

On Departing From Forum Law
35 Mercer L. Rev. 595 (1984)

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Whatever explains the historic and pervasive phenomenon of forum preference in choice of law, the prevailing wisdom is that the intractable nonfalse conflict, the forum can, and should, seek in a disinterested way to choose law that will advance multistate, rather than forum, policies:¹ that will provide functional solutions to multistate problems. As marching orders go, those do not sound bad. They give us at once a reason to depart from forum law, a solution for otherwise intractable problems, and the illusion of doing something wise.

I began this study to illustrate the workings of this appealing prescription. I ended it, to my surprise, no longer sure that the prescription was one courts always could or should follow.

Assuming that multistate policies would not outweigh local ones in all case, I took it that the helpful thing to do would be to illuminate for courts and commentators the characteristics of those cases in which multistate policy clearly would require departure from forum law. In what follows, I sought to identify and to describe the possibilities, for the most part limiting the analysis for obvious reasons to nonfalse conflicts, and for practical reasons to interstate ones. I dealt first with modernist and then with traditionalist proposals for departure from forum law. I had to conclude **(1984) 35 Mercer L. Rev. 596** that conflicts appropriately resolved by departure from forum law were much more rare than even the

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1. A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 206-311, 376-400 (1965) (identifying particular multistate policies for a 'functional approach' to resolution of nonfalse conflicts). For a more recent discussion, see R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 371 (2d ed. 1980) (urging that identification of a true conflict frees a court to consider "questions . . . appropriate to the interstate case"); Leflar, *The Nature of Conflicts Law*, 52 *COLUM. L. REV.* 959 (1952); see also Yntema, *The Objectives of Private International Law*, 35 *CAN. B. REV.* 721, 734-35 (1957). These more general ideas find influential expression today in the *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 6 (1971); R. LEFLAR, *AMERICAN CONFLICTS LAW* § 96 (3d ed. 1977).

modernists have supposed, and certainly more rare than I had suspected. I found that deference to nonforum law, even when intended to advance policies shared by both states, in operation tended to create irrational or inequitable law at the forum.

A methodological interpolation is in order at this point. In exploring the problem of inequitable administration of law—of discrimination, if it amounts to that—I was able to focus the inquiry a little more sharply than has been done in the past by avoiding what seemed to be the error of virtually every major writer who has raised the question:² the error of assuming that the risk of discrimination in conflicts cases is a risk of discrimination against nonresidents.³ It was increasingly borne in on me that the real difficulty lay in a risk of unequal treatment of similarly situated residents, a difficulty that arose when the forum sought, in the prescribed fashion, to depart from its own law.

In fact, discrimination against nonresidents through forum preference is a nonissue. The nonresident is rather easily distinguished from the

2. Brainerd Currie, for example, in his two major articles on unconstitutional discrimination, written with Schreter, now Kay, concentrated almost exclusively on discrimination against nonresidents. See Currie & Schreter, *Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960); Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960) [hereinafter cited as Currie & Schreter, *Unconstitutional Discrimination*], reprinted in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 445, 526 (1963) [*Editor's Note*: Since most of Currie's articles are reprinted in *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, a corresponding page reference to this work will appear throughout this article in brackets immediately after the citation to the appropriate page in Currie's originally published article.] He perceived discrimination between residents in departures from forum law, in the main, only when both residents were parties to the same suit. Currie & Schreter, *Unconstitutional Discrimination*, at 45 n.194 [575 n.195]. The same twin concerns exclusively preoccupy Professor Weintraub. R. WEINTRAUB, *supra* note 1, at 543-47. Dean Ely lists critics of modern conflicts approaches who join him in worrying about forum discrimination against nonresidents, see Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 173 n.2 (1981); it is intriguing that a specialist in constitutional law should have bogged down on this supposed issue, while neglecting the functional disequilibria with which this essay is in part concerned. Brainerd Currie did deal with one such disequilibrium in Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 268 [283, 306] (1959) [hereinafter cited as Currie, *The "Transitory" Cause of Action*].

3. See *infra* notes 4-5 and accompanying text.

resident,⁴ and the distinction is often taken in the nonresident's favor; it is (1984) 35 Mercer L. Rev. 597 classic conflicts reasoning that forum law should not be construed so as to surprise the nonresident without ample notice of it.⁵ When the forum withholds the *benefit* of its law from the nonresident we do not perceive a want of evenhandedness; but in that case the forum by hypothesis applies nonforum law. Forum preference would have been less objectionable to the nonresident. When—the third possibility—the forum applies its own law in the nonresident's favor, the nonresident will not complain. Finally, in the seemingly hardest case, when the forum applies its own law in favor of a resident and against a nonresident, obviously it will be treating the nonresident exactly as it would treat a similarly situated resident. So forum discrimination against nonresidents through choice of facially neutral forum law is only a bugbear; it need never have engaged the intellect.⁶

4. This is one of three points handled unconvincingly or misunderstood by Dean Ely, *supra* note 2. A court does not unconstitutionally discriminate in determining on rational grounds that a nonresident is not within the intended scope of a local rule. (Dean Ely regrets this, and calls for strict scrutiny. Why?) The second point is that such a determination is hardly some special vice of modern conflicts theory; it is an example of ordinary judicial process. Courts must determine the theoretical scope of local law in light of the purposes of such law; law has no more positive or mandatory force on courts than its rational basis will support. The third point is that the legislative power of a state derives from its legitimate sphere of interest in the welfare of its residents. Those writers who, like Dean Ely, suppose that the state can govern events but not people seem insufficiently mindful of the essential preconditions of effective government, and thus seem to misconceive the nature of legislative power. For a demonstration that event-delimited legislative jurisdiction is an unworkable concept, see Weinberg, *Conflicts Cases and the Problem of Relevant Time: A Response to the Hague Symposium*, 10 HOFSTRA L. REV. 1023, 1026-27, 1026 n.16, 1027 n.18 (1982).

5. *E.g.*, *Milliken v. Pratt*, 125 Mass. 374 (1878). Other cases inviting similar reasoning are discussed *infra* in the text accompanying notes 34, 54-55, 72.

6. Thus, writers like Dean Ely, *supra* note 2, in attacking modern conflicts theory as discriminatory, are driven to doing so in the sole context of denials to nonresidents of the benefit of forum law. Yet modern conflicts theorists, as we shall see, are virtually unanimous in recommending that the interested forum extend the benefit of its laws to a nonresident, and even that the uninterested forum do so whether or not multistate policy would best be served by a choice of forum law. See, *e.g.*, Currie & Schreter, *Unconstitutional Discrimination*, *supra* note 2, at 12-13 [539]. In any event, denials of forum law favorable to a nonresident present problems of constitutional discrimination only when the forum is an interested one; that is, only when there is a regulatory interest that

The conclusions that real problems of discrimination and irrationality are associated with departures from forum law led to a further conclusion, in the nature of a recommendation: when nonforum law might seem preferable to forum law on grounds of multistate policy, many conflicts can, and often should, be resolved through a change in forum law. Only when judicial revision of local law is infeasible should the forum consider nonforum law, and then the forum should weigh the advantages of effectuating substantive multistate policies against the disadvantages of generating (1984) 35 Mercer L. Rev. 598 discriminatory or irrational law at the forum.

I. MODERNIST PROPOSALS FOR DEPARTURE FROM FORUM LAW

Despite much confused hand-wringing in the literature, modernist writers are in substantial agreement about the uses of forum preference in choice of law.⁷ It is true that a myth has arisen that forum preference is the consequence of judicial parochialism,⁸ chauvinism,⁹ or sloth. It is thought that when a state applies its own law, at least in nonfalse conflict cases, it acts at the expense of widely shared, multistate, or even national policies.¹⁰ Ever since *International Shoe Co. v. Washington*¹¹ bestowed upon plaintiffs the option of forum shopping, forum preference also, inevitably, has been perceived as a kind of systemic unfairness to defendants,¹² so that conflicts thinking has become politicized on the

would justify imposing liability on a resident defendant, or when there is a procedural interest that would justify giving a nonresident defendant the benefit of a forum defense. In other cases, the nonresident is generally distinguishable from the resident, as being beyond the scope of the legislation. See *supra* note 4.

7. See A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 309, 314, 350 (1962); R. LEFLAR, *supra* note 1 at § 90; R. WEINTRAUB, *supra* note 1, at 345-46; Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 1026-27 [3, 75] (1958).

8. Prominent exponents of these views include Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 10-11, 19 (1963); Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 26-27 (1945); von Mehren & Trutman, *Constitutional Control of Choice of Law: Some Reflections on Hague*, 10 HOFSTRA L. REV. 35, 43, 57 (1981).

9. See, e.g., Ely, *supra* note 2.

10. See generally Reese, *The Hague Case: An Opportunity Lost*, 10 HOFSTRA L. REV. 195 (1981); see also von Mehren & Trautman, *supra* note 8, at 48.

11. 326 U.S. 310 (1945).

12. See, e.g., R. GRAVESON, COMPARATIVE CONFLICT OF LAWS 112 (1977); Kozyris, *Reflections on Allstate—The Lessening of Due Process and*

point. Those writers tending to align themselves with the defendants' bar do not like forum preference, and those tending to align themselves with the plaintiffs' bar do (although these latter, inwardly persuaded of the myth, tend to avoid saying that they do). The foes of forum preference have thus elected themselves the champions of multistate policy,¹³ while the apologists for forum preference are occasionally found trying to explain why multistate policy does not count.¹⁴ (1984) 35 *Mercer L. Rev.* 599

This polarization of thinking is quite unnecessary, and conceals what in actuality is a broad-based, if implicit, consensus. It should be a truism that the two positions reconcile.

