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Dealing With Missouri's Choice of Law Mess

*James E. Westbrook**

I. INTRODUCTION

Choice of law in Missouri and many other states is a mess. The United States Supreme Court has exercised only minimal constitutional control over state choice of law in recent decades.¹ This freedom was used by many state courts, including those in Missouri, to fashion what may be called a revolution in choice of law. Some of the best conflicts scholarship in recent years has demonstrated that this revolution has produced a parochial and incoherent body of law.² This second body of conflicts scholarship has been described as a counter-revolution.³ This Article's purpose is to call these scholarly

* Earl F. Nelson and James S. Rollins Professor of Law, University of Missouri-Columbia; B.A., Hendrix College, 1956; J.D., Duke University, 1959; LL.M., Georgetown, 1965.

1. Peterson, *Jurisdiction and Choice of Law Revisited*, 59 U. COLO. L. REV. 37, 39 (1988).

2. The following comments from a defender of interest analysis are revealing:

Brainerd Currie once remarked that Walter Wheeler Cook discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another.' Now Professor Lea Brilmayer has done the same thing. By lucidly exposing the obfuscations that inhere within interest analysis, she has performed a consummate act of "trashing" that rivals the finest works of the most gifted critical legal scholars. . . .

Professor Brilmayer accurately asserts that interest analysis, both in theory and in practice, is 'pro-resident, pro-forum, and pro-recovery'

Berman, *To Brainerd Currie: A Fallen Giant*, 46 OHIO ST. L.J. 529, 529 (1985) (footnotes omitted); see also Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585 (1985); Korn, *The Choice-of-Law Revolution: A Critique*, 83 COLUM. L. REV. 772 (1983).

3. Easley, *An Examination of Choice-at-Law Theory and Practice in the Kansas Supreme Court: A Historical Perspective on Rules and Reasons*, 27 WASHBURN L.

developments to the attention of Missouri judges and to make recommendations for steps that our court may take to improve what has become a troublesome situation. Choice of law is and always will be a difficult and frustrating subject. There is no fail-safe method or approach that will reconcile all the conflicting values and interests in a way that will satisfy everyone. However, the situation can and should be improved.

II. REVOLUTION AND COUNTER-REVOLUTION

A. Revolution

Missouri's situation can be understood better if it is considered in light of the revolution and counter-revolution that has occurred in choice of law thinking. During the past thirty years many scholars and courts rejected traditional choice of law thinking.⁴ The person who most influenced these developments was Professor Brainerd Currie of the Duke School of Law.⁵ He led a scathing attack on traditional rules in general and on the First Restatement of Conflict of Laws in particular.⁶

The First Restatement was territorial and jurisdiction-selecting in its approach. It was territorial in the sense that it recommended application of the law of the state where certain events occurred.⁷ In tort cases, for example, it recommended application of the law of the place of the wrong (*lex loci delicti*), defined as the place where the last event necessary for liability occurred.⁸ In cases involving issues of contract obligation, it recommended application of the law of the place of making (*lex loci contractus*).⁹ If the issue were sufficiency of performance or excuse for nonperformance, it recommended application of the law of the place of performance (*lex loci*

J. 407, 407 (1988); Symeonides, *Revolution and Counter-Revolution in American Conflicts Law: Is There a Middle Ground?*, 46 OHIO ST. L.J. 549 (1985).

4. Hill, *supra* note 2, at 1585; Korn, *supra* note 2, at 802; Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case For Eclecticism*, 40 MO. L. REV. 407, 407-18 (1975).

5. Hill, *supra* note 2, at 1587-88.

6. See, e.g., B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 699 (1963); Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958).

7. Professor Easley has pointed out that territoriality meant something different in the First Restatement than it had to traditional scholars. Easley, *supra* note 3, at 411 n.29.

8. RESTATEMENT OF CONFLICT OF LAWS § 377 (1934).

9. *Id.* § 346.

solutions).¹⁰ The First Restatement was described as jurisdiction-selecting because its rules usually located the applicable law without considering the substantive content of that law.¹¹ Professor Currie and Professor David Cavers convinced most scholars and many courts that jurisdiction-selecting rules are inherently suspect.¹²

The work of conflicts scholars and the adoption of the Restatement (Second) of Conflict of Laws resulted in the rejection of traditional choice of law rules by many courts. The greatest impact has been in tort and contract choice of law.¹³ Thirty-three states and the District of Columbia have abandoned or modified the place-of-wrong rule for tort choice of law cases.¹⁴ Traditional choice of law rules have shown more staying power in other areas.¹⁵ Neither courts nor scholars have arrived at a consensus on a new method or approach to replace traditional thinking. Judicial opinions rejecting traditional rules often refer to more than one approach in explaining the court's choice of law.¹⁶ Courts in a single jurisdiction have jumped from one theory to another as they have decided new cases.¹⁷ The three most influential new approaches in the courts have been Professor Currie's Interest Analysis, the Second Restatement, and Professor Leflar's Choice-Influencing Considerations.

1. Interest Analysis

Proponents of interest analysis assert that choice of law problems should not be dealt with by general principles or rules but by determining case-by-case the policies embodied in the purportedly conflicting state laws and deciding which persons or entities those laws were intended to benefit.¹⁸ The policies are determined through the usual processes of construction and interpretation. Professor Currie and his followers assumed that states intend

10. *Id.* § 358.

11. See Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Easley, *supra* note 3, at 413.

12. Hill, *supra* note 2, at 1646.

13. *Id.* at 1586.

14. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 318 (3d ed. 1986 & Supp. 1989).

