Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect

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It is understandable that some conflicts scholars are disappointed with *Allstate Insurance Co. v. Hague*.[1] That case signals the Supreme Court's continued permissive attitude toward the "conflicts revolution" with all its excesses. The proclamation of some guidelines would have pleased those who are not "True Believers"[2] or have become bored with "transcendental mediation over guest statutes."[3] Moreover, the constitutionalization of choice of law might upgrade a discipline that seems mired in the attempt to derive solutions to multistate problems from analyzing what a judge once called "minor morals of expediency and debatable questions of internal policy."[4] But I, for one, question the Supreme Court's ability to improve American conflicts law.

First, let us recall that when the Court actively controlled the conflicts field by means of "first principles of legal thinking,"[5] it performed poorly.[6] Of course, the Justices might do better next time. I doubt it. Choice of law has vexed the finest legal minds since the Middle Ages. Cardozo called it "one of the most baf-

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[1] 449 U.S. 302 (1981).

[2] *Compare* Baade, *Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process*, 46 TEX. L. REV. 141, 151 (1967), *with* Peterson, *Weighing Contacts in Conflicts Cases: The Handmaiden Axiom*, 9 DUQ. L. REV. 436, 441 (1971).

[3] Kozyris, *No-Fault Insurance and the Conflict of Laws—An Interim Update*, 1973 DUKE L. J. 1009, 1033.

[4] Mertz v. Mertz, 271 N.Y. 466, 475, 3 N.E.2d 597, 600 (1936) (Crouch, J., dissenting).

[5] Mutual Life Ins. Co. v. Liebing, 259 U.S. 209, 214 (1922).

[6] *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 495-99 (2d ed. 1980).

fling subjects of legal science"[7] and Prosser called it worse.[8] No one maintains that jurisdiction is equally troublesome. Most law schools purport to teach that subject to first year law students, presumably because the issues are fewer and easier than those posed by choice of law. But the Supreme Court has not even done well with jurisdiction. Let us assess their work in that cognate field before we cheer on the Justices to intervene in choice of law.

Recall *Pennoyer v. Neff*,[9] where the Court shunned common sense and relied on so-called "principles of public law"[10] to slip the turf theory into the Constitution. A quarter of a century after England had followed the example of other European nations and enacted long-arm legislation,[11] our Supreme Court reached for the ancient ingredients of sovereignty and territoriality to concoct a doctrine that could not possibly work satisfactorily in a federal system. The turf theory resembled Procrustean twin beds. It was too narrow and therefore could not cope well with such obvious practical problems as jurisdiction over foreign corporations[12] and non-resident motorists.[13] But it was also too broad in that it sanctioned two exorbitant practices: "tag jurisdiction" and the quasi-in-rem holdup. For almost seventy years, the Court's first misguided attempt to assess all jurisdictional assertions by a single standard forced American judges to grasp for fictions to reach decent results in interstate cases. Even now the old case still haunts us, as illustrated by the propensity of counsel and judges to say "process" when they mean jurisdiction. In fact, our current jurisdictional lore can perhaps only be understood as a reaction to the *Pennoyer* madness.

International Shoe Co. v. Washington[14] tried to set things straight. For the earlier "principles of public law" it substituted a new dogma that was but a vague policy statement with a "minimum contacts" mantra. Still, the Justices' reaction to the thirteen salesmen who roamed through Washington with one shoe

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[7] B. CARDOZO, THE PARADOXES OF LEGAL SCIENCES 67 (1928).
[8] *See* Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).
[9] 95 U.S. 714 (1878).
[10] *Id.* at 722.
[11] *See* Common Law Procedure Act, 1852, 15 & 16 Vict., c. 76, §§ 17-19.
[12] *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).
[13] *See* Hess v. Pawloski, 274 U.S. 352 (1927).
[14] 326 U.S. 310 (1945).

apiece proved useful: it stimulated courts and legislatures to broaden unduly narrow jurisdictional bases. *McGee v. International Life Insurance Co.*[15] seemed to signal even greater freedom. But in *Hanson v. Denckla*[16] the Court reemphasized territoriality and sovereignty, the very notions that had long stunted the growth of American jurisdictional law. Beginning with *Shaffer v. Heitner*,[17] the Supreme Court became even more interventionist. With what results? After more than a century of experimentation we are still looking at dominant grays and innumerable shades.[18] Such a chiaroscuro approach would be tolerable if it did justice. But does it?

