ABANDONMENT OF *LEX LOCI DELICTI*? TOWARD A FUNCTIONAL APPROACH TO CHOICE-OF-LAW IN VERMONT

In the excercise of diversity jurisdiction,[1] two federal district courts have recently anticipated[2] that the Vermont Supreme Court, in view of its decision in *Pioneer Credit Corp. v. Carden,*[3] will apply, when the proper case arises, the torts provisions of the *Restatement (Second) of Conflict of Laws.*[4] Since the formal adoption in *Goldman v. Beadry,*[5] of the traditional "place of injury" or *lex loci delicti* rule[6] for resolving tort choice-of-law problems, the Vermont Supreme Court has not been presented with an opportunity to consider replacing *lex loci* with a contemporary choice-of-law methodology for tort problems. In *Pioneer,* however, the Vermont Supreme Court abandoned for contract problems the traditional *lex locus contractus* doctrine[7] of the *Restatement (First) of Conflict of Laws*[8]

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1. A diversity court is bound by Erie R.R. v. Tompkins, 304 U.S. 64 (1938) to apply the substantive law of the forum state, including its choice-of-law rules. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). In addition, a court to which an action has been transferred, such as the one in *In re* Air Crash Disaster at Boston, Mass., July 31, 1973, 399 F. Supp. 1106 (D. Mass. 1975) [hereinafter cited as Delta Air Crash litigation], must apply the choice-of-law rules that the transferor court would have applied, Van Dusen v. Barrack, 376 U.S. 612 (1964). An interesting issue, reserved in *Van Dusen* and decided in the Delta Air Crash litigation, is what law applies if "a plaintiff sought transfer under [28 U.S.C.] § 1404(a) or if it was contended that the transferor State would simply have dismissed the action on the ground of *forum non conveniens." Id.* at 640. *See* Caffrey, *The Role of the Transferee Judge in Multidistrict Litigation,* 69 F.R.D. 289, 294-98 (1975).

2. Delta Air Crash litigation, *supra* note 1; LeBlanc v. Stuart, 342 F. Supp. 773 (D. Vt. 1972).

3. 127 Vt. 229, 245 A.2d 891 (1968).

4. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145-174 (1971) [hereinafter cited as *Restatement (Second)*].

5. 122 Vt. 299, 170 A.2d 636 (1961). Earlier decisions, however, either adopted the rule, *see* Brown v. Perry, 104 Vt. 66, 156 A. 910 (1931), or the "vested rights" theory from which the rule sprang, *see, e.g.,* Needham v. Grand Trunk Ry., 38 Vt. 294, 307-11 (1865).

6. The traditional method for determining the applicable law in multistate tort actions involved locating the "place of injury." Professor Ehrenzweig has demonstrated that the courts had consistently applied the law of the place of the tortious conduct in cases involving intentional torts. Ehrenzweig, *The Place of Acting in Intentional Multistate Torts: Law and Reason versus the Restatement,* 36 MINN. L. REV. 1 (1951).

7. For issues of validity in multistate contract cases, the traditional method of locating the applicable law involved a determination of the law of the place of contracting or, more precisely, the law where the act that formally made the contract binding took place. "So if the parties domiciled in State X negotiate in X a contract to be performed in that State, and one party signs the contract in X but the other, wishing to read the contract again, takes it

in favor of a "center of gravity" approach,[9] holding that the Massachusetts usury statute governed the validity of a secured transaction executed in Massachusetts between a Massachusetts lender and a Vermont debtor.[10] In so holding, the court relied on a tentative draft of the *Restatement (Second)* which, as subsequently adopted by the American Law Institute, repudiates the dogmatic rules methodology of the first *Restatement.*[11] Despite the lack of a formal rejection of *Goldman v. Beadry* by the Vermont Supreme Court, the federal district courts reasoned that the Vermont court, in view of *Pioneer* and the adoption by the American Law Institute of the *Restatement (Second)*, would also utilize contemporary choice-of-law methodology for tort problems rather than the traditional approach typified by the first *Restatement.*[12]

Assuming the eventual overruling of *Goldman* by the Vermont Supreme Court and its adoption of the *Restatement (Second)*, the question for Vermont attorneys and other observers of Vermont law is to predict the precise choice-of-law methodology likely to be ulti-

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with him on a trip and finally signs it in State Y and there mails it back to the first party, Y, rather than X, would be the State of the governing law." Reese, *Contracts and the Restatement of Conflict of Laws, Second*, 9 INT & COMP L. Q. 531, 533 (1960). For issues of performance the court was to apply the law of the place of performance.

8. RESTATEMENT OF CONFLICT OF LAWS § 332 (1934) [hereinafter cited as RESTATEMENT (FIRST)].

9. The center of gravity test, adopted for multistate contract problems in Auten v. Auten, 308 N.Y. 155, 160-61, 124 N.E.2d 99, 102 (1954), looks to the law of the place "which has the most significant contacts with the matter in dispute" rather than laying exclusive emphasis on the place of making or performance of a contract.

10. 127 Vt. at 233, 245 A.2d at 894.

11. Wechsler, Introduction to 1 RESTATEMENT (SECOND) at vii. *See* Cavers, *Some of Ehrenzweig's Choice-of-Law Generalizations*, 18 OKLA. L. REV. 357, 360 n.8 (1965); *Symposium on the Restatement (Second)*, 72 COLUM. L. REV. 219 (1972).

12. A federal diversity court may not substitute its view for that of the state's highest court. It may, however, anticipate the trend of state law. Bernhardt v. Polygraphic Co. of America, 350 U.S 198, 205 (1956) (limited to cases where there is a "developing line of authorities that casts a shadow over the established ones, [or] . . . dicta [or] doubts or ambiguities in the opinions of [state] judges"); Meridith v. Winter Haven, 320 U.S. 228 (1943); Orfield v. International Harvestor Co., 535 F.2d 959, 965 (6th Cir. 1976). *See* Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1301 (1952) ("Every time judges are called upon to apply the law of a foreign jurisdiction, are they not inclined to give undue weight to the recorded landmarks and to underestimate the mobile qualities and the thrusts of principle we discern in our domestic law?").

On the living state of the law in the Vermont Supreme Court, *see* Justice Frankfurter's concurring opinion in *Bernhardt*, 350 U.S. at 209-10 n.4 (Frankfurter, J., concurring).

mately employed by the court. Basically, the issue is whether the *Restatement (Second)*, upon which both federal district courts relied, stands merely for an alternative set of "rules"[14] to that contained in the first *Restatement* or whether it contemplates an "approach"[15] based on a functional analysis of the interests of the concerned jurisdictions in the resolution of a particular issue. As Professor Willis Reese, the Reporter for the *Restatement (Second)*, and a number of courts have pointed out, the "principle question in choice-of-law today" is "whether or not to adopt rational choice-of-law rules, or to deal with each case as it comes to us on an ad hoc basis."[16] The major premise of this note is that the torts chapter of the *Restatement (Second)* has answered this fundamental question in favor of a functional or interest approach to choice-of-law. Thus, the *Restatement (Second)* directs a court faced with a conflicts problem in tort to examine and assess the relative significance of the policy content of the competing laws, rather than to apply a preformulated choice-of-law rule.

In view of this directive, the preference of the *Pioneer* court and of the Vermont federal district court for choice-of-law rules[17] which do not account for the policies expressed in each concerned state's law presents the major difficulties for prognosticators of the eventual course of Vermont conflicts law. The focus, therefore, will be

13. A recent remark by the court in response to a jurisdictional challenge appears, at first, to question this assumption. In a wrongful death action against a nonresident corporation for damages resulting from an accident in Maine, the defendant moved to dismiss for lack of jurisdiction and on the ground of *forum non convieniens*. Upholding the Vermont court's jurisdiction the court responded: "It is true that the controlling law is fixed by the lex loci delicti, but the defendant has not demonstrated that the ascertainment of Maine law and its application in Vermont courts present any difficulty. In fact, both Vermont and Maine have adopted comparative negligence rules." Burrington v. Ashland Oil Co., 134 Vt. 211, 214, 356 A.2d 506, 509 (1976). This statement cannot be viewed as a reaffirmation of *Goldman* because the question was not focused for consideration in view of the lack of a conflict between Maine's and Vermont's rules of decision.

14. A "rule" may be defined as "a formula which once applied will lead the court to a conclusion." Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 315 (1972).

15. An "approach" is merely " a system which does no more than state what factor or factors should be considered in arriving at a conclusion." *Id.*

16. Reese, *supra* note 14, at 315. *See* First Nat'l Bank in Fort Collins v. Rostek, 182 Colo. 437, 514 P.2d 314 (1973).

