



Property Law Conflicts

Citation

Joseph William Singer, Property Law Conflicts, 54 Washburn L. J. 139 (2014).

Published version

<http://contentdm.washburnlaw.edu/cdm/ref/collection/wlj/id/6477>

Link

<http://nrs.harvard.edu/urn-3:HUL.InstRepos:34816657>

Terms of use

This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material (LAA), as set forth at

<https://harvardwiki.atlassian.net/wiki/external/NGY5NDE4ZjgzNTc5NDQzMGIzZWZhMGFIOWI2M2EwYTg>

Accessibility

<https://accessibility.huit.harvard.edu/digital-accessibility-policy>

Share Your Story

The Harvard community has made this article openly available.
Please share how this access benefits you. [Submit a story](#)

Property Law Conflicts*

Joseph William Singer**

I. INTRODUCTION

What law applies to real property? At one time the answer to this question was simple: the law of the situs.¹ But then the choice-of-law revolution came and legal scholars began to see reasons to depart from the situs law rule.² As interest analysis and the most-significant-relationship test developed, legal theorists undermined the logical and normative basis for such a simple solution to the choice-of-law problem.³ In recent years, however, the situs rule has been rehabilitated and increasingly defended by some scholars while others have continued to subject it to criticism.⁴ And in fact, the rule was never dislodged in practice and it remained the presumptive rule in the Second Restatement of Conflict of Laws.⁵ Even today, courts generally apply situs law to real property issues, although important exceptions have developed over time and some brave judges have deviated from the rule in certain classes of cases.

Rather than argue for or against the rule, I propose to explain the circumstances under which situs law clearly should and clearly should not apply. I also propose to explain the cases that are hard because they present value conflicts generating good reasons *both* for application of situs law *and* for deviating from it. Viewed from an abstract level, the argument for the situs

* © 2014 Joseph William Singer

** Bussey Professor of Law, Harvard Law School.

1. Restatement of Conflict of Laws §§ 208–209, §§ 214–239 **1934).

2. DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 193–194 *1965) (explaining why it might be reasonable to apply situs law to foreclosure of land but the law of the domicile of the relevant party to the question of whether a deficiency judgment is available); Walter Wheeler Cook, *Immovables and the Law of the Situs: A Study in the Ambiguity of Legal Terminology*, in *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 252 (1949) (originally published as ‘*Immovables*’ and the ‘*Law*’ of the ‘*Situs*’: A Study in the Ambiguity of Legal Terminology, 52 HARV. L. REV. 1246 (1939)) (explaining when it may be desirable to deviate from the “situs rule”).

3. See, e.g., Moffatt Hancock, *Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: The Disadvantages of Disingenuousness*, 20 STAN. L. REV. 1 (1967); Russell Weintraub, *An Inquiry into the Utility of “Situs” as a Concept in Conflicts Analysis*, 52 CORNELL L. REV. 1 (1966).

4. Compare Robby Alden, *Modernizing the Situs Rule for Real Property Conflicts*, 65 TEX. L. REV. 585 (1987) (criticizing the situs rule in a manner compatible with my arguments in this article), with Daniel Klerman, *Jurisdiction, Choice of Law and Property*, in *LAW AND ECONOMICS OF POSSESSION* (forthcoming, Yun-Chien Chang ed. 2015), and James Y. Stern, *Property, Exclusivity, and Jurisdiction*, 100 VA. L. REV. 111 (2014) (largely defending the situs rule).

5. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 223 (1971) (“(1) Whether a conveyance transfers an interest in land and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs. (2) These courts would usually apply their own local law in determining such questions.”).

rule is pretty convincing. If I buy a parcel of land in Cambridge, Massachusetts, I need to know who owns it, what I can do with it, how I can transfer it, and how I might lose it through adverse possession, foreclosure, eminent domain, or otherwise. That means we need a single law to apply to all those questions if we want to know who holds title to property and what encumbrances burden it. Predictability and usability of property depend on clear answers to ownership questions. When you put it that way, having a single law apply to all these issues makes a great deal of sense.

But life is more complicated than that. In particular, problems arise when individuals own property in more than one jurisdiction. In such cases, it sometimes matters how the law of the various situs is coordinated in order to protect both the justified expectations of the parties and the policy goals of the affected states. Consider the case of subprime mortgages. Banks securitized subprime mortgages located in many states. The situs rule requires owners to follow the recording acts of the states in which the property is situated, and foreclosure procedures and standards are also governed by the laws of the states where the property is located. Differing rules on these matters should affect the value of the mortgages, as well as complicate enforcement of the lender's rights, as well as those of bondholders who invested in those securities. Rather than simplifying matters, the situs rule arguably creates complexity for securitizers and the secondary mortgage market.

To get around these complexities and to make mortgage securitization more profitable, the banks created an entity called MERS (Mortgage Electronic Registration Systems) that seeks to avoid traditional recording practices by placing all mortgages in the name of an entity that holds "bare title" to the mortgages and allows them to be transferred without recording assignments in the various recording offices.⁶ While mortgages still had to be recorded in the local registry, mortgage assignments would no longer have to be recorded as long as the parties kept track of the underlying notes and properly endorsed and transferred them. While this system worked to reduce some costs associated with securitization, it also failed adequately to consider the various laws of the several states, some of which have found MERS to be inconsistent with local foreclosure procedures.⁷ Rather than assuring that mortgage assignments

6. By giving MERS status as the mortgagee, even though it did not originate the loan or own its economic benefits, lending banks hoped they could record the first mortgage and then not have to record any assignments of the mortgage to subsequent banks. If the borrower defaulted, MERS would either foreclose on the mortgage itself or transfer the mortgage to the bank to whom the payments were due enabling that bank to foreclose. Because MERS's records were incomplete or inaccurate, some courts refused to allow foreclosures to happen because there was insufficient proof that the foreclosing bank had the right to foreclose on the mortgage. State laws differed on what evidence was necessary to foreclose. Because securitizations bundled loans from many states, investors in the securitized mortgages were not given accurate or complete information about the value of the underlying mortgages since their value would differ depending on whether it was easy or difficult to prove ownership of the mortgage and thus reap the economic benefits of the right to foreclose.

7. For an analysis of some of the problems MERS has created see Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 WM. & MARY L. REV. 111 (2011); Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic*

accorded with situs law, banks tried to create a national system that eschewed the formalities that some states required for mortgage assignments and for foreclosure proceedings. The subprime mortgage securitization market wanted to avoid the costs associated with the situs rule by using contract and negotiable instruments law to deviate from the complexities that situs foreclosure statutes created and in so doing brought new costs and uncertainties into the picture. In contrast, compliance with the situs rule would have induced banks to more carefully analyze the law of the situs of each property financed by a subprime mortgage. That would have increased the complexity of securitization as well as its costs, hence reducing its profitability. Rather than simplifying property transactions, the situs rule arguably complicated them and inhibited them. Whether that is a good or bad thing is open to question. What is clear is that the situs rule sometimes makes property transactions more, rather than less, complex.

Consider as well the case of a married couple domiciled in New Jersey that owns real property in California. When the husband dies, the community property law dictates a particular distribution of interests in the California real property while the separate property law of New Jersey dictates a different distribution of New Jersey real estate and the decedent's personal property. The resulting mishmash of the two laws may leave the widow with less property than either state believes is fair. In this case, the situs rule not only complicates matters but may result in allocation of property rights that no sovereign supports.

It is therefore important to understand when the situs rule works and when it should be abandoned or modified in favor of other choice-of-law rules to determine property rights. Following the able lead of Dean Symeon Symeonides, I will identify patterns of cases that present typical value conflicts and explain how we should analyze and understand them.⁸ In Part II, I will explore false conflicts where only one state has a legitimate interest in applying its law. I will begin with the many cases where the situs rule should apply because the situs is the only state with a real interest in applying its law. I will then discuss cases in which application of the situs rule makes no sense at all. Those cases represent situations in which the situs state should engage in restrained interpretation of its policies and yield to the law of the domicile of the relevant party or parties; in such cases, the situs has no real interest in applying its law while the domicile state has powerful reasons to want its law applied. Properly understood, these cases represent false conflicts that justify deviation from the situs rule.

In Part III, I will discuss true conflicts—hard cases that generate good

Registration System, 78 U. CIN. L. REV. 1359 (2010); Joseph William Singer, *Foreclosure and the Failures of Formality, or Subprime Mortgage Conundrums and How to Fix Them*, 46 CONN. L. REV. 497 (2013).

8. See SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT, AND FUTURE* (2006) (discussing magisterial analysis of tort conflicts).

reasons to apply situs law and good reasons to apply the law of another state. Those cases are of four types: (a) conflicts between situs law and the law of the domicile of one of the parties; (b) conflicts between situs law and the place where a contractual relationship is centered; (c) nuisance-type cases where the conduct is in one state and the injury is in another; and (d) the special case of federal Indian law which involves the paradoxical case of overlapping situs.

Part IV addresses the *renvoi* issue. Always a puzzle and a perennial favorite for analysis by conflicts scholars, *renvoi* is normally rejected in traditional choice-of-law analysis. Yet in the field of real property law, longstanding doctrine requires application of *renvoi* for issues involving title to real property. I will explain the reasons why that is so and why those reasons are less powerful than we may have thought.

Part IV concludes by emphasizing the importance of seeing and confronting the legitimate value conflicts involved when real property issues affect persons and property in more than one jurisdiction.

II. FALSE CONFLICTS

A. Cases in Which the Situs is the Only Interested Jurisdiction

Although often maligned, the situs rule makes perfect sense for whole classes of cases. All other things being equal, there is simply no reason to deviate from situs law when the issue involves zoning, servitudes, estates in land, nuisance, mortgages and other liens, and trespass. In each of these cases, the state where the property is located has strong interests in regulating its use, determining what estates in land are recognized and what encumbrances can be enforced, and what exceptions exist to the right to exclude non-owners. Owners of land have the right to the benefits of local law and cannot claim exemption from its burdens when the law at issue concerns the use of land and the bundles of rights that the situs will recognize.