Look at *Shaffer*. Where, in a rational legal system, should a shareholder sue the management of a Delaware corporation? The Delaware courts can best apply the law that determines the duties allegedly breached. Unless the officers and directors can be sued in one place, how can we avoid conflicting decisions? Should it really be impossible for the state of incorporation to assert jurisdiction over managerial misfeasance? Following a suggestion in Justice Marshall's opinion,[19] Delaware passed a statute subjecting the management of Delaware corporations to local jurisdiction.[20] Is this enactment constitutional, as the Delaware Supreme Court has held?[21] Must California[22] copy that statutory monstrosity, a throwback to the era of "implied consent,"[23] to collar the management of California corporations? Or are yet more potent incantations needed? Of course, the state could require officers and directors to sign a form consenting to jurisdiction as a condition of employment.[24] Then, I suppose,

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[15] 355 U.S. 220 (1957).

[16] 357 U.S. 235 (1958).

[17] 433 U.S. 186 (1977).

[18] Kulko v. Superior Court, 436 U.S. 84, 92 (1978) (*quoting from* Estin v. Estin, 334 U.S. 541, 545 (1948)).

[19] *See* Shaffer v. Heitner, 433 U.S. 186, 214 (1977).

[20] DEL. CODE ANN. tit. 10, § 3114 (Mitchie Cum. Supp. 1980).

[21] Armstrong v. Pomeranze, 423 A.2d 174 (Del. 1980). As for the genesis of this provision, *see id.* at 175 n.2, 179 n.8.

[22] California asserts jurisdiction to the full extent permitted by the state and federal constitutions. *See* CAL. CODE CIV. PROC. § 410.10 (West 1973).

[23] *Compare* DEL. CODE ANN. tit. 10, § 3114 (Mitchie Cum. Supp. 1980), *with* the Massachusetts nonresident motorist provision *cited in* Hess v. Pawloski, 274 U.S. 352, 354 (1927).

[24] *See* Shaffer v. Heitner, 433 U.S. 186, 227 n.6 (1977) (Brennan, J., dissenting).

even the Constitution could not break the spell cast by ink and paper.

Now look at *Kulko v. Superior Court.*[25] What is wrong with giving support claimants a jurisdictional preference? They have one in Europe, thanks to the Brussels Convention.[26] Would such a preference undermine Our Federalism? Apparently in this country only the interests of illegitimate offspring are sufficiently worthy of protection to permit suits in their home state, provided that they were sired there.[27] By giving the phrases "minimum contacts" and "fair play" a meaning the Supreme Court may never have intended, state courts have been able to help these children. Darwin and Ilsa Kulko, however, were told to try their luck with the Uniform Reciprocal Enforcement of Support Act. URESA attempts to cope with our territorialist bias against support claimants by the rubber-bands-and-matchsticks method of authorizing two concurrent actions in the claimant's and the obligor's forum.[28] If the Supreme Court read Ann Landers as avidly as the election returns, it might have noted a recent item entitled "Fleet-foot flees."[29] There a support claimant signed "Discouraged in Virginia Beach" said that URESA had destroyed her faith in the judicial system. As she advised others, "don't make your grocery list until you get the check!"

And what about *Rush v. Savchuk?*[30] Why should an interstate accident victim be unable to take to the local court an insurance company whose headquarters are but a few blocks away? It would be more than poetic justice to hold insurers such as Nationwide and Allstate to their suggestive names. After all, their business is to sell policies wherever they can and to litigate

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[25] 436 U.S. 84 (1978).

[26] *See* Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments, Sept. 27, 1968, 15 J.O. COMM. EUR. (No. L 299) art. 5(2) (1972), *translated in* 2 COMM. MKT. REP. (CCH) ¶ 6003 (*entered into force* Feb. 1, 1973).

[27] *See, e.g.,* Nelson v. Nelson, 298 Minn. 438, 216 N.W.2d 140 (1974); Gentry v. Davis, 512 S.W.2d 4 (Tenn. 1974). *cf.* Bebeau v. Berger, 22 Ariz. App. 522, 529 P.2d 234 (1975) (Wisconsin paternity decree entitled to full faith and credit). *See also* UNIFORM PARENTAGE ACT § 8(b), *reprinted in* 9A UNIFORM LAWS ANNOTATED 598 (master ed. 1979).

