Simon Says: Time for a New Approach to Choice-of-Law Questions in Indiana

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INTRODUCTION

Since the Indiana Supreme Court abandoned its traditional choice-of-law approach in the landmark case, *Hubbard Manufacturing Co. v. Greeson*,[1] the court has developed a replacement choice-of-law test that straddles the fence between traditional and modern doctrine.[2] Prior to *Hubbard*, Indiana adhered to the traditional rule of lex loci delicti[3] in resolving choice-of-law questions in tort disputes.[4] In *Hubbard*, the Indiana Supreme Court attempted to break away from the anomalous results that were sometimes generated by rigid application of the traditional rule,[5] but the court stopped short of fully adopting the *Restatement (Second) of Conflicts* ("*Restatement (Second)*") or the technique of governmental interest analysis,[6] which constitutes a vital

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1. 515 N.E.2d 1071 (Ind. 1987).

2. *See generally* David A. Moore, Note, Hubbard v. Greeson*: Indiana's Misapplication of the Tort Sections of the Restatement (Second) of Conflict of Laws*, 79 IND. L.J. 533 (2004) (discussing inconsistencies in the application of the first prong of the *Hubbard* test by lower courts and uncertainty over the extent to which either prong of the *Hubbard* test allows for use of the *Restatement (Second)* methodology and governmental interest / policy analysis). Moore describes the *Hubbard* test as one that "start[s] with a tremendously strong territorial presumption that falls back on a grouping of contacts approach when the place of the tort is first deemed insignificant." *Id.* at 550.

3. Lex loci delicti results in application of "[t]he law of the place where the tort or other wrong was committed." BLACK'S LAW DICTIONARY 930 (8th ed. 2004). The *Restatement (First) of Conflict of Laws* ("*Restatement (First)*") defined the place of the wrong as "the state where the last event necessary to make an actor liable for an alleged tort takes place." RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934). Practically, this almost always meant the law of the place of the plaintiff's injury, because the injury would constitute the last event necessary to subject the defendant to liability. WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 182 (3d ed. 2002).

4. *See Hubbard*, 515 N.E.2d at 1073.

5. *See id.*

6. Symeon C. Symeonides, *Choice of Law in the American Courts in 1988*, 37 AM. J. COMP. L. 457, 458 (1989). Moore points out that, in crafting its choice-of-law approach, the Indiana Supreme Court ignored Section 6 of the *Restatement (Second)*, which includes, among its list of central choice-of-law principles, consideration of the policy objectives of interested states. Moore, *supra* note 2, at 550. Professor Symeonides agrees that the *Hubbard* "significant-contacts approach . . . calls for a consideration of the factual contacts alone, rather than of a set of policies in light of the factual contacts as does the *Restatement (Second)*." Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*,

component of the *Restatement (Second)* and most other modern choice-of-law approaches. While the *Hubbard* court favorably cited one section of the *Restatement (Second)* and employed similar language in its decision,[7] the court ultimately formulated a new choice-of-law test that has been characterized as a "significant-contacts approach."[8] Subsequent Indiana Supreme Court and lower court decisions left open questions of the extent to which Indiana had adopted the *Restatement (Second)*, if at all,[9] and whether the Indiana approach incorporated governmental interest analysis as a tool in resolving choice-of-law problems.[10]

In *Simon v. United States*,[11] the Indiana Supreme Court seized the opportunity to answer these questions, emphatically rejecting both the general analytical approach of the *Restatement (Second)* and the technique of governmental interest analysis.[12] The court also rejected the use of dépeçage,[13] declaring that under Indiana choice-of-law doctrine, a single state's law should govern all substantive issues for a given claim.[14] The court ultimately viewed the gravamen of the case as an issue of conduct regulation, and therefore concluded that the substantive law of Indiana—the location of the defendant's negligent conduct—would govern all issues in the dispute.[15]

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56 MD. L. REV. 1248, 1272 n.159 (1997). Modern choice-of-law approaches that focus on or incorporate governmental interest analysis include the Currie approach, comparative impairment, the *Restatement (Second)*, and Professor Robert Leflar's choice-influencing considerations. *See* RICHMAN & REYNOLDS, *supra* note 3, at 254–57.

7. The court cited section 145(2) of the *Restatement (Second)* for its list of state contacts that should be evaluated in a tort choice-of-law dispute. *Hubbard*, 515 N.E.2d at 1073–74. The court also held that "[t]hese factors should be evaluated according to their relative importance to the particular issues being litigated," *id.* at 1074, a test with language similar to the directive found in section 145 that "[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue," RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

8. *See supra* note 6 (discussing Professor Symeonides's characterization of the Indiana approach).

9. *See* Allen v. Great Am. Reserve Ins. Co., 766 N.E.2d 1157 (Ind. 2002) (citing sections 145, 148, 174, and 291 of the *Restatement (Second)* in resolving choice-of-law questions); Gollnick v. Gollnick, 517 N.E.2d 1257, 1259 (Ind. Ct. App. 1988) (citing section 169(2) of the *Restatement (Second)* in support of the decision that the state law of the parties' domicile should govern in matters of intra-family immunity), *aff'd*, 539 N.E.2d 3, 4 (Ind. 1989) (stating that the court of appeals had "merely applied California law . . . in accordance with the choice of law rule announced in [*Hubbard*].").

10. In *Gollnick*, the First District Court of Appeals arguably engaged in interest analysis in its analysis of choice-of-law and intra-family immunity, concluding that California had a "predominant interest" in regulating the family relationship of its citizens. *See* 517 N.E.2d at 1259; Moore, *supra* note 2, at 552 ("The court's discussion of [other] cases bordered on what [could be described] as governmental interest analysis, constantly concerning itself with California's *interest* in governing its family relationships." (emphasis in original)).

11. 805 N.E.2d 798 (Ind. 2004).

12. *See id.* at 803–04.

13. Dépeçage is defined as "[a] court's application of different state laws to different issues in a legal dispute; choice of law on an issue-by-issue basis." BLACK'S LAW DICTIONARY 469–70 (8th ed. 2004).

14. *Simon*, 805 N.E.2d at 802–03.

15. *Id.* at 806–07.

This Note argues that in *Simon*, the Indiana Supreme Court missed an opportunity to clarify Indiana choice-of-law doctrine; instead of providing clarity, the decision raises puzzling questions for those using the *Hubbard* test to evaluate the relative significance of state contacts to a dispute. Although the court emphatically rejected the use of governmental interest analysis, this technique was central to the development of the so-called "conduct-regulating exception" that the court relied upon to resolve *Simon*. Indeed, the court's wholesale rejection of governmental interest analysis led the court to misapply this "conduct-regulating exception"[16] to determine that Indiana substantive law would govern all issues in the dispute.[17] Further, absent acceptance of governmental interest analysis, it is difficult to reconcile *Simon* with the court's choice-of-law approach in the context of intra-family immunity provisions. Ultimately, the *Simon* decision exposes the absence of a coherent analytical framework for determining which state contacts are most significant under the *Hubbard* test.

Part I of this Note provides an overview of governmental interest analysis, dépeçage, and the loss-allocating/conduct-regulating distinction in modern choice-of-law doctrine. This Part begins by exploring traditional choice-of-law doctrine, and then traces the transition to modern approaches that incorporate governmental interest analysis and dépeçage. Part I concludes by examining the loss-allocating/conduct-regulating distinction in modern choice-of-law approaches. Part II begins by discussing the *Hubbard* decision, in which the Indiana Supreme Court first articulated its modern choice-of-law test. Part II then discusses the Indiana Supreme Court's flirtation with governmental interest analysis in the context of intra-family immunity. Part II concludes by criticizing the *Simon* decision for rejecting some of the central tenets of modern choice-of-law doctrine without offering a viable alternative analytical framework.

I. GOVERNMENTAL INTEREST ANALYSIS, DÉPEÇAGE, AND THE LOSS-ALLOCATING/CONDUCT-REGULATING DISTINCTION IN TORT CASES

Governmental interest analysis, dépeçage, and the loss-allocating/conduct-regnlating distinction are interrelated concepts in modern choice-of-law doctrine; this Part explores these three concepts. This section begins with a brief introduction to traditional choice-of-law doctrine and the transition to modern approaches incorporating governmental interest analysis.

A. From Lex Loci Delicti to Modern Doctrine: A Brief History

Under the traditional doctrine of lex loci delicti, a doctrine embraced by Indiana until the *Hubbard* decision, courts encountering choice-of-law questions in tort disputes mechanically applied the law of the "place of the wrong," which for practical purposes meant the place where the plaintiff suffered her injury.[18] This meant that a plaintiff's ability to recover was governed by the law in place at the site of her injury,

16. *Id.* at 807 & n.12 (stating that "[c]ourts as a practical matter recognize a 'conduct-regulating exception' to the normal interest-based choice-of-law methods" and applying that rule to reach the application of the substantive law of Indiana, the site of the negligent conduct).

