Reflections on *Allstate*—The Lessening of Due Process in Choice of Law

By P. John Kozyris*

It is like "tattooing soap bubbles"—said plaintiff's attorney J. Kennelly about the choice-of-law process as applied to punitive damages in wrongful death claims in the wake of the DC-10 crash on May 25, 1979 at Chicago's O'Hare Airport. In a lengthy opinion the Seventh Circuit held that the law of Illinois, which did not permit recovery of such damages, governed.[1] Mr. Kennelly, who is appealing the decision to the Supreme Court, said:

> It's time the U.S. Supreme Court took one of these cases so that the judiciary and the legal profession will have some definite criteria to try to predict what law is going to be applied.[2]

Meanwhile, the Supreme Court decided *Allstate Insurance Co. v. Hague*,[3] its first major conflicts decision in more than fifteen years. Most conflicts gurus had expected the Court to reverse the Minnesota Supreme Court's decision to apply as the "better law"[4] the forum's "stacking" rule for uninsured motorist coverage in circumstances where no other state had ever applied its law.[5] And they believed that the Court would reject, in light

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[1] *In re* Aircrash Disaster Near Chicago, 644 F.2d 594, 616 (7th Cir. 1981).

[2] Nat'l L.J., Jan. 19, 1981, at 9.

[3] 449 U.S. 302 (1981).

[4] Hague v. Allstate Ins. Co., 289 N.W.2d 43, 49 (Minn. 1978), *aff'd on rehearing*, 289 N.W.2d 50 (1979), *aff'd*, 449 U.S. 302 (1981). The Court sidestepped whether the "better law" conflicts approach was constitutional. The sole issue was whether Minnesota's substantive law could apply. *Id.* at 307. This is a doubtful approach. Minnesota was not convinced that its contacts were sufficient and the Supreme Court should not have made up its own version of such contacts.

[5] *See, e.g.*, Grayson v. Nat'l Fire Ins. Co., 313 F. Supp. 1002 (D. Puerto Rico 1970); Travelers Indem. Co. v. Stearns, 116 N.H. 285, 358 A.2d 402 (1976); Brooks v. Pennsylvania Mfrs.' Ass'n Ins. Co., 62 N.J. 853, 303 A.2d 884 (1973).

of *World-Wide Volkswagen Corp. v. Woodson*,[6] the state court's further and narrower rationale, added on rehearing, that "contracts of insurance on motor vehicles are in a class by themselves [because] the automobile is a moveable item which will be driven from state to state."[7]

The Supreme Court, however, affirmed *Allstate*. Those who hoped that the Court would clearly explicate the constitutional dimensions of choice of law under due process and full faith and credit will be sorely disappointed. Despite its erudition, the decision is neither enlightening nor apt to produce practical solutions.

In 1945, Justice Jackson identified the three courses available to the Supreme Court in deciding choice-of-law cases.

> One is that we will leave choice of law in all cases to the local policy of the states. This seems to me to be at odds with the implication of our federal system that the mutual limits of the states' powers are defined by the Constitution. . . . A second course is that we will adopt no rule, permit a good deal of overlapping and confusion, but interfere now and then, without imparting to the bar any reason by which the one or the other course is to be guided or predicted. This seems to me about where our present decisions leave us. Third, we may candidly recognize that choice-of-law questions, when properly raised, ought to and do present constitutional questions under the full faith and credit clause which the Court may properly decide and as to which it ought at least to mark out reasonably narrow limits of permissible variation in areas where there is confusion.[8]

Ten years later, he clearly opted for the third alternative which would best serve "our hope for a better general legal system."[9]

Developments in conflicts in the years since Justice Jackson wrote have severely aggravated the modest "overlapping and confusion" of traditional conflicts. The Supreme Court could have made a major contribution toward a "better legal system" if it had heeded Justice Jackson's suggestion of "reasonably narrow limits of permissible variation." By reversing *Allstate* the Court could have jolted conflicts back to a path of some practi-

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[6] 444 U.S. 286 (1980).

[7] Hague v. Allstate Ins. Co., 289 N.W.2d 50, 50 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981).

[8] Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 26-27 (1945).

[9] R. JACKSON, THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM 43 (1955).

cality and precision. A number of rationales were available to the Court. For example, it could have followed Professor Martin's persuasive suggestion to extend the "minimum contacts" test to choice of law;[10] or Professor Simson's admonition that it is the task of the Supreme Court to allocate state decisionmaking authority and establish minimum nationwide uniformity in choice of law.[11] In this symposium, Professor Juenger expresses extreme skepticism that the Supreme Court is up to such a task.[12] But decisions on how far a state may extend its legislative long arm have to be made by someone. Who else is better positioned and qualified than the Supreme Court? Is there any hope that the individual states will do it better or with greater clarity and consistency? If not, is there any intrinsic value in extensive overlapping of legislative authority in a federal system? Alternatively, if the Supreme Court has decided to withdraw from choice of law altogether, and is relying on tightened jurisdictional controls to restrain legislative overreaching indirectly,[13] it could have at least said so clearly and with one voice. The Court's divided, limited, ambivalent stance in *Allstate* is the least desirable option.

