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SCHLEMMER v. FIREMAN'S FUND INSURANCE CO.:
A CASE FOR RETHINKING ARKANSAS' CHOICE-OF-
LAW RULE FOR INTERSTATE TORTS

L. Lynn Hogue*

I. INTRODUCTION

Prior to 1977, Arkansas applied the law of the place of the accident, the *lex loci delicti*,¹ a rule popularized by the first *Restatement of Conflict of Laws*,² to resolve choice-of-law issues in cases in interstate torts.³ In *Wallis v. Mrs. Smith's Pie Co.*⁴ the Arkansas Supreme

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1. *McGinty v. Ballentine Produce, Inc.*, 241 Ark. 533, 408 S.W. 2d 891 (1966). *Compare Turkey Express, Inc. v. Skelton Motor Co.*, 246 Ark. 739, 439 S.W.2d 923 (1969).

2. *RESTATEMENT OF CONFLICT OF LAWS* § 384 (1934). The first *Restatement* was heavily influenced by Joseph H. Beale's theories of territoriality and vested rights. Beale's theories were later discredited. *See, e.g.,* W. COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942). "Walter Wheeler Cook discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual produce of another." Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 966 (1958), reprinted in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 6 (1963).

3. For a fuller history, see Hogue, *Arkansas' New Choice of Law Rule for Interstate Torts: A Critique of Wallis, Williams, and the "Better Rule of Law,"* 1978 WASH. U.L.Q. 713, 714-17 (1978). The Arkansas Supreme Court had signaled its willingness to reconsider the *lex loci* rule of the *RESTATEMENT OF CONFLICT OF LAWS* (1934) in *McGinty v. Ballentine Produce, Inc.*, 241 Ark. 533, 408 S.W.2d 891 (1966).

Court departed from this mechanical conflicts rule, which it had followed for some time, and adopted instead an eclectic fusion of Dr. Robert A. Leflar's "better rule of law" methodology⁵ and the second *Restatement of Conflict of Laws*. With the decision in *Schlemmer v. Fireman's Fund Insurance Co.*,⁶ the marriage between the second *Restatement* and the "better rule" theory apparently is ended, and Arkansas now has a unitary choice-of-law theory for interstate torts—the "better rule of law."⁷

After *Williams v. Carr*⁸ was decided closely on the heels of *Wallis*, I criticized both the *Wallis* and *Williams* decisions because they were decided under mistake of law.⁹ It appeared illogical to me (and ultimately silly) to decide a case on the basis of which state has the "better" rule of law when the competing laws are never correctly ascertained and therefore never clearly before the court for its assessment—as was the case in both *Wallis* and *Williams*. As I earlier suggested, the court's approach not only defied Leflar's procedure—"A state's 'governmental interest' in a set of facts can be analyzed only by reference to the content of the competing rules of law"¹⁰—but "it reaches a choice of law effected in a legal vacuum—a conflict of laws hardly ripe for judicial resolution."¹¹ In *Wallis* the Arkansas Supreme Court ignored the content of applicable Missouri law on the question of whether Missouri law permitted recovery by a contribu-

4. 261 Ark. 622, 550 S.W.2d 453 (1977). See Note, *Wallis v. Mrs. Smith's Pie Co.*, 1 U. ARK. LITTLE ROCK L.J. 103 (1978).

5. See, e.g., R. LEFLAR, L. MCDUGAL & R. FELIX, *AMERICAN CONFLICTS LAW* 281-82, 391-92 (4th ed. 1986) ("There are numerous cases [citing *inter alia* *Wallis* as a fusion of the choice-influencing considerations, significant relationships and governmental interests] which cite and undertake to follow authorities supporting two or three or all of the current approaches. This tends to pull them together, as the new law." *Id.* at 391-92 (emphasis in original)). See also Reppy, *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645 (1983); Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS., 10 (Spring 1977); Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case for Eclecticism*, 40 MO. L. REV. 407 (1975); Leflar, *The "New" Choice of Law*, 21 AM. U.L. REV. 457 (1972).

6. 292 Ark. 344, 730 S.W.2d 217 (1987). See Note, *Arkansas Relies on Choice-Influencing Considerations and the "Better Rule of Law,"* 10 U. ARK. LITTLE ROCK L.J. 511 (1987-88).

7. Dr. Leflar's "better rule of law" theory was developed and advanced in a series of writings over several years beginning in 1966. See Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Consideration*, 54 CALIF. L. REV. 1584 (1966).

8. 263 Ark. 326, 565 S.W.2d 400 (1978).

9. Hogue, *supra* note 3.

10. Leflar, *More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1587 (1966).

11. Hogue, *supra* note 3, at 730.

torily negligent plaintiff. That law included both Missouri precedent which allowed a jury to find that the conduct which served as the basis of the Arkansas plaintiffs' claim was excusable as well as the defense of last clear chance (known in Missouri as the humanitarian doctrine).¹² In *Williams* the court ignored the subtleties of Tennessee's rules on proximate and remote contributory negligence.¹³

This criticism of the "better rule" approach—in essence that the transition to the newer theory of "better rule" from *lex loci* was made by the court without being faithful to the premises or methodology of the theory or theories it purported to adopt—differs somewhat from that advanced by other critics. For example, Professor von Mehren bluntly observes that "[Dr. Leflar's] analysis in terms of five 'choice-influencing considerations' . . . adds little toward solving the [problem of principled, comprehensible, and noninvidious solutions to choice-of-law questions]."¹⁴ Indeed, the "betterness" of a particular law is impossible to gauge without general agreement on an appropriate measure for laws.¹⁵ The decision in *Schlemmer* demonstrates the bankruptcy of the "better rule" method and amply justifies rethinking Arkansas' choice-of-law rule for interstate torts. *Schlemmer* is wrongly decided on two entirely separate but interrelated grounds. It is wrong as a matter of choice of law, and it is wrong as a matter of constitutional law.

The facts of *Schlemmer v. Fireman's Fund Insurance Co.*¹⁶ are deceptively straightforward. In May 1981 plaintiff/appellant Donna Schlemmer drove her stepfather's car from her home in Memphis, Tennessee, to the home of Rochelle Smith in West Memphis, Arkansas. There Schlemmer and Smith got into another vehicle, an uninsured car owned by Smith's sister. Schlemmer and Smith then drove together to a party elsewhere in West Memphis where they drank beer. After some time had passed, Schlemmer told Smith that she

12. For the analysis upon which this conclusion rests, see *id.* at 717-22.

13. *Id.* at 726-30.

14. Von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 952 (1975).

15. *Id.* at 952-53 ("An approach in terms of 'the better rule of law' probably complicates the problem even further unless general agreement were to exist on the standards by which superiority was to be judged."). See also von Mehren & Trautman, *Constitutional Control of Choice of Law: Some Reflections on Hague*, 10 HOFSTRA L. REV. 35, 50 n.50 (1981) ("[I]t would be impermissible for the forum to justify application of its own law solely on the ground that it finds its law easier to apply or that it regards its own law as better law simply because it is its own law. Equally impermissible would be any methodology arbitrarily weighing the scales in favor of forum law." (citations omitted)).