Current modernist writers are fully aware that forum preference vindicates widely shared policy concerns in the general run of nonfalse conflict cases. It is understood that the choice of forum confers upon plaintiffs some control over choice of law. A proponent of multistate policy would have to be writing in his or her sleep not to have noticed that what the plaintiff seeks in the general run of cases is precisely the vindication of policies all states share: compensation for injury, deterrence of wrongdoing, and enforcement of agreements. Plaintiffs today have the power to seek effectuation of these multistate policies under forum law. It is thus transparent that forum preference promotes multistate policies.¹⁵

Choice of Law, 78 MICH. L. REV. 872, 879-80 (1980); Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y. L. REV. 33, 82-83, 88 (1978); von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279, 330-31 (1983).

13. See, e.g., Baxter, *supra* note 8; von Mehren & Trautman, *supra* note 8 at 49-50.

14. See, e.g., Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics'*, 34 MERCER L. REV. 593, 601-02 (1983) [hereinafter cited as Sedler, *New Critics*]. Professor Currie was of a similarly strict view, subject to some later softening; see, e.g., Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 250 [73, 77] (1958) [hereinafter cited as Currie, *Married Women's Contracts*] ("In a conflict-of-laws case a court should have just that degree of freedom to escape the compulsion of disagreeable law that it has in a purely domestic case, and no more.")

15. These are substantive policies. In Part II, *infra*, procedural policies of comity, evenhandedness, and fairness are discussed; policies bearing more directly on uniformity of decision than does the general policy of evenhandedness are omitted as having been dealt with conclusively in Currie, *Married Women's Contracts*, *supra* note 14, at 246, 261 [100-01, 119]. For

This conviction underlies the virtually universal advice given by modernist writers on when the forum should depart from its own law. Most agree that a departure is justified precisely in those cases in which multistate policy would *not* be advanced by forum law. Thus (to touch briefly on the more prominent of the proposals), Professors von Mehren and Trautman suggest that forum law that is “regressing” rather than “emerging” be avoided,¹⁶ and Professor Weintraub suggests a similar disregard of forum law that is “aberrational” or “anachronistic.”¹⁷ Professor Leflar suggests that the forum choose “the better law.”¹⁸ If the law of the forum is not plaintiff-favoring, Professor Weintraub suggests a straight-forward choice of law that is.¹⁹ In a more neutral-sounding fashion, a departure from undesirable local law may be managed through Professor Baxter’s “comparative impairment” analysis²⁰ or some version of “common policy” analysis.²¹ All of these proposals rest upon the observation (1984) 35 Mercer L. Rev. 600 that in a typical conflict of laws, both concerned jurisdictions will share fundamental multistate policies. On the other hand, when there is disfavored law at the forum, by hypothesis only the forum will be concerned in its application.²² In other words, all states share plaintiff-encouraging policies of compensation, deterrence, enforcement, and validation; one state’s occasional idiosyncratic defense need not be deferred to.

Carried to their logical conclusion, then, current approaches to the resolution of nonfalse conflicts will tend to reduce to variations on the ‘better law’ formulation of Professor Leflar. The litmus test is multistate policy: a departure from forum law will be justified when there is ‘better law’ in the nonforum state, law more representative of multistate policy—that is, law more favorable (in the usual case) to the plaintiff. So the forum faced with a nonfalse conflict, and hewing to the modernist

further discussion of multistate policy and choice of law, *see* Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 463-70 (1982).

16. A. VON MEHREN & D. TRAUTMAN, *supra* note 1, at 377.

17. R. WEINTRAUB, *supra* note 1, at 346.

18. R. LEFLAR, *supra* note 1, at § 107. *See* Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1214-15, 1223 (1946).

19. R. WEINTRAUB, *supra* note 1, at 346 (torts). With respect to contracts, Professor Weintraub proposes a rebuttable presumption in favor of validating law, *id.*, at 397; of course a contract creditor, in the usual case, is party plaintiff or in a claimant’s posture.

20. Baxter, *supra* note 8.

21. *See* Sedler, *Interstate Accidents and the Unprovided For Case: Reflections on Neumeier v. Kuehner*, 1 HOFSTRA L. REV. 125, 143-49 (1973).

22. *See generally* von Mehren, *Choice of Law and the Problem of Justice*, 41 LAW & CONTEMP. PROBS. 27, 36-42 (Spring 1977).

position, will apply sister-state law when the plaintiff's claim under forum law is generally disfavored, or when forum law favors the defendant and the defense is not generally favored.

What cannot be extracted from current writing on resolution of intractable cases, however, is an understanding of functional difficulties that in fact attend departures from forum law, and thus any recommendation for courts struggling with such difficulties. In particular, there is a failure to perceive that the forum may have a superior option. But before I come to that option, it will be convenient to introduce some perhaps overly fundamental background.

It seems to me that the modern, rationalized approaches to choice of law pretty much boil down to interest analysis, which in turn boils down to ordinary judicial process. The job of a court confronted with extraterritorial facts is not to give such facts any unique treatment, but instead to deal with them just as it would with any other facts raising legal issues. It is elementary that a court handles such facts by finding reasons for the allegedly applicable rules, and identifying the known relevant policies of the sovereign. Once those are discerned a court's task is considerably narrowed. It remains only to determine whether the new facts make a difference, in light of the discerned policies. That much is obvious. Now, the modern view is that extraterritorial facts should be treated in precisely the same way as other problem facts. That was the essential insight of Brainerd Currie.²³ **(1984) 35 Mercer L. Rev. 601**

We have already seen that the various suggested grounds for departure from forum law require a preliminary finding that nonforum law is more closely attuned to multistate policy—in short, that it is 'better.' But a court that has found the law of a sister state to be 'better' than its own, in so doing has inescapably discerned its own current policy. Once that happens, the cleaner, more direct approach would be to make a change in local law.²⁴ Even a statutory rule may be interpreted to conform to existing local policy,²⁵ although this latter option may not always be practicable; but setting to one side the stumbling-block of outworn or

23. It is this perception of choice of law as ordinary judicial process that seems to be lacking in Professor Brylmayer's attacks on interest analysis. She does not seem to have recognized that the required analysis is objective and teleological. See Weintraub, *Interest Analysis in the Conflict of Laws as an Application of Sound Legal Reasoning*, 35 MERCER L. REV. 629 (1984).

24. I also recently have found suggestions to this effect in PERSPECTIVES ON CONFLICT OF LAWS: CHOICE OF LAW 183 (J. Martin ed. 1980); Currie, *Married Women's Contracts*, *supra* note 14, at 250 n.49 [106 n.49].

25. See generally G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

wrong-headed legislation, identification of ‘better law’ in a sister state will inevitably suggest to the forum the advisability of adopting the sister state’s view as its own. In some cases, as we shall see, the forum may have no acceptable alternative to that course.

A. *When There Is a Defense at the Forum*

The first observation to be made concerning the situation in which there is a defense at the forum is that such cases will arise only infrequently. Under modern longarm statutes, plaintiffs generally can sue in the favorable (interested) sister state.²⁶

The second observation is that in this situation if the forum is to disallow the defense it should do so not through a flight to nonforum law, but through a change in forum law. A pair of recent cases will illustrate the point.

In *Pevoski v. Pevoski*,²⁷ the Supreme Judicial Court of Massachusetts was confronted with a question of interspousal tort immunity. The spouses were local residents, but the place of inquiry was New York. Under New York law, plaintiff could sue here husband; New York had weighed the desirability of protecting insurers from collusive suit against the desirability of giving injured parties access to paid-for insurance proceeds, and had come out in favor of the injured parties. Under Massachusetts law as it stood at the time of the accident, the wife would have been **(1984) 35 Mercer L. Rev. 602** barred.

The Massachusetts court was easily persuaded that New York’s was the better rule, having recently adopted that rule as its own in *Lewis v. Lewis*.²⁸ Nevertheless, the court did not rule that New York law should be applied. Instead, the Massachusetts court changed its own law.²⁹ This was a ‘retroactive’ application of *Lewis*, but in the absence of *Lewis*, the court obviously could have seized the occasion presented in *Pevoski* to

26. *But see* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (interested place of injury may not take jurisdiction over nonresident automobile distributor and retailer); *Kulko v. Superior Court*, 436 U.S. 84 (1978) (interested residence of family may not take jurisdiction over insufficiently supporting breadwinner who has not recently stepped foot in forum state); *Shaffer v. Heitner*, 433 U.S. 186 (1977) (interested state of incorporation may not take general quasi-in-rem jurisdiction over nonresident directors in action alleging corporate mismanagement); *but see* *Armstrong v. Pomerance*, 423 A.2d 174 (Del. 1980).

27. 371 Mass. 358, 358 N.E.2d 416 (1976).

28. 370 Mass. 619, 351 N.E.2d 526 (1976).

29. 371 Mass. at 361, 358 N.E.2d at 418.

perform the same revision. Thus, the wife was given access to the insurance proceeds under Massachusetts, not New York, law.³⁰

Now compare with the directness of *Pevoski* the intelligently reasoned but fundamentally evasive resolution in *Miree v. DeKalb County*,³¹ a case raising an alleged conflict between state and federal law. *Miree* was an action on a contract between the Federal Aviation Administration (FAA) and DeKalb County, Georgia. Under its contract with the FAA, the county undertook, among other things, to restrict the use of land adjacent to the airport to activities compatible with airport safety. Plaintiffs, survivors of passengers killed in an air crash caused by an alleged breach of this agreement, sought to sue as third-party beneficiaries. The issue in the United States Supreme Court was whether to allow plaintiffs to sue as third-party beneficiaries, as permitted by Georgia law, or to affirm the holding for the defendants under an alleged federal rule denying standing to third-party beneficiaries. Justice Rehnquist, writing for the Court, reasoned that the Georgia rule more nearly would vindicate the national interest in airport safety than would the supposed federal rule; he held, therefore, that Georgia law should have been sustained.³²

But, having discerned the national interest, should not the Court have resolved the case by recognizing that there was no federal common law impediment to suits by third-party beneficiaries on government contracts providing for airport safety? I pass over Justice Rehnquist's reluctance to deal with issues of federal common law; that problem to one side, is not the approach taken in *Pevoski* superior?

