Washington and Lee Law Review

Volume 49 | Issue 2 Article 10

Spring 3-1-1992

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Patrick J. Borchers

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Recommended Citation

Patrick J. Borchers, *The Choice-Of-Law Revolution: An Empirical Study*, 49 Wash. & Lee L. Rev. 357 (1992).

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ARTICLES

THE CHOICE-OF-LAW REVOLUTION: AN EMPIRICAL STUDY

PATRICK J. BORCHERS*

INTRODUCTION

Much has been said and written about the changes in choice of law wrought over the course of the last three decades. Since the New York Court of Appeals' 1963 landmark decision in *Babcock v. Jackson*,[1] it is generally accepted that the United States has undergone a "conflicts revolution."[2] The conflicts literature is replete with exhaustive reviews of the "revolutionary" case law.[3]

It is clear beyond peradventure that the American choice-of-law vocabulary has changed dramatically. Until 1963 the Restatement (First) of Conflict of Laws (the First Restatement) commanded a nearly universal following.[4] Grounded in the conceptual edifice of the "vested rights" theory, the First Restatement chose the *lex loci delicti*, or the law of the place of the injury, in tort cases.[5] Now, only fifteen of the fifty-one United States jurisdictions still follow the First Restatement in tort cases, while thirty-six states have adopted some alternative.[6] Instead of looking for the place of the injury, these thirty-six jurisdictions rationalize their choice-of-law decisions in terms of "interests,"[7] "significant relationships,"[8] and "choice-influencing considerations."[9]

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* Assistant Professor of Law, Albany Law School of Union University. Thanks to Richard Platkin and Cori Kaplan for their outstanding research help, and to Fritz Juenges and Michael Solimine for their helpful comments on an earlier draft.

1. 191 N.E.2d 279 (N.Y. 1963).

2. *See, e.g.*, Gary J. Simson, *Introduction: New Directions in Choice of Law: Alternatives to Interest Analysis*, 24 CORNELL INT'L L.J. 195, 195 (1991).

3. *See, e.g.*, TH. M. DE BOER, BEYOND LEX LOCI DELICTI (1987); Herma H. Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983); Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983); Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041 (1987).

4. Friedrich K. Juenger, *General Course on Private International Law*, 193 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 123, 220-21 (1985).

5. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934) (stating that law applied in tort cases is place of last event necessary to complete tort).

6. *See infra* Table II.

7. BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 90 (1963).

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

9. Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966).

Wide differences now exist between state courts as to what they *say* about choice of law. But, as Walter Wheeler Cook once enjoined lawyers, what courts *do*, not what they say, is important.[10] With that injunction firmly in mind, I set out to conduct this empirical study of the conflicts revolution.[11]

Despite the undeniable realignment in choice of law, important questions remain concerning the depth of the changes and the relative merits of the competing modern approaches. One obvious question is the magnitude of the change actually effected by the revolution. Although the *lex loci delicti* rule is often thought of as inflexible, in practice certain "escape devices" allow for manipulation.[12] Another important question is whether and to what degree the modern theories differ among themselves. Although choice-of-law theories have sparked fierce doctrinal battles between their proponents,[13] others have noted that in practice the courts follow a more temperate route of borrowing from many of the "new"[14] theories and reaching results consistent with many proposals.[15]

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10. Walter W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 460 (1924); *see also* Kay, *supra* note 3, at 523 (citing Cook but placing more emphasis on purported methodologies of courts).

11. There has been one other empirical study of choice of law. *See* Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989). The focus of Professor Solimine's study is different, however. First, he grouped all of the various modern approaches together, and compared the results to the First Restatement. *Id.* at 83-85. In this survey, by contrast, I attempt to evaluate not only the differences between the modern approaches and the First Restatement but also the differences between the competitors. Second, Professor Solimine counted only appellate cases from 1970, while I counted all reported cases as far back as 1960. Accordingly, my data base consisted of over 800 cases, a bit over three times the size of Professor Solimine's. *Id.* at 85. Third, Professor Solimine concentrated his statistical analysis on the significance of the correlation between departure from the First Restatement and certain geographical and social characteristics of the states, *id.* at 83, while this study concentrates on the statistical significance of variations in the result patterns. Yet, in spite of the difference between the two studies, where they overlap they confirm each other. For instance, Professor Solimine found that state supreme courts applying the First Restatement from 1970 to 1988 chose prorecovery rules in 45% of the cases. *Id.* at 83. For all state courts applying the First Restatement since 1960, I found that state courts chose prorecovery rules in 40 ± 12% of the cases. *See infra* Table IV.

12. *See, e.g.*, Kilberg v. Northeast Airlines, Inc., 172 N.E.2d 526, 528 (N.Y. 1961); Emery v. Emery, 289 P.2d 218, 223-24 (Cal. 1955); Haumschild v. Continental Casualty Co., 95 N.W.2d 814, 818-19 (Wis. 1959).

13. *See, e.g.*, Brainerd Currie, *Comment on* Babcock v. Jackson, 63 COLUM. L. REV. 1233, 1235-43 (1963) (criticizing "center of gravity" and Second Restatement approaches); Herma H. Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577, 604-10 (1980) (criticizing California's adoption of Baxter's "comparative impairment" solution to true conflicts as opposed to Currie's choice of forum law).

14. Actually, none of the "new" theories are really very new. One historical investigation has concluded that all of the currently competing choice-of-law methodologies have visible roots as far back as the fourteenth century. Juenger, *supra* note 4, at 142-44 (tracing all three major schools to glossators).

15. Robert A. Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. 10, 11-21 (Spring, 1977).

In order to determine, therefore, the depth of the change actually effected by the revolution, it is necessary to identify some variables to gauge the change. Commentators have made various assertions regarding the actual operation of the new choice-of-law theories. Most frequently these assertions center on the perception that the new theories are "pro-resident, pro-forum law and pro-recovery."[16]

To find out whether this perception is correct, I decided to study the propensity of each conflicts methodology to apply forum law, prorecovery rules and rules that favor local parties. For states still following the First Restatement, I surveyed all reported decisions, both trial and appellate, state and federal, since 1960. For states following a new methodology, I canvassed all reported decisions, trial and appellate, state and federal, since the states adopted the new approach. My search yielded a total data base of 802 decisions. In Part I of this Article, I briefly review the choice-of-law approaches currently competing in the United States. In Part II, I report the results of the study. In Part III, I draw conclusions from the data.

I. Choice-of-law Methodologies

Until the early 1960s, the First Restatement had a nearly monolithic following in the United States. This restatement, reported by Professor Joseph Beale, was completed in 1934.[17] The First Restatement was firmly grounded in the multilateralist theory of choice of law.[18] That approach attempts to derive solutions to conflicts problems by laying down choice-of-law norms external to the forum's substantive law.[19] These "jurisdiction-selecting"[20] rules select the governing state's laws independently of the content of the substantive rules competing for application.

Although in the United States Professor Beale's name is most frequently associated with this approach, he certainly did not invent the multilateralist methodology.[21] Beale grounded his version of multilateralism in the "vested

16. *See* Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 Mich. L. Rev. 392, 398 (1980). Some have even asserted that these tendencies are so pronounced as to render some of the new theories unconstitutional. *See, e.g.*, John H. Ely, *Choice of Law and the State's Interest in Protecting its Own*, 23 Wm. & Mary L. Rev. 173, 180-85 (1981) (observing that interest analysis's propensity to favor local parties violates Privileges and Immunities Clause).

17. Juenger, *supra* note 4, at 208.

18. *Id.*

19. *Id.* at 168.

20. David Cavers invented the term "jurisdiction-selecting." *See* David F. Cavers, *A Critique of the Choice of Law Problem*, 47 Harv. L. Rev. 173, 194 (1933).

21. Juenger, *supra* note 4, at 157 (noting that although multilateralist approach has much more ancient roots, its modern origin probably traces to Dutch jurist Huber). Although less influential in Europe, Huber's writings heavily influenced Joseph Story, the great Supreme Court justice and Dane Professor of Law at Harvard. *Id.* at 157. Story published the first edition of his legendary Commentaries on the Conflict of Laws in 1834. Joseph Story, Commentaries on the Conflict of Laws (1834). Although Beale's outlook was considerably more parochial than Story's, Beale recognized his debt to Story by dedicating his treatise to Story. Joseph Beale, 1 A Treatise on the Conflict of Laws ii (1935).

rights" theory.[22] Beale postulated that the forum court's role in a multistate dispute is not to apply foreign law but, rather, to enforce existing legal rights created under the foreign law.[23] He hypothesized that the power to create rights belonged to the place where the last event necessary to create liability occurred. In tort cases this last event principle necessarily calls for application of the law of the place of the injury.[24]

Even before it was completed, however, the First Restatement came under heavy fire, principally from the legal realists. Two influential and early critics were David Cavers and Walter Wheeler Cook. Cavers—Beale's former pupil—criticized the First Restatement for selecting the applicable law based upon factors independent of the substantive content of the rules competing for application.[25] Cook attacked the First Restatement at its roots. Unwittingly restating the century-old criticisms of European commentators,[26] Cook demonstrated that the "vested rights" theory was circular because it assumed precisely what it was designed to prove, for example, that territorial connecting factors control the choice of the applicable law in multistate cases.[27]

For a considerable length of time, the First Restatement's critics were content to attack it without proposing an alternative.[28] However, in a series of law review articles penned in the late 1950s and early 1960s, the late Brainerd Currie wove the fabric of his "governmental interest analysis,"[29] an approach that would ultimately come to be seen as "the first real alternative" to the First Restatement.[30] Currie postulated that each and every rule of positive state law, whether embodied in a judicial decision or statute, represents a singular state "policy."[31] This was true, apparently, even for outmoded and antiquated rules, such as the denial of contractual capacity to married women and the nonsurvival of tort liability.[32] From these policies spring "interests."[33] Currie argued that these policies and interests can be determined from the normal processes of statutory construction.[34] Consequently, Currie invariably adopted the following methodology: Each statute or common-law rule represents a singular state policy, and the

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22. BEALE, *supra* note 21, at 53.