The emphasis in recent jurisdictional cases on the due process limits on state power had led to the expectation that the Court would regard federalism and fairness as even more important in choice of law. State overreaching into the legislative domain of other states is potentially more destructive of the goals of federalism and more prejudicial to the rights of defendants than the concurrent jurisdiction of the courts of different states. After all,

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[10] Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980). Professor Martin called for the reversal of *Allstate* under the criteria of Home Ins. Co. v. Dick, 281 U.S. 397 (1930). Martin, *supra* note 10, at 887-88.

[11] Simson, *State Autonomy in Choice of Law: A Suggested Analysis*, 52 S. CAL. L. REV. 61, 87 (1978).

[12] Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, this issue at 907.

[13] *See* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1131-32 (1966). *See also* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 291 (1956). In his *World-Wide Volkswagen* dissent, Justice Brennan suggested that the unexpected potential application of an unfavorable substantive law might be so unfair as to preclude jurisdiction. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 311 n.19 (1980) (Brennan, J., dissenting).

how to decide a case is more important than where to decide it.[14] Contrary to Professor Lowenfeld's suggestion,[15] a state's interests in regulating the affairs of persons and events with which it has contacts does not justify greater latitude in choice of law than in jurisdiction. For by definition every conflicts case involves a multistate fact pattern with the law of at least two legal systems potentially applicable, and other states may have antithetical interests which should receive equal weight in choosing the governing law.

The plaintiff's power to select the forum warrants a threshold scrutiny of the defendant's contacts with the forum chosen. But because litigational convenience is the defendant's principal concern,[16] the plaintiff's need for a forum may justify jurisdiction in a state with no constitutional basis for applying its law to the dispute. Thus, jurisdiction involves a different calculus of the fairness considerations than choice of law.[17] A multiplicity of fora serves a practical purpose and does not in principle prejudice the ultimate disposition of the case. But by what logic in a federal system should there be more than one applicable law depending upon the forum where the action is brought?

The Supreme Court has properly recognized that the jurisdiction and conflicts inquiries, though related, are not identical.[18] The reasons why the applicability of forum law favors jurisdiction were aptly summarized by Justice Brennan in his *Shaffer*

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[14] *See* R. GRAVESON, COMPARATIVE CONFLICT OF LAWS 112 (1976); Martin, *supra* note 10, at 879-80; Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U.L. REV. 33, 82-83, 88 (1978).

[15] Lowenfeld & Silberman, *Choice of Law and the Supreme Court: A Dialogue Inspired by* Allstate Insurance Co. v. Hague, this issue at 841.

[16] *See* Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1593 (1978); Silberman, *supra* note 14, at 82-83; Sunderland, *The Provisions Relating to Trial Practice in the New Illinois Civil Practice Act*, 1 U. CHI. L. REV. 188, 192 (1933).

[17] 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. U.L. REV. 363, 370-79 (1980); Reese, *supra* note 16, at 1589, 1595; Silberman, *supra* note 14, at 82-83; Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner*, 63 IOWA L. REV. 1031 (1978); Comment, *Federalism, Due Process, and Minimum Contacts: World-Wide Volkswagen Corp. v. Woodson*, 80 COLUM. L. REV. 1341, 1346 (1980).

[18] *See* Kulko v. Superior Court, 436 U.S. 84, 98 (1978); Shaffer v. Heitner, 433 U.S. 186, 215 (1977); Hanson v. Denkla, 357 U.S. 235, 254 (1958).

dissent.

> [A] court . . . apply[ing] the law of a different forum, as a general rule . . . will feel less knowledgeable and comfortable in interpretation, and less interested in fostering the policies of that foreign jurisdiction than would the courts established by the state that provides the applicable law. . . .[19]

Moreover, when a dispute is sufficiently related to a particular state so as to support application of its law, that state is justified in providing a forum to give effect to such law (*forum legis*).[20]

Does this rationale apply to the inverse situation? Is it proper to derive choice of law from jurisdiction? The plurality in *Allstate* stated that "jurisdiction in the Minnesota courts . . . is a factor not without significance in assessing the constitutionality of Minnesota's choice of its own substantive law."[21] Justice Stevens even found a state financial interest in applying the *lex fori* to reduce court library expenses and to save judicial time.[22]

There are good reasons, practical and theoretical, which support having recourse to the *lex fori* as the residual source of the applicable law when everything else fails. Injecting it, however,

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[19] Shaffer v. Heitner, 433 U.S. 186, 225 (1977) (Brennan, J., concurring in part and dissenting in part). *See also* Rush v. Savchuk, 444 U.S. 320, 332-33 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 310 n.15 (1980) (Brennan, J., dissenting); Kulko v. Superior Court, 436 U.S. 84, 98-101 (1978); von Mehren & Trautman, *supra* note 13, at 1176-77; Comment, *supra* note 17.