An obvious virtue of the *Pevoski* solution is that Massachusetts' policy favoring risk spreading can be vindicated in the next interspousal suit, even the wholly domestic one, or one in which the injury occurs in a nonrecovery state. But under the *Miree* approach, when the next case arises in a state denying third-party beneficiaries a right to sue, the national interest in airport safety may have to be subordinated to that state's tenacious views on third-party beneficiaries. (1984) 35 Mercer L. Rev. 603

Pevoski also avoids the irrationality that retention of a disfavored rule implies. In *Miree*, the insight grounding the choice of nonforum law obviously could have grounded a change of forum law. Application of the explicitly disfavored forum rule can only be an embarrassment in a subsequent case.

Finally, the *Pevoski* resolution avoids the problem of discrimination. When there is a defense at the forum and the parties are joint domiciliaries

30. *Id.* at 360, 358 N.E.2d at 417.

31. 433 U.S. 25 (1977).

32. *Id.* at 33.

of the forum state, the only factor raising the conflicts issue is likely to be that the place of injury or of contracting was extraterritorial to the forum. This is a factor that can rarely—if ever—furnish a rational basis on which to discriminate between classes of similarly situated residents.³³

The third possibility, of course, is that the forum reluctantly apply its law unchanged. It may be beyond the power of a court to do otherwise; a federal court dealing with a clear state choice of law rule, or a state court with a clear statutory mandate, simply will apply existing state law. Then, too, because an interested state constitutionally is free to apply its own law, and because a state's interest in doing so may be particularly intense, it may happen—multistate policy to the contrary notwithstanding—that a plaintiff will be made to submit to unfavorable forum law. In part, these considerations explain the disquieting case of *Lilienthal v. Kaufman*.³⁴

In *Lilienthal*, on facts reminiscent of those of the classic case of *Milliken v. Pratt*,³⁵ a local contract debtor was permitted to defend on the ground of incapacity, under an unusual statutory arrangement whereby the contracts of habitual 'spendthrifts' could be voided by a guardian appointed judicially at the instance of the spendthrift's family. It will be recalled that in *Milliken*, the court departed from forum law to validate the contract; the local defense of incapacity had been held unavailable.³⁶

The result to the contrary in *Lilienthal*, leaving the California contract creditor empty-handed, seems wrong under any modernist approach, and the Oregon court itself was excruciatingly reluctant to reach it. Both states share policies favoring the security of commercial transactions, of course, and the defense was aberrational. The nonresident creditor was quite as unprepared for the blow in *Lilienthal* as in *Milliken*, a fact given lurid emphasis by Kaufman's having fraudulently concealed from Lilienthal the voidability of his (Kaufman's) contracts. That is conduct no one has attributed to the Pratts; we presume on their part a genteel ignorance of or inattentiveness to the point of local law. **(1984) 35 Mercer L. Rev. 604**

It is true that in *Lilienthal* there was a preexisting judicial declaration of Kaufman's incapacity. But, like the legislation authorizing that judicial proceeding, the decree could have been construed as limiting the powers of the guardian to wholly domestic contracts only.

There was, however, a more significant problem for the court in *Lilienthal* in seeking to depart from its incapacitating law. In a recent

33. See *infra* notes 42-43 and accompanying text; text following notes 46 & 64.

34. 239 Or. 1, 395 P.2d 543 (1964).

35. 125 Mass. 374 (1878).

36. *Id.* at 375

Oregon precedent, a wholly domestic case brought against Kaufman himself, the court had enforced the statute.³⁷

It might be reasoned that the court easily could have distinguished the former case. *Lilienthal*, unlike that case, had been brought by a nonresident creditor. The court might have retraced the ground of distinction marked out by Chief Justice Gray in *Milliken*: that the local defense could not be construed fairly to apply to a nonresident creditor without notice of it; it was for domestic use only, not for export. As Gray had pointed out, it would be both impolitic and inconvenient to put contract creditors at their peril when dealing with residents of other states.³⁸

On these thoughtful grounds, most commentators approve *Milliken* and regret *Lilienthal*.³⁹ Nevertheless, it is possible to take a more sympathetic view of the result in *Lilienthal*.

Professor Sedler does approve the result in *Lilienthal*,⁴⁰ but his reasoning is rather conclusory, and somewhat inconsistent with some of his other commentary. It seems to me that Professor Ceders approval of *Lilienthal*, in the last analysis, rests on his faith in forum preference. In his view, the interested forum should apply its defense. But that prescription seems utterly at war with Professor Ceders sophisticated understanding of the changes *International Shoe* has wrought. When Brainerd Currie was writing, during the lag between *International Shoe* and its implementation through the proliferation of long arm legislation, one of the grand, legitimizing features of forum law as Currie's residual choice for intractable cases seemed to be the forum's neutrality between plaintiffs and defendants. But even Currie's forum preference came to be more 'moderate and restrained' as it became apparent to him that sometimes forum law might operate to frustrate policies shared even by the forum. Today, most of us, and Professor Sedler as well, have given up the pretense that justice is blind and the forum neutral. It is too late to insist upon preserving that value. In *Lilienthal*, inadequate long arm legislation at home forced plaintiff to an unfavorable forum.⁴¹ The post-*International (1984) 35 Mercer L. Rev. 605 Shoe* arrangements thus had broken down. In light of this, and of multistate policy clearly pointing to nonforum law, why not take a 'moderate and restrained' view of the reach of the forum law in *Lilienthal*? Professor Sedler would reply that in order to do that,

37. *Olshen v. Kaufman*, 235 Or. 423, 385 P.2d 161 (1963).

38. 125 Mass. at 382-83.

39. See, e.g., R. WEINTRAUB, *supra* note 1, at 371 n.72.

40. Sedler, *New Critics*, *supra* note 14, at 604.

41. Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process*, 46 TEXAS L. REV. 141, 160 (1967).

the forum would have to take multistate policy into account. For him, only the forum's policy legitimately may find expression at the forum. But it should be obvious that the forum shares multistate policy.

Yet there is a sense in which the last word on *Lilienthal* remains to be spoken. A flight to nonforum law in *Lilienthal* would have generated grave functional difficulties at the forum. It was probably this, not stare decisis,⁴² that rendered the Oregon court unwilling to set its interstate and domestic cases on diverging paths. A ruling for *Lilienthal* under California law would have created two classes of beneficiaries of the Oregon statute: one set of Oregon families protected because their profligate members dealt only with local victims, the other shorn of protection by their spendthrift members' penchants for defrauding nonresidents as well. It is true that the forum residency level vel non of the plaintiffs will distinguish their respective cases; the problem is that it will not, with any immediacy, distinguish the Oregon spendthrifts' respective families. The Oregon court had to weigh the perceived need to apply protective local policy evenhandedly against its desire to advance multistate policy and to avoid unfair surprise to the nonresident creditor. The important thing is that the court did throw all this onto the scales.⁴³ That it struck the balance in favor of Oregon families is not an unreasonable result, as long as little could be done to eliminate the defense for domestic as well as interstate cases.

Milliken is rather different. That case is widely approved, and it is thought that the distinction taken in *Milliken* between resident and nonresident plaintiffs justifies Chief Justice Gray's departure from forum law to allow the nonresident to recover. But the local company held to a contract which another local company is not, or made to pay for the consequences of a tort for which another local company would not be, may understandably feel that the denial to it of its own state's laws in its own state's courts is unjust, whatever the domicile of the plaintiff. It is true that a contract defendant is not 'surprised' when held to the contract, but that is just as true of the debtor of a nonresident as of a resident creditor. It is true that a tort defendant is not 'surprised' when required to pay for the damage, but that too is true in both domestic and conflicts cases. The safer course would seem to be to apply forum law; and the best course (1984) 35 Mercer L. Rev. 606 would be to undertake judicial revision of forum law to conform to multistate policy—when that course is

42. R. WEINTRAUB, *supra* note 1, at 370-71, deals with this issue as a problem in stare decisis, and points out that the interstate case is always distinguishable from the wholly domestic one.

43. 239 Or. at 11-16, 395 P.2d at 548-49.

feasible, as it was not in *Lilienthal*—rather than to resort to a departure from existing forum law.

And that is the feature of *Milliken* that actually justifies the case. Forum law had, in fact, already changed. The incapacitating statute on which the Pratts were relying had been repealed after the time of contracting. Professors von Mehren and Trautman say, in view of the statute's repeal, that the forum's policy was "held" with very little "conviction," and, therefore, a restrained view of the reach of the repealed law was an appropriate resolution of this true conflict case.⁴⁴ But I would go further. Whenever the forum would limit the reach of its own defensive law because it discerns no current forum policy on which to ground the defense (and Chief Justice Gray was explicit about the collapse of any forum policy that might justify application of the defense),⁴⁵ that lack of policy concern in effect converts the forum to an uninterested one in the domestic as well as the conflicts case. When that happens, application of the supposedly relevant defense (relevant because extant at the time of contracting) in fact will be arbitrary and irrational. A modernist might say that what was really 'happening' in *Milliken*, though Chief Justice Gray's recognition of the intervening revision of local law, was a recharacterization of the problem before him as presenting a false conflict. Either state's current law could have been applied on the issue without raising any problem of discrimination. That enabled the *Milliken* court to conform so admirably to multistate policy favoring the security of commercial transactions. But the *Lilienthal* court had a more difficult problem before it.

Not all defenses are as aberrational as those we have been discussing. There are cases in which the defense is virtually universal, as might be, for example, a statute of limitations or a statute of frauds. Yet, even among these, one finds certain defenses more than usually disfavored. The statute of frauds is commonly viewed with suspicion; although occasionally protective, the statute can operate to deprive a plaintiff of the benefit of a legitimate bargain. Thus, the statute is chronically given a narrow construction. In a nonfalse conflict case, when the existence of the oral agreement is not doubted, we are not altogether surprised to find the statute denied extraterritorial effect,⁴⁶ just as, in the domestic case, we are not altogether surprised to find the statute construed away. Such a flight

44. A. VON MEHREN & D. TRAUTMAN, *supra* note 1, at 377-78.

45. 125 Mass at 383.