When I buy a house in Concord, New Hampshire, I am subject to local zoning rules despite the fact that I am domiciled in Massachusetts. No one carries their home state's zoning law around with them when they buy property elsewhere. Similarly, my residence in Cambridge, Massachusetts does not exempt me from the zoning law of Somerville, Massachusetts if I buy real estate there. The same holds true of other areas of real property law. The situs state is interested in determining the estates it will recognize, the rules that limit use of land and the right to exclude, the rules governing transfer, the enforceability of covenants and the powers of homeowners associations, and the rules governing loss through adverse possession, prescription, or eminent domain.

The state of the domicile of the owner may believe the law at the situs is foolish or unjust and the domicile state may have general interests in protecting its residents from foolishness and injustice. But that interest in better law is not

sufficient to allow the domicile state to assert its interests when its domiciliaries travel to other states to buy land and do business there. These cases represent paradigm false conflicts when the situs state has legitimate and strong interests in applying its laws to achieve its policies and the domicile state cannot legitimately assert whatever interests it may have.⁹

Indeed, such cases may remain false conflicts even when the parties have connections elsewhere and contract in another jurisdiction. Consider the case of *CS-Lakeview at Gwinnet, Inc. v. Simon Property Group, Inc.*¹⁰ Two corporations incorporated in Delaware were involved in litigation in Delaware court. They settled the lawsuit and part of the settlement involved a contract to transfer real property in Georgia with a right of first refusal; that contract had a choice-of-law clause for Delaware law. Unfortunately for the parties, no one researched Delaware law, and the right of first refusal on the Georgia property that is valid under Georgia law violates the Delaware rule against perpetuities, making it void and of no effect.

The parties, sophisticated as they may have been, clearly made a mutual mistake by choosing Delaware law to govern this issue. It is implausible to believe they deliberately chose a law that would invalidate a key term in their agreement. Moreover, the situs state is perfectly happy with their arrangement; Georgia does not view the right of first refusal as inhibiting alienability. Conversely, Delaware has no conceivable interest in regulating Georgia land to promote its alienability and no conceivable interest in forcing the parties to comply with a contractual term that neither one of them wanted. Yet the court followed a rigid policy of promoting “freedom of contract,” applied Delaware law as the choice-of-law clause required, and invalidated the parties’ agreement.

This result furthered no interest of Delaware, frustrated strong interests of Georgia in promoting transactions regarding its land, and violated the justified expectations of both the plaintiff and defendant. The result, in other words, was incoherent; it promoted no state’s interest and protected the rights of neither of the parties. The case was a false conflict if I’ve ever seen one and the court’s decision to honor the parties’ wishes by “respect[ing their] selection of Delaware law” had the effect of forcing on them a result neither one wanted—

9. See Stern, *supra* note 4 (explaining why uniformity of result matters for property law and property rights). Although Abraham Bell & Gideon Parchomovsky have argued that owners should often be allowed to opt out of the law at the forum, I am not in agreement at least when situs law is intended to be mandatory, such as outlawing certain estates in land or limiting land use. While competition among the states is often a good thing, in property law as well as elsewhere in the law, owners cannot simply declare themselves immune from mandatory local rules designed to set the minimum standards for market relationships and to define the allowable legal infrastructure for the state’s property system. See Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L. J. 72 (2005) (arguing that owners should generally be able to choose non-situs law to govern their property as long as no third parties are wrongfully prejudiced by the owner’s choices).

10. 642 S.E.2d 393 (Ga. Ct. App. 2007).

at least at the time of the contract.¹¹ The court honored the formal terms of the contract to achieve an absurd result that did not reflect the justified expectations of the parties. Indeed, if one of the parties had known that the clause was unenforceable at the time it selected Delaware law, then the agreement perpetrated a fraud by enabling that party to get something for nothing. Nothing is gained by enforcing choice-of-law clauses with regard to the validity of estates in land; the only state with a real interest in applying its law is the situs. That makes the usual analysis of choice-of-law clauses inapplicable. Rather than asking whether the parties' chosen law violates a fundamental public policy of the situs, the real question is whether application of that law furthers any interest of the state whose law was chosen and whether it promotes the justified expectations of either of the parties. If the answer to both questions is no, then the case is a false conflict and situs law should apply.

B. Cases in Which the Situs State Should Defer to Domicile Law

Despite the strength of the situs rule, there are clear cases where the situs has no legitimate interest in applying its law. When a person is domiciled in one state and owns real property in another, the domicile state has strong interests in determining who owns the domiciliary's property upon divorce or death. Because states differ in their marital property laws and their intestacy laws, application of the law of several states to a divorce proceeding or a probate of an estate may result in a spouse or other family member being denied a reasonable share of the property. If that were to happen, it would violate the policy of both states to ensure that family members are taken care of in such cases.¹²

For example, states have various rules about who owns real property upon death or divorce and may have different rules about the distribution of personal property. The goal of all states in inheritance and testacy cases is to promote the will of the owner who writes a will while ensuring fairness for surviving family members. The goal of all states in divorce cases is to promote an equitable distribution of marital property on divorce. Mixing and matching the law of various states has great potential to undermine all these shared policies, resulting in distributions no state thinks fair. For example, in *Dority v. Dority*,¹³ the situs state of Pennsylvania required property held in tenancy by the entirety to be divided fifty-fifty upon divorce.¹⁴ However, the spouses were domiciled in Utah at the time of the divorce. Applying Utah law to the parties' property *wherever situated*, the court chose an equitable division that gave one party the Utah residence and the other party the Pennsylvania property while dividing up

11. *Id.* at 397.

12. See Alden, *supra* note 4, at 610–612 (making a similar argument).

13. 645 P.2d 56 (Utah 1982).

14. For a similar case, see *Kirstein v. Kirstein*, 306 S.E.2d 552 (N.C. Ct. App. 1983).

stock and other personal property to ensure an equitable overall division of property upon the divorce.

Application of Pennsylvania law to the Pennsylvania real estate and application of Utah law to the Utah real estate and personal property could have generated a result that neither state would consider fair or consistent with the wishes of the parties. While the situs state might have a conceivable interest in fair distribution of property located there, its interest is attenuated when the owner is domiciled elsewhere and the situs state shares an interest with the domicile state in a coherent, fair distribution of property on divorce or death. Such cases resemble the classic *Babcock* situation where the place of the accident has no real interest in regulating the parties' relationship and the rule at issue is not designed to regulate conduct, promote investment, or shape incentives.¹⁵ In such cases, we apply the law of the common domicile of the parties because it has strong interests in regulating the parties' relationship regardless of the location of property they own or the location of conduct that affects only the parties themselves. The situs state's only real interest in such cases is in clarity of title. Since it is possible to completely satisfy *that* situs interest while applying the law of the domicile to determine who owns what, these cases represent false conflicts that should deviate from situs law, all other things being equal.

Domicile law should therefore apply when the situs prohibits equitable distribution of land on divorce,¹⁶ has a community property system that differs from the separate property system of the marital domicile,¹⁷ has different rules regarding a pretermitted spouse,¹⁸ or (in older cases) denies married women the freedom to make contracts without their husband's consent.¹⁹ While the domicile state has clear interests in regulating the rights of married couples and individuals domiciled there, the situs state has no real interest in making those decisions for nonresidents.

The situs state does have very strong interests in clarifying who owns real property within the state but any judgment about property title at the domicile can be implemented by requiring the relevant party to grant a deed of real

15. *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963). *Babcock* involved a loss-allocating rule of the place of the accident immunizing the host from suit by a guest in the car while the common domicile of the parties allowed such a suit. Almost all courts and almost all conflict of laws scholars agree that the place of the accident has no interest in applying its immunizing rule to non-residents since that rule is not designed to regulate conduct, either by promoting safe driving or by promoting tourism or investment or by inducing hosts to invite guests to share rides in their cars. The place of conduct also has no interest in regulating the relationship of a nonresident couple. This was not a case of child abuse or other wrongful conduct that the place of conduct and injury might have an interest in regulating; rather, the place of conduct prohibits a lawsuit. Since the place of conduct has no interest in regulating either the conduct or the parties' relationship and the common domicile state has an interest in regulating the parties' relationship, the courts will apply the law of the only state that has a real interest in applying its law—the place of the common domicile—and allow the lawsuit to proceed.

16. See *McElreath v. McElreath*, 345 S.W.2d 722 (Tex. 1961).

17. See *In re Estate of Erickson*, 368 N.W.2d 525 (N.D.1985).

18. See *Saunders v. Saunders*, 796 So. 2d 1253 (Fla. Dist. Ct. App. 2001).

19. See *Polson v. Stewart*, 45 N.E. 737 (Mass. 1897).

property to the appropriate person who then can record the deed at the situs, thereby satisfying any interest the situs has in its title system. Just as the courts find Ontario to lack any real interest in prohibiting suits between hosts and guests who drive on Ontario roads but are domiciled elsewhere where such suits are allowed,²⁰ situs states lack any real interest in determining who owns property within their borders.

The situs may view the domicile rule as unfair but the situs rule is not really one designed to promote investment in land at the situs or to protect parties from oppression. When loss-allocation or relationship-shaping is involved, the only truly interested state is the domicile. All the situs legitimately needs is a clear answer to the question of ownership. The domicile, on the other hand, has strong and legitimate interests in regulating a relationship centered there and determining who inherits property when one of its residents dies or who owns property on divorce. Even if one views the situs as having a legitimate interest in determining who owns land located there, the situs cannot reasonably assert that interest in a multistate case without creating a real possibility of an incoherent result favored by neither state. That represents the perfect case for restrained interpretation of situs law; the situs should grant comity to the law of the domicile. If that is so, then we have a false conflict governed by the law of the only interested state, which is the domicile.