[20] On the English practice under Order 11 of the Rules of the Supreme Court of basing jurisdiction on a contractual choice of law, see Silberman, *supra* note 14, at 89 n.288. For application of *forum legis* on the Continent, see Article 5 of the EEC Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments, Sept. 27, 1968, 15 J.O. COMM. EUR. (No. L 299) art. 5 (1972), *translated in* 2 COMM. MKT. REP. (CCH) ¶ 6003 (entered into force Feb. 1, 1973).

Of course to the extent that long arm jurisdiction uses the same contacts as choice of law, we already have *forum legis* in the United States. *Cf.* St. Clair v. Righter, 250 F. Supp. 148 (W.D. Va. 1966). "It is possible that the law is moving more and more toward the idea that choice of law is jurisdictional, and that the fact that the law of the place is applicable provides the minimum contact necessary to permit the state to exercise in personum jurisdiction under the Due Process Clause." *Id.* at 155.

[21] Allstate Ins. Co. v. Hague, 449 U.S. 302, 317 n.23 (1981).

Professor Hay has suggested that deriving the applicable law from the presence of the jurisdictional factors is often questionable. Hay, *The Interrelationship of Jurisdiction and Choice of Law in U.S. Conflicts Law*, 28 INT'L & COMP. L.Q. 161, 171 (1979).

[22] 449 U.S. 302, 326 n.14 (Stevens, J., concurring).

into the first level of conflicts inquiry and making it a priori a predominant consideration is totally antithetical to federalism. Furthermore, in conjunction with liberal judicial jurisdiction, it encourages forum shopping and promotes inconsistent adjudications. The consequences of judicial as well as legislative overreaching are compounded and extended by the strict enforcement of judgments across state lines under full faith and credit.

The issue of whether choice of law may be derived from jurisdiction would have become largely academic had the Supreme Court adopted the concept of "specific" jurisdiction, while preserving one basis of general jurisdiction such as the defendant's habitual residence, where unfairness to the defendant is not likely. This is essentially what Professors von Mehren and Trautman proposed in their seminal article on jurisdiction.[23] Had the Court done this, jurisdiction based on the defendant's other general affiliating circumstances unrelated to the particular claim, such as presence or doing business, would have been eliminated and the abuses of applying the *lex fori* reduced.

Language in *Shaffer* has prompted commentators to predict the demise of presence and doing business as jurisdictional bases.[24] This of course would require, first, rejecting transient jurisdiction and, second, restricting *Perkins v. Benguet Consolidated Mining Co.*,[25] which preserved doing business as a general basis of jursidiction over corporations, to its special facts.[26] Nor

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[23] von Mehren & Trautman, *supra* note 13.

[24] *See, e.g.*, Sedler, *supra* note 17, at 1035; Vernon, *Single-Factor Bases of In Personum Jurisdiction: A Speculation on the Impact of* Shaffer v. Heitner, 1978 WASH. U.L.Q. 273, 293-95, 299-305; Werner, *Dropping the Other Shoe*: Shaffer v. Heitner *and the Demise of Presence-Oriented Jurisdiction*, 45 BROOKLYN L. REV. 565, 595 (1978).

[25] 343 U.S. 437 (1952).

[26] In *Perkins*, the defendant mining company's center of activities had been in the Philippine Islands, but during World War II suit could not be initiated there because of the Japanese occupation. Suit was therefore brought in Ohio, where the defendant had temporarily carried on a "continuous and systematic, but limited" part of its general business. *Id.* at 438. Although the cause of action did not arise in Ohio or relate to any of the defendant's activities there, the Court upheld jurisdiction. According to Professors von Mehren and Trautman, "the decision should be regarded as decision on its exceptional facts, not as a significant reaffirmation of obsolescing notions of general jurisdiction." von Mehren & Trautman, *supra* note 13, at 1144. *See also* H. GOODRICH & E. SCOLES, CONFLICT OF LAWS 134 (4th ed. 1964); Currie, *The Growth of Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. Ill. L.F. 533, 584-85.

should exacting or construing consent to service of process as incidental to doing business confer general jurisdiction. Such "consent" should reinforce jurisdiction over related claims, but not establish general jurisdiction absent the requisite due process contacts.[27]

Unfortunately, doing business general jurisdiction is still with us. In neither *Rush v. Savchuk*[28] nor *Allstate*[29] did the defendant insurance company contest general amenability to suit in Minnesota, where it did business. And recent decisions have routinely upheld jurisdiction absent specific, claim-related forum contacts by the defendant.[30] Thus, the Supreme Court should make another major leap forward to strengthen the due process requirement of a definite nexus between the claim and the forum to justify the exercise of judicial jurisdiction.

Let us now analyze the major premises and conclusions of *Allstate*. All the Justices agreed on the basic constitutional mold into which the choice-of-law inquiry is cast. It is a close analogue to the jurisdictional one, differing mainly on the greater role of state interests and on a modified definition of what is fair to a

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Professor Rudolph Schlesinger reports that the civilians in Europe consider the extention of "doing business" jurisdiction to unrelated claims as "barbarous." R. SCHLESINGER, COMPARATIVE LAW 365 n.71b (4th ed. 1980). Article 5 of the EEC Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments, discussed at note 19 *supra*, follows the pattern of general jurisdiction at the defendant's domicile and special jurisdiction at particular points of contact between the claim and the forum.