46. *See, e.g., Marie v. Garrison*, 13 Abb. N. Cas. 210 (N.Y. Super. Ct. 1883), in which extraterritorial effect was also denied for the sister-state statute, and the contract thus held enforceable despite statutes of frauds in both states.

from forum law cannot produce real discrimination. (1984) 35 Mercer L. Rev. 607

Other common defenses, like the statute of limitations, are not disfavored in domestic cases, yet share the disfavor with which all forum defenses are viewed presumptively in the multistate case. Thus, in the rare case in which a plaintiff today may be forced to an unfavorable forum, the forum may seem wise to find means to apply the longer statute of limitations of the place of transaction or occurrence.⁴⁷ The extraterritoriality of the events in suit can distinguish cases outside the statute from those barred by it; the forum rationally can defer to the transactional state's policies favoring recovery. Moreover, a defendant's expectations of local governance are inevitably diminished when that defendant engages in transstate activity. But when the locality of the events in suit will not convincingly distinguish between the two classes of resident defendants, insofar as they are both apparently within the intended protections of the statute: those who must stand and defend, and those who are off the hook.

In the acute case, when the parties are joint domiciliaries of the forum, the whole of the distinction must be pitched on the locality of the defendant's acts. But why should it matter to a legislature protecting residents from suits brought after a prescribed period *where* the events giving rise to a suit occurred?

In joint domicile cases, moreover, we cannot throw into the balance the problem of fairness to a surprised nonresident plaintiff. No one would argue that the forum should not force a resident plaintiff to sue a resident defendant within the time prescribed at the forum. Although the place of occurrence typically would have an interest in allowing the plaintiff to go to the jury, we do not feel that multistate policy requires deference to the longer statute of limitations at the place of occurrence. Very probably the weight of the joint domicile of the parties at the forum influences us heavily in this, but there may be a further explanation for our instinctive conclusion.

When a universal defense, like a statute of limitations, is at issue, it would seem that multistate policies would operate in favor of the defendant to some extent, and not exclusively in favor of the plaintiff. Both states will share the view that the defendant ought not to be suable

47. See Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 458-59, 487 (1982). Borrowing statutes notoriously 'borrow' shorter periods. See R. LEFLAR, *supra* note 1, at 256 n.1; see, e.g., UNIF. STATUTE OF LIMITATIONS ON FOREIGN CLAIMS ACT § 2 (1957), 13 U.L.A. 523, 524 (1975). See also Leflar, *The New Conflicts-Limitations Act*, 35 MERCER L. REV. 461 (1984).

forever. Although this limitations policy is shared, the difference in limitations period, however crucial to state policy in specific instances, is essentially one of detail. Thus, when there can be no question of unfair surprise to a nonresident (as in the case of joint domicile at the forum), **(1984) 35 Mercer L. Rev. 608** the forum properly applies its own shorter statute.

That reasoning may carry over to the harder case, in which a nonresident sues at a forum with a short statute of limitations. The result may turn on the existence vel non of alternative forums, or on the scope of the loss to be sustained in another state. But it will be necessary for the forum to weigh against these not only shared limitations policies, but also the functional problems that may arise from treating the supposed conflicts case differently from the domestic one.

It remains to discuss the case of the favored defense at the forum. A defense may be favored to the point where uniform legislation greatly reduces the possibility of a conflict concerning it, as for example the defense unconscionability to contracts of adhesion between parties of unequal bargaining power.⁴⁸ It is typical of such defenses, however, that they are raised by plaintiffs seeking recovery beyond that permitted in their supposed agreements, rather than be defendants.⁴⁹ In such instances, plaintiff-protecting policies generally outweigh policies favoring the security of transactions. A plaintiff in that sort of case sues for personal injuries or other damage, and the defense to the contract derives from the same policies that support the plaintiff's claim. In that class of cases, the forum should give the plaintiff the benefit of the local defense to the warranty, release, or stipulation; a departure from forum law cannot be justified by general policies favoring validation of agreements.⁵⁰

For these reasons, *Siegelman v. Cunard White Star Ltd.*⁵¹ seems wrongly decided. In that case, an American personal-injuries claimant was held bound by a stipulation for English law when the stipulation appeared in fine print on passenger ticket. The court reasoned that the duties imposed on ocean carriers should be uniform, and that this was best achieved through giving effect to the planned transaction of the parties.⁵²

48. U.C.C. § 2-302.

49. *See, e.g.,* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

50. *See* Weinberg, *supra* note 4, at 1036, n.58 and accompanying text.

51. 221 F.2d 189 (2d Cir. 1955).

52. *Id.* at 191, 195-96. The court pointed out that its ruling would require Cunard employees to learn only one set of rules; yet the rule assumed to be English law by the court—that a ship's agent might with impunity lie about his intentions in order to discourage the timely filing of a personal-injuries suit—is

But whatever the needs of foreign vessels for uniform regulation, policies favoring recovery for an American personal-injuries claimant will not be subordinated to them. To further such recoveries, American admiralty bestows upon an American plaintiff's contracts of adhesion a scrutiny often beyond that available under state law.⁵³ In denying the plaintiff the (1984) 35 Mercer L. Rev. 609 benefit of this jurisprudence, the court in *Siegelman* could not fall back on the usual justification that the promisee was a nonresident; the nonresident defendant is commonplace in maritime litigation in our courts.

Among the most difficult true conflict cases are those in which multistate policies are ambivalent or clash with each other. If we compare the classic case of *Emery v. Burbank*,⁵⁴ (in which the Massachusetts court refused to enforce on behalf of a self-sacrificing claimant an oral contract to provide by will) with the equally classic *Bernkrant v. Fowler*,⁵⁵ (in which the California court refused to protect a local estate from a claim on a relied-upon oral contract to provide by will), the difficulty of resolution of such cases is well illustrated. In both cases, the courts were clear that the place of contracting had scant relevance to the scope of local policy: the estate would be protected from trumped up obligations wherever allegedly undertaken by the decedent. Both courts, too, saw the heightened unfairness of interposing the protections of forum law between the estate and the nonresident claimant when the decedent had not been domiciled at the forum state at the time of contracting: in that circumstance, how could the promisee obtain compliance with the formalities at the forum, when the promisee could not anticipate the final domicile, and thus, traditionally, the place of administration of the estate?

At this point the facts of the two cases may diverge. In *Emery*, we assume the decedent always to have been domiciled at the forum; in *Bernkrant*, the decedent may have been domiciled elsewhere at the time of the promise. Yet, in *Emery*, Justice Holmes insists such a difference would not have affected his result.⁵⁶ The court of administration must protect local estates in any event, a concern he identified as sufficiently 'procedural' to overcome his compunction of fairness.⁵⁷ But it is Justice Traynor's decision to the contrary in *Bernkrant* that seems to have won the

hardly the sort of rule for which stipulations are conducive to commercial convenience.

53. See, e.g., *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942) (seaman's release; both parties American).

54. 163 Mass. 326, 39 N.E. 1026 (1895).

55. 55 Cal. 2d 588, 360 P.2d 906 (1961).

56. 163 Mass. at 329, 39 N.E. at 1027.

57. *Id.*

verdict of the commentators; they find in it an enlightened willingness to allow the nonresident contract creditors a chance to prove their case.⁵⁸

Now—given multistate policies favoring validation of agreements (especially commercial agreements)—that might have been the preferred resolution in any other contract case. But, in *Bernkrant*, the defense at the forum is a favored one. More than the contract is at stake. In some cases of that kind the validity of the will, too, will be an issue. Even when there (1984) 35 Mercer L. Rev. 610 is no will, the forum will be under an obligation to husband the assets for the heirs at law.

The result in *Bernkrant*, permitting the plaintiffs to try to prove their case, is, therefore, rather a different one from that permitting a plaintiff to go to the jury in the usual contract case. The promisor in *Bernkrant* was dead and could not testify. The policy protecting estates from oral claims is so widely shared that, as Professor Cavers has pointed out,⁵⁹ the plaintiff's testimony would have been barred at the place of contracting in *Bernkrant*, even if their claim theoretically could have survived a motion to dismiss.

In any event, Justice Traynor would not have wanted to handle *Bernkrant* as a false conflict case. His perseverance in construing away the forum's own evidentiary bar, and again in sustaining suit against the executrix alone, implies the influence upon him of imponderables about which he does not enlighten us. There can hardly be a doubt that he believed the claimants.⁶⁰

But, given that the defense was a favored one, widely under adoption in one form or another, the fight from forum law in *Bernkrant* is very hard to justify. Of course it was discriminatory. In effect, Justice Traynor denied to Granrud's estate the protections California afforded to every other local estate *because Granrud had arrived too recently*, only after contracting. On that ground, California could not have withheld the protections of its laws from him with respect to any other aspect of his dying; and the Supreme Court has recently affirmed in another context that

58. See, e.g., R. LEFLAR, *supra* note 1, at § 148 n.15. Professor Weintraub attributes the result in *Bernkrant* to the more commercial context of the contract sought to be enforced against the estate. R. WEINTRAUB, *supra* note 1, at 378-81.

59. Cavers, *Oral Contracts to Provide by Will and the Choice-of-Law Process: Some Notes on Bernkrant*, PERSPECTIVES OF LAW—ESSAYS FOR AUSTIN WAKEMAN SCOTT 38 (R. Pound ed. 1964).