III. TRUE CONFLICTS

So far we have seen good reason to apply the situs rule and good reason to depart from it. We now reach the hard cases—those that represent true conflicts when both the situs state and another state have legitimate interests in applying their law and in which both parties may claim a right to the protection of the law of one or another of the states. These cases are of four types: (a) conflicts between situs law and the law of the domicile of one or both parties; (b) conflicts between situs law and the place where a contractual relationship is centered; (c) nuisance-type cases where the conduct is in one state and the injury is in another; and (d) the special case of federal Indian law which involves the paradoxical case of overlapping situs.

A. Conflicts Between Situs Law and Domicile Law

1. Formalities

The first set of cases involves conflicts between the law of the situs and the law of the domicile of one or both parties. Such true conflicts can arise in the case of inheritance, marriage, and trust administration. The famous case of

20. See *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963).

*In re Barrie's Estate*²¹ is often thought to represent a false conflict and an appropriate case for deviating from the situs rule. I will argue instead that it represents a true conflict and a hard case. Mary Barrie died domiciled in Illinois while owning real estate in Iowa. Before dying she apparently attempted to revoke her will by writing "REVOKED" across it. While this was sufficient under Illinois wills law to revoke the will and transfer her property to her heirs as defined in the Illinois intestacy statute, Iowa required greater formality to revoke the will and would enforce the terms of the will, giving the property to the devisee under the will rather than the heirs under the Illinois intestacy statute. *Barrie's Estate* is often used by conflict of laws professors to teach the fact that the situs interests extend only to clarity of title while the domicile is interested in determining who owns a person's property when she dies. Both interests can be achieved by applying domicile law, making the case seem to be a false conflict and an appropriate case for deviating from the situs rule.

However, contrary to the prevailing wisdom, I believe the case presents a true, rather than a false, conflict. It is true that the situs does not seem to have a strong interest in determining who owns the property, and if it has such an interest, it would be appropriate for the situs to refrain from asserting that interest in this case. But it is *not* true that the situs has no interest in applying its law in this type of case. Perhaps I am sensitive to the interests of the situs because I am a property law expert as well as a conflict of laws scholar. In any event, the situs interest is not just in determining who owns the property or having clear title, it is in promoting the alienability of the land by making it *easy to determine* who owns the land.

The law of Iowa differed from Illinois law because it required *greater formality* to revoke a valid will than Illinois did. The Illinois legislature might be happy to accept the handwritten revocation but Iowa is not irrational to believe that anyone could write "REVOKED" across the pages of a will—including a disappointed heir—and even do so after the decedent died so as to ensure that the decedent's property goes to the heirs rather than the devisees under the will. Greater formality may have the effect of protecting property owners from fraud while reducing the costs of litigation needed to determine whether a revocation is valid. If Iowa, for example, requires a new typed document to revoke the will, and also requires two witnesses that are generally required to write a will in the first place, that Iowa rule may reduce controversy about whether a will was or was not revoked by the decedent—rather than by a devious heir who was unhappy with her share under the will. The situs interest in reducing the time it takes to determine who owns land, and seeking greater assurance that a revocation is valid rather than fraudulent, is based on the policies underlying both the statute of frauds and the statute of wills. This interest is not only a legitimate one but an important one; the rule at issue affects

21. 35 N.W.2d 658 (Iowa 1949).

the alienability of the land which in turn affects the state's economy and the ability of the parties to transfer property expeditiously to its most highly valued use after the owner dies.

That means that *Barrie's Estate* requires the courts to weigh the situs interest in promoting the alienability of land through greater formality for will revocation, against the domicile interest in promoting the will of the decedent by reference to evidence that the domicile—but not the situs—views as sufficient to conclude that she wanted her heirs—and not the named devisees—to get her Iowa real estate upon her death. One might still conclude that the domicile interest outweighs the situs interest, but the case is a much closer one than many conflicts professors seem to think it is.

Similar cases involve handwritten (holographic) wills and oral wills. In *Succession of Miller*,²² for example, a will was rejected by the court at the decedent's domicile in New Mexico because it was handwritten and lacked the requisite formalities that domicile law required. However, the situs courts found no problem with the holographic will and enforced it on the ground that title to real property is governed solely by the law of the situs. *Miller* is the opposite of *Barrie's Estate* because the domicile law required greater formality than the situs did, while in *Barrie's Estate* it was the situs that required more formality than the domicile. The reversal of the laws does not turn the case into a false conflict however. While the situs was happy to enforce the informal will, the domicile has strong interests in not having its residents cheated of their property by handwritten documents that emerge upon death that purport to constitute promises by the decedent that cannot be confirmed since the writer of the document is no longer able to speak as to its authenticity.

Deciding these cases requires weighing the domicile interest in protecting the will of its decedents and the rights of their family members to get what they deserve against the interest of the situs in regulating the transfer of property within its borders. If the decedent knew that real property is governed by the law of the situs, then the decedent might have relied on the fact that holographic wills are valid there and refrained by making a more formal will because such formality was not required by the law of the state where the property was located. If in fact the decedent relied on the law of the situs in planning, then application of domicile law would frustrate the decedent's will contrary to the policy of both states.

At the same time, people who write holographic wills are unlikely to be relying on any law when they do so other than the general understanding that people are entitled to write wills to determine ownership of their property after death. Someone who is planning carefully would generally draft a more formal will regardless of the rule recognizing holographic wills. That is because there is likely to be less dispute about the validity of a typed will signed in the

22. 479 So. 2d 1035 (La. Ct. App. 1985).

presence of two witnesses than handwritten notes on a napkin. In such cases, it would not be unreasonable to believe that the situs state should engage in restrained interpretation of its relaxed policy and defer to domicile law in cases like this. That would allow the domicile state to determine the disposition of the property of its residents while protecting the interests of family members. Application of domicile law would not frustrate interests of the situs in clarity of title and the domicile state is likely to be the one with the most significant relationship with the legal issue and the state whose policy would be most impaired if not applied here. Conversely, cases like *Barrie's Estate* might reasonably come out the other way and be governed by situs law given the situs interest in promoting alienability of land by greater formality for property transactions.

In *Miller*, the interests of the domicile probably outweigh the interests of the situs, while in *Barrie*—contrary to conventional wisdom—the opposite is likely to be true given the strong situs interest in promoting the alienability of land. At the same time, my point is that both cases represent true conflicts and that application of the law of either state would be reasonable given the pertinent interests both states have in these cases.

2. Substantive Rights

True conflicts between the law of the domicile and situs law can involve substantive rights as well as different formality rules. The well-known 1897 case of *Polson v. Stewart*²³ deviated from situs law based on old-fashioned recharacterization. In an opinion by Justice Oliver Wendell Holmes, Jr., the court applied the law of North Carolina—the common domicile of the marital couple—to a contract made there respecting land situated in Massachusetts. Although married women had no capacity under Massachusetts law to enter such agreements, North Carolina had no such disability. By classifying the issue as one of contract or status—governed by the law of the marital domicile—rather than as a property issue governed by the law of the situs, the Massachusetts forum enforced the contract and ordered the husband to convey the property to the wife's heir. This case resembles the torts cases that apply a *Babcock*-style analysis in choosing the law of the common marital domicile to allow a tort suit between a husband and wife when the place of the accident provides for interspousal immunity.²⁴ In such cases, the situs of the accident or the land has little interest in regulating the relationship between two nonresidents while the domicile state, where the relationship was established or is centered, has strong interests in regulating the contours of that relationship.

23. 45 N.E. 737 (Mass. 1897).

24. See *Babcock*, 191 N.E.2d 279; accord *Haumschild v. Cont'l Cas. Co.*, 95 N.W.2d 814 (Wis. 1959) (applying the law of the marital domicile to allow a tort suit between husband and wife rather than the immunizing law of the place of the accident); see also SYMEONIDES, *AMERICAN CHOICE-OF-LAW REVOLUTION*, *supra* note 8, at 146–150 (explaining the *Babcock* pattern).

These days it is hard to take seriously the policy interests of the state that refuses to give married women the capacity to contract. For a more contemporary example, consider the cases of *Wyatt v. Fulrath*²⁵ and *In re Estate of Clark*.²⁶ In both cases, married property owners physically transferred personal property to another jurisdiction in order to evade the requirements of domicile law that ensured that a surviving spouse or children would inherit some portion of the property on the death of the owner. In *Wyatt*, the New York Court of Appeals allowed the Spanish couple to get away with this by entrusting their property to a New York bank, thereby enabling the courts at the situs of trust administration in New York to apply situs law to enforce the parties' wills and disinherit the children—a result not possible under the law of the parties' domicile in Spain. In contrast, in *Estate of Clark*, the same court refused to let a Virginian husband evade the statutory share provisions of his domicile merely by placing his property in trust in New York. Virginia law was more favorable to the surviving wife than was the law of New York and the court held that the decedent could not escape the obligations that domicile law placed on his estate when the domicile had a strong interest in limiting freedom of disposition of the husband's property to promote gender equality in the marital relationship and to protect the surviving spouse from penury after her husband's death.

While the domicile has a strong and potentially overriding interest in protecting vulnerable family members from deprivation upon the death of a spouse or parent, we must concede that the situs of trust administration does have an interest in predictability and ease of administration. If banks must operate in light of the law of the domicile of anyone that entrusts money to them, they will not only need to determine where people are domiciled but what the law is there. This makes trust administration more cumbersome, uncertain, and costly and one can forgive the situs state if it finds itself interested in looking only to the situs of trust administration to determine who owns property being administered there.