17. *Id.*

18. RICHMAN & REYNOLDS, *supra* note 3, at 182.

without regard for the laws that may have been in place in other states with connections to the dispute.[19] For instance, even where two parties were domiciled in the same state, and where the parties' home state provided a right of recovery for the plaintiff, if the state where the injury occurred did not provide such a right of recovery, then the plaintiff had no cause of action.[20]

The theoretical grounding for the traditional rule was embodied in two principles: territoriality and vested rights.[21] The principle of territoriality confined the operation of a sovereign's law to its borders and prohibited giving laws extraterritorial effect.[22] Under vested rights theory, legal rights were thought to "vest" in individuals according to the law in place when a given event, such as an injury in a tort case, occurred.[23] Vested rights theory accommodated the limitations of territoriality by allowing courts of the forum state to avoid giving extraterritorial effect to another state's law; vested rights theory required only that the forum recognize and enforce legal rights which had "vested" elsewhere.[24] As Justice Holmes explained: "The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation . . . which, like other obligations, follows the person, and may be enforced wherever the person may be found."[25]

While the vested rights approach, enshrined in the *Restatement (First)*,[26] offered "certainty, ease of application and predictability" of results,[27] courts and commentators criticized it as a formalistic theory that often resulted in the application of the law of a place that had only a fortuitous or attenuated connection to the events giving rise to the dispute.[28] Critics focused on the doctrine's failure to consider the policy objectives behind the laws of other jurisdictions with connections to a given dispute.[29] Failure to consider these policy interests could lead to one of the principal vices of the *Restatement (First)*: the anomalous result of applying "the law of a state with no interest in the resolution of the dispute."[30] Professor Symeon Symeonides describes the flaws of the *Restatement (First)* as follows:

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19. *See id.*

20. *See, e.g.*, Ala. Great So. R.R. Co. v. Carroll, 11 So. 803 (Ala. 1892) (applying the law of the state of the injury, Mississippi, to deny the plaintiff's claim against the defendant-employer/railroad because Mississippi adhered to the common law fellow-servant rule, even though the parties were both Alabama residents and Alabama had abrogated the common law rule).

21. EUGENE F. SCOLES, PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 21 (4th ed. 2004).

22. *See* RICHMAN & REYNOLDS, *supra* note 3, at 178.

23. *Id.*

24. *Id.*

25. Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126 (1904).

26. RICHMAN & REYNOLDS, *supra* note 3, at 180.

27. Babcock v. Jackson, 191 N.E.2d 279, 281 (N.Y. 1963).

28. *See id.*

29. *Id.* As the New York Court of Appeals pointed out, the traditional approach "ignores the interest which jurisdictions other than that where the tort occurred may have in the resolution of particular issues. It is for this very reason that . . . there has in recent years been increasing criticism of the traditional rule by commentators and a judicial trend towards its abandonment or modification." *Id.* (footnote omitted).

30. RICHMAN & REYNOLDS, *supra* note 3, at 200.

> [T]hese rules were also rigid and mechanical. They completely sacrificed flexibility in the altar of certainty and ignored the lessons of experience in the pursuit of an ill-conceived theoretical purity. They chose not among laws, but among states, based solely on a single, predesignated contact applied almost automatically, regardless of its content, its underlying policy, or the substantive quality of the solution it would bring to the case at hand.[31]

Modern choice-of-law approaches, such as the "most significant relationship" test employed by the New York Court of Appeals in the landmark case, *Babcock v. Jackson*,[32] sought to address the shortcomings of traditional doctrine by considering the policy objectives behind competing laws.[33] In *Babcock*, three New York residents took a weekend trip together to Ontario and were involved in a one-car auto accident that seriously injured one of the passengers.[34] Upon return to New York, the passenger brought suit against the driver, alleging negligence in his operation of the car.[35] At the time of the accident, Ontario had a guest statute in place that would have prohibited the suit, but New York had no such statute.[36] Under traditional choice-of-law doctrine, the place of the injury would govern the plaintiff's right of recovery, and therefore, application of Ontario's guest statute would preclude recovery.[37]

The court posed the question: "Shall the law of the place of the tort *invariably* govern the availability of relief for the tort or shall the applicable choice of law rule also reflect a consideration of other factors which are relevant to the purposes served by the enforcement or denial of the remedy?"[38] The court answered this question by deciding to apply the law of the place with the greatest *interest* in having its law applied to the precise legal issue involved.[39] The court proceeded to identify the policy interests behind each state's law, determining that Ontario sought to prevent fraudulent claims against insurance carriers while New York sought to ensure compensation for guests who were injured through the negligence of drivers.[40] The court concluded that Ontario's policy interest was not implicated, because a New York insurer, not an Ontario insurer, was involved in the case.[41] Conversely, New York's interest in

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31. Symeon C. Symeonides, *The American Choice-of-Law Revolution in the Courts: Today and Tomorrow*, *in* 298 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 11, 34 (2002).

32. 191 N.E.2d 279 (N.Y. 1963).

33. *Id.* at 283–84. "Justice, fairness and 'the best practical result' may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." *Id.* at 283 (internal citations omitted). The court eventually concluded that because New York had a greater interest than Ontario, New York law should apply. *Id.* at 284.

34. *Id.* at 280.

35. *Id.*

36. *Id.*

37. *See id.* at 280–81.

38. *Id.* at 280–81 (emphasis in original) (footnote omitted).

39. *Id.* at 283.

40. *Id.* at 284.

41. *Id.* ("Whether New York defendants are imposed upon or their insurers defrauded by a New York plaintiff is scarcely a valid legislative concern of Ontario simply because the accident occurred there, any more so than if the accident had happened in some other jurisdiction.").

compensating guests was directly implicated by the New York citizenship of the plaintiff, and New York had a predominant interest in regulating the guest-host relationship where both parties were citizens of that state.[42] Accordingly, New York law applied with respect to this issue, rendering the Ontario guest statute inapplicable.[43]

As demonstrated in *Babcock*, courts could avoid the anomalous results of traditional doctrine by determining the *significance* of each state's contacts with a dispute through consideration of the underlying policy objectives of each state's law and the particular facts of the dispute.[44] The New York Court of Appeals elaborated on this process in *Dym v. Gordon*,[45] offering the following three-step methodology for approaching choice-of-law questions: first, isolate the precise legal issue which results in a conflict among the laws of competing jurisdictions;[46] next, with regard to this issue, identify the policy objectives that each law seeks to achieve; and finally, determine each jurisdiction's interest by considering that jurisdiction's contacts with the dispute in light of its policy objectives, ultimately deciding which state has a "superior connection" with the dispute.[47]

The approach described above is similar to the "governmental interest analysis" methodology developed by the late, influential scholar Professor Brainerd Currie.[48] Currie's methodology, like the *Babcock/Dym* approach, is based on the idea that laws exist in order to further underlying policy objectives. On this view, mechanical choice-of-law approaches are deficient because they select law without any consideration of whether and how that application will further those underlying objectives.[49]

Currie's governmental interest analysis methodology departs somewhat from the three-step process described above where a case involves a "true conflict"—a case in which more than one jurisdiction is interested in the application of its law. Where such a "true conflict" exists, Currie's approach results in the automatic application of forum law, rather than a comparison of state interests to determine which state has the superior interest.[50] However, the Currie approach is identical in the determination of whether a given state is interested in the application of its law—a jurisdiction is interested in the application of its law only if that law's underlying policy objectives will be served by application of the law to the particular facts of the case.[51]

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42. *Id.* at 284–85. Because only New York was interested in the application of its law in this case, it is a perfect illustration of a *false conflict*. False conflicts arise when only one jurisdiction is truly interested in the application of its law to the legal issue presented. RICHMAN & REYNOLDS, *supra* note 3, at 240–42.

43. *See Babcock*, 191 N.E.2d at 285.

44. *Id.* at 281.

45. 209 N.E.2d 792 (N.Y. 1965).

46. This step requires a difference in the laws of the competing jurisdictions; if all states with contacts to a given dispute have the same law with regard to a particular issue, then there is no conflict with regard to that issue.

47. *Dym*, 209 N.E.2d at 794.

48. *See* RICHMAN & REYNOLDS, *supra* note 3, at 239.

49. *Id.* at 239–40.

50. *Id.* at 247.

