Interstate Accidents and the Unprovided For Case: Reflections on Neumeier v. Kuehner

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THE primary focus of interest analysis, as developed by Brainerd Currie,1 was on identifying false and true conflicts.2 Currie also recognized, however, that there could be a case in which none of the involved states had an interest in applying its law on the issue as to which their laws differed.3 This he called the unprovided for case, which, while “comparatively rare,”4 did occur, and in Currie’s view, should be resolved with reference to other policies that were common to the involved states.5 Currie did not fully develop the rationale for resolving the unprovided for case until he came to consider the effect of the privileges and immunities6 and the equal protection7 clauses upon a court’s freedom to choose the applicable law. His concern there in the context of the unprovided for case was whether the forum, in order to avoid unreasonable discrimination, was required to apply its own law in favor of a non-resident party.8 But it must be admitted that Currie did not fully develop the rationale for resolving the unprovided for case.9

Currie also intimated that it was the unprovided for case which might present the most difficulty for the utilization of interest analysis, since by definition “neither state cares what happens,”10 and the basis of interest analysis is the identification of the interests of the involved states. His fears, I would submit, are well borne out by the decision of the New York Court of Appeals in Neumeier v.
"Not only did the court decide the case in a way of which Currie would not approve, but it limited the application of interest analysis, which by that time—despite a rocky path—seemed fairly secure in New York. Neumeier was clearly the unprovided for case. The decedent was a resident of Ontario, a guest statute state, and the accident occurred there. The defendant was a resident of New York, and his automobile was insured there. Ontario had no interest in immunizing the New York host and his insured, and New York had no interest in applying its law to allow recovery to a non-resident injured in his home state.

Previous interstate accident cases coming before the New York Court of Appeals had involved either false or true conflicts. With the decision in Tooker v. Lopez, despite the fact that the court was “wracked by dissent,” it was established that in a guest statute case involving New York residents a false conflict was presented and New York law would apply. In Miller v. Miller, the court was faced with a conflict between Maine law imposing a limitation on wrongful death recovery and its own law which allowed unlimited recovery. The decedent was a New York resident and the defendant was a Maine resident at the time of the accident, although he subsequently moved to New York. The accident occurred in Maine.

13. Highway Traffic Act of Province of Ontario [ONT. STAT. ch. 172 (1960)], § 105(2), as amended, Stat. of 1966, ch. 64, § 20(2). The statute provides that the guest passenger cannot recover unless the host was guilty of gross negligence.
14. Insurance rates are determined by the loss experience in a territory of insureds, and the place where the vehicle is garaged is the place where it is considered insured for loss allocation purposes. See the discussion in Morris, Enterprise Liability and the Actuarial Process—the Insignificance of Foresight, 70 YALE L.J. 554, 567-9 (1961).
16. As to the possible interest in allowing recovery if the non-resident had been injured in New York, see the discussion infra notes 60-69 and accompanying text.
In terms of interest analysis this was a true conflict, and New York applied its own law on the ground that it had an interest in so doing and that the application of its law was not unfair to the defendant or his insurer. The court also emphasized the fact that the defendant had subsequently changed his residence to New York, and the decision has been explained on that basis. Taking Miller and Tooker together, and looking to the approach taken in other cases, it clearly seemed that the majority of the court at least was committed to the methodology of interest analysis in dealing with conflicts problems.

Neumeier, however, involved the unprovided for case, and this was the rock on which interest analysis foundered in New York. With only Judge Bergan dissenting, the court questioned the utility of interest analysis and turned instead to "narrow choice of law rules." Chief Judge Fuld, speaking for the court, stated as follows:

In consequence of the change effected [looking to the law of the state which has the "greatest interest" in the specific issue raised in the litigation]—our decision in multi-state highway accident cases, particularly in those involving guest-host controversies, have, it must be acknowledged, lacked consistency. This stemmed, in part, from the circumstance that it is frequently difficult to discover the purposes or policies underlying the relevant local law rules of the respective jurisdictions involved. It is even more difficult, assuming that these purposes or policies are found to conflict, to deter-

21. The court pointed out that under Maine law the defendant would have been fully liable for compensatory damages if the decedent had lived, and that Maine automobile insurance policies did not distinguish between liability for personal injuries and liability for wrongful death, so that there was no "reliance" on the Maine limitation. 22 N.Y.2d at 20, 237 N.E.2d at 881, 290 N.Y.S.2d at 740. Also under Maine law the insurance policy could not be limited to accidents occurring in Maine. Id. at 21, 237 N.E.2d at 882, 290 N.Y.S.2d at 741. Thus, unlimited liability was "foreseeable and insurable," and there was no unfairness in holding the insurer to the higher standard of liability. The nominal defendant obviously wanted his brother's beneficiaries to have full recovery against his insurance company. The court in Miller lined up the same way it did subsequently in Tooker.

22. See the discussion in R. WEINTRAUB, COMMENTARY, supra note 9, at 252-53.

23. The majority opinion was concurred in by Judges Burke, Scileppi and Gibson. Judges Breitel and Jasen concurred on the ground that the law of the state of injury should normally apply and that the accident did not have a sufficient relationship to New York to justify a departure from the "normal rule."

24. 31 N.Y.2d at 127, 286 N.E.2d at 457, 335 N.Y.S.2d at 69.

25. The term "greatest interest" may cause some confusion, since, according to Currie, a court cannot "weigh" conflicting interests. In practice, however, at least by the time of Tooker, the "greatest interest" test meant that New York law would apply whenever New York had a real interest in the application of its law and this produced no unfairness to the other party.
mine on some principled basis which should be given effect at the expense of the others.

The single all-encompassing rule which called, invariably, for selection of the law of the place of injury was discarded, and wisely, because it was too broad to prove satisfactory in application. There is, however, no reason why choice-of-law rules, more narrow than those previously devised, should not be successfully developed, in order to assure a greater degree of predictability and uniformity, on the basis of our present knowledge and experience.