16. 292 Ark. 344, 730 S.W.2d 217 (1987).

wanted to go home and prevailed on Smith to take her back to her car. While on the way back to Schlemmer's car, Smith drove at an excessive rate of speed on a rain-slick service road. Schlemmer asked her to slow down, but Smith lost control of the car and wrecked it, injuring Schlemmer.

Schlemmer brought suit against Fireman's Fund Insurance Co., the insurer of her stepfather's car (the car Schlemmer drove to West Memphis from Memphis, not the uninsured car involved in the accident) seeking coverage under the uninsured motor vehicle coverage provision of the stepfather's policy. The defendant/appellee insurance company moved for summary judgment contending, alternatively, "that [the] plaintiff was not a covered person under her stepfather's policy . . . [or] that the Arkansas guest statute barred recovery by the plaintiff."¹⁷ The trial court applied Arkansas law and held "that, as a matter of law, the guest statute barred recovery because the driver of the car was not driving in willful and wanton disregard of the rights of others."¹⁸ The plaintiff appealed and the Arkansas Supreme Court reversed, holding that Arkansas' guest statute¹⁹ would not apply to these non-Arkansan litigants.²⁰

To place matters in context, under Arkansas' guest statute, a guest/plaintiff may still recover (assuming, of course that his or her fault is not equal to or greater than that of the defendant²¹) if he or she can show that the host driver operated an automobile in a "willful and wanton" manner.²² "Willful and wanton" conduct, a term of art, is apparently more aggravated than "gross negligence," and the determination of when gross negligence becomes willful and wanton is one for the jury.²³ Although certain factual aspects of the *Schlemmer* case—drinking and driving at a high rate of speed on rain-slick roads²⁴—have been associated with findings of willful and wanton

17. *Id.* at 345, 730 S.W.2d at 218.

18. *Id.*

19. ARK. STAT. ANN. § 75-913 (repealed 1983).

20. 292 Ark. at 345, 730 S.W.2d at 218. The case was settled after having been remanded for trial.

21. See ARK. CODE ANN. § 16-64-122 (1987) (Arkansas' Comparative Faults Statute); see also H. WOODS, COMPARATIVE FAULT 514 (2d ed. 1987). Where the host driver has been drinking, "[t]he guest passenger assumes the risk of . . . his host driver's negligence" H. WOODS, at 467 n.1.

22. O. HARRIS, ARKANSAS WRONGFUL DEATH ACTIONS 85 (1984) (see cases cited at 88 n.3).

23. *Id.* (see also cases cited at 89 n.8).

24. *Moeller v. Theis Realty, Inc.*, 13 Ark. App. 266, 683 S.W.2d 239 (1985) (burden is on moving party to show that, even though the facts may be in dispute, reasonable minds could not differ as to the conclusion to be drawn from them).

conduct, their mere presence does not preclude summary judgment. For example, in *Froman v. J.R. Kelley Stave & Heading Co.*²⁵ the court noted that the "testimony [in the case at trial] was sufficient to support, as a matter of fact, the finding that the 'vehicle was willfully and wantonly operated in disregard of the rights of others.'"²⁶ The testimony in *Froman* included evidence that the driver (the agent of the host/defendant) drank beer and wine and later drove under their influence at a high rate of speed, wrecking the car and injuring the guest/plaintiffs. The testimony in the *Froman* case was disputed, and the jury did not find for the plaintiffs.²⁷ As the court was careful to point out, the elements of drinking, driving too fast, and the like, do not make out a case of willful and wanton conduct as a matter of law.²⁸

Although *Schlemmer* was remanded for trial, the parties subsequently settled. This critique shows that the Arkansas Supreme Court's conclusion is wrong both as a matter of choice of law and as a matter of constitutional law. *Schlemmer* and "the better rule of law" theory should be abandoned by the court at its earliest opportunity.

II. ROLE OF THE GUEST STATUTE'S REPEAL

Repeal of Arkansas' guest statute²⁹ changed state policy on recovery by plaintiff guests, but only prospectively. By its terms, the repealing legislation applied "only to claims or causes of action aris-

25. 196 Ark. 808, 120 S.W.2d 164 (1938).

26. *Id.* at 814, 120 S.W.2d at 167.

27. This result was affirmed on appeal. *Id.* at 816, 120 S.W.2d at 168.

28. *Id.* at 814, 120 S.W.2d at 167. "This testimony was sufficient to support, as a matter of fact, the finding that the 'vehicle was willfully and wantonly operated in disregard of the rights of others.' But we cannot say, as a matter of law, that it entitled appellants to recover, for the reason that [the testimony] was sharply disputed." *Id.* (emphasis added).

Other cases also support the point that whether driving while intoxicated constitutes willful and wanton conduct is a question of fact for the jury. See, e.g., *McCall v. Liberty*, 248 Ark. 618, 453 S.W.2d 24 (1970); *Bridges v. Stephens*, 238 Ark. 801, 802-03, 384 S.W.2d 490-91 (1964) ("We think it goes without saying that one who drives a car while he is drunk may fairly be held to be engaging in misconduct—criminal misconduct—that is both willful and wanton."); *Cooper v. Calico*, 214 Ark. 853, 218 S.W.2d 723 (1949) (driving under the influence of alcohol can be willful and wanton misconduct).

Some Arkansas cases bar recovery by a guest/plaintiff who fails to protest the actions of the intoxicated host/defendant. See *Lewis v. Chitwood Motor Co.*, 196 Ark. 86, 115 S.W.2d 1072 (1938); *Beason v. Withington*, 189 Ark. 211, 71 S.W.2d 461 (1934).

Compare *Rone v. Miller*, 257 Ark. 791, 796-98, 520 S.W.2d 268, 271-72 (1975) (the denial of a directed verdict on the issue of willful and wanton misconduct was appropriate where there was evidence of speeding at night on a curving road even absent intoxication).

29. 1983 Ark. Acts 13 (repealing Ark. Stat. Ann. § 75-913).

ing on or after its effective date.”³⁰ This language led Professor O. Fred Harris, Jr., (a former colleague at UALR, now on the law faculty of the University of Illinois) to conclude in his *Arkansas Wrongful Death Actions* that “‘claims and causes of action,’ either pending or arising prior to the effective date of the Act [repealing the Arkansas guest statute], will likely be subject to the onerous evidentiary requirements of the guest statutes.”³¹

Unsurprisingly, purely domestic guest statute cases, otherwise on all fours with *Schlemmer*, decided under the Arkansas guest statute *after* the effective date of the repealing act but involving accidents taking place *before* the effective date, treat the guest statute as controlling. For example, *Goodnight v. Richardson*³² involved an accident which occurred April 27, 1979. The case was decided May 13, 1985. Justice Hickman’s opinion notes: “[The defendant] pleaded the guest statute . . . which has since been repealed. That statute provides that a guest in a car does not have a cause of action against the owner or operator of the car unless the driver’s conduct was willful and wanton.”³³ Another case, *Lawrence v. Meux*,³⁴ in which all parties are from Arkansas, also applies the guest statute. This prior case law serves as an important benchmark both for conflicts purposes—as a measure of Arkansas’ interest in the recovery of a plaintiff/guest—and for constitutional purposes—as a basis for assessing Arkansas’ nexus with the litigation for due process purposes. However, these cases went unnoted by the court in *Schlemmer*.³⁵

Consideration by the Arkansas Supreme Court of the choice-of-law issue in *Schlemmer* is more truncated than it might have been because a coherent presentation of Tennessee law was not before the court. Justice Dudley, writing for the majority, holds that Tennessee law applies to the case on remand because “Tennessee does not have a guest statute.”³⁶ Quoting extensively from an early article by Dr. Leflar criticizing guest statutes as “archaic, anachronistic, out of keeping with the times,”³⁷ Justice Dudley concludes that Tennessee’s law is

30. *Id.*

31. O. HARRIS, *supra* note 22, at 88.

32. 286 Ark. 38, 688 S.W.2d 941 (1985).