[27] As stated by Justice Brennan in his *Shaffer* dissent:

> Once we have rejected the jurisdictional framework created in *Pennoyer v. Neff*, I see no reason to rest jurisdiction on a fictional outgrowth of that system such as the existence of a consent statute, express or implied.

Shaffer v. Heitner, 433 U.S. 186, 227 (1977) (Brennan, J., concurring in part and dissenting in part).

[28] 444 U.S. 320 (1980); *see* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 303 (1980) (Brennan, J., dissenting), where, in a dissent that applied to *Rush* as well, Justice Brennan noted that "the real impact is on the defendant insurer [of Mr. Rush], which is concededly amenable to suit in the forum State."

[29] Allstate Ins. Co. v. Hague, 449 U.S. 302, 317 n.23 (1981) ("Here, of course, jurisdiction in the Minnesota courts is unquestioned . . .").

[30] *See, e.g.*, Schreiber v. Allis-Chalmers Corp., 611 F.2d 790, 793-94 (10th Cir. 1979) (jurisdiction based upon "doing business" sustained); Humphrey v. Langford, 246 Ga. 732, 273 S.E.2d 22 (1980) (jurisdiction based upon "transient presence" sustained).

defendant. But in terms of result the plurality opinion of Justices Brennan, White, Marshall and Blackmun, and the concurrence of Justice Stevens substantially extend the frontiers of state autonomy in choice of law. Justice Powell, Chief Justice Burger and Justice Rehnquist dissented in an opinion that diametrically opposes the plurality's position on the role of state interests in assessing the constitutionality of choosing the applicable law.

Perhaps after tightening the jurisdictional screws in *Shaffer*,[31] *Kulko*,[32] *World-Wide Volkswagen*[33] and *Rush*,[34] Justice Brennan's brethren let him have his way in choice of law and accepted his tripartite due process test, which calls for examination of the contacts of the *parties* and the *litigation* with the *forum*.[35] The principal variance between this test and the test that prevails in jurisdiction is the reference to a nexus of the "parties" with the forum, rather than merely the defendant.[36] The plaintiff's contacts count at the *first* level of inquiry and not merely as auxiliary factors once the defendant is found to have judicially cognizable contacts with the forum. Hence, the scope of a state's law may be broader than that of its jurisdiction, as demonstrated by comparing the result reached in *Allstate* with those reached by the Court in *Hanson*, *Shaffer* and *Kulko*. Jurisdiction and choice of law can thus be symbolized not by concentric but by overlapping circles with considerable common area.

One way to curtail state legislative overreaching is to be skeptical about state interests and reject the loose divination of such interests from slight or casual contacts. Another way is to give greater weight to the defendant-protective interests of other states, with emphasis on federalist allocation. It is on the first point that the plurality and the dissent in *Allstate* primarily disagreed. Justice Stevens, however, defined the issue in different terms. The only one to treat due process (fairness) and full faith and credit (federalism) separately, he examined the interests of

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

[32] Kulko v. Superior Court, 436 U.S. 86 (1978).

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

[34] Rush v. Savchuk, 444 U.S. 320 (1980).

[35] *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[36] *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 225 (1977) (Brennan, J., dissenting).

Minnesota and Wisconsin in the federalism context alone and found what could be called a "false conflict." Application of Minnesota's law in this case posed no threat to national unity or Wisconsin's sovereignty because the insurance policy contained nationwide coverage, so that application of another state's law had not been foreclosed.[37] The forum need not assert state interests to justify initial applicability of its law. Rather, the sole issue is whether another state's interests are infringed. Only in that event, according to Justice Stevens, must forum interests be considered.[38] Beyond full faith and credit, due process is satisfied if application of a state's law is not totally arbitrary or fundamentally unfair to either litigant.[39]

Writing for the plurality, Justice Brennan identified several contacts "with the parties and occurrence" that gave rise to state interests in protecting the plaintiff. First, and "very important," the insured decedent had been a member of Minnesota's commuting "workforce" for many years and the policy coverage extended to the commute.[40] Having "police power responsibilities" toward the decedent, Minnesota was interested in his well-being.[41] Second, "an important state concern [was to vindicate] the rights of the estate of a Minnesota employee."[42]

Justice Powell was not at all persuaded by the Brennan analysis. His position was that for a contact to count it must have some nexus with the state policies purportedly advanced by applying the state's law. "[T]he facts to which the rule will be applied [must] have created effects within the State, toward which

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[37] Allstate Ins. Co. v. Hague, 449 U.S. 302, 324 (1981) (Stevens, J., concurring).

[38] *Id.* at 325-26.

[39] *Id.*

[40] *Id.* at 313 (plurality opinion).

[41] *Id.* at 314.