Judge Fuld then referred to his concurring opinion in Tooker, in which he set forth three principles for deciding guest statute cases, and these principles were adopted by the majority in Neumeier. First, when the passenger and driver were from the same state, that state's law should apply on the issue of guest-host immunity. Second, when the driver was from a guest statute state and the passenger was from a recovery state, the law of the state where the accident occurred should apply.\(^26\) Third, where the parties were from different states, the law of the state where the accident occurred should apply unless it could be shown that "displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants."\(^27\)

\(\text{Neumeier} \) was governed by the third principle. The law of Ontario, where the accident occurred, was presumptively applicable. The proviso to the third principle was not relevant here, in the view of the court, because:\(^28\)

Certainly, ignoring Ontario's policy requiring proof of gross negligence in a case which involves an Ontario-domiciled guest at the expense of a New Yorker does not further the substantive law purposes of New York. In point of fact, application of New York law would result in the exposure of this State's domiciliaries to a greater liability than that imposed upon resident users of Ontario's highways. Conversely, the failure to apply Ontario's law would "impair"—to cull from the rule set out above—"the smooth working of the multi-

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\(^{26}\) The court recognized that there might be "special circumstances" enabling a driver from a guest statute state who caused the accident in a recovery state to assert the law of his home state as a defense, but did not indicate what those "special circumstances" were. 31 N.Y.2d at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70.

\(^{27}\) Id. at 128, 286 N.E.2d at 458, 335 N.Y.S.2d at 70.

\(^{28}\) Id. at 129, 286 N.E.2d at 458, 335 N.Y.S.2d at 70.
state system [and] produce great uncertainty for litigants” by sanctioning forum shopping and thereby allowing a party to select a forum which could give him a larger recovery than the court of his own domicile.

The court saw nothing discriminatory in refusing to give the same protection to an Ontario plaintiff injured in Ontario by a New York defendant that it would give to a New York plaintiff injured in the same situation. Where the injured plaintiff was an Ontario resident, New York, said the court, “has no legitimate interest in ignoring the public policy of a foreign jurisdiction . . . and in protecting the plaintiff guest domiciled and injured there from legislation obviously addressed, at the very least, to a resident riding in a vehicle traveling within its borders.” Although this meant that an Ontario plaintiff injured in Ontario would not be protected against a New York defendant while a New York plaintiff would, this was said to be “the result of the existence of disparate rules of law in jurisdictions that have diverse and important connections with the litigants and the litigated issue.” It was also immaterial that the defendant’s vehicle was insured in New York and that the insurance policy covered the owner's liability regardless of where the accident occurred, since “[t]he compulsory insurance requirement is designed to cover a car-owner’s liability, not create it.” And, as the court concluded, quoting from Professor Reese, “[W]as the New York rule really intended to be manna for the entire world?”

My concern with the Neumeier decision is three-fold. As a proponent of what I have called judicial method and the policy-centered conflict of laws, I am particularly concerned about the approach

29. Under Tooker, of course, the New York plaintiff injured by a New York defendant could recover irrespective of where the accident occurred or of the particular facts giving rise to the accident.
30. 31 N.Y.2d at 125, 286 N.E.2d at 456, 335 N.Y.S.2d at 68.
31. Id. at 126, 286 N.E.2d at 456, 335 N.Y.S.2d at 68.
32. Id. In Tooker Judge Keating observed that the New York legislature “has evinced commendable concern not only for residents of this State, but residents of other States who may be injured as a result of the activities of New York residents.” 24 N.Y.2d at 577, 249 N.E.2d at 399, 301 N.Y.S.2d at 526. In Neumeier the court said that this statement was “in the context, not of proving that New York had a governmental interest in overriding foreign rules of liability, but of demonstrating that it was immaterial . . . that the driver and passenger, while domiciliaries of New York, were attending college in Michigan.” 31 N.Y.2d at 126, 286 N.E.2d at 456, 335 N.Y.S.2d at 68.
34. 31 N.Y.2d at 130, 286 N.E.2d at 458, 335 N.Y.S.2d at 71.
to conflicts problems in terms of “narrow choice of law rules” that the court adopted in Neumeier. Secondly, since interest analysis lies at the core of my approach,8 I want to develop precisely the rationale for solving the unprovided for case in terms of interest analysis. Thirdly, I would like to explore further the question of discrimination in choice of law, including the constitutional overtones, and consider whether in certain circumstances a state’s rule of law must be “manna for the entire world.” The present writing will be structured along these lines.

JUDICIAL METHOD AND THE “NEUMEIER RULES”

In Neumeier the court tried to formulate choice of law rules for future application at least in guest statute cases.37 The rules that the court formulated contained elements of both interest analysis and considerations of territoriality, and perhaps are symbolic of the court’s ambivalence in this regard. After abandoning the place of the wrong rule with its territorial basis, in Babcock v. Jackson,39 the court—if it is possible to speak of “institutional behavior”—had second thoughts in Dym v. Gordon.40 In Dym, it strained to find a reason for applying the law of the place where the accident occurred,41 and did so on the ground that the relationship was “seated” there. In Macey v. Rozbicki,42 it was able to reconcile its concern with territorialism with its interest in applying New York law by

36. I differ with Professor Currie only in regard to distinguishing between “real” and “hypothetical” interests, and that difference will not frequently be significant. See the discussion in Sedler, Conflict of Laws: Round Table Symposium, 49 Texas L. Rev. 224, 225 (1971). I agree with Professor Currie that in the case of a true conflict the forum should apply its own law. Professor Weintraub, the leading present-day proponent of interest analysis, on the other hand, contends that there are rational bases for resolving true conflicts. R. Weintraub, Commentary, supra note 9, at 203-10. See also the discussion in Sedler, Book Review, supra note 9, at 1075-78.

37. The court uses “rules” and “principles” interchangeably, and no distinction is apparently intended.

38. It is difficult to see why they should be so limited if the court is really serious, as I think it is, in trying to develop choice of law rules.


41. It found that one of the purposes of the Colorado guest statute was to give priority in the assets of the negligent driver to persons in the vehicle of the other driver, so that Colorado had an interest in the application of its law notwithstanding that the plaintiff and defendant were New York residents, 16 N.Y.2d at 124, 209 N.E.2d at 794, 262 N.Y.S.2d at 466. In Toker, the court said that this could not have been a purpose of the Colorado statute, since the statute permitted recovery by guests in the vehicle of the negligent driver if they could establish that he was guilty of gross negligence, 24 N.Y.2d at 575, 249 N.E.2d at 397, 301 N.Y.S.2d at 524.

finding that the relationship between the parties, who were sisters, was "seated" in New York. When it could not perform this feat in *Tooker v. Lopez*, which was indistinguishable on its facts from *Dym*, it split, with the majority coming down in favor of interest analysis. As stated previously, the majority of the court had also been employing interest analysis in other cases as well. In *Neumeier*, however—and only partly influenced by a change of personnel—the court retreated considerably back to territorialism. It changed its approach to one of "narrow choice of law rules," which were based only in part upon interest analysis and in which considerations of territoriality, *i.e.*, the place where the accident occurred, predominated.