51. Currie describes a state interest as "'the product of (a) a governmental policy and (b) the concurrent existence of an appropriate relationship between the state having the policy and the

While the term "governmental interest analysis" is often associated specifically with Currie's methodology, including his method of resolving true conflicts,[52] this Note will use the term "governmental interest analysis" more broadly. For purposes of this Note, governmental interest analysis refers to a choice-of-law process that incorporates consideration of the policy objectives behind competing laws and asks whether those policy objectives are implicated by the facts of a given dispute.

Modern choice-of-law approaches, such as the *Restatement (Second)* and the Leflar approach, incorporate some form of governmental interest analysis.[53] These approaches differ from the Currie approach in their methods for resolving true conflicts because they include consideration of additional factors, such as the justified expectations of the parties to the dispute.[54] In addition, these approaches may seek to answer a question broader than that of which jurisdiction is *most interested* in the application of its law. For example, the *Restatement (Second)* attempts to identify the state with the "most significant relationship" to the dispute through application of its central choice-of-law principles found in section 6.[55] These central principles include governmental interest analysis, but the results of such analysis are not necessarily dispositive.[56] Nevertheless, governmental interest analysis plays a central role in almost all modern choice-of-law approaches.

B. Issue-by-Issue Analysis and Dépeçage

Traditional choice-of-law doctrine, as embodied in the *Restatement (First)*, focused on selecting the appropriate jurisdiction to supply the laws that would govern all the substantive issues in a dispute, rather than engaging in issue-by-issue analysis.[57] With few exceptions, all substantive issues in a case were governed by the law of one state.[58]

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transaction, the parties, or the litigation.'" SCOLES ET AL., *supra* note 21, at 27 (quoting BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 621 (1963)).

52. RICHMAN & REYNOLDS, *supra* note 3, at 239, 244–45.

53. Section 6(2), which encapsulates the principles at the core of the *Restatement (Second)*, includes consideration of "the relevant policies of the forum," "the relevant policies of other interested states," and "the basic policies underlying the particular field of law," and these factors "reveal the central place of interest analysis in the Restatement's choice-of-law methodology." RICHMAN & REYNOLDS, *supra* note 3, at 206–07. Among Leflar's choice-influencing considerations are "maintenance of interstate and international order," which includes consideration of the policy interests of other interested states, and "advancement of the forum's governmental interests," which considers the forum's interest in the dispute. *Id.* at 257–58.

54. Section 6(2) of the *Restatement (Second)* includes consideration of the justified expectations of the parties, along with other factors, such as "the needs of the interstate and international systems." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(a), (d) (1971). Similarly, Leflar's approach includes consideration of the justified expectations of the parties, along with factors such as "predictability of result" and "the better rule of law." RICHMAN & REYNOLDS, *supra* note 3, at 256–57.

55. "Section 6(2) and the concept of the most significant relationship form the heart of the *Restatement (Second)*." RICHMAN & REYNOLDS, *supra* note 3, at 207.

56. *See supra* notes 52-54 and accompanying text.

57. RICHMAN & REYNOLDS, *supra* note 3, at 171.

58. In contract disputes, the *Restatement (First)* sometimes resulted in dépeçage with respect to substantive issues, since under section 332, validity issues were generally determined

However, the forum would always apply its own procedural law, even where lex loci principles dictated the application of some other state's law to the substantive issues of the case.[59] This phenomenon of applying the law of different states to different issues in a dispute is known as dépeçage.[60]

Modern choice-of-law doctrine focuses on the selection of the appropriate substantive law on an issue-by-issue basis, rather than selection of the appropriate jurisdiction to govern all substantive issues in a dispute.[61] In *Babcock*, the landmark conflicts case discussed above, the New York Court of Appeals directed the application of "the law of the jurisdiction which . . . has the greatest concern with the *specific issue* raised in the litigation."[62] The court emphasized that there was "no reason" why the laws of one jurisdiction should necessarily govern every discrete legal issue in a tort claim.[63] Similar language can be seen in section 145 of the *Restatement (Second)*, which establishes the general principle for tort disputes; this section directs the evaluation of relevant contacts "according to their relative importance *with respect to the particular issue.*"[64]

While *Babcock* involved a conflict with regard to only one substantive issue—the applicability of the Ontario guest statute[65]—some cases involve conflicts concerning more than one substantive issue, and such cases may result in dépeçage with regard to substantive law. For example, in *Sabell v. Pacific Intermountain Express Co.*,[66] the court applied Iowa's law to determine whether the defendant's conduct was negligent per se, but on the issue of the plaintiff's fault, the court applied Colorado's doctrine of comparative negligence rather than the Iowa rule of contributory negligence.[67] The result—the application of the laws of two different states to two different substantive issues in the dispute—constituted dépeçage, although the court did not explicitly use this term to describe its approach.[68]

American courts routinely reach results that constitute dépeçage today, and most academic commentary on the subject is favorable.[69] Dépeçage is consistent with modern approaches that incorporate governmental interest analysis because it allows, for each discrete substantive issue, application of the law of the jurisdiction that has the

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by the law of the place of contracting while under section 358, performance issues were determined by the law of the place of performance. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 332, 358 (1934). *See* RICHMAN & REYNOLDS, *supra* note 3, at 171.

59. RICHMAN & REYNOLDS, *supra* note 3, at 171.

60. *Id.*

61. Symeonides, *supra* note 31, at 132.

62. Babcock v. Jackson, 191 N.E.2d 279, 283 (N.Y. 1963) (emphasis added).

63. *Id.* at 285. The court went on to explain that issues of conduct regulation might be governed by the law of the place of the negligent conduct, even though the law of the parties' domicile governed the question of the applicability of the guest statute. *Id.* This foreshadows our discussion of the loss-allocating/conduct-regulating distinction in tort law. *See infra* Part I.C.

64. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971) (emphasis added).

65. *Babcock*, 191 N.E.2d at 280.

66. 536 P.2d 1160 (Colo. Ct. App. 1975).

67. *Id.* at 1165–66.

68. *Id.* The court's failure to mention the term "dépeçage" is understandable, since dépeçage refers not to a process, but to the result of applying more than one state's law to the issues in a case. *See* Symeonides, *supra* note 31, at 132–33.

69. RICHMAN & REYNOLDS, *supra* note 3, at 172; Symeonides, *supra* note 31, at 132.

greatest interest in having its law applied.[70] Professor Symeonides characterizes dépeçage as:

> the result, often unintended, of the abandonment of the traditional theory's broad categories and the adoption of issue-by-issue analysis. It is also a natural consequence, and an appropriate recognition, of the fact that the states involved in the case may be interested in different aspects of it or interested in varying degrees. As such, dépeçage is, per se, neither good nor bad.[71]

Viewed from this perspective—as a natural byproduct of modern approaches to choice-of-law—it is unsurprising that dépeçage has encountered little scholarly resistance.

However, commentators have identified one situation in which dépeçage should be avoided—where combining the laws of two states would produce a result that frustrates the policy objectives of both states without advancing either state's interest.[72] For example, in a New Jersey case[73] involving a court applying the traditional "vested rights" approach, the laws of New Jersey and New York were combined to hold an insurer liable even though the insurer would not have faced liability in either state in a purely domestic case.[74] This result frustrated the policy objectives of both states, and accordingly, commentators harshly criticized the result.[75] The case illustrates the danger of issue-by-issue selection of law where one state's law reflects a compromise among policies and is combined with another state's law in a manner such that the two laws form an inseparable whole.[76] Selection of only one of those laws may frustrate the state's policy objectives.[77]

A proper application of modern doctrine that includes governmental interest analysis would seem to preclude this result. Governmental interest analysis involves a determination of the policy objectives hehind each law and only directs the application of a state's law where that state is "interested"—where the state's underlying policy objectives would be furthered by application of its law to a particular situation.[78] Even where issue-by-issue analysis is employed, where a law's policy objective can be

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70. *See* Christopher G. Stevenson, Note, *Depecage: Embracing Complexity to Solve Choice-of-Law Issues*, 37 IND. L. REV. 303, 328 (2003).

71. Symeonides, *supra* note 31, at 132–33 (italics omitted).

72. *Id.* at 133; RICHMAN & REYNOLDS, *supra* note 3, at 171–72.