[28] *See* Kulko v. Superior Court, 436 U.S. 84, 99 n.13 (1978).

[29] Davis Enterprise, Dec. 18, 1980, at 11 col. 1.

[30] 444 U.S. 320 (1980).

wherever they must. Why should such entities hide behind John Doe, the nominal defendant? And what should be the fate of all the *Seider* actions pending in the State of New York?[31] If New York's assertion of jurisdiction was unconstitutional, the running of foreign statutes of limitation would inevitably bar numerous meritorious claims. How can it be squared with common sense and social justice to penalize tort victims for their counsels' strategy? And what about counsel? Are *Seider* attorneys liable for malpractice even though they were misled by the Supreme Court?[32]

Finally, there is *World-Wide Volkswagen Corp. v. Woodson.*[33] Only Justice Blackmun wondered "why the plaintiffs . . . are so insistent that the regional distributor and the retail dealer . . . be named defendants."[34] If his brethren had asked themselves this simple question they might not have granted the petition for certiorari. The real reason for importuning the Court was intrastate forum shopping: by joining the regional distributor and the retailer as defendants, plaintiffs' counsel sought to destroy diversity. Defendants, however, preferred to litigate in the federal district court in Tulsa, rather than face a jury from Creek County, Oklahoma, a blue-collar neighborhood renowned for lavish awards. The Court's failure to grasp that venue-shopping, rather than sovereignty and comity, was at issue may explain its decision. That decision, in countless products cases, will thwart the policy which calls for liability of every link in the distributive chain. And, like *Shaffer, Volkswagen* is bound to impede the rational disposition of multiple-defendant cases.

We would be better off if the Court had just denied the petitions for review in all of these cases. Only Mr. Kulko was truly aggrieved, though the requested increase in child support was dwarfed by the cost of taking the matter to the Supreme Court. If the Justices sought an opportunity to refine their jurisdictional thinking, they should have chosen more appealing cases. But the merits of a case may no longer concern the Court.

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[31] *Compare* Carbone v. Ericson, 79 A.D.2d 593, 433 N.Y.S.2d 806 (1980), and Gager v. White, 78 A.D.2d 617, 432 N.Y.S.2d 388 (1980), *with* Ranz v. Sposato, 77 A.D.2d 408, 435 N.Y.S.2d 723 (1980).

[32] Hanover Ins. Co. v. Victor, 393 U.S. 7 (1968) (dismissal of appeal challenging the constitutionality of *Seider* for want of a substantial federal question).

[33] 444 U.S. 286 (1980).

[34] *Id.* at 317.

Volkswagen tells us that the plaintiff's interest, the effective resolution of interstate controversies, and fundamental substantive policies shared by all states, are but secondary considerations.[35] Nothing matters unless the defendant has "contacts, ties, or relations"[36] with the forum state. Thus

> [e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may . . . act to divest the State of its power to render a valid judgment.[37]

In other words, we are asked to believe that something in the Constitution blocks rational interstate procedure. But the due process clause does not refer to "contacts, ties, or relations"; the Court added this gloss. As in *Pennoyer,* the Justices are again prepared to sacrifice sane multistate procedural rules for doctrinal purity.

But what dogma could be so powerful as to outweigh fairness and common sense? Behind the catchphrase "contacts, ties, or relations" there lurks a thought which Justice Douglas, in *Milliken v. Meyer,*[38] expressed as follows:

> The state which accords . . . [a citizen] privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties.[39]

While *Milliken* used the tit-for-tat theory to support a state court's jurisdiction over an absent domiciliary, *Hanson v. Denckla*[40] employed it to defeat a jurisdictional assertion over nonresidents. Chief Justice Warren, who wrote the majority opinion in *Hanson,* reformulated the pertinent test to require

> some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.[41]

The "purposeful availment" formula, today's conventional wis-

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[35] *Id.* at 292.

[36] *Id.* at 294 (*quoting from* International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

[37] World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980).

[38] 311 U.S. 457 (1940).

[39] *Id.* at 463.

[40] 347 U.S. 235 (1958).