It has been my submission that the courts should decide conflicts problems on a case by case basis with reference to considerations of policy and fairness to the parties. Conflicts cases, particularly in the tort area, fall into certain fact-law patterns, and in my view, can properly be resolved with reference to those considerations. The decision in each case will serve as a precedent for future ones, and in time, based on the normal workings of stare decisis, a body of conflicts law may emerge in each jurisdiction. I have called this approach judicial method and the policy-centered conflict of laws and have developed it more fully elsewhere. When the New York Court of Appeals decided *Tooker*, it seemed to me that it was essentially following this kind of approach. It recognized that *Babcock*, *Dym*, *Macey*, and *Tooker*, although they involved different factual situations, presented the same fact-law pattern: two parties from a recovery state were involved in an accident in an immunity state. In terms of interest analysis this case was a false conflict, since New York was interested in seeing that the New York plaintiff recover for his personal injuries and the state of injury had no interest in

43. See the discussion of the *Dym* and *Macey* decisions in Sedler, *Babcock v. Jackson in Kentucky*, supra note 35, at 77.
45. See note 18 supra. The court said *Dym* could be distinguished because of the presence of a third party "non-guest," but refused to rest its decision on that ground and effectively overruled *Dym*, observing that: "[w]here the guest-host relationship 'arose' or is 'centered' is wholly irrelevant to policies reflected by the laws in conflict. Any language in our earlier opinions lending support to a contrary view has . . . been overruled." 24 N.Y.2d at 579, 249 N.E.2d at 400, 301 N.Y.S.2d at 527.
46. See note 12 supra.
47. Judge Keating had been replaced by Judge Gibson. Of the other three members of the "Tooker majority," only Judge Bergan dissented, and Judge Scileppi, who dissented in *Tooker*, concurred in the majority opinion in *Neumeier*.
48. Supra note 35.
immunizing the New York defendant and his New York-based insurer from liability. In Miller v. Miller, decided a year before Tooker, there was a different fact-law pattern: a recovery state (unlimited liability for wrongful death) victim was involved in a fatal accident with a defendant from a non-recovery state (limited liability for wrongful death) in the defendant's home state. In this case of true conflict the court, although split, applied New York law on the basis of an "interest and fairness" test. While the result in Miller may have been influenced by the fact that the defendant subsequently moved to New York, this was not crucial to the decision, and it is difficult to believe that the case would have been decided differently if the move had not occurred. Tooker then would serve as a precedent for any interstate accident case presenting a false conflict and Miller for one presenting a true conflict.

If the New York Court of Appeals was following the approach of judicial method and the policy-centered conflict of laws prior to Neumeier, it is clear after Neumeier that it has abandoned it. The approach in Neumeier is one of choice of law rules, however narrow, and more important, the rules that the court pronounced in Neumeier are not a summary of what the court had decided in previous cases and do not necessarily follow from the decisions in those cases.

50. See note 14 supra.
52. I use the terms "recovery" and "non-recovery" to encompass the existence or non-existence of affirmative tort liability, defenses such as guest statute immunity, and limitations on the amount recoverable.
53. See note 21 supra.
54. See R. Weintraub, Commentary, supra note 9.
55. The nominal defendant, who would have wanted his brother's beneficiaries to recover against his insurer, would have permitted himself to be served in New York, and in any event, quasi in rem jurisdiction would exist by the attachment of the insurer's obligation to defend under the doctrine of Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). The "interest and fairness" test that the court employed in Miller did not, in my view, depend upon the defendant's subsequent move to New York. See also the discussion in Sedler, The Territorial Imperative: Automobile Accidents and the Significance of a State Line, 9 Duq. L. Rev. 394, 399-407 (1971).
56. See also Farber v. Smolack, 20 N.Y.2d 198, 229 N.E.2d 96, 282 N.Y.S.2d 248 (1967), where it was held that the New York wrongful death statute and the New York rule of vicarious liability applied in a suit between New York parties arising out of a fatal accident in North Carolina.
57. In light of Farber, New York could now decide Kilberg v. Northeast Air Lines, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961), as it did without resorting to "manipulative techniques." Even assuming a Massachusetts interest in limiting the liability of the airline, New York would certainly apply its own law to insure full recovery to the beneficiaries of a New York decedent.
58. Chief Judge Fuld contended that, "Babcock and its progeny enable us to formulate a set of basic principles that may be profitably utilized, for they have helped us uncover the underlying values and policies which are operative in this area of law." 31 N.Y.2d at 127, 259 N.E.2d at 457, 335 N.Y.S.2d at 69. I would respectfully submit
Nor, in *stare decisis* terms, were they necessary to the decision in *Neumeier*. Rather, as the opinion clearly indicates, the court promulgated rules of decision and applied the applicable rule to the situation presented in that case. It could have decided *Neumeier* with reference to the fact-law pattern presented and reached the result that it did by holding that where the plaintiff is from an immunity state, and defendant is from a recovery state, and the accident occurs in the plaintiff's state or another immunity state, the plaintiff should not recover. The court was not merely deciding the case before it, but was developing rules that would not only cover that case, but rules that would cover cases it had previously decided and cases that had not yet arisen. In no sense was it acting in the common law tradition of judicial method.59