At the same time, once a case has proceeded to court, it is apparent that the situs state of trust administration is not the only interested jurisdiction and it is not implausible to conclude that the domicile of the parties may have a stronger interest in determining substantively who owns property after death than the situs state has in ease of administration. The conflict seems to be one of fairness versus simplicity and when it comes to laws designed to protect widows, widowers, and children, it is hard to see how the interest in efficiency outweighs the interest in family stability. That being said, we do have a true conflict here rather than a false one and deviation from the situs rule may well be appropriate to protect the owner's family from the owner's attempts to evade domicile law.

25. 211 N.E.2d 637 (N.Y. 1965).

26. 236 N.E.2d 152 (N.Y. 1968).

A similar tale can be told about same-sex marriage. Consider a Massachusetts man who owns a beach house in South Carolina. He falls in love and marries another man in Cambridge, Massachusetts. Some time later, the couple gets divorced. Or perhaps the man dies intestate. Under the South Carolina Constitution, Article XVII, § 15, his spouse would get nothing in either case.

A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State. This State and its political subdivisions shall not create a legal status, right, or claim respecting any other domestic union, however denominated. This State and its political subdivisions shall not recognize or give effect to a legal status, right, or claim created by another jurisdiction respecting any other domestic union, however denominated.²⁷

Because title to the property was solely in the name of the decedent, South Carolina would not equitably distribute the beach house on divorce because, according to South Carolina law, the men are not married. Nor would South Carolina allow the surviving spouse to inherit the house because, according to South Carolina, he is not a spouse at all. In the absence of an independent contract disposing of the property,²⁸ South Carolina would treat the real property as the sole property of the one whose name is on the title while Massachusetts would recognize the spouse as a part owner of the property either through equitable distribution on divorce or by operation of the intestacy statute at the owner's death.

Clearly, South Carolina purports to have an interest in refusing to recognize any right or claim based on the marriage of a person to another person of the same sex. Whether its interest is a legitimate one is doubtful after *United States v. Windsor*,²⁹ but assuming it is legitimate, we can easily see how a true conflict can arise between the law of the domicile and the law of the situs in this case. The result would probably differ depending on which court heard the case. The Massachusetts courts would treat the couple as married and make whatever orders are needed to get the property in the hands of the appropriate party upon divorce. And a probate of the estate in Massachusetts would award the beach house to the surviving spouse. The South Carolina courts, however, are likely to apply the situs rule unless they find the constitutional provision to be unconstitutional in light of the dignity language in *Windsor* and the rulings of the many federal courts that have begun to strike down such nonrecognition laws.³⁰ In any event, deviation from the situs rule is warranted here even

27. S.C. CONST. art. XVII, § 15.

28. See S.C. CONST. art. XVII, § 15 ("This section shall not prohibit or limit parties, other than the State or its political subdivisions, from entering into contracts or other legal instruments.").

29. 133 S. Ct. 2675 (2013) (holding that the federal government could not refuse to recognize a same-sex marriage validly created by state law because the United States has no legitimate government interest in refusing to recognize such marriages).

30. 133 S. Ct. at 2693 (DOMA interferes with "the equal dignity of same-sex marriages"). For cases striking down nonrecognition laws, see *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014); *Whitewood*

though the situs claims an interest in denying the validity of the marriage. While South Carolina has interests in determining the marital status of couples domiciled there, it has no property law-specific policies merely because the land is located in South Carolina. In such a case, Massachusetts' interests in regulating the relationship outweigh those of South Carolina when the relationship is centered in Massachusetts.³¹

B. Conflicts Between Situs Law and the Law of the Place Where the Contractual Relationship is Centered

1. Formalities

There seems to be a consensus that the well-known case of *Bernkrant v. Fowler*³² was correctly decided. I will argue, however, that this prevailing view is based on viewing the case as a contracts case rather than as a property case. Again, it may be the fact that I am a property professor as well as a conflict of laws professor that I see the case with different eyes. Once the property law implications of the case are understood, *Bernkrant* morphs from an easy false conflict to a very hard true conflict whose resolution is anything but easy.

Bernkrant involved an agreement made in Nevada regarding real property located in Nevada. Both the contract and the situs are in the same state as is the domicile of at least one of the parties. The only possible contact with another state is the fact that the promisor may have been domiciled in California at the time of the agreement; alternatively, the case involves a promisor who moved to California after the time of contracting. Either way, at first glance, this seems to present the falsest of false conflicts. The domicile of one party in another state, especially if it is "after-acquired"—that is, one party moved to California after the relevant events—seems irrelevant from a choice-of-law perspective, so much so that there is a strong argument that it is unconstitutional to apply any law other than the law of Nevada to the agreement made in Nevada respecting a mortgage in Nevada real estate. Why then did the case have to go

v. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014); and *Barrier v. Vasterling*, No. 1416-CV03892, 2014 WL 4966467 (Mo. Cir. Ct., Oct. 3, 2014). At the time this article was written, South Carolina's prohibition against recognition of same-sex marriages was in full force. However, shortly before this article went to print, an explosion of precedent in the Federal Circuit Courts struck down prohibitions on same-sex marriage either because such prohibitions violated the Equal Protection Clause of the Fourteenth Amendment or because they furthered no legitimate government interest and thus were arbitrary denials of the right to marry under the Due Process Clause. See *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Baskin v. Bogan*, 2014 U.S. App. LEXIS 17294 (7th Cir. Sept. 4, 2014); *Latta v. Otter*, 2014 U.S. App. LEXIS 19620 (9th Cir. Oct. 7, 2014). By contrast, the Sixth Circuit upheld the constitutionality of state prohibitions on same-sex marriage. *DeBoer v. Snyder*, 2014 U.S. App. LEXIS 21191 (6th Cir. Nov. 6, 2014). Since the Fourth Circuit's opinion in *Bostic v. Schaefer*, the same-sex marriage ban in South Carolina has been held unconstitutional under both the Due Process Clause and the Equal Protection Clause. *Bradacs v. Haley*, 2014 WL 6473727 (D.S.C. Nov. 18, 2014). The ruling in *Bradacs* specifically requires recognition of same-sex marriages validly celebrated in other jurisdictions. *Id.* at *14.

31. Of course, if the South Carolina interest is not a constitutionally cognizable one, as held by *Bradacs*, then the case is a false conflict and only Massachusetts has an interest in applying its law.

32. 360 P.2d 906 (Cal.1961).

to the California Supreme Court to be decided? Why was it a hard case after all? And why was it even harder than the California Supreme Court thought it to be?

The case involved a mortgage on Nevada land and the promise involved a promise to forgive the rest of the debt if the lender died before it was fully paid. The problem is that this promise to forgive a debt at death was oral; it was not in written form. Apparently enforceable under an exception to the statute of frauds in Nevada, the promise was definitely not enforceable in California, the domicile of the promisor at the time of his death and probably at the time the promise was made. The promisor died testate but his will made no mention of the promise. Enforcement was prohibited by two California laws: the statute of frauds and the statute of wills. The statute of frauds requires promises regarding land to be in writing and that applies to mortgages; the statute of wills also requires wills to be in writing and attested by witnesses who sign the will.

The court found the case to be an easy one because the contract was made in Nevada; both parties were present when the oral promise was made and accepted. The real property was located in Nevada. Whether we look at this as a contracts case, a property case, or a tort case—involving a claim of a fraudulent statement—everything points to Nevada. The only contact with California may be the domicile of the promisor and one cannot bring one's home state law with him when one goes to another state to do business. Even if California might be "interested" in protecting its domiciliary from oral promises, it cannot legitimately assert that interest when its domiciliaries travel elsewhere. The case is a false conflict if ever there was one.

But not so fast. The much-maligned case of *Lilienthal v. Kaufman*³³ addressed a similar issue by applying forum law when it was the domicile of the promisor and that law immunized the promisor from the contractual obligation made elsewhere. *Lilienthal* is much criticized because it involves a nonresident carrying around an unusual spendthrift disability with him while fraudulently inducing a gullible victim in another state into a disastrous business deal. Most conflicts scholars think the case came out the wrong way and that Oregon should not have applied its law to a contract that took place wholly inside California borders even if this violated forum policy designed to protect its domiciliary and his family.

At the same time, we must understand that the failure to apply Oregon law in the case might have the effect of eviscerating it. Since the spendthrift was not in someone else's physical custody or limited in his ability to travel, he could freely go to other states and enter business negotiations there, depleting his family of all their resources. The Oregon law was designed to protect both the spendthrift and his family and if Oregon law does not apply to out-of-state

33. 395 P.2d 543 (Or. 1964).

transactions, it would be impaired into nothingness. *Lilienthal* therefore involved a hard true conflict between the domicile's interest in protecting what it viewed as a resident person and a family in need of protection and the place of contracting's interest in the justified expectations of persons entering business relationships within its borders. While it is true that application of Oregon law surprised the promisee in California—and probably also *unfairly* surprised him—there is no question that Oregon had a legitimate interest in applying its law and a strong argument that its policy would be more impaired than would California's policy if Oregon law were not applied to this type of case.

This does not mean, of course, that *Lilienthal* was correctly decided. The mainstream view is probably correct that the unusual nature of the disability law in *Lilienthal* made its application to foreign transactions one that not only violated the rights of promisees to the protection of the law of the place of contracting, but also the policy of those states to protect justified expectations based on mutual exchanges freely made. But if that is so, then *Lilienthal* is a false conflict only because of the view that Oregon should engage in restrained interpretation of its policy and refrain from extending it to out-of-state transactions both to prevent unfairness to the defendant and because of comity to the policy of other states within their borders.

