PRINCIPAL PAPERS

CHOICE OF LAW AND THE SUPREME COURT: A DIALOGUE INSPIRED BY *ALLSTATE INSURANCE CO. v. HAGUE*

BY
ANDREAS F. LOWENFELD*
LINDA J. SILBERMAN**

Ralph Hague was a resident of Wisconsin, age 52, who worked as a truckdriver in Minnesota. He owned three automobiles and had a motor vehicle insurance policy issued by Allstate Insurance Company in Wisconsin. The policy covering the Hague family had a ceiling of $15,000, insuring injuries caused through the negligence of uninsured motorists, whether the accident involved one of the insured cars or not. While a passenger on a motorcycle driven by his son, Mr. Hague was killed by a negligent, uninsured motorist, whose car struck the motorcycle in the rear. The accident happened in Wisconsin, about a mile from the Minnesota border.

After her husband's death, Mrs. Hague moved to Minnesota to live with a son. She was appointed personal representative of her husband's Minnesota estate, whose principal asset was the insurance claim against Allstate. Under Minnesota law, in the circumstances described, the insured is entitled to recover the uninsured

---

* Professor of Law, New York University School of Law, A.B., 1951, L.L.B., 1955, Harvard University.
** Professor of Law, New York University School of Law, B.A., 1965, J.D. 1968, University of Michigan.

motorist coverage multiplied by the number of cars insured, in this case $45,000. Under Wisconsin law, apparently, only the single amount of $15,000 is recoverable.

In a suit for declaratory judgment brought by Mrs. Hague, the District Court for Hennepin County, Minnesota, held that Minnesota law applied, and that Allstate was liable for $45,000. The Supreme Court of Minnesota affirmed, on the ground that Minnesota had an interest in the case and that the better law should be applied. The U.S. Supreme Court granted certiorari, and the case was heard in October, 1980. Professor Lowenfeld argued the case for respondent. After argument, but before decision in the case, Professor Lowenfeld and Professor Silberman, among others, debated the Hague case at the AALS convention in San Antonio. The Supreme Court handed down its decision on January 13, 1981, affirming 5-3 the decision of the Minnesota Supreme Court. Justice Brennan wrote for four members of the Court in favor of affirmance, Justice Stevens concurred in a separate opinion, and Justice Powell dissented in an opinion joined by Chief Justice Burger and Justice Rehnquist.

S: I must say, Andy, that although I was delighted to see the Supreme Court finally reconsider the question of control of choice of law by state courts after deciding four judicial jurisdiction cases in four years,[1] I am sorry that your skilled advocacy led the majority to a position of rejecting any useful standard of supervision over state choice of law.

L: I thank you for the compliment, but as you know, I believe the Supreme Court reached the right decision and I was only too glad to be able to share my views. I believe that the Supreme Court should not—indeed could not—direct the moves of state (and lower federal) courts in the perplexing game of choice of law. And, of course, the Supreme Court did not renounce all interest in the subject. It did state that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[2] Where my adversary and I differed was over whether the Minnesota

---

[1] Rush v. Savchuk, 444 U.S. 320 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977).

[2] Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981).

courts had violated that principle.

S: Well, of course, I would quarrel with the result reached by the Court in the application of that standard in *Hague*. When we have a Wisconsin decedent, a Wisconsin accident, an insurance contract made in Wisconsin with a Wisconsin resident, the application of Minnesota law by a Minnesota court because the nominal plaintiff has moved to Minnesota after the accident and has chosen a Minnesota court is, I submit, unfair and arbitrary. Moreover, I had hoped the Court might provide more exacting guidance than the passage you quote. And I do not understand your statement that the Supreme Court "could not" undertake such a role. If Justice Powell had persuaded two more Justices, he would be writing for the majority rather than the dissent, and would have begun to provide the kind of guidance I have been advocating. Justice Powell wrote that the touchstone was the "reasonable expectations of the parties."[3] And he noted that the Constitution was satisfied by application of forum law when the litigants were not "unfairly surprised" and when the "law reasonably can be understood to further a legitimate public policy of the forum state."[4]

L: I hardly see those statements as providing for Supreme Court control of choice of law. As a critic, Justice Powell had an easy task; he was able to argue that the particular contacts relied on by Justice Brennan in his plurality opinion—such as the residence of the plaintiff-beneficiary and the business activities of the insurance company—were trivial or could give rise to abuse. But to try to convert Justice Powell's opinion into a majority opinion is like turning a drama critic's review into a play. I submit that the only type of choice of law control that will work is adoption of the rigid rules that might have satisfied a Beale or a Goodrich. Indeed, even Beale, for all his dogmatism (reinforced, I suspect, by the temptations of "black letter rules" that a Restatement offers) never argued that his rules flowed inevitably from the United States Constitution.[5]

---

[3] *Id.* at 333 (Powell, J. dissenting).