15. Hill, *supra* note 2, at 1586.

16. Westbrook, *supra* note 4, at 408.

17. See, for example, Professor Korn's description of the New York experience in Korn, *supra* note 2, at 820-957.

18. Hill, *supra* note 2, at 1586; Note, *Interest Analysis Applied to Corporations: The Unprincipled Use of a Choice of Law Method*, 98 YALE L. J. 597, 599-601 (1989).

their laws to benefit only their domiciliaries. This has been aptly described as a "protect the locals conception."¹⁹ States are assumed to have a governmental interest when their domiciliaries would benefit from application of laws designed to afford them compensation or protection. For example, if a guest-statute's policies are determined to be anti-ingrate and anti-fraud against insurance companies, the assumption of an interest analyst would be that such laws were intended to protect only insurance companies and host-drivers located or domiciled in the guest-statute state.²⁰ Professor Currie maintained that often only one state would have an interest in the application of its law. This situation was described as a "false-conflict." Currie believed that the forum should always apply its own law when it has an interest, even if another state has an interest. While agreeing with Currie's basic approach and his treatment of false conflicts, many proponents of interest analysis do not agree that forum law should always be applied in a "true-conflict" situation.²¹

2. The Second Restatement

It is more difficult to generalize about the methodology of the Second Restatement because the open-endedness of the language in its general tort and contract provisions - its most influential provisions - and the inclusion in these provisions of antithetical considerations have resulted in a variety of interpretations.²² Although the Second Restatement is two volumes in length and contains hundreds of rules, it tends to be identified with section 145, the general choice of law rule for torts. Section 145 recommends application of the local law of the state with "the most significant relationship to the occurrence and the parties under the principles stated in § 6," considering four categories of contacts.²³ Section 6 identifies seven factors relevant to choice

19. Note, *supra* note 18, at 600.

20. For a discussion of the difficulty of applying interest analysis to corporations, see *id.* at 598.

21. R. CRAMTON, D. CURRIE, & H. KAY, *CONFLICT OF LAWS, CASES-COMMENTS-QUESTIONS* 242 n.2 (4th ed. 1987).

22. Note, *supra* note 18, at n.77.

23. Section 145 reads as follows:

§ 145. The General Principle

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

of the applicable law.²⁴ The factors in section 6 used most often in deciding specific cases have been the policies of the forum and other interested states and the protection of justified expectations. Experience indicates that the other factors in section 6 are more useful in developing choice of law rules than in deciding specific cases. Examples of such factors are the needs of the interstate and international systems and certainty, predictability, and uniformity of result.

In *Kennedy v. Dixon*,²⁵ the Missouri Supreme Court abandoned "the inflexible *lex loci delicti* rule in favor of the rule set forth in § 145."²⁶ The most salient characteristic of section 145 is its malleability. The phrase "most significant relationship" fails to aid in making choices of law in specific cases. The contacts listed in section 145 and the factors identified in section 6 point to both territorial and policy considerations.

It is not surprising that courts have used the Second Restatement "in radically different ways."²⁷ One typical response is to incorporate some of the techniques of interest analysis to give more specific content to the vague

- (b) the place where the conduct causing the injury occurred,
- (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.

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

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1986).

24. Section 6 reads as follows:

§ 6. Choice of Law Principles

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

Id. § 6.

25. 439 S.W.2d 173 (Mo. 1969) (en banc).

26. *Id.* at 184.

27. Note, *supra* note 18, at n.77.

language of section 145. This is easily done since subsections 6(2)(b) and (c) mandate consideration of the policies of the forum and other interested states. Indeed, Professor Currie's writings have been so influential that his ideas appear to have influenced most courts that have adopted any of the new approaches.²⁸

Several Missouri judicial opinions have incorporated interest analysis into section 145.²⁹ The Missouri judicial opinions have not been any more successful than those from other jurisdictions in using section 145 and interest analysis, either together or separately, to explain their choices of law in an understandable way or to guide future cases. In a 1987 analysis of Missouri cases, Professor Abraham Wani suggested that Missouri judicial opinions dealing with choice of law were cursory, inconsistent, and superficial.³⁰

Although the tort and contract sections of the Second Restatement have tended in practice to produce results similar to those produced by the use of interest analysis, there is a clear difference in one important respect between the approaches advocated by Professor Currie and by Professor Willis Reese, the Reporter for the Second Restatement. Professor Currie advocated an *ad hoc*, no rules approach; Professor Reese endorses a system of rules.³¹ Not only are there many rules included in the Second Restatement, but Professor Reese suggested that the vague tort and contract provisions were intended as transitional rules to be used until more specific rules are developed.³²

3. Choice-Influencing Considerations

Several courts have used Professor Robert Leflar's Choice-Influencing Considerations for guidance in making choices of law.³³ This approach has been described as a check-list method.³⁴ Professor Leflar's considerations summarize what he considers the motivating reasons behind choices of law. He concluded that choices of law should be made after a frank, reasoned discussion of the values at stake in a case. These considerations are useful in

28. See Korn, *supra* note 2, at 816.

29. See Hicks v. Graves Truck Lines, Inc., 707 S.W.2d 439 (Mo. Ct. App. 1986); Carver v. Schafer, 647 S.W.2d 570 (Mo. Ct. App. 1983); Griggs v. Riley, 489 S.W.2d 469 (Mo. Ct. App. 1972); and Wani, *Choice of Law Theory in the Courts: A Missouri Case Study*, 32 ST. LOUIS U.L.J. 355, 391, 429 (1987).

30. Wani, *supra* note 29, at 390-91.

31. Reese, *A Suggested Approach to Choice of Law*, 14 VT. L. REV. 1, 1-9 (1989).

32. Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679, 699 (1963). See also W. REESE, M. ROSENBERG, & P. HAY, *CONFLICT OF LAWS, CASES AND MATERIALS* 495 (9th ed. 1990); Reese, *supra* note 31, at 15.

33. See the cases discussed in Hill, *supra* note 2, at 1617-19.

34. *Id.* at 1617.

developing and evaluating choice of law rules³⁵ and in deciding specific cases.³⁶ Leflar's five choice-influencing considerations are: predictability of results; maintenance of interstate and international order; simplification of the judicial task; advancement of the forum's governmental interests; and, application of the better rule of law.³⁷

The first four considerations parallel the factors in section 6 of the Second Restatement. Both Professor Leflar and Professor Reese advocate a dialectic between the general factors or considerations and more specific rules in an effort to improve choice of law.³⁸ Professor Leflar's advocacy of the better rule of law consideration clearly distinguishes his approach from that of the Second Restatement. The Second Restatement does not list the better rule of law as one of the factors to be included. Leflar believes that competing rules of law should be evaluated "in terms of socio-economic jurisprudential standards."³⁹ He maintains that courts always have been influenced by their assessment of the relative merits of competing substantive rules and that it is therefore better to acknowledge and discuss this factor openly.⁴⁰ The better rule consideration has been the most influential factor in tort choice of law decisions based on Professor Leflar's approach.⁴¹ Scholars have noted that use of the better law consideration tends to result in application of forum law⁴² and law that favors the plaintiff.⁴³

B. Counter-Revolution

The choice of law revolution produced a reaction by conflicts scholars that has been described as a counter-revolution. Some of the best conflicts articles in recent years direct a drumfire of criticism at Professor Currie's theories and criticize aggressively the body of case law developed by courts that have rejected traditional choice of law rules.⁴⁴ These articles assert that

35. R. LEFLAR, *AMERICAN CONFLICTS LAW* § 108, at 215-216 (3d ed. 1977).

36. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 304-09 (1966).