33. *Id.* at 40, 688 S.W.2d at 942 (citations omitted).

34. 282 Ark. 512, 669 S.W.2d 464 (1984). (“This case was tried under the now repealed ‘guest statute’”; *Id.* at 514, 669 S.W.2d at 466.)

35. Justice Hickman refers only to cases applying the guest statute “until it was repealed by the legislature.” *Schlemmer*, 292 Ark. at 348, 730 S.W.2d at 220 (Hickman, J., dissenting).

36. *Id.* at 347, 730 S.W.2d at 219.

37. Leflar, *Conflict of Laws: Arkansas—The Choice-Influencing Considerations*, 28 ARK. L. REV. 199, 215 (1974) (cited in *Schlemmer*, 292 Ark. at 347, 730 S.W.2d at 219).

"better." But what is Tennessee law?

Although under Arkansas law, and indeed the law of most jurisdictions,³⁸ the plaintiff has the burden of pleading any foreign law (e.g., Tennessee law) on which she seeks to rely,³⁹ we know little about the content of Tennessee law from the opinion. What we do know is that Donna Schlemmer, the Tennessee plaintiff, brought her action in Arkansas in the teeth of Arkansas' guest statute. Examination of the content of Tennessee law illuminates the reasons for this apparently counter-intuitive strategy.

At least two factors must have motivated her to elect an Arkansas forum. First, the Tennessee guest/plaintiff apparently sought a recovery that was more attractive than that available in her home state of Tennessee. Second, the action had to be worth the risk that Arkansas would decline to exempt a foreign plaintiff from the rigors of the guest statute. To be more favorable to the foreign plaintiff, however, Arkansas law somehow had to be divorced from its general policy of nonrecovery by plaintiff/guests. This leads to the suspicion that there is more to Tennessee law than its lack of a guest statute.

III. CHOICE OF FORUM

A possible explanation for Donna Schlemmer's election to sue in Arkansas can be found in the differential treatment which each state affords for direct actions against insurers in uninsured motorist cases. Under Tennessee case law construing the Tennessee Uninsured Motorist Act,⁴⁰ the injured party must bring an action against the uninsured motorist and prosecute it to judgment before an action can be brought against an insurer.⁴¹ An insurer also has a right to subrogation against the uninsured motorist who caused the injury *unless the insurer is subjected to a direct action*.⁴² Thus, for Donna Schlemmer

38. See, e.g., UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT 44.1; see also FED. R. CIV. P. 44.1.

39. The rules of proof are lax: "[i]n determining the law of any jurisdiction or governmental unit outside this State, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the rules of evidence." ARK. R. CIV. P. 44.1(b). See *Arkansas Appliance Distrib. Co. v. Tandy Elecs., Inc.*, 292 Ark. 482, 730 S.W.2d 899 (1987) (contract action).

40. TENN. CODE ANN. §§ 56-7-1201 to 1206 (1989).

41. *Glover v. Tennessee Farmers Mut. Insurance Co.*, 225 Tenn. 306, 312-13, 468 S.W.2d 727, 729 (1971); *Hickey v. Ins. Co. of N. Am.*, 239 F. Supp. 109 (D.C. Tenn. 1965); see Note, *Uninsured Motorist Insurance: Selected Tennessee Procedural Aspects*, 10 MEM. ST. U.L. REV. 746 (1980).

42. *Glover v. Tennessee Farmers Mut. Ins. Co.*, 225 Tenn. 306, 468 S.W.2d 727 (1971). Subrogation is available *only* "to the extent . . . of the rights of the person to whom such payment has been made. . . ." TENN. CODE ANN. § 56-7-1204(a) (1989). In *Glover* the court

to have sued in Tennessee, she would first have had to sue her friend, Rochelle Smith, before seeking compensation from the insurer. The insurer would then have had the right to reimbursement from Smith for what it paid out to Schlemmer.

In contrast, under Arkansas law, Schlemmer had the option of bringing an action against the insured motorist, the insurer, or both.⁴³ As noted above, if the direct action in Arkansas was successful, it would have defeated the insurer's right to subrogation under Tennessee law. In short, in Arkansas Donna Schlemmer could sue her stepfather's insurer⁴⁴ without the doubtless, unsavory necessity of suing her friend Rochelle Smith or having her friend remain liable for any recovery she might obtain from her insurer.

This contrast between the laws of Tennessee and Arkansas explains why Schlemmer would bring suit in the teeth of Arkansas' guest statute. Tennessee law had certain clear procedural disincentives in uninsured motorist cases, and there was a chance that Arkansas might not hold a foreign guest/plaintiff to the same harsh law to which local plaintiffs were subject in view of the legislature's abandonment of the guest statute as a defense. This also helps explain why *Schlemmer* is such a novel case and quite unlike the run-of-the-mill guest statute cases.⁴⁵

interpreted this language as allowing subrogation only "where the insurer has paid off a settlement or judgment recovered by the insured against the uninsured motorist . . ." 225 Tenn. at 310, 468 S.W.2d at 729. "A direct action would, therefore, deny the insurer's right to subrogation." Note, *supra* note 4, at 748. *Accord* McCall v. Maryland Casualty Co., 516 S.W.2d 353 (Tenn. 1974). The exceptions to the Tennessee direct action proscription—accidents involving hit-and-run drivers and uninsured drivers who cannot be located and served—are of no relevance to the *Schlemmer* situation. See Note, *supra* note 4, at 751-52.

43. Hartford Accident & Indem. Co. v. Warren, 246 Ark. 323, 438 S.W.2d 31 (1969).

44. Assuming she was a covered person under her stepfather's policy—an issue never resolved. See *Schlemmer*, 292 Ark. at 345, 730 S.W.2d at 218.

45. *Schlemmer* does not even fit within Judge Fuld's rules or "principles . . . proposed as sound for situations involving guest statutes in conflicts settings:"

1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.

2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.