[4] *Id.* at 336.

[5] In the first edition of Goodrich's HANDBOOK ON CONFLICT OF LAWS (1927), there is no discussion of Supreme Court supervision of state conflict of laws decisions. The second, third, and fourth editions published in 1938, 1949, and (with Scoles) in 1964, each contain a section devoted to this subject, (§ 11 in the 2d edition, § 15 in the 3d edition, § 13 in the 4th edition), concluding "It seems a desirable thing for the Supreme Court, which sees the nation as a

S: Are you suggesting that a standard based on expectations . . . .

L: Excuse me for one more minute, before you put words in my mouth. I do believe the Constitution requires courts—all courts, state and federal, to be fair. Not necessarily just, or right, or learned, but not unfair. *International Shoe*[6] taught us that in the jurisdiction field, and *Shaffer v. Heitner*[7] confirmed it. Other cases have taught the same lesson in other respects—the opportunity to have legal advice, for instance,[8] and the requirement of notice of a lawsuit by the best possible means.[9] As far as the Constitution is concerned, fairness is the only appropriate inquiry.

S: You don't really expect me to quarrel with your emphasis on fairness. Perhaps what divides us is how to apply the concept—whether in the jurisdictional or in the choice of law context. Justice White asked you in oral argument whether you thought once a state court had jurisdiction in accordance with the Supreme Court's current standards, concerns about fairness in choice of law would disappear. If I recall correctly, you were not prepared to endorse that proposition, at least not completely.

L: Well, of course one rule of oral advocacy is "never say never." I do think the concerns of jurisdiction and choice of law

---

whole, to correct instances of too shocking or too obstinate provincialism upon the part of the courts of a state."

Beale undertook no systematic discussion of Supreme Court review of state court decisions concerning choice of law. He thought Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932) was an untenable decision, and discussed Home Ins. Co. v. Dick, 281 U.S. 397 (1930) only under the heading of "procedure." J. BEALE, TREATISE ON THE CONFLICT OF LAWS §§ 61.2, 604.3 (1935). Prof. E. Merrick Dodd, Jr., later famous for his work in corporate law and finance and not a supporter of Beale, wrote an article in 1926 in which he sought to base supervision of state court decisions in this area on the full faith and credit clause, whether one adopted the vested rights or the local law theory of choice of law. He thought the task would be harder with respect to unwritten than with respect to statutory law. Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533 (1926).

[6] International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[7] 433 U.S. 186 (1977).

[8] *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

[9] *See, e.g.*, Robinson v. Hanrahan, 409 U.S. 38 (1972); Schroeder v. City of New York, 371 U.S. 208 (1962); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950).

are related, as Justice Brennan has pointed out repeatedly,[10] and as you did in your article on *Shaffer v. Heitner*.[11] Moreover, I think you are right in suggesting that when a forum bases its jurisdiction on the outstretched fingers of the long arm, one ought to be very skeptical about then applying that forum's law. *Rosenthal v. Warren*[12] is, I think, such a case, and so perhaps is *O'Connor v. Lee-Hy Paving*.[13] As you have written, both of those cases, in which the New York courts exercised attachment jurisdiction and then applied New York law to transactions outside the state, come "dangerously close to the constitutional fairness line"[14] in choice of law terms. Indeed, *Home Insurance Co. v. Dick*,[15] one of the few cases in which the Supreme Court has

---

[10] *See, e.g.*, his opinions in Shaffer v. Heitner, 433 U.S. 186, 224-25 (1977) (Brennan, J., concurring in part and dissenting in part) and in World-Wide Volkswagen v. Woodson, 444 U.S. 286, 305-6 (1980) (Brennan, J., dissenting).

[11] Silberman, *Shaffer v. Heitner: The End of An Era*, 53 N.Y.U.L. REV. 33, 70-71, 79-90 (1978).