37. The considerations are analyzed and evaluated in Westbrook, *supra* note 4, at 427-33, 460-63.

38. *Id.* at 430.

39. Leflar, *supra* note 36, at 296.

40. *Id.* at 295-304.

41. T. DE BOER, *BEYOND LEX LOCI DELICTI: CONFLICTS METHODOLOGY AND MULTISTATE TORTS IN AMERICAN CASE LAW* 5-329 (1987).

42. *Id.* at 5-331.

43. *Id.* at 5-341.

44. See, e.g., Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459 (1985); Brilmayer, *Interest Analysis and the Myth*

the choice of law revolution has produced incoherence and parochialism. The choice of law revolution has produced incoherence in the sense that it has led to judicial opinions that provide very little guidance for the future and very little help in understanding why a court made a particular choice of law. Several factors have produced this state of affairs. The new approaches encourage courts to consider more variables in making choices.⁴⁵ Some of the criteria used are vague and amorphous.⁴⁶ The welter of theories and approaches contending for attention confuses lawyers and judges.⁴⁷ Scholars apparently have persuaded many judges that the values of predictability and uniformity are either unattainable or less important than other values.

Professor Hill from Columbia said "what has emerged on the judicial plane is chaos"⁴⁸ and "what is most striking . . . is the superficiality of so much of the judicial effort at analysis."⁴⁹ In evaluating judicial use of interest analysis, Professor Juenger from California-Davis asserted that "[o]verwritten opinions, replete with unfathomable terminology, bear witness to the sacrifice of intellectual honesty which the will-o'-the-wisp approach exacts from its users."⁵⁰ Professor Korn from Columbia concluded "there was in most quarters of the revolution a marked pendulum swing away from 'rigid and overbroad' rules and toward the antithetical qualities of flexibility carried by some to the extreme of no-rule, case-by-case approaches to decision."⁵¹ Speaking of New York choice-of-law decisions, Professor Korn said, "I cannot think of any field of law that has in modern times become as hopelessly jumbled as the present New York law of conflicts."⁵²

United States Senior District Judge Peirson Hall wrote that "[t]he law on 'choice of law' in the various states and in the federal courts is a veritable jungle, which, if the law can be found out, leads not to a 'rule of action' but to a reign of chaos."⁵³ Judge Buttler of the Oregon Court of Appeals expressed his frustration as follows: "When any court embarks on a

of Legislative Interest, 78 MICH. L. REV. 392 (1980); Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981); Hill, *supra* note 2; Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1 (1984); Korn, *supra* note 2.

45. Korn, *supra* note 2, at 779.

46. *Id.* at 780.

47. See Westbrook, *supra* note 4, for an overview of the various approaches.

48. Hill, *supra* note 2, at 1600.

49. *Id.*

50. Juenger, *supra* note 44, at 49.

51. Korn, *supra* note 2, at 962, 963.

52. *Id.* at 956.

53. *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732, 739 (C.D. Cal. 1975).

determination of the 'relevant policies of other interested states and the relative interests of those states . . .' the endeavor, in many instances, is like skeet shooting with a bow and arrow: a direct hit is likely to be a rarity, if not pure luck."⁵⁴ One reaction of practicing attorneys to the present situation was described by United States District Judge Jack Weinstein: "I seldom get a conflicts decision anymore. As soon as I mention the fact that perhaps a brief ought to be submitted, the attorneys immediately go out and settle the case."⁵⁵

If the focus is on results rather than how courts explain their choices of law, it is fair to conclude that the second effect of the choice of law revolution is parochialism. State courts that reject traditional rules end up applying forum law in most cases.⁵⁶ This application is especially true of courts which use some form of interest analysis.⁵⁷ The combination of forum preference and expansion of judicial jurisdiction has increased the opportunities for plaintiffs to shop for favorable substantive law.⁵⁸ Since large, national corporations are subject to suit in many states, they are particularly susceptible to being sued in states with law favorable to plaintiffs.⁵⁹ In addition, one commentator concluded that the systematic failure of courts using interest analysis to recognize states' corporate-protecting interests leads to application of "the law which imposes maximum corporate liability."⁶⁰

Professor Korn alleges that there is an unconscious bias in modern approaches favoring local litigants over those from other states which arises from the assumption that a state has an interest only when its law favors local domiciliaries and that each state is entitled to pursue its own interests.⁶¹ He asserts that the "astonishingly widespread and uncritical acceptance" of these assumptions provides "the home-team bias with an aura of legitimacy that threatens to erode the very principle of evenhanded administration of justice

54. *Fisher v. Huck*, 50 Or. App. 635, 624 P.2d 177, 178, *review granted*, 291 Or. 117, 631 P.2d 339, *appeal dismissed*, 291 Or. 566, 632 P.2d 1260 (1981).

55. Juenger, *supra* note 44, at 28 (quoting a letter from Judge Weinstein to Professor Juenger).

56. T. DE BOER, *supra* note 41, at 7-374, 7-375; Peterson, *supra* note 1, at 39. This is true of Missouri courts. Wani, *supra* note 29, at 429

57. See Juenger, *supra* note 44, at 21-22, 43; Kozyris, *Interest Analysis Facing Its Critics - And, Incidentally, What Should Be Done About Choice of Law for Products Liability?*, 46 OHIO ST. L.J. 569, 576 (1985); Symeonides, *supra* note 3, at 566-67.