3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown

It is also interesting to note that the *Schlemmer* case, when filed in Arkansas on May 7, 1984,⁴⁶ would have been time-barred in Tennessee.⁴⁷ This also helps to account for the decision to sue in Arkansas. Application of a forum state's statute of limitations, of course, presents no constitutional difficulties even though it results in a defendant being liable to suit in one jurisdiction while not in another.⁴⁸ So long as defendants are treated similarly within the forum, there is no cause for complaint.⁴⁹ While there is no quibble with *Schlemmer's* availing herself of the benefits of Arkansas law, given that the case is appropriately in an Arkansas forum (including a coherent choice of law), there is the overarching question of whether she should have the benefits that Arkansas law affords without being subjected to its burdens, including the guest statute—whether she can fairly take the hide and leave the tail. This question will be explored both from a conflicts and a constitutional perspective.

that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants. (Cf. Restatement, 2d, Conflict of Laws, P.O.D., pt. II, §§ 146, 159 [later adopted and promulgated May 23, 1969].)

Neumeier v. Kuehner, 31 N.Y.2d 121, 128, 335 N.Y.S.2d 64, 70, 286 N.E.2d 454, 457-58 (1972).

Instance 1 is not *Schlemmer* because the car is not registered in the same state as that in which the guest-passenger and host-driver are domiciled. Whether the rule should be applied in the absence of that factor is an issue beyond the scope of this article. It is obvious, however, that where, as in *Schlemmer*, the car involved is not registered in any state, including the state of injury which is also the state where it is garaged, the state of injury may have an interest of equal or greater moment than the state of the domicile of the host and guest.

Instance 2 is not *Schlemmer* because the driver's conduct did not occur in her state of domicile, and instance 3 is not *Schlemmer* because host and guest share a domicile.

46. Defendant's Brief in Support of Motion for Summary Judgment at 1, *Schlemmer*, 292 Ark. 344, 730 S.W.2d 217 (No. 86-256). I am indebted to Elton A. Rieves, IV of Rieves & Mayton, West Memphis, Arkansas, for copies of the above-cited Brief and a discovery deposition of Donna Schlemmer taken February 26, 1985, both of which proved helpful in the preparation of this article.

47. There is a one-year statute of limitations for tort claims such as this in Tennessee. TENN. CODE ANN. § 28-3-104(a) (1980); see Note, *supra* note 41, at 760; Comment, *Uninsured Motorist Coverage in Tennessee*, 38 TENN. L. REV. 391 (1971); compare ARK. CODE ANN. § 16-56-115 (1987) (five-year statute of limitations). Under the new Arkansas Uniform Conflict of Laws Limitations Act, ARK. CODE ANN. §§ 16-56-201 to 210 (1987) (effective July 1, 1985), the applicable statute of limitations would be selected by Arkansas' choice-of-law rule, ARK. CODE ANN. § 16-56-202(a)(2) (1978).

48. See, e.g., *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953) (application of a shorter forum statute of limitations upheld; "[T]he Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state." *Id.* at 516).

49. See, e.g., *Hughes v. Fetter*, 341 U.S. 609 (1951); see also *First Nat'l Bank v. United Air Lines*, 342 U.S. 396 (1952).

IV. INTEREST ANALYSIS

I suggest approaching *Schlemmer* from the perspective of interest analysis because that technique is particularly useful for illuminating conflicts problems. The late Professor Brainerd Currie developed a method of conflicts analysis that stressed identification of the competing governmental policies implicit in conflicting laws⁵⁰ and sought to resolve conflicts of law by identifying and valuing the competing governmental policies or interests brought into conflict in a given case.⁵¹ I should note that no effort is made here to address the critics of interest analysis,⁵² whose work I find on the whole unpersuasive and who have been effectively answered elsewhere.⁵³

Quite simply, under interest analysis, a true conflict exists where two jurisdictions have identifiable policies that would be furthered by the application of their respective laws. In a false conflict, one state has no policy, or only a spurious one, to justify application of its law, while the other state has a legitimate claim.⁵⁴ Another category is the "unprovided-for" case in which an examination of interests and poli-

50. Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 966 (1958), reprinted in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

51. See R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* (4th ed., 1987), 202-05. This technique underlies my earlier critique as well. Hogue, *supra* note 3, at 715.

52. Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459 (1985); Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585 (1985); Juenger, *Governmental Interest—Real and Spurious—in Multistate Disputes*, 21 U.C. DAVIS L. REV. 515, 528-33 (1988); Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1 (1984); Korn, *The Choice of Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983).

53. Posnak, *Choice of Law: Interest Analysis and Its "New Critics,"* 36 AM. J. COMP. L. 681, 684-89 (1988) ("Unwittingly, these critics created strawmen." *Id.* at 685); Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics,"* 34 MERCER L. REV. 593, 606-20 (1983) (Brilmayer "has launched a sweeping attack on interest analysis as a basic approach to choice of law based on a complete—one might almost say deliberate—misconception of what interest analysis is all about." *Id.* at 609).

In addition, because, as will be seen, I view *Schlemmer* as a false conflict, there is little likelihood of disagreement that only the law of an interested state should apply since that proposition is generally accepted. Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 179 n.19 (1981).

54. For recent summaries of Currie's methodology, see R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* 202-05, 222-34 (4th ed. 1987); R. LEFLAR, L. MCDUGAL, R. FELIX, *AMERICAN CONFLICTS LAW* 267-70 (4th ed. 1986); E. SCOLES & P. HAY, *CONFLICT OF LAWS* 16-20 (1982); R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 7-8 (3d ed. 1986). See also Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CALIF. L. REV. 577 (1980); Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 U.C.L.A. L. REV. 181, 243 (1977); Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics,"* 34 MERCER L. REV. 593 (1983).

cies does not yield a solution because a disinterested forum is unable to choose between competing policies in which it has no stake; no state has an interest because neither state has a policy which would be advanced by an application of its law.⁵⁵ Recent scholarship has persuasively demonstrated that the "unprovided-for" case is chimerical.⁵⁶ Interest analysis is most useful in resolving false conflicts since a determination that a state has either no interest or a specious interest in applying its law makes the ascertainment of the correct law straightforward. Indeed, many of the conflicts casebook chestnuts are false conflicts (e.g., *Alabama Great S. R.R. Co. v. Carroll*,⁵⁷ *Milliken v. Pratt*,⁵⁸ and *In re Estate of Jones*⁵⁹) just as *Wallis*⁶⁰ and *Williams*⁶¹ are also false conflicts. True conflicts are resolved by applying the rule of the forum since the forum by definition has an interest⁶² and since there is no principled basis for displacing that interest, as California's experiments with "comparative impairment" have shown.⁶³ The "better rule" theory's fatal flaw is its insensitivity to interests; false conflicts and true conflicts are treated alike.

As I have noted before,⁶⁴ the "better rule" theory is applied with apparent success to the solution of both false and true conflicts, although this is merely an artifact. This conclusion perhaps is best illustrated by comparing three cases which rely on the "better rule" theory. The first two, *Milkovich v. Saari*⁶⁵ and *Hunker v. Royal Indemnity Co.*,⁶⁶ are factually similar; both were resolved under the "better rule" approach. *Hunker* and a third case, *Bigelow v. Hal-loran*,⁶⁷ are cited by Leflar as examples of the successful application of the "better rule" theory.⁶⁸ *Hunker* and *Bigelow* are also important

55. The "unprovided-for case" is one in which policies are not in conflict and "neither state cares what happens." R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* (4th ed. 1987), 282-87.