17. In *Pioneer*, the court adopted the center of gravity test for choice-of-law problems in tort. *See* note 10 *supra*. In *LeBlanc*, the court used the place of domicile test for choice-of-law problems in the interspousal immunity context. 342 F. Supp. at 775.

on the torts provisions of the *Restatement (Second)* and the problems presented by the application of choice-of-law rules by Vermont courts. The objective will be to assess the contemporary significance of existing directives for the future course of Vermont conflicts methodology, and to demonstrate that it is inappropriate for any court to adopt, in the name of the torts provisions of the *Restatement (Second)*, any "rule" which fails to account for the legitimate interests of the concerned jurisdictions in the application of their law to the specific fact situation encountered.

I. RESTATEMENT (SECOND) AND JURISDICTION-SELECTING RULES

Perhaps the most significant contribution of the *Restatement (Second)* is its rejection of the unquestioned use of what Professor David F. Cavers has styled "jurisdiction-selecting rules."[18] A jurisdiction-selecting rule refers to a choice-of-law rule which, when employed to resolve a conflict between competing laws, identifies the state whose law is to be applied on the basis of criteria which do not require a court to consider the content of, and policies behind, the conflicting laws.[19] A typical example is the *lex loci delicti* rule which prescribes that, for negligent torts, the law of the place of injury governs the rights and liabilities of parties to a multistate tort action.[20] The only criterion used in the selection process contemplated by a jurisdiction-selecting rule is the prescribed "contact" a state has with the litigation, for example, as the place where the injury occurred. Hence, "it is only after the rule has selected the governing state by reference to the 'contact' prescribed in the rule that the court ascertains the content of the state's law."[21]

The shortcomings of a mechanical choice-of-law process based

18. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933) [hereinafter cited as *Critique of the Choice-of-Law Problem*]; CAVERS, THE CHOICE OF LAW PROCESS 9 (1965) [hereinafter cited as THE CHOICE OF LAW PROCESS]. Recently, Professor Cavers has preferred to use "state-selecting" as more appropriate in an international context. *See* Cavers, *A Critique of the Choice-of-Law Process: Addendum 1972*, 17 HARV. INT'L L. J. 651, 652 (1976) [hereinafter cited as *Addendum 1972*].

19. *See* note 18 *supra*.

20. *See generally* note 18 *supra*.

21. THE CHOICE OF LAW PROCESS, *supra* note 18, at 9 n.24. In this sense the court is making a "blindfold choice of law." *Addendum 1972*, *supra* note 18, at 652.

on jurisdiction-selecting rules are revealed once it is recognized that in a conflicts case much more is at stake than a simple choice of a state whose law is to be applied. Concerned states may wish to regulate a given multistate occurrence in differing ways and a court must give effect to these desires by precisely identifying and accommodating them so far as is practicable in its resolution of the problem. Of these two issues in choice-of-law—selecting the controlling legal order and effectuating the desires of the concerned jurisdictions to regulate the multistate occurrence—the latter is excluded from consideration by the mechanical application of jurisdiction-selecting rules.[22] Sole emphasis on mere selection of the governing jurisdiction results from the traditional notion of the "contact." Traditionally, a contact's importance arose simply by virtue of the choice-of-law rule which prescribed it as the criterion in the selection process, not because of its relation to the desires of a state to regulate the transaction. Thus, the contact a jurisdiction had with a multistate occurrence, for example as the place where the injury occurred, was significant only as a device for designating, as a territorial matter, the source of the governing law.[23] Similarily, the "center of gravity" test, used by many courts which declare a will-

22. von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 931-33 (1975). Jurisdiction-selecting rules satisfy one of two fundamental objectives of choice-of-law, that is, avoiding forum shopping. They do not, however, satisfy another, equally fundamental, policy of providing "apt" or just solutions to conflicts problems, von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice-of-Law Methodology*, 88 HARV. L. REV. 347, 349-56 (1974). This latter goal may be effectuated in a jurisdiction-selecting choice-of-law system, however, through the use of familiar devices such as the substance-procedure dichotomy, concepts of public policy of the forum, and characterization. *Id.* at 354 n.17.

23. The contact in the conventional choice-of-law problem is, if I may be indulged in still another conceit, the coin which, when inserted in the doctrinal slot machine, produces the appropriate jurisdiction. Now according to the common understanding which the telephone company shares with the mass of mankind, the only requisite of such a coin is that it fit the slot. So with the conflict of laws contact. One does not have to appraise the significance of the contact in the light of the consequences worked by the law whose applicaton it dictates. The conflicts rule vouches for it; and that rule is the product of efforts, whether theoretical or positive, to allocate legal problems among territorial jurisdictions, not to decide specific cases justly.

Critique of the Choice-of-Law Problem, *supra* note 18, at 191-92.

It was presumably this passage which prompted Professor Rosenberg's epithet: "hot vaporings about . . . 'slot machine justice.'" ROSENBERG, *Comment on Reich v. Purcell*, 15 U.C.L.A. L. REV. 641, 642 (1968).

ingness to depart from traditional choice-of-law methodology, merely locates the controlling legal order by "counting up the contacts" or "grouping the contacts," instead of by focusing on a single, prescribed contact.[24]

If a court, however, intends in its resolution of a problem to consider how the concerned jurisdictions wish to regulate the particular multistate transaction, it must abandon the conventional conception of the "contact" and substitute a more sophisticated notion embracing the significance of a particular contact to the ultimate resolution of the dispute between the parties.[25] Professor Weintraub summarizes the modern relevance of the "contact" to the desires of the concerned jurisdictions in the resolution of the problem as follows:

> Whether or not a particular contact with a state is significant for conflicts purposes cannot be known until one first knows exactly what domestic tort rules are in conflict and what the policies underlying those rules are. Only then can one intelligently "evaluate" rather than mechanically count the contacts. A dozen contacts with an occurrence may fail to give a state any interest in having its rule applied to determine the consequences of that occurrence. One contact may make the policies underlying a state's rule directly and rationally applicable to the case being decided.[26]

Thus, a state's contact with the parties or the occurrence should become important only when it rationally brings into play the policies underlying the law that the state wishes to apply to the situation. Furthermore, a court cannot ascertain whether a contact rationally invokes the policy underlying a state's law without a prior determination of the content of that law and the policies sought to be asserted.[27]

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24. *See* text accompanying notes 34 to 48 *infra*.

25. "[I]f a law is to be chosen with some consideration of the result it effects in a given litigation, then the contact should itself be significant in relation to that result." *Critique of the Choice-of-Law Problem*, *supra* note 18, at 192.

26. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 210 (1971).

27. *See* Haines v. Mid Century Ins. Co., 47 Wis.2d 442, 447, 177 N.W. 2d 328, 331 (1970) ("It must be recognized that a contact can be considered to be significant only in terms of its relevance to a specific domestic law and the policy underlying that law.").

A brief examination of the torts provisions of the *Restatement (Second)* demonstrates that the drafters contemplated that the "contact" should be considered in this latter sense and rejected a jurisdiction-selecting or *lex loci* approach to choice-of-law. For tort problems, section 145 directs the court to apply, with respect to a particular issue, the law of the state which "has the most significant relationship to the occurrence and the parties under the principles stated in § 6."[28] The significance of the relationship of a jurisdiction to the occurrence and the parties, with respect to an issue, is ascertained by "evaluating" the "relative importance" of that state's contacts to the problem in light of the relevant choice-influencing criteria listed in section 6.[29] Of the seven factors listed in section 6, the most relevant to the choice of the applicable rule in tort cases[30]

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28. RESTATEMENT (SECOND) § 145 provides, as the "General Principle" for choice-of-law in tort:

> (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 respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 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.
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> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

29. RESTATEMENT (SECOND) § 6 provides "choice-of-law principles" applicable to all conflicts questions:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
>
> (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.

30. Many courts have held that "the protection of justified expectations," "certainty,

are the "relevant policies of the forum [and] . . . of other interested states and the relative interests of those states in the determination of the particular issue."[31] A jurisdiction's contacts become important as a way of ascertaining or identifying the relevant policies underlying that jurisdiction's law.[32] A court is specifically directed to consider the content of the concerned state's law with respect to an issue in determining which contacts give a state a rational interest in applying its law and, ultimately, in determining which state has the "most significant relationship" to the occurrence and the parties on that issue.[33]

The "most significant relationship" test of section 145 should not be confused with the varying definitions of the "most significant relationship" test articulated by the New York Court of Appeals in *Babcock v. Jackson*[34] and its progeny.[35] The court of appeals struggled for nearly a decade with the tension in *Babcock* between a policy based, interest analysis approach to finding the state of most significant relationship, and a jurisdiction-selecting approach based on the "center of gravity" of the case,[36] before finally resolving the problem by accepting Judge Fuld's guidelines[37] in *Neumeier v.*

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predictibility and uniformity of result," and "ease in the determination and application of the law to be applied," are relatively unimportant factors in tort cases as distinguished from contract cases. RESTATEMENT (SECOND) § 6(2), comments g, i, j. *See* Delta Air Crash litigation, *supra* note 1, 399 F. Supp. at 1111 n. 8; Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966).

