second Restatement’s significant relationship approach in tandem with the Leflar approach in conflicts cases.³⁷³ Wisconsin asks whether applying a particular state’s law would constitute “officious intermeddling” before even considering the choice-influencing considerations.³⁷⁴ In short, the “Leflar states” take such significantly different approaches to choice-of-law problems, independent of their differing interpretations of the choice-influencing considerations, that, in many cases, it would probably be more honest to think of them as simply applying variations with no theme whatsoever.

The “variations on a theme” construct also misses the mark because the choice-influencing considerations themselves—at least as courts apply them—are not consistent or coherent enough to comprise any sort of identifiable theme. Each of the five states that uses the Leflar method applies an array of standards to determine the direction a particular choice-influencing consideration points. For instance, in determining which state’s law is the most predictable, Minnesota courts consider everything from the parties’ subjective expectations, to significant contacts, to the rules applied by other states.³⁷⁵ New Hampshire courts, by contrast, look more at forum shopping and the likely expectations of reasonable parties in defining predictability.³⁷⁶

Many of these standards are quite different from one another, and there are no hard-and-fast rules for when one standard, as opposed to another, should apply in any given situation.

371. See *supra* Part II.

372. See *supra* Part II.A.

373. See *supra* Part II.C.

374. See *supra* Part II.E.

375. See *supra* Part II.D.

376. See *supra* Part II.B.

Furthermore, there are no limits on how many or how few of these standards may be considered in a particular case, meaning that the mixing and matching of standards varies considerably from case to case.³⁷⁷ Most notably, however, the standards that effectively inform how the Leflar criteria are applied are, themselves, so vague and amorphous as to impose almost no limits on a judge's decision about a given criterion.³⁷⁸ The result is a lack of method or consistency in how the choice-influencing considerations are defined and applied. Without a constrained, systematic approach to application of the choice-influencing consideration, judges are left to decide on an ad hoc basis which combination of standards and applications to apply in any given case, resulting in huge numbers of judicial opinions that cannot be reconciled with each other. To say that this analytical approach represents a "theme" of some sort is to play fast and loose with any reasonable definition of that term.

B. Assessing the Effectiveness of the Leflar "Method"

Given the variations among states as to when, how, and to what extent to apply the Leflar method in deciding conflicts cases, and given the ambiguity and inconsistency within states in how the criteria are applied from one case to the next, the question becomes whether the Leflar method really can be considered a "method" for resolving conflicts disputes at all. The purpose of a choice-of-law method, after all, is to constrain judicial decision-making so that judges are directed to particular outcomes by certain pre-determined factors rather than left free to rely on whatever they want.³⁷⁹ With the myriad determinations that must be made in applying the Leflar approach (at least as applied by the courts) and the subjectivity inherent in the choice-influencing considerations themselves, judges can justify conflicting results while ostensibly applying the same criteria. There is precedent in every Leflar state to support virtually

377. Compare, e.g., *Najarian v. Nat'l Amusements, Inc.*, 768 A.2d 1253, 1255 (R.I. 2001) (applying better law factors and significant contacts approach to choice-of-law analysis in slip-and-fall case), with *Taylor v. Mass. Flora Realty, Inc.*, 840 A.2d 1126, 1128 (R.I. 2004) (emphasizing *lex loci delicti* and significant contacts approaches, and completely ignoring better law criteria, in choice-of-law analysis in slip-and-fall case).

378. See Trachtman, *supra* note 64, at 1011 ("Professor Leflar introduced a system that provides extreme flexibility to the judge in balancing vague and possibly contradictory factors, including one factor that seems substantively attractive, but that belies any pretense that the field of conflict of laws might make toward procedural regularity.").