73. Md. Cas. Co. v. Jacek, 156 F. Supp. 43 (D.N.J. 1957).

74. RICHMAN & REYNOLDS, *supra* note 3, at 171–72 (discussing and criticizing the *Jacek* case).

75. *Id.*

76. *Id.*

77. Professor Symeonides describes the situation as one where "the rule of one state that is chosen is so closely interrelated to a rule of the same state that is not chosen that applying the one rule without the other would drastically upset the equilibrium established by the two rules and would distort and defeat the policies of that state." Symeon C. Symeonides, *Choice of Law in the American Courts in 2004: Eighteenth Annual Survey*, 52 AM. J. COMP. L. 919, 947–48 (2004) (quoting SYMEON C. SYMEONIDES, WENDY C. PERDUE & ARTHUR T. VON MEHREN, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 260 (2d ed. 2003)). Professor Symeonides suggests that courts can devise better solutions to this problem than outright rejection of dépeçage. *Id.*

78. *See supra* notes 52–53 and accompanying text.

understood only with reference to some other complementary law, consideration of that complementary law is necessary to determine a state's interest in the application of its law.[79] A state would never be "interested" in having its law applied in a manner that would compromise its ultimate policy goals.[80]

The discussion above demonstrates that dépeçage is a fairly unremarkable byproduct of the issue-by-issue focus of modern choice-of-law doctrine, rather than a process unto itself, and that dépeçage—at least when it involved the application of forum procedural law and some other state's substantive law—was considered an acceptable result even under traditional choice-of-law doctrine.[81] The next section explores the connections between governmental interest analysis, dépeçage, and the loss-allocating/conduct-regulating distinction in modern choice-of-law doctrine.

C. The Loss-Allocating/Conduct-Regulating Distinction in Torts

Governmental interest analysis and the modern focus on resolving choice-of-law questions on an issue-by-issue basis help to explain one of the fundamental concepts in modern choice-of-law doctrine in tort disputes: the distinction between laws directed to loss allocation and laws directed to the regulation of eonduct.[82] Governmental interest analysis suggests that for the former category of laws, the domicile of the parties should usually determine choice-of-law questions, whereas for the latter category, the location of the parties' conduct is more important.[83] Two aspects of modern doctrine—issue-by-issue analysis and the permissibility of dépeçage—give rise to the possibility that for a given tort dispute, the laws of different states may govern issues of conduct regulation and loss allocation.[84]

Babcock embraced this conceptual distinction and the notion that, in a single case, the law of one state might govern issues of conduct regulation, while the law of another state could govern issues of loss allocation.[85] In *Babcock*, the court emphasized that the conflict was confined to a single, narrow issue—Ontario's guest statute and New York's absence thereof—and that with respect to this issue, the state of the parties' domicile, New York, enjoyed the dominant interest.[86] However, in dicta, the court noted that if the conflict between the two jurisdictions' laws had related to an issue of

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79. *Id.*

80. *Id.*

81. *See supra* notes 57–60 and accompanying text. Under modern doctrine, *substantive* dépeçage, that is, dépeçage with regard to the substantive issues in the case, will be more common than under the traditional approach due to the focus of the traditional approach on issue-by-issue resolution of substantive issues.

82. *See* SCOLES ET AL., *supra* note 21, at 790–93 (discussing the evolution of the distinction).

83. *Id.* Professor Symeonides points out that most major cases in the "American conflicts revolution," including *Babcock*, involved loss-distribution conflicts, because "it is with regard to these conflicts that the territorially based traditional system proved most deficient." Symeonides, *supra* note 31, at 173.

84. *See infra* text aecompanying notes 93–101.

85. *See* SCOLES ET AL., *supra* note 21, at 790–91 (discussing *Babcock* and the origins of the loss-allocating/conduct-regulating distinction).

86. Babcock v. Jackson, 191 N.E.2d 279, 284–85 (N.Y. 1963).

conduct regulation, then the jurisdiction where the negligent conduct occurred, Ontario, would have enjoyed the superior interest.[87] The court explained its rationale:

> It is hardly necessary to say that Ontario's interest is quite different from what it would have been had the issue related to the manner in which the defendant had been driving his car at the time of the accident. Where the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern. In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place.[88]

The court acknowledged the possibility of dépeçage, noting that if such a conflict regarding the standard of care had arisen in this case, nothing would have prevented the court from applying Ontario law to issues of conduct regulation and New York law to issues of loss allocation(such as the applicability of the guest statute).[89]

The court elaborated on this distinction in *Schultz v. Boy Scouts of America*,[90] explaining that where a conflict in laws concerns appropriate standards of conduct, such as "rules of the road," the application of the law of the jurisdiction where the conduct occurred is supported by the jurisdiction's interest in the "admonitory effect" of such application on future conduct within its borders as well as protection of the justifiable expectations of the parties.[91] Conversely, where the conflicting laws pertain primarily to the loss allocation, such as limitations on damages or immunities from suit, then the state of common domicile of the parties has the superior interest in the application of its law "because of its interest in enforcing the decisions of both parties to accept both the benefits and the burdens of identifying with that jurisdiction."[92]

Sabell v. Pacific Intermountain Express Co.[93] provides an example of a court using this distinction in order to reach a decision applying the substantive laws of different states to different issues in a dispute.[94] In *Sabell*, the plaintiff, a Colorado resident, sued the defendant, a Colorado corporation, for damages arising from an auto accident between the two parties in Iowa.[95] The court identified two choice-of-law issues to be resolved: (1) whether to apply Iowa or Colorado law to determine whether the parties had behaved negligently; and (2) whether to apply the contributory negligence rule of Iowa, which would absolutely bar recovery if the plaintiff were found negligent, or the comparative negligence rule of Colorado, which would only reduce the possible reward.[96]

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87. *Id.* at 284.
88. *Id.*
89. *Id.* at 284–85.
90. 480 N.E.2d 679 (N.Y. 1985).
91. *Id.* at 684–85.
92. *Id.* at 685.
93. 536 P.2d 1160 (Colo. Ct. App. 1975).
94. *Id.*
95. *Id.* at 1162.
96. *Id.* at 1163.

Applying the *Restatement (Second)*, the court concluded that, among the choice-of-law principles found in section 6, the governmental interest analysis factors were most important to resolution of this case, and proceeded to analyze the interests of each jurisdiction.[97] The court concluded that Iowa law should govern the issue of the parties' negligence, because "the state in which the motor vehicle collision and the conduct which caused such collision occurs has an overriding interest in regulating the minimum standards of acceptable conduct by motorists using its roads."[98] Conversely, the court concluded that Colorado's comparative negligence law should govern the plaintiff's ability to recover, because "[t]he relationship the parties have with a particular state has the greatest effect upon which of such rules of recovery should apply."[99] The court directed that in future cases, choice-of-law questions related to comparative negligence rules should focus on the parties' state of domicile/residence, or the state where the relationship between the parties is centered.[100] This decision illustrates how the loss-allocating/conduct-regulating distinction may lead to dépeçage in a case involving conflicts of laws related to both loss allocation and conduct regulation.

As illustrated above, the loss-allocating/conduct-regulating distinction is grounded in modern choice-of-law doctrine incorporating governmental interest analysis.[101] With regard to loss-allocating rules, modern doctrine focuses on the domicile of the parties as the most significant contact, based on the assumption that a state's loss-allocation policy always extends to its domiciliaries, even when they act outside the state.[102] With regard to conduct-regulating rules, modern doctrine focuses on the location of the conduct, based on the assumption that a state's conduct-regulating rules operate territorially, because "[a] state's policy of deterrence embodied in its conduct-regulating rules is implicated by all sub-standard conduct that occurs within its territory," regardless of the parties' domiciles.[103]

Although this distinction is part of modern doctrine, even traditional choice-of-law doctrine sometimes dictated application of the law of the place of the allegedly tortious conduct to issues of conduct regulation.[104] Section 380(2) of the *Restatement (First)* specifies that "where by the law of the place of wrong, the liability-creating character of the actor's conduct depends upon the application of a standard of care, and such standard has been defined in particular situations by . . . the law of the place of the actor's conduct, such application of the standard will be made hy the forum."[105] Under this provision, where the law of the place of the allegedly tortious conduct specifies, by statute or common law rule, a standard of care for a particular situation, that standard should be applied to determine whether a defendant's *conduct* may result in liability.[106]

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97. *Id.* at 1164.
98. *Id.* at 1164–65.
99. *Id.* at 1165.
100. *Id.* at 1166.
101. *See* SCOLES ET AL., *supra* note 21, at 790–93.
102. *Id.* at 791–92.
103. *Id.* at 793.
104. John T. Cross, *The Conduct-Regulating Exception in Modern United States Choice-of-Law*, 36 CREIGHTON L. REV. 425, 428–30 (2003).
105. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 380(2) (1934).
106. Cross, *supra* note 104, at 428.