31. RESTATEMENT (SECOND) § 6(b)-(c).

32. "Any link, *i.e.*, any contact, is to be evaluated 'in proportion to the significance of the action or circumstance constituting [that contact] when related to the controversy and the solutions to it which the competing laws propound.'" *Addendum 1972, supra* note 18, at 653 (quoting from *Critique of the Choice-of-Law Problem, supra* note 18, at 192).

33. *See* text accompanying note 26 *supra*. *Cf.* Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 213 (1969) ("[T]he necessity of focusing on contacts and their relative importance may have the effect of inhibiting courts from setting forth explicitly the factors that induced them to adopt a given resolution."); Ratner, *Choice of Law: Interest Analysis and Cost-Contribution*, 47 S. CALIF. L. REV. 817, 822 (1974) ("It is not clear why the appropriate dispute-resolving policy is identified by the tallying of such contacts, most of which relate to convenience-familiarity and access-to-evidence values that support judicial jurisdiction.").

34. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

35. *See* Leflar, *The Torts Provisions of the Restatement (Second)*, 72 COLUM. L. REV. 267, 269 (1972).

36. The ambiguities of the opinion in *Babcock* are discussed in a *Symposium, Comments on Babcock v. Jackson: A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963). *See* THE CHOICE OF LAW PROCESS, *supra* note 18, at 60-61.

37. These rules are:

(1) When the guest-passenger and the host-driver are domiciled in the

Kuehner[38] for applicability in the guest-host statute context. The center of gravity test usually meant "counting up the contacts" quantitatively to determine which state had the "dominant contacts" with the case. Application of the center of gravity rule gave the selected jurisdiction "paramount control over the legal issues arising out of a particular factual context."[39] Strict adherence to the center of gravity formula foreclosed a court from consideration of the relevance of a particular contact to the specific issue involved, the internal policies of the concerned jurisdictions, and the other choice-influencing criteria listed in section 6. The center of gravity test was merely an alternative jurisdiction-selecting rule replacing the *lex loci delicti* doctrine.[40] In *Tooker v. Lopez,*[41] the New York Court of Appeals explicitly rejected a mere quantitative analysis of the contacts and appeared to embrace a full interest analysis of the desires of the concerned jurisdictions to regulate the multistate occurrence.[42] As Professor Twerski has pointed out, however,the sub-

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same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.

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

(3) In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants.

Neumeier v. Kuehner, 31 N.Y.2d 121, 128-29, 286 N.E.2d 454, 457-58, 335 N.Y.S.2d 64, 70 (1972).

38. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

39. Babcock v. Jackson, 12 N.Y.2d at 481, 191 N.E. 2d at 283, 240 N.Y.S. 2d at 749 (1963).

40. Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969). *See generally* THE CHOICE OF LAW PROCESS, *supra* note 18, at 60-61; Trautman, *A Comment: Kell v. Henderson,* 67 COLUM. L. REV. 465 (1967).

41. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

42. *Id.* at 576, 249 N.E.2d at 398, 301 N.Y.S.2d at 524 ("[A] method of decision based on contact counting [is] a method open to the same criticism of unreasonableness as the earlier *lex loci delicti* rule. This analysis has been rejected . . .").

See Burke, J., concurring in *Tooker:*

sequent adoption of the first of Judge Fuld's rules in *Neumeier,* which calls for the application of the law of the parties' domicile where both parties are from the same jurisdiction, signals the return to a jurisdiction-selecting approach to determine which state has the "most significant relationship" with the litigation.[43] The most significant relationship test of section 145, on the other hand, requires an evaluation of the relative importance of the contacts in light of the putatively applicable domestic law rules respecting an issue.

The drafting history of section 145 supports the view that the *Restatement (Second)* rejects a center of gravity test for choice-of-law problems in tort. The early draft of the general rule for tort cases[44] omitted the words *with respect to a particular issue* and failed to explicitly require consideration of the factors listed in secton 6. Consequently, many courts, confronted with a list of relevant contacts to be considered in determining the controlling legal order, construed these early drafts as adopting a center of gravity approach.[45] The inclusion of the words *with respect to a particular*

> In postulating a choice-of-law process which would replace the *lex loci* rule, we first indicated in *Babcock* our adoption of the "center of gravity" or "grouping of contacts" doctrine.
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> . . . It is evident that the philosophy of the court has changed . . . and, as a result of this transformation, we have firmly embarked upon an interest analysis approach to a conflicts problem.

Id. at 587, 591, 249 N.E.2d at 405, 407-08, 301 N.Y.S.2d at 534, 538 (Burke, J., concurring).

43. Twerski, *Neumeier v. Kuehner: Where are the Emperor's Clothes?* 1 HOFSTRA L. REV. 104, 121 (1973).

44. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964) reads as follows:

> (1) The local law of the state which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort.
>
> (2) Important contacts that the forum will consider in determing the state of most significant relationship include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct occurred,
>
> (c) the domicil, 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.
>
> (3) In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort and the relevant purposes of the tort rules of the interested states.

45. *See* Gates v. P.F. Collier, Inc., 378 F.2d 888, 894-95 (9th Cir. 1967); Graham v.

issue,[46] at various points in section 145 and the addition of the directive reference to section 6, however, make clear that it is inappropriate simply to count the contacts and select a jurisdiction whose law shall apply to the whole case. A specific repudiation of the "dominant contacts" rule seems intended.[47] Whatever doubt remains should be dispelled by the last sentence of section 145 which directs the court to "evaluate" (rather than "count") contacts according to their "relative importance with respect to a particular issue."[48]

In addition to consideration of the internal policies of concerned states, section 6 requires a court to account adequately for the shared multistate policies involved.[49] These policies are derived "from a community's position as a single unit of a larger community,"[50] and also from the individual's relationship to the community, its laws, and the multistate occurrence.[51] Policies emanat-

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General U.S. Grant Post N. 2665, V.F.W., 43 Ill. 1, 4-5, 248 N.E.2d 657, 659 (1969); Babcock v. Jackson, 12 N.Y.2d 473, 482, 191 N.E.2d 279, 283-84, 240 N.Y.S.2d 743, 749-50 (1963).

46. These words ensure the use of dépecage.

> Dépecage can be defined broadly to cover all situations where the rules of different states are applied to govern different issues in the same case. It can be defined more narrowly to be present only when the rules of different states are applied to govern different substantive issues, and the most restrictive definition would confine the term to situations where by applying the rules of different states to different issues a result is reached which could not be obtained by exclusive application of the law of any one of the states concerned.

Reese, *Dépecage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973).

47. Leflar, *supra* note 35, at 269.

48. RESTATEMENT (SECOND) § 145(2).

49. RESTATEMENT (SECOND) § 6(2)(a), (d)-(g).

50. A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 216 (1965) [hereinafter cited as LAW OF MULTISTATE PROBLEMS]. These policies include "policies of facilitating multistate activity, of simplifying and making workable interstate transactions, and of minimizing interstate conflict." *Id. Cf.* RESTATEMENT (SECOND) § 6(2)(a) (policies of effectuating "the needs of the interstate and international systems"); von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 942 (1975) ("those [policies] relating to effective and harmonious intercourse and relations between and among communities").

51. These policies include the effectuation of an individual's justifiable demands upon the law including the application of rules "which are fair, simple, workable, and rational and which promote predictability and uniformity." LAW OF MULTISTATE PROBLEMS, *supra* note 50, at 284-85. *Cf.* RESTATEMENT (SECOND) § 6(2)(d) ("the protection of justified expectations"), (e) ("the basic policies underlying the particular field of law"), (f) ("certainty, predictibility and uniformity of result"); Trautman, *Rule or Reason in Choice of Law: A Comment on Neumeier*, 1 VT. L. REV. 1, 18 (1976) ("evenhanded treatment of similar cases" or "like

ing from the latter have received increased attention from courts and commentators in recent years.[52] The thrust of these policies is to assure that where a different legal result occurs in a given situation, the result is based on a rational, rather than an "invidious" distinction or discrimination and that these distinctions are "comprehensible" to the parties involved and the general public.[53] Effectuation of these policies ensures "principled" decisions.[54] The importance of these considerations for conflict resolution will be briefly discussed later.[55]

One further point concerning the torts provisions of the *Restatement (Second)* deserves mention. Confusion may arise because many of the separate provisions relating to specific torts and specific issues contain statements of the judicially developed rules under the first *Restatement*.[56] Professor Wechsler has pointed out in

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treatment of like problems"); von Mehren, *supra* note 50, at 943, 945 ("requirement that rules and their administration be principled" which is associated with issues of "comprehensibility and invidiousness").

52. *Compare* LAW OF MULTISTATE PROBLEMS, *supra* note 50, at 285 ("Relatively little recognition has been given to the impact of these kinds of considerations on judicial thinking about the multistate transaction.") *with* Neumeier v. Kuehner, 31 N.Y.2d 121, 126, 286 N.E.2d 454, 456, 335 N.Y.S.2d 64, 68 (1972) (where the court asserts that its decision "is not a consequence of [an] invidious discrimination") *and* Trautman, *supra* note 51, at 16-22 *and*, generally, von Mehren, *supra* note 50. *See also Symposium - Neumeier v. Kuehner: A Conflicts Conflict*, 1 HOFSTRA L. REV. 93 (1973).