379. See SCOLAS ET AL., *supra* note 10, at 105-10 ("Courts need and are entitled to more guidance than the iconoclastic literature has provided."); cf. P. John Kozyris, *Interest Analysis Facing Its Critics—And, Incidentally, What Should Be Done About Choice of Law for Products Liability?*, 46 OHIO ST. L.J. 569, 578-80 (1985) (observing that subjective, highly-variable choice-of-law methods, like the better law method, have turned American conflicts law into "a tale of a thousand-and-one cases," where "each case is decided as if it were unique and of first impression").

any decision a court might reach regarding choice of law, and it seems obvious that judges can (and do) pick and choose from those precedents to reach results that strike them as desirable.³⁸⁰ In other words, the Leflar method is so variable in application that it does not lead judges to reach a particular conclusion. Instead, the variability allows judges to use (or not use) the choice-influencing considerations to justify a conclusion arrived at by some other means. And this reality seemingly defeats the entire purpose of using a choice-of-law method in the first place,³⁸¹ raising serious questions about the Leflar method's desirability as a choice-of-law system.³⁸²

In the end, whether an unconstrained, essentially ad hoc approach to choice of law is a good thing largely depends on one's perspective and, it often seems, the specifics of the case at issue.³⁸³ More standardized, mechanical choice-of-law methods—such as *lex loci delicti* and *lex loci contractus*—have a number of virtues, most notably the predictability of decisions and uniformity of results they achieve.³⁸⁴ But, as modern choice-of-law theorists have repeatedly observed, *lex loci* methods are oftentimes so uncritically rigid that they ignore other important factors in the choice-of-law calculus, particularly the need to do justice in the individual case.³⁸⁵ Given

380. See Symeon Symeonides, *Result-Selectivism in Conflicts Law*, 46 WILLAMETTE L. REV. 1, 5 (2009) ("Indeed, it is not surprising that an approach that authorizes an ad hoc, unguided, and ex post choice of the better law produces choices that reflect the subjective predilections of the judges who make the choices.").

381. See Symeonides, *supra* note 68, at 260 ("To the extent [two choice-of-law methods, one being the better law method] purport to guide judicial practice they deserve severe criticism for misjudging the whole purpose of the science of choice-of-law and prejudging the results of the choice-of-law process.").

382. See SCOLES ET AL., *supra* note 10, at 105-10.

383. See, e.g., NYU Article, *supra* note 1, at 326 ("Does ultimate reliance upon the choice-influencing considerations, rather than upon more exactly stated mechanical rules or upon simple forum preference, leave too much room for variety in decision, more flexibility than it is good for courts to have? Some will answer this question 'Yes.' There is room for difference of opinion.").

384. See Julia Halloran McLaughlin, *Premarital Agreements and Choice of Law: "One, Two, Three, Baby, You and Me"*, 72 MO. L. REV. 793, 803 (2007) ("Compelling justifications for the *lex loci* approach include 'simplicity, predictability, and forum neutrality.'" (quoting William M. Richman & David Riley, *The First Restatement of Conflict of Laws on the Twenty-fifth Anniversary of its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1200 (1997)); Solimine, *supra* note 16, at 51-52 (noting that the advantages of a *lex loci* approach include certainty, predictability, and consistency in application).

385. See, e.g., Bert J. Miano, *Choice of Law: Abandoning the "Toothless Old Dog" of Lex Loci Delicti in Tort Actions*, 20 AM. J. TRIAL ADVOC. 443, 444 (1997) ("Although *lex loci* promotes uniformity and predictability and prevents forum shopping, application of this rule often yields harsh results because the place of injury often has little significance to the cause of action or to either party."); James Audley McLaughlin, *Conflict of Laws: The New Approach to Choice of Law: Justice in Search of Certainty, Part Two*, 94 W. VA. L. REV. 73, 88 (1991) ("Lex loci gave us all the 'nice coherence' we

that choice-of-law cases come in so many varieties and encompass such differing fact patterns, a one-size-fits-all approach will inevitably fail—at least in some cases—to take into account important contacts or party expectations that, in fairness, should be considered in resolving the issue.³⁸⁶ Indeed, even courts applying *lex loci delicti* or *lex loci contractus* have developed a variety of “escape devices” to mitigate the harsh effects of these approaches.³⁸⁷ The flexibility inherent in the Leflar approach, by contrast, allows judges to avoid intuitively unfair results in the first place, obviating the need for escape devices and other judicial gimmicks.³⁸⁸ These advantages ought to be considered seriously, not only because fairness is an important value in choice-of-law decisions,³⁸⁹ but also because judicial covering up of the actual reasons for certain decisions is likely to undermine public confidence in the courts over time.³⁹⁰

could ever want. Nice coherence does not allow sufficient room for situation-sense—for the complex of facts and law that inform the sense of justice in the individual case.”).