Although the classical approach requires application of the law of the state of the injury to the remaining elements of the tort claim, even the classical approach selects the appropriate standard of care according to the place where the allegedly tortious conduct occurred.[107]

In jurisdictions that have abandoned the classical approach in favor of a modern approach incorporating some form of governmental interest analysis (which characterizes most American jurisdictions today),[108] application of the law of the place of the allegedly tortious conduct to issues of conduct regulation is virtually universal.[109] As under the approach of the *Restatement (First)*, and as explained by the *Babcock* court and illustrated in *Sabell*, this does not necessarily result in the application of the law of the conduct-regulating state to all issues in the dispute; rather, other issues, such as loss allocation issues, may be governed by the laws of other states, resulting in dépeçage.[110]

One commentator, Professor John T. Cross, argues that courts employing modern choice-of-law approaches have adopted this principle—application of the law of the place of the allegedly tortious conduct to issues of conduct regulation—as an absolute rule, which he describes as the "conduct-regulating exception."[111] Cross argues that under modern approaches, full consideration of the governmental interests of other jurisdictions, among other factors, should sometimes lead to the application of the law of another jurisdiction, even on issues of conduct regulation.[112] Therefore, he characterizes this absolute preference for the law of the place where the conduct occurred with regard to issues of conduct-regulation as the "conduct-regulating exception" in modern choice-of-law methods.[113]

However, the modern loss-allocating/conduct-regulating distinction is based on governmental interest analysis, as explained above.[114] Therefore, characterizing this near-absolute preference for the law of the place of the tortious conduct with respect to issues of conduct regulation as an "exception" to modern doctrine seems to go too far. Courts using modern approaches apply this rule because it seems consistent with governmental interest analysis and the justifiable expectations of the parties,[115] and

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107. *Id.* at 428–29.

108. Only 10 states continue to adhere to lex loci delicti, and the remainder follow one of the modern approaches, with a majority of these following the *Restatement*. Symeonides, *supra* note 77, at 942–43.

109. Cross, *supra* note 104, at 436–42.

110. *Id.* at 439; Sabell v. Pac. Intermountain Express Co., 536 P.2d 1160, 1164–66 (Colo. Ct. App. 1975); Babcock v. Jackson, 191 N.E.2d 279, 284–85 (N.Y. 1963).

111. Cross, *supra* note 104, at 437.

112. In fact, Cross argues that there are only three cases in which the rule of the conduct state ("CS") should automatically be selected over the law of another jurisdiction ("OS"):

> (a) when the law of CS is stricter than that of OS; (b) when the laws of CS and OS create incompatible standards of conduct, or (c) when the standard of CS is more lenient and the actor can demonstrate that she actually knew that standard and justifiably relied on it when engaging in the actions that gave rise to the tort.

Id. at 457. Cross argues that the law of CS may be applied in other situations as well, but these are the only situations in which it should be automatically applied. *Id.* at 458.

113. *Id.* at 436–42.

114. *See supra* text accompanying notes 82–84.

115. *See supra* text accompanying notes 90–91.

therefore consistent with modern doctrine. Even if exhaustive analysis under principles of modern doctrine indicates that this rule should not be applied invariably,[116] the rule itself is still derived from a modern approach incorporating governmental interest analysis.

The foregoing discussion shows that governmental interest analysis, dépeçage, and the loss-allocating/conduct-regulating distinction are interrelated concepts; proper understanding and application of the last of these concepts is not possible without proper understanding of the first two. This Note now turns to the Indiana choice-of-law doctrine, the *Simon* decision, and Indiana's curious reliance on the so-called "conduct-regulating exception" in light of its simultaneous rejection of both governmental interest analysis and dépeçage.

II. INDIANA CHOICE-OF-LAW DOCTRINE IN LIGHT OF *SIMON*

Indiana's abandonment of the traditional rule of lex loci delicti in favor of the *Hubbard* test was followed by a period of confusion regarding the precise contours of Indiana choice-of-law doctrine.[117] *Simon* presented an opportunity for the Indiana Supreme Court to clarify its choice-of-law doctrine, and while the court did answer some outstanding questions, it introduced further confusion through its misapplication of the so-called "conduct-regulating exception" and its simultaneous rejection of both governmental interest analysis and dépeçage. This Part will first discuss the *Hubbard* test and the questions that emerged prior to *Simon*, and then analyze *Simon*'s implications.

A. The Hubbard *Test*

In the landmark 1987 case, *Hubbard Manufacturing Co. v. Greeson*,[118] the Indiana Supreme Court abandoned the traditional doctrine of lex loci delicti and adopted what has since become known as the *Hubbard* test, a two-part test for resolving choice-of-law questions in tort disputes.[119] *Hubbard* involved an Indiana plaintiff pursuing a wrongful death action against an Indiana corporation that manufactured lift units for street light maintenance.[120] The plaintiff alleged that her husband's death was caused by the defective manufacture of the defendant's lift unit.[121] The accident that led to her husband's death occurred in Illinois while the decedent conducted street light maintenance using one of the lift units.[122] Indiana law would have barred recovery if the product represented an open and obvious danger or if product misuse occurred, whereas Illinois law would not have absolutely barred recovery in either circumstance.[123]

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116. *See* Cross, *supra* note 104, at 436–42.
117. *See supra* notes 9–10 and accompanying text.
118. 515 N.E.2d 1071 (Ind. 1987).
119. *Id.* at 1074.
120. *Id.* at 1072.
121. *Id.*
122. *Id.*
123. *Id.* at 1073.

Since Indiana followed lex loci delicti at the time of the *Hubbard* case, application of existing Indiana choice-of-law rules would have resulted in the application of the law of the place of the injury, Illinois.[124] The court saw this as an anomalous result, since all the jurisdictions bordering Indiana would have applied Indiana law to the dispute.[125] In order to avoid this "inappropriate result," the court sought to craft a choice-of-law test that would "ensure the appropriate substantive law applies."[126]

The court proceeded to announce its new two-part test for analyzing choice-of-law problems in torts.[127] First, the court noted that the place of the tort will often be "significant and the place with the most contacts," and therefore, the traditional rule would be appropriate in many cases.[128] Accordingly, under the first prong of the court's test, the law of the place of the tort would apply unless it "bears little connection to the legal action" or is an "insignificant contact."[129] The court determined that none of the contacts with Illinois related to the wrongful death suit, and therefore declared the place of the tort insignificant.[130]

Since the court determined that the place of the tort was an insignificant contact in this case, it proceeded to the second prong of the test, a determination of whether another place has a "more significant relationship and contacts."[131] In making this determination, the court cited section 145 of the *Restatement (Second)* for a list of contacts that courts should consider: "1) the place where the conduct causing the injury occurred; 2) the residence or place of business of the parties; and 3) the place where the relationship is centered."[132] The court also directed that these contacts "should be evaluated according to their relative importance to the particular issues being litigated,"[133] employing language similar to that found in *Babcock* and the *Restatement (Second)*.[134] Evaluating the contacts listed above, the court determined that Indiana had the more significant relationship to the dispute; both parties were Indiana residents, the relationship between them was centered in Indiana, and the decedent frequently visited the defendant's plant in order to discuss repair and maintenance of the lift unit.[135]

Although the court abandoned the traditional choice-of-law rule for torts in *Hubbard* and crafted a replacement test, significant questions remained unanswered. The court offered little guidance on how to determine whether the place of the tort was a significant contact under the first prong of the test.[136] In addition, while the court

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124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 1073–74.
128. *Id.* at 1073.
129. *Id.*
130. *Id.* at 1074.
131. *Id.*
132. *Id.* at 1073–74 (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145(2) (1971)).
133. *Id.* at 1074.
134. *See supra* text accompanying notes 32, 55.
135. *Hubbard*, 515 N.E.2d at 1074.
136. The court simply listed the contacts with Illinois and then stated, in conclusory fashion, that these contacts did not "relate" to the wrongful death action and that the place of the tort was therefore insignificant. *Id.* However, the court offered no insight into how it determined that the contacts did not relate to the legal action. *Id.*

cited section 145(2) of the *Restatement (Second)* for a list of relevant contacts to evaluate in the second prong of the test, the court declined to elaborate on when and how courts could turn to the *Restatement (Second)* for general guidance.[137] Perhaps the most puzzling feature of the *Hubbard* opinion was the court's abandonment of its traditional approach without any mention of governmental interest analysis; the court simply failed to discuss this methodology.[138] Modern choice-of-law approaches generally incorporate governmental interest analysis as a central tool in evaluating the significance of state contacts, seeking to avoid the "anomalous" outcomes that sometimes resulted under lex loci delicti.[139] While the Indiana Supreme Court also sought to avoid such anomalous results, directing evaluation of state contacts according to their relative importance to the issues being litigated, the court failed to specify *how* this relative importance was to be determined.[140]

B. Gollnick*: Embracing Governmental Interest Analysis?*

One post-*Hubbard* decision strongly suggested that the Indiana Supreme Court might be amenable to incorporating governmental interest analysis, and perhaps other principles of the *Restatement (Second)*, in its choice-of-law methodology. In *Gollnick v. Gollnick*,[141] the court affirmed and adopted as its own a decision by the court of appeals that applied California law to govern an issue of intrafamily immunity in a tort dispute where both parties were California residents and the accident occurred in Indiana.[142] The court indicated that the appellate court had correctly applied the *Hubbard* test to reach the proper result, but said little else about the lower court's decision.[143]

Gollnick was an intrafamily dispute between divorced California residents that arose from a sledding accident in Indiana.[144] The father-defendant, in exercise of his visitation rights, had taken his daughters to Indiana to visit their aunt and uncle.[145] While in Indiana, one of the daughters was struck by a car and injured while sledding without adult supervision.[146] The choice-of-law issue presented was whether the intrafamily immunity rules of Indiana or California would govern the dispute.[147]

Applying *Hubbard*, the First District Court of Appeals decided that Indiana, the place of the tort, bore "little connection to the legal action."[148] The court cited numerous cases from other jurisdictions for the proposition that in matters of

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137. *Id.* at 1073–74.