[12] 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973). In *Rosenthal*, a New York widow brought a wrongful death action against a Massachusetts hospital and a Massachusetts surgeon based on their improper medical treatment of her husband, who died in Massachusetts shortly after an operation at the hospital. Jurisdiction in New York over the nonresident doctor was obtained by attaching the obligations owed to him under his malpractice insurance policy. Affirming the district court's application of New York's unlimited damage remedy, rather than the Massachusetts $50,000.00 limit, the Court of Appeals for the Second Circuit held that New York's interest in assuring full recovery to domiciliaries should be furthered, notwithstanding a Massachusetts interest in limiting recoveries against its citizens generally, and in keeping down medical liability premiums. The court noted that the Massachusetts hospital treated patients from "literally everywhere," and that the surgeon had a "world-wide following."

[13] 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978). *O'Connor* was a wrongful death action brought by a New York widow against a Virginia corporation for the death of her husband, who was killed in a Virginia industrial accident due to the alleged negligence of one of defendant's employees. As in *Rosenthal*, jurisdiction over the nonresident corporation was based on the attachment of the defendant's insurance policy. The Court of Appeals for the Second Circuit upheld the New York court's jurisdiction by attachment and also concluded that the plaintiff could pursue her favorable tort remedy under New York law and was not limited to the Virginia workmen's compensation scheme.

[14] Silberman, *supra* note 11, at 99.

[15] 281 U.S. 397 (1930). *Dick* involved a fire insurance policy issued in Mexico to a Mexican citizen and covering a vessel located in Mexican waters. The policy was later assigned to Dick, nominally a Texas resident although domiciled and present in Mexico. Following a loss which occurred in Mexican waters,

struck down the application of forum law as contrary to due process, involved jurisdiction based on attachment of the obligation of a reinsurer. The Supreme Court's recent action to curb jurisdictional excesses of this type[16] will mean the elimination of opportunities for such abuses in choice of law. The reverse point, however, as made by Justice Brennan in *Hague,* is also correct. A firm that does substantial, continuing business under license in a state, as the insurance company did in *Watson,*[17] and as Allstate did in *Hague,* cannot really argue, in a constitutional context, that it is unfairly surprised when the state applies its own law to one of its contracts. I have always thought, as you know, that Justice Frankfurter's concurring opinion in *Watson,*[18] justifying the application of Louisiana's direct-action statute to the insurance company because it was doing substantial business in that state, was quite persuasive.

S: Don't you think I am right to suggest that the conse-

Dick brought suit in Texas against Anglo-Mexicana de Seguros, the Mexican insurance company, by garnishing Home Insurance Co.'s reinsurance obligation to Anglo-Mexicana. Home Insurance, a New York company doing business in Texas, actually defended the action. The Supreme Court refused to permit the application of Texas law to strike down a limitations period clause of the Mexican contract. The Court's opinion said, "We need not consider how far the state may go in enforcing restrictions on the conduct of its own residents, and of foreign corporations which have received permission to do business within its borders." *Id.* at 410.

[16] *See* Rush v. Savchuk, 444 U.S. 320 (1980); Shaffer v. Heitner, 433 U.S. 186 (1977). The impact of these jurisdictional restrictions on choice of law has been noted by various commentators. *See* Fischer, *Shaffer v. Heitner: Some Thoughts on Its Impact on the Doctrines of Choice of Law and Preclusion by Judgment,* 30 CASE W. RES. L. REV. 74, 110-22 (1979); Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner,* 63 IOWA L. REV. 1031 (1978).

[17] Watson v. Employers' Liab. Assurance Corp., 348 U.S. 66 (1954). A nonresident insurance company, doing business in Louisiana, challenged application of Louisiana's direct action statute to a policy negotiated, issued, and delivered outside of the state. The Supreme Court, noting that a Louisiana plaintiff had been injured in Louisiana due to the alleged negligence of defendant's insured, found the application of the Louisiana statute constitutional.

[18]

> I have no doubt, however, that Louisiana can exact from Employers', as it did, valid consent to direct action in the case of injuries inflicted in Louisiana upon its citizens by Employers' policyholders. It can do so as part of the fair bargain by which it gave hospitality to Employers' for doing business in Louisiana.

Id. at 78.

quences of a choice of law decision affect a party much more severely than does an inconvenient (otherwise fair) forum? To conclude that a defendant's contacts with the forum state for jurisdictional purposes are more critical than those for choice of law prompts me to repeat my favorite line: it is to believe that an accused is more concerned with where he will be hanged than whether. What Allstate wanted and expected in *Hague*, for example, was to pay only a single, not a threefold recovery for injury caused by an uninsured negligent motorist. Whether the litigation took place in Minnesota or Wisconsin didn't really matter.