386. See, e.g., *Fox v. Morrison Motor Freight, Inc.*, 267 N.E.2d 405, 406 (Ohio 1971) (“But would rote application of *lex loci delicti*, with its blindness to other operable facts, consistently produce a just result . . . ? We think not.”); SCOLES ET AL., *supra* note 10, at 24 (“Conflicts problems are essentially complex, and a simplistic, static system working with preexisting formulae cannot provide solutions to such problems.”).

387. James Audley McLaughlin, *Conflict of Laws: The Choice of Law Lex Loci Doctrine, the Beguiling Appeal of a Dead Tradition, Part One*, 93 W. VA. L. REV. 957, 981 (1991) (“Judges used certain ‘devices’ to ‘escape’ from the straight jacket of *lex loci*; the desire to escape being a function of the felt injustice or arbitrariness of the dictated result.”); Karen L. Federman, *Hauch v. Connor—Beginning a Transition in Maryland Conflict of Laws Doctrine?*, 43 MD. L. REV. 204, 208-10 (1984) (“The arbitrariness of [*lex loci delicti*] led some courts to use ‘escape devices’—manipulative techniques for reaching a more desirable outcome than *lex loci delicti* would permit.”).

388. See *NYU Article*, *supra* note 1, at 300 (“One way or another [a court] will normally choose the law that makes good sense when applied to the facts. ‘One way or another.’ That suggests manipulation of conflicts rules, the deliberate employment of conflicts concepts as gimmicks to enable courts to reach desired results, as ‘cover-up’ devices designed to conceal the real influences that dominate the judicial process in choice-of-law decision.”); see also LEFLAR ET AL., *supra* note 30, at 300 (“The difficulty is in the cover-up, the pretense that the court is only making a choice between jurisdictions.”).

389. See *Cavers*, *supra* note 54, at 190-92 (arguing that the choice-of-law process should focus primarily on the result a given rule would produce in the case at bar); Yntema, *supra* note 54, at 735 (identifying “justice of the end results” as an important policy consideration in choice of law).

390. See LEFLAR ET AL., *supra* note 30, at 300 (“[H]onesty is the best policy, even in judicial opinions.”); cf. W. Jonathan Cardi, *Purging Foreseeability: The New Vision of Duty and Judicial Power in the Proposed Restatement (Third) of Torts*, 58 VAND. L. REV. 739, 741 (2005) (“Furthermore, to the extent that reference to foreseeability masks the actual reasons for a judge’s decision to impose or deny negligence liability, foreseeability obfuscates the judicial process and likely undermines its perceived legitimacy.”).

Just as uncompromising rigidity can be a problem in choice of law, however, so too can excessive flexibility.³⁹¹ When judges are invited “to do hand-tailored justice, case by case, free from the constraints or guidelines of [meaningful] rules,”³⁹² a host of problems arise, “including increased litigation costs, waste of judicial resources, and an increased danger of judicial subjectivism, which . . . leads to dissimilar handling of similar cases, which in turn tests the citizens’ faith in the legal system and tends to undermine its very legitimacy.”³⁹³ Although the Leflar method is not alone in its vulnerability to these criticisms,³⁹⁴ it is unique in its potential to undermine the goals of predictability and uniformity in choice of law.³⁹⁵ Because the Leflar method allows for a seemingly endless array of permutations in how it is applied, it constrains judges only insofar as those judges, themselves, commit to a particular line of precedent or reasoning, consistently forswearing other possible applications of the Leflar factors that, in some cases, might lead to results those judges prefer. The voluntary exercise of judicial self-restraint is a flimsy barrier and one that many parties might be uncomfortable relying upon in litigation.³⁹⁶

The Constitution imposes some minor limitations on the arbitrariness of the Leflar method. The Full Faith and Credit Clause and the 14th Amendment’s Due Process Clause, for example, mandate that courts only apply the law of states having “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”³⁹⁷ Furthermore, a totally arbitrary or irrational decisional mechanism, like a coin-flip, would violate

391. See Robert A. Leflar, *Choice-of-Law Statutes*, 44 TENN. L. REV. 951, 952 (1977) (“[F]lexibility is not a virtue for every type of conflicts case.”); see also SYMEONIDES, *supra* note 7, at 423-24; SCOLES, *supra* note 10, at 105-08.