23. *Id.* at 64.

24. *E.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934) (noting that place of last event necessary to create tort provides governing substantive law).

25. Cavers, *supra* note 20, at 194.

26. Kurt H. Nadelman, *Wächter's Essay on the Collision of Private Laws of Different States*, 13 AM. J. COMP. L. 414 (1963) (translating 1842 essay by Carl G. von Wächter).

27. WALTER W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 17-18 (1942).

28. *Id.* at ix (asserting that primary purpose was "weed[ing]" "garden" of conflicts).

29. Most of these articles on interest analysis are collected in CURRIE, *supra* note 7.

30. LEA BRILMAYER, CONFLICT OF LAWS, FOUNDATIONS AND FUTURE DIRECTIONS 43 (1991).

31. CURRIE, *supra* note 7, at 183-84.

32. *Id.* at 85, 144.

33. *Id.* at 47-48.

34. *Id.* at 183-84.

state has an "interest" in applying that policy in favor of the state's domiciliaries.[35]

The adoption of the domiciliary nexus, and substantial elimination of territorial connecting factors, brought about a marked departure from the First Restatement. Under Currie's approach, conflicts cases fall into three categories: True conflicts, false conflicts and unprovided-for cases.[36] False conflicts occur only if the parties have a common domicile.[37] In such cases, only one state has an "interest" in having its law applied, because only one domiciliary will be aided by application of her state's laws.[38] In these cases, Currie recommended applying the law of the only interested state—the state of the common domicile.[39] If the parties hail from different states, however, either a true conflict or an unprovided-for case arises.[40] True conflicts occur when the application of two or more state's laws will benefit those states' domiciliaries, while unprovided-for cases occur when no domiciliary will benefit from the application of her state's law.[41] In either case, Currie recommended applying forum law on the grounds that the problem was insoluble, and, thus, no good reason existed to displace the application of forum law.[42] Because cases are usually litigated in the home state of one or both of the parties, interest analysis is essentially a mandate to apply forum law unless the parties have a common domicile in a state other than the forum.[43]

Much of the credit or blame—depending upon one's perspective—for the conflicts revolution must go to Currie. His essays, as one commentator would state later, were "so seductive in style that [they] appear[] to have hypnotized a generation of American lawyers."[44] Currie, however, was not alone in his later-day criticism of the First Restatement. When New York, in *Babcock v. Jackson*,[45] became the first American jurisdiction to break explicitly from the *lex loci delicti* rule in tort cases, fully six commentators were able to share the limelight and find support for their theories in *Babcock*'s cryptic phrases and far-reaching implications.[46] This diversity of

35. Patrick J. Borchers, *Professor Brilmayer and the Holy Grail*, 1991 WIS. L. REV. 465, 471 (review essay).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Currie, *supra* note 13, at 1234.

41. Borchers, *supra* note 35, at 471.

42. CURRIE, *supra* note 7, at 167.

43. *See* Juenger, *supra* note 4, at 217.

44. Korn, *supra* note 3, at 812.

45. 191 N.E.2d 279 (N.Y. 1963).

46. *The Columbia Law Review* presented a symposium on *Babcock* shortly after the decision. David F. Cavers et al., *Comments on* Babcock v. Jackson, *A Recent Development in the Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963). The contributors were David F. Cavers, Elliott E. Cheatham, Brainerd Currie, Albert A. Ehrenzweig, Robert A. Leflar and Willis L.M. Reese. *Id.*

opinion spawned several modern competitors to interest analysis, two of which have earned a substantial following among American courts.

One of Currie 's important competitors was the American Law Institute (ALI), which under the direction of reporter Willis Reese set out to draft a Restatement (Second) of Conflict of Laws (the Second Restatement). Completed in 1971, the Second Restatement is a thoroughly eclectic document,[47] but it bears Reese's mark. As early as 1952, Reese, with coauthor Elliott Cheatham, argued for a "checklist" approach to multistate problems.[48] This article argued that a court should exercise a mild presumption in favor of applying forum law, but the choice of forum law could be rebutted by the application of a multifactor analysis.[49] Included in this analysis are the need to advance local purposes, certainty, predictability, uniformity of result, protection of justified expectations, furthering the policies of the state with the dominant interest and ease of application.[50]

With Currie,[51] Ehrenzweig,[52] and others arguing passionately against adoption, the Second Restatement brought to bear the ALI's authority in support of a choice-of-law approach much in the mold of the earlier Cheatham and Reese proposal. The Second Restatement contains two general sections that bear on choice of law in torts cases. The first is section 6, which provides that in the absence of a statutory directive:

> The factors relevant to the choice of the applicable rule of law include:
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.[53]

More specifically, section 145 provides:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with

47. Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 508 (1983) (describing Second Restatement as eclectic). Reese, the Reporter for the Second Restatement, stated that it was "eclectic in nature [because it] reli[ies] on a variety of different theories and values." *Id.*

48. Elliott E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959 (1952).

49. *Id.* at 964.

50. *Id.* at 981.

51. Currie, *supra* note 13, at 1235-43.

52. Albert A. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for its Withdrawal*, 113 U. PA. L. REV. 1230 (1965).

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

respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in section 6.

(2) Contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicil, 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.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.[54]

Another major competitor of Currie was Robert A. Leflar. Like Currie, Leflar set forth his proposal in a series of law review articles published around the time of the commencement of the conflicts revolution.[55] Like the Second Restatement, Leflar set forth his factors in an unweighted, open-ended form. As Leflar identified them, the five "choice-influencing considerations" are:

(A) Predictability of results;
(B) Maintenance of interstate and international order;
(C) Simplification of the judicial task;
(D) Advancement of the forum's governmental interests;
(E) Application of the better rule of law.[56]

Superficially at least, each of the four dominant approaches—the First Restatement, the Second Restatement, interest analysis and Leflar's choice-influencing considerations—differ markedly from one another. Both the First and Second Restatements are cast in the mold of multilateralism because of their basic methodology of interposing choice-of-law rules based upon the legal category to which the dispute belongs.[57] To be sure, the First Restatement's multilateralism is more rigid and pure. But even though the Second Restatement makes room for such considerations as "the relevant policies of the interested states" and relies upon "soft" connecting factors, it is primarily multilateralist and territorial in its outlook, especially in tort cases.[58] In stark contrast, Currie's interest analysis is almost classically unilateralist.[59] Instead of attempting to link transactions to legal systems by

54. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

55. *See, e.g.*, Leflar, *supra* note 9; Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584 (1966) [hereinafter Leflar, *More Considerations*].

56. Leflar, *supra* note 9, at 279; Leflar, *More Considerations*, *supra* note 55, at 1586-88.

57. Juenger, *supra* note 4, at 220.

58. *Id.*

59. DE BOER, *supra* note 3, at 1-5 (arguing that Currie's method is "neo-statutist");

means of connecting factors, interest analysis assumes that some spatial dimension can be ascribed to rules of decision.[60] By making the fundamental assumption that a state promulgates substantive rules primarily for the benefit of its domiciliaries, Currie's approach prefers the personal law principle to territorial connecting factors.[61] Leflar's approach, which in tort cases relies primarily upon the "better law" consideration,[62] is neither multilateralist nor unilateralist. Leflar's approach is "teleological" or "substantive"[63] because it looks not to connecting factors, whether personal or territorial, but instead to the merits of the competing rules.[64]

For analytical purposes, then, let us begin with a tentative hypothesis. It is a hypothesis that I ultimately believe to be false, but analytically useful nonetheless. The tentative hypothesis is that courts take these choice-of-law approaches seriously and make a sincere effort to follow their dictates.

If one accepts this hypothesis the four different approaches should yield different patterns of results in tort cases. Of course, there are some—perhaps many—cases in which all or some of the approaches will produce the same result.[65] Nevertheless, assuming the approaches are applied faithfully, one can make some predictions as to their affinity for forum, plaintiff-favoring and local-favoring rules.

The First Restatement's outstanding characteristic is its evenhandedness.[66] By making the applicable law in tort cases depend upon the place of the

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Juenger, *supra* note 4, at 215 (noting that Currie was "modern unilateralist"). *But see* Herma H. Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 Recueil des Cours d'Academie de Droit International 12, 46 (1989) (arguing that Currie's method differs from unilateralism in important respects).

60. Currie, *supra* note 13, at 1234 (observing that spatial reach of legal rules can be determined through ordinary processes of construction and interpretation).