60. Trautman, *A Comment on Twerski and Mayer: A Pragmatic Step Towards Consensus as a Basis for Choice-of-Law Solutions*, 7 HOFSTRA L. REV. 833, 840-41 (1979).

a state may not discriminate against its more newly arrived residents.⁶¹ The great distinction operates specifically to justify discriminating between claimants on out-of-state oral contracts who can foresee, and those who cannot foresee, the place of trial and its laws. It does not support discrimination between two local estates otherwise within the legislative purposes of the requirement of a writing. Concerning that purpose, it cannot matter that one estate is sued by surprised claimants and the other by merely inattentive (1984) 35 Mercer L. Rev. 611 ones. That was Holmes' explicit reason in *Emery* for protecting the estate; whatever the mental state of the creditor, the purpose of the legislation clearly was to protect all local estates.⁶²

In any event, the *Emery* result would not have been unfair in *Bernkrant*. In dealing with widely adopted defenses, even when the law of the place of contracting is clearly to the contrary, as it was not in *Bernkrant*, it is not fundamentally unfair to expect the creditor to anticipate the defense. Finally, when there is a favored defense at the forum, multistate policy will point in both directions and, therefore, in neither. Perhaps *Bernkrant* does not deserve the praises reserved for it.

When the defendant is a member of the plaintiff's class, application of the forum's defense may seem particularly appropriate. In *Saharceski v. Marcure*,⁶³ an injured worker sued a fellow employee for damages. Under the worker's compensation laws of their joint domicile, Massachusetts, such a suit was barred; under those of the place of inquiry, Connecticut, the suit was permissible when, as in *Saharceski*, the defendant employee had caused the injury through the negligent operation of a motor vehicle. Regrettably, the court did not discuss the reasons for these rules. But it is transparent that both legislatures, in shifting the risk of industrial accident to employers, had sought to spread the risk through compensation insurance, rather than to allow an industrial accident to become a personal disaster for any single member of the workforce. Both legislatures also had recognized that to permit the risk to be shifted back upon another member of the workforce would frustrate this fundamental policy: the accident would then, once again, become a single individual's personal disaster. The exception for which Connecticut permitted suit was one for which liability insurance probably would be available to the driver either

61. *Zobel v. Williams*, 457 U.S. 55 (1982); *see also* *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969). *But see* *Sosna v. Iowa*, 419 U.S. 393 (1975).

62. 163 Mass. at 328, 39 N.E. at 1027.

63. 373 Mass. 304, 366 N.E.2d 1245 (1977).

through the employer's policy or through the driver's own. The Massachusetts court, however, applied forum law to bar the plaintiff.⁶⁴

It is submitted that the court could not have applied Connecticut law without creating an unjustifiable discrimination between arbitrarily determined classes of resident plaintiffs. As we have seen, the fact that the place of injury would rule for the plaintiff in its own courts can make no difference for purposes of construing the reach of the forum's defense.⁶⁵ A rule discriminating against resident plaintiffs with the bad luck to be injured at home lacks a rational basis

Furthermore, a flight to nonforum law in this joint domicile case would have produced an arbitrary discrimination between resident defendants. Those with the bad luck to have committed their on-the-job torts while (1984) 35 Mercer L. Rev. 612 working out of state would lose the protections of the statute. Yet, to the legislature determined to avoid shifting the risk of industrial accident to any single worker, what difference could it make that an industrial accident occurred elsewhere, so long as the parties were local workers?

Thus, although a ruling for the plaintiff would have been an appropriate result from a multistate policy point of view, the court rationally could have reached that result only through discovering a common law exception to its statute, applicable even in wholly domestic cases. Such an exception, mirroring the Connecticut exception, would not have compromised the policy underlying the statutory prohibition of suit, yet would have effectuated the risk-spreading and remedial policies that all states share. Thus, the better result in *Saharceski* would have been a reinterpretation of forum law.

Thus far, we have not dealt specifically with the 'no-interest' or 'unprovided-for' case involving a defense at the forum. When such a case arises, the forum must choose either arbitrarily to apply its own law, by hypothesis frustrating widely shared policies, or equally arbitrarily to apply the law of the sister state, conferring new rights on the plaintiff.

One end run around the problem has been for the court to find a specific regulatory interest to justify application for the local defense, thus transforming the case from an unprovided-for one to a false conflict. That was the solution in *Intercontinental Planning, Ltd. v. Daystrom, Inc.*⁶⁶ There, a New York broker, suing a New Jersey defendant for a finder's fee, unaccountably brought suit in New York, where an amendment to the statute of frauds imposed a requirement of a signed writing. The New York court, however, ruled under New York law for the New Jersey

64. 373 Mass. at 304, 366 N.E.2d at 1252.

65. See *supra* note 62 and accompanying text.

66. 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969).

defendant. The court reasoned that the statute was intended to regulate New York brokers by protecting all those who dealt with them from liability under alleged oral agreements; extending this protection to nonresident customers would encourage nonresidents to do business with New York brokers.⁶⁷ Thus, despite general policies favoring contract creditors and disfavoring the statute of frauds, the court was able to justify application of forum law. Had the court seen fit to depart from forum law, having identified its regulatory interest, the denial of the benefit of New York's regulation to the nonresident defendant might well have raised an issue of unconstitutional discrimination between the plaintiff broker in this case, who would be allowed to recover, and other resident brokers, who would not. The state's regulatory concern would seem to be the same with respect to all. **(1984) 35 Mercer L. Rev. 613**

When a specific regulatory concern seems absent, the generally recommended result has been that a forum influenced by multistate policy apply nonforum law to favor its resident plaintiff. Would such a departure from forum law raise problems of discrimination?

Suppose a Massachusetts patient is killed in New York by a negligent New York doctor. The widow somehow obtains jurisdiction and sues the doctor in Massachusetts. The action is brought at a time when Massachusetts law imposes a \$50,000 limit on recoveries for wrongful death. Here, there would seem no more reason to allow the New York doctor the benefit of the Massachusetts limitation than to confer upon the Massachusetts widow a right to unlimited recovery under New York law. The resolution advocated by most modernist writers has been a choice of nonforum law to favor the plaintiff.⁶⁸ The reasoning here is that all states share policies in favor of full compensation for such torts, while the \$50,000 limitation imposed on recovery for this particular tort is aberrational. Thus, New York's rule would best accommodate the interests of both states. Moreover, a ruling for the widow seems less arbitrary: to rule for the doctor would require application of the law of a wholly uninterested state, while to rule for the widow would at least advance generalized interests of both states.

It will be argued, moreover, that the result is reasonable; the \$50,000 limitation on liability could not have been intended to benefit a nonresident defendant. It is true that the nonresidence of the defendant rationally distinguishes a case for purposes of the statute. But it does not directly distinguish between two resident plaintiff widows, one of whom will have a crack at full recovery, while the other will remain mired in arrangements for her future support from which her own state's courts

67. *Id.* at 384-85, 248 N.E.2d at 582-84, 300 N.Y.S.2d at 826-28.

68. *See, e.g.,* R. WEINTRAUB, *supra* note 1, at 346.

seek in conflicts cases to rescue her. When possible on such facts, the forum should use the *Pevoski*, rather than the *Milliken*, approach.

In this, courts may be assisted by the reflection that certain defenses are disfavored in part because they are irrational in any event. In the widow's case just put, the limitation on recovery for wrongful death irrationally discriminates between widows suing for wrongful death and wives suing for loss of consortium.⁶⁹ Defenses exhibiting these irrationalities may be vulnerable to attack on separate, perhaps constitutional, grounds.⁷⁰

But when the defense is less disfavored and represents a clear and recent legislative mandate, a court in the unprovided-for case should probably be guided by multistate policy, the problem of arbitrary discrimination (1984) 35 Mercer L. Rev. 614 notwithstanding. In the unprovided-for case, by hypothesis, the local defense can be applied only arbitrarily in any event. The defendant is beyond the protective intention of the legislature. When reformulation of local law is not possible on these facts, by all means let the plaintiff go to the jury under sister-state law. But the court will be aware of the price that is paid for this otherwise exemplary resolution.

B. When There is a Generally Disfavored Claim at the Forum

When the disfavored law at the forum is the plaintiff's claim, modernist writers tend to recommend a choice of nonforum law precisely as they would in the case of a disfavored defense. But in this situation, too, we shall see that departures from forum law carry substantial risks, and that the forum frequently will find it advantageous to make a change in forum law.

The most important category of disfavored claim cases is probably that in which the plaintiff seeks to invalidate a will or devise, marriage or divorce, trust or agreement, or to illegitimize a birth, valid elsewhere. In such cases, unlike the general run of cases, the plaintiff is not the instrument of multistate policy. The favored class in such cases is defendants, not plaintiffs; multistate policy favors validation.⁷¹ It can readily be agreed that expensively created dispositions of property, and settled expectations concerning them, as well as settled expectations

69. *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 280 (1980) (in admiralty).

70. *See, e.g., Brown v. Merlo*, 8 Cal. 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

71. A. EHRENZWEIG, *supra* note 7, at 465; R. LEFLAR, *supra* note 1, at § 148; R. Weintraub, *supra* note 1, at 382.

concerning matters of marital status or legitimacy, ought not to be upset simply because more than one state has connections with the transaction or the parties. Indeed, it ought to be a goal of federalism to preserve such expectations and arrangements when those relying upon them cross state lines.

A famous example of a claim at once both invalidating and aberrational is found in *People v. One 1953 Ford Victoria*.⁷² The case is interesting also because it is one in which a refusal to give local law extraterritorial effect is accomplished without discrimination.

In *Ford Victoria*, California sought to confiscate a car that had been used to transport narcotics. Under California law, the car could be seized and, pursuant to a forfeiture proceeding, sold without regard to a finance company's equity in the car, if the finance company had failed to make a reasonable investigation of the character of the debtor. The Texas creditor appeared in the forfeiture proceeding. Texas law, it argued, required no such investigation; the car had been financed in Texas, and the contract had specified that the car was not to be driven out of Texas.