392. Maurice Rosenberg, *Comments on Reich v. Purcell*, 15 UCLA L. REV. 641, 644 (1968).

393. SYMEONIDES, *supra* note 7, at 424.

394. *Id.* at 425 (“It is also time to recognize that the [choice-of-law] revolution has gone too far in embracing flexibility to the exclusion of all certainty, just as the traditional system had gone too far toward certainty to the exclusion of all flexibility.”); SCOLES ET AL., *supra* note 10, at 107 (“Indeed, all of the above approaches have . . . failed to produce a new choice-of-law system with which to replace the old one. As the early New York experience shows, courts have often produced *ad hoc* results . . .”).

395. See Harold P. Southerland, *Sovereignty, Value Judgments, and Choice of Law*, 38 BRANDEIS L.J. 451, 503-04 (2000) (noting that “Leflar’s method stands at one end of the [subjectivity-objectivity] spectrum” and that Brainerd Currie’s interest analysis method, “in contrast to Leflar’s, is utterly objective”).

396. See Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1184 (2000) (noting that courts often ignore the costs imposed on parties by uncertainty in choice of law).

397. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981).

litigants' due process rights because the judge would be abdicating his or her constitutionally-prescribed role as a rational decision-maker.³⁹⁸

However salutary these constitutional limitations may appear to be in theory, though, in practice they do relatively little to constrain courts.³⁹⁹ For one thing, the Supreme Court has adopted a highly permissive definition of what is a "significant contact" for purposes of choice-of-law analysis, sometimes looking not only at the particular facts giving rise to the case, but also at any contacts the parties have with a state apart from the incident from which the case arose.⁴⁰⁰ Under this definition, the Supreme Court has only once found a lower court's choice of law to be so unrelated to the facts of a case as to fail the significant contacts test.⁴⁰¹ Moreover, as a practical matter, it is unlikely that a party would ask a court to apply the law of a state having *no* connection to the litigation or the parties, let alone that the court would subsequently opt to apply that law. In other words, the Due Process and Full Faith and Credit requirement is "a very low hurdle" in almost all choice-of-law cases.⁴⁰²

The Constitution's non-arbitrariness requirement is even less of an obstacle for judges applying the Leflar criteria. Just because the Leflar approach is *ad hoc* does not make it arbitrary, and the Supreme Court has expressly declined to make any serious inquiry into the rationality of states' choice-of-law methods.⁴⁰³ In a typical

398. See, e.g., Thomas Healy, *Stare Decisis and the Constitution: Four Questions and Answers*, 83 NOTRE DAME L. REV. 1173, 1201 n.152 (2008) ("A court that decided a case based upon a coin flip would certainly violate due process."); Courtland H. Peterson, *Particularism in the Conflict of Laws*, 10 HOFSTRA L. REV. 973, 1013 (1982) ("If a state has 'some factual connections' with a case, choice of its law would be reasonable in terms of state interest, leaving only the negative test—constraints on arbitrary or irrational application—as a limit on choice of law.").

399. See, e.g., Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL. 93, 106 (2002) (noting the "virtual elimination of constitutional limitations on state courts' choice of law"); Scott Fruehwald, *Constitutional Constraints on State Choice of Law*, 24 U. DAYTON L. REV. 39, 40-41 (1998) ("Current constitutional constraints [on state choice of law], however, are minimal.").

400. See, e.g., *Allstate Ins. Co.*, 449 U.S. at 313-20 (holding that decedent's membership in Minnesota's workforce, petitioner's business presence in Minnesota, and respondent's post-accident adoption of Minnesota residence constituted a significant aggregation of contacts with Minnesota justifying application of Minnesota law in a case where the underlying occurrence involved Wisconsin contacts exclusively); see also WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *UNDERSTANDING CONFLICT OF LAWS* 309 (3d ed. 2002) ("*Allstate* shows that not much is needed to satisfy the Court, as least as long as there is some 'real' connection with the litigation.").