61. Borchers, *supra* note 35, at 471.

62. Robert A. Leflar, *Choice of Law: States' Rights*, 10 HOFSTRA L. REV. 203, 209-10 (1981).

63. Juenger, *supra* note 4, at 219.

64. Borchers, *supra* note 35, at 468 n.19.

65. For instance, in a case such as Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963), in which the New York Court of Appeals applied its rule of ordinary negligence instead of the Ontario guest statute to a case involving an Ontario one-car accident, at least three of the four approaches would have reached the same result. Interest analysis calls for application of New York law because both of the parties were New York domiciliaries, leaving New York as the only interested jurisdiction. *See* Currie, *supra* note 13, at 1234. Leflar's approach calls for application of New York law primarily because of the undoubted superiority of the New York full recovery rule. Robert A. Leflar, *Comment on* Babcock v. Jackson, 63 COLUM. L. REV. 1247, 1248-49 (1963). The Second Restatement, or "grouping of contacts" approach, which was apparently applied by the Court of Appeals, calls for application of New York law because the only contact with Ontario of significance was the accident, while contacts with New York were plentiful. Willis L.M. Reese, *Comment on* Babcock v. Jackson, 63 COLUM. L. REV. 1251, 1254-55 (1963). Even the First Restatement, which normally would have called for application of Ontario law because Ontario was the situs of the accident, might have been bent to accommodate application of New York law. *See, e.g.*, Kilberg v. Northeast Airlines, Inc., 172 N.E.2d 526, 528-29 (N.Y. 1961) (displaying "offensive" use of public policy doctrine to avoid application of Massachusetts wrongful death damage limitation).

66. Juenger, *supra* note 4, at 218 (noting "urbane neutrality" of First Restatement).

injury, no apparent reason exists why the First Restatement should favor any particular type of substantive rule. Because the place of the injury is a random event, the First Restatement should not be expected to produce forum, plaintiff-favoring or local-favoring outcomes. This prediction, however, must be tempered by at least one observation. The First Restatement came equipped with several escape devices, at least two of which are applicable in tort cases. The first device is the ability to recharacterize apparently "substantive" tort issues as matters of procedure and thereby take advantage of the forum rule.[67] The second is the "public policy" exception, which in later years was molded by the courts to allow for use by plaintiffs to avoid obnoxious foreign rules excusing or limiting liability.[68] Application of these escape devices might give the First Restatement a slight preference for forum and recovery-favoring rules, but, even so, the First Restatement's approach is remarkably neutral on its face.

Even assuming that courts take the Second Restatement seriously, it is much more difficult to predict the likely results. As one writer observed, "[a]lthough printed in black letters, [the Second Restatement's tort provision] is not much of a rule."[69] Nonetheless, the Second Restatement shares many of the neutral features of the First Restatement. By making territorial connecting factors the thrust of its approach in tort cases,[70] the Second Restatement should be expected to be partially immune to preferences for forum, plaintiff-favoring or local-favoring rules. However, that immunity is not complete. Two of the factors in section 6 plainly indicate a preference for forum law. Both factor (b)—"the relevant policies of the forum"—and factor (g)—"ease in determination and application of the law to be applied"—point toward forum law. Moreover, factor (c), which was designed to accommodate a measure of interest analysis, probably imports some of that methodology's preference for forum law. On the whole, therefore, the Second Restatement should show a stronger preference for forum law than the First Restatement. Along with the preference for forum law should go a mild preference for recovery-favoring rules. Although limitations on personal jurisdiction do not allow for unlimited choice of fora,[71] in interstate cases plaintiffs have an opportunity to forum shop. One would expect plaintiffs to file cases in states having favorable substantive rules, provided those states have a preference for applying their own law.[72] Finally, the

67. *See, e.g.*, Grant v. McAuliffe, 264 P.2d 944, 949 (Cal. 1953).

68. *See, e.g.*, *Kilberg*, 172 N.E.2d at 528.

69. Friedrich K. Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 212 (1969) (footnote omitte).

70. The Second Restatement employs the place of injury rule for many important tort issues. EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 588-89 (1982).

71. For a discussion of the current state of the law of personal jurisdiction, see *generally* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. DAVIS L. REV. 19 (1990).

72. This observation is not original. *See* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 559 (1989); Brilmayer, *supra* note 16, at 398-99.

Second Restatement should not favor local over nonlocal parties. None of the factors in either section 6 or section 145 make any overt distinctions between locals and nonlocals.

In contrast to the First Restatement's "urbane neutrality" and the relative neutrality of the Second Restatement, interest analysis is "unabashedly parochial."[73] Two features stand out immediately. The first is that the fundamental assumption that laws are enacted for the benefit of local parties is bound to favor local parties over nonlocals.[74] In fact, one commentator has argued for this reason that interest analysis unconstitutionally discriminates against nonlocal parties.[75] The second feature is that by requiring application of forum law in all cases except those in which the parties have a common domicile outside the state, interest analysis should favor application of forum law.[76] This forum bias should entail a preference for recovery-favoring rules because of the incentive to forum shop for favorable substantive rules.[77] Weighing against these preferences is the fact that courts tend not to apply interest analysis in its pure form but opt for slight variations on the theme.[78] California, for instance, resolves true conflicts not by the blunt forum law preference Currie advocated, but by a "comparative impairment" approach that calls on courts to determine which of the two competing policies would be most greatly injured if denied application.[79] These admixtures probably dilute the strong preferences for forum and local-favoring rules inherent in the methodology. Nevertheless, interest analysis, applied faithfully in almost any form, should strongly favor forum and local-favoring rules and less strongly favor recovery-favoring rules.

Finally, Leflar's approach reveals some clear tendencies as well. By relying substantially on the "better law" consideration in tort cases, Leflar's approach undoubtedly must favor plaintiffs. Although there are some examples of substantive tort rules that are excessively favorable to plaintiffs,[80] most of the fodder for the conflicts revolution was substandard, defendant-favoring tort rules such as interspousal immunity, guest statutes, contributory negligence and wrongful death damage limitations.[81] Leflar's approach also should strongly favor forum law.[82] In cases in which the

73. Juenger, *supra* note 4, at 218.

74. Brilmayer, *supra* note 16, at 398-99.

75. *See, e.g.*, Ely, *supra* note 16, at 180-91.

76. Brilmayer, *supra* note 16, at 399.

77. *Id.*

78. Kay, *supra* note 59, at 184-85.

79. *See, e.g.*, Bernhard v. Harrah's Club, 546 P.2d 719, 723 (Cal.), *cert. denied*, 429 U.S. 859 (1976).

80. *See, e.g.*, Cleary v. American Airlines, Inc., 168 Cal. Rptr. 122 (Cal. Ct. App. 1980) (noting that emotional distress and punitive damages are available for wrongful employment termination even for expressly at-will employees), *disapproved by* Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988).

81. *See, e.g.*, Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963); *see also infra* notes 134-37.

82. Scoles & Hay, *supra* note 70, at 31 (observing that better law is almost invariably forum law).

relevant forum rule is judge-made, the courts are likely to view their own work product as better.[83] In cases in which the relevant forum rule is legislative, there is probably a less consistent view among the state judiciary as to its wisdom, but there is still likely to be some preference for the familiar forum rule. Leflar's theory does not rely exclusively on the better law factor in tort cases; the "governmental interest" factor also plays a role.[84] To the degree that interests are a factor in Leflar's theory, this should do nothing to diminish the propensity to favor forum and recovery rules, because interest analysis is tilted in those directions as well.[85] With regard to favoring local over nonlocal parties, Leflar's approach is relatively blind. Determination of the better rule has no necessary interrelationship with the domicile of the parties. The interest factor must favor locals somewhat,[86] but the better law determinant should dilute this significantly.

To summarize, Table I shows the apparent preferences of the competing conflicts approaches in tort cases.

TABLE I—APPARENT PREFERENCES OF CONFLICTS APPROACHES

	First Rest.	Second Rest.	Intrst. Anal.	Leflar
Forum Law	None	Mild	Strong	Strong
Recovery-Favoring	None	Mild	Mild	Strong
Local Parties	None	None	Strong	Mild

II. THE STUDY

It is one thing to speculate about how the various conflicts theories might operate in practice and quite another to determine their actual operation. With the second goal in mind, I set out to study, as comprehensively as possible, the results generated in tort cases by the competing conflicts approaches.

The first step in the study was to identify the approach that a state purports to follow.[87] For some states this proved to be a fairly simple

83. Robert A. Sedler, *Professor Juenger's Challenge to the Interest Analysis Approach to Choice-of-Law: An Appreciation and a Response*, 23 U.C. DAVIS L. REV. 865, 894 (1990).

84. Leflar, *supra* note 62, at 209-10.

85. *See supra* notes 73-79 and accompanying text.

86. *See supra* notes 73-79 and accompanying text.

87. There have been other surveys of the approaches that courts purport to follow, but the pace with which states have changed their approach renders any such survey at least partially obsolete in a matter of a few years. For instance, Professor Kay in a 1983 survey reported that 22 states follow the First Restatement. Kay, *supra* note 3, at 591-92. In a 1988 survey, Mr. Smith found that 18 states follow the First Restatement in torts cases. Smith,

task,[88] but others presented more challenges. Some states—New York being the most striking example—clearly reject the First Restatement, but their approaches have overtones of many of the competing approaches and have frequently changed during the postrevolutionary period.[89] Other states explicitly combine two or more of the competing approaches.[90] The resulting permutations led Professor Kay to conclude that American courts follow as many as ten distinct approaches.[91] Recognizing that number of approaches, however, would greatly reduce the survey's statistical value by shrinking the size of each data base.

Fortunately, only eleven jurisdictions—Arkansas, the District of Columbia, Hawaii, Kentucky, Louisiana, Massachusetts, Michigan, New York, Oregon, Pennsylvania and Rhode Island—presented significant classification issues. A careful study of the reported opinions revealed that eight of these jurisdictions fit reasonably comfortably into one of the three new theories—the Second Restatement, Leflar's choice-influencing considerations or interest analysis.[92] Although classification difficulties remain, and there is room for debate with respect to the problematic jurisdictions, these issues were marginal in terms of the overall effect on the survey.