The court's formulation of choice of law rules in this manner raises some interesting questions as to what it will do in future cases. For example, the first "Neumeier rule" states: "When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest."60 The court has decided that question in the case of two parties from a recovery state who are involved in an accident in an immunity state, as is demonstrated by *Tooker*. But it has not decided the question in the reverse situation, that is, when two parties from an immunity state are involved in an accident in a recovery state such as New York, and, at least in terms of interest analysis, this is not necessarily the same case as *Tooker*. Where both parties are from a recovery state, there is a false conflict. The parties' home state has an interest in applying its own law to allow recovery to a resident plaintiff injured elsewhere, since the social and economic consequences of the accident will be felt in the home state, and the state of injury has no interest in applying its law to immunize a non-resident defendant and his insurer.61 When two parties from an immunity state are involved in an accident in a recovery state, their home state likewise has an interest in applying its own law to immunize its resident defendant and his insurer.62 But here, unlike the previous situation,
the state of injury may also have an interest in applying its law allowing recovery in favor of a non-resident plaintiff. If the suit is one for personal injuries, it can be argued that if the plaintiff does not recover he could become a public charge in that state or that he might be unable to reimburse resident medical creditors for medical and hospital expenses. It can also be argued, whether the suit is one for personal injuries or wrongful death, that the state of injury has a general compensatory interest in providing recovery for all persons injured there as part of its policy of extending protection to people who are within its borders. My own view is that any interest on the part of the state of injury in allowing recovery in this situation is more theoretical than real. In this day and age the injured plaintiff will get back home, and the only state concerned with his welfare is his home state. If that state denies recovery in order to protect the defendant and his insurer, the state of injury should defer to that policy. But most courts, when confronted with this question, have held that their own law allowing recovery should be applied in favor of a non-resident plaintiff against a non-resident defendant, notwithstanding that they also apply their own law when two of their residents are involved in an accident in an immunity state, and this includes lower courts in New York. Under the first

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rule of Neumeier the New York Court of Appeals has presumably decided this question, which has not yet been presented to it, and has decided it in a way contrary to the decisions of lower New York courts, which have dealt with it specifically.

The second rule of Neumeier states that, “When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile.”\(^7\) No case involving a New York plaintiff and a guest statute state defendant, with the accident occurring in the defendant's home state, has yet been before the New York Court of Appeals.\(^7\) Such cases have arisen elsewhere with the suit being brought in the plaintiff's home state.\(^7\) These courts have held that where there were substantial contacts with the forum, e.g., the trip began in the forum and the parties were to return there, the forum would apply its own law to allow recovery notwithstanding that the accident occurred in the defendant's home state.\(^7\) A contrary result has prevailed when these factual contacts were missing.\(^7\) The rule as formulated by the court in Neumeier covers both the case where there were substantial contacts with the forum and the case where there were not, neither of which has yet been presented to the New York Court of Appeals. Moreover, the result dictated by the rule would seem inconsistent with the result in Miller v. Miller,\(^7\) since there the accident occurred in the defendant's home state. Although the Neumeier rules are stated to apply only to guest statute cases, it is difficult to see why the result should be different where the defense asserted is that of limited liability for

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70. 31 N.Y.2d at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70. Under that rule if the accident occurred in the plaintiff's home state and its law permits recovery, the non-resident driver will not “in the absence of special circumstances” be permitted to claim the defense.

71. In Pryor v. Swarner, 445 F.2d 1272 (2d Cir. 1971), the plaintiff was a resident of New York, the defendant was a resident of Florida, a guest statute state, and the accident occurred in Ohio, also a guest statute state. The trip began in Ohio and was to end in New York. The Second Circuit, applying New York conflicts law, held, on the basis of Judge Fuld's concurring opinion in Tooker, that New York would allow the defense.

72. The defendant, who generally wants the plaintiff to recover, will permit himself to be served in the plaintiff's home state. See the discussion in Sedler, The Territorial Imperative, supra note 55, at 399-401.

73. See Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972); Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968); Bennett v. Macy, 324 F. Supp. 409 (W.D. Ky. 1971).


wrongful death. Possibly Miller could be distinguished on the basis of the defendant's post-accident change of residence to New York, but this is a dubious ground of distinction, and to distinguish Miller on that basis would be to effectively overrule it. In any event, the second rule of Neumeier not only operates to decide cases that have not yet arisen, but casts serious doubt on the court's decision in Miller.

The third rule of Neumeier covers the unprovided for case, and in view of the result in Neumeier, indicates that the law of the place of the injury will generally control. This would mean that an Ontario plaintiff injured in New York by a New York defendant will recover, but one injured by the same New York defendant in Ontario will not. If the difference is explained on the basis that New York has an interest in providing recovery for a non-resident injured there, this explanation is difficult to reconcile with the first rule of Neumeier, which denies recovery to an Ontario resident injured in New York by an Ontario defendant. The distinction effected by the third rule then cannot rationally be explained with reference to any New York interest. The only explanation must be that the law of the state of injury should apply simply because the accident occurred there. This demonstrates a return to the territorialism that presumably was abandoned in Tooker. Indeed, the three rules of Neumeier, taken together, say that unless the parties are from the same state, the law of the state of injury ordinarily applies, which is only somewhat "all-embracing" than the place of the wrong rule that was abandoned in Babcock.

Both defenses relate to the plaintiff's ability to recover, and the interests of the involved states are the same.

It is difficult to believe that the court would have decided the case differently if the change of residence had not occurred. The change of residence was relied on only to show that Maine had no present interest in protecting the nominal defendant; the accident would still be charged to Maine loss experience for insurance purposes.

Perhaps this observation is not entirely fair, since many cases will involve parties from the same state. Nonetheless, the thrust of the "Neumeier rules" looks to the place where the injury occurred much in the same manner as did the place of the wrong rule. In Chila v. Owens, 348 F. Supp. 1207 (S.D.N.Y. 1972), the plaintiff was a resident of New Jersey, which did not have a guest statute, the defendant was a resident of New York, and the accident occurred in Ohio, a guest statute state. Applying the third rule of Neumeier, the court held that New York would not recognize the guest statute defense, since New Jersey had an interest in allowing the plaintiff to recover. It stated:

With the injured plaintiff and the alleged wrongdoers respectively domiciliaries of New Jersey and New York, which states are not inhospitable to guest claims, logic and fairness suggest that New York would equate the New Jersey claimant's position to that of its own domiciliary and apply the first principle
With its decision in *Neumeier* the New York Court of Appeals has moved in the direction of a “rules approach” for the solution of conflicts problems notwithstanding that the rules may have been developed at least in part with reference to considerations of policy and fairness and the interests of the involved states. More significantly, *Neumeier* indicates that rules for the solution of conflicts problems will be developed independently of the cases that the court has decided and will be designed to cover cases that have not yet arisen. Whatever the court is doing, it is not operating in the common law tradition of judicial method, and in my view this is a cause for great regret.