58. See Korn, *supra* note 2, at 789; Kozyris, *supra* note 57, at 577.

59. Korn, *supra* note 2, at 798; Note, *supra* note 18, at 613.

60. Note, *supra* note 18, at 613.

61. Korn, *supra* note 2, at 792, 898-903.

itself.⁶² Professor Brilmayer, Dean Ely, and Professor Juenger believe the home state preference is constitutionally suspect.⁶³

Professor Brilmayer, one of the leading critics of interest analysis, has concluded that it has "three discernible biases: pro-resident, pro-forum law, and pro-recovery."⁶⁴ Professor Michael E. Solimine surveyed all of the published private tort choice of law cases decided by state supreme courts or the United States Courts of Appeals from January 1, 1970, to June 30, 1988. He concluded that the "empirical study of state and federal cases largely confirms the charge that modern choice of law theory is pro-plaintiff and pro-forum in orientation."⁶⁵ Professor Wani concluded after analyzing the Missouri cases that there was a pro-recovery⁶⁶ and pro-resident⁶⁷ bias and that Missouri "courts . . . apply Missouri law more often than not."⁶⁸ Scholars sympathetic with the choice of law revolution often do not deny the resulting pro-forum law, pro-resident, pro-recovery biases. Professor Berman, for example, defended forum shopping by injured plaintiffs⁶⁹ and asserted: "I suspect that Professor Sedler and other nonrevisionist defenders of interest analysis believe that the doctrine has worked because they share my political view that it is all right for judges to help out accident victims by shifting costs on to those who can easily insure."⁷⁰

The counter-revolutionary scholars agree more on what is wrong with modern approaches than on alternatives to these approaches. There are, however, some recurring themes in their work. They oppose an uncritical return to the rules and reasoning of the First Restatement.⁷¹ They advocate choice of law rules instead of *ad hoc* analysis.⁷² They typically propose rules that are narrower in scope than those in the First Restatement.⁷³ There

62. *Id.* at 899.

63. Brilmayer, *Governmental Interest Analysis*, *supra* note 44, at 459, 472-76 (1985); Ely, *supra* note 44; Juenger, *supra* note 44, at 41.

64. Brilmayer, *Myth of Legislative Intent*, *supra* note 44, at 398.

65. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49, 92 (1989).

66. Wani, *supra* note 29, at 428, 429.

67. *Id.* at 429.

68. *Id.*

69. Berman, *supra* note 2, at 531-32.

70. *Id.* at 535.

71. Hill, *supra* note 2, at 1623-25; Korn, *supra* note 2, at 961; Kozyris, *Choice of Law for Products Liability: Whither Ohio*, 48 OHIO ST. L.J. 377, 379 (1987).

72. *See, e.g.*, Hill, *supra* note 2, at 1636-46; Juenger, *supra* note 44, at 42-44; Reese, *supra* notes 31 & 32; and Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946 (1981).

73. *See, e.g.*, Hill, *supra* note 2, at 1636-46; Juenger, *supra* note 44, at 42-44; Reese, *supra* notes 31 and 32; and Rosenberg, *The Comeback of Choice-of-Law Rules*,

is less hostility to traditional rules and concepts. Professor Hill, for example, maintains that traditional choice of law practice, including traditional jurisdiction-selecting rules, often vindicates broadly conceived governmental interests and provides sensible solutions to choice of law problems.⁷⁴ Professor Korn believes that the modern approaches overestimate the harm done by traditional rules.⁷⁵ In general, the scholars in this group support incremental change in choice of law and are suspicious of radical change.

III. RECOMMENDED CHANGES IN THE MISSOURI APPROACH TO CHOICE OF LAW

The counter-revolutionary scholars have made a case for reform in those states such as Missouri which have been influenced significantly by the choice of law revolution. There is more of a consensus in their writing on what is wrong with modern approaches than on an alternative methodology. There are steps that may and should be taken, however, if courts agree that something is amiss. Although the recommendations which follow are related in various ways, they need not be adopted or rejected as a package.

A. The Rule Adopted in Kennedy v. Dixon Should Be Used as a Framework for Use in Developing and Modifying Narrower Choice-of-Law Rules Rather than as a Means of Making Choices of Law in Particular Cases

Missouri joined the revolution when it abandoned *lex loci delicti* in *Kennedy v. Dixon*.⁷⁶ If this is where the problems began, it is at least arguable that reinstating *lex loci delicti* is the place to start solving these problems. This, however, would be a mistake. One of the few things on which there is a consensus among many courts and most commentators is that the *lex loci delicti* rule is too broad and too inflexible. Indeed, there is a strong consensus that choice of law in general cannot be handled satisfactorily by a few all-embracing rules.⁷⁷ There are too many different law-fact patterns that can arise to expect that they all can be dealt with satisfactorily

81 COLUM. L. REV. 946 (1981).

74. See Hill, *supra* note 2, at 1636-46.

75. Korn, *supra* note 2, at 962.

76. 439 S.W.2d 173 (Mo. 1969) (en banc).

77. Reese, *Recent Developments in Torts, Choice of Law Thinking in the United States*, 8 COLUM. J. TRANSNAT'L L. 181, 181 (1969).

by a few broad rules. Professor Korn, one of the principal critics of the choice of law revolution, praised *Babcock v. Jackson*, perhaps the most important decision in bringing about the demise of *lex loci delicti* in this country.⁷⁸ The choice is not solely between a few broad rules such as *lex loci delicti* and the no-rule, *ad hoc* approach which prevails in states such as Missouri in tort choice of law cases.

The most significant decision that the Missouri Supreme Court made when it decided the *Kennedy* case was that *lex loci delicti* was unsatisfactory. Section 145 of the Second Restatement was an obvious choice for a replacement rule. Section 145 can continue to play a useful role in dealing with tort choice of law cases. The framers of section 145 never intended, however, that it stand alone as the sole rule for use in tort cases. Section 145 is only one of the many rules in the Second Restatement that deal with various tort choice of law issues. Although experience indicates that section 145 can be used to decide individual cases, that same experience demonstrates that section 145, standing alone, is not a satisfactory rule for deciding individual cases because it is too vague and because it incorporates a reference to factors that point in different directions.⁷⁹

Section 145 and section 6 do provide a workable framework for use in developing and evaluating relatively narrow rules for the numerous tort issues that arise. It is appropriate to consider policy and territorial factors and the antithetical considerations in section 6 before adopting, distinguishing, and modifying rules. At some point, however, this process should result in a choice from among the competing values and rules that give more guidance to lower courts and give lawyers a reasonable chance of predicting what law will be applied. Section 145, standing alone, does not serve these functions. Litigants today have to go all the way to a court of appeals or the Missouri Supreme Court before they can know with any degree of confidence what the applicable law will be in a high percentage of tort choice of law cases. Section 145 provides an approach instead of a rule.⁸⁰ It identifies the factors relevant to choice of law in torts, but it is not very helpful to trial judges called upon to choose the applicable law, appellate judges called upon to explain why a particular law was chosen, or practicing lawyers called upon to predict which law will be applied.⁸¹

Although predictability, uniformity of result, and ease in the determination of applicable law probably are less important in tort litigation

78. Korn, *supra* note 2, at 960, 961.

79. See Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 212 (1969); Korn, *supra* note 2, at 818; Note, *supra* note 18, at n.77.