Bernkrant on the other hand does *not* represent an unusual law. On the contrary, it is the place of contracting and the situs that had the unusual law. A promise to convey property, or to forgive a property-based debt, is a thing that is ordinarily governed by the statute of frauds. It cannot be surprising to anyone that such promises may need to be in writing to be enforceable. Be that as it may, it is also true that every state requires wills to be in writing and every state requires witnesses. A few states recognize holographic wills written without witnesses but even so, those states require a writing. Oral promises to convey property after one dies are normally not enforced in the U.S. for obvious reasons. Consider the movie stars and high tech entrepreneurs who live in California. If oral promises to convey gifts after death were generally enforceable, then every celebrity or rich person would face myriad fraudulent oral claims when they die, tying up estates in lengthy, costly, and uncertain litigation. Even when a will is involved, as was the case in *Bernkrant*, someone could come forward with a claim of an oral promise made in another state and the only person who could testify that the promise was never made is unable to testify.

Contrary to popular wisdom, *Bernkrant* was not a case like *Lilienthal* that posed a ready case for restrained interpretation of forum law. On the contrary, it was a true conflict of the worst sort; it involved relevant and very strong policies in both states. California had powerful interests to refrain from hearing claims based on oral promises to forgive a debt on death or otherwise to give a

gift not included in the will. Conversely, persons in other states cannot be unfairly surprised that courts want written proof of promises made by people who can no longer testify, especially since every state requires or at least highly encourages wills to be both in writing and witnessed. *Bernkrant* is a case where deviation from the situs rule governing promisees respecting land would have been more than justified to protect the estate of the testator domiciled in California. The case involved, not a false conflict, but a conflict between two situs; the situs of the real property located in Nevada—and the agreement made respecting it—and the situs of the decedent's estate in California. Application of the law of the testator's domicile at death would not only have been reasonable but would arguably have been more reasonable than deference to the unusual law of Nevada that opened estates in California to the possibility of a myriad of fraudulent oral claims.

A similar problem arose in *Rudow v. Fogel*.³⁴ A New York couple that summered in Massachusetts had marital problems and separated. Although there was great animosity between the parties, the husband conveyed a house they owned on the coast of Massachusetts in Rockport to his wife, Florence Rudow. Divorce proceedings began but apparently were not completed. Hospitalized for cancer, Florence wanted to make sure the Rockport house would never end up in the hands of her husband so she conveyed it to her brother by giving him a deed to the house. However, she made her brother promise orally that when her son became 25, her brother would transfer title to the house to her son. When the time came, the boy's uncle refused to give the house to his nephew. Massachusetts law would not enforce the oral agreement because it violated the statute of frauds, but New York law would impose a constructive trust on the property and order a transfer of title to the son if the relationship between the mother and her brother was such that they trusted each other and might refrain from putting their agreement into writing. Although the Massachusetts courts would not order the uncle to transfer title to the nephew, they would enforce the oral promise to the extent of ordering him to pay the nephew the fair market value of the property.

Like *Bernkrant*, this case poses a true conflict between one state's interest in formality and another state's interest in enforcing the will of the parties expressed orally and clearly. *Bernkrant* involved a situs state that was happy to enforce oral promises and a domicile state that rejected them when it came to enforcement after death against the estate of a domiciliary. In contrast, *Rudow* involved a situs state that insisted on formality and a domicile state where the contract was made that wanted to regulate the family relationship by refusing to insist on formality, protecting expectations based on the trusting relationship between the parties as reflected in an oral arrangement. Unlike *Bernkrant*, *Rudow* involved a conflict between the situs interest in formality for

34. 426 N.E.2d 155 (Mass. App. Ct. 1981).

real estate transactions and the domicile interest in enforcing promises between family members who understandably may not reduce their promises to writing.

The courts have often recognized exceptions to the statute of frauds when the relationship between the parties is such that it is perfectly understandable how insistence on a writing might interfere with the relationship.³⁵ That is why oral agreements about borders are enforceable under an equitable exception to the statute of frauds; someone who insists that a neighbor put a promise in writing might convey distrust and destroy the easy confidence that neighbors may have in each other.³⁶ The same is true for family relationships.

On the other hand, because the interest in clear title to property is so important, one can well understand states that insist on greater formality—as California law did in *Bernkrant* and as Massachusetts did in *Rudow*. Cases like this may justify deviation from the situs rule because states have strong interests in regulating family relationships and protecting the legitimate interests of family members, such as the son in *Rudow* and the will beneficiaries in *Bernkrant*. On the other hand, the situs of property—such as the estate in California and the house in Massachusetts—have strong interests in protecting owners from false claims based on possibly fraudulent oral promises and thus may reasonably insist on greater formality for property arrangements to protect owners from wrongful dispossession. States do not lack interests in protecting the property rights of owners within their jurisdiction just because they may have a domicile elsewhere.

2. Fraud

Our last discussion raises the possibility of fraud. Property cases often involve issues other than clarity of title. They involve expectations based on contract and tort policies focused on protecting people from false claims. Consider a contract between two Massachusetts domiciliaries regarding the sale of a New Hampshire business.³⁷ The situs of the real property and the business is New Hampshire; the domicile of both the buyer and seller and the place of contract negotiation and making is in Massachusetts. During the course of the negotiations, the seller lies about the profitability of the business and shows the buyer fraudulently-altered books. The contract of sale contains a “non-reliance clause” affirming that the buyer is not relying on any oral statements of the seller or any representations not contained within the sale contract itself. No written representations are made in the contract respecting the profitability of

35. See, e.g., *Rase v. Castle Mountain Ranch*, 631 P.2d 680 (Mont. 1981) (imposing a constructive trust on property based on implicit understandings and a long course of dealing).

36. JOSEPH WILLIAM SINGER, PROPERTY § 4.7.3, at 172 (4th ed. 2014); JOSEPH WILLIAM SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON, EDUARDO MOISÉS PEÑALVER, PROPERTY LAW: RULES, POLICIES, & PRACTICES 327 (6th ed. 2014).

37. This hypothetical case is a version of the facts in *Danann Realty Corp. v. Harris*, 157 N.E.2d 597 (N.Y. 1959).

the company, the value of the real estate, or the business being sold.

After the sale, the buyer learns of the fraud and sues in Massachusetts to rescind the deal. Assume that under New Hampshire law, the non-reliance clause is fully enforceable under a policy of “freedom of contract” and no claim can be made that the written agreement contains any fraudulent statements; therefore, the sale is final and the transfer of property cannot be rescinded. In addition, no claim for damages for fraud can be mounted because the non-reliance clause breaks the chain of causation; the plaintiff cannot claim to have reasonably relied on oral statements when the plaintiff promised he was not relying on an extra-contractual information but was buying the property, effectively, “as is.” Assume that under Massachusetts law, a non-reliance clause cannot shield the seller from a fraud claim. The victim of the fraud can recover damages for the tort and can rescind the agreement, get its money back, and give title to the property back to the tortious seller. What law applies?

If we look at it as a tort claim, the conduct and injury both occurred in Massachusetts where the fraudulent statements and the reliance and its consequences happened. Of course, the fraud causes injury in New Hampshire as well. But if we consider the fact that there was injury at the place of the conduct, there is a clear argument for application of Massachusetts law at the time of the tort because both parties were domiciliaries of Massachusetts. Fraud is not just a loss-allocation rule; damages for fraud are intended to induce people not to lie in such transactions so the interests of the place where the fraudulent conduct and resulting injury occur would normally apply to deter the tort and remedy it when that law regulates and attempts to prevent the conduct from occurring.³⁸

At the same time, one could argue that the injury happened in New Hampshire because that is where the buyer is saddled with an unprofitable property. In that case, with the conduct and injury in different states, the usual result is to apply whatever law favors the plaintiff if that is not unfair to the defendant.³⁹ However, if we view the conduct as taking place in Massachusetts and the injury as taking place in New Hampshire, we have what might be thought of as a no-interest or “unprovided-for case” since the place of conduct has a plaintiff-protecting rule and the place of injury has a defendant-protecting rule. In such cases, U.S. courts are split on what to do. However, since injury arguably occurred in Massachusetts as well as New Hampshire, then this is a case where one would expect Massachusetts law to apply on the tort claim.⁴⁰ The same result would occur if we focus on the contractual aspects of the problem. We have a contract negotiated and signed in Massachusetts between

38. See SYMEONIDES, *AMERICAN CHOICE-OF-LAW REVOLUTION*, *supra* note 8, at 213–220.

39. See SYMEONIDES, *AMERICAN CHOICE-OF-LAW REVOLUTION*, *supra* note 8, at 223–235.

40. Symeon Symeonides, *Oregon's New Choice-of-Law Codification for Tort Conflicts: An Exegesis*, 88 OR. L. REV. 963, 1023–32 (2009) (in cross-border torts, courts apply the plaintiff-favoring law unless that is unfair to the defendant).

two residents of Massachusetts; in such a case, one would expect Massachusetts law to apply.

On the other hand, if we emphasize the property aspects of the case, it becomes clear the contract is an agreement to buy a New Hampshire business. In that sense, the situs of the real property looms large. One might expect that the parties have agreed to cross the border to do business and they should anticipate that New Hampshire law would apply to regulate their business relations there, as well as free them from burdensome Massachusetts regulations. Given the location of the business, one could argue that the seller waived the protections of Massachusetts tort and contract law by agreeing to buy a New Hampshire business, while the seller relied on the protections afforded by New Hampshire law when it sold the New Hampshire business. The location of the negotiations and the signing of the contract, as well as the domicile of the parties, vanishes into irrelevancy when the case is viewed in this manner.