**INTEREST ANALYSIS AND THE UNPROVIDED FOR CASE**

It is unfortunate that *Neumeier*, presenting the unprovided for case, was the rock on which New York’s “stormy affair” with interest analysis foundered. If the unprovided for case is approached with reference to the common policies of the involved states, sound solutions readily appear and would have appeared to the court in *Neumeier*. The fact that neither state has an interest in applying its law on the issue as to which the laws differ does not mean that the court cannot identify common policies of both states which will lead to the solution of the problem. As Currie has observed:

> It may be that the laws of neither state, nor of both states together, purport to dispose of the entire universe of possible cases. Identical laws do not necessarily mean identical policies, and different laws do not necessarily mean conflicting policies, when it is remembered that the scope of policy is limited by the legitimate interests of the respective states.

It should also be noted that the question is one of choice of laws, not choice of jurisdictions. The issue before the court in *Neumeier*, properly speaking, was not whether New York law or Ontario law “governed,” but whether the defense of guest statute immunity should be allowed. An analysis of the policies and interests of the

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*articated by Chief Judge Fuld—that is, the New York “standard of care which the host owes to his guest.” *Id.* at 1210.

In terms of interest analysis, of course, this case presents a false conflict in the same manner as in *Tooker*.

80. See the discussion in Reese, *Choice of Law: Rules or Approach, supra* note 18, at 318.

involved states may reveal, as in *Neumeier*, that neither state has an interest in applying its law on the issue of guest-host immunity, but when the common policies of both states are considered, this will furnish guidance on the question of whether the defense of guest statute immunity should be allowed.

Approaching the problem from this perspective, I would submit that *Neumeier* is an easy case. All states have a common policy of compensating automobile accident victims for harm caused by the negligence of a driver. A number of states, in order to implement what I have called anti-tort policies,\(^8\) such as protecting insurance companies from collusive suits, put aside this compensatory policy where the victim was a passenger in the car of the driver. Whether the purpose of guest statute immunity is to protect the host from ungrateful guests—which is difficult to believe\(^83\)—or to protect insurance companies from collusive suits, or simply to remove this category of cases from the insurer’s liability, thereby increasing its profits and possibly reducing insurance rates, it is clear that the only state interested in extending such protection is the defendant’s home state, where the vehicle is insured and where the consequences of imposing liability will be felt. If that state does not have a guest statute, this means that the only state interested in protecting the defendant and his insurer does not do so, and the common policy of both states in allowing accident victims to recover from negligent drivers should prevail, causing the court to disallow the defense.\(^84\)

I would carry this further and say that generally in an accident case where the defendant is from a recovery state,\(^85\) he should be held liable irrespective of where the plaintiff resides or the accident occurs. This is because all states have a common policy of allowing compensation to accident victims, and usually in the unprovided for case, as in *Neumeier*, the defendant will be asserting a defense that represents an exception to that common policy.\(^86\) But even where

\(^82\). See the discussion in Sedler, *Characterization*, supra note 35, at 52-54.

\(^83\). The court in *Neumeier* observed, however, that this may have been the only purpose that the Ontario legislature intended to accomplish when it enacted the statute. 31 N.Y.2d at 124, 286 N.E.2d at 465, 285 N.Y.S.2d at 67. See also the discussion of the purpose of the Delaware guest statute in *Cipolla v. Shaposha*, 439 Pa. 569-70, 267 A.2d at 858 (dissenting opinion). My own view is that we must look to the purposes that are advanced by a state’s law in light of modern conditions, as opposed to what may have been the original intention of the legislature. The retention of guest statutes today serves only to benefit insurance companies and not host insureds.


\(^85\). See note 52 *supra*.

\(^86\). This would cover other immunities and matters such as limitations on wrongful
the issue is one of affirmative tort liability, such as vicarious responsibility, I would generally hold the defendant liable if he is liable under the law of his home state, since such liability is consistent with the common policy of both states in providing compensation for accident victims.87

It may be asked why the court in Neumeier did not see it this way. Perhaps it was because in the unprovided for case a court sees itself faced with the "windfall dilemma,"88 and is reluctant to allow the plaintiff greater recovery than is permitted under the law of his home state, particularly when the accident occurred there. In Neumeier, the court emphasized that New York should not ignore "the public policy of . . . Ontario and . . . [protect] the plaintiff guest domiciled and injured there from legislation obviously addressed, at the very least, to a resident riding in a vehicle traveling within its borders."89 But by the same token, it may be asked why a defendant who is insured against such liability under the law of his home state—or more accurately, the insurer who issued the policy covering his liability—should be able to escape liability simply because the defendant had the "good fortune" to injure a victim whose home state was not equally solicitous for his welfare. In Johnson v. Hertz,90 a federal court, sitting as a New York state court in a diversity action,
applied the New York rule of vicarious liability against the owner of a New York insured vehicle, notwithstanding that neither the plaintiff's home state nor the state of injury would extend such protection, observing, incorrectly it turns out in light of Neumeier, that "The automobile insurance laws of New York have been held by the courts of that state to express a policy aimed at protecting innocent victims of New York vehicle registrants, whether injured or harmed in New York State or elsewhere." 93

The results in the unprovided for cases that have arisen do appear to depend on whether the court stresses the fact that the plaintiff's home state would not allow him to recover or the fact that the defendant should not be able to avoid a liability imposed upon him by the law of his home state. In Johnson v. Hertz, for example, the court emphasized the responsibility of the defendant to comply with the policies reflected in New York's compulsory insurance law, and noted that neither the plaintiff's home state nor the state where the injury occurred had any interest in protecting the defendant from liability. It paid scant attention to the fact that the plaintiff's home state did not impose liability against this defendant. Likewise, in Van Dyke v. Bovles, New Jersey applied the New York rule imposing vicarious liability in favor of a New Jersey plaintiff injured there by a vehicle owned by a New York defendant. The court noted that the owner "could reasonably have expected that his conduct would have been controlled by New York law," and did not discuss the position or expectations of the plaintiff. And in Decker v. Fox River

91. The defendant, Hertz Corporation, was incorporated in Delaware, but had "extensive offices" in New York. Under New York's compulsory insurance law, Hertz, of course, had to insure its New York based vehicles. In point of fact, Hertz's vehicles are insured under a master policy issued by a New York insurer. In Pahmer v. Hertz Corp., 36 App. Div. 2d 252, 319 N.Y.S.2d 949 (1971), the court held that this justified applying New York's rule of guest-host liability in favor of a New York plaintiff injured while a passenger in a Hertz-owned vehicle that was registered in California, where the accident occurred.