56. Kramer, *The Myth of the "Unprovided-For" Case*, 75 VA. L. REV. 1045 (1989).

57. 97 Ala. 126, 11 So. 803 (1892).

58. 125 Mass. 374 (1878).

59. 192 Iowa 78, 182 N.W. 227 (1921).

60. 261 Ark. 622, 550 S.W.2d 453 (1977).

61. 263 Ark. 326, 565 S.W.2d 400 (1978).

62. Currie, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212, 1235 (1963).

63. See Kay, *supra* note 54.

64. Hogue, *supra* note 3, at 724.

65. 295 Minn. 155, 203 N.W.2d 408 (1973).

66. 57 Wis. 2d 588, 204 N.W.2d 897 (1973).

67. 313 N.W.2d 10 (Minn. 1981).

68. R. LEFLAR, L. MCDUGAL & R. FELIX, *supra* note 54, at 389 n.3 (*Bigelow* and *Hunker*); Leflar, *Choice of Law: States' Rights*, 10 HOFSTRA L. REV. 203, 210 n.41 (1981) (*Hunker*).

because in each the forum court holds that foreign law applies (*i.e.*, in terms of the methodology followed) and finds that foreign law is "better" than domestic forum law. What will be apparent, however, is that in both instances, foreign law applied not because it was "better," but because the forum had no interest in applying its own law.

I begin with *Milkovich* in which a foreign plaintiff/guest and defendant/host, both from Ontario, had an accident in Minnesota. Ontario had a guest statute requiring proof of gross negligence on the defendant's part in order for plaintiff to recover. Minnesota, where the automobile accident occurred, had no guest statute. The Minnesota Supreme Court, applying the "better rule" of law, held Minnesota law governed the case:

In our search for the better rule, we are firmly convinced of the superiority of the common-law rule of liability to that of the Ontario guest statute. We can find little reason for the strict limitation of a host's liability to his guest beyond the fear of collusive suits and the vague disapproval of a guest "biting the hand that feeds him." Neither rationale is persuasive. We are convinced the judicial system can uncover collusive suits without such overinclusive rules, and we do not find any discomfort in the prospect of a guest suing his host for injuries suffered through the host's simple negligence.⁶⁹

The result in *Milkovich* is correct; Minnesota law applied. However, the reason Minnesota law applied is unrelated to its relative "betterness." Minnesota law applied because both Ontario and Minnesota had an interest in applying their respective laws—Ontario to protect its resident defendant from recovery by a resident guest in defiance of its established legislative policy and Minnesota to facilitate a recovery out of which the expenses owed medical and other emergency creditors could be satisfied. Minnesota law applied because *Milkovich* is a true conflict adjudicated in a Minnesota forum.⁷⁰

In contrast, *Hunker v. Royal Indemnity Co.*⁷¹ involves the issue of whether to apply an Ohio law barring suits against co-employees or a Wisconsin (forum) law permitting such suits in an action by an Ohio plaintiff against an Ohio defendant, insurer of the co-employee driver, to an accident occurring in Wisconsin. Despite a prolix review by the court of the various choice-influencing considerations purporting to identify the "better rule of law," the case is nothing more than

69. 295 Minn. 155, 171, 203 N.W.2d 408, 417 (1973).

70. Hogue, *supra* note 3, at 727; Trautman, *A Comment*, 67 COLUM. L. REV. 465, 467 (1967).

71. 57 Wis. 2d 588, 204 N.W.2d 897 (1973).

a false conflict in which Wisconsin has no interest in applying its law to a dispute between two Ohio residents. Unlike the situation in *Milkovich*, in which medical creditors in Minnesota required assurance of assets out of which their obligations could be satisfied, the Wisconsin court in *Hunker* is careful to point out that the Ohio plaintiff had already received a workers' compensation award⁷² and that medical creditors had been satisfied.⁷³ The court's labored conclusion that, notwithstanding a complete absence of Wisconsin interests, Wisconsin law is not "better" and Ohio law should be applied, trivializes the choice-of-law process it purports to undertake.

Another Leflar example, *Bigelow v. Halloran*,⁷⁴ also follows the "better rule" approach and concludes that foreign law is to be preferred over forum law. Examination of the facts in *Bigelow* suggests that the sheer outrageousness of the case and the court's desire to avoid a harsh result for a widow who had already suffered much (a classic "widows and orphans" case) had more to do with the result than the determination of which state had the "better rule of law." As the court dispassionately described the matter, plaintiff "Jean E. Bigelow, a widow with two minor children, was seriously injured when she was struck in the face and head by a shotgun blast fired by defendant's decedent, Ralph Mathias."⁷⁵ Bigelow was shot as she sought to escape from her Iowa farmhouse where she was being held hostage by Mathias. Mathias then shot and killed himself. The issue was whether to apply Minnesota's statute, which included a common law bar against intentional tort actions after the death of either party (which would have left the widow with nothing and allowed the heirs of Mathias to split everything), or Iowa's statute, which would allow survival of the action. The Minnesota court found Iowa's more generous provision to be the "better law." The case is a false conflict since Iowa has no interest in the application of its law—all parties to the case resided in Minnesota at the time of the suit—and wrongly decided (harsh though that judgment seems).

Interest analysis reveals that *Milkovich* is a true conflict and forum law is properly applied not because it is better, but because the forum as well as the foreign state have interests. Both *Hunker* and *Bigelow* are false conflicts. *Hunker* correctly applies foreign law because only the foreign state has an interest in having its law apply,

72. *Id.* at 595, 204 N.W.2d at 901.

73. *Id.* at 605, 204 N.W.2d at 906.

74. 313 N.W.2d 10 (Minn. 1981).

75. *Id.* at 11.

and *Bigelow* incorrectly applies foreign law since only the forum state has an interest. Yet both cases find foreign law to be "better." This blindness to interests and uncritical recourse to abstract concepts of "betterness" is the weakness of the "better rule" theory.

Bigelow is like *Allstate Insurance Co. v. Hague*,⁷⁶ which it cites,⁷⁷ in that the plaintiff was originally a resident of another state but moved to Minnesota before bringing suit there. Indeed, the defects in the "better rule" approach are nicely summarized in the numerous critiques of *Hague*,⁷⁸ in which the Minnesota Supreme Court followed the "better rule" of Minnesota and allowed stacking of uninsured motorist coverage. For example, Justice Stevens' observation that "I regard the Minnesota courts' decision to apply forum law as unsound as a matter of conflicts law"⁷⁹ has been echoed by others.⁸⁰

Because of the factual and legal variations in guest statute cases, there can be false conflicts or true conflicts. Consider the following examples of permutations involving guest statutes.

Example I: A domestic guest and host are involved in an accident in a foreign state that has a guest statute and suit is filed in a domestic forum that does not have a guest statute.⁸¹ Can the domestic host/defendant claim the benefit of the foreign guest statute as a defense, thereby requiring the plaintiff to prove that the defendant's negligence was more serious than ordinary negligence (e.g., gross, willful, wanton) and thereby defeat recovery?⁸² *Example I*, a casebook classic, is a false conflict; the guest statute state lacks any

76. 449 U.S. 302 (1981).