L: There is something in what you say, although it seems to me quite reasonable for the Supreme Court to set down limits on judicial jurisdiction and allow close to free play on choice of law, as it did in *Hanson v. Denckla*[19] and continued in the line of cases from *Shaffer* to *Hague*. There are several ways, I suppose, that jurisdictional rules can accommodate a rational choice of law process. For example, if we had the English system, where service out of the jurisdiction is always discretionary,[20] one might urge that appellate courts set guidelines for the exercise of that discretion, and that those guidelines would include choice of law considerations. In the American system, where our courts regard jurisdiction as an either/or proposition—as is the teaching of all the cases from *Pennoyer v. Neff*[21] to *World-Wide Volkswagen v. Woodson*[22]—I find a more relaxed attitude on choice of law quite acceptable.

Besides, your approach assumes that litigants forum shop only for choice of law purposes. I suspect most such decisions are made for the convenience of counsel, for perceptions about how local judges or juries view damages, possibly for reasons of evidence and burden of proof, or even for a concern about lawyer's

---

[19] 357 U.S. 235 (1958).

[20] *See* R. Sup. Ct. O. 11, r. 1; 1 The Supreme Court Practice 1976, ¶ 11/1/4 (I. Jacob ed. 1975). *See also* Mauroux v. Soc. Com. Pereira, [1972] 1 W.L.R. 962, 964-65, 968-69 (Ch.).

The bases for extra-territorial service are similar to those under state long-arm statutes and include, among others, actions "founded on a tort committed within the jurisdiction," actions based on breach of a contract "made within the jurisdiction," and actions "in respect of a breach committed within the jurisdiction."

[21] 95 U.S. 714 (1878).

[22] 444 U.S. 286 (1980).

fees, but not really for choice of law reasons. As to many of these things, we have accepted the propriety of forum shopping.

S: I heartily agree that considerations aside from choice of law lead litigants to choose a particular forum.[23] Moreover, I have never really been persuaded that the jurisdictional issues, which the Supreme Court most recently addressed in *World-Wide Volkswagen* and *Kulko v. Superior Court*[24] should be ana-

---

[23] In *Volkswagen,* for instance, plaintiffs wanted Oklahoma rather than New York law because of a more favorable view of contributory negligence in products liability cases. See note 36 *infra.* But they joined the New York defendants, see note 24 *infra,* in order to defeat removal to the federal court which they thought would be less sympathetic.

[24] *See* note 1 *supra. Volkswagen* was a suit in an Oklahoma state court for injuries resulting from an automobile accident in that state allegedly caused by defects in an Audi automobile purchased in New York. Plaintiffs, who were moving from New York to Arizona but had not yet effectively abandoned their New York domicil (i.e., citizenship for diversity purposes), named the German manufacturer, the importer (a New Jersey corporation), the regional distributor for the New York area, and the local upstate New York dealer, as defendants. The distributor and dealer moved to dismiss for lack of jurisdiction. (The manufacturer made no jurisdictional objection, and the importer failed to seek review of its jurisdictional objection). The Supreme Court of Oklahoma, applying the Uniform Interstate and International Procedure Act as adopted in that state, held that it was reasonable to infer that the distributor and dealer derived substantial income from automobiles which from time to time are used in Oklahoma, and therefore sustained jurisdiction. 585 P.2d 351, 354 (Okla. 1978). The U.S. Supreme Court, finding a total lack of connections between the New York defendants and Oklahoma, reversed. Conceding that it was foreseeable that purchasers of automobiles from the dealer and distributor could take the automobiles to Oklahoma, the Court refused to sanction jurisdiction based on the unilateral activity of the plaintiffs.

For an excellent analysis of the *Volkswagen* case, *see* Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Corp. v. Woodson and Rush v. Savchuk,* 58 N.C. L. REV. 407 (1980).

In *Kulko,* a California plaintiff brought suit in California against her former husband, still living in New York, for an increase in child support payments. Although the original agreement provided that the children were to remain with their father in New York during the school year, the daughter had requested to live with her mother in California and that request had been honored by the father. Later, the son also went to live with his mother in California, but without his father's consent. The California courts based jurisdiction over the nonresident father on the fact that he had consented to an alteration of the original custodial arrangement and had in fact bought his daughter's airplane ticket to California, thus purposefully availing himself of the benefits and protections of the laws of California. The Supreme Court reversed, specifically refuting the contention that the defendant had derived personal or commercial benefits from his children's presence in California, and