The situs rule might counsel application of New Hampshire law to promote predictability and to free the parties from unnecessary, counterproductive, or unfair Massachusetts rules that would burden New Hampshire businesses with possibly fraudulent claims that buyers relied on oral statements made out of state, thereby undoing carefully negotiated New Hampshire contracts regarding New Hampshire businesses. On the other hand, Massachusetts regulatory and protective policy might well want to protect its domiciliary from a fraud perpetrated within its territory and it is hard to argue that the seller is unfairly surprised by application of Massachusetts law when it commits a fraud there and injures a Massachusetts resident.

Given the array of contacts in this case, it would not be out of place to suggest a judicious use of *depeçage*, applying Massachusetts law to the tort claim—allowing damages caused by the fraud—but applying New Hampshire law to the contract and the conveyance of property—denying the buyer the remedy of rescinding the deal. That compromise might be a way to vindicate the most important interests of both states, assuming the seller is not judgment-proof and damages are meaningful rather than illusory. On the other hand, one could forgive a Massachusetts court that eschewed situs law and subjected the seller to the full weight of the Massachusetts policy given the common domicile of the parties, the commission of fraudulent acts inside Massachusetts, and the conduct-regulating nature of the tort claim. Application of situs law would be reasonable here but so would deviation from it.

3. Consumer Protection

It was Professor David Cavers who first recognized the possibility of applying the law of the situs to most issues regarding mortgages while applying the law of domicile of the debtor or the place where the contract was made to

determine rights under the underlying contract such as the right to a deficiency judgment.⁴¹ Consider a lender, whose principal place of business is California, that loans money to a couple domiciled in California to purchase land in Hawai'i. The couple defaults on the loan payments, the lender forecloses on the property, and then the lender sues to collect on the deficiency since the price paid at the foreclosure sale was less than the outstanding debt. Hawai'i law allows the deficiency judgment while California prohibits it. What law applies? Those are the basic facts of *California Federal Savings & Loan Association v. Bell*.⁴²

The common domicile where the contract was made is interested in regulating the relationship and protecting its domiciliary from onerous contract terms. California law has a strong public policy against deficiency judgments, that is, lawsuits brought against borrowers when the property decreased in value such that the lender does not recover the full amount of the unpaid debt when the property is sold in a foreclosure sale. Such laws are intended to protect borrowers from ruin by limiting their personal liability, much as corporate law limits the liability of shareholders by protecting their personal wealth from corporate debts. They also induce lenders to look only to the real property as a source of funds to pay back the debt upon default and to price the loan accordingly. Such laws place the risks of a fall in the market value of the property on the lender rather than the borrower. Conversely, Hawai'i law, like the law in most states, allows deficiency judgments to ensure that the lender can get its money back when the property value is insufficient to do that. Such laws give greater protection to the lender, may decrease the cost of borrowing money by lowering the interest rate given the possibility of multiple sources of repayment of the loan in a falling real estate market, and may therefore increase the willingness of lenders to lend and promote the alienability of land at the situs.

Because of these competing state interests, such cases represent true conflicts. The Hawaiian court in *Bell* emphasized the interests of the forum in promoting land sales in Hawai'i and applied situs law.⁴³ The result might be justified on traditional grounds as promoting predictability by looking to the law of only one jurisdiction to determine the parties' rights arising out of their business deal; this makes sense if one views the case as a contract to engage in business in Hawai'i which might justify regulating the contract by the law of the place of performance rather than the place of contracting.⁴⁴ This way of thinking about the case ignores the interests of the place of contracting and gives no reason for elevating situs interests over the interests of the common

41. CAVERS, *supra* note 2 (explaining why it might be reasonable to apply situs law to foreclosure of land but the law of the domicile of the relevant party to the question of whether a deficiency judgment is available).

42. 735 P.2d 499 (Haw. Ct. App. 1987).

43. A similar case is *Verreaux v. D'Onofrio*, 824 P.2d 1021 (Nev. 1992).

44. For a result like this, see *Wood Bros. v. Walker Adjustment Bureau*, 601 P.2d 1369 (Colo. 1979).

domicile and place of contracting. The common domicile may well be interested in regulating its resident business and protecting its resident borrower; at the same time, perhaps the common domicile and place of contracting should engage in restrained interpretation of its policy in deference to the ability of the situs state to regulate business centered there. If we conceptualize land ownership and transfer as a “business” situated at the situs, then comity concerns might justify deference to the law of the place of performance of the contract. Nor is such a result unfair to the borrower who knew it was entering another jurisdiction to do business while the lender may have relied on the law of the place of performance (the situs) in determining its rights and vulnerabilities. Still, one can also understand why the law of the common domicile might be thought relevant when it is intended to regulate the business conduct of resident banks and to protect resident or nonresident borrowers who borrow money from California banks.

A Minnesota court recognized the prevailing interests of the common domicile and place of contracting in *Gate City Federal Savings & Loan Association v. O'Connor*,⁴⁵ where situs law measured the deficiency judgment by the difference between the outstanding debt and the amount obtained from the foreclosure sale while the common domicile of the parties where the loan was made protected the borrower better by measuring the deficiency judgment by the difference between the unpaid debt and the fair market value of the land. Domicile law ensured that the bank would not buy the property itself on the cheap at the foreclosure sale, resell it for a profit, and then chase the borrower for the difference. Instead, the lender was entitled only to the amount it could not obtain by sale of the property at its fair market value.

Unlike the result in *Bell*, the situs court applied the law of the common domicile where the contract was made. Such a result might be justified by the opposite reasoning from that in *Bell*. Here, one might argue that the situs interests in clarity of title and in foreclosure procedures are fully satisfied by application of situs law to those issues. But deficiency judgments are unlikely to be “conduct-regulating” in the sense that their availability is unlikely to promote investment in mortgages at the situs. Banks are not likely to loan money if they do not think they can recover the money through foreclosure. The inability to obtain a deficiency judgment is thus unlikely to reduce the cost of lending much, if at all. Moreover, if it comes to foreclosure, anyone who defaults on a mortgage is likely to not have other resources; if they did, they would not have defaulted. A deficiency judgment is not likely therefore to generate new funds to pay off the rest of the unpaid debt that remains after the foreclosure sale. For that reason, deficiency claims may well have little economic value. The question of whether a deficiency judgment is available therefore looks more like a loss-allocating rule than a conduct-regulating (or

45. 410 N.W.2d 448 (Minn. Ct. App. 1987).

investment-promoting) one. That typically points us toward the law of the common domicile to regulate the issue.

If that is so, the situs interests in promoting real estate transactions are not very impaired if not applied here. In contrast, the common domicile has strong interests in protecting its borrower from a deficiency judgment because the inability to pay the judgment may drive the debtor to bankruptcy or limit the borrower's income in the future. The consequences for the family of the debtor may well outweigh the interests of the situs in promoting real estate investment, especially if we use the comparative impairment standard to make the comparison. The situs rule will either not promote real estate transactions at all or will have a negligible effect; the domicile rule, in contrast, will have a big impact on protecting the resources of the borrower at the domicile. And banks cannot be unfairly surprised that they are subject to the consumer protection law of the place where they do business, issue loans, and contract with borrowers. Either way we resolve this case, it represents a real conflict between competing policies of the situs/contract performance state and the common domicile/contracting state that might justify deviating from situs law.

4. Marital Property

We have already considered a number of marital property cases. I argued that it made sense to apply the law of the marital domicile to determine who owns property on divorce or death when real property is located in other jurisdictions so that a coherent plan could be implemented that does not leave anyone without a fair share of the property or otherwise interfere with the wishes of the decedent. Marital property conflicts also arise when the parties have entered a contract with each other or with third parties.

Contracts between married partners raise complicated choice-of-law questions. Consider a California couple that marries in California and signs a premarital agreement that is enforceable in California which waives the protections of the California's community property statutes and provides that property earned during the marriage shall remain the separate property of the spouses and that any property owned prior to the marriage cannot be equitably distributed on divorce. That means that, upon divorce, each party is left with whatever property they earned individually during the marriage or which they received by gift or inheritance. The couple moves to New Jersey, lives there for several years, and then gets divorced in New Jersey courts. Assume that New Jersey's version of the Uniform Premarital Agreement Act will not enforce the agreement since it was made without the disclosure of assets required by the act.⁴⁶

This case represents a conflict between the interests of the place of

46. See N.J. STAT. ANN. § 37:2-38(c) (West Supp. 2013).

contracting in enforcing voluntary agreements and the interests of the domicile at the time of divorce in ensuring fair distribution of property for its married couples when they separate. The place of contracting has interests in giving the parties the freedom to determine the shape and contours of their relationship by opting out of the community property system for married couples. That policy promotes “freedom” in the abstract and “freedom of contract” in particular. More importantly, it allows wealthy residents of California some assurance that their partners are marrying them out of love and not out of greed. Premarital agreements make little sense for most couples since it is psychologically difficult—and possibly torturous—to simultaneously plan to spend your life with someone you love and plan for divorce at the same time.⁴⁷ Where they do make sense is when one party is very wealthy and may be worried about whether someone else is marrying them just for the money and not out of love. Premarital agreements are not a sure way to prevent this because marriage entails sharing a lifestyle while the marriage lasts, but such agreements go some way to ensure that money is not the *only* motivating factor for the marriage. That means that the place of contracting retains an interest in applying its law even when the couple moves elsewhere.

Conversely, the place of domicile at divorce has very strong interests in applying its law to ensure fairness for both parties and to prevent one of the parties from becoming a public charge. In addition, the New Jersey disclosure provision effectively makes equitable distribution of property the norm because it promotes gender equality and protects the justified expectations of the parties. New Jersey law only allows a narrow exception to that principle when there is sufficient disclosure to give confidence that the parties truly understood what they were giving up by signing the agreement.