[41] *Id.* at 253.

dom, is of course but a reincarnation of the old implied consent fiction.[42] Yet the underlying notion of reciprocity, or retaliation, is even older. It inheres in the phrases "tàcit submission"[43] and "temporary allegiance"[44] that have afflicted the conflicts vocabulary for centuries. These verbalizations are but variants of the thought that jurisdiction is the price for imposing upon a sovereign. This simplistic quid-pro-quo idea has now become the touchstone of American jurisdictional law. Of the entire bench only Justice Brennan questions it.[45]

Pennoyer should have taught the Supreme Court to beware of self-evident truths. Yet, once again the Justices, mesmerized by conceptual symmetry, embrace a "single standard"[46] premised on sovereignty. To be sure, rationalizations such as the tit-for-tat theory can serve a valid purpose. Like fictions, they can help adapt the law to changed realities. This, of course, was the function the stock phrase "minimum contacts" served in *International Shoe*. But the Court should not allow such constructs to frustrate what Holmes called "felt necessities and intuitions of public policy."[47] As the recent cases show, "purposeful availment" causes problems. It may not work, for instance, in multiparty cases such as *Shaffer, World-Wide Volkswagen* and *Mullane v. Central Hanover Bank & Trust Co.*[48] It will cause hardship for accident victims and support claimants, as *Savchuk* and *Kulko* demonstrate. It will also leave the law of jurisdiction

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[42] *See* Ratner, *Procedural Due Process and Jurisdiction to Adjudicate: (a) Effective-Litigation Values vs. the Territorial Imperative, (b) The Uniform Child Custody Jurisdiction Act*, 75 NW. L. REV. 363, 369, 379, 420 (1980). *See also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 311 (1980) (Brennan, J., dissenting).

[43] *See, e.g.*, The Peninsular and Oriental Steam Navigation Co. v. Shand, 16 Eng. Rep. 103, 110 (P. C. 1865); 1 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS 388-89 (1935); F. VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS 134, 135, 196, 198, 200, 202, 218, 223, 293, 295 (2d ed. W. Guthrie trans. 1880). As a Dutch author once remarked, "it is most remarkable how hardy this age-old fiction is." Kollewijn, Book Review, 8 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 173, 174 (1961).

[44] *See, e.g.*, The Peninsular and Oriental Steam Navigation Co. v. Shand, 16 Eng. Rep. 103, 110 (P. C. 1865); J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 22 (7th ed. 1872). *See also* 1 W. BLACKSTONE, COMMENTARIES *357, *358.

[45] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299, 300-01, 304, 308-12 (1980) (dissenting opinion).

[46] Shaffer v. Heitner, 433 U.S. 186, 209 (1977).

[47] O. HOLMES, THE COMMON LAW 5 (1881).

[48] 339 U.S. 306 (1950).

quite confused.

The spate of recent Supreme Court decisions has not infused the law of jurisdiction with greater certainty and predictability. Commenting on *Shaffer*, a distinguished scholar has noted that the case's "implications and ramifications remain quite nebulous and are bound to necessitate further clarification."[49] As shown by the many jurisdictional cases that continue to grace the advance sheets, *Kulko*, *Savchuck* and *World-Wide Volkswagen* have hardly dispelled the "doubts and perplexity in the lower courts"[50] that *Shaffer* introduced. On the highest echelon, if the Justices continue playing the role of a court of error and appeals,[51] they will have to parse "every variant in the myriad of motor vehicle fact situations that present themselves."[52] All in all, the Court's intervention has made our jurisdictional law more cluttered than ever.

And this, finally, brings me back to choice of law. Clearly, *Allstate* could have wrought havoc with that field. As in the jurisdictional cases, a common sense determination by a state supreme court was attacked on grounds that had but little to do with the parties' squabble. At issue was the grievance of an insurance company which had sold a poorly drafted policy that covered three cars. Although the insurer had collected a separate premium for each automobile, it took the position that it had to pay off on only one uninsured motorist coverage. To save thirty thousand dollars, the insurer converted the dispute into a vicarious fight between sovereigns[53] who quarrel about state interests and federalism. The authors of the plurality and the dissenting opinons readily accepted this transmogrification. By anthropomorphizing the states of Minnesota and Wisconsin, and making them the real parties in interest, the Justices were able to train the heavy guns of due process and full faith and credit on a rather piddling controversy between private parties. They thus failed to heed the statement of one of the Court's most distin-

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[49] Riesenfeld, Shaffer v. Heitner, *Holding, Implications, Forebodings*, 30 HASTINGS L. REV. 1183, 1203 (1979).

[50] *Id.* at 1183.

[51] Lowenfeld & Silberman, *Choice of Law and the Supreme Court: A Dialogue Inspired by* Allstate Insurance Co. v. Hague, 14 U.C. DAVIS L. REV. 841, 849 (1980).