138. *Id. See* Moore, *supra* note 2, at 550.

139. *See supra* text accompanying notes 55–56.

140. *Hubbard*, 515 N.E.2d at 1073–74.

141. 539 N.E.2d 3 (Ind. 1989) (per curiam).

142. *Id.* at 4.

143. *Id.*

144. Gollnick v. Gollnick, 514 N.E.2d 645, 647 (Ind. Ct. App. 1987), *reh'g granted*, 517 N.E.2d 1257 (Ind. Ct. App. 1988) (decided prior to the *Hubbard* decision).

145. *Id.* at 647.

146. *Id.*

147. *Id.* at 648.

148. Gollnick, 517 N.E.2d at 1259 (decided after the *Hubbard* decision with the court of appeals reconsidering its prior decision in light of *Hubbard*).

intrafamily immunity, the state of the parties' domicile has a superior interest in regulating the family relationship.[149] The court also cited the *Restatement (Second)* for the proposition that in matters of intrafamily immunity, the parties' common domicile will usually provide the applicable law.[150] The court concluded that California enjoyed a "predominant interest" in the regulation of the family relationship of its citizens, and that this interest would override the occurrence of the accident in Indiana.[151] Therefore, the court applied California's intrafamily immunity rule.[152]

A plausible reading of the Indiana Supreme Court's approval of *Gollnick* might elicit the conclusion that the court embraced a choice-of-law approach incorporating both governmental interest analysis and the loss-allocating/conduct-regulating distinction. Intrafamily immunity, and more generally capacity to sue, is considered a rule dealing with loss allocation;[153] therefore, applying the law of the parties' common domicile as the state with the "predominant interest" with respect to this issue would be consistent with governmental interest analysis. Such incorporation of governmental interest analysis into the *Hubbard* test would have provided guidance to courts in executing the test's directive to evaluate contacts according to their relative importance to the issues being litigated.

In *Simon*, the court would have the opportunity to clarify its position regarding governmental interest analysis and the broader choice-of-law principles embodied in the *Restatement (Second)*. Unfortunately, as discussed in the next section, the court's decision in *Simon* failed to provide clarity; rather, it exposed the *Hubbard* test's lack of a coherent analytical framework for determining the relative significance of state contacts.

C. The Simon *Opinion: A Rejection of Governmental Interest Analysis, the* Restatement (Second)*, and Dépeçage*

In *Simon v. United States*,[154] the Indiana Supreme Court responded to certified questions from the U.S. Court of Appeals for the Third Circuit concerning the appropriate application of Indiana choice-of-law doctrine to a wrongful death action against the United States government under the Federal Tort Claims Act (FTCA).[155] Under the FTCA, a court applies the entire law, including choice-of-law rules, of the place where the negligent conduct occurred.[156] In *Simon*, the allegedly negligent conduct occurred in both the District of Columbia (D.C.) and Indiana; if there was a "true conflict" between the choice-of-law rules of these jurisdictions, then the Third Circuit would apply the choice-of-law rules of the place where the last significant

149. *See id.* at 1258–59 (citing Wartell v. Formusca, 213 N.E.2d 544 (Ill. 1966) and Emery v. Emery, 289 P.2d 218 (Cal. 1955), among other cases).

150. *See id.* at 1259 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 169(2) (1971)).

151. *Id.*

152. *Id.*

153. *See* SCOLES ET AL., *supra* note 21, at 794 (describing both guest statutes and intrafamily immunity rules as "clearly loss-distributing").

154. 805 N.E.2d 798 (Ind. 2004).

155. *Id.* at 800.

156. *Id.* at 801.

negligent act occurred, which was Indiana.[157] Therefore, the Third Circuit certified questions to the Indiana Supreme Court in order to determine (1)whether a true conflict existed between Indiana and D.C. choice-of-law rules, and (2) in the event of such a conflict, to determine how Indiana choice-of-law rules would resolve the conflicts issues.[158]

Simon arose from the crash of a small private aircraft in Kentucky, killing two Pennsylvania passengers, a Georgia passenger, and the pilot, who lived in New Jersey but worked in Pennsylvania.[159] The flight began in Pennsylvania, stopped overnight in Ohio, and ended with the fatal crash in Kentucky without ever passing through Indiana.[160] Due to poor weather conditions, the pilot, relying on a chart published by the Federal Aviation Administration (FAA) in D.C., sought clearance for a Simplified Directional Facility (SDF) approach at the Somerset, Kentucky airport.[161] Even though the proper instrumentation required for this type of landing had not been operational at the Somerset airport for several years, Indiana-based FAA air traffic controllers cleared the approach.[162] After the resulting crash, the plaintiffs brought wrongful death complaints under the FTCA in the U.S. District Court for the Eastern District of Pennsylvania, alleging negligence by the government in: first, publication of the erroneous chart information in D.C.; and second, the Indiana-based air traffic controllers' clearance of the approach, failure to properly monitor the approach via radar, failure to alert the pilot of an impending obstacle, and failure to respond to last-minute radio communications.[163] By the time the Third Circuit's certified questions reached the Indiana Supreme Court, two cases had settled, and the remaining plaintiffs were suing on behalf of the estates of one of the Pennsylvania passengers and the pilot.[164]

The Indiana Supreme Court answered the Third Circuit's first question by declaring that a "true conflict" existed between the choice-of-law rules of Indiana and D.C.[165] The court explained that D.C.'s choice-of-law methodology, unlike Indiana's, embraces both dépeçage and a hybrid *Restatement (Second)* / governmental interest analysis, resulting in a "true conflict" in choice-of-law methods.[166] The court then proceeded to the second certified question, determining that under Indiana choice-of-law rules, Indiana law would govern all issues in the dispute.[167] The court's reasoning for each of these conclusions is explained below.

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157. *Id.*
158. *Id.*
159. *Id.* at 801.
160. *Id.*
161. *Id.*
162. *Id.* at 800–01.
163. *Id.* at 801.
164. *Id.*
165. *Id.*
166. *Id.* at 801–03.
167. *Id.* at 804.

1. Rejecting Dépeçage

The court began by rejecting dépeçage, which it characterized as "the process of analyzing different issues within the same case separately under the laws of different states."[168] The court offered four primary reasons for rejecting dépeçage.

First, the court acknowledged that *Hubbard* directed courts to analyze state contacts according to their relative importance to the particular *issues* being litigated.[169] However, the court emphasized that despite similar language in the *Restatement (Second)*, and despite the court's favorable citation to the *Restatement (Second)* in *Hubbard*, Indiana had adopted neither the *Restatement (Second)* nor its issue-by-issue approach to choice-of-law questions regarding substantive law.[170] Second, the court characterized Indiana as "still primarily a lex loci state" and stated that dépeçage is not allowed under the lex loci approach.[171] The court said that it would, therefore, be "illogical" to incorporate dépeçage into the *Hubbard* approach.[172] Third, the court pointed out that some laws are enacted with the purpose and expectation that they will interact with other, complementary laws.[173] Applying such laws in isolation, the court said, "may hinder the policy of one or more states without furthering the considered policy of any state."[174] Fourth, the court argued that dépeçage might generate unfair results by producing a hybrid law more favorable to one party than another, which would not exist if the law of just one state were applied.[175] Further, dépeçage could compound the advantage of a party with greater access to legal resources by requiring separate analysis of each issue for each state with connections to the dispute.[176]

2. Rejecting Governmental Interest Analysis

Next, the court turned its focus to govemmental interest analysis, emphatically rejecting any place for such analysis in the *Hubbard* test.[177] The court noted that D.C. employs a hybrid governmental interest analysis / *Restatement (Second)* methodology that identifies the policy interests behind applicable laws and attempts to apply the law of the most interested jurisdiction.[178] The court stated that "Indiana does not require that courts undertake the difficult and ultimately speculative task of identifying the policies underlying the laws of multiple states and weighing the potential advancement of each in the context of the case."[179] Rather, under the *Hubbard* approach, a court should "simply look at the contacts that exist between the action and the relevant statcs