53. The terms are borrowed from von Mehren, *supra* note 50, at 945. "It should be noted that a generally accepted terminology has not yet emerged for discussion of these issues. The effort here is to consider, as it may be appropriate, the individual's sense of justice." *Id.* at 945 n.45.

54. In multistate affairs identical situations can be handled by several legal orders. Is it unprincipled for these legal orders to reach different results? Differing results may be disturbing, but they do not seem unprincipled. So long as a legal order treats in a similar fashion situations that are, in terms of its values and purposes, equivalent, the results are principled in the sense of being consequent.

Id. at 943.

> [I]ssues of comprehensibility and invidiousness (in the sense of results that are perceived as unfair) are associated with the issue of unprincipledness. Incomprehensible or invidious results are, in a sense, the lay analogy of the jurist's unprincipled results. When a layman cannot understand distinctions taken or when he considers them unfair, the justice of the result is called into question.

Id. at 945.

55. *See* text accompanying notes 125-30 *infra*.

56. RESTATEMENT (SECOND) §§ 146-155, 156(2), 157(2), 158(2), 159(2), 160(2), 162(2), 164(2), 165(2), 166(2), 169(2), 172(2).

the introduction to the *Restatement (Second)* that these provisions are mere "*secondary statements* in black letter" of the choice-of-law a court may make in given situations.[57] They are intended only to be "empirical appraisals" of existing case law rather than purported rules, designed to indicate "how far the statements may be subject to revaluation in a concrete instance" in light of the principles stated in section 6.[58] Since it was the manifest purpose of the drafters of the *Restatement (Second)* to depart from their predecessor's dependence on the antiquated vested rights theory,[59] these provisions are misleading to the extent they are read ordinarily to require application of the stated rules.[60]

The torts provisions of the *Restatement (Second)* do not support the formulation or application of jurisdiction-selecting rules.[61]

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57. Wechsler, *supra* note 11, at viii. *But see* Peterson, *Developments in American Conflicts of Law: Torts*, 1969 U. ILL. L. F. 289, 318, 320.

58. Wechsler, *supra* note 11, at viii ("the reader is thus alerted to the dynamic element in choice of law adjudication, without losing the degree of guidance past decisions may afford.").

59. 1 RESTATEMENT (SECOND), Introductory note to ch. 7, topic 1 at 413. *See* Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679 (1963).

60. *See* Leflar, *supra* note 35, at 269. *See generally* R. CRAMTON, D. CURRIE & H. KAY, CONFLICT OF LAWS 306-10 (1975); R. WEINTRAUB, *supra* note 26, at 209-10. Cramton, Curie and Kay assert that the provisions in the RESTATEMENT (SECOND) which set forth the judicially developed rules under the first RESTATEMENT are "presumptive statement[s] that a particular state is the place of most significant relationship." R. CRAMTON, D. CURRIE & H. KAY at 205. However, no such presumption can be inferred from the text of the provisions, in view of the "unless" clauses of the specific sections of the torts chapter of the RESTATEMENT (SECOND), which direct the court to disregard the "presumptive" rule if another state is more significantly related to the occurrence and the parties. In other words, the text of the provisions contemplate that in all cases the local law of the state with the most significant relationship controls with respect to a particular issue, whether it be the state prescribed in the jurisdiction-selecting rule set forth or another state as determined by application of sections 145 and 6. In all fairness to the authors, they concede that their "presumptive rules" do not "foreclose further inquiry." *Id.* at 205.

61. Professor Ehrenzweig, as the harshest critic of the RESTATEMENT (SECOND), would not necessarily disagree with the above analysis of the provisions. His criticism is directed more at the RESTATEMENT (SECOND) project itself as misguided. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for its Withdrawal*, 119 U. PA. L. REV. 1230, 1244 (1965) ("Surely, it is neither feasible nor desirable to 'restate' a beginning."). Furthermore, he views the "most significant relationship" test as a "give-it-up-formula" which leads courts to arbitrary decisions. Ehrenzweig, *The "Most Significant Relationship" in the Conflicts of Torts: Law and Reason versus the Restatement Second*, 28 LAW AND CONTEMP. PROB. 700, 704-05 (1963). Ehrenzweig's view is that the courts have done nothing more than "interpret extensively the forum rule's territorial reach without regard to foreign interests, though, of course,

The drafters' primary objective was to force focused consideration of relevant domestic and multistate interests and policies in order to provide a background for subsequent formulation of appropriate rules to be applicable in specific situations.[62] Professor Grant Gilmore has suggested, in another context, that "as in the literature and the arts there are alternating rhythms of classicism and romanticism" in the process of the law.[63] As the culmination of over a quarter of a century of "protracted romantic agony," the *Restatement (Second)* represents a significant step toward the complete breakdown of the "classical aesthetic" embodied in the first *Restatement*. Of course, remnants of old dogma recur in the text and the comments to the torts chapter of the *Restatement (Second);* but throughout the provisions recognition of the basic directive to substitute modern choice-of-law methodology is unavoidable. The enduring value of the subsequent "classical reformulation" may well depend on the extent to which the "romantic energy" is allowed

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with due regard to foreign expectations relevant under forum policy." Ehrenzweig, *Choice-of-Law in California - A "Prestatement,"* 21 U.C.L.A. L. REV. 781, 792 (1974).

Professor Rosenberg, like John P. Frank, does not dispute that the RESTATEMENT (SECOND) contemplates the functional analysis described in the text. But Frank and Rosenberg warn of the consequences to the administration of justice of forcing complex issues on already overburdened courts. Rosenberg, *Comments on Reich v. Purcell,* 15 U.C.L.A. L.REV. 641, 644 (1968). J. FRANK, AMERICAN LAW: THE CASE FOR RADICAL REFORM, 95-105 (1969). Professor Weintraub, in response to Frank's criticisms of the functional approach of the RESTATEMENT (SECOND), argues that the RESTATEMENT (SECOND) functional analysis simplifies rather than complicates the law in view of the characterization problems under the first RESTATEMENT. Weintraub, *John P. Frank's Criticisms of Recent Developments in the Conflict of Laws,* 47 TEXAS L. REV. 977, 980-81 (1969).

62. *See generally* Reese, *supra* note 14.

63. G. GILMORE, THE DEATH OF CONTRACT 102 (1974).

> During classical periods, which are, typically, of brief duration, everything is neat, tidy and logical; theorists and critics reign supreme; formal rules of structure and composition are stated to the general acclaim. During classical periods, which are, among other things, extremely dull, it seems that nothing interesting is ever going to happen again. But the classical aesthetic, once it has been formulated, regularly breaks down in a protracted romantic agony The romantics spurn the exquisitly stated rules of the preceding period; they experiment, they improvise; they deny the existence of any rules; they churn around in an ecstasy of self-expression. At the height of a romantic period, everything is confused, sprawling, formless and chaotic—as well as, frequently, extremely interesting. Then, the romantic energy having spent itself, there is a new classical reformulation—and so the rhythms continue."

Id.

to "spend itself."[64] Hence the torts provisions of the *Restatement (Second)* are designed to prevent premature formulation of rules based on insufficient data.[65]

II. *Pioneer* IN THE FEDERAL COURTS

In forecasting that the Vermont Supreme Court would probably abandon the "place of injury" rule, the Vermont federal district court in *LeBlanc v. Stuart*[66] noted the strong influence the A.L.I. restatement projects have had on the development of Vermont law.[67] Perhaps taking a cue from the court's adoption in *Pioneer* of a jurisdiction-selecting rule based on the center of gravity of the case, the court in *LeBlanc* summarily adopted one of the rules intended by the drafters to be mere "secondary statements" or "empirical appraisals" of the results in past decisions.[68] Although the opinion improves upon the first *Restatement's* methodology in the sense that the rule adopted was confined to the particular issue rather than the whole case, the court nevertheless failed to account for the

64. *Cf.* Trautman, *supra* note 51, at 2 ("We need to be clear that we understand the problem in all its dimensions before we become too firm in our conclusions."); von Mehren, *supra* note 50, at 965 ("Inevitably, a radical shift in methodology involves, as the new *Restatement* so well illustrates, discarding of old rules before new ones have had time to emerge.").

65. Even Professor Reese, the Reporter for the RESTATEMENT (SECOND), who advocates speedy formulation of choice-of-law rules has observed: ("Rules are the product of policies, and it is unwise to seek to formulate a rule until the nature and range of the policies it embodies are well understood." Reese, *supra* note 14, at 333.

66. 342 F. Supp. 773 (D. Vt. 1972).

67. *Id.* at 775. *See* Delta Air Crash litigation, *supra* note 1, at 1111.