[42] *Id.* at 315. Interestingly, in 1972, Justice Brennan dissented from the refusal to grant certiorari in a case involving the application of Florida law to a life insurance policy issued in Cuba to a Cuban resident who later died in Cuba. The premiums had been paid in Cuba in pesos. The only connection Florida had with the dispute was that the beneficiaries resided there and the defendant-insurer did business there. According to Justice Brennan, "[t]he general validity of [the] proposition . . . that the Due Process Clause . . . precludes a State from altering 'substantive obligations arising out of a foreign transaction having no significant relation to the state' . . . is clearly established . . .," citing Home Ins. Co. v. Dick, 281 U.S. 397 (1930). Confederation Life Ins. Co. v. De Lara, 409 U.S. 953, 954 (1972) (Brennan, J., dissenting).

the State's public policy is directed. . . . [T]he contacts [must] form a reasonable link between the litigation and a state policy."[43] Minnesota's interest in the safety of motorists who use its roads has nothing to do with whether a nonresident's estate can stack coverage under an insurance policy written elsewhere for a foreign accident.[44] And while Minnesota has an interest in its nonresident employees and can consider that interest in employment matters, none of the facts in *Allstate* implicated that interest.[45] Nor did Justice Powell bother even to comment on Minnesota's purported interest in "the rights of the estate of a Minnesota employee." At best, this factor only reinforced the reality of Mrs. Hague's connection with Minnesota; it did not create another significant contact.

Curiously, Justice Brennan did not reject the Powell nexus requirement. On the contrary, he repeatedly referred to the contacts of the parties *and* the occurrence with the forum.[46] But with notable prestidigitation, he maintained that Minnesota had a connection with the *occurrence* because "a crash fatal to a Minnesota employee in another State is a Minnesota contact."[47] By this dubious analysis, a contact with a party is automatically a contact with a totally foreign occurrence.

Another Minnesota contact relied upon by the plurality was the claimant's change of residence to Minnesota before filing her suit. Should this post-occurrence change of residence be considered in the contact calculus? Justice Powell unequivocally argued that it should not.[48] It is constitutionally irrelevant because it is unrelated to the substantive law issues presented by the litigation. To count such a contact would allow a defendant's rea-

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[43] Allstate Ins. Co. v. Hague, 449 U.S. 302, 354 (1981) (Powell, J., dissenting). For a due process analysis emphasizing the policy-contact nexus requirement, see Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94, 103-04 (1976).

[44] Allstate Ins. Co. v. Hague, 449 U.S. 302, 338 n.5 (1981) (Powell, J., dissenting).

[45] *Id.* at 339.

[46] *Id.* at 313-20 (plurality opinion).

[47] *Id.* at 315.

[48] *Id.* at 338 (Powell, J., dissenting). Justice Powell cited John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936) and Home Ins. Co. v. Dick, 281 U.S. 397 (1930) in support of his position that Mrs. Hague's change of residence was constitutionally irrelevant. 449 U.S. at 337. He distinguished Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964), noting that in *Clay* the insured changed residence prior to the loss. 449 U.S. at 333.

sonable expectations to be frustrated at the plaintiff's choice and encourage forum shopping.[49]

Justice Brennan did not directly address these issues but instead sought a circuitous escape from this persuasive argument. To him, a post-occurrence change of residence was "insufficient in and of itself" under *Yates*, but not totally irrelevant.[50] Such a change coupled with the plaintiff's Minnesota post-occurrence appointment as personal representative of the decedent's estate equalled *one* significant contact that brought into play Minnesota's interest in the recovery of " 'resident accident victims' to keep them 'off welfare rolls' and 'able to meet financial obligations.' "[51] Could this contact be *decisive* in upholding application of a state's law? Concerned that he had already revealed too many of the sacred mysteries of constitutional choice of law, Justice Brennan resorted to a tantalizing disclaimer:

> We express no view whether the first two contacts [decedent's employment in and commute to Minnesota and defendant's Minnesota contacts], either together or separately, would have sufficed to sustain the choice of Minnesota law. . . .[52]

Apparently, however, at least for the plurality, what made those two contacts suffice in this case were the post-occurrence events.

Quite importantly, the plurality's reliance on post-occurrence contacts, as well as its view of the decedent's Minnesota commuting employment, did not command majority approval. These issues thus remain open for another round of litigation. Even Justice Stevens' concurrence emphasized that plaintiff-related contacts were irrelevant in the due process analysis.[53] He focused instead on the defendant's relationship with the forum, and it is on this critical issue that *Allstate* departs not only from prior assumptions about fairness to the defendant, but also from

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[49] Allstate Ins. Co. v. Hague, 449 U.S. 302, 337 (1981) (Powell, J., dissenting).

[50] *Id.* at 319 (plurality opinion).

[51] *Id.* (quoting from the Minnesota Supreme Court's decision below). With regard to forum shopping, Justice Brennan merely noted that in this case there was no indication that Mrs. Hague's move to Minnesota was so motivated. For a case of blatant forum shopping which did not deter Minnesota from applying its "better law," see Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973).

[52] Allstate Ins. Co. v. Hague, 449 U.S. 302, 320 n.29 (1981).

[53] Indeed, he even went so far as to state that the plurality's reliance on such contacts might "possibly even tend to undermine the plurality's conclusion." *Id.* at 339 (Stevens, J., concurring).

the logic of federalism.