80. This distinction is explained and discussed in Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972).

81. See the discussion in *id.* at 315-17, 324-25.

than in many areas of law,⁸² it is questionable whether law can fulfill society's expectations if some attempt is not made to honor these values in all areas of law.⁸³ Sir John Salmond once argued that men's respect for law is influenced strongly by their belief that "[j]ust or unjust, wise or foolish, it is the same for all."⁸⁴ The ideal of dispassionate justice is undermined by an approach to choice of law that is so amorphous that there does not appear to be much connection between the criteria for decision and the actual results. Malleable criteria and the multiplication of decision points also can increase costs and burden courts because of the extra time needed to research issues and write briefs and the increased incentive to appeal provided by uncertainty.⁸⁵ The suggestion that section 145 should be used as a reminder of the factors to consider while adopting, distinguishing, and modifying narrow rules comes from Professor Willis Reese, the Reporter for the Second Restatement. After explaining the difficulty of formulating definite rules for contracts and torts at the time the Second Restatement was drafted, Professor Reese stated "more definite and precise rules can be stated after more experience has accumulated."⁸⁶ Writing of the process of developing narrow rules he stated: "There is no easy short cut. In each case, all of the policies [of section 6] must be considered and a choice-of-law rule developed that will give effect to what are the most important policies for the precise purpose at hand."⁸⁷

The Missouri cases do not indicate clearly whether the Second Restatement should be routinely consulted on non-tort choice of law issues.⁸⁸ I think it should be routinely consulted but its specific rules should not always be adopted. Professor Hill has argued persuasively that traditional choice of law rules should be given a presumptive effect because many of them "make a good deal of sense in terms of the enlightened self-interest of the forum."⁸⁹ I believe that traditional rules should be modified, retained, or overruled after analysis of alternative rules and the arguments that can be advanced on their

82. See Reese, *supra* note 32, at 699.

83. See the discussion in Westbrook, *supra* note 4, at 449-50.

84. SALMOND, INTRODUCTION TO SCIENCE OF LEGAL MEANING 1XXXi (1917).

85. See J. FRANK, AMERICAN LAW: THE CASE FOR RADICAL REFORM 95-105 (1969).

86. Reese, *supra* note 32, at 699.

87. *Id.* at 698. See also *id.* at 681-82; Reese, *supra* note 31; and Reese, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1251, 1254 (1963).

88. Compare *State Farm Mut. Auto. Ins. Co. v. MFA Mut. Ins. Co.*, 671 S.W.2d 276 (Mo. 1984) (en banc), with *Miller v. Home Ins. Co.*, 605 S.W.2d 778, 780 (Mo. 1980) (en banc). See Wani, *supra* note 29, at 419-25.

89. Hill, *supra* note 2, at 1619.

behalf.⁹⁰ Missouri courts should insist that the parties provide them with alternative rules and arguments for their adoption. They should insist that the parties explain how the recommended rules would advance values incorporated in section 6 of the Second Restatement. The specific rules recommended by the Second Restatement in all choice of law areas should be consulted.⁹¹ Parties should be encouraged to call additional narrow rules to the courts' attention, however, because American and European scholars and courts have developed rules that are an improvement on some of the Second Restatement rules.⁹² Missouri courts should make it clear to attorneys that it never is enough to brief only general approaches to choice of law or vague criteria such as those found in section 145 and section 6. In tort cases, for example, the courts should send a message that neither *lex loci delicti* nor general language such as "most significant relationship" will be the sole criteria used in all tort choice of law cases. The question should be what choice of law rule is appropriate in a products liability case,⁹³ a guest statute case,⁹⁴ and so on. The task of developing and refining narrow rules will never be finished. Predictability, uniformity, and ease in the determination of applicable law will never be fully realized because of the nature of the problems presented in choice of law cases. The search for rules with more specific content than section 145 will produce, however, a better body of law than the amorphous *ad hoc* approach currently in use.

It might clarify my proposal to describe some of the choice of law rules that have been recommended or adopted. I am not urging adoption of these rules and I will not give the arguments that have been advanced on their behalf. They are offered merely to illustrate some of the possibilities. Professor Korn has discussed several alternatives in the area of tort choice of law. When tort loss-distribution rules are in conflict, he argued for domiciliary law where plaintiff and defendant share a common domicile,⁹⁵ and locus law in split-domicile cases where the injury resulted from a single

90. See Easley, *supra* note 3, at 409; Peterson, *Particularism in the Conflict of Laws*, 10 HOFSTRA L. REV. 973, 995 (1982).

91. See Hill, *supra* note 2, at 1636.

92. For examples of rules recommended by courts and scholars see *infra* text accompanying notes 95-104. For an article recommending that the Kansas courts insist upon lawyers apprising them of alternative rules and their rationale, see Easley, *supra* note 3.

93. For a discussion of proposed choice of law rules in products liability cases, see Kozyris, *supra* note 71, and Kozyris, *supra* note 57.

94. For a discussion of rules in guest statute cases, see *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

95. Korn, *supra* note 2, at 800.

encounter between strangers and each conflicting rule favors the local party.⁹⁶ He said that a respectable argument can be made for "an across-the-board *lex locus* rule for all split-domicile true conflicts,"⁹⁷ although he did not end up endorsing such a rule. Professor Korn pointed out that in automobile accident cases, application of the law of the state where the automobile is insured would promote the reliance interests of the insured and insurer in purchasing protection and calculating premiums.⁹⁸

Dutch Professor and Judge Ted M. de Boer argued for application of the compensation standards of plaintiff's home state in tort cases.⁹⁹ The New York Court of Appeals developed a set of rules for guest-statute conflicts in *Neumeier v. Kuehner*.¹⁰⁰ Professor Kozyris recommended that products liability cases should be governed by the law of the place of the intended use of the product.¹⁰¹ Professor de Boer gave examples of European choice of law rules in a book in which he concluded that the policy oriented approach of American courts "has too many drawbacks to be adopted in Europe as a feasible methodological alternative."¹⁰² He pointed out, for example, that the EEOC Convention provides that "absent a choice of law by the parties and provided that certain conditions are met, consumer transactions will be governed by the law of the consumer's habitual residence."¹⁰³ In employment contract cases, the Convention provides for application of the law of the country in which an employee "habitually carries out his work" when the parties have not agreed upon the applicable law.¹⁰⁴

B. The Use of Interest Analysis Should Be Decisively Rejected

It was pointed out earlier that Missouri Courts of Appeals have sometimes incorporated interest analysis into section 145 of the Second Restatement.¹⁰⁵ These courts sought help in deciding which state had the most significant relationship by considering the governmental interests of contending states.¹⁰⁶ Interest analysis seeks a case by case determination of

96. *Id.* at 800, 801.