68. Another federal district court took the same approach in an alienation of affections case. Marra v. Bushee, 317 F. Supp. 972 (D.Vt. 1970), *rev'd on other grounds*, 447 F.2d 1282 (2d Cir. 1971) (the law of the state where the defendant acts or principally acts). The court of appeals affirmed the choice of the jurisdiction-selecting rule but held that the determination of where the defendant's conduct primarily occurred involves a preliminary resolution of disputed questions of fact which should be decided by a jury. *Id.* at 1284-85. The Vermont district court had characterized the problem as a "jurisdictional consideration within the fact-finding province of the trial court." *Id.* at 1284. For discussion of the appeals court ruling in *Marra*, see Chance v. E. I. Dupont DeNemours & Co., 57 F.R.D. 165 (E.D.N.Y. 1972) (suggesting that the appeals court ruling was too broad), and Seidelson, *Interest Analysis Meets the Jury Function in an Alienation of Affections Action*, 12 DUQ. L. REV. 1 (1973). *Cf.* Chance v. E. I. Dupont DeNemours & Co., 371 F. Supp. 439, 441 (E.D.N.Y. 1974) (preliminary resolution of pretrial issues "not intended to be dispositive of the same issue when raised with respect to the merits or other issues").

content of the domestic and multistate policies implicated by the facts of the case. A description of *LeBlanc* illustrates the danger of automatic adoption of jurisdiction-selecting rules even when confined to the particular issue involved.[69]

In *LeBlanc,* a Rhode Island couple was involved in a motor vehicle accident in Vermont allegedly caused by the husband's negligence. Because of Rhode Island's adherence to the common law preclusion of interspousal suits in tort,[70] the widow sued the administrator of her husband's estate on the theory that Vermont law applied and that Vermont had relaxed the common law rule. The Vermont federal district court held that the wife could not recover because "disabilities to sue and immunities from suit because of a family relationship are more properly determined by reference to the law of the state of family domicile."[71] The assertion that Vermont's relationship to the occurrence and the parties (as the place where the injury and the conduct causing the injury occurred) was entirely "fortuitous"[72] demonstrates that the court failed to account adequately for the "relative importance"—to use the *Restatement (Second)* term—of these contacts to Vermont's general policies of deterrence and compensation. In addition, the court's application of a jurisdiction-selecting rule based on domicile came without any explanation of the relative importance of domicile, or any other contact, to the content of the internal policies expressed in Rhode Island's and Vermont's law on the immunity issue.[73] The most glar-

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69. Professor Cavers has recently made explicit what was implicit in his 1933 article, that is, that "[jurisdiction]-selecting rules are consistent with depecage." *Addendum 1972, supra* note 18, at 652.

> One achievement of [my 1933 article] that has become increasingly manifest in recent years is the acceptance of the concept of the "jurisdiction-selecting rule," . . . However, I suspect that some of its users apply the concept when their only departure from the traditional purpose of selecting a governing legal system is to choose a rule to govern a particular legal issue. It is just as possible for that purpose to make a blindfold choice of law, *i.e.*, a choice without regard to the content of the competing rules relevant to the issue, as it is to make a blindfold choice between states for laws to govern an entire case.

Id.

70. Oken v. Oken, 44 R.I. 291, 117 A. 357 (1922).

71. 342 F. Supp. at 775.

72. *Id.*

73. The court quoted in full RESTATEMENT (SECOND) § 145 and noted the adoption in *Pioneer* of the center of gravity approach for contract cases, but did not articulate why it thought domicile was so important or why it thought the circumstance that the accident

ing defect of the decision was the court's failure to ascertain Vermont's law.[74] The court only assumed, without deciding, that Vermont had abrogated the common law rule of interspousal immunity.[75] For purposes of further analysis, the assumption of the court will be taken as correct.[76]

The following analysis is largely a transmutation of the functional analysis[77] employed by Professors Trautman and von Mehren in the guest-host statute context.[78] While it appears questionable at first to utilize the choice-of-law methodology of any one school of commentators, the functional approach implies, as does the *Restatement (Second),* a rejection of any self-contained conflicts ideology. Like the drafters of the *Restatement (Second),* Professors Trautman and von Mehren implore courts to articulate the actual bases of their holdings in terms of the implicated domestic and

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occurred in Vermont was insignificant. Consideration of the content of Rhode Island's rule came only after the choice of the state of governing law had been made. *Id.*

74. The court stated that it was not faced with a "false conflict," apparently using Professor Leflar's definition of the term, Leflar, *supra* note 35, at 274-75 (where the relevant laws of the concerned states do not differ), rather than Professor Currie's definition. Currie, *Notes on Methods and Objectives in the Conflict of Laws,* 1959 DUKE L.J. 171; B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 180 (1963) (where the governmental interests of the concerned states do not differ but the regulating rules do). The implication of this statement that Vermont had abandoned the immunity rule, however, was contradicted when the court declared it did not have to decide the issue. 342 F. Supp. at 774 n.1.

75. The leading case in Vermont applying the interspousal immunity rule is Comstock v. Comstock, 106 Vt. 50, 169 A. 903 (1934). The court in *LeBlanc* found support for its supposition that *Comstock* was no longer the law in Vermont in Jauire v. Jauire, 128 Vt. 149, 259 A.2d 786 (1969) (wife may sue husband where tort occurred before marriage).

76. In Richard v. Richard, 131 Vt. 98, 300 A.2d 637 (1973), the court finally abandoned, explicitly, the common law interspousal immunity rule. The decision came less than a year after the decision in *LeBlanc,* indicating that the policies underlying the rule were extremely weak or nonexistent at the time *LeBlanc* was decided.

77. A "functional approach" or analysis is:

> . . . one that aims at solutions that are the rational elaboration and application of the policies and purposes underlying specific legal rules and the legal system as a whole. In conflict of laws, this approach requires one to consider the differences, in functional terms, between domestic and multistate transactions and to handle the latter in ways that take into account not only the policies expressed in domestic rules as they are relevant in a multistate context but also multistate policies as such.

LAW OF MULTISTATE PROBLEMS, *supra* note 50, at 76.

For the analytical steps involved in a functional analysis and an answer to the charge that the approach is "unduly complex," see *id.* at 76-79.

78. *See* Trautman, *supra* note 51; von Mehren, *supra* note 50.

multistate policies which motivate their decisions, rather than attempting to fit the case into a particular choice-of-law category or philosophy.[79] Under this view, use of a functional analysis reflects the *Restatement (Second)*'s concern for avoidance of jurisdiction-selecting rules and overdependence on any particular choice-of-law methodology.[80]

In *LeBlanc,* a functional analysis of the concerns of Rhode Island and Vermont in regulating the multistate occurrence may have called for an opposite result, allowing the wife to recover. With the abandonment of the common law interspousal immunity rule, Vermont's general policies of deterrence and compensation, previously

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79. LAW OF MULTISTATE PROBLEMS, *supra* note 50, ch. 3.

80. The utility of the functional analysis has been questioned by commentators, notably Professors Reese and Rosenberg, who assert that the approach is "probably . . . too demanding to catch the fancy of the judges." W. REESE & M. ROSENBERG, CASES & MATERIALS ON CONFLICT OF LAWS 527-28 (6th ed. 1971). In striking contrast are the remarks of Judge Charles D. Breitel, now Chief Judge of the New York Court of Appeals, who has asserted that "it is efforts like these of Professors von Mehren and Trautman, open-minded and not doctrinaire, which will someday bring forth a rational law of conflicts." Breitel, Book Review, 81 HARV. L. REV. 1585, 1588 (1968).

> It was a delight to find an extraordinary analytic attack on any monistic approach. . . . Instead, the [functional approach] reveals a healthy pluralism . . . . To be sure, no self-respecting scholar can avoid proclaiming some unitary thread for his analysis. Moreover, even a pluralistic approach requires some principle of unity, if only to make the discourse communicative. In this instance it is the functional approach.
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> . . . The overall effect is that the functional analysis is more tentative and less doctrinaire than its modern sister theories. Best of all, instead of explaining the cases by going off into the blue on the basis of a favored theory, it looks more to the law that is, and then *in quite proper critical form* seeks to evaluate what the law ought to be when a functional analysis suggests changes.
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> . . . *At every turn, this analysis derives sustenance from litigated cases, unlike many other approaches which proceed too much from an a priori basis, rejecting much of past learning.*

Id. at 1585-87 (emphasis added).

This high commendation, coming as it does from a member of the judiciary, strongly suggests that the functional approach, as well as the approach of the RESTATEMENT (SECOND), as described, provide valuable analytical tools for judicial problem solving in choice-of-law. *But see* Ehrenzweig, *Comments on Reich v. Purcell,* 15 U.C.L.A. L. REV. 570, 574 (1968); Kay, *Comments on Reich v. Purcell,* 15 U.C.L.A. L. REV. 584, 587 (1968) ("[von Mehren's and Trautman's] touchstone of relevance is broad enough to include any jurisdiction potentially concerned under any conceivable state of law, thus limiting the list only by the court's imagination."); Gorman, Book Review, 115 U. PA. L. REV. 288, 295 (1966) ("Many of their formulations and distinctions have an air of unreality.").