77. 313 N.W.2d at 12-13.

78. 449 U.S. 302 (1981).

79. *Id.* at 331 (Stevens, J., concurring).

80. See Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103 (1981) ("There is little doubt that the decision of the Minnesota court to apply its own law was wrong, and would be condemned by most choice-of-law theories." *Id.* at 104; see *id.* at 108-10); Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?*, 10 HOFSTRA L. REV. 17 (1981) ("undesirable and unwise," *id.* at 17; "I also agree with Justice Stevens that the . . . decision was 'plainly unsound as a matter of normal conflicts law.'" *Id.* at 24); Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149 (1981) ("makes no sense," *id.* at 170). But see Leflar, *Choice of Law: States' Rights*, 10 HOFSTRA L. REV. 203, 210 (1981).

81. I.e., holds the defendant to the standard of ordinary negligence in guest/host cases.

82. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E. 279, 240 N.Y.S.2d 743 (1963) (domestic guest; domestic host; foreign accident [situs guest statute]; domestic forum); *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966) (same); *Kopp v. Rechtzigel*, 273 Minn. 441, 141 N.W.2d 526 (1966) (same); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 294-95 (3d ed. 1986); BRILMAYER, *Methods and Objectives in the Conflict of Laws: A Challenge*, 35 MERCER L. REV. 555, 556 (1984).

interest in having its law applied, and "[i]t would make no sense to apply [the foreign] guest statute."⁸³

Example II: A foreign guest and host are involved in an accident in a state with no guest statute; an action is brought in a domestic forum in a state which has a guest statute. Can the foreign host claim the benefit of his/her own foreign guest statute as a defense?⁸⁴ *Example II* presents a true conflict; the domicile of the foreign host/defendant has an interest in him/her not becoming a public charge, and the forum where the accident took place also has an interest in creating liquidity to satisfy creditors who have extended emergency or medical aid in the forum state to the accident victims.⁸⁵ Numerous cases illustrate *Example II*.⁸⁶

Example III: A domestic guest and foreign host are involved in a foreign accident in the host's domicile which has a guest statute; suit is filed in a domestic forum. Can the foreign host claim the benefit of his/her own foreign guest statute as a defense?⁸⁷ *Example III* presents a true conflict as did *Example II* and for the same reasons.

Example IV: A foreign guest and domestic host are involved in a foreign accident; suit is filed in a domestic forum, but the foreign state where the accident takes place has a guest statute. Can the domestic host claim the benefit of the foreign guest statute as a defense?⁸⁸ *Example IV* presents a false conflict. The foreign state, which is the situs of the accident, has no interest in protecting hosts (and hosts' insur-

83. R. WEINTRAUB, *supra* note 82, at 295.

84. *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973) (foreign guest; foreign host [host's domicile has guest statute]; domestic accident; domestic forum—forum law applied); *Gagne v. Berry*, 112 N.H. 125, 290 A.2d 624 (1972) (same); *Conklin v. Horner*, 38 Wisc. 2d 468, 157 N.W.2d 579 (1968) (same); *Kell v. Henderson*, 47 Misc. 2d 992, 263 N.Y.S.2d 647 (1965) *aff'd* 26 A.D.2d 595, 270 N.Y.S.2d 552 (1966) (same). In *Gagne*, subsequent to the accident in 1968, Massachusetts had repealed its guest statute; this parallels *Schlemmer's* facts.

85. Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205 (1958), reprinted in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963) ("There is [a] need to secure reimbursement for medical and other services rendered locally . . ."). *Id.* at 145 n.64.

86. *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973); *Kell v. Henderson*, 47 Misc. 2d 992, 263 N.Y.S.2d 647 (1965), *aff'd* 26 A.D.2d 595, 270 N.Y.S.2d 552 (1966). See also the false conflict examples *Clark v. Clark*, 107 N.H. 351, 222 A.2d 205 (1966); and *Kopp v. Rechtzigel*, 273 Minn. 441, 141 N.W.2d 526 (1966).

87. *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970). See Von Mehren, *Choice of Law and The Problem of Justice*, 41 LAW & CONTEMP. PROBS., 27, 40 (Spring 1977).

88. *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972) (foreign guest; domestic host; foreign accident [situs guest statute]; domestic forum). See also, *Miller v. Gay*, 323 Pa. Super. 466, 470 A.2d 1353 (1983) ("neither state seems to have a significant relationship as to the issue of guest vs. host protection," *id.* at 470, 470 A.2d at 1355).

ers) who are out of state.⁸⁹

Example V: As in *Example II*, a foreign guest and host are involved in a domestic accident; suit is filed in a domestic forum. This time, however the host is from a state which lacks a guest statute and the forum has a guest statute. Can the foreign host/defendant claim the benefit of the guest statute as a defense?⁹⁰ As with *Example IV*, *Example V* presents a false conflict in which the forum state has no interest either in facilitating recovery by the plaintiff, since by its enactment of a guest statute it has subordinated the interest of medical and other similarly situated domestic creditors, or in protecting the foreign host/defendant.

Schlemmer, *Example V* above, is admittedly a novel case because, if it were not a conflicts case and merely involved a domestic host, a domestic guest and a domestic accident in a forum state with a guest statute, the plaintiff/guest would have to sue in the teeth of the guest statute—ordinarily a quixotic venture.

Sound reasons for resorting to an interest analysis which would have identified *Schlemmer* as a false conflict and pointed the way toward its correct resolution can be found in the dissents of Justices Hays and Hickman in *Schlemmer*; indeed, interest analysis seems to inform their conclusions.⁹¹ Those dissents raise two issues to which I now turn in detail—the absence of any Arkansas interest in the case and the issue of conflicts fairness (judged vis-a-vis a case involving non-Arkansans in comparison with a purely domestic case where both parties are from Arkansas).

As a point of departure, it is clear that Arkansas has no interest in applying its law to this dispute between two Tennesseans. Justice Hays makes that point in the first paragraph of his dissent:

I have no disagreement with applying Tennessee law to a dispute between a Tennessee resident and a Tennessee insurer over the coverage of an insurance policy issued in Tennessee, assuming Arkansas has jurisdiction to decide the issue. But with respect to the liability of Rochelle Smith to Donna Schlemmer, the majority opinion concludes that Tennessee law applies and with that I

89. Kramer, *The Myth of the "Unprovided-For" Case*, 75 VA. L. REV. 1045, 1056-60 (1989).

90. *Schlemmer v. Fireman's Fund Ins. Co.*, 292 Ark. 344, 730 S.W.2d 217 (1987).