lyzed in constitutional due process terms at all. Although I certainly think the question of convenience to the litigants should be taken into account, a number of devices are available to govern forum allocation which do not rise to the level of constitutional mandate. State jurisdictional laws—in the form of individual long-arm statutes—suggest the kinds of lines that can be drawn in exercising jurisdiction over out-of-state transactions.[25] Further, the device of *forum non conveniens,* when appropriately utilized by trial judges, can help to assure that litigation against a particular defendant in a particular forum is not unduly burdensome or inconvenient. The additional factors you mention, such as high jury verdicts or favorable rules of evidence, can always be embraced by flexible principles of *forum non conveniens.* Unfortunately, the approach to jurisdiction taken by the present Supreme Court has left that court (as well as the various state and federal appellate courts) as a general court of appeal and error on all questions of jurisdiction. A general nation-wide approach to jurisdiction, where a plaintiff could seek a forum in any state without regard to state lines, coupled with discretionary power in the trial judge to reallocate on principles akin to *forum non conveniens* would, I submit, be a more desirable solution.[26] But, of course, that would only work if there were meaningful guidelines on choice of law. And for the moment, I do not care whether the supervision occurs in the form of a federal common law of conflicts (developed by both state and federal courts with guidance from the Supreme Court) or whether the Supreme Court uses due process or full faith and credit to articulate meaningful guidelines.

---

finding the California forum unfair and unconstitutional as a matter of due process. *See* Note, *The Long-Arm Reach of the Courts under the Effect Test After Kulko v. Superior Court,* 65 VA. L. REV. 175 (1979).

[25] For example, an injury in the state may subject the manufacturer but not the distributor to jurisdiction under a state's long-arm statute, or a distributor with substantial revenue from the state may be subject to suit in circumstances where a distributor with insubstantial revenue would not be. The Uniform Interstate and International Procedure Act attempts to draw both of these distinctions, but the Oklahoma court's interpretation of the second one did not pass muster in the U.S. Supreme Court.

[26] Similar proposals have been advanced by others. *See* Dooling, *Seider v. Roth After Shaffer v. Heitner,* 45 BROOKLYN L. REV. 505 (1979); Ehrenzweig, *From State Jurisdiction to Interstate Venue,* 50 OR. L. REV. 103 (1971); Hazard, *Interstate Venue,* 74 NW. U. L. REV. 711 (1979). *Cf.* Stafford v. Briggs, 444 U.S. 527, 554 (1980) (Stewart, J., dissenting).

L: I think you have gotten carried away with a series of fantasies. The idea of conflicts rules for the federal courts went out with *Klaxon*,[27] and a federal common law of conflicts such as occasionally surfaced in the nineteenth century[28] was not accepted even by Story,[29] let alone by the post-*Erie* cases.[30] It is clear that after *Shaffer, Kulko, World-Wide Volkswagen,* and *Rush v. Savchuk* the Supreme Court is not going to let go of jurisdiction. The question is whether it can or should intervene to take hold of choice of law.

S: Well, yes, I suppose I have to concede that controls on jurisdiction are here to stay. But I had hoped that the jurisdictional cases, and particularly *World-Wide Volkswagen*, would show the way to intervention by the Court in regard to choice of law. All our colleagues, as you know, were sure that would happen when the Court granted certiorari in *Hague*.[31]

There has been criticism of the *Volkswagen* case,[32] but I think it should be directed more at the opinion than at the result. Nu-

---

[27] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

[28] The existence of an embryonic federal common law of conflicts was noted by Professor Baxter in *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 29 (1963). *See, e.g.*, Scudder v. Union Nat'l Bank, 91 U.S. 406, 411-13 (1875); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 359-68 (1827); DeWolf v. Johnson, 23 U.S. (10 Wheat.) 367, 383 (1825).

In the well-known case of Pritchard v. Norton, 106 U.S. 124 (1882), the Supreme Court entered on an elaborate disquisition upon choice of law in an interstate contracts case, without ever raising the question of the source of the law it was setting out.

[29] It is interesting that Story treated conflict of laws not as a branch of the common law, but as a (as yet imperfectly developed) derivative of the Law of Nations. *See* J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS, v-vii, 7-10 (1st ed. 1834).

[30] The argument in favor of the development of federal choice of law principles as federal common law with the Supreme Court as final arbiter is made in Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 U.C.L.A. L. REV. 1191 (1967). For the suggestion that the structure of the Constitution itself provides authority for a federal common law of conflicts, subject to Congressional revision, see Monaghan, *The Supreme Court* 1974 *Term, Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 14-15 (1975).

[31] *See, e.g.*, Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 887 (1980). Similar views were expressed by other conflict theorists at the AALS Conflicts Symposium in San Antonio, Texas.