After classifying the states, I collected as many reported conflicts decisions as possible. Generally, I accomplished this with computer searches, though in some cases the data base did not extend far enough back in time. In these instances I employed more traditional research methods. The study thus included both appellate decisions and trial court decisions, if reported. Also included were reported federal district court cases and decisions of the circuit courts of appeals, which under *Klaxon Co. v. Stentor Electric Manufacturing Co.*[93] purport to adhere to their home state's choice-of-law methodology. Despite *Klaxon*, there are some notable examples of federal

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supra note 3, at 1174. Updating her own research in 1989, Professor Kay found that 16 states follow the First Restatement. Kay, *supra* note 59, at 182. A 1989 survey by Professors Kozyris and Symeonides found that 16 states follow the First Restatement in torts cases and 13 follow it in contracts cases. P. John Kozyris & Symeon C. Symeonides, *Choice of Law in the American Courts in 1989: An Overview*, 38 AM. J. COMP. L. 601, 602-04 (1990). Without differentiating between tort and contract, Professor Solimine found that 14 states adhere to the First Restatement as of 1989. Solimine, *supra* note 11, at 54-55. All of this makes clear that classifying states as to their choice-of-law approach is more art than science.

88. *See, e.g.*, Clark v. Clark, 222 A.2d 205, 207-09 (N.H. 1966) (adopting Leflar's approach).

89. *See, e.g.*, Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 683-84 (N.Y. 1985) (describing New York approach as one of "interest analysis"); Cousins v. Instrument Flyers, Inc., 376 N.E.2d 914, 915 (N.Y. 1978) (noting that *lex loci delicti* remains general rule in New York); Neumeier v. Kuehner, 286 N.E.2d 454, 457-58 (N.Y. 1972) (listing set of rules amounting to common domicile exception to *lex loci delicti* rule); Babcock v. Jackson, 191 N.E.2d 279, 283-85 (1963) (rationalizing result both in terms of "center of gravity" and "interests").

90. *See, e.g.*, Wallis v. Mrs. Smith's Pie Co., 550 S.W.2d 453, 456-69 (Ark. 1977) (combining Leflar's approach with Second Restatement).

91. Kay, *supra* note 3, at 585.

92. *See infra* Table II.

93. 313 U.S. 487 (1941).

courts striking out on their own.[94] For this reason, some commentators have suggested that choice-of-law surveys should be limited to state court decisions.[95] I decided, however, to include the federal court cases for a number of reasons. First, although federal courts occasionally do depart from the state precedents, in most cases they eventually return to the fold.[96] In many respects the task of a federal court hearing a diversity case replicates the task of a lower state court.[97] Second, by virtue of the interstate character of choice-of-law cases, a large number of them qualify for diversity jurisdiction and are likely to wind up in federal court either as an original matter[98] or after removal.[99] Ignoring the federal court cases, therefore, would greatly decrease the size of the data base. Third, compiling the federal cases separately allowed for an evaluation of the degree to which the federal courts are able to emulate their state court counterparts.

For states that still follow the First Restatement, I compiled all cases from 1960—the approximate date of the commencement of the conflicts revolution—to the present. For states that follow one of the new approaches, I compiled all cases beginning with the departure from the First Restatement.

For several reasons I included only torts cases. First, tort litigation was indubitably the conflicts revolution's principal battlefield.[100] Second, the new theories have their principal application in tort cases. Although most states follow the same approach in tort and contract cases,[101] in practice frequent use of choice-of-law clauses and recourse to arbitration have diminished the need to apply any conflicts approach in many contract cases.[102] Outside the tort and contact areas, the traditional rules have been less affected by the revolution.[103] Third, evaluating the results that the theories are likely to generate is easier in tort cases. Of course, occasionally it is not obvious whether a case should be classified as tort, contract, or something else.[104] In doubtful cases I erred on the side of inclusion.

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94. *See, e.g.*, Rosenthal v. Warren., 475 F.2d 438, 442 (2d Cir.) (distinguishing New York's *Neumeier* decision in order to apply forum law allowing full recovery), *cert. denied*, 414 U.S. 856 (1973).

95. Kay, *supra* note 59, at 184-85.

96. *See, e.g.*, Barkanic v. General Admin. of Civil Aviation of P.R.C., 923 F.2d 957, 963 (2d Cir. 1991) (applying Chinese wrongful death damage limitation because situs of accident was in China and rejecting *Rosenthal* approach).

97. CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS 373-74 (4th ed. 1983).

98. *See* 28 U.S.C. § 1332 (1988) (authorizing federal court subject matter jurisdiction for actions between citizens of different states).

99. *See* 28 U.S.C. § 1441 (1988) (authorizing removal of most cases from state court that qualify for original federal court subject matter jurisdiction).

100. DE BOER, *supra* note 3, at 8-397 n.2.

101. There are some counterexamples. West Virginia, for instance, follows the traditional approach in tort cases, but a "grouping of contacts" approach in contract matters. *See* Paul v. National Life Ins. Co., 352 S.E.2d 550, 555-56 (W.Va. 1986).

102. *Cf.* Juenger, *supra* note 4, at 307.

103. SCOLES & HAY, *supra* note 70, at xvii.

104. *See, e.g.*, Wong v. Tenneco, Inc., 702 P.2d 570 (Cal. 1985).

I excluded cases in which the choice of law was mandated by statute rather than the state's choice-of-law theory. Most commonly, this occurred with borrowing statutes[105] and workers' compensation statutes.[106] I excluded these cases because how a court interprets a statute such as a borrowing statute reveals relatively little about how it approaches choice of law generally. The study ultimately yielded a total data base of 802 decisions.

Finally, once the cases were assembled I examined them to make three determinations. First, I determined whether the court chose the forum rule or a foreign rule.

Second, of the rules competing for application, I determined whether the court chose a rule that favored recovery or a rule that did not. I made this determination as a relative matter. For instance, a statute allowing wrongful death recovery up to fifty-thousand dollars does allow for some recovery, but it is certainly not a "recovery-favoring" rule when juxtaposed with a rule allowing unlimited recovery.[107] In such cases, I treated the rule allowing unlimited recovery as the "prorecovery rule" and the fifty-thousand dollar limitation as the "nonrecovery rule."

Third, to the extent possible, I determined whether the court chose a rule that favored a local party over a nonlocal party, or vice versa. I treated as "local" individuals domiciled in the forum state and business associations whose business activities were centered in the state. In many cases no such determination was possible. For instance, if both parties were local[108] or both parties were nonlocal[109] a court obviously could not favor a local party over a nonlocal party, or vice versa.

Table II shows the results of the study state by state:

TABLE II - TOTAL RESULTS

State	Approach	Forum Law		Recovery Law		Local Favoring	
		State	Fed.	State	Fed.	State	Fed.
Alabama	First Rest.	0/4	1/2	1/4	0/2	1/2	1/2
Alaska	Second Rest. (1968)	2/2	0/0	2/2	0/0	1/1	0/0
Arizona	Second Rest. (1968)	8/10	0/0	9/10	0/0	3/3	0/0
Arkansas	Leflar (1977)	2/4	0/1	4/4	0/1	1/1	0/0

105. *See, e.g.*, Makarow v. Volkswagen of Am., Inc., 403 N.W.2d 563 (Mich. Ct. App. 1987).

106. *See, e.g.*, Jansen v. Fidelity & Casualty Co., 566 N.Y.S.2d 962 (N.Y. App. Div. 1991).

107. *See, e.g.*, Rosenthal v. Warren, 475 F.2d 438 (2d Cir. 1973).

108. *See, e.g.*, Babcock v. Jackson, 191 N.E.2d 279 (N.Y. 1963).

109. *See, e.g.*, Kell v. Henderson, 270 N.Y.S.2d 552 (N.Y. App. Div. 1966).

State	Approach	Forum Law		Recovery Law		Local Favoring	
		State	Fed.	State	Fed.	State	Fed.
California	Intrst. Anal. (1967)	13/21	11/18	14/21	12/18	7/14	8/11
Colorado	Second Rest. (1973)	2/3	7/13	3/3	9/13	1/1	7/9
Connecticut	Second Rest. (1986)	1/2	2/5	1/2	3/5	0/0	3/5
Delaware	Second Rest. (1991)	1/1	0/0	1/1	0/0	0/0	0/0
District of Columbia	Intrst. Anal./ Second Rest. (1965)	5/14	12/22	7/14	11/22	4/7	5/7
Florida	Second Rest. (1981)	9/16	5/9	11/16	6/9	6/10	4/5
Georgia	First Rest.	4/7	5/12	4/7	6/12	0/0	3/8
Hawaii	Intrst. Anal. (1981)	1/1	3/4	0/1	2/4	0/0	2/2
Idaho	Second Rest. (1982)	2/4	0/0	1/4	0/0	0/0	0/0
Illinois	Second Rest. (1970)	6/22	14/24	10/22	12/24	2/6	12/17
Indiana	Second Rest. (1987)	3/5	3/4	4/5	1/4	1/2	0/2
Iowa	Second Rest. (1968)	4/4	5/7	1/4	4/7	1/1	3/4
Kansas	First Rest.	1/3	4/7	0/3	3/7	0/3	3/6
Kentucky	Lex Fori (1968)	2/2	3/3	2/2	3/3	1/1	2/2
Louisiana	Intrst. Anal./ Second Rest. (1973)[110]	9/11	10/17	5/11	6/17	5/9	2/6
Maine	Second Rest. (1970)	2/2	3/7	2/2	5/7	1/1	2/4
Maryland	First Rest.	0/9	4/8	2/9	2/8	0/0	4/6
Massachusetts	Intrst. Anal. (1976)	2/2	6/9	1/2	4/9	1/1	4/9
Michigan	Lex Fori (1982)	3/3	2/5	3/3	1/5	1/2	2/4

110. Effective January 1, 1992, Louisiana adopted a statute codifying and altering in some respects its choice-of-law approach. Act No. 923, 1991 La. Sess. Law. Serv. 1693. All cases were collected before the effective date of the new law. For a discussion of the Louisiana statute, see Symeon C. Symeonides, *Louisiana's New Law on Choice of Law: An Exegesis*, 66 TUL. L. REV. 677 (1992).