91. Compare the conclusion of the student note writer who considered *Schlemmer*: "The dissenters in *Schlemmer* are applying the 'most significant relationship' test of the Second Restatement, although they do not call it by name." Note, *supra* note 6, at 520 (citations omitted).

disagree.⁹²

The clarity of this conclusion, one that interest analysis compels, is complicated, however, by the fact that, in order to vindicate Arkansas' absence of interest in this dispute, Arkansas must apply its guest statute as a means of asserting its disinterest, or noninterest (*i.e.*, neither favoring plaintiff nor defendant). By failing to recognize Arkansas' noninterest in this false conflict and by applying a law that would, in effect, keep Arkansas law out of the case, the court reaches the anomalous and unprincipled result of applying a different rule to a foreign defendant in a conflicts case than it would apply to a domestic defendant in a purely domestic case. Thus, *Schlemmer* differs markedly from prior Arkansas guest statute cases as well as from conflicts cases such as *Milkovich* and *Kell*. *Schlemmer*, as both Justices Hays and Hickman implicitly recognized in their separate dissents, is a false conflict. The Arkansas Supreme Court's decision to lay aside the guest statute in an interstate case occurring after the enactment of the guest statute but before its effective date, while it had not done so in a purely domestic case, does not supply an interest. The case is thus wrongly decided as a matter of conflicts law. As with the earlier cases of *Wallis v. Mrs. Smith's Pie Co.*⁹³ and *Williams v. Carr*,⁹⁴ the Arkansas Supreme Court chose law in a vacuum. In a very real sense, the court did not choose the "better rule" of law. The content of Tennessee law was never adequately before the court. Rather, the court in *Schlemmer* merely weighed glib generalizations about guest statutes. The matter, unfortunately, does not end there. The denial to the foreign defendant of a defense otherwise available to a domestic defendant violates the federal constitution.

IV. CONSTITUTIONAL PROBLEMS

A. Due Process

A federal constitutional issue exists as to whether it is permissible under the due process clause of the fourteenth amendment, as construed in *Phillips Petroleum Co. v. Shutts*⁹⁵ and *Allstate Insurance Co. v. Hague*,⁹⁶ for Arkansas to deny a foreign defendant access to the defense of the Arkansas guest statute.

The United States Supreme Court's most recent assessment of

92. 292 Ark. at 348, 730 S.W.2d at 220 (Hays, J., dissenting).

93. 261 Ark. 622, 550 S.W.2d 453 (1977).

94. 263 Ark. 326, 565 S.W.2d 400 (1978).

95. 472 U.S. 797 (1985).

96. 449 U.S. 302 (1981).

the constitutional limits on choice of law appears in *Phillips Petroleum Co. v. Shutts*.⁹⁷ *Phillips Petroleum* involved a class action brought by certain natural gas lessors to recover interest on royalties withheld by lessees pending federal approval of proposed price increases. The Supreme Court held that Kansas' application of its law to all of the claims arising in this case, even those of ninety-seven percent of the plaintiffs with no apparent connection to Kansas, violated the due process clause of the federal constitution. Contrasting the "entirely distinct" constitutional questions of personal jurisdiction as a requisite for applying a given state's law and "the question of the constitutional limitations on choice of law," the Court concluded that Kansas had too tenuous a connection to support the application of Kansas law. In reaching this conclusion, the Court drew upon the earlier case of *Home Insurance Co. v. Dick*,⁹⁸ which had advanced the principle that a state "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them."⁹⁹ This, in a nutshell, is the problem *Phillips Petroleum* raises in *Schlemmer*; Arkansas officiously applies its law—an ersatz "better rule" of ordinary negligence in guest statute cases which is unlike that applied in similarly situated purely domestic cases—to abrogate the rights of the defendant and does so irrespective of any relation to Arkansas or any interest that the state might have. The rule in domestic cases reveals no interest in furthering recovery by plaintiffs to aid creditors apart from the timetable prescribed in the repeal statute.

Phillips Petroleum adopts *Hague's* measure of the requisite nexus demanded by the due process clause in order for a forum state to enforce a choice of law: "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."¹⁰⁰

In *Hague* the forum state had three contacts with the litigation plaintiff. First, plaintiff's decedent, Mr. Hague, was an employee in the forum state. Second, the defendant insurance company "was at all times present and doing business" in the forum state,¹⁰¹ and, third, the plaintiff became a resident of the forum prior to instituting litigation and for reasons unconnected with the litigation. None of these

97. 472 U.S. 797.

98. 281 U.S. 397 (1930).

99. 472 U.S. 797, 822 (1985) (quoting *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930)).

100. *Id.* at 818 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981)).

101. 449 U.S. at 317.

Hague contacts has an analog in the *Schlemmer* case. In *Schlemmer* both plaintiff and defendant were from Tennessee. Also, whereas there is no question that Arkansas courts had jurisdiction over the accident, singling out a foreign defendant for substantially dissimilar treatment is fundamentally unfair and lacks the appropriate contacts which *Phillips Petroleum* and *Hague* require.

B. Privileges and Immunities

A second constitutional objection should be considered which, although it applies to cases like *Schlemmer*, does not square with *Schlemmer*'s facts. Commentators¹⁰² have argued that the differential treatment of residents and nonresidents in choice of law cases violates the privileges and immunities clause of article IV which provides that "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."¹⁰³ Under the privileges and immunities clause, discrimination is constitutionally permissible against nonresidents only where: "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective."¹⁰⁴

The Supreme Court has invalidated differential state treatment of nonresidents in cases involving commercial fishing licenses,¹⁰⁵ medical services,¹⁰⁶ employment preferences,¹⁰⁷ and restrictions on bar admissions.¹⁰⁸ Protection under the privileges and immunities clause extends, however, only to certain privileges and immunities within the protection of the clause.¹⁰⁹ There is little doubt that factors bearing on the liability of a party to damages would be within the clause.¹¹⁰ Indeed, the right "to institute and maintain actions of any kind in the courts of the state" was among those fundamental rights identified by

102. Corr, *Interest Analysis and Choice of Law: The Dubious Dominance of Domicile*, 1983 UTAH L. REV. 651, 665-66; Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 180-87 (1981); Kramer, *supra* note 89, at 1065-74; Laycock, *Equality and the Citizens of Sister States*, 15 FLA. ST. U.L. REV. 431, 446-48 (1987).

103. U.S. CONST., art. IV, § 2, cl. 1.

104. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985).

105. *Toomer v. Witsell*, 334 U.S. 385 (1948). Compare *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978).

106. *Doe v. Bolton*, 410 U.S. 179 (1973).

107. *United Bldg. & Constr. Trades v. Camden*, 465 U.S. 208 (1984); *Hicklin v. Orbeck*, 437 U.S. 518 (1978).

108. *Barnard v. Thorstenn*, 109 S. Ct. 1294 (1989); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Piper*, 470 U.S. 274.

109. *United Bldg. & Constr. Trades*, 465 U.S. 208.

110. Ely, *supra* note 101.

Justice Bushrod Washington in his delineation of the scope of the clause in *Corfield v. Coryell*.¹¹¹ Clearly, maintaining a defense such as under a guest statute would require equality of access.¹¹² Arkansas cannot justify denial of access to the guest statute defense to a nonresident merely on the ground of nonresidence.

A stumbling block arises with this line of analysis, however, where the party seeking the protection of the privileges and immunities clause is, as in *Schlemmer*, a corporation. Since it remains the law that corporations (and aliens) are not "citizens" for the purposes of the privileges and immunities clauses,¹¹³ there would be no violation in *Schlemmer*. Thus, while the privileges and immunities argument would have force were the defendant an individual, a corporation such as Fireman's Fund Insurance Company, under hoary precedent, would not be heard to complain.