Possibly the most far-reaching and dangerous effect of *Allstate* is its emphasis on *potential* contacts based upon a defendant's "reasonable expectations," regardless of whether such potential contacts eventually materialize. All eight Justices apparently agree on this shift of focus from actual to potential contacts.[54] To focus exclusively on the parties' subjective understanding of what law might apply in a particular situation would be both problematical and unwise in the constitutional context; problematical because such an understanding would mostly be hypothetical and virtually impossible to substantiate, and unwise because of the circuity of using expectations to justify the expected, a typical question-begging situation.[55] To be sure, *Shaffer* suggests that a state's jurisdictional laws must give reasonable advance notice that certain contacts will be seized upon to hale a defendant into court, and a similar notion could be introduced into constitutional choice of law. The parties' actual expectations are also given some weight in conflicts, e.g., to vindicate party autonomy and to protect proven reliance interests. The constitutional issue, however, deals with whether a state's law may be applied consistently with due process. The expectations which matter thus necessarily relate to the facts which establish the requisite relationship, under a purposeful availment analysis, to justify application of a particular state's law. The commingling of expectations of law with expectations of fact by the Court in *Allstate* not only compounds the confusion but takes us down the wrong path of analysis.

It is important to note that mere expectations alone have never been considered sufficient to support jurisdiction; the expected contacts have to materialize before jurisdiction may be asserted. Thus, what mattered in *Shaffer* was that the defendants had not acted in or even entered Delaware.[56] No acts re-

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[54] *See id.* at 316 (plurality opinion); *id.* at 324 (Stevens, J., concurring); *id.* at 336-37 (Powell, J., dissenting).

[55] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 311 n.18 (1980) (Brennan, J., dissenting). *See also* Ratner, *supra* note 17, at 379-81; Vernon, *supra* note 24, at 305. In a recent case, the Eight Circuit stressed that "[W]hen the forum's contacts with the parties or the transaction satisfy the [Supreme] Court's 'significant contacts' test, . . . it follows, necessarily, that no party may 'reasonably' expect that the forum state's law cannot control the case." McCluney v. Jos. Schlitz Brewing Co., 649 F.2d 578, 582 (8th Cir. 1981).

[56] Shaffer v. Heitner, 433 U.S. 186, 213 (1977).

lating to the cause of action had occurred in Delaware. Nor had Delaware purported to assert jurisdiction over the defendants by reason of their directorships.[57] Moreover, the fact that Delaware was the statutory situs of the stock had no connection with the issue being litigated and hence failed to sustain jurisdiction.[58] Similarly, in *Kulko*[59] and *Rush*[60] not only expectations but also contacts were lacking. Perhaps the most interesting case on the expectations issue is *World-Wide Volkswagen.*[61] In that case the automobile accident and consequent injury happened in the forum state, Oklahoma. But the allegedly defective car had been sold in New York and the defendants' sales patterns and product-usage expectations made it improbable, albeit foreseeable, that one of their cars would be involved in an accident so far away. Having engaged in no purposeful activity aimed at Oklahoma, the defendants had no reason to expect to be "haled into court there."[62] Consequently, because there were no actual Oklahoma contacts, jurisdiction was found lacking.

From these cases it is clear that a defendant's jurisdictional expectations as to a particular state will not support jurisdiction unless, at a minimum, the expected contact in fact occurs there. If Allstate had reasonably anticipated the possibility that the insured would be killed in Minnesota and had he actually been killed there, Minnesota's law could properly apply. Since the policy had nationwide coverage, Allstate's expectations would not have been frustrated by applying Minnesota's law in such a case. This conclusion is reinforced by the absence of a choice-of-law provision in the policy and by the commuting employment of plaintiff's decedent in Minnesota.

However, what most certainly surprised Allstate, and many of us, was the *actual* application of Minnesota law by reason of its *potential* applicability. Justice Brennan rationalized the plurality position by pointing out that Allstate had no right to rely on the "wooden" *lex loci delicti* and had no reason to expect that Minnesota law would apply only to Minnesota accidents.[63] But

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[57] *Id.* at 214.

[58] *Id.*

[59] Kulko v. Superior Court, 436 U.S. 84 (1978).

[60] Rush v. Savchuk, 444 U.S. 320 (1980).

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

[62] *Id.* at 297.

[63] Allstate Ins. Co. v. Hague, 449 U.S. 302, 316-17 n.22 (1981).