State	Approach	Forum Law		Recovery Law		Local Favoring	
		State	Fed.	State	Fed.	State	Fed.
Minnesota	Leflar (1973)	7/10	6/7	10/10	4/7	5/5	3/5
Mississippi	Second Rest. (1968)	2/4	3/14	2/4	2/14	0/0	1/7
Missouri	Second Rest. (1969)	8/11	2/5	8/11	3/5	4/4	0/1
Montana	First Rest.	0/0	0/0	0/0	0/0	0/0	0/0
Nebraska	Second Rest. (1987)	0/1	0/0	0/1	0/0	0/0	0/0
Nevada	First Rest.	0/0	6/6	0/0	2/6	0/0	2/4
New Hampshire	Leflar (1966)	6/8	3/5	5/8	3/5	1/2	1/2
New Jersey	Intrst. Anal. (1967)	11/17	9/17	12/17	9/17	5/6	4/8
New Mexico	First Rest.	1/3	0/0	1/3	0/0	0/0	0/0
New York	Eclectic (1963)	38/68	34/62	46/68	31/62	18/25	20/36
North Carolina	First Rest.	3/16	1/6	7/16	1/6	3/4	0/2
North Dakota	Center of Gravity (1972)	2/4	0/1	0/4	0/1	0/0	0/0
Ohio	Second Rest. (1971)	5/8	9/14	4/8	6/14	3/3	7/9
Oklahoma	Second Rest. (1974)	1/2	5/6	2/2	5/6	1/1	1/1
Oregon	Second Rest. (1967)	4/8	3/4	3/8	3/4	1/4	2/2
Pennsylvania	Second Rest./Intrst. Anal. (1964)	8/16	15/28	7/16	13/28	2/4	10/18
Rhode Island	Leflar (1968)	3/7	4/6	5/7	4/6	3/5	0/2
South Carolina	First Rest.	2/5	2/5	2/5	2/5	2/3	0/1
South Dakota	First Rest.	1/3	0/0	2/3	0/0	0/1	0/0
Tennessee	First Rest.	0/2	2/8	0/2	3/8	0/0	2/5
Texas	Second Rest. (1979)	5/7	9/16	6/7	10/16	4/5	4/6
Utah	Second Rest. (1989)	0/1	0/0	1/1	0/0	0/0	0/0
Vermont	First Rest.	0/2	0/2	1/2	0/2	0/0	0/0
Virginia	First Rest.	0/1	6/7	0/1	1/7	0/0	0/2
Washington	Second Rest. (1974)	4/6	2/4	3/6	2/4	1/4	0/1
West Virginia	First Rest.	2/5	0/2	4/5	1/2	2/3	1/2
Wisconsin	Leflar (1965)	8/10	5/10	8/10	6/10	2/2	3/5
Wyoming	First Rest.	0/2	1/2	1/2	1/2	0/0	0/0

The left-hand column of Table II shows the approach followed by the state. In the event that the state has abandoned the First Restatement, the

date of abandonment is shown parenthetically. The pair of columns to the right of that column shows—separately for state and federal courts—the fraction of times that courts applied forum law. For instance, if state courts applied forum law in five out of eight cases, the entry under the state portion of that column is "5/8." The pair of columns to the right of those entries—again separating state and federal courts—shows the fraction of times that courts applied the law favoring recovery. Finally, the right-hand pair of columns shows the fraction of times that courts have favored local over nonlocal parties. The total numbers in this column are lower because many conflicts cases do not present a choice between local and nonlocal parties.[111] The next step in the analysis was to group the states into the major theoretical groupings: The First Restatement (fifteen states),[112] the Second Restatement (twenty-four states),[113] interest analysis (four states)[114] and Leflar's choice-influencing considerations (five states).[115]

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111. *See supra* notes 108-09 and accompanying text (noting cases presenting no choice between favoring local or nonlocal parties).

112. As shown in Table II, these states are Alabama, Georgia, Kansas, Maryland, Montana, Nevada, New Mexico, North Carolina, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia and Wyoming.

113. As shown in Table II these states are Alaska, Arizona, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah and Washington. Four of these states—the District of Columbia, Louisiana, Pennsylvania and Oregon—were all among the 11 problematic jurisdictions discussed above. *See supra* text accompanying note 92. In each case, the problem is that the states combine interest analysis with the Second Restatement's approach. *See, e.g.*, Taylor v. Liberty Mutual Ins. Co., 579 So. 2d 443 (La. 1991); Dunkwu v. Neville, 575 A.2d 293 (D.C. 1990); Guy v. Liederbach, 459 A.2d 744 (Pa. 1983); Seattle First Nat'l Bank v. Schriber, 625 P.2d 1370 (Or. Ct. App. 1981). In each case, however, I concluded that the decisions most often relied on Second Restatement factors, and that if "interests" were discussed, they were subsumed within the "significant relationship" factors. North Dakota, which purports to subscribe to a "center of gravity" theory, follows an approach quite similar to the Second Restatement. *See, e.g.*, Vigen Constr. Co. v. Millers Nat'l Ins. Co., 436 N.W.2d 254, 257 (N.D. 1989) (citing Second Restatement in course of "center of gravity" analysis in contract case). In any event, the number of conflicts cases decided by the North Dakota courts is quite small.

114. As shown in Table II these states are California, Hawaii, Massachusetts and New Jersey. Two of these states—Hawaii and Massachusetts—were among the 11 problematic jurisdictions discussed above. *See supra* text accompanying note 92. However, examination of the opinions of these states convinced me that they primarily rely on an evaluation of the state interests in a manner fairly similar to that proposed by Currie. *See, e.g.*, Peters v. Peters, 634 P.2d 586, 593 (Haw. 1981) (approving of mode of looking at interest and policies). The court noted that "the preferred analysis, in our opinion, would be an assessment of the interests and policy factors involved with a purpose of arriving at a desirable result in each situation." *Id.*; *see, e.g.*, Pevoski v. Pevoski, 358 N.E.2d 416, 417 (Mass. 1976) (purporting to retain *lex loci delicti* as basic rule, but applying Massachusetts law—the law of common domicile of parties). The court used this law because a state "has no legitimate interest in regulating the inter-spousal relationships of Massachusetts domiciliaries who chance to be injured within its borders." *Id.*

115. As shown in Table II these states are Arkansas, Minnesota, New Hampshire, Rhode Island and Wisconsin. Two of these states—Arkansas and Rhode Island—were among the 11

This left three states unclassified. Two of them, Kentucky[116] and Michigan,[117] exercise a blunt forum law preference that requires separate categorization. The remaining state, New York, defies classification. New York, of course, was the revolution's first battleground and initially adopted the "center of gravity" metaphor.[118] In many respects it is tempting to lump New York with the Second Restatement states because of the similarities between the center of gravity theory and the "most signficant relationship" test. Additionally, it is clear that many New York developments directly affected the Second Restatement.[119] Tempting as this might be for sake of simplicity, however, it will not suffice for analytical purposes. The shifting sands of New York's approaches do not allow for pigeonholing. After coining the "center of gravity" metaphor, the New York Court of Appeals adopted a set of rules amounting to a common domicile exception to the *lex loci delicti* rule.[120] More recently, the New York Court of Appeals has variously described its approach as being generally one of *lex loci*[121] and one of interest analysis.[122] All of this makes clear that New York requires separate treatment. I therefore organized the data as follows:

TABLE III—TOTALS BY APPROACH

	First Rest.	Second Rest.	Intrst. Anal.	Leflar	New York	Lex Fori
Forum Total	45/129	202/364	56/89	44/68	72/130	10/13
Forum %	35±8	55±5	63±10	65±11	55±9	77±23
Rcvry Total	47/129	194/364	54/89	49/68	77/130	9/13
Rcvry %	36±8	53±5	61±10	72±11	59±9	69±25
Local Total	24/54	106/170	31/51	19/29	36/61	6/9
Local %	44±13	62±7	61±13	66±17	59±12	67±31

Table III, therefore, shows the total for each approach, grouping the

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problematic jurisdictions discussed above. *See supra* text accompanying note 92. Examination of opinions from these states, however, convinced me that they most closely adhere to Leflar's approach. *See, e.g.*, Schlemmer v. Fireman's Fund Ins. Co., 730 S.W.2d 217, 219 (Ark. 1987) (applying all five of Leflar's factors including "better law" consideration); Brown v. Church of the Holy Name of Jesus, 252 A.2d 176, 178-82 (R.I. 1969) (examining all five of Leflar's considerations).