Justice Traynor held California law to be without extraterritorial force **(1984) 35 Mercer L. Rev. 615** on these facts; the Texas company was given the benefit of its own state's law. Traynor reasoned that the California legislature could not reasonably have intended to impose the burden of the 'reasonable' character investigation on a nonresident who could not know of the destination of the car, or of the peculiar requirements of the destination state's laws. The car would be confiscated, but subject to the claim of the innocent mortgagee.⁷³ In this way, the court submitted the legislation to reasonable interpretation, and persuaded the only party that would ever respond to such claims—the state—that it could live with the distinction taken. The departure from forum law was sound; but the case presented an unusual opportunity.

Then there are claims that, while not invalidating, are aberrational or anachronistic. The action for alienation of affections is often given as an example; and it is thought that the way to deal with such a case is for the forum to apply nonforum law. That is, the anachronistic claim is to be denied extraterritorial effect; it is to be held in reserve for wholly domestic cases. A moment's reflection will show that such a result should not be countenanced when the forum can overrule its anachronistic position.

A major recent example is afforded by the California 'key employee' case, *Offshore Rental Co. v. Continental Oil Co.*⁷⁴ In that case, the injured key employee had already sued the defendant corporation and recovered

72. 48 Cal. 2d 595, 311 P.2d 480 (1957)

73. *Id.* at 598-99, 311 P.2d at 483.

74. 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978).

for his injuries sustained in Louisiana. The California corporate employer was seeking to bring a second action against the defendant corporation, rather like a corporate loss of consortium suit.

The California court assumed the action to be cognizable under California, but not Louisiana, law, although the matter was not free from doubt.⁷⁵ The court then refused to give the California plaintiff the benefit of California law. The action for loss of services of a key employee seemed to the court to have little to recommend it in these circumstances. Plaintiff and defendant were equally capable of insuring, and on the whole it seemed preferable to cast directly on the employer the burden of insuring against such risks. The court therefore applied Louisiana law to affirm the judgment of dismissal.⁷⁶ Surely, the better approach would have been to hold such a claim noncognizable under California's ambiguous code section. The option was certainly available,⁷⁷ and there would seem to be **(1984) 35 Mercer L. Rev. 616** no important difference in the intellectual process leading to either resolution. The advantage of applying refined forum law, of course, is that in the next, wholly domestic, case, the court would not be forced to entertain the disapproved claim. Indeed, the rationale offered for the result in *Offshore Rental* will make the domestic application of the rule appear as absurd as it will be arbitrary and discriminatory to local defendants.

This last remark points up a further troubling effect of departures from a disfavored liability rule in a true conflicts case. In *Offshore Rental*, we find not only the discrimination between residents typically produced by such departures (the resident plaintiff in this case losing, the resident plaintiff in the next case winning), but also a further problem of discrimination in favor of nonresidents. Unlike cases of departure from a disfavored defense, these cases require a distinction to be drawn between resident and nonresident *defendants*. It is one thing to take account of the expectations of nonresident plaintiffs, as was done in *Milliken*; it is quite another to try to distinguish between the expectations of resident and nonresident defendants. I will return to this problem shortly.⁷⁸

The disfavored claim at the forum may occur in a no-interest, or unprovided-for, case. An example is the well-known case of *Gordon v.*

75. California case pronouncements were "chiefly dicta;" California Civil Code § 49 could have been read not to encompass the claim in suit. The California court, however, assumed "for purposes of analysis" that section 49 would supply the cause of action sued upon. *Id.* at 162, 583 P.2d at 724, 148 Cal. Rptr. at 870.

76. *Id.* at 171, 583 P.2d at 729, 148 Cal. Rptr. at 875.

77. *See supra* note 75.

78. *See infra* text following note 82.

Parker,⁷⁹ in which an action for alienation of affections was brought in Massachusetts; the cause of action had been abolished at plaintiff's home state, Pennsylvania. Defendant was a resident of the forum state. Despite the court's strikingly modern analysis, in the end the action was allowed to proceed under Massachusetts law because the tortious conduct took place there, and departure from a territorial view might be perceived by plaintiff as discriminatory to him.⁸⁰ Ignoring for the instance the special exigencies of federal adjudication, we may doubt that a Massachusetts court today would deal with a disfavored claim of this kind by allowing it. The preferred result would be to overrule the common-law position, as was done in *Pevoski*, and to leave undisturbed the emotional entanglements of the parties.

When the aberrational local claim cannot be abolished for domestic cases (as it could not in *Gordon*, the forum being a federal court), but when the court is free to make a choice under its own steam (as it ought not to have done in *Gordon* for the same reason),⁸¹ should the court disregard the functional problems entailed in a flight to nonforum law, and **(1984) 35 Mercer L. Rev. 617** block the aberrational claim? In an unprovided-for case, the answer is probably no. Application of nonforum law would be no less arbitrary than application of forum law, by hypothesis. But the court would have to face up to the resultant discrimination between resident defendants in such cases and in wholly domestic ones.

Interestingly, the fact that the local rule is disfavored suggests that the policy basis for it has collapsed, whether the case appears nominally to be a true conflict or an unprovided-for one. Any court struggling to avoid disfavored forum law, in either kind of case, is to a rough approximation an uninterested forum. Thus a departure from forum law in this context may seem easy even in a true conflict case. But as we have seen in *Offshore Rental*, the risks of departure remain substantial. Suppose in *Gordon*, the cuckolded husband had brought his action at home in Pennsylvania, where such a suit was permitted, the defendant lover relying on the law of his home state, the place of alienation of affections, Massachusetts, where no recovery could be had. In this true conflict case, the authorities would recommend a moderate and restrained view of the

79. 83 F.Supp. 40 (D. Mass. 1949) (Wyzanski, J.).

80. *Id.* at 43.

81. There, the federal court, finding no forum state conflicts rulings in the context of actions for alienation of affections, held itself free to analyze the problem before it without regard to state conflicts law, and embarked on a prescient interest analysis of which the forum state's courts at the time were quite incapable. *Id.* at 41.

reach of Pennsylvania's aberrational law. But that would entail the discrimination in favor of nonresidents noted in *Offshore Rental*. The further the absconder fled with a Pennsylvanian's wife, the less the Pennsylvanian would be likely to have his remedy under Pennsylvania law. If the court was intellectually honest enough to acknowledge that multistate policy favored leaving the relations of the lovers undisturbed, the court would be faced with having to apply explicitly disfavored law in the next case, and with having to discriminate in this way against lovers who had not "fled away."⁸²

The usual *Milliken*-like distinction is even less persuasive on these facts, for when the *defendant* is the nonresident the foreseeability issue lacks the glamor it has when the plaintiff is the nonresident. The defendant is on notice in a way that the plaintiff is not. The contract debtor expects to be made to pay. The tortfeasor expects to have to make the damage good. Defendants are not surprised by claims. They are surprised, rather, when counsel discovers that they have some sort of defense. Even the Massachusetts lover, in our hypothetical, must be aware that he has injured the Pennsylvania husband. The lover is scarcely 'surprised' when the cuckold sues. Thus, the general desirability of leaving the lovers alone must be weighed against the difficulties the forum inevitably will encounter if it departs from its own disfavored law; and no real question of unfairness to a nonresident can arise to help tip the balance in favor of multistate policy.

Yet, on proper facts, a court unable to change local law may feel justified (1984) 35 Mercer L. Rev. 618 in departing from it, just as in acute cases, even in the presence of unfairness to a nonresident, a court may feel the mandate of the legislature to be inexorable. Against multistate policy, however, the court will be balancing genuine functional considerations. An ultimate insistence on forum law need not be viewed as mechanical or parochial.

II. TRADITIONALIST PROPOSALS FOR DEPARTURE FROM FORUM LAW

Courts and writers sharing a territorialist outlook also share a tendency to approach choice of law *ab initio*; rarely will they confine discussion to nonfalse conflicts. But we do find an occasional suggestion for avoidance of parochial applications of forum law in nonfalse conflict cases, and when relevant we may also consider more general traditionalist suggestions for departure from forum law.

It should be pointed out that traditionalist writers favor departures from forum law generally, quite apart from their further advocacy of some

82. Keats, *The Eve of St. Agnes* (final stanza).

particular, traditionalist alternative choice. They note that chronic resort to the law of the forum is clearly incompatible with the goal of uniformity of decision. Moreover, when the forum defers to the law of a sister state, they find a refreshing lack of parochialism and a welcome appearance of comity.

Yet it seems obvious that comity cannot stand alone as a desideratum. As the Supreme Court has pointed out in a more acute context, an invariable comity requirement “would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.”⁸³ The shorter answer to the argument from comity, however, is that it begs the question. The issue is, precisely, when to depart from forum law.

Brainerd Currie, of course, would disapprove any residual choice rule that did *not* look to forum law, on the very ground that in a true conflict case such a rule would tie the interested forum’s hands, or else enable it to evade its legislature’s mandate.⁸⁴ That is a powerful criticism. Indeed, the territorial rule proposed for true conflicts in the New York case of *Neumeier v. Kuehner*⁸⁵ (if it applied in nonguest statute cases) would operate to overrule New York’s famous decision in *Kilberg b. Northeast Airlines, Inc.*,⁸⁶ in which New York refused to go along with *lex loci delicti* (1984) 35 Mercer L. Rev. 619 when to do so would frustrate New York policy.⁸⁷

It should also be taken into account by those who find chronic resort to forum law parochial that departures from forum law, in cases brought by nonresidents, will *create* parochialism, of a less speculative sort. An interesting example of this sort of well-intentioned fumbling may be found in a recent amendment⁸⁸ to the Jones Act,⁸⁹ denying a cause of action under American maritime laws to foreign seamen injured in foreign waters. To put it crudely, the amendment will protect American

83. *Alaska Packers Ass’n v. Industrial Acc. Comm’n*, 294 U.S. 532, 547 (1935).

84. Currie, *Married Women’s Contracts*, *supra* note 14.

85. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). For true conflicts in guest statute cases, the court in *Neumeier* proposed choice of the law of the place of occurrence, except in joint domicile cases. *Id.* at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70 (quoting *Tooker v. Lopez*, 24 N.Y.2d 569, 585, 249 N.E.2d 394, 404, 301 N.Y.S.2d 519, 532-33 (1969)).

86. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

87. *See* *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir. 1973) (ignoring *Neumeier*).

88. Pub. L. No. 97-389, 96 Stat. 1955 (1982) (amending 46 U.S.C. § 688).

89. 46 U.S.C. § 688 (1976).

defendants⁹⁰ from liability to some foreign plaintiffs. A Congress bent on avoiding parochial applications of United States law⁹¹ has set up a situation of rather blatant parochialism.

How, then, could Congress or the courts preserve American courts from an inundation of litigation brought by foreigners attracted by our more generous laws?⁹² Whatever the solution to that considerable difficulty, it ought not to be managed with such a palpable lack of evenhandedness. When the defendant shipowner is in some sense American, United States regulatory concern is so clear that the denial of recovery to foreign seaman may well involve discrimination of constitutional magnitude.⁹³

But the traditionalists unite their distaste for the law of the forum with a clear preference for the law of the place of transaction or occurrence. The proposal made in the *Neumeier* case, stated more fully, is that, except in joint domicile cases, in all true conflict and unprovided-for guest statute cases the law of the place of injury should govern.⁹⁴

A residual choice of territorial law for intractable cases is appealing to traditionalists in part because the place where the events in suit occurred seems to them to have a more significant contact with a case than may be found at the residence of either party, (at least when the parties are not joint domiciliaries), and certainly than may be found at the forum. Only the 'seat' of the parties' 'relationship' might, to some of these writers, as **(1984) 35 Mercer L. Rev. 620** legitimately, or perhaps more legitimately, govern the parties' respective rights and duties.⁹⁵ When the forum defers

90. And other defendants sufficiently present here to be amendable to the process.

91. See generally *Hearings on Jones Act Liability*, 96th Cong., 2d Sess. (June 3, 1980); see *deMateos v. Texaco, Inc.*, 562 F.2d 895, 901 (3d Cir. 1977) ('social jingoism').

92. See, e.g., *Castanho v. Brown and Root (U.K.) Ltd.*, [1980] 1 W.L.R. 833 (C.A.) (opinion of Lord Denning), *rev'd* [1981] 1 All E.R. 143 (H.L.). After *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), the New York courts inundated by guest statute cases. I suspect this may help to explain New York's so-called *Neumeier* rules. See *supra* note 85 and *infra* note 94.

93. See generally Currie, *The "Transitory" Cause of Action*, *supra* note 2, at 268 [283].

94. This statement is extracted from an amalgam of the three rules proposed. The first *Neumeier* rule will not cover all false conflicts, nor the second all true ones. But the residual territorial choice of the third *Neumeier* rule justifies the generalization in the text. See 31 N.Y.2d at 128, 286 N.E.2d at 457-58, 335 N.Y.S. at 70.

95. E.g., D. CAVERS, *THE CHOICE OF LAW PROCESS* 166, 177 (1965).

to the laws at the territory where the events in suit occurred, the choice appeals to writers like Professor Reese, for example, as giving weight to concerns of federalism, because in his view the place of occurrence is the state of presumptively greater concern.⁹⁶

Of course, it cannot be that either reason or federalism require a departure from forum law whenever the place of the event is elsewhere; too many false conflicts fit that description.⁹⁷ Yet there are those who even believe that the lawmaking power of a state is limited to events and things within its territory; these authorities sometimes assert that a state lacks power to apply its law when the residence of a party is the state's only contact with a case.⁹⁸ But, of course, a state's legislative power must derive from its legitimate interest in the welfare of its *residents*;⁹⁹ power over events and things in the territory is delimited entirely by the scope of that more fundamental interest. That is why a state has the power to declare the status of its residents;¹⁰⁰ to serve them with process wherever they may be located;¹⁰¹ to prosecute them for crimes committed elsewhere;¹⁰² and to give them the benefit of its laws in cases against nonresidents concerning extraterritorial events.¹⁰³ I have dealt with this issue elsewhere.¹⁰⁴

It should be understood that the residual territorial choice tends to frustrate those widely shared policies that can be vindicated only through application of forum law. As we have seen, in tort cases, these policies favor recovery; in contract cases, they favor validation, which, again, is likely to mean recovery. The plaintiff who has been able to choose a forum **(1984) 35 Mercer L. Rev. 621** ought to be given access to justice at

96. Reese, *The Second Restatement of Conflict of Laws Revisited*, 34 MERCER L. REV. 501, 514 (1983).

97. *See, e.g.*, the classic case of *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

98. *See, e.g.*, Martin, *The Constitution and Legislative Jurisdiction*, 10 HOFSTRA L. REV. 133, 142-46 (1981).

99. This has been the principal definition of state 'police power' since *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 208 (1824). *See, e.g.*, *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 314 (1981) (state has most profound police power responsibilities towards residents) (plurality).

100. As Martin, *supra* note 98, at 146, finally concedes. *See, e.g.*, *Williams v. North Carolina*, 317 U.S. 287 (1942).

101. *Blackmer v. United States*, 284 U.S. 421 (1932) (service abroad issuing from federal court).

102. *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941).

103. *See, e.g.*, *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194, 203 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978).

104. Weinberg, *supra* note 4.

that forum in part because all states share policies favoring compensation for injuries, deterrence of tortious conduct, and enforcement of agreements. Moreover, any general policy of evenhandedness would support such access. The fact that the place of the tort or of contracting may recognize a particular defense in a domestic case in its own courts ought not to deflect the forum from its task of enforcing its own law, in harmony with widely shared policy concerns.

The residual territorial choice cannot be supported on the ground that it tends to effectuate those sorts of policies. It is true that there are always general validating and deterrent interests at the transactional state, a reflection that lent appeal to the place of contracting for Chief Justice Gray in *Milliken*. But in a true conflict case, when the traditionalists would have us choose the law of the transactional state in preference to the law of the forum, the chances are overwhelming that the plaintiff has chosen the forum precisely because compensation, enforcement, and so forth, cannot be obtained at the transactional state.¹⁰⁵

It may be argued that at least the territorial choice is neutral, made without reference to the citizenship of the parties; that the forum should not be able to apply forum law in favor of its own resident without further justification; and that nonterritorial approaches lead precisely to this discriminatory result.

Now, we have already seen that there is no merit in this view. The lack of evenhandedness imputed to courts enforcing their own laws in conflicts cases does not exist.¹⁰⁶ Discriminations against nonresidents will occur significantly only when the forum fails to apply its law to them. (Even then, such discriminations rarely assume constitutional proportions, because nonresidents are rationally distinguishable from residents.) Astonishingly, the very writers who contend for departures from forum law through neutral, territorial choices also recognize that discrimination against nonresidents is generated only by such departures from forum law—by refusals of the forum to extend the benefit of its laws to nonresidents.¹⁰⁷ As we have also seen, departures from forum law on territorial grounds generate discrimination because the extraterritoriality of events can rarely justify distinctions between residents in application of their home law to them. (Of course, it can distinguish their *case*, and thus may prevent a given discrimination from assuming constitutional dimensions.) The territorialists' promise of evenhandedness in choice of law is thus a hollow one; the policy of evenhandedness cannot be used to

105. *But see supra* note 26.

106. *See supra* notes 4-6 and accompanying text.

107. *See, e.g., Ely, supra* note 2, at 196, 217.

justify departures (1984) 35 *Mercer L. Rev.* 622 from forum law, and in fact counsels strongly against such departures.

There is one widely shared policy concern, however, which territorialists are persuaded makes the residual territorial choice far superior to the residual choice of forum law: fairness. Even the interest analysts would agree that there is some wisdom in the territorial choice for cases in which the reasonable expectations of the regulated party would be dispositive. An interest analyst would deal with such cases by determining whether forum law reasonably could have been intended to govern the extraterritorial transaction, given the inability of the affected party to foresee the laws at the unknown future forum.¹⁰⁸ The affected party will be able to foresee forum law only to the extent that the forum bears some other, known, relation to the case. Forum law is thought to be foreseeable if the forum was the place of transaction or occurrence, or is the home state of the party to be disadvantaged by it. Thus, in *Ford Victoria*, the result favoring the innocent mortgagee probably would have shifted had the claimant entered the forum state contract.

It is not possible, however, to argue that a residual territorial choice for all true conflict cases is *required* by considerations of fairness. The cases that focus on the problem of foreseeability, like *Milliken* and *Ford Victoria*, do so when there is a defense at the forum, and it is the claimant who could benefit from a territorial choice. As we have observed, fairness to plaintiffs generally requires access to forum law.¹⁰⁹ But the expectations of contract defendants are that they will be bound; thus, it is always fair to apply validating forum law to them. The expectations of tort defendants are that, unless there is some defense unanticipated by them, they or their insurer will have to pay for the consequences of their tort; that is why they tend to insure.

So the argument from fairness turns out to be question-begging too. The issue is, to whom shall the forum be fair? It is the collective wisdom, in view of multistate policy, that the favored class, generally, is not that of defendants.

An argument is made by Professor Cavers,¹¹⁰ and through the second *Neumeier* rule by Judge Fuld,¹¹¹ that at least the defendant acting in his own state's territory should be given the benefit of his own state's law. Fairness is thought to support this view. I have dealt with a similar argument elsewhere,¹¹² and will reply to this very briefly here.

108. *See supra* note 5.

109. *See supra* notes 5-6 and accompanying text.

110. D. CAVERS, *supra* note 95, at 49. *But see infra* note 113.

111. 31 N.Y.2d at 128, 286 N.E.2d at 457-58, 335 N.Y.S. at 70.