"subordinated" in the interspousal context for wholly domestic (intrastate) situations, emerge as in any tort case.[81] Its deterrence policy, "expressed in general rules of delictual liability," clearly reaches negligent conduct within its borders regardless of the domicile of the parties involved.[82] In addition, Vermont's compensation policy "may be viewed as attenuated, *but not fully excluded,* because the injured person is a member of another community."[83] Application of Rhode Island law on the issue of immunity therefore would frustrate Vermont's legitimate concern with the issue as the place where the injury and conduct causing the injury occurred. In view of these factors, required to be considered under the *Restatement (Second),*[84] Vermont's relationship to the issue, the occurrence and the parties can hardly be described as "fortuitous."

On the other hand, Rhode Island also had an interest in the application of its interspousal immunity rule in *LeBlanc.* Rhode Island has chosen, at least for wholly domestic situations, to "subordinate" its general policies of deterrence and compensation in favor of policies addressed to its spouses. In addition to its desire to preserve marital harmony among its domiciliaries, Rhode Island also is concerned with maintaining a reasonable insurance rate structure for its populace by protecting insurance companies doing business within its borders from false claims.[85] Since the parties were domiciled in Rhode Island and their car presumably insured there, that state's policies would be impaired by application of Vermont's law on the issue of immunity.

Thus the contact of Vermont as the place where the injury and the conduct causing the injury occurred, and the contact of Rhode

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81. This follows from the conception of a domestic rule or principle as not only "rest[ing] on several supportive policies;" but also representing in fully domestic contexts "a subordination of competing policies." von Mehren, *supra* note 50, at 936.

82. *Id.* at 947 n.52.

83. *Id.* (emphasis added).

84. RESTATEMENT (SECOND) §§ 169(1), 145(1)-(2)(b), 6(2)(b)-(e).

85. A thorough investigation into the specific policies sought to be vindicated by the immunity rule in Rhode Island would have been proper. For the sake of simplicity, the analysis here will discuss the most prevalent policies underlying interspousal immunity. RESTATEMENT (SECOND) § 169, comment b. *See generally* Felix, *Interspousal Immunity in the Conflict of Laws: Automobile Accident Claims,* 53 CORNELL L. REV. 406, 410-18 (1968); Hancock, *The Rise and Fall of Buckeye v. Buckeye, 1931-1959: Marital Immunity for Torts in Conflict of Laws,* 29 U. CHI. L. REV. 237 (1962).

Island as the domicile of the parties both serve to rationally implicate the policies behind each state's law sought to be applied. Mechanical application of a jurisdiction-selecting rule based on domicile would violate the command of the *Restatement (Second)* to evaluate the relative importance of the contacts in light of the content of each state's law.

If the internal policies of the concerned jurisdictions had been reversed, as in *Haumschild v. Continental Casualty Co.*,[86] application of a rule based on matrimonial domicile would have been more appropriate.[87] In *Haumschild,* the state of matrimonial domicile, Wisconsin, permitted the spouse to sue, but the state where the accident occurred, California, denied recovery. Although the court permitted recovery on the theory that interspousal immunity questions should be decided by the law of the parties' domicile,[88] the result (as distinguished from the rule adopted) was supportable in view of the context of the case which presented a false conflict of the internal policies of the concerned jurisdictions.[89] On the facts of *Haumschild* and the reverse law-fact pattern of *LeBlanc*, both states would have the wife recover. This results because the policies underlying the California immunity rule, unlike Rhode Island's same policies in *LeBlanc*, have little or not application in a multistate context where the only contact California has with the occurrence and the parties is the circumstance that the accident occurred there.[90] Because California could assert no rational interest

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86. 7 Wis.2d 130, 95 N.W.2d 814 (1959).

87. In determining which conflicts cases are alike, Professor Cavers has articulated a fundamental principle:

> [Cases] are not simply patterns of fact: they are law-fact patterns. In any two cases, the fact elements in the pattern may be the same, but their legal elements may be reversed. A [jurisdiction]-selecting rule treats those two cases as if they were the same; I have stressed their difference.

Addendum 1972, supra note 18, at 656.

88. 7 Wis.2d at 137, 95 N.W.2d at 818 ("The law of the domicile is the one that ought to be applied in determining any issue of incapacity to sue based upon family relationship.").

89. "False conflict" is used here in the sense of a lack of any significant conflict of internal policy. *See* note 74 *supra.*

90. This assumes that a society's immunity rule is not "universal in [its] claims" and the relationship of the spouse and of the insurance operation to California "did not bring into play the specific policies underlying [the immunity rule]." von Mehren, *supra* note 50, at 947 n.51. *See* Comment, *Functional Application of Conflict of Laws Rules in Tort Cases,* 44 YALE L. J. 1233, 1239 (1935) (If the state of the parties' domicile "does not fear discord among the families within its borders, then it hardly seems to be the concern of other states.").

in regulating foreign marriages and insurance operations,[91] "the policies of deterrence and compensation that are subordinated for domestic situations revive, and [California] has no basis, . . . to deny recovery."[92] In addition, Wisconsin, having abandoned the immunity rule, elevated policies of deterrence and compensation above its prior policies directed at the family.[93] In the context of *Haumschild* (and the reverse law-fact pattern of *LeBlanc*) permitting recovery by applying the law of the matrimonial domicile was entirely appropriate since it was proper to speak of the relationship of California to the suit as "fortuitous."[94]

Returning to the situation facing the court in *LeBlanc*, it is evident from a comparison of the two cases that the problem was more complex than that involved in *Haumschild*. A proper solution of the conflict required a delicate balancing of the policies implicated rather than automatic application of a jurisdiction-selecting rule based on domicile.[95]

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91. *But see* Magid v. Decker, 251 F. Supp. 955, 959 (W.D. Wis. 1966) ("inherent claim of the domiciliary state to vindication of its policy"), *cited with approval in* Felix, *supra* note 85, at 434. Apparently the district court and Professor Felix forgot Judge Cardozo's strict narrowing of the reach of the general concept of public policy in choice-of-law cases. Loucks v. Standard Oil Co. of N.Y., 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918) ("some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal").

92. von Mehren, *supra* note 50, at 947. For a description of the phenomena of "subordination" and "revival" of domestic law policies, see *id.* at 935-39, 946-52. Recognition of these phenomena is where a functional analysis parts with Currie's governmental interest methodology. *Id.*; LAW OF MULTISTATE PROBLEMS, *supra* note 50, at 215-16 n.162.

93. "Presumably, the deterrence policy . . . is less significant . . . since the conduct and injury occurred elsewhere, but the compensation policy clearly applies with undiminished force." von Mehren, *supra* note 50, at 947.

94. This is because "no conceivable policy—whether it actually exists or existed—could rationally support application of [California's] rule in [this] multistate context." Trautman, *supra* note 51, at 6 n.18.

95. *See* Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1223-25 (1946). The analysis here parts company with the views of commentators like Professor Felix who prefer the use of a jurisdiction-selecting rule based on *lex domicilii* as a better rule than *lex loci delicti*. Felix, *supra* note 85, at 433, 445. Felix supports the use of *lex domicilii* by pointing out that "false conflicts are decided appropriately," even though true conflicts cases are decided on more questionable grounds. *Id.* at 433. Just because the "correct" result is achieved in one class of cases does not make the rule employed a better rule to use than another in other classes of cases. For example, based on a functional analysis, the result obtained in true conflict cases by application of the *lex loci delicti* rule *may* be preferable to the result obtained by Felix's "better rule." Of course, this is not to advocate the use of one rule or the other in any class of cases. Rather it is to demonstrate the inherent

Particularly persuasive in this regard is *Johnson v. Johnson*,[96] decided by the New Hampshire Supreme Court in 1966. Earlier, the New Hampshire court had abandoned the vested rights approach to choice-of-law in interspousal immunity cases and had formulated a rule based on domicile in a false conflict situation similar to that in *Haumschild*.[97] In a true conflict situation created by the reverse law-fact pattern, however, the court in *Johnson* perceived the difference between the two cases and emphasized the more complex analytical problems encountered.[98] Chief Justice Kenison's opinion revealed that the court had balanced the competing policies prior to its decision to apply Massachusetts interspousal immunity to a Massachusetts wife injured in New Hampshire, a recovery state.[99] The result may have been the same as that in *LeBlanc*, but the choice-of-law methodology employed differed from the jurisdiction-selecting approach of the Vermont federal district court. Instead of merely selecting the source of the law to be applied without regard to the content of that law, the New Hampshire Supreme Court analytically determined that the restrictive policy of the domicile outweighed the interest of New Hampshire to provide recovery and

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deficiencies in any jurisdiction-selecting rule.