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

402. RICHMAN & REYNOLDS, *supra* note 400, at 309.

403. See *Allstate*, 449 U.S. at 307 ("It is not for this Court to say whether the choice-of-law analysis suggested by Professor Leflar is to be preferred or whether we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court. Our

case in which a judge in a Leflar state is called on to choose between the laws of multiple states, each having some plausible connection to the litigation, the constitutional constraints on choice of law will simply not affect the court's final decision. Any of the suggested choices will satisfy the Due Process and Full Faith and Credit Clauses, and the court's application of the Leflar approach will not be seriously scrutinized for arbitrariness or irrationality. Consequently, the judge will be free to apply the Leflar method—in all its ambiguity—however he or she sees fit, with the Constitution doing nothing to narrow his or her options.⁴⁰⁴

C. *Rethinking Leflar Scholarship*

The variability inherent in the Leflar method as applied by Arkansas, New Hampshire, Rhode Island, Minnesota, and Wisconsin also raises doubts as to the merits of much of the existing scholarship purportedly analyzing the method. Almost all of this scholarship ignores the many significant differences in how the states actually apply the choice-influencing considerations.⁴⁰⁵ Moreover, it treats the considerations themselves as though they had some fixed, definite meaning. Instead of accounting for the differences in application, the existing scholarship ends up treating cases decided under very different methods as though they were decided under identical methods.⁴⁰⁶

This scholarship is at best incomplete and at worst seriously misleading. However convenient it might be to lump cases decided by the five “Leflar states” together, doing so only perpetuates the myth that these states apply fundamentally identical choice-of-law mechanisms. In reality, they use five distinct approaches to resolve choice-of-law problems, similar only to the extent they sometimes structure parts of their analyses according to the same set of

sole function is to determine whether the Minnesota Supreme Court's choice of its own substantive law in this case exceeded federal constitutional limitations.”); *see also* RICHMAN & REYNOLDS, *supra* note 400, at 312 (“[T]he chances that the Court will upset a state's choice of law are remote.”).

404. *See Allstate*, 449 U.S. at 307-08 (“[This Court has long accepted] that a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction. . . . As a result, the forum State may have to select one law from among the laws of several jurisdictions having some contact with the controversy.”).

405. *See, e.g., Felix, supra* note 8, at 40 (“[T]his article follows current wisdom and treats these states as more or less having adopted the approach of choice-influencing considerations”); Borchers, *supra* note 16, at 368, 373 n.115 (grouping Rhode Island, Minnesota, Wisconsin, Arkansas, and New Hampshire together for analytical purposes and explaining that any “classification difficulties” had only a “marginal . . . effect on the survey”).

406. *See, e.g., Borchers, supra* note 16, at 370-75 (grouping all cases decided by “better law states” together); Solimine, *supra* note 16, at 81-89 (same).

ambiguous criteria. By acknowledging this reality, however inconvenient and unsatisfying it may be from an analytical perspective, scholars and practitioners can reorient Leflar analysis to reflect the diversity of approaches actually used in practice, rather than continuing to assume that fundamentally dissimilar approaches are, in fact, similar.

CONCLUSION

At the close of his first article describing the choice-influencing considerations, Professor Leflar declared that his was “not a ‘free law’ proposal, not a suggested system of adjudication that would leave it to courts to reach what is conceived to be a ‘just result’ in the particular case regardless of rules and precedents.”⁴⁰⁷ Rather, his goal was to identify the “real reasons” behind choice-of-law decisions, with the aim of creating a simpler, more predictable, and more honest choice-of-law system.⁴⁰⁸

A half-century later, it is clear that there is nothing simple or predictable about the Leflar method as applied in the courts, and the myriad avenues for applying the method offer even more of an opportunity for obfuscation and facile judicial maneuvering than do other choice-of-law methods. For better or for worse, analysis of existing case law reveals that the “free law” label Leflar once denounced so strongly may not be all that far off today.

407. *NYU Article*, *supra* note 1, at 327.

408. *See Cal Article*, *supra* note 1, at 1585-86.