In such cases, a value conflict is presented between the interests of California in protecting what it sees as the legitimate expectations of the wealthier party on divorce and California’s ability to encourage marriage between loving partners and discourage marriage by “gold-diggers” versus New Jersey’s interest in gender equality and protection from agreements not likely to represent the actual will of the parties. This is *not* a conflict between freedom of contract and regulation. New Jersey’s policy is as much a “freedom of contract” policy as is that of California; New Jersey simply believes that premarital contracts do not actually promote the justified expectations of the parties unless they have certain procedural safeguards. Nor is the conflict between the “fairness” policy of New Jersey and the deregulatory “freedom” policy of California. Both states promote their notion of fair distribution and

47. At the same, it is important to note that Jews have long signed a “ketubah” just before the marriage ceremony that provides for support for the wife upon divorce. That document represents a loving commitment rather than an assumption that the marriage will only be temporary. Cultural norms may therefore be crucial in determining how premarital agreements are viewed and experienced from an emotional and moral point of view.

freedom. The conflict is really between California's interest in allowing the parties to determine the character of their relationship—and to protect wealthy parties from “gold-diggers”—and New Jersey's interest in ensuring that the parties are fully informed before waiving significant rights and in promoting gender equality and fairness on divorce.

Because this type of case represents a true conflict, there might be reasons to depart from the situs rule. If there is a home located in New Jersey then traditional conflict of law rules would apply the law of the situs and the marital domicile to determine rights on divorce. That is because such issues were not traditionally thought of as “contracts” issues but issues of “status” for which domicile law should govern. But the policy of the Uniform Premarital Agreements Act and the increasingly majority rule in the U.S. is to favor enforcement of premarital contracts—whatever their terms—and the notion of giving the parties the freedom to waive the protections of equitable distribution statutes might point to enforcing the contract under California law since at that time, the parties may have relied on California law applying to regulate their agreement. The wife cannot claim surprise that California law applies to a California contract any more than the decedent could claim surprise in *Bernkrant* that Nevada law governed a Nevada contract regarding Nevada real estate. On the other hand, the husband cannot claim to be surprised that his move to New Jersey subjected him to New Jersey marital property law designed to protect both parties to what had become a New Jersey marriage.

Similar conflicts may arise when one married person enters contracts with third parties and the couple then moves to another state. In *Pacific Gamble Robinson Co. v. Lapp*,⁴⁸ a businessman entered a contract in Colorado that he later breached. His wife was not a party to the contract. After breach, the couple moved to Washington state. Under Colorado law, the creditor could attach the husband's separate earnings to satisfy the unpaid debt. Under Washington's community property law, however, the husband's earnings during marriage could not be used to pay a debt that he alone incurred; only if both parties to the marriage signed the agreement could his earnings during marriage be used to satisfy a debt of the marital community.

The Washington court unsurprisingly held that Colorado law applied to the contractual relationship and that this meant that the creditor could attach the husband's earnings to pay off the debt. At the time of the contract, it arguably would have been unconstitutional to apply any other law to the parties' contractual relationship and the wife had no reasonable expectation that her husband's earnings could not be used to pay off his separate debts. The “after-acquired domicile” in Washington should arguably not change that; otherwise, as the court noted, Washington could turn itself into a “sanctuary for fleeing

48. 622 P.2d 850 (Wash. 1980).

debtors.”⁴⁹ On this reasoning, Washington was justified in engaging in restrained interpretation of its policy that defined future earnings of the couple as belonging to the marital community unless both parties agreed to the debt. Colorado arguably had strong interests in applying its law to promote the justified expectations of the parties and that result was not unfair to the wife; nor could either the husband or wife have relied on application of the law of their new domicile to escape his valid debt in Colorado simply by moving to Washington.

The dissenting judge balanced the interests the other way. While conceding that Colorado law applied to the contract, Justice Horowitz argued that the issue in this case was not what law applied to the contract but what law applied to the remedy. Should future earnings in Washington by the husband be available to pay a debt he incurred without his wife’s agreement before they established a new domicile in Washington? On that issue, Washington had a strong interest in gender equality, treating wives as having equal claims to husbands in property acquired by either party during marriage. The fact that Colorado had a system that failed to protect the interests of married women in the marital partnership did not mean that Washington needed to defer to Colorado’s marital property rules by discriminating against recent immigrants by subjecting them to a regime of marriage law that denied equal rights to women. Recent immigrants had as much right as older immigrants to equal rights in property acquired during the marriage in Washington. So both state policy and party rights suggested that, on the issue of the source of funds available to pay the debt, Washington contacts were more significant than those of Colorado.

Nor was this unfair to the creditor or an affront to the sovereignty of Colorado. The debt in question was unsecured. Lots of people default on their debts but a court judgment may not be of any value if the debtor is judgment proof and has no assets to pay the judgment. If the creditor had wanted to be assured of funds to pay the debt, it could have taken a mortgage on the husband’s property interest in the house in Colorado or a security interest in his business receipts or assets. While there is something unseemly about traveling to another state to escape a valid debt, the same result would have occurred if the husband/debtor had gone bankrupt and had no funds to pay the judgment. Thus, the creditor’s reliance on Colorado law was reasonable to the extent it understood the contract to be valid and enforceable but it was not reasonable to the extent the contractor assumed that resources would be available to pay the debt even though the debt was unsecured.

Even if we view the creditor’s interest in repayment as valid and reasonable, the case presents a conflict between the rights of the creditor and the rights of the wife. There was no indication the parties moved to Washington

49. *Id.* at 856.

in order to escape the debt and Washington law created a strong policy of protecting married women by giving them equal rights in property acquired during the marriage and veto rights over its transfer through debt obligations not assented to by the wife herself. Washington had a strong interest in ensuring the wife had rights in property acquired during the marriage, including *future* earnings in Washington, so she would be fairly treated on divorce if it came to that as well as treated equally during the marriage. The wife had a right to the protection of the Washington marital property regime when she moved there.

The question was whether the wife's right to equal protection through the Washington community property system outweighed the creditor's right to be repaid under the rules established by Colorado law. The case presents a choice between Washington engaging in comity toward Colorado by putting the interests of the creditor over its interest in ensuring full equality for all Washington married couples—including recent immigrants—and Colorado engaging in comity toward Washington by recognizing that the validity of the debt did not mean that Colorado could impose on Washington a particular remedy for enforcement of the debt when that remedy would violate strong forum policies protecting someone who was not herself a party to the contract at all.

The complexities involved in this case can be further appreciated if we consider the converse case. In *American Standard Life & Accident Insurance Co. v. Speros*,⁵⁰ the laws were reversed. The place of contracting, Arizona, was a community property state that, like Washington, refused to allow the husband's earnings during marriage to be attached to pay his separate debt. But the couple moved to North Dakota, a separate property state, which agreed with Colorado that the husband's future earnings could be attached to pay his separate debts and that this did not result in any unfairness to the wife. Unlike the court in *Lapp*, the court in *Speros* applied the law of the new domicile. Because the laws were reversed, this meant that the result in both cases was to allow the creditor to attach the husband's earnings to pay off the debt incurred out of state before the married couple moved to the forum.

Lapp was a true conflict because the new domicile had an interest in protecting its recent immigrant wife while the place of contracting had interests in promoting the sanctity of contracts and the creditor who loaned money there. *Speros* was arguably an unprovided-for case (a “no-interest” case) since the creditor in Arizona had no justified expectations that it could attach the husband's salary to pay off the debt and the new domicile arguably had no interest in impoverishing its recent immigrant to pay a debt that the creditor had no right to collect under the law of the place of contracting. However, the court turned the case into a true conflict by interpreting its law as imposing an obligation on its residents to pay their debts. Rather than understanding

50. 494 N.W.2d 599 (N.D. 1993).

application of forum law as needlessly altruistic regulation of its residents to protect foreigners with no rights under the law of their home states, the forum in *Speros* agreed with the Washington court in *Lapp* that it would not be a haven for “fleeing debtors” and found a forum interest in making its resident give his money earned in North Dakota to the person who rightly owned it, i.e., the creditor in Arizona.

Lapp and *Speros* illustrate the true conflicts that can arise between the situs of property and the place of contracting. Suppose, for example, the creditor in *Lapp* sought to place a lien on the debtor’s new house in Washington. That would have created a conflict between the law of the situs—which denies the ability of creditors to attach property acquired during marriage unless both spouses agreed to the debt—and the law of the place of contracting which would allow such a lien and enforce it. Similarly, it involved a conflict between the place of contracting and the situs where future earnings were going to be made. Conversely, *Speros* involved a conflict between the law of a state that did not allow attachment of earnings or the market value of the house in Arizona and the law of a state that believed that the husband’s separate property—including whatever interest he had in the North Dakota home and his North Dakota salary—should be encumbered with a lien to pay off his legitimate creditors even if the place of contracting would allow the debtor to get away with murder by failing to pay his debts, leaving the state, and taking his property with him.

C. Conflicting and Overlapping Situs

1. Conflicts Between the Place of Conduct and the Place of Injury

Few cases have been addressed by the courts that involve use of property in one state that cause a nuisance in another. A recent example is the Supreme Court’s interpretation of federal environmental law that found valid a regulation that imposed duties on Midwestern states to avoid polluting the air in New England.⁵¹ Such cases are properly analyzed the way we would treat cases where the conduct and injury are in different jurisdictions. Dean Symeon Symeonides explains that the normal result in such cases is to apply whichever law favors the plaintiff as long as this is not unfair to the defendant; unfairness occurs only when it was foreseeable that the harm might materialize at the place of injury.⁵² That means that the law of the place of injury applies if it is more

51. EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584 (2014); see Coral Davenport, *Justices Back Rule Limiting Coal Pollution*, N.Y. TIMES (Apr. 29, 2014), <http://www.nytimes.com/2014/04/30/us/politics/supreme-court-backs-epa-coal-pollution-rules.html>; Clifton B. Parker & Bjorn Carey, *Supreme Court’s ruling expands air pollution control efforts, say Stanford scholars*, STANFORD REPORT (May 5, 2014), <http://news.stanford.edu/news/2014/may/coal-pollution-ruling-050514.html>.