97. *Id.* at 967.

98. *Id.* at 882, 883.

99. T. DE BOER, *supra* note 41, at 1-73.

100. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

101. Kozyris, *supra* note 71, at 383.

102. T. DE BOER, *supra* note 41, at 500.

103. *Id.* at 1-46.

104. *Id.*

105. See cases cited in *supra* note 29.

106. See, *supra*, text accompanying notes 27-30. For cases from other

the spatial reach of a substantive rule by identifying the policy behind the rule and determining who that policy was designed to cover.¹⁰⁷ It assumes states intend that their compensatory and protective policies should benefit only their residents.¹⁰⁸ I submit that the experience of Missouri and other states with interest analysis indicates that the Missouri Supreme Court should send a clear message to the lower courts that interest analysis is not an acceptable means of choosing the applicable law, either alone or in combination with provisions of the Second Restatement. Brainerd Currie wrote brilliantly about choice of law, but in practice his approach has led to confusion in judicial opinions and parochialism in the results reached by courts. Interest analysis has failed in practice in part because it is difficult if not impossible to identify the policies behind legal rules in a consistent, predictable manner. Brainerd Currie said this should be done by the ordinary processes of statutory construction and interpretation. This sounds easy, but an examination of the decisions of almost any state which has resorted to interest analysis shows that it has turned out to be frustratingly difficult. One of the best known illustrations of this is the series of cases in which the New York Court of Appeals tried to determine the policy behind guest statutes. In *Babcock v. Jackson*,¹⁰⁹ the court said the policy was preventing fraud against insurance companies. In *Dym v. Gordon*,¹¹⁰ the court said these statutes are designed to promote anti-fraud and anti-ingrate policies and to give priority of payment to injured non-guests. In *Tooker v. Lopez*,¹¹¹ the court repudiated the notion that one of the guest statute policies is priority for the non-guest. In *Neumier v. Kuehner*, the court said further research "has revealed the distinct possibility that . . . perhaps the only purpose . . . was to protect owners and drivers against suits by ungrateful guests."¹¹² One scholar's research led him to conclude that the Ontario guest statute's only purpose was to protect insurance companies.¹¹³

jurisdictions which have invoked the Second Restatement to justify using interest analysis, see Note, *supra* note 18, at n.77. For criticism of this practice, see Reppy, *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645, 656-66 (1983).

107. See Hill, *supra* note 2, at 1590-92.

108. Note, *supra* note 18, at 600.

109. 12 N.Y.2d 473, 482-83, 191 N.E.2d 279, 284, 240 N.Y.S.2d 743, 750 (1963).

110. 16 N.Y.2d 120, 124, 209 N.E. 2d 792, 794, 262 N.Y.S.2d 463, 466 (1965).

111. 24 N.Y.2d 569, 576, 249 N.E.2d 394, 398, 301 N.Y.S.2d 519, 525 (1969).

112. 31 N.Y.2d 121, 124, 286 N.E.2d 454, 455, 335 N.Y.S.2d 64, 67 (1972).

113. Baade, *The Case of the Disinterested Two States: Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 150, 152-54 (1973).

Why is it so difficult to identify policies? Many legal rules have more than one purpose. In part, this results from the fact that statutes and court decisions usually are a product of compromise.¹¹⁴ Interest analysis does not provide a way to choose between these policies.¹¹⁵ Moreover, each legal rule exists in a body of related rules which incorporate policies which may conflict with the policy which underlies the rule in question.¹¹⁶ Another source of difficulty is the absence in many states of committee reports and legislative debates. Even if information is available, it may show that legislators voted for a bill for a variety of reasons.

Some scholars assert that neither courts nor interest analysis scholars are as interested in the real policies underlying statutes and common law decisions as in using the play in the joints of the system to reach a result they like. Professor de Boer concluded that "many of the decisions . . . give the impression of being geared to a 'just result' irrespective of the policies and interests involved."¹¹⁷ In Professor Juenger's view, reliance on policies and interests permits judges "to reach any conclusion they choose."¹¹⁸ Professor Brilmayer maintains that "all of this talk about willingness to defer to state policy decisions is pure bunk"¹¹⁹ and that the goal of interest analysis scholars is to implement "the policies of a select group of choice of law scholars, not the policy choices of those legal institutions empowered to adopt and interpret state law."¹²⁰

Interest analysis is also suspect because it promotes the wrong goals. The goal of a choice of law approach should be achieving conflicts justice between litigants¹²¹ and mitigating the hardships created by the legal diversity of our federal system,¹²² not promoting governmental interests. These goals can be promoted best by an approach that respects simplicity, multistate harmony and predictability. Professor Hill asserted that interest analysis ignores the interests of states as a member of the community of states.¹²³ Professor Juenger argued that the only real governmental interests

114. Juenger, *supra* note 44, at 33.

115. *Id.* at 33, 34. For a contrary view, see Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 301 (1990).

116. W. REESE, M. ROSENBERG & P. HAY, *supra* note 32, at 548.

117. T. DE BOER, *supra* note 41, at 9-458.

118. Juenger, *supra* note 44, at 49.

119. Brilmayer, *supra* note 44, at 469.

120. *Id.* at 472.

121. See Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1285, 1301, 1306, 1311, 1318, 1319 (1989); Korn, *supra* note 2, at 965, 966.