[32] *See, e.g.*, Kamp, *Beyond Minimum Contacts: The Supreme Court's New Jurisdictional Theory*, 15 GA. L. REV. 19, 53-55 (1980); Comment, *Federalism, Due Process, and Minimum Contacts: World-Wide Volkswagen Corp. v. Woodson*, 80 COLUM. L. REV. 1341 (1980).

merous cases prior to *Volkswagen* drew distinctions in terms of jurisdiction between manufacturers and dealer/distributors on the same terms that the Supreme Court did in *Volkswagen*.[33] But the basis of those decisions was an interpretation of the reach of the state long-arm statutes. The difficulty with the *Volkswagen* case is the Supreme Court's change from merely providing protection against inconvenient litigation to advancing the proposition that "the Framers . . . intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts."[34] And I do not understand the Supreme Court's curious statement that even if the forum state has a strong interest in applying its law, even if the defendant would suffer no inconvenience, and even if the forum state is the most convenient location, the due process clause serves as a limitation on the power to provide that forum.[35] If an issue of sovereignty is involved at all, I would think it would go to the question what regime of law was going to be applied to the parties in *Volkswagen*. And to the extent that concerns about sovereignty and about expectations merge, it is the choice of law and not the jurisdictional question which is important.

In *Volkswagen*, where I understand there may have been differences between Oklahoma and New York law on the question of contributory/comparative negligence,[36] it is appropriate to ask whether the defendant dealer had done anything to submit itself

---

[33] *See, e.g.*, Granite States Volkswagen, Inc. v. District Court, 177 Colo. 42, 492 P.2d 624 (1972); Pellegrini v. Sachs and Sons, 522 P.2d 704 (Utah 1974).

[34] 444 U.S. at 293 (1980). On this point, see Redish, Due Process, Federalism, Personal Jurisdiction: A Theoretical Evaluation, 75 Nw. U.L. Rev. 1112 (1981).

[35] 444 U.S. at 294. This position is also criticized in *The Supreme Court, 1979 Term, State Long-Arm and Quasi in Rem Jurisdiction*, 94 HARV. L. REV. 107, 116 (1980) ("By asserting that minimum contacts are necessary to preserve state sovereignty rather than merely to insure fairness, the Court has again confined state courts to a jurisdictional straight jacket.").

[36] In New York, contributory negligence would have barred recovery for injuries sustained as a result of negligent design or manufacture of a product if it was a "substantial factor" in causing the injury. *See* Micallef v. Miehle Co., 39 N.Y.2d 376, 382, 348 N.E.2d 571, 575, 384 N.Y.S.2d 115, 119 (1976); Codling v. Paglia, 32 N.Y.2d 330, 342, 298 N.E.2d 622, 629 345 N.Y.S.2d 461, 470, (1973). Under Oklahoma law, apparently, contributory negligence (as contrasted with causation) would not have been available as a defense. *See* Kirkland v. General Motors Corp., 521 P.2d 1353, 1365-67 (Okla. 1974).

to a regime of Oklahoma law. Of course, the fact that the injury occurred in Oklahoma would have been sufficient to trigger the application of Oklahoma law in the old days, but perhaps it shouldn't be. There certainly are some cases which cast doubt on application of the place of injury rule when it undermines the expectations of a defendant who acts locally.[37] And yet the place of injury as a jurisdictional event makes perfect litigational sense. In short, I think the *Volkswagen* opinion should have been written about choice of law.

L: Forgive me for interrupting what is turning into a monologue. If *Volkswagen* had been decided as a choice of law case, Oklahoma law would probably have been applied, and there would have been no rational way to distinguish, as there was in the actual case, between the manufacturer in Germany and the importer in New Jersey who did do business (and launch merchandise into the stream of commerce) and the regional distributor and local dealer who did not. After all, either the plaintiff is barred by contributory negligence or he is not. But let's not get diverted. If *Volkswagen* had been decided as you would have liked and then *Hague* had come up, the Court would have been faced—in a constitutional context—with the question of whether the questions of foreseeability, reliance, etc. were different for Allstate than they were for World-Wide. If there is anything I did persuade the Court of in *Hague,* it was that it should avoid becoming a court of error in the conflicts field, drawing narrow factual distinctions and issuing them as constitutional principles.

S: But doesn't the Court do just that on jurisdictional questions? As I was starting to say, *Hanson v. Denckla* is another case where the jurisdictional subterfuge was used to avoid thorny choice of law questions and indeed to remedy an unhappy situation resulting from the lack of willingness by the Supreme Court to exercise control over that choice of law.[38] In

---

[37] The vicarious liability cases are good illustrations. *See, e.g.,* Siegmann v. Meyer, 100 F.2d 367 (2d Cir. 1938); Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934).