116. Arnett v. Thompson, 433 S.W.2d 109 (Ky. Ct. App. 1968).

117. Sexton v. Ryder Truck Rental, Inc., 320 N.W.2d 843 (Mich. 1982).

118. Babcock v. Jackson, 191 N.E.2d 279, 282 (N.Y. 1963).

119. *Compare* Dym v. Gordon, 209 N.E.2d 792, 794 (N.Y. 1965) (placing emphasis on place of formation of relationship between parties) *with* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2)(d) (1977) (stating that one of factors in evaluating most significant relationship in torts is place of formation of relationship between parties).

120. Neumeier v. Kuehner, 286 N.E.2d 454, 457 (N.Y. 1972).

121. Cousins v. Instrument Flyers, Inc., 376 N.E.2d 914, 915 (N.Y. 1978).

122. Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 683 (N.Y. 1985).

states as discussed above. The figures following the plus or minus symbol are the confidence intervals generated by the results. Using the accepted formula for binary statistics,[123] I calculated the 95% confidence interval. The confidence interval assesses the statistical significance of the results. For instance, as shown in Table III, First Restatement jurisdictions applied forum law in 45 out of 129 cases. This yielded a percentage of 35 plus or minus 8, meaning that one can state with 95% confidence that the true value is between 27% and 43%.

Finally, I separated the data by state and federal decisions. Employing the same error formula, Table IV shows these values:

TABLE IV— COMPARISON OF STATE AND FEDERAL APPLICATION[124]

	First Rest.		Second Rest.		Intrst. Anal.		Leflar		New York	
	State	Fed.	State	Fed.	State	Fed.	State	Fed.	State	Fed.
Forum Total	14/62	32/66	93/164	109/200	27/41	29/48	26/39	18/29	38/68	34/62
Forum %	23±10	48±12	57±8	55±7	66±15	60±14	67±15	62±18	56±12	57±12
Rcvry Total	25/62	22/66	93/164	101/200	27/41	27/48	32/39	17/29	48/68	31/62
Rcvry %	40±12	33±11	57±8	51±7	66±15	56±14	82±13	59±18	68±11	50±12
Local Total	8/16	16/38	41/66	63/104	13/21	18/30	12/15	7/14	18/25	20/36
Local %	50±25	42±16	62±12	61±9	62±21	60±18	80±20	50±26	72±18	56±16

123. Each test upon the cases allowed for only two possibilities. For instance, the examination of each case determined whether the case applied forum or foreign law, which, of course, allows for only two possibilities. Thus, the statistics are binary. The accepted formula for calculating the 95% confidence interval for binary statistics is 1.96 times the square root of ((y x (1 - y))/n), where "y" is equal to the ratio generated by the sample and "n" is the total number of samples. *See, e.g.*, DAVID K. HILDEBRANT & LYMAN OTT, STATISTICAL THINKING FOR MANAGERS 231 (2d ed. 1987). The 95% confidence interval is the traditionally accepted measure of statistical significance in social statistics. HUBERT M. BLALOCK, JR., SOCIAL STATISTICS 208-11 (rev. 2d ed. 1979). Applying the formula, to take an example, the sample for application of forum law by the First Restatement generated a ratio of 45/129, which equals .348. Thus, multiplying "y" (which equals .348) times "1-y" (which equals .652) results in a product of .227. Dividing this by "n" (which equals 129) and taking the square root equals .042. Finally, multiplying by .196 results in a confidence interval of .08. Thus, the result reported in the table is 35 ± 8%. All other confidence intervals were calculated in the same manner and are reported in Tables III and IV. A recent empirical study of the tendency of courts to pierce the corporate veil made the same assumptions regarding the binary nature of the statistics. Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1049 n.77 (1991).

124. The small size and uniformity of the decisions in the *lex fori* states made it impossible to calculate meaningful confidence intervals. For that reason, those results are not reported in Table IV. In any event, the results did not show any statistically signficant deviations between state and federal decisions in the *lex fori* states.

III. ANALYSIS OF THE DATA

Before proceeding to a discussion of what the results show, it is important to note some of the data's inherent limitations. First, the data include only reported cases. There are, of course, practical reasons for this. Combing trial court records for unreported multistate cases would be a monumental undertaking.[125] However, the fact that I considered only reported cases might distort the data because, in general, only cases that are "important" or address unresolved questions qualify for publication.[126]

Several considerations, however, convince me that this is not a substantial problem. First, all states were subject to the same mode of analysis, and all reported decisions were collected for each state. If one takes the data as a *relative* evaluation of the tendencies of the methodologies, rather than an *absolute* evaluation of the methodologies, the data are meaningful because the statistics were gathered in the same manner for each state. Second, the evaluations made in Part I are relative. Although interest analysis, if taken seriously, should favor forum law more often than the First Restatement, it is not clear whether this means that interest analysis should favor forum law in an ascertainable percentage of the cases. Third, the inclusion of reported trial court decisions reduces the absolute distortion because the sample is not therefore entirely appellate opinions.[127]

A second potential limitation is the finite size of the data base. Although some of the conflicts approaches, most notably the Second Restatement, have generated huge numbers of cases, others have generated fewer. Smaller data bases lead to larger confidence intervals, thus reducing the usefulness of the results.[128] I endeavored, however, to generate the largest possible sample population by examining all reported cases.

Finally, there is room for debate as to the conflicts methodology that some of the states follow. In particular, the eleven problematic states presented difficult issues of classification.[129] I have attempted to minimize

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125. *Cf.* CURRIE, supra note 7, at 589 (stating that examining unindexed trial court records is "not my dish of tea").

126. *See, e.g.*, 9TH CIR. R. 36-2 (setting standards for publication of cases). The Rule states that a disposition qualifies for publication "only if it . . . establishes, alters, modifies or clarifies a rule of law, or . . . [c]alls attention to a rule of law which appears to have been generally overlooked, or . . . [c]riticizes existing law, or . . . [i]nvolves a legal or factual issue of unique interest or substantial public importance. . . ." *Id.* Others have noted the potentially nonrepresentative character of reported cases. *See, e.g.*, George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 2-3 (1984); Peter Siegelman & John J. Donohue, *Studying the Iceberg From Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133 (1990).

127. *Cf.* Solimine, *supra* note 11, at 82-86 (explaining decision to use only appellate cases); *see also supra* note 11 (noting agreement with Solimine's data).

128. This, of course, is because the size of the confidence interval is inversely proportional to the square root of the total number of samples. *See supra* note 123. This formula confirms the intuitively obvious proposition that the statistical value of a study increases with the size of the sample population.

129. *See supra* text accompanying note 92.

this problem by carefully examining the decisions to find the dominant strain in each state's conflicts approach. In any event, as the state-by-state breakdown shows, the overall effect of these problematic states was slight. Thus, even if one were to disagree with my classification of some of the states, it is unlikely that it would significantly change the conclusions of the study.

Several conclusions that can be drawn from the data stand out. The first conclusion is that the great divide in American choice of law is still between the First Restatement and everything else. With respect to the degree to which the competing methodologies favor forum law, only the First Restatement shows a statistically significant variation from the other approaches. The confidence interval for the First Restatement for this variable is 28% to 44%. This confidence interval does not overlap with the intervals for the Second Restatement (50% to 60%), interest analysis (53% to 73%), Leflar (54% to 76%) or New York (46% to 64%).

Similarly, the First Restatement shows a statistically significant propensity to apply recovery-favoring rules less often. The confidence interval for this variable for the First Restatement is 28% to 44%. Again, this confidence interval does not overlap with the confidence intervals for the Second Restatement (48% to 58%), interest analysis (51% to 71%), Leflar (61% to 82%) or New York (50% to 68%).

The picture is somewhat foggier with respect to the propensity of the approaches to favor local parties. Although the First Restatement's confidence interval is the lowest (31% to 57%), because of the smaller number of samples it overlaps with the confidence intervals for the Second Restatement (55% to 69%), interest analysis (48% to 74%), Leflar (49% to 83%) and New York (47% to 71%). However, lumping all of the modern approaches together yields a composite confidence interval of 57% to 67%,[130] which approaches a statistically significant variance from the First Restatement. Thus, although the picture is less clear, the First Restatement is probably the least generous to locals.

In one important respect, therefore, the data confirms the tentative hypothesis advanced above: The First Restatement is the most evenhanded of the approaches and courts appear to take it fairly seriously. Territorial connecting factors do not favor forum law, prorecovery rules or local parties. In practice, therefore, it appears that the First Restatement works much as one would expect.

The corollary to the proposition that the First Restatement is statistically distinguishable from the new approaches is that the new approaches are *not*, by and large, distinguishable from each other. With respect to the application of forum law, all of the major competitors to the First Restatement show a clear overlap. The confidence interval for the Second Restate-

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130. The total figure for local parties, lumping all of the non-First Restatement cases together, is 198/320. Employing the formula discussed above, *see supra* note 123, yielded a 95% confidence interval of 57% to 67%.

ment is 50% to 60%, for interest analysis is 53% to 73%, for Leflar is 54% to 76% and for New York is 46% to 64%. These approaches, therefore, are statistically indistinguishable in the degree to which they favor forum law.

The picture is a bit different with regard to recovery-favoring rules. The confidence intervals for this variable for the major competitors to the First Restatement are: Second Restatement: 48% to 58%; interest analysis: 51% to 71%; Leflar: 61% to 83%; and New York: 45% to 63%. These intervals show that in this respect the Second Restatement and Leflar's approach are statistically distinguishable from each other, but neither is distinguishable from interest analysis or the New York approach.

Finally, with respect to the propensity of these approaches to favor local parties, no statistically significant variations could be detected. The confidence intervals here for the major new approaches are: Second Restatement: 55% to 67%; interest analysis: 48% to 74%; Leflar: 49% to 83%; and New York: 47% to 71%. All of these intervals overlap.