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168. *Id.* at 801.
169. *Id.* at 802.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 802–03.
174. *Id.* at 803.
175. *Id.*
176. *Id.*
177. *See id.*
178. *Id.*
179. *Id.*

and determine which state has the most significant relationship with the action."[180] The court stated that it need not decide whether this difference in methodology would produce a "true conflict" in choice-of-law methods between Indiana and D.C., because the differences with respect to dépeçage were sufficient to conclude that such a conflict existed.[181]

D. Applying the Hubbard *Test to Select Indiana Substantive Law*

After determining that a conflict existed between the Indiana and D.C. choice-of-law tests, the court answered the second certified question, applying the *Hubbard* test to select Indiana substantive law to govern all issues in the dispute.[182] The court began by explaining its rejection of the *Restatement (Second)*, criticizing it as "a hodgepodge of all theories" that resulted in unpredictable outcomes, allowed manipulative courts to reach any decision they desired, and offered even the most well-intentioned courts "no guidance" in resolving choice-of-law questions.[183]

Applying the *Hubbard* test, the court noted that it must first identify whether, for the relevant jurisdictions, differences in substantive law existed that would be "important enough to affect the outcome of the litigation."[184] The plaintiffs had urged the application of Pennsylvania law to the dispute, whereas the defendants had urged the application of Indiana law.[185] The court identified three significant differences in the states' respective laws: (1) Pennsylvania law allowed for joint-and-several liability and right of contribution, while Indiana did not; (2) Pennsylvania allowed for recovery for *both* wrongful death and survival damages, while Indiana did not; and (3) Pennsylvania damages included the decedent's conscious pain and suffering from the moment of injury until the time of death, while Indiana damages did not.[186]

Proceeding with the *Hubbard* analysis, the court next asked whether the place of the injury was an insignificant contact bearing "little connection to the legal action," and concluded that Kentucky was, indeed, an insignificant contact.[187] Noting that the location of the negligent conduct and the domicile of the parties pointed elsewhere, and that the ultimate location of the crash was largely fortuitous, the court characterized this as one of the "rare cases" where application of the traditional lex loci delicti rule would be inappropriate.[188]

Turning to the second prong of the *Hubbard* test, the court stated that it would apply the law of the state with "the most significant relationship to the case."[189] The court reiterated the three contacts that it had listed in *Hubbard* for resolving choice-of-law questions in tort disputes: (1) the place of the tortious conduct; (2) the parties'

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180. *Id.*
181. *Id.* at 803–04.
182. *Id.* at 804.
183. *See id.* at 804 (quoting Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO L.J. 1, 8 (1991)).
184. *Id.* at 805.
185. *See id.*
186. *Id.*
187. *Id.* at 806.
188. *See id.*
189. *Id.*

residence or place of business; and (3) the place where the parties' relationship is centered.[190] The court then explained that this is not a comprehensive list and that other relevant factors may be considered, although none were present in this case.[191] The court also stated that "[t]hese factors should not be applied mechanically," but should be "evaluated according to their relative importance to the particular issues before the court."[192]

The court concluded that the gravamen of this case was the allegedly negligent conduct, and that therefore, the law of the place of that conduct should apply.[193] The court explained that "the most important relevant factor is where the conduct causing the injury occurred because an individual's actions and the recovery available to others as a result of those actions should be governed by the law of the state in which he acts."[194] In a footnote, the court characterized this as a "nearly universal" principle and went on to seek support for this principle in the "conduct-regulating exception" discussed earlier in this Note.[195] The court explained:

> Even under the modern methods there are certain issues for which courts continue to apply the law of the place where the tort occurred. The most notable of these issues are those concerning a party's conduct. If the state of conduct has a law regulating how the tortfeasor or victim is supposed to act in the particular situation, courts will apply that standard rather than the law of the parties' residence. In fact, this preference for the conduct-regulating law of the conduct state is virtually absolute, winning out even over the law of other interested states. Courts as a practical matter recoguize a "conduct-regulating exception" to the normal interest-based choice-of-law methods.[196]

The court dismissed the residence of the parties or the place where the parties' relationship was centered as important factors in this case.[197] The court appeared to give a nod to *Gollnick*, stating that while the parties' residence or place of business *is* important in cases of "family law or asset distribution," it was not particularly important in this case.[198] According to the court, "[p]eople do not take the laws of their home state with them when they travel but are subject to the laws of the state in which they act."[199] Further, the court stressed that the negligent conduct of the FAA and the air traffic controllers was at issue in the case, and emphasized that the conduct of the plaintiffs was not in issue.[200] Finally, the court concluded that the contact between the allegedly negligent party and the injured party was "fleeting"—thus, there was no "real relationship" between the parties and therefore the relationship could not be centered

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190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 806–07.
194. *Id.*
195. *Id.* at 807 n.12.
196. *Id.*
197. *See id.* at 807.
198. *Id.*
199. *Id.*
200. *Id.*

anywhere.[201] As a result, the court concluded that under Indiana choice-of-law doctrine, Indiana substantive law would apply.[202]

E. Simon*: A Critique*

While the *Simon* decision offered some clarity in rejecting dépeçage, governmental interest analysis, and the *Restatement (Second)*, the court's opinion left much to be desired. First, the reasons the court offered for rejecting dépeçage were largely unpersuasive. Second, the court misapplied the so-called conduct-regulating exception to reach its decision that Indiana substantive law would apply to all issues in the dispute. Finally, the *Simon* opinion adds little clarity, and arguably introduces greater confusion, regarding the methodology that Indiana courts should use to determine the relative importance of state contacts when resolving choice-of-law questions in tort disputes.

I. An Unpersuasive Rejection of Dépeçage

The *Simon* court's reasons for rejecting dépeçage are not persuasive. First, contrary to the court's assertion, dépeçage is a result—the application of different states' laws to different issues in a case—rather than a process,[203] and dépeçage occurred even under the traditional lex loci approach.[204] As explained earlier in this Note, the *Restatement (First)* expressly provided for dépeçage in tort disputes where the injury-causing conduct and the injury occurred in separate states and where the state of the injury-causing conduct provided a standard of care to govern the particular facts of the case.[205] Further, dépeçage occurs even where the forum applies its own procedural law while applying the substantive law of another jurisdiction—a routine occurrence in choice-of-law cases.[206] Dépeçage is not a *technique* of modern doctrine, but an unremarkable and natural by-product of the choice-of-law process.

The *Simon* opinion correctly pointed out that a court engaging in issue-by-issue choice-of-law analysis might, through failure to consider complementary laws necessary to a proper understanding of state policy, construct a hybrid law that frustrates the policy goals of the relevant jurisdictions without advancing any state's policy interests.[207] Despite the validity of this criticism, proper governmental interest analysis should avoid this result, since this approach aims to apply a law *only* where it will advance the policy goals of an interested jurisdiction.[208] This criticism merely demonstrates that any choice-of-law technique can be applied incorrectly; this criticism is equally true of any choice-of-law approach, and therefore should not serve as a basis for rejecting any particular approach.

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201. *Id.*
202. *Id.*
203. *See supra* text accompanying note 60.
204. *See supra* text accompanying notes 104–07.
205. *See id.*
206. *See supra* text accompanying notes 59–60.
207. *See supra* text accompanying notes 172–73.
208. *See supra* text accompanying notes 78–80.

2. *Simon*'s Misapplication of the "Conduct-Regulating Exception"

The *Simon* court fundamentally misapplied the so-called conduct-regulating exception in order to determine that Indiana substantive law should apply to all substantive issues in the case. First, the near-absolute preference in modern doctrine for application of the law of the place of the tortious conduct—what the court refers to as the "conduct-regulating exception"—applies only where the choice-of-law issue concerns a law dealing with conduct regulation.[209] Proper application of this exception in *Simon* would have resulted in application of Indiana substantive law to the issue of whether the FAA air traffic controllers were negligent, because Indiana has a strong interest in determining the standard of care for conduct that occurs within its borders. However, the conflict between Indiana and Pennsylvania law in this case concerned not a matter of conduct regulation, such as the applicable standard of care, but matters of loss allocation;[210] therefore, the conduct-regulating exception is inapplicable.