C. State Constitutional Objections

Assuming, as I do, that *Schlemmer* was wrongly decided, an alternative constitutional ground for objection is available in the Arkansas Constitution to justify another result.¹¹⁴ Conventional wisdom has treated linguistically similar provisions in state and federal constitutions as legally alike although there is no particular warrant for doing so. Indeed, Justice Linde of the Oregon Supreme Court has argued that state courts should make their own independent assessment even in instances where the constitutional texts are identical.¹¹⁵

111. 6 Fed. Cas. 456, 552 (C.C.E.D. Pa. 1823) (No. 3230).

112. Compare L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 535 (2d ed. 1988) ("[W]hile the Court had never expressly repudiated the fundamental rights limitation on privileges and immunities analysis, that view played no substantial part in any of the Court's opinions from *Toomer v. Witsell* onward.").

113. *Blake v. McClung*, 172 U.S. 239 (1898); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868); *St. Louis & S.F.R.R. v. State*, 120 Ark. 182, 179 S.W. 342 (1915); *State ex rel. Moose v. Southern Sand & Material Co.*, 113 Ark. 149, 167 S.W. 854 (1914); *Chicago, R.I. & Pac. Ry. v. State*, 86 Ark. 412, 111 S.W. 456 (1908), *aff'd*, 219 U.S. 453 (1911); L. TRIBE, *supra*, note 111, at 544.

114. The potential for state constitutional law as an independent source of rights is not a new idea; see Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Hogue, *Regulating Business Activity By Means of the Substantive Due Process and Equal Protection Doctrines Under the Georgia Constitution: An Analysis and a Proposal*, 3 GA. ST. U.L. REV. 1 (1986-87); Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984). See, e.g., *Harris v. Entertainment Systems, Inc.*, 259 Ga. 701, 386 S.E.2d 140 (1989) (nude dancing in establishments serving liquor protected by Georgia's constitutional free expression guarantees); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989) (minor's right to terminate a pregnancy by abortion protected by Florida's constitutional privacy guarantees).

115. Linde, *supra* note 113, at 181-83.

Arkansas' constitution contains equality provisions that are textually different from federal ones, and thus, the task is arguably easier. The *Schlemmer* majority's willingness to treat a foreign plaintiff more favorably than a domestic one (and a foreign defendant less favorably than a domestic one) should be held to violate a norm of parity of treatment fairly derived from provisions of the Declaration of Rights in the Arkansas Constitution which address equality: "The equality of all persons before the law is recognized, and shall ever remain inviolate . . ." ¹¹⁶ and "the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens." ¹¹⁷ The equality provision, the first example above, was interpreted to allow giving out-of-staters advantages over in-staters in *Thompson v. Continental Southern Lines, Inc.*, ¹¹⁸ although that case, which involved allowing a tax exemption on the first twenty gallons of motor fuel brought into the state which was not equally available to in-staters, would seem distinguishable both on the nature and extent of the difference in treatment. ¹¹⁹ With respect to the state privileges and immunities example, the holding in *Schlemmer* interprets the tort statute in such a way as to draw it into conflict with article 2, section 18 of the Arkansas Constitution since the guest statute defense was in no sense "equally [available] to all citizens." Note that this unavailability is distinguishable from that at issue in prior constitutional challenges to the Arkansas guest statute.

In *White v. Hughes* ¹²⁰ the issue was the differential treatment of guests and nonguests by the guest statute law by requiring guests to prove willful and wanton negligence in order to recover. *White* upheld the guest statute against inequality challenges based both on article 2, section 18 of the Arkansas Constitution and on the equal protection clause of the federal constitution. Interestingly, *White's*

116. ARK. CONST. art. 2, sec. 3.

117. ARK. CONST. art. 2, sec. 18.

118. 222 Ark. 108, 257 S.W.2d 375 (1953).

119. *Id.* at 112, 257 S.W.2d at 378.

Under the provisions of the [applicable statute], no citizen or class of citizens is granted any privilege or immunity which upon the same terms is not granted to all citizens. It is true that one entering the state may use the highways without paying any tax on 20 gallons of gas he has in the fuel tanks, whereas one who does not enter the state but is already here must pay a tax on each and every gallon he uses in driving on the highways; but if this can be said to be a discrimination, it is not an arbitrary one.

Id. Compare *Davis v. Cox*, 268 Ark. 78, 593 S.W.2d 180 (1980) (guest statute violates Arkansas Constitution, article 2, section 3) (Mays, J., dissenting).

120. 257 Ark. 627, 519 S.W.2d 70, *appeal dismissed*, 423 U.S. 805 (1975).

disposition of the state constitutional issue is based on a faulty use of precedent. The opinion by Justice Byrd says that "[t]he constitutionality of our [Arkansas'] guest statute was upheld in *Roberson v. Roberson* as against the argument that it contravened article 2, § 18 of the Arkansas Constitution."¹²¹ This is simply wrong. Examination of *Roberson* reveals instead that it upheld the Arkansas guest statute against an attack based on article 2, section 13 (entitlement to a remedy for wrongs), *not* section 18.¹²² *White*, however, was affirmed in *Davis v. Cox*¹²³ and is correctly decided notwithstanding its insubstantial precedential base.

The argument urged here, by contrast, is that the equality principle of article 2, section 18, prohibits granting to a class of citizens (nonresidents/noncitizens of Arkansas) a privilege or immunity (as a plaintiff—avoiding the hurdle of showing willful and wanton negligence; as a defendant—inability to plead the guest statute defense) that is not equally available to all citizens, including Arkansas plaintiffs and defendants. Such an application of the state constitutional equality principle would clearly void *Schlemmer*'s result. It also nicely avoids the baggage that the federal privileges and immunities clause has picked up which prevents its application to corporate defendants.

In sum, and apart from this proposed state constitutional approach, however, sufficient conflicts and due process constitutional objections remain to suggest not only that *Schlemmer* was wrongly decided but that the "better rule" conflicts method on which the case relies is flawed and should be discarded. Twelve years ago I warned that given the "inauspicious beginnings" of modern conflicts analysis in Arkansas, the court "should view *Wallis* as merely having adopted a rule of flexibility in choice of law in interstate torts rather than a particular method or theory of choosing."¹²⁴ That advice was not heeded. Again, in this most recent decision, the "better rule" method has shown itself unfaithful to its own premises. In fact, it has revealed its flaws on the three occasions when the Arkansas Supreme Court has applied it—*Wallis*, *Williams*, and now *Schlemmer*. In law as in baseball three strikes is all we should allow.

121. *Id.* at 628, 519 S.W.2d at 71 (citing *Roberson v. Roberson*, 193 Ark. 669, 101 S.W.2d 961 (1937)) (citation omitted).

122. *Roberson*, 193 Ark. at 676, 101 S.W.2d at 965.

123. 268 Ark. 78, 593 S.W.2d 180 (1980).

124. Hogue, *supra* note 3, at 731.