[38] 357 U.S. 235 (1958). *Hanson* involved a dispute about the validity of a Delaware trust created by the settlor many years before her death, and the validity of the exercise of a power of appointment under that trust in favor of two other Delaware trusts. The validity of the first trust depended on whether the settlor had reserved too many powers to herself, and on whether that question would be decided under the law of Pennsylvania (her domicil at the time

Hanson, the decedent was a Florida resident and all the beneficiaries were in Florida. Florida was a particularly appropriate and convenient place for the action to be tried. Lack of jurisdiction over the "indispensable" Delaware trustee, I submit, was a means for the court to avert the real danger that if the Florida court heard the case, it would have applied Florida law to upset valid expectations of the grantor, who had been domiciled elsewhere when the Delaware trusts were created. I would even be prepared to argue that the choice of Florida law in *Hanson* was unconstitutional; at minimum I am convinced that appropriate choice of law controls should dictate Delaware or Pennsylvania law.[39]

L: There you go again with your passion for the Constitution. You may be right that *Hanson* was wrongly decided, though I suppose the Supreme Court was anxious to let the world know that *McGee v. International Life Insurance Co.*[40] didn't signal free play on jurisdiction, and *Hanson* was the first case that came along. If the Court had gone the other way on jurisdiction, it might have had something to say about full faith and credit to judgments—a modern version of *Fauntleroy v.*

---

the trust was created), Florida (her domicil at the time of death), or Delaware (the place of business of the trustee). The validity of the exercise of the power of appointment depended both on resolution of the first question and on whether or not the Florida statute of wills applied to what was arguably a testamentary act. On both issues the Florida courts would have applied Florida law to invalidate the settlor's acts, and the Delaware courts would have applied Delaware law to uphold the trusts and the exercise of the power of appointment. The majority and dissent in the Supreme Court differed over which was the critical issue. Faced with inconsistent results in the two state courts, the Supreme Court avoided the issues of choice of law and full faith and credit by deciding (5-4) that (i) the trust companies were indispensable parties in the Florida action: and (ii) that the Florida court did not have jurisdiction over them. Accordingly only the Delaware court could adjudicate a dispute between beneficiaries and residuary legatees of the settlor, all of whom were Florida residents.

[39] But note Chief Justice Warren's statement to the contrary. "For choice-of-law purposes . . . [the ruling by the Florida court that exercise of the power of appointment amounted to republication of the trust in Florida] may be justified, but we think it [the appointment] an insubstantial connection with the trust agreement for purposes of determining the question of personal jurisdiction over a nonresident defendant." *Id.* at 253. Justice Black replied in dissent, "I can see nothing which approaches that degree of unfairness." *Id.* at 259.

[40] 355 U.S. 220 (1957).

Lum.[41] I find it unlikely that the Court would have said as a constitutional matter that a Florida court could not apply Florida law to determine whether an inter vivos trust made by its domiciliary (I don't care when) was or was not a testamentary substitute for purposes of the Florida statute of wills. With all respect to my mentor, Professor Scott, I don't think the validation of trusts and party autonomy in estate planning rise to constitutional principles.[42]

But I'm glad you brought up *Hanson.* It shows, if you'll forgive me, the weakness of making choice of law—whether Florida's (or indeed Delaware's) in *Hanson,* or Minnesota's in *Hague*—a matter of constitutional determination.

S: You really do want free play on choice of law, without any restraints, even though (for understandable reasons) you were unwilling to admit it to the Court in your argument in *Hague.*

L: No, no, that's unfair. As I told you, and told the Court, I believe the Court sits, in implementing the due process clause, to restrain arbitrary action. I happen to believe, with Justice Black,[43] that *Hanson* is a decedent estate and not an inter vivos trust case,[44] and if I had been sitting on the Florida Supreme Court, I would have applied Florida law. I think you might, too,

---

[41] 210 U.S. 230 (1908).

[42] *See* Scott, *Hanson v. Denckla,* 72 HARV. L. REV. 695, 698-700 (1959). Professor Scott argues that Delaware law was the proper law to govern the validity of the dispositions, but adds that the choice of Florida law would not be "so clearly unjustified" as to amount to a violation of the fourteenth amendment. *Id.* at 700.