52. Symeon Symeonides, *Oregon’s New Choice-of-Law Codification for Tort Conflicts: An Exegesis*, *supra* note 40.

plaintiff-favoring than the law of the place of conduct in order to protect people who are injured at home from conduct the home state views as tortious. The defendant has no right to stand across the border and negligently or deliberately act so as to cause harm in another state and say “nyah, nyah, nyah, nyah, nyah, you can’t get me.” Thomas Hobbes teaches us that the first obligation of states and law is to protect us from harm caused by others.⁵³ The defendant cannot complain that it is subject to this obligation if the defendant’s conduct foreseeably caused harm in the forum.

When the laws are reversed, we might see it as an unprovided-for case and conclude, with Professor Larry Kramer, that no state gives the plaintiff a remedy so the defendant should win.⁵⁴ Why impoverish a resident defendant to help a plaintiff who has no rights under the law of the only state she has contacts with? On the other hand, I have argued that the place of a defendant’s conduct has interests in not allowing its territory to be used to enable its residents to cause tortious harm to others.⁵⁵ Just as the *Speros* court viewed its new resident as having an obligation to pay off a debt incurred out of state, the case of the defendant acting in a plaintiff-protecting state should be seen as one where the place of conduct is vitally interested, not in needlessly impoverishing its resident, but in holding its residents to reasonable standards of conduct and ensuring that they pay damages when they violate the rights of others wherever located.

Cases like this represent conflicts between the situs of conduct and the situs of injury. In pollution or other nuisance cases, the situs of each property has interests in protecting the owner either to engage in the activity or to be free of its effects. A suggestion that we promote simplicity by “applying the law of the situs” tells us nothing at all about what to do in such cases.

2. Overlapping Situs: Indian Nation Jurisdiction

A second case of conflicting situs involves the special case of the jurisdiction of Indian nations in the United States. In the case of *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,⁵⁶ the Supreme Court confronted the question of whether a tribe had the power to apply its zoning law over its entire reservation or whether its power was limited to land owned by the tribe or its citizens and thus did not extend to land owned in fee simple by non-Indians within reservation borders.⁵⁷ The Court had trouble reaching a decision. Three Justices thought that Indian nations *always* have

53. THOMAS HOBBS, *LEVIATHAN* (C.B. MacPherson ed., Penguin Classics 1968 (original 1651)).

54. Larry Kramer, *The Myth of the “Unprovided-For” Case*, 75 VA. L. REV. 1045 (1989).

55. Joseph William Singer, *Justice and the Conflict of Law*, 48 MERCER L. REV. 831 (1997). For cases consistent with this approach, see *Erwin v. Thomas*, 506 P.2d 494 (Or. 1973), and *Johnson v. Spider Staging Co.*, 555 P.2d 997 (Wash. 1976).

56. 492 U.S. 408 (1989).

57. For a critique of the Supreme Court’s reasoning, see Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991).

regulatory powers (including zoning authority) over all territory within the borders of the reservation whether owned by Indians or non-Indians or by tribal citizens or noncitizens.⁵⁸ Four Justices thought that Indian nations *never* have the power to apply their regulatory laws to non-Indian conduct on land owned by non-Indians in fee simple within the reservation unless those non-Indians consent to such jurisdiction or the non-Indian conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”⁵⁹ Two Justices argued that Indian nations *sometimes* had the power to apply their zoning laws to non-Indian conduct on non-Indian owned fee land within the reservation.⁶⁰

Whatever the benefits of the situs rule, it does not provide a solution of any kind when the situs overlap as they do when the jurisdiction of Washington state overlaps with the jurisdiction of the Yakama Indian Nation.⁶¹ In some ways, this type of case is very similar to the problem of cross-border torts where the “location of the tort” cannot be situated in only one jurisdiction. In other ways, this type of case is very different from the usual cross-border problem because the jurisdictions overlap physically as well as metaphorically and because the conflict of state interests implicates issues of colonialism, conquest, and denial of equal protection of law.

While non-Indians may complain that it is unfair to be regulated by a government when they cannot vote in the elections that choose that government,⁶² one cannot help but feel bewildered by this idea. After all, anyone who buys land in another city is subject to that city’s zoning law even if they cannot vote there. There is simply no property right, no voting right, no equal protection right, or other constitutional right of any kind to vote in the government that zones your land. And while non-Indians who bought land in Indian reservations may have assumed they would not be subject to tribal law, that expectation was based on governmental policy in effect at the time of the purchase—a policy that has since been repudiated. Since the 1970s, the United States has pursued a policy of self-determination for Indian nations and encourages the revitalization of their governments and the exercise of tribal sovereignty.

Owners of property generally are subject to revisions of real covenants governing their property if they are governed by a homeowners association, and the Takings Clause does not protect owners from changes in zoning laws as long as they allow current uses to continue. It was not a secret that non-Indians who purchased property inside Indian country were doing so. At the same time,

58. See *Brendale*, 492 U.S. at 448–468 (Blackmun, J., dissenting in part, concurring in part).

59. *Id.* at 428 (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981)).

60. See *id.* at 433–448 (Stevens, J., concurring).

61. The Yakama Indian Nation has changed the spelling of its name since the Supreme Court decided the case. See YAKAMA NATION, <http://www.yakamanation-nsn.gov> (last visited Oct. 25, 2014).

62. See *Brendale*, 492 U.S. at 446 (Stevens, J., concurring) (suggesting this argument).

it is true that when most non-Indians bought land inside Indian country, the tribes were not allowed to exercise their inherent sovereign powers because the United States was pursuing a policy of limiting or destroying tribal sovereignty both during the allotment era (1871 to 1934) and the termination era (1950 to 1970). In any event, current federal Indian law creates patchwork zoning jurisdiction. The *Brendale* decision means that the county governs zoning for non-Indians and the tribe governs zoning for its land and its citizens. That makes property on the same street subject to differing zoning regimes, making rational planning close to impossible. For any reasonable zoning policy to be put into place, Indian nations with patchwork reservations must come to an agreement with the counties or municipalities that have jurisdiction over the land use of non-Indians within reservation borders. The same is true for those municipalities; if they want to benefit from zoning law and establish the character of different neighborhoods, their only option is to negotiate a kind of “treaty” with the relevant Indian nation.

The point here is that the Supreme Court rejected simple application of the situs rule. Rather than grant Indian nations full authority over property within their borders, it allocated sovereign powers based on the citizenship of the landowners. I have argued in the past that this was a grave mistake that denied Indians and Indian nations equal protection of the law but it nonetheless remains the law of the land and gives an example of a significant deviation from the situs rule. On the other hand, I have also argued that the case presents a situation of overlapping situs where invocation of the situs law rule tells us nothing about how to adjudicate the controversy.

IV. THE RENVOI PROBLEM

Renvoi has been historically disfavored but it has seemingly always applied to issues involving real property. The traditional situs rule requires application, not of situs real property law, but whatever law the courts at the situs would apply to the issue. If the situs courts would apply the law of the domicile of one of the parties or the place where the contract was made, then the situs rule requires courts elsewhere to do so as well. That is because the situs rule has been interpreted to mean application of the “whole law” of the situs, including its choice-of-law rules. Renvoi is normally ignored in choice-of-law analysis but real property cases normally assume that “application of situs law” means application of the law a court at the situs would apply to the controversy or issue.

The argument for using renvoi in real property cases is that it is crucial for every court to come to the same determination so that title to land will be clear. The problem with this argument, as conflicts scholars have long recognized, is that this cannot mean that every court adopts renvoi to adjudicate property issues. Suppose for example that the situs has one substantive property rule

and the domicile another. Assume further that the states *also* have different choice-of-law rules; the situs state applies the law of the domicile and the domicile state applies the law of the situs. In this situation, if *both* states adopt the renvoi doctrine, *then the result will differ depending on which jurisdiction hears the case*. If a situs court hears the claim, situs law will apply; if a domicile court hears the claim, domicile law will apply. The *only* way to get a uniform result in such cases is *for one state to adopt the renvoi doctrine and the other state to reject it*. The invocation of renvoi in both jurisdictions will *defeat* rather than promote the objective of having the same party win the case no matter where the case is brought.

The idea that the situs rule promotes uniformity of result suffers another major flaw unless one interprets it to mean that the situs state should always apply the law of the situs. That approach would violate strong interests of other states in many important cases, as I have tried to show in this article. The idea that we can achieve predictability and fairness by rigid adherence to the law of the situs of real property is an idea we would do well to abandon. That does not mean that the application of situs substantive property law is often warranted. As I have explained, the situs state is often the only state with a legitimate interest in applying its law to real property law questions. When we have such false conflicts, the situs rule deserves its place in the choice-of-law universe. But when other states have strong interests or when the situs rule results in incoherence, then we have reason to do the right thing rather than the easy thing.

V. CONCLUSION

The idea that the situs rule promotes uniformity of result, predictability of outcome, and clarity of title for property sounds good if you say it fast. In the real world, we confront greater complexity than imagined in this philosophy. The situs rule is a good one in many cases, but in other cases it promotes perverse or destructive results. And in still other cases, we find important value conflicts between the interests of the situs state and the interests of the state where the parties are domiciled or their contractual relationship is centered. Those cases also present conflicts between the rights of the parties who claim the protection of the law of different jurisdictions. Adjudicating such cases requires choices about which values should prevail, which interests should take precedence, and whose rights should be vindicated. Only if we confront those real conflicts will we make reasonable and fair choices of applicable law.