122. See Westbrook, *supra* note 4, at 453-55.

123. Hill, *supra* note 2, at 1597.

are fiscal and proprietary interests such as revenue and water rights.¹²⁴ Professor Brilmayer pointed out that when state legislatures adopt statutes dealing with choice of law issues, they are motivated by a desire to achieve predictability and multistate harmony, and that these statutes give no significant support for the interest analysts' premise that "compensatory and protective policies are designed to benefit only forum residents."¹²⁵ If the emphasis is placed on conflicts justice between litigants, more attention should be given to whether defendants have affiliated themselves with a state in a way that justifies or makes it fair to apply that state's law to them.¹²⁶ If the emphasis is placed on mitigating the hardships created by the legal diversity of our federal system, more attention should be given to predictability and the delays and costs associated with legal uncertainty.¹²⁷ Interest analysis ignores these considerations.

*C. Missouri Courts Should Make a Conscious
Choice Between Both Content Neutral and Result
Selective Choice of Law Rules*

Choices of law can be made by engaging in *ad hoc* analysis or by relying upon rules. Choice of law rules can be content neutral or result selective.¹²⁸ Content neutral choice of law rules, also described as jurisdiction selecting rules, choose the applicable law without regard to the substantive content of the chosen rule. Result selective choice of law rules choose the applicable law through conscious consideration of the end result that will be achieved by application of a particular rule. *Lex loci delicti* is a content neutral choice of law rule; the better rule consideration urged by Professor Leflar is result selective. Use of *lex loci delicti* enables a court to choose the applicable tort rule without considering the content of the competing rules. If the choice is made by deciding which of the competing rules is better, it will be necessary

124. Juenger, *Governmental Interests - Real and Spurious - in Multistate Disputes*, 21 U.C. DAVIS L. REV. 515, 519-28 (1988). Professor Sedler's argument against this position can be found in Sedler, *Professor Juenger's Challenge to the Interest Analysis Approach to Choice-of-Law: An Appreciation and A Response*, 23 U.C. DAVIS L. REV. 865, 875-80 (1990).

125. Brilmayer, *supra* note 64, at 424.

126. See Brilmayer, *supra* note 121, at 1289, 1306, 1318, 1319; Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1245 (1987); Korn, *supra* note 2, at 959.

127. See Westbrook, *supra* note 4, at 409 for discussion of some of the problems associated with legal uncertainty.

128. See Sedler, *supra* note 124, at 867-75.

to compare their substantive merits and the court will simultaneously select a result and the law that achieves that result.

Jurisdiction selecting rules have a long history and are still widely used.¹²⁹ They have been under attack by scholars for years,¹³⁰ but counterrevolutionary scholars have begun making the case for their utility.¹³¹ Jurisdiction selecting rules, while subject to manipulation¹³² like all legal rules, promote predictability more effectively and are easier to use than an approach which relies on policy analysis. Jurisdiction selecting rules need not be based upon abstract concepts like vested rights. Professor de Boer, for example, recommends a method of jurisdiction selection which he calls functional allocation.¹³³ Under this approach, the choice of law rule is formulated on the basis of an *a priori* identification of the jurisdiction thought to be most concerned with the issue.¹³⁴ For example, since legislation aimed at protecting consumers is presumably enacted to benefit a state's habitual residents, an appropriate choice of law rule would apply the law of the consumer's habitual residence to disputes involving consumer transactions.¹³⁵

The law of the habitual residence, however, is chosen irregardless of whether it helps or hurts the resident in the particular case. It is thus a jurisdiction selecting rule because no consideration is given to the content of the rule chosen or which party the rule favors.

Result selecting rules can indicate rather specifically in advance which result is favored or they can impose on courts an obligation to select a preferred result case by case through application of very general criteria. An example of the first kind of result selective rule would be one calling for the "more fully compensating tort law."¹³⁶ Examples of the second kind would be Professor Leflar's better rule consideration and Professor Juenger's "most suitable rule of decision" rule for mass disasters.¹³⁷ If a court were called upon to decide between the law of a state with ceilings on the damages that

129. F. JUENGER, *GENERAL COURSE ON PRIVATE INTERNATIONAL LAW* 163 (1983).

130. See, e.g., Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

131. See T. DE BOER, *supra* note 41, at 9-495; Hill, *supra* note 2, at 1636-46; and Korn, *supra* note 2, at 962.

132. See Westbrook, *supra* note 4, at 418.

133. T. DE BOER, *supra* note 41, at 1-43.

134. *Id.* at 9-494, 9-495.

135. *Id.* at 1-46.

136. Morrison, *Death of Conflicts*, 29 VILL. L. REV. 313, 338 (1983).

137. Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105, 126.

can be recovered from health care providers and the law of a state with no ceilings, the rule requiring application of the "more fully compensating tort law" would be relatively easy to apply. The parties could predict with some confidence before trial which law would be applied. If Leflar's better rule consideration were used, however, the trial and appellate courts would have to consider the competing socio-economic-legal arguments and the parties would not know the governing law with any confidence until after completion of an appeal.

Missouri courts do not have to decide in advance whether they prefer content neutral or result selective choice of law rules. In adopting and modifying choice of law rules to deal with various areas of law, however, Missouri courts should consider in each instance the arguments for both kinds of rules. The Second Restatement includes both kinds of choice of law rules. For example, section 223 recommends application of situs law when the question is the validity of a conveyance of interest in land. This is a content neutral, jurisdiction selecting rule.¹³⁸ When the question is which usury statute applies, section 203 of the Second Restatement recommends a carefully hedged preference for the law that would uphold the contract in the face of a usury charge.¹³⁹ This is a result selective rule of the first kind described above. Result selective rules such as section 203 are most apt to be used in areas of the law in which there is a consensus among states on basic policy but disagreement over details.

Professor Leflar's better rule consideration is not the only available approach to case by case result selection, but the fact that it is well known and has been used by some courts¹⁴⁰ makes it the leading candidate for use by Missouri courts if they should decide to try case by case result selection. Professor Leflar's writings do not advocate sole reliance upon the better rule consideration. It is one of several considerations. In practice, however, the better rule consideration tends to crowd out the other considerations and become decisive. Thus, it seems fair to use Professor Leflar's approach as an example of case by case result selection. It is harder to dismiss case by case result selection than it is to dismiss interest analysis. If one assumes as I do

138. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 (1986).

139. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 203 (1986) reads as follows:

§ 203. Usury

The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188.