Further, even if the conduct-regulating exception were applicable to *some* issue in this case, it would dictate *only* that rules of conduct regulation—such as the applicable standard of care for the Indiana-based air traffic controllers—would be determined by Indiana law.[211] Proper application of this exception dictates that loss-allocation issues should still be determined by the law of the parties' residence, or the locus of their relationship, rather than the place of the tortious conduct.[212] This is because the conduct-regulating exception is based on governmental interest analysis and the assumption that the law of the place of the tortious conduct will have a predominant interest in regulating conduct within its borders.[213] In rejecting both governmental interest analysis and dépeçage, the *Simon* court misapplied the conduct-regulating exception to determine that Indiana law would govern not just issues of conduct regulation, but *all* substantive legal issues in the case.

The rejection of governmental interest analysis ensured more than just the misapplication of the conduct-regulating exception in *Simon*. It ensured that, in the future, lower Indiana courts would be deprived of a powerful tool to evaluate the importance of state contacts relative to the particular issues in a choice-of-law dispute. The following section illustrates this problem.

3. *Simon's* Rejection of Governmental Interest Analysis Reduces Clarity

The *Simon* court concluded that the place of the allegedly negligent conduct was the most important geographical contact and accordingly determined that Indiana law would govern the dispute under the *Hubbard* test. However, after rejecting governmental interest analysis as a tool for determining which contacts are most

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209. *See supra* text accompanying notes 108–10.

210. "[R]ules imposing ceilings on the amount of damages or excluding certain types of damages, such as for pain and suffering" are generally considered loss-distributive, as are "rules dealing with contribution or indemnification among joint tortfeasors." *See* SCOLES ET AL., *supra* note 21, at 794 n.6.

211. *See supra* text accompanying notes 108–10.

212. *See id.*

213. *See supra* text accompanying notes 101–03.

important to the issues being litigated, the court offered no viable alternative methodology for explaining *why* a particular contact is or is not significant.

The court's contention that the gravamen of this case was the allegedly negligent conduct of the defendant offers little help in explaining the court's basis for selecting the location of the allegedly negligent conduct as the most significant contact in *Simon*. Indeed, it would seem odd if the court were characterizing the location of the negligent conduct as central to the conflict in substantive laws; the conflict between Indiana and Pennsylvania substantive law pertained not to whether the defendant behaved negligently—an issue of conduct regulation—but to issues of loss allocation.[214] Therefore, the central conflict in substantive rules of law had nothing to do with the determination of whether the defendant behaved negligently.

Alternatively, perhaps the court was arguing that the place of the negligent conduct was the most significant contact because the defendant's liability depended on a finding of negligence. However, it is difficult to understand how this reasoning would help to resolve the choice-of-law inquiry. While a finding of negligence would be necessary to hold the defendant liable, this is true of any negligence case. It was equally true in *Gollnick*, where the court concluded that the parties' domicile, not the location of the allegedly negligent conduct, was the most significant contact for purposes of resolving the conflict of laws.[215] Why was the location of the negligent conduct controlling in *Simon*, but secondary in *Gollnick*? While the court offered the conclusory assertion that the state of the parties' residence is more important in cases involving family law or asset distribution,[216] it offered no reason for *why* this is true.

The court's statements that "an individual's actions and the recovery available to others as a result of those actions should be governed by the law of the state in which he acts"[217] and that "[p]eople do not take the laws of their home state with them when they travel but are subject to the laws of the state in which they act"[218] also offer little help in evaluating the significance of state contacts and distinguishing *Gollnick*. If these propositions were always controlling, then *Gollnick* would have been decided differently; because Indiana was the location of the negligent conduct and parties do not "take the laws of their home state with them" when they travel, Indiana's intrafamily immunity law would have applied. However, the court concluded in *Gollnick* that the location of the parties' common domicile, California, trumped the location of the negligent conduct.[219]

Again, after the rejection of governmental interest analysis as a valid choice-of-law technique in *Simon*, the question remains: why was the parties' residence the most significant contact in a case involving a conflict of intrafamily immunity rules, while the location of the negligent conduct was the most significant contact in *Simon*, which also involved a conflict of loss-allocating rules? It is not sufficient to answer this question by simply identifying the place of the parties' residence as the most important contact where the choice-of-law question concerns an intrafamily immunity rule; such

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214. *See supra* note 210 and accompanying text.
215. *See supra* text accompanying notes 147–51.
216. *See* Simon v. United States, 805 N.E.2d 798, 807 (Ind. 2004).
217. *Id.*
218. *Id.*
219. *See supra* text accompanying notes 147–51.

an answer begs the ultimate question, which is *how* the court reached the conclusion that one contact was more important than another.

Given its rejection of governmental interest analysis as a technique for answering choice-of-law questions, it is difficult to imagine the *Simon* court explaining *Gollnick* by embracing the following proposition: California had the superior interest in the application of its law because the rule involved was one of intrafamily immunity and California was the state of the parties' common domicile. Yet this was precisely the explanation offered by the First District Court of Appeals in *Gollnick* before the Indiana Supreme Court adopted that opinion as its own.[220] Modern doctrine, incorporating governmental interest analysis, could sensibly explain *Gollnick* in this fashion, and it could also sensibly predict that Indiana would resolve future conflicts involving loss-allocation issues in this manner, assigning primary importance to the state of the parties' domicile. Yet after *Simon* and the court's puzzling misapplication of the "conduct-regulating exception," it is unclear what methodology lower courts should use to evaluate the importance of state contacts relative to the issues being litigated. It is equally unclear why the Indiana Supreme Court has identified the parties' residence or place of business as the most significant contact in cases involving family law or asset distribution.

4. *Simon* as the Dreaded "Anomalous Result"

Lack of analytical clarity and misapplication of the "conduct-regulating exception" were not the only shortcomings of the *Simon* decision; the *Simon* result, analyzed using governmental interest analysis, represents exactly the sort of anomalous result—application of the law of a place with no interest in the application of its law in a manner that frustrates the policy goals of an interested jurisdiction—that led courts to abandon the rigid lex loci approach in favor of modern approaches that would produce more rational results.[221] As explained above, Pennsylvania and Indiana substantive law differed only with regard to issues of loss allocation.[222] No Indiana parties were involved in the case—the U.S. government was the sole defendant and neither plaintiff was from Indiana.[223] This left Indiana with no interest in applying its rules of loss distribution in this case. Conversely, since one plaintiff was from Pennsylvania,[224] that state's loss-distribution policy interests were at least arguably implicated by the facts of the case. This demonstrates that, lacking a coherent rationale for distinguishing the importance of state contacts, the *Hubbard* approach is capable of generating the same sort of anomalous results that plagued the classical approach and led to its demise in most American jurisdictions, including Indiana.

CONCLUSION

In *Simon*, the Indiana Supreme Court missed an opportunity to clarify its choice-of-law doctrine. In rejecting governmental interest analysis and dépeçage while

220. *See id.*
221. *See supra* text accompanying note 30.
222. *See supra* note 210 and accompanying text.
223. *See Simon*, 805 N.E.2d at 800–01.
224. *Id.*

simultaneously embracing, but misapplying, the "conduct-regulating exception" of modern doctrine, the court created additional confusion concerning its methodology for determining the significance of state contacts. The *Simon* court's apparent approval of the *Gollnick* principle—that the parties' residence or place of business should be considered the most significant contact in choice-of-law questions involving intrafamily immunity provisions—only complicates matters, because this principle is consistent with the loss-allocating/conduct-regulating distinction in modern doctrine and is rooted in governmental interest analysis, a methodology that the *Simon* court emphatically rejected.

Because of the absence of an underlying methodology, such as governmental interest analysis, for determining *why* certain state contacts are important and others are not, the *Hubbard* test is severely flawed. While the Indiana Supreme Court abandoned the lex loci approach because of the anomalous results that it sometimes produced, the court failed to embrace popular modern approaches—such as the *Restatement (Second)* or the governmental interest analysis incorporated in that approach—due to their supposed unpredictability and lack of guidance. However, the *Hubbard* test, lacking a coherent analytical framework for evaluating the significance of state contacts, does little to improve upon—and arguably exacerbates—the supposed unpredictability of modern approaches. Further, as illustrated by the *Simon* decision, the *Hubbard* test is capable of producing the same sort of anomalous results that led many jurisdictions, including Indiana, to abandon traditional choice-of-law doctrine.

It is not sufficient to direct, as *Simon* did, that courts "simply look at the contacts that exist between the action and the relevant states and determine which state has the most significant relationship with the action."[225] Such a directive overlooks the basic function of any choice-of-law approach—to provide courts with a *method* for evaluating state contacts and selecting the state with the most significant contacts to a dispute. Until the Indiana Supreme Court offers a coherent analytical framework for evaluating the relative importance of state contacts, the *Hubbard* test will likely continue to exhibit the vices—anomalous results *and* lack of guidance or predictability—but not the virtues, of both traditional and modern choice-of-law doctrine.

225. *Simon*, 805 N.E.2d at 803.