Professor von Mehren would presumably strike the balance by employing a special substantive rule accomodating the policies of both states. *See* von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347, 356-70 (1974). In the context of *LeBlanc* he would envision a compromise that would allow a partial recovery by permitting the wife to recover one-half of the damage suffered or, if it could be established that Vermont's compensatory policies were stronger, an even larger recovery. *Id.* at 369. Although his solution appears preferable to the "all-or-nothing solution that results from applying either domestic rule," *id.* at 369, Professor von Mehren fails to articulate criteria to guide a court's determination of the proper percentage of recovery. His analogy to the concept of comparative negligence, *id.* at 370, should not encourage courts to rely on a jury determination of the proper measure of recovery.

96. 107 N.H. 31, 216 A.2d 781 (1966).

97. Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963).

98. *See* R. WEINTRAUB, *supra* note 26, at 228.

99. 107 N.H. at 32, 216 A.2d at 783:

> In this true conflict, the court's task is to determine whether the purposes of the relevant and applicable New Hampshire laws would be so seriously impaired by denying the Massachusetts plaintiff the right to sue her husband here that we should refuse to recognize this incident of a Massachusetts marital relationship.

Id.

deter negligent conduct on its highways.[100] Although the spouses' domicile was the most important contact in both cases, the significance of that contact arose by virtue of the specific policies underlying that state's law in each case, not because of its inclusion within a jurisdiction-selecting rule.[101]

In similar fashion, the torts provisions of the *Restatement (Second)* require[102] the court to "evaluate" the "relative importance"[103] of the contacts in light of the "relevant policies of the forum [and] . . . other interested states and the relative interests of those states in the determination of the particular issue."[104] Because an evaluation of relative interests implies a balance, a court must assess the relative strengths of the foreign and domestic policies at stake.[105] Some judges and commentators have found this aspect of the functional or *Restatement (Second)* approach particularly objectionable. They argue that in view of the difficulty of discerning local law policy, courts will rarely be able to ascertain foreign law policy on anything more than a speculative basis.[106] The courts,

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100. The court also employed the most significant relationship test of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (Tent. Draft No.9, 1964), 107 N.H. at 32-33, 216 A.2d at 783. Later, in Schneider v. Schneider, 110 N.H. 70, 260 A.2d 97 (1969), the court held that the same result should obtain despite the fact that the parties had not been married at the time of the accident.

101. *See* text accompanying notes 18-33 *supra*; "[I]t may be noted that we are not now choosing the law of the domicile for its simplicity. We have chosen that law only after we have considered the purposes of the respective state laws here in conflict. . . ." 107 N.H. at 33, 216 A.2d at 783.

> I must concede . . . that a jurisdiction-selecting rule may be the product of two decisions choosing on policy grounds between competing rules in cases in which the law-fact patterns are reversed. If the court concludes that the same contact should be controlling in each case, economy in stating the results would yield a choice-of-law rule stated in terms of the jurisdiction where that contact is located. However, in the use of a rule thus synthesized, its origin should always be kept in mind.

THE CHOICE OF LAW PROCESS, *supra* note 18, at 9 n.24.

102. RESTATEMENT (SECOND) § 169(1).

103. RESTATEMENT (SECOND) § 145.

104. RESTATEMENT (SECOND) § 6(2)(b)-(c).

105. Reich v. Purcell, 67 Cal.2d 551, 555, 432 P.2d 727, 730, 63 Cal. Rptr. 31, 34 (1967) ("As the forum we must consider all of the foreign and domestic elements and interests involved in this case to determine the rule applicable.").

106. Professor Rosenberg has argued: "To try to bring all the huffing and puffing together into a policy that runs clearly in one direction and that has a measurable intensity that permits comparing it with some contrary policy is, in my judgment, pure fantasy."

however, often manage to assess implicitly the strength of foreign policy.[107] Indeed, it has already been suggested by more than one commentator that the courts which have purportedly adopted Professor Leflar's "better law" approach to choice-of-law are really appraising the relative strength and continuing viability of the law in the foreign state.[108] Where rational criteria for evaluation are used and the foreign legal materials do not appear unduly complex, the court should not avoid its duty to ascertain the desires of the foreign legal orders to regulate the multistate occurrence.[109]

On the other hand, a court should not give undue weight to the policies of the forum, because of either a questionable assessment of the importance of foreign law or the failure properly to ascertain and assign significance to all the potentially relevant domestic policies. *Johnson v. Johnson* again provides an excellent example. The New Hampshire court found that the application of Massachusetts' immunity rule would not seriously impair the forum's general policies of deterrence and compensation. But, as one commentator has suggested, Chief Justice Kenison may not have recognized the full range and extent of New Hampshire's interest in the matter and the potential weakness of the competing restrictive policy.[110] Subsequent New Hampshire choice-of-law decisions have demonstrated an increased willingness to explore the dimensions of foreign policy and to reject more restrictive laws when found to lack substantial policy support.[111] Moreover, in *Gagne v. Berry*,[112] the Supreme Court

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Rosenberg, *Two Views on Kell v. Henderson: An opinion for the New York Court of Appeals*, 67 COLUM. L. REV. 459, 464 (1967). *See* Tooker v. Lopez, 24 N.Y.2d 569, 597, 249 N.E.2d 394, 411, 301 N.Y.S.2d 519, 543 (1969) ("Intra-mural speculation on the policies of other States has obvious limitations because of restricted information and wisdom."); Juenger, *supra* note 33, at 210.

107. *See, e.g.*, Reich v. Purcell, 67 Cal.2d at 556, 432 P. 2d at 731, 63 Cal. Rptr. at 35 ("[G]iving effect to Ohio's interests in affording full recovery to injured parties does not conflict with any *substantial* interest of Missouri.") (emphasis added); Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944 (1953).

108. Trautman, *supra* note 51, at 14; Horowitz, *Comments on Reich v. Purcell, 15* U.C.L.A. L. REV. 631, 636 (1968). *See, e.g.*, Clark v. Clark 107 N.H. 351, 222 A.2d 205 (1966).

109. Trautman, *Kell v. Henderson: A Comment*, 67 COLUM. L. REV. 465, 473 (1967) ("There is no need to be more Roman than the Romans.").

110. 79 HARV. L. REV. 1707 (1966). The court, in *Johnson*, stressed only the compensatory interest.

111. Gagne v. Berry, 112 N.H. 125, 290 A.2d 624 (1972); Doiron v. Doiron, 109 N.H. 1, 241 A.2d 372 (1968).

112. 112 N.H. 125, 290 A.2d 624 (1972).

of New Hampshire has seemingly reassessed its view of the relative strength of the forum's policies, at least in the guest-host statute context, in holding that application of a foreign gross negligence rule would defeat the strong policies of New Hampshire to deter negligent conduct within its borders.[113] Presumably, a rational court would hold that this argument has equal vitality in the interspousal immunity context, particularly where the competing immunity policies are found to be weak.[114]

The early Massachusetts case of *Milliken v. Pratt*[115] has been commonly regarded as setting forth two criteria which justify a court's rejection of foreign law on the basis of the weakness of the supportive policies asserted.[116] First, if the law sought to be applied has been changed by the legislature or by judicial fiat subsequent to the accident and before the decision of the appellate court, the court is then justified in rejecting the former law as lacking substantial policy support.[117] More recently, in *Gagne v. Berry,* the New Hampshire Supreme Court rejected application of the Massachusetts guest-host gross negligence rule partly on the ground that the Massachusetts legislature abolished the rule subsequent to the accident.[118] Of course, this criterion is not applicable on the facts of *LeBlanc* since Rhode Island's restrictive law had not yet been abrogated. The second, and more delicate criteria of *Milliken* looks to the trend of the law in other states as a means of ascertaining the strength of the specific foreign law policy encountered.[119] This criterion, utilized in the absence of a relatively recent evaluation of the policy by the foreign state, is easy to apply in the context of *LeBlanc*. The growing dissatisfaction with the interspousal immunity rule in general, and the number of states which have repudiated

113. The court stresed the policies of deterrence which it failed to consider in the *Johnson* case, 112 N.H. at 128, 290 A.2d at 626.

114. The court, in *Gagne,* distinguished *Johnson* by stating that the interspousal immunity context "differs materially" from the guest-host statute context. *Id.* No explanation of why this is so was offered. Indeed, it is difficult to perceive a difference which relates in any way to New Hampshire's general policies of deterrence. R. CRAMTON, D. CURRIE, & H. KAY, *supra* note 60, at 326.

115. 125 Mass. 374 (1878).

116. LAW OF MULTISTATE PROBLEMS, *supra* note 50, at 376-77, 394.

117. *Id.* at 376.

118. 112 N.H. at 129-30, 290 A.2d at 627.