92. The plaintiff was a resident of Massachusetts, and the accident occurred in New Jersey. The vehicle was apparently stolen, and under Massachusetts and New Jersey law, Hertz would not be liable in that situation. Such liability was imposed by New York law.

93. 315 F. Supp. at 304. The court relied on the language to that effect in Tooker, which was repudiated in Neumeier. See note 32 supra.

94. It said that, "New York has an interest in having its law applied on this issue so that those regulated by its auto insurance policies will be required to fulfill the ends at which these policies were aimed." 315 F. Supp. at 304-05. This interest, however, is what Currie called an "altruistic interest." B. Currie, supra note 1, at 489. The policy represented by the requirement of compulsory insurance is clearly a compensatory one, and New York has no interest in applying that policy in favor of a non-resident injured elsewhere.


96. Id. at 345, 258 A.2d at 373.
Symposium

Tractor Co., a federal court in Wisconsin applied the Wisconsin rule of comparative negligence in favor of a Pennsylvania plaintiff injured in Pennsylvania by a harvester manufactured by the defendant in Wisconsin. The court saw Wisconsin as having a "governmental interest" in applying its law, and saw Wisconsin's law as representing the "better rule." Again the orientation was toward holding the defendant to the standard of liability imposed by his home state and ignoring the lack of protection afforded the plaintiff by his home state.  

On the other hand, in Ryan v. Clark Equipment Co., a California appellate court held that where an Oregon decedent was killed in Oregon while operating a vehicle manufactured in Michigan by a Michigan corporation, the Oregon limitation on the amount recoverable for wrongful death was applicable. It noted that Oregon was the only state that had any real interest in how the decedent's survivors were to be compensated, and that the defendant's home state had no interest "in extending to Oregon residents any greater rights than are afforded by the state of residence." In the same vein, in Patch v.

98. Id. at 1091. Since Wisconsin imposes strict liability for defective products, it could be argued that the admonitory policy reflected in that law would be advanced by holding the manufacturer to some liability irrespective of the victim's fault. Professor Weintraub makes the point that, "[i]n general, when the only two contact states share identical policies, but one state has an exception to that policy, if the reasons underlying the exception are inapplicable, it is highly likely that at least one of the states will have a significant interest in having the shared policy applied." Weintraub, Conflict of Laws Roundtable: A Symposium, supra note 9, at 1260. Decker may be a good example of this situation.
99. Wisconsin employs Professor Leflar's choice-influencing considerations. See, e.g., Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W. 2d 664 (1967).
100. See also Frummer v. Hilton Hotels International, Inc., 60 Misc. 2d 840, 304 N.Y.S.2d 335 (Sup. Ct. 1969). There a New York resident was injured while a guest at a Hilton Hotel in England. New York retains the common law rule of contributory negligence; England has comparative negligence. The court held that English law applied on that issue. It could be argued that England had an interest in providing recovery for a non-resident injured there, and if so, this is not, strictly speaking the unprovided for case. In my view it is, because I see no real interest on the part of the state of injury here. In any event, under the third rule of Neumeier, English law would apply.
102. Id. at 683, 74 Cal. Rptr. at 331. In Reich v. Purcell, 67 Cal.2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967), the decedent was a resident of Ohio who was in the process of moving to California, when he was killed in Missouri by a California defendant. Missouri had a limitation on the amount recoverable for wrongful death; California and Ohio did not. The court held that interests had to be analyzed at the time of the accident, so that it was irrelevant that the beneficiaries now lived in California. However, it saw Missouri as having no interest in limiting recovery, and since Ohio had an interest in allowing full recovery, a false conflict was presented, and Ohio law would apply. My approach to Reich would have been simply to hold that the defense should be disallowed, since California, the only state interested in protect-
Stanley Works, the First Circuit held that where a New Hampshire decedent was killed in New Hampshire due to the negligence of a Connecticut defendant, New Hampshire would apply its law limiting the amount recoverable for wrongful death. Neumeier represents the latest word on the subject, and here too it was emphasized that the plaintiff's home state failed to protect him.

The inconsistent results in these cases and the differing orientation toward the plaintiff in some and the defendant in others could have been avoided if the courts had approached the problem in terms of the common policies of the involved states. In all of these cases the imposition of liability would have furthered the common policy of compensating accident victims, and would not trench on any state's interest. The unprovided for case, like the false and true conflicts, lends itself to rational solution by means of interest analysis when common policies are considered. A proper consideration of those policies would have dictated a different result in Neumeier, and possibly would have persuaded the court majority that it should not abandon interest analysis in favor of choice of law rules.

In Bolgrean v. Stich, Minn., 196 N.W.2d 442 (1972), the defendant was a resident of Minnesota, a non-guest statute state, and the plaintiff had lived in Minnesota during most of her life before moving across the river to attend school in Fargo, North Dakota. Moorhead, Minnesota, where the defendant lived, is across the river from Fargo, North Dakota, and the defendant telephoned the plaintiff to ask her for a date. She accepted. He picked her up at her home in Fargo and drove her to a dance in South Dakota, where the accident occurred. Both North Dakota and South Dakota had guest statutes. At the time of the suit, she had graduated from high school and moved back to Moorhead, Minnesota. The Court did not make a determination as to whether the plaintiff was domiciled in either Minnesota or North Dakota at the time of the accident, since it concluded that in view of the extensive factual contacts with Minnesota, it was the “center of gravity”, and its law should apply on the issue of guest-host immunity. It also emphasized that the vehicle was insured in Minnesota and observed that, “[t]he insurer of a Minnesota vehicle, it must be assumed, charged rates applicable to Minnesota risks.” 196 N.W.2d at 444. In Allen v. Gannaway, Minn., 199 N.W.2d 424 (1972), some of the passengers in a vehicle driven by a Minnesota resident and involved in an accident in Nevada, a guest statute state, did not have a firm domicile in Minnesota. The Court held that Minnesota law applied on the issue of host-guest immunity as to all passengers. Again, all that it was necessary for the Court to say is that the only state interested in protecting the defendant and his insurer did not do so.