[52] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 319 (1980) (Blackmun, J., dissenting).

[53] *See id.* at 311-12 (Brennan, J., dissenting).

guished members who had said, many years ago, that conflicts law "is chiefly seen and felt in its application to the common business of private persons, and rarely rises to the dignity of national negotiations, or of national controversies."[54]

However, the petitioner's ploy, one that had worked so well in the jurisdictional cases, fell flat: a majority decided to leave well enough alone. The plurality opinion written by Justice Brennan adopted a much broader, less defendant-oriented test than purposeful availment to determine the constitutional propriety of applying forum law. Although there must be contacts, what counts is not solely the relationship of the defendant with the forum. Rather, in Justice Brennan's words, the application of forum law is improper only if the forum has "no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction."[55] Even the dissenters agreed that the forum may apply its own law unless there are "no significant contacts between the State and *the litigation.*"[56]

This broad language leaves lower courts ample leeway in multistate cases. Moreover, *Allstate* allows state courts to premise their choice-of-law decisions on any rationale, including the preference for the forum rule as the one best suited to do justice.[57] Unlike jurisdictional assertions, the power of state courts to apply forum law does not depend on their proffering some "particularized interest."[58] Rather, the Court will supply its own constitutional analysis after the fact. This frees inferior judges from the need to simulate the Supreme Court's mock arbitration of sovereign grievances; they need not count contacts or divine interests. Nor do state judges need to short-circuit the problem by invoking public policy, by specious characterizations or by presuming (or guessing[59]) that a foreign rule is identical to fo-

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[54] J. STORY, *supra* note 44, at 9.

[55] Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981).

[56] *Id.* at 332 (Powell, J., dissenting) (emphasis added).

[57] This preference furnished the basis for the Minnesota Supreme Court's decision. *See id.* at 306-07.

[58] *See* Kulko v. Superior Court, 436 U.S. 84, 98 (1978); Shaffer v. Heitner, 433 U.S. 186, 214 (1977).

[59] The Minnesota Supreme Court deliberately refused to convert the choice-of-law question presented into a "false conflict." It could, of course, have surmised that the Wisconsin Supreme Court would change its position on the question of "stacking" uninsured motorist coverage. *See* Allstate Ins. Co. v.

rum law. In other words, after *Allstate* neither modern gimmickry nor old-fashioned escape devices are needed to make choice-of-law determinations certiorari-proof.

This is not to say that all is well. Although most of the Justices agreed on principle, they differed on price. In counting the contacts of this borderline case Justice Brennan came up with three, Justice Stevens with one, and Justice Powell with none that mattered. Inevitably, the Justices' disagreement on its application cast doubt on the test they purported to establish. Nor are any of their opinions particularly persuasive. Justice Brennan's enumeration of sundry connections of the parties and the deceased bi-state employee with Minnesota amounts to a strained and implausible lumping technique. Justice Powell's dissenting opinion, on the other hand, draws a distinction between trivial or irrelevant[60] and policy-related contacts[61] that may be more helpful to conflicts professors than to trial judges. Only Justice Stevens realized that the Constitution was not in danger, because application of the Minnesota stacking rule could hardly threaten the "federal interest in national unity by unjustifiably infringing upon the legitimate interests of another state."[62] His concurring opinion is, however, marred by a confusing reference to "normal conflicts law"[63] and the gratuitous slap on the wrist of the Minnesota Supreme Court, whose decision he calls "plainly unsound."[64]

Yet, these deficiencies are minor if one considers what the Court might have done with *Allstate*. The opinions in the case merely confirm what should be obvious from watching the Justices' labors in the jurisdictional vineyard, namely that there is little reason to trust their ability to cultivate the conflicts jungle. If *Shaffer* and its progeny are any indication, Supreme Court intervention in choice of law would hardly improve interstate justice. The Court's devotion to dogma could only further frustrate interstate support claimants, accident victims and policyholders. Any attempt to correct some imaginary evil by setting

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Hague, 449 U.S. 302, 306 n.6 (1981).

[60] *Id.* at 337.

[61] *Id.* at 340.

[62] *Id.* at 323 (concurring opinion).

[63] *Id.* at 324.

[64] *Id.*

aside the Minnesota court's supremely sensible decision in *Allstate* would have been the first step down the wrong road.