119. LAW OF MULTISTATE PROBLEMS, *supra* note 50, at 394.

the rule, demonstrate that the doctrine had only a weak, antiquated policy basis at the time *LeBlanc* was decided.[120] In addition to the rejection of the rule because of its failure to preserve marital harmony, more enlightened jurisdictions have also rejected the rule as a basis for preserving a reasonable insurance rate structure.[121] For example, in *Emery v. Emery*,[122] relied on by the court in *LeBlanc* for its application of a jurisdiction-selecting rule,[123] the court observed that where the concern is with false claims in a multistate context, the courts "should take cognizance of fraud and collusion when found to exist in the particular case," rather than "closing the door" to all cases where an opportunity for fraud is contemplated.[124]

On the other hand, Vermont's policies of deterrence and compensation in the context of *LeBlanc* are unquestionably strong, as in any tort case. The concurring opinion in *Haumschild* is, in large part, an argument that the domicile of the spouses may be a relatively insignificant contact when compared to the place of the accident and the conduct causing the accident because that state's strong policies of deterrence and compensation, shared by the state of domicile may outweigh the latter state's interest in the regulation of marital conduct.[125] That assessment was advanced without any examination of the strength of the immunity rule and, hence, without the use of the accepted criteria for evaluating foreign policy. Nevertheless, it is a significant pronouncement of the strength of the policies of deterrence and compensation in negligence cases. Al-

120. The history of the rule is documented in W. PROSSER, LAW OF TORTS 859-64 (4th ed. 1971) ("The devastating attack on the old rule found in a number of recent decisions seems to leave no possible justification for it except that of historical survival.") *Id.* at 864.

121. *E.g.*, Richard v. Richard, 131 Vt. 98, 300 A.2d 637 (1973). *See* W. PROSSER, *supra* note 120, at 864 & n.61.

122. 45 Cal.2d 421, 289 P.2d 218 (1955).

123. 342 F. Supp. at 775-76.

124. Emery v. Emery, 45 Cal.2d 421, 289 P.2d 218 (1955). Justice Traynor, writing for the majority, held that "[t]he fact that there may be greater opportunity for fraud in one class of cases than another does not warrant courts of law in closing the door to all cases of that class." *Id.* at 431, 289 P.2d at 225. This same position has been taken by the Vermont Supreme Court in a wholly domestic context. Richard v. Richard, 131 Vt. 98, 105, 300 A.2d 637, 641 (1973) ("[W]e have not lost such faith in our courts and juries to believe that they could not weed out the spurious claims of the few.").

125. Haumschild v. Continental Cas. Co., 7 Wis.2d 130, 143-44, 95 N.W.2d 814, 821 (1954) (Fairchild, J., concurring) ("[C]ourts will henceforth be required to determine [domicile] in many cases where it has heretofore been considered immaterial.").

though the balance to be drawn depends on the facts of the particular case, shared policies of deterrence and compensation should take precedence where the policies underlying the immunity rule are weak or one of the spouses is dead.[126]

A determination that, on the facts of *LeBlanc,* a proper balance of the competing domestic law policies on the issue of immunity requires application of Vermont's law, does not end the inquiry. A court is also required under the *Restatement (Second)* to consider the relevant multistate policies, shared by all jurisdictions, of "evenhandedness" or "non-invidiousness." A court seeking principled decisions must consider whether "permitting recovery here would call for drawing of incomprehensible or invidious distinctions in related fact situations."[127] Because the problem involves complexitites beyond the scope of this note, detailed treatment is not provided here. Reference should be had to other commentators who have explored the dimensions of the problem in analogous contexts.[128] A synthesis of their analysis is provided by the following question, adapted to the interspousal immunity context, the answer to which, if properly addressed by courts, should encompass the domestic and multistate considerations heretofore discussed.[129]

> Do the interests of the state with the [immunity rule], given the current significance of policies known to underlie or presumably underlying the [common law rule], and the relevance of those policies to the actual multistate occurrence, warrant application of the [immunity rule] as an exception to the shared domestic-law policies of both jurisdictions in compensation and deterrence and their multistate interests in rules that work with a fair degree of predictability and evenhandedness and that will be perceived as being evenhanded by those subject to the rules?[130]

One caveat is in order. Often, resolution of a conflict cannot be

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126. *See* Clark v. Clark, 107 N.H. 351, 356-57, 222 A.2d 205, 210 (1966) (weakness of guest statute policies); Trautman, *supra* note 51, at 10-11.

127. von Mehren, *supra* note 50, at 948.

128. Most notably, the problem has been explored in the guest-host statute context. *See id.* at 927-52; Trautman, *supra* note 51, at 16-22.

129. Trautman, *supra* note 51, at 21.

130. *Id. Cf. Addendum 1972, supra* note 18, at 656 ("[U]nder what circumstances should we prefer the more protective law?") (emphasis omitted).

made without seriously jeopardizing vindication of either the implicated domestic law policies or the shared multistate policies of even-handedness and comprehensibility.[131] Where this is inevitable, it may be preferable "to resolve the controversy in favor of even-handed treatment" particularly if the competing domestic law policies calling for another result are weak.[132]

The choice-of-law methodology of the Massachusetts federal district court in *In Re Air Crash Disaster At Boston, Mass., July 31, 1973,*[133] applying Vermont conflicts law in a wrongful death action is more consonant with the torts provisions of the *Restatement (Second).* A plane trip by Vermont residents which began and was to end in Vermont, terminated when the defendant's aircraft crashed in Massachusetts. With the exception of the defendant's contact with Massachusetts as a corporation doing business there, Vermont had all the other contacts with the litigation. After holding that the Vermont Supreme Court would abandon the *lex loci delicti* rule and adopt the torts provisions of the *Restatement (Second),* the court refused to apply the Massachusetts damage limitation for wrongful death recoveries in view of Vermont's strong compensatory policies.[134] Significantly, the court explicitly recognized that the *Restatement (Second)* required close consideration of the content of and policies behind the laws of the concerned states.[135] Recognizing that Massachusetts may have yet had a policy arguably relevant to this multistate occurrence, despite its lack of significant contacts, the court determined that the policy must have been extremely weak in view of the subsequent repeal of the damage limitation by the Massachusetts legislature.[136] Finally, the court at least identified, albeit superficially, the importance of multistate policies of accommodating the needs of the interstate system in the resolution of multistate disputes.[137] Unfortunately, the opinion did not specify

131. von Mehren, *supra* note 50, at 952.

132. Trautman, *supra* note 51, at 18.

133. 399 F. Supp. 1106 (D. Mass. 1975).

134. *Id.* at 1112.

135. *Id.* ("The policy underlying each statute is an important consideration in determining which state has the more significant connection with the issue.").

136. *Id.*

137. *Id.* ("Because Massachusetts' current policy with respect to theory and amount of recovery in wrongful death actions parallels that of Vermont, consideration of the needs of the interstate systems points to application of Vermont law.").

why this policy was relevant and how it applied to the case. In addition, the court confined its conception of multistate policies to those deriving from a state's position in a federal system.[138] Equally important are the multistate policies of "non-invidiousness and comprehensibility" which derive from the individual's relationship to the community, its laws, and the multistate occurrence. While the opinion did not identify these latter multistate concerns, its explicit recognition of the relevance of multistate policies to a *Restatement (Second)* analysis is important for the future of Vermont's choice-of-law methodology.

In view of the competence of federal diversity courts, such as those in *LeBlanc* and the *Delta Air Crash* cases, to anticipate the trend of state law,[139] a state court, when eventually faced with the same issues, must determine the ultimate effect of the federal decisions as binding or persuasive authority. The Vermont Supreme Court would presumably be free to disregard *LeBlanc* and *Delta Air Crash* and adhere to *lex loci delicti* because federal court determinations of state law questions are not binding on the state court.[140] Quite often however, federal decisions are considered persuasive authority.[141]

The *LeBlanc* and *Delta Air Crash* cases are strong authority in favor of the abandonment of the *lex loci delicti* in Vermont. The time has come for adoption by the Vermont Supreme Court of contemporary choice-of-law methodology. For its views on the metho-

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138. *See* note 137 *supra.*

139. *See* note 12 *supra.*

140. Wichita Royalty Co. v. City Nat'l Bank, 306 U.S. 103, 109 (1939) ("[N]othing requires the state courts to adopt the rule which the federal or other courts may believe to be the better one, or to be consistent in their decisions if they do not choose to be."). The *Pullman* abstention doctrine cases illustrate the attitude of the Supreme Court regarding the precedential effect of their decisions on state law issues. In actions involving constitutional challenges to official state action, the federal courts will ordinarily abstain where state law issues may be dispositive of the claim regardless of the validity of the federal claim. A federal court will not make "a tentative answer which may be displaced tomorrow by a state adjudication. . . . The reign of law is hardly promoted if an unnecessary ruling of a federal court [on state law] is thus supplanted by a controlling decision of a state court." Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941). *See* Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 501-02 (1954).

141. *E.g.,* Kuhns v. Horn, 223 Or. 547, 557, 355 P.2d 249, 254 (1960) ("While it is true that the federal decisions are not binding on the State of Oregon . . . such decisions are entitled to be considered for whatever instructive value they may have in a particular case.").

dology of the *Restatement (Second),* however, *LeBlanc* (more than *Delta Air Crash*) should be disregarded to the extent it fails to employ a functional analysis of the interests of the concerned jurisdictions in the resolution of the dispute. The application of a jurisdiction-selecting rule, where a functional analysis points to a different result, is untenable under the provisions of the *Restatement (Second).*

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