Allstate was surely justified in assuming that Minnesota law would not apply to a situation in which no actual significant Minnesota contacts had materialized. Yet all eight Justices agreed that expectations as to the potentially applicable law met the requirements of fairness and federalism. To the plurality such expectations were an important due process factor supporting Minnesota's assertion of legislative jurisdiction.[64] And for Justice Stevens, this factor standing alone satisfied due process.[65] Even the dissenters felt that the "touchstone" of fairness is "the reasonable expectations of the parties," noting that the "risk insured by petitioner was not geographically limited [and the insurer should have realized] that there was a reasonable probability that the risk would materialize in Minnesota."[66]

Another aspect of the plurality opinion in *Allstate* is particularly disturbing with regard to fairness. By treating all contacts in a cumulative, interchangeable fashion, Justice Brennan's approach elevated Allstate's doing business in Minnesota from an auxilliary contact which merely reinforced the application of Minnesota law to a primary contact establishing its applicability in the first instance. Yet such business had nothing to do with the insurance policy or the event giving rise to the litigation. Nonetheless, Justice Brennan accorded such business a dual significance. First, he felt it reasonable to assume that Allstate was familiar with Minnesota law and should have expected that it might be sued there and that such law might apply.[67] Second, according to Justice Brennan,

> Allstate's presence in Minnesota gave Minnesota an interest in regulating the company's insurance obligations insofar as they affected both a Minnesota resident and court appointed representative . . . and a long-standing member of Minnesota's workforce—Mr. Hague. See *Hoopeston Canning Co. v. Cullen* . . . .[68]

Justice Powell disagreed, citing *Hoopeston* for precisely the opposite proposition:

> [T]his argument proves too much. The insurer here does business in all 50 states. The forum State has no interest in regulating that conduct of the insurer unrelated to property, persons, or contracts

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[64] *Id.* at 318 n.24.

[65] *Id.* at 328-29 (Stevens, J., concurring).

[66] Allstate Ins. Co. v. Hague, 449 U.S. 302, 336 (1981) (Powell, J., dissenting).

[67] *Id.* at 317-18 (plurality opinion).

[68] *Id.* at 318 (citation omitted).

executed within the forum State.[69]

Who is right about *Hoopeston?* The issue in that case was whether certain out-of-state fire insurers could be required, as a condition of licensure in New York, to comply with New York insurance regulations. Even though the policies were issued and the payments made in Illinois, the Court upheld New York's power to regulate where "the insured interest is located in the state, and there are many points of contact between the insurer and the property in the state."[70] The thrust of the case thus accords in principle with Justice Powell's reading. But, as Justice Brennan indicated, in *Hoopeston* the Court did note that "a state may have substantial interests in the business of insurance of its people. . . ."[71]

Whether the Court meant "people" to include insurance beneficiaries, and not just the insured, is extremely doubtful. So too is the efficacy of basing a state interest in someone's loss upon events subsequent to that loss. Clearly, in *Allstate,* Minnesota had the power to regulate the policy during the decedent's daily commute. But it is an entirely different proposition to extend such power to losses that occur in other states under contracts executed there with local residents. This is especially true when, in contrast to *Hoopeston,* the state does not purport to exercise such power directly by imposing obligations in advance based upon an insurer's local business in the forum. As correctly pointed out by Justice Powell, *John Hancock Mutual Life Insurance Co. v. Yates*[72] precludes viewing such local business, by itself, as having "the slightest significance to the choice-of-law question."[73] Absent some nexus between the local business and the litigation, doing business should be irrelevant to choice of law. Indeed, the excessive use of state power over a defendant's local business to impose out-of-state obligations raises serious questions under the commerce clause.[74]

Is there any way to give *Allstate* a more limited reading and

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[69] *Id.* at 338 (Powell, J., dissenting).

[70] Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 319 (1943).

[71] *Id.* at 316.

[72] 299 U.S. 178 (1936).

[73] Allstate Ins. Co. v. Hague, 449 U.S. 302, 338 n.4 (1981) (Powell, J., dissenting).

[74] *See generally* Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine,* 84 HARV. L. REV. 806 (1971).

avoid its broader implications? One may perhaps stress Justice Brennan's emphasis on the need for an aggregation of contacts rather than just any colorable governmental interest;[75] or note that only four Justices acknowledged the legitimacy of taking into account the post-occurrence data;[76] or seek solace in the significance attributed by five of the Justices to the absence of a "choice-of-law" clause in the policy,[77] which can easily be remedied by drafting.[78] One may also point to the decedent's residence two miles from the Minnesota border, and given his employment there, functionally treat him as a Minnesota resident whose coverage under the policy should have been governed by Minnesota law. Or one may lump *Allstate* with *Clay*[79] and *Watson*[80] under the category of insurance cases, which receive special pro-plaintiff treatment because of the national scope of the business, coverage and actuarial process. Or finally, *Allstate* may be challenged on its misinterpretation of the nature of the insurance involved. Indeed, Justice Stevens discussed uninsured motorist coverage as if it were liability (third-party) insurance and it was on this basis that, on the crucial question of full faith and credit, he distinguished away *John Hancock Insurance Co. v. Yates*.[81] The plurality[82] and the dissent[83] also repeatedly focused

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[75] Allstate Ins. Co. v. Hague, 449 U.S. 302, 313, 320 (1981).

[76] *See* notes 47-52 and accompanying text *supra*.

[77] Allstate Ins. Co. v. Hague, 449 U.S. 302, 331 n.24 (plurality opinion), 648-49 (Stevens, J., concurring) (1981).