The question of what New Hampshire would do arose somewhat indirectly. The court was applying Connecticut conflicts law, and Connecticut follows the place of the wrong rule. The plaintiff argued that Connecticut would look to the “whole law” of New Hampshire, and it was in this context that the court concluded that New Hampshire would apply its own law on the question if suit were brought there. Id. at 492.

The trend of tort law is also clearly in the direction of favoring compensation. See the discussion in R. Wm. Edraut, Commentary, supra note 9, at 203-04.
THE QUESTION OF DISCRIMINATION

"Was the New York rule really intended to be manna for the entire world?" Professor Reese's rhetorical question was picked up by the court in Neumeier and resoundingly answered in the negative. But the question can be stated somewhat differently, and stating it in that way may suggest a very different answer. Suppose that the victim in Neumeier was a resident of Ohio, a sister state, rather than Ontario. The Constitution provides that, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." If a New York victim had been injured by a New York defendant in Ohio, New York would give him or his beneficiaries the "manna" represented by its law allowing an action by a guest passenger against his host. It is not unreasonable to ask whether the constitutional guarantee of privileges and immunities entitles the Ohio victim or his beneficiaries to claim the same "manna." The Constitution also provides that, "[n]o State shall... deny to any person within its jurisdiction the equal protection of the laws." Assuming that the Ontario plaintiff who sues in New York, as in Neumeier, is "within its jurisdiction" for equal protection purposes, may he too be entitled to claim equal "manna" with the New York victim? The question of discrimination, particularly if it has constitutional overtones, cannot be fobbed off so easily.

The court in Neumeier was aware of the possible discrimination that its decision could produce, although it did not approach the issue in constitutional terms. It stated:

It is quite true that, in applying the Ontario guest statute to the Ontario-domiciled passenger, we, in a sense, extend a right less generous than New York extends to a New York passenger in a New York vehicle with New York insurance. That, though, is not a consequence of invidious discrimination; it is, rather, the result of the existence of disparate rules of law in jurisdictions that have diverse and important connections with the litigants and the litigated issue.

With all deference to the court, it would seem that it is begging the

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106. Reese, supra note 83.
109. U.S. CONST. amend. XIV.
110. See the discussion in B. Currie, supra note 1, at 530-36.
111. 31 N.Y.2d at 126, 286 N.E.2d at 456, 335 N.Y.S.2d at 68.
question completely. The fact that the rules are disparate is irrelevant, since the question is whether New York is required to give the non-resident plaintiff the benefit of its rule, which by definition is disparate to the rule of the plaintiff’s home state. And the fact that different jurisdictions have connections with the litigants does not answer the question of whether, in light of those connections, it is discriminatory for New York to refuse to give the non-resident plaintiff the benefit of its more favorable rule. We are talking about the right to have the benefit of New York law, and simply because the plaintiff is a resident of a state with a different rule and that state has some connection with the transaction, does not answer the question of whether, notwithstanding, the plaintiff is discriminated against if he is denied the benefits of New York law.\(^1\)

Professor Currie saw the privileges and immunities clause and the equal protection clause as requiring in some circumstances the application of the forum’s law in favor of non-residents, even though the application of that law would not advance any of the forum’s governmental interests.\(^2\) Neither of these constitutional provisions, however, “is firmly established as a limitation on choice of law,”\(^3\) and whether the Supreme Court will in fact recognize such limitations is at best questionable. The traditional grounds that have been relied upon to invalidate a state’s choice of law decisions, due process\(^4\) and full faith and credit,\(^5\) have in recent years been given very limited scope by the Supreme Court,\(^6\) and the Court will be

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112. Judge Bergan, dissenting in Neumeier, stated:

There is a difference of fundamental character between justifying a departure from *lex loci delictus* because the court will not, as a matter of policy, permit a New York owner of a car licensed and insured in New York to escape liability that would be imposed on him here, and a departure based on the fact that a New York resident makes the claim for injury. The first ground of departure is justifiable as sound policy; the second is justifiable only if one is willing to treat the rights of a stranger permitted to sue in New York differently from the way a resident is treated. Neither because of “interest” nor “contact” nor any other defensible ground is it proper to say in a court of law that the rights of one man whose suit is accepted shall be adjudged differently on the merits on the basis of where he happens to live. *Id.* at 192-93, 286 N.E.2d at 460, 335 N.Y.S.2d at 74.


115. U.S. CONST., amend. XIV.


117. The last time the Supreme Court considered a question of the constitutionality
understandably reluctant to open up new avenues of constitutional attack. Nonetheless, it may be well to consider the constitutional arguments that Professor Currie has advanced, since even if a discriminatory result is not necessarily unconstitutional, it is something that a court should strive to avoid.

Let us first consider the question of privileges and immunities, and assume for these purposes that the victim in Neumeier was an Ohio resident injured in his home state. While neither New York or Ohio has an interest in applying its law on the issue of guest-host immunity, both states do have a common policy of providing compensation to accident victims injured by negligent drivers, and guest-host immunity is an exception to that common policy. This is the same situation as that presented in a spinoff of Grant v. McAuliffe, used by Professor Currie, that of an Arizona plaintiff injured by a California tortfeasor in Arizona. In speaking of this case from a constitutional perspective Professor Currie stated:

The rule of abatement on death of the tortfeasor can most intelligibly be interpreted as expressing a policy for the benefit of those interested in the estate of the deceased; the living are not to be mulcted for the wrongs of the dead. When a state legislature abrogates that common-law rule, allowing suit against the personal representative, it adopts instead a policy for the benefit of the victim, and primarily of those victims within the sphere of its own governmental concern: residents of the state, and others injured within the state. Can it be said that the state retains a general policy of protecting estates against liability for the wrongs of the deceased, subject to an exception in favor of local victims? Such a proposition is implausible. To withhold from citizens of other states, injured outside the state, the right to sue the personal representative in local courts, while granting the right to residents similarly injured, would rather clearly be a denial of the privileges and immunities of citizenship, and this though the classification were in terms of residence rather than citizenship. To ex-
tend the privilege to nonresidents injured outside the state only if their home states give them similar "protection" would be "not so much a differential treatment in good faith of persons differently situated as a mere attempt to preclude recovery by as many foreigners as possible."