112. Weinberg, *supra* note 4, at 1038.

It cannot be that all defendants acting in conformity with the laws of (1984) 35 Mercer L. Rev. 623 their own territories who nevertheless injure nonresidents who have entered those territories somehow become immune from all liability for those injuries. It cannot be that for those hapless plaintiffs all other multistate policies are suddenly suspended. To credit that, it seems to me, one would have to substitute for our federalism a set of streetgame-like rules, under which any 'player' daring to step foot on a tortfeasor's territory would at once on that account be stripped of any right to expect the protections of widely adopted law. I decline to share that outlook.¹¹³

Certainly, many traditionalists would agree that tortfeasors on interstate highways, or transacting with known nonresidents, or with tourists generally, or for the interstate market, ought to be chargeable with notice of the likelihood of foreign law being brought to bear on their conduct. Similarly, debtors contracting at home with nonresidents must be chargeable with knowledge that validating law might be brought to bear on their transactions, if only because they intend to be bound

These instances, concededly, are drawn from easy cases. Presumably, the traditionalists' concern for fairness is evoked by harder cases, and the suggested rule intended to apply to those cases only, the easy ones being perceived as exceptional. The hardest case for my position is the case in which the defendant has reasonably conformed to the law of his or her home state, and in which the defendant cannot be expected to vary his or her conduct with the fortuitous residences of occasional visitors. On such facts, the plaintiff's own state's court might be expected to exhibit some reluctance to export its rule creating liability.

A hypothetical hard case might be illustrative here. Driving through unfamiliar streets on business, Mr. Jones, the plaintiff, a nonresident, rings a random doorbell to ask directions after making his way up a snowy path. On his way back to the road, he observes a sign warning that the path is slippery. Although he makes every effort to avoid an accident, he slips on the unshoveled, unsanded snow on the path and is seriously injured. Under the law of the situs, there is no duty to remove or sand snow on one's own property, as long as one has posted a warning; the law of the plaintiff's home state is to the contrary. The plaintiff sues at home and somehow obtains jurisdiction.

Since Ms. Smith, the homeowner defendant, specifically relied on the law of her home state in postponing the task of clearing the walk, and since she had no way of knowing in advance in which state her uninvited visitor resided, it might be thought insupportable to hold her to duties

113. Professor Cavers seems to have repented of that position in Cavers, *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 647, 650 & n.14 (1968).

intended to regulate landowners in that visitor's state. It might be suggested that on these facts the forum could not constitutionally apply its (1984) 35 Mercer L. Rev. 624 own law.¹¹⁴ It will surely be thought that the forum should not do so.

Yet imposition of liability would not be inappropriate. Although the failure to shovel snow may not be actionable at the situs, it is a failure nevertheless; a homeowner must be aware that the failure creates a condition of some risk,¹¹⁵ whether or not a warning is posted. That the situs cheerfully places the risk on the injured party is all very well when the injured party is one of the situs' own residents. It seems a bit high-handed when the injured party is a nonresident, particularly when the costs of the injury will have to be borne in another state. As between an innocent injured party and an insured or otherwise suable party amenable to jurisdiction, whose act or omission caused the injury, widely shared policies favoring risk spreading, compensation, and deterrence, coupled with considerations of the foregoing kind, suggest that the risk of accident should not fall on the injured party, and that most courts would share the view.

I have the temerity to argue that even a court at the situs should apply compensatory law, particularly since, on these hypothetical facts, no other court is likely to be available to the plaintiff. Better yet, the situs court should rid itself, if at all possible, of its aberrational nonliability rule.

A fair example of this sort of intrepidity in a very hard case indeed may be found in Judge Friendly's opinion in *O'Connor v. Lee-Hy Paving Corp.*¹¹⁶ In that case, the court ruled that New York would apply its own law to allow a New York widow to recover against a Virginia paving company for the death of her husband on a Virginia worksite.¹¹⁷ Under New York workers' compensation law, an action against the New York employer was barred, but an action against the third-party paving company

114. Some authorities persist in the opinion that the forum residence of a party is constitutionally insufficient to ground application of forum law beneficial to that party. See, e.g., Martin, *The Constitution and Legislative Jurisdiction*, 10 HOFSTRA L. REV. 133, 143 (1981). Professor Martin believes this view is required by *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), except in matters of status. It should also be recalled that in the *Dick* situation the taking of jurisdiction would today be held unconstitutional, absent some transitory presence of the defendant in the forum state; see *infra* note 121 and accompanying text.

115. See, e.g., *Mirza v. Filmore Corp.*, 92 N.J. 390, 393-94, 456 A.2d 518, 520-21 (1983) (commercial landowner).

116. 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978).

117. *Id.* at 205-06.

could be maintained. Under Virginia law the employer's immunity cloaked the paving company as well.

The case would be very like my hypothetical if the defendant were an individual and the owner of the Virginia worksite. But even were that so, Judge Friendly's opinion would not have shifted. Referring to the general course of New York jurisprudence, he reasoned that New York would not suspend its policy favoring recovery for the widow simply because the accident (1984) 35 Mercer L. Rev. 625 occurred elsewhere, at the defendant's home state.¹¹⁸ The district judge had reached the same conclusion.¹¹⁹

Even a Virginia court might have allowed the nonresident widow to bring the action there. Virginia's bar to third-party suits is clearly capable of construction limiting it to local employees and their survivors. Indeed, a Virginia court, noting that the bar to third-party suits is aberrational and difficult to justify, might well consider judicial revision of the rule. If the statute is capable of construction limiting its application even in domestic cases, that construction should be put upon it. In this way, both resident and nonresident workers at a Virginia worksite would have access to the better rule.

O'Connor presents a problem about which reasonable minds can and do differ. But even assuming such conflicts require application of the laws of the defendant's state, obviously they are unlikely to arise. Personal jurisdiction would seem virtually unobtainable on these facts; *O'Connor* could not happen today, given *Shaffer v. Heitner*¹²⁰ and *Rush v. Savchuk*.¹²¹ Even were transient jurisdiction obtainable, some writers would argue that such jurisdiction is, or may shortly become, unconstitutional.¹²² There seems little point in pitching a general principle, or even an excepting principle, on an impossible case. In short, concern for fairness to defendants acting in their own territories need not be exalted above other widely shared concerns.¹²³

118. *Id.* at 205.

119. *See* *O'Connor v. Lee-Hy Paving Corp.*, 437 F.Supp. 994 (E.D.N.Y. 1977).

120. 433 U.S. 186 (1977) (actions quasi in rem are subject to minimum contacts requirements for the taking of jurisdiction).

121. 444 U.S. 320 (1980) (*Shaffer* applies to an action commenced by seizure of insurer's contingent obligation to defend and to pay any judgment).

122. *See, e.g.,* Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner*, 63 IOWA L. REV. 1031 (1978).

123. The Supreme Court has, no doubt, imposed these heavy jurisdictional barriers precisely out of this very concern. In light of this discussion the Court's preoccupation seems unnecessary, and damaging to widely shared remedial

Thus far, we have considered the propriety of territorialist departures from forum law in true conflict cases. It remains to be considered whether resort to the law of the transactional state would furnish an appropriate resolution for the unprovided-for case, as suggested in the third rule of *Neumeier v. Kuehner*.¹²⁴

In these cases, a nonresident plaintiff from a nonliability state sues a resident defendant at a proliability forum.¹²⁵ Although on such facts **(1984) 35 Mercer L. Rev. 626** *Neumeier* resulted in dismissal, in other cases the plaintiff has been permitted to go to the jury under forum law.¹²⁶ It would appear obvious that the correct result would be application of forum law. By hypothesis, the place of injury has no policy to which the forum need defer on grounds of comity, while forum law would advance policies shared by the place of injury. In applying its own law, the forum would be in no danger of discriminating between two arbitrarily determined classes of defendants: resident defendants would be liable both to resident and nonresident plaintiffs. Indeed, the forum would be acting with evenhandedness in making its laws available to the nonresident plaintiff. The expectations of the defeated party, moreover, would not be especially affronted by the choice of forum law. The defendant resides at the forum, and it cannot seriously be argued that there is substantial injustice or unfair surprise when the defendant residing there is governed by forum law.

III. CONCLUSION

It appears that nonfalse conflict cases occasions for departure from forum law are even less numerous than suggested by modernist writers. Certainly, the forum is never warranted in departing from its own law on the spurious ground that comity or federalism require it to defer to some other law, or on the ground that comity or federalism require it to defer to some other law, or on the ground that the place of transaction is the more concerned jurisdiction. The forum cannot with assurance depart from its law, even when there is a defense or an aberrational or invalidating claim at the forum, unless revision of local law is not a desirable or practicable

policies. My argument is that defendants should not be allowed to escape responsibility behind either jurisdictional *or* choice of law barriers.

124. 31 N.Y.2d at 128, 286 N.E.2d at 458, 335 N.Y.S. at 70.

125. The reverse situation will not be ‘unprovided-for,’ the place of injury having an interest in recovery without regard to the residence of the parties, chiefly because its deterrent safety concerns are advanced through imposition of liability on the tortfeasor.

126. *See, e.g., Erwin v. Thomas*, 264 Or. 454, 506 P.2d 494 (1973)

alternative, or unless a departure from local law can be managed without discrimination between residents of the forum state in conflicts and domestic cases respectively. The forum cannot depart from its own law on the ground that its law is highly disfavored without risking the irrationality of returning to explicitly disfavored law in subsequent cases; when feasible the forum must refine local law. When there is repealed or overruled law at the forum, retroactive application of the newer law, when possible, is preferable to a flight to nonforum law. In sum, the forum ought not to depart from its own law on grounds of multistate policy without considering the magnitude of the irrationalities and inequities that can attend a departure from forum law.

I suspect that we should begin to see increased judicial revision of local law by courts confronted with invalidating, aberrational, or anachronistic home law, if conflicts analysis, as it should be, is increasingly and successfully assimilated to ordinary judicial process.¹²⁷ I suspect, too that commentators **(1984) 35 Mercer L. Rev. 627** will become increasingly comfortable with choices of forum law, and more sympathetic to courts making such choices, once the role of forum law in administration of multistate policy, and the functional constraints operating on the forum, are more fully understood.

127. *See supra* note 23 and accompanying text.