140. See cases cited in Hill, *supra* note 2, at 1617-19.

that interest analysis as practiced by courts is often simply disguised case by case result selection, use of the better rule consideration at least has the virtue of frankness. Moreover, since courts in wholly domestic cases quite properly consider the substantive merits of legal rules in deciding whether to adopt, extend or limit the rules, there is an intuitive appeal in doing so in choice of law cases.

Why then have some commentators criticized the better rule approach?¹⁴¹ The objections tend to be based on different conceptions of the role of courts and the differences between wholly domestic and choice of law cases. Those who stress the importance of uniform application of the law, predictability, and ease in the determination of the law, tend to react negatively to the subjectivity and variability implicit in a better rule approach.¹⁴² Professor de Boer, for example, said, "If it were to be used as an overriding choice of law criterion, it would become a license for undisguised *Kadi-Justiz*, and that is why it should be rejected out of hand."¹⁴³ Those who question case by case result selection may wonder how judges can eschew disinterestedness in choice of law without also accepting the notion of preferring favored classes of litigants whenever they appear in court.¹⁴⁴ The critics of case by case result selection also tend to believe that the role of judges in promoting various substantive policies and goals should be more circumscribed in choice of law cases than in wholly domestic cases. It has been argued that it is unfair to further favored policies by applying the adverse laws of a state to a party who has not in some way associated herself with the state.¹⁴⁵ Professor Brilmayer asserted:

In the choice of law context the purported justifications for a system of adjudication that maximizes the total good to society are least persuasive. . . . Whatever the merits of adjudicative efforts to further social policy, one cannot simply take for granted the fairness of using the litigant in a multistate case as a means to that end.¹⁴⁶

141. For examples of critical commentary, see T. DE BOER, *supra* note 41, at 5-343, 5-347, 9-489; Korn, *supra* note 2, at 958-960; Westbrook, *supra* note 4, at 460-462.

142. Professor Juenger, however, believes that result selectivity could lead to greater consistency. Juenger, *supra* note 129, at 287-88. This assumption is challenged in Sedler, *supra* note 124, at 895-902 (1990).

143. T. DE BOER, *supra* note 41, at 9-489.

144. See Dane, *supra* note 126, at 1244.

145. See Korn, *supra* note 2, at 966.

146. Brilmayer, *supra* note 121, at 1293, 1294.

IV. CONCLUSION

This Article recommends the development wherever possible of narrow choice of law rules through examination of the considerations in section 6 of the Second Restatement of Conflicts and careful comparison of existing precedent, the rules contained in the Second Restatement, and rules developed by scholars and courts from other states and nations.¹⁴⁷ It urges Missouri courts to refrain from using interest analysis as a way of deciding which state has the most significant relationship to an issue in a case.

I believe changes are needed because Missouri choice of law decisions in recent years have neglected the values of disinterestedness, predictability, uniformity of result, and ease in the determination of applicable law. Sections 145 and 6 of the Second Restatement, adopted by the Missouri Supreme Court in *Kennedy v. Dixon*,¹⁴⁸ can be helpful in developing more specific rules, but they do not provide much guidance in dealing with particular cases. The attempt to use interest analysis in applying section 145 has made the situation worse. A judge interested in evaluating current Missouri precedent in this area should read *Hicks v. Graves Truck Lines*,¹⁴⁹ *Carver v. Schafer*,¹⁵⁰ and *Griggs v. Riley*,¹⁵¹ and ask whether a reading of these opinions would assist or impede an attorney or trial judge in deciding upon the applicable law in a tort case. I do not fault the authors of those opinions; I fault some of the scholarly literature that they relied upon. The judges involved in those cases looked around for help in dealing with some of the most difficult problems in the law and, in my opinion, they received bad advice.

Missouri choice of law decisions since *Kennedy v. Dixon*¹⁵² have shown a pro-forum law and pro-plaintiff bias. A case can be made for these preferences, but Missouri courts should at least be forthright about their preferences if this is going to be a deliberate policy. Explicit adoption of result selective choice of law rules would accomplish this. Before adopting explicit plaintiff-favoring choice of law rules,¹⁵³ however, Missouri judges should ask themselves whether an across-the-board preference is appropriate

147. Compare the recommendation directed to Kansas courts in *Easley*, *supra* note 3, at 409, 452.

148. 439 S.W.2d 173, 184 (Mo. 1969) (en banc).

149. 707 S.W. 2d 439 (Mo. Ct. App. 1986).

150. 647 S.W. 2d 570 (Mo. Ct. App. 1983).

151. 489 S.W. 2d 469 (Mo. Ct. App. 1972).

152. Note, *supra* note 18, at 613-15.

153. For a discussion of how this could be accomplished, see R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 284-85, 360 (3d ed. 1986).

in a time when there seems to be a trend toward limiting liability and damages.¹⁵⁴

The Missouri courts should realize that adoption of the course of action recommended in this Article will not eliminate the uncertainty and frustration experienced by lawyers and judges when they deal with choice of law. While there is room for real improvement, no scholar or judge will ever develop an approach that will reconcile all the irreconcilables inherent in this field.¹⁵⁵ Reflecting on his study of policy oriented choice of law, Professor de Boer concluded as follows:

[F]or a long time I kept secretly hoping that the philosopher's stone of conflicts methodology would be hidden somewhere in the multitude of policy-oriented cases. Gradually it dawned on me that I would never find it, and that no one ever will. It is in the nature of conflicts law that its solutions will always be found wanting.¹⁵⁶

Missouri judges should also realize that rejection of interest analysis and an effort to develop rules that place more emphasis on uniformity, predictability and ease of determination will result in criticism from some conflicts scholars. If that should happen, I would urge them to accept such criticisms with equanimity and to redouble their efforts to mitigate as best they can the problems created for business persons, consumers, injured persons, practicing attorneys, trial judges, and others by the legal diversity of our federal system. Give these persons guidance where possible and ask whether it is fair to subject a person or entity to a particular state's laws instead of asking whether application of those laws will further that state's domestic policies. This approach will not solve all the problems in this field. It at least pursues the right goals.

154. Priest, *The Current Insurance Crises and Modern Tort Law*, 96 YALE L.J. 1521, 1587-88 and nn.257-62 (1987).

155. For a discussion of why this is the case, see Westbrook, *supra* note 4, at 440-47.

156. DE BOER, *supra* note 41, at 9-498.