It follows, therefore, that the new approaches do *not* work as they should. With respect to the propensity to favor forum law, interest analysis and Leflar's approach apparently should favor forum law more often than the Second Restatement. The data do not bear this out because there are no statistically significant variations among the new theories.

With respect to the propensity to favor victims, Leflar's approach ought to be the most prorecovery, followed by interest analysis and the Second Restatement. Although Leflar's choice-influencing considerations do show a statistically significantly greater bent toward prorecovery rules than the Second Restatement, the results produced by interest analysis and the New York approach are statistically indistinguishable from those in Leflar and Second Restatement jurisdictions.

With respect to the propensity to favor local parties, interest analysis ought to point more strongly in this direction than Leflar's approach or the Second Restatement. The data do not confirm this, however. The new approaches are statistically indistinguishable in this regard.

On the matter of whether federal courts faithfully adhere to their home state's method, the data reveal little to suggest that they do not. All but one of the confidence intervals for each of the approaches overlap. In First Restatement cases, the confidence interval for application of forum law by state courts is 13% to 33%, while the same interval for federal courts is 36% to 60%. This deviation may be aberrational, however, because in other respects the state and federal court decisions applying the First Restatement are quite consistent. With respect to application of prorecovery rules, the state confidence interval is 28% to 52%, while the federal confidence interval is 22% to 44%. With respect to favoring local parties, the state confidence interval is 25% to 75%, while the federal confidence interval is 24% to 68%.

The most frequently cited example of state and federal courts going opposite directions is New York.[131] At one time, the New York federal

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131. *See, e.g.*, Cooperman v. Sunmark Indus. Div. of Sun Oil Co., 529 F. Supp. 365,

courts appeared to follow a methodology that more closely mimicked California's interest analysis than New York's approach.[132] Eventually, however, the New York federal courts returned to the fold,[133] and the data reveal no statistically significant variations between the state and federal courts in New York. Taking the New York results alone, with respect to application of forum law the confidence interval for the state courts is 44% to 68%, while the interval for federal courts is 45% to 69%. For application of prorecovery rules the confidence interval for state courts is 57% to 79%, while the interval for federal courts is 38% to 62%. For application of rules favoring local parties, the confidence interval for state courts is 54% to 90%, while the interval for federal courts is 40% to 72%. All of these intervals overlap, and, thus, one cannot detect variations between the New York federal courts and the state courts. Accordingly, taken as a whole the results suggest that federal courts are fulfilling their duty under *Klaxon*[134] to follow the lead of their state court counterparts.

What, then, can one say about the present and future of choice of law given the data? One thing is clear: The tentative hypothesis advanced above must be, as I suggested, at least partially incorrect. Courts do *not* take the new approaches seriously. Because all of the competitors to the First Restatement start from different analytical premises, if courts were faithful to their tenets they would inevitably generate different result patterns. Yet in practice the outcomes are largely indistinguishable.

None of this is really surprising. Although interest analysis purports to rely predominantly on domiciliary contacts, the notion of what counts as an "interest" is so uncertain that even territorial contacts can be rationalized with fictions such as the need to protect medical creditors who provide care at the situs of an accident.[135] The Second Restatement still relies on territorial contacts, but the unweighted, open-ended nature of its factors allows for the rationalization of almost any result.[136] New York's approach is so thoroughly muddled that it is doubtful that even a court sincerely attempting to follow the Court of Appeals' precedents could do so.[137] Leflar's approach is dominated by the better law determinant and never has purported to be much of a check on judicial discretion.[138]

The reason, then, that all of the modern approaches perform nearly identically in practice is that none of them is much of a check on judicial

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368 (S.D.N.Y. 1981) (noting that there exists discrepancy between views of New York Court of Appeals and Second Circuit on conflicts standards forum).

132. *Compare* Rosenthal v. Warren, 475 F.2d 438 (2d Cir. 1973) *with* Neumeier v. Kuehner, 286 N.E.2d 454 (N.Y. 1972).

133. Barkanic v. General Admin. of CAAC, 923 F.2d 952 (2d Cir. 1991).

134. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

135. CURRIE, *supra* note 7, at 366, 369-70.

136. DE BOER, *supra* note 3, at 3-225.

137. *See supra* notes 118-22 and accompanying text.

138. *See, e.g.*, Juenger, *supra* note 4, at 219. Juenger observed that "judicial discretion in conflicts cases [that follow Leflar] is near absolute." *Id.*

discretion. No other hypothesis can account for the similarity in result patterns. If the new theories actually curtailed judicial discretion, their differing analytical foundations ought to produce quite different result patterns.

What is it, then, that courts *do* take seriously in deciding multistate cases? While there is no absolutely rigorous manner of demonstrating exactly what motivates judges applying the new theories, the primary motivation seems to be fair substantive results. Several considerations support this conclusion.

The first consideration is the strong prorecovery bent all of the new theories evince in application. Although this bent is apparent on the face of Leflar's theory, it is less so with interest analysis and not at all with the Second Restatement.[139] This speaks volumes on the propensity of judges to seek out desirable results even in the face of arguably contrary conflicts theories.

The second consideration is the strong tendency of courts to break from the *lex loci delicti* rule to avoid an undesirable result, such as the application of a guest statute,[140] spousal or intrafamilial immunity,[141] a damage limitation[142] or other undesirable and anachronistic tort

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139. *See supra* notes 71-79 and accompanying text.

140. *See* First Nat'l Bank v. Rostek, 514 P.2d 314, 319-20 (Colo. 1973) (finding that Colorado rule of full recovery applied instead of *lex loci*'s aircraft guest statute); DeMayer v. Maxwell, 647 P.2d 783, 784-85 (Id. 1982) (concluding that Idaho rule of full recovery applied instead of *lex loci*'s guest statute); Arnett v. Thompson, 433 S.W.2d 109, 112-13 (Ky. 1968) (explaining that Kentucky rule of full compensation applied instead of Ohio guest statute); Beaulieu v. Beaulieu, 265 A.2d 610, 616-17 (Me. 1970) (finding that Maine rule of full recovery applied instead of *lex loci*'s guest statute); Milkovich v. Saari, 203 N.W.2d 408, 412-15 (Minn. 1973) (applying Minnesota rule of full recovery instead of *lex loci*'s guest statute); Kennedy v. Dixon, 439 S.W.2d 173, 184-85 (Mo. 1969) (finding that Missouri rule of full recovery applied instead of *lex loci*'s guest statute); Clark v. Clark, 222 A.2d 205 (N.H. 1966) (finding that New Hampshire rule of full recovery applied instead of *lex loci*'s guest statute); Mellk v. Sarahson, 229 A.2d 625, 629 (N.J. 1967) (finding that New Jersey rule of full recovery applied instead of *lex loci*'s guest statute); Babcock v. Jackson, 191 N.E.2d 279, 284-85 (N.Y. 1963) (finding that New York rule of full recovery applied instead of *lex loci*'s guest statute); Wilcox v. Wilcox, 133 N.W.2d 408, 416-17 (Wis. 1965) (finding that Wisconsin rule of full recovery applied instead of *lex loci*'s rule of full recovery); *cf.* Fuerste v. Benis, 156 N.W.2d 831, 934-35 (Iowa 1968) (finding that Iowa guest statute applied instead of *lex loci*'s rule of full recovery).

141. *See* Armstrong v. Armstrong, 441 P.2d 699, 703-04 (Alaska 1968) (applying Alaska rule of full recovery instead of *lex loci*'s rule of spousal immunity); Jagers v. Royal Indem. Co., 276 So. 2d 309, 315 (La. 1973) (applying Louisiana rule of full recovery instead of *lex loci*'s alleged rule of intrafamilial immunity); Forsman v. Forsman, 799 P.2d 218, 221 (Utah 1989) (applying California rule of full recovery instead of *lex loci*'s rule of spousal immunity); *cf.* Schwartz v. Schwartz, 440 P.2d 326, 328-28 (Ariz. App. 1968) (applying Arizona rule of spousal immunity); Peters v. Peters, 634 P.2d 586, 594-95 (Haw. 1981) (applying Hawaii rule of spousal immunity); Pevoski v. Pevoski, 358 N.E.2d 416, 418 (Mass. 1976) (applying Massachusetts rule but abrogating spousal immunity retroactively).