[78] It should be remembered, however, that in the past the Supreme Court has paid scant attention to choice-of-law clauses. *See, e.g.*, Alaska Packers Ass'n v. Industrial Accident Comm., 294 U.S. 532 (1935). *Cf.* Pac. Employers Ins. Co. v. Industrial Accident Comm., 306 U.S. 493, 499 (1939), where an employee had contractually consented to be bound by Massachusetts law. The Supreme Court sanctioned California's disregard of such a provision because of its statutory provision that "(n)o contract, rule or regulation shall exempt the employer from liability" under the California Act.

[79] Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964).

[80] Watson v. Employers Liability Corp., 348 U.S. 66 (1954).

[81] 299 U.S. 178 (1936). According to Justice Stevens, "[t]he parties to a life insurance contract normally would not expect the place of death to have any bearing upon the proper construction of the policy; by way of contrast, in the case of a liability policy, the place of the tort might well be relevant. For that reason, in a life insurance contract relationship, it is likely that neither party would expect the law of any state other than the place of contracting to have any relevance in possible subsequent litigation." Allstate Ins. Co. v. Hague, 449 U.S. 302, 324-25 n.11 (Stevens, J., concurring). This mischaracterization of the insurance as liability, calling for a tort conflicts analysis, originated in Minne-

on the place of the accident which would also indicate a comparable perception since in first-party insurance, such as life insurance, the place of loss is not considered relevant for choice-of-law purposes. That uninsured motorist coverage is first-party insurance is beyond peradventure.[84]

Coming on the heels of the denial of certiorari in two even more egregious cases of Minnesota state court overreaching,[85] *Allstate* signals the Supreme Court's further retreat from the choice-of-law field; and it suggests that even "plainly unsound"[86] conflicts rules will be constitutional so long as they are not totally irrational, leaving to the courts and the scholars the monumental task of putting the conflicts house in some sort of order.

The conflicts revolution has been on the march now for over twenty years generating unprecedented high expectations and euphoria—but it has yet to produce a manageable system of choice of law. From the ashes of the First Restatement has sprung not a Phoenix but an Aegaeon with fifty heads and a hundred arms reaching in all directions. Variation upon variation of conceptual constructs propounded in Delphic fashion dominate a scene where the escape device and the rationalization reign. The ever-expanding soap bubble keeps being tattooed to the despair of those who need real answers to actual conflicts problems.

Worse yet, the very foundations of the new doctrines are sub-

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sota. Hague v. Allstate Ins. Co., 289 N.W.2d 43, 47 (Minn. 1978), *aff'd on rehearing*, 289 N.W.2d 50 (1979), *aff'd*, 449 U.S. 302 (1981).

[82] *Id.* at 449 U.S. 302, 316-17 n.22, 318 n.24.

[83] *Id.* at 336-37.

[84] *See, e.g.*, 7 BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 274.2 at 46 (1966).

> Uninsured motorist insurance is in the nature of a contract of indemnity. Such insurance is not liability insurance in any sense but it resembles limited accident insurance; it does not undertake to protect the insured against liability he may incur to others, as does liability insurance, but rather insures him against losses occasioned to him by a limited group of tortfeasors.

See also Symposium, *Uninsured Motorist Endorsements*, 53 MARQ. L. REV. 319, 319 (1970).

[85] Blamey v. Brown, 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980); Schwartz v. Consolidated Freightways Corp., 300 Minn. 487, 221 N.W.2d 665 (1974), *cert. denied*, 425 U.S. 959 (1976).

[86] This was how Justice Stevens characterized the Minnesota Supreme Court's decision to apply its own law in *Allstate*. Allstate Ins. Co. v. Hague, 449 U.S. 302, 324 (1981) (Stevens, J., concurring).

ject to serious challenge. Does it really make sense to mix substantive justice with conflicts justice? Under what authority, from what source and in what practical way may a judge decide that one of two potentially applicable systems of justice is more just? Or that one will produce a more just result in a particular case? What is the reason why the plaintiff (or the defendant for that matter) should be declared the winner in the conflicts battle? In the private law sphere, where the legislator has been notoriously unconcerned and disinclined to provide for maximum extraterritoriality, what is the justification for the dogged pursuit of governmental interests which, when not non-existent, are elusive and speculative to say the least? If in our primitive hearts we know that in the end we should apply the *lex fori* catch-as-catch-can, is there any need to pretend that we are pursuing conflicts justice? On the other hand, if we take conflicts seriously, could we not accommodate most of the goals of the conflicts revolution within a revised "public policy" exception?

The general choice-influencing considerations may be as appealing as Mom and apple pie, but is there any hope that they can provide specific solutions that are not subjective and arbitrary to an intolerable degree? According to Justice Stevens, in *Allstate* these considerations produced a result which was "plainly unsound as a matter of normal conflicts law."[87] Justice Stevens benignly assumed that there is such a thing as "normal conflicts law" today much as there is, say, a normal law of contracts. It is up to us to make this prophecy come true, to welcome conflicts back to the legal fold, return to it the flesh and bones of a legal precision and make it an instrument, however imperfect, of interstate and international mutual justice.

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[87] *Id.*