The same rationale, in Professor Currie's view, would require a state having a dram shop act to hold its resident defendant liable for injuries inflicted by an intoxicated patron upon a non-resident plaintiff in the latter's home state,\(^1\) and a state imposing unlimited liability for wrongful death to apply its law in favor of the beneficiaries of a non-resident decedent killed by a resident defendant irrespective of where the accident occurred.\(^2\) And of course, under this analysis, New York would be acting unconstitutionally if it refused to allow the Ohio guest to recover against the New York host.

The common policy of the involved states, however, may justify the forum's denying the benefit of its law to a non-resident whose home state does not protect him. Professor Currie illustrates this point by a spinoff of *Milliken v. Pratt*,\(^3\) in which a married woman who is a resident of Maine, which does not recognize married women's immunity, contracts with a Massachusetts creditor in Massachusetts, which does recognize such immunity. Here both states have a common policy of enforcing contracts and Massachusetts' rule of married women's immunity is an exception to that common policy. Massachusetts has no interest in extending this immunity to a non-resident,\(^4\) and since the only state interested in extending the immunity, Maine, does not do so, the common policy of both states in enforcing contracts comes into play. Massachusetts, in fact, has an interest in denying the defense in order to promote its policy of insuring the security of transactions entered into in Massachusetts, and this interest does not conflict with any interest of Maine.\(^5\)

The forum also does not discriminate if it denies a non-resident the benefit of its law in circumstances where his home state has an

\(^{122}\) B. Currie, *supra* note 1, at 508. Cf. note 87 *supra*.

\(^{123}\) B. Currie, *supra* note 1, at 520.

\(^{124}\) 125 Mass. 374 (1878).

\(^{125}\) See the discussion in B. Currie, *supra* note 1, at 90-91.

\(^{126}\) See the discussion *id.* at 503-05.
interest in having its law applied against him. Here Professor Currie states: 127

In pursuit of its altruistic interests, a state must stop short of trenching upon the interests of other states; therefore, the Privileges and Immunities Clause does not require a state to extend the benefits of its law to nonresidents where the state has no interest in so doing, and where so doing would interfere with the policy of a state having a direct interest in the matter.

It is one thing for a state to be generous to nonresidents at the expense of its own residents and enterprises; it is quite another to be generous to nonresidents at the expense of other nonresidents, or even of residents, or local enterprises, whose activities bring them within the protection of another state’s policy.

I would illustrate this point by the example of two residents from a guest statute state who were involved in an accident in New York. The state of injury may see itself as having a real interest in applying its law to allow recovery, and if so, it is not required to defer to the conflicting interest of the parties’ home state. 128 But if it does not see itself as having such an interest, or if for any reason, if chooses to apply the law of the parties’ home state, as New York apparently would do, 129 it is not impermissibly discriminating against the non-resident plaintiff notwithstanding that it would apply New York law in favor of a New York plaintiff injured in New York by an Ohio defendant, 130 and would apply New York law in favor of an Ohio plaintiff injured by a New York defendant in New York. 131

Where a New York plaintiff is involved, New York obviously has a real interest in allowing recovery, which conflicts with Ohio’s interest in immunizing its resident defendant and his insurer, and New York will prefer its own interest. Since it does not see that interest in the case of the non-resident plaintiff, who will get back home and whose welfare is the responsibility of his home state, the cases are distinguishable, and New York is not discriminating when it defers to the interest of the plaintiff’s home state. Where an Ohio

127. Id. at 495.
128. See note 65 supra.
129. Under the first rule of Neumeier.
130. Under the second rule of Neumeier.
131. Under the third rule of Neumeier. Under my view, of course, this would extend to an Ohio plaintiff injured by a New York defendant in Ohio.
defendant is involved, unlike the situation where the defendant is a New York resident, the plaintiff's home state does have an interest in seeing that its law denying recovery is applied, and again New York is not discriminating when it defers to the interest of the parties' home state. The privileges and immunities clause, says Currie, only requires the forum to be altruistic; it does not require it to engage in "officious intermeddling" contrary to the interests of the parties' home state.183

In summary, Currie says that, "when the law of a state provides benefits for its residents generally, the same benefits should be extended to citizens of other states unless there is some substantial reason, in addition to the fact that the governmental interests of the state do not require extension of the benefit to foreigners, for limiting the benefit to residents."183 No such reason is present in the case of an Ohio passenger injured by a New York host in Ohio, and in Currie's view for New York to sustain the guest statute defense in that case would be violative of the privileges and immunities clause.

In Neumeier, of course, the privileges and immunities clause would be inapplicable, since the victim was a resident of Ontario. But Currie contends that the same results required by the privileges and immunities clause are required by the equal protection clause. In his view, a party suing in the forum's courts is a "person within its jurisdiction" for equal protection purposes,184 and the privileges and immunities clause and the equal protection clause are co-extensive in prohibiting discrimination against non-residents.185 Therefore, he would say that in Neumeier New York was violating the equal protection clause when it sustained the guest statute defense asserted by a New York defendant.

As stated previously, it is questionable whether the Supreme Court will be willing to find limitations on choice of law inherent in the privileges and immunities and equal protection clauses. Perhaps it may, and certainly these kinds of questions should be raised by astute counsel. But whether or not discrimination in choice of law rises to a constitutional dimension, it is certainly a factor that a court should take into account in arriving at its decision. The court in Neumeier was aware of the danger of possible discrimination, but it did little more than beg the question. It is in the un-

182. See the discussion in B. Currie, supra note 1, at 495-98.
183. Id. at 508.
184. See note 110 supra.
185. See the discussion in B. Currie, supra note 1, at 474-75, 531-32, 538-41. He also uses the Grant v. McAuliffe spinoff to illustrate the point. Id. at 570-72.
provided for case that the question of discrimination is most clearly presented, and to approach the choice of law decision in such a case with a view toward avoiding discrimination may be a very helpful guide to its solution.

CONCLUSION

Obviously, I view the decision in *Neumeier* with considerable displeasure. The New York Court of Appeals had taken the lead in forging new directions in conflicts law with its decision in *Babcock v. Jackson*, and its influence in this area is widely felt. In my view, *Neumeier* not only represents a retreat from interest analysis, but a return to choice of law rules, which, however narrow, are not a substitute for careful consideration of conflicts problems on a case by case basis with reference to considerations of policy and fairness to the parties. It is regrettable that New York has chosen to follow that path.