142. *See* Reich v. Purcell, 432 P.2d 727, 731 (Cal. 1967) (applying rule of full recovery instead of *lex loci*'s rule of $25,000 wrongful death limitation); O'Connor v. O'Connor, 519

rules.[143] In fact, the truly striking feature of the thirty-six cases in which courts have made the initial decision to abandon the First Restatement is that in twenty-six of these cases courts did so to apply a demonstrably superior tort rule, while in only six of the cases have courts applied an inferior tort rule, and in another four cases the impact of the decision was unclear.[144] Taking as a subset of total cases those cases in which courts have departed from the First Restatement and the impact of the decision has been clear, courts applied the prorecovery rule in 82 ± 14 % of the cases. This confidence interval is statistically significantly greater than the composite tendency of courts applying the modern theories to apply prorecovery rules. Taking together all of the modern decisions, courts have applied prorecovery rules in 383 of 664 cases, yielding a confidence interval of 58 ± 4 %, which is below the confidence interval for the subset. Even beyond the strong prorecovery bent of the cases abandoning the First

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A.2d 13, 25 (Conn. 1986) (applying Connecticut rule of full recovery instead of *lex loci*'s severely limited government fund compensation); Traveler's Indem. Co. v. Lake, 594 A.2d 38, 48 (Del. 1991) (applying Delaware rule of full recovery instead of *lex loci*'s severely limited government fund compensation); Fox v. Morrison Motor Freight, Inc., 267 N.E.2d 405, 409 (Ohio) (applying Ohio rule of full recovery instead of *lex loci*'s rule of $30,000 wrongful death damage limitation), *cert. denied*, 403 U.S. 431 (1971); Brickner v. Gooden, 525 P.2d 632, 638 (Okla. 1974) (applying Oklahoma wrongful death law instead of *lex loci*'s severely limited compensation); Griffith v. United Air Lines, Inc., 203 A.2d 796, 807 (Pa. 1964) (applying Pennsylvania rule of full recovery instead of *lex loci*'s rule severely limiting wrongful death compensation); Woodward v. Stewart, 243 A.2d 917, 923-24 (R.I.) (applying Rhode Island's rule of full recovery instead of *lex loci*'s limited recovery), *cert. dismissed*, 393 U.S. 957 (1968); Gutierrez v. Collins, 583 S.W.2d 312, 319 (Tex. 1979) (remanding for probable application of Texas law of full recovery instead of *lex loci*'s rule severely limiting compensation); *cf.* Tramontana v. S. A. Empresa de Viacoa Aerea Rio Grandense, 350 F.2d 468, 471 (D.C. Cir. 1965) (applying Brazil's $170 wrongful death limitation), *cert. denied*, 383 U.S. 943 (1966); Ingersoll v. Klein, 262 N.E.2d 593, 596-97 (Ill. 1970) (finding that plaintiff was to rely on Illinois wrongful death statute instead of Iowa wrongful death statute; unclear as to differences between statutes).

143. *See* Wallis v. Mrs. Smith's Pie Co., 550 S.W.2d 453, 458 (Ark. 1977) (applying Arkansas comparative negligence rule instead of *lex loci*'s contributory negligence rule); Futch v. Ryder Truck Rental, Inc., 391 So. 2d 808, 809-10 (Fla. 1980) (applying Florida rule of comparative negligence instead of *lex loci*'s rule of contributory negligence); Sexton v. Ryder Truck Rental, Inc., 320 N.W.2d 843, 854 (Mich. 1982) (applying Michigan rule of imputed owner liability instead of *lex loci*'s rule of nonliability); Mitchell v. Craft, 211 So. 2d 509, 513-14 (Miss. 1968) (applying Mississippi rule of comparative negligence instead of *lex loci*'s rule of contributory negligence); Werner v. Werner, 526 P.2d 370, 376-77 (Wash. 1974) (applying California rule of tort liability for notaries); *cf.* Hubbard Mfg. Co. v. Greeson, 515 N.E.2d 1071, 1074 (Ind. 1987) (applying Indiana rule allowing absolute defense for openly dangerous products instead of *lex loci*'s rule of partial defense); Harper v. Silva, 399 N.W.2d 826, 830 (Neb. 1987) (recognizing that it was unclear whether court has previously departed from *lex loci* rule; opinion in response to certification from federal court; decision not to apply Nebraska excess medical malpractice insurance fund; unclear as to impact of decision); Issendorf v. Olson, 194 N.W.2d 750, 755-56 (N.D. 1972) (applying North Dakota rule of contributory negligence instead of *lex loci*'s rule of comparative negligence); Casey v. Manson Constr. & Eng'g Co., 428 P.2d 898, 907-08 (Or. 1967) (applying Washington rule not allowing recovery for loss of consortium).

144. *See supra* notes 140-43.

Restatement is the striking fact that the huge fraction of this subset follows the *Babcock* pattern: the *lex loci delicti* rule pointed to a highly undesirable tort rule such as a guest statute or a damage limitation, and the new theories gave courts the wiggle room to apply a preferable tort rule.[145]

While Leflar's theory, interest analysis, and the Second Restatement have been well-known for decades, courts suddenly find religion at precisely the moment when the new theories will help them avoid a bad result. The unavoidable inference is that such epiphanies have much to do with the the substantive result reached and little to do with the theories themselves.[146] It is quite unlikely that those motivations, so apparent at first, disappear and allow the courts to apply the new theories in a manner dispassionate to results in subsequent cases.

The third consideration blends into the second. All of the new approaches are extraordinarily malleable. Judges and justices are in the business of dispensing justice to the real parties that litigate before them. Because nearly every case under the new theories is fairly debatable, it defies credulity to think that those who sit in judgment, and face counsel and the parties directly, can be or are blind to the outcomes of their decisions. As one commentator has observed, "The real clash is between a result-conscious judiciary and scholars who are committed to one or the other conflicts orthodoxy."[147]

This survey demonstrates that choice of law in the United States is at a crossroads. If, as I suggest, the new theories usually amount to little more than long-winded excuses to do what courts wanted to do in the first place, one may ask whether the current state of affairs is satisfactory. It seems to me that counsel, courts and parties would be better off if judges would admit candidly—as do courts in states that follow Leflar's approach[148]—that substantive preferences control results in multistate cases.

The costs of obfuscating the real desiderata in choice-of-law cases are high. Honesty is the best policy, even in judicial opinions,[149] because dishonesty has discernable negative effects. For one, it makes it difficult to advise clients. Although lifelong observers of American choice-of-law decisions may be able to detect that most recent cases can be explained by a desire to apply prorecovery, forum rules,[150] practicing lawyers who research these cases only occasionally are much more likely to be taken in by the

145. *See supra* notes 140-43 and accompanying text.

146. Friedrich K. Juenger, *Governmental Interests and Multistate Justice: A Reply to Professor Sedler*, 24 U.C. DAVIS L. REV. 227, 238 (1990); *see also* Paul v. National Life Ins. Co., 352 S.E.2d 550, 551-52 (W. Va. 1986).

147. Juenger, *supra* note 4, at 254.

148. *See, e.g.*, Bigelow v. Halloran, 313 N.W.2d 10, 12-13 (Minn. 1981) (finding that Iowa survival rule is better rule than Minnesota's rule of nonsurvival of tort liability).

149. Leflar, *supra* note 9, at 300. Leflar noted that "we do not like it when there is less than the appearance of intellectual integrity in the process, and we ask that the process be purified as soon as possible." *Id.*

150. Willis L.M. Reese, *Book Review*, 33 AM. J. COMP. L. 332, 335 (1985).

highly abstract, "quasi-objective drivel about policies and interests"[151] that permeates current judicial opinions. Moreover, the resources of counsel and the judiciary would be better directed toward discussing the real issues instead of articulating fine-spun theories that befuddle the practicing bar and, in some cases, lower courts.[152] No doubt, we would be better off if courts actually informed us as to the true basis for their decisions. If, as I suggest, the real issue in conflicts cases is the relative merits of the rules, counsel and lower courts are likely to be of much more help to higher courts if they are pointed in the right direction.

The alternatives to candidly admitting that results are the major determinant in multistate tort cases are clear. One alternative is to retreat to a regime of reasonably hard and fast rules such as the First Restatement. Although such a regime produces many unpalatable results,[153] at least it has the relative virtues of candor and clarity. The other alternative is to remain in the shadowy netherworld in which most of American conflicts now dwells. In this netherworld, substantive preferences are always just out of sight, influencing the discussion of mysterious concepts such as "interests" and "significant relationships," but never quite showing themselves. What direction American choice of law will ultimately take is a chapter that is yet unwritten. I would suggest that the best of the available alternatives is to admit candidly that results have been and are the guiding light in multistate tort cases, and the sooner we get on with it the better.

CONCLUSION

As Robert Leflar said over a decade ago, United States choice of law truly is a "well-watered plateau."[154] The four dominant approaches toward choice of law in the United States—the First Restatement, the Second Restatement, interest analysis and Leflar's choice-influencing considerations—all proceed from different analytical foundations. While the First Restatement, and to a lesser extent the Second Restatement, emphasizes territorial connecting factors, interest analysis relies predominantly on domiciliary contacts, and Leflar's approach relies on substantive results. Given this, one would expect all four of the approaches to generate different result patterns with respect to the degree to which they favor forum law, prorecovery rules and local parties. Yet, after surveying 802 cases and applying accepted modes of statistical analysis, my conclusion is that only the First Restatement stands apart from the others. In practice the Second Restate-

151. DE BOER, *supra* note 3, at 8-456.

152. *See, e.g.*, Fisher v. Huck, 624 P.2d 177, 178 (Or. Ct. App. 1981) (applying Second Restatement is "like skeet shooting with a bow and arrow").

153. *See, e.g.*, Alabama Great S. R. R. Co. v. Carroll, 11 So. 803, 809 (Ala. 1892) (applying Mississippi fellow servant rule to bar recovery by Alabama plaintiff against Alabama defendant, even though tortious conduct occurred in Alabama, because injury was ultimately suffered in Mississippi).

154. Leflar, *supra* note 15, at 10.

ment, interest analysis and Leflar's approach are largely indistinguishable. The factor that explains this similarity is that none of the modern theories acts as a substantial check on judicial discretion. In practice, courts appear to reach their preferred substantive results, and—except for Leflar's theory that allows courts to admit their substantive preferences—the new theories are little more than veils for the real reasoning of courts. As a consequence, choice of law in the United States is at the crossroads. Either we can admit that results are the primary determinant in multistate torts cases, or we can retreat to a regime resembling the First Restatement. In my view, the preferable road is for us to get on with the business of admitting that results are important.