[43] Justice Black wrote,

> Florida's interest in the validity of [the decedent's exercise of the power] of appointment is made more emphatic by the fact that her will is being administered in that state . . . . Here Florida was seriously concerned with winding up [her] estate and with finally determining what property was to be distributed under her will. In part this suit was brought [in Florida] for this very purpose.

357 U.S. at 259 (1958).

[44] That characterization has traditionally been important for choice of law purposes. *Compare* Wyatt v. Fulrath, 16 N.Y.2d 169, 211 N.E.2d 637, 264 N.Y.S.2d 233 (1965) *with* Estate of Crichton, 20 N.Y.2d 124, 228 N.E.2d 799, 281 N.Y.S.2d 811 (1967) and Estate of Clark, 21 N.Y.2d 478, 236 N.E.2d 152, 288 N.Y.S.2d 993 (1968). *See generally* RESTATEMENT OF CONFLICT OF LAWS §§ 255-310 (1934), RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 222-275 (1971). For a critique of the disparate treatment of inter vivos and testamentary dispositions, see Lowenfeld, *"Tempora Mutantur . . . " Wills and Trusts in the Conflicts Restatement,* 72 COLUM. L. REV. 382 (1972).

if we could change the facts slightly and instead of a contest between sisters already well provided for, make the contest one between the grantor's widow and some third party who was the beneficiary of the Delaware trust.[45] But never mind; those questions of construction, of characterization, of principles of preference if you will, are fascinating questions for you and me, not for the Supreme Court of the United States.

S: I thought you were once fond of the idea of the Supreme Court as an umpire in our federal system. Has your advocate's role in a single case made you change your mind?

L: Well, the idea of the Supreme Court as the choice of law umpire may in fact be consistent with the intention of the Founding Fathers. I like to read to my students from a wonderful letter that Madison wrote to Washington as the Constitution was being drafted. The letter talks about the various functions that will be left to the states and talks of an umpiring role for the national government, including the Supreme Court and lower federal courts. "The great desideratum," Madison writes, "seems to be some disinterested & dispassionate umpire in disputes between different passions & interests in the State. . . ."[46]

In some areas—notably in regard to the control of commerce[47] and recently in regard to civil rights matters,[48] we have seen a kind of umpire's role develop for the Supreme Court. But I don't think it has worked, or can work, in the choice of law area. The closest case I can think of was *Hughes v. Fetter*,[49] where the question was whether Wisconsin could close its doors to a cause of action arising in Illinois. And that 5-4 decision is really very

---

[45] *Cf.* Watts v. Swiss Bank Corp., 27 N.Y.2d 270, 265 N.E.2d 739, 317 N.Y.S.2d 315 (1970), Estate of Clark, 21 N.Y.2d 478, 236 N.E.2d 152, 288 N.Y.S.2d 993 (1968).

[46] Letter from Madison to Washington (April 16, 1787), *excerpted in* J. MADISON, THE FORGING OF AMERICAN FEDERALISM, 184-87 (S. Padover ed. 1965). The quoted passage continues " . . . Might not the national prerogative here suggested be found sufficiently disinterested for the decision of local questions of policy, whilst it would itself be sufficiently restrained from the pursuit of interests adverse to those of those of the whole society?"

[47] *See, e.g.*, Kassel v. Consolidated Freightways Corp., 101 S. Ct. 1309 (1981); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). *See generally* Monaghan, *supra* note 30, at 10-17.

[48] *See, e.g.*, Sosna v. Iowa, 419 U.S. 393 (1975).

[49] 341 U.S. 609 (1951).

unsatisfactory on every level, including the Court's rationale, which purported to be full faith and credit but sounds more in equal protection.[50] I think the real difficulty with being the umpire in a case of this kind is that there *are* no real "passions and interests" here. Wisconsin doesn't much care whether Mrs. Hague recovers a little more or a little less from the insurance company and I suspect Florida (in contrast to the greedy sisters) didn't grieve much about the result in *Hanson v. Denckla.*

The concept of interest analysis as developed by Professor Currie[51] is useful, if you see it as another tool, another string to your bow, as Scott used to say, handy in disposing of "false conflicts." But as I suggested elsewhere, we should not pretend that the kind of interest involved in laws about how to construe an insurance contract or an inter vivos trust is the same as an interest in, say, antitrust or securities regulation, or a trade embargo—matters where the "state" really is interested.[52] Anyhow, we've drifted away from the issue again.

S: I share some of your skepticism about the depth of "state interest" in cases such as *Hanson* and *Hague.* Even so, I believe it would be a good idea for the Supreme Court to take hold of choice of law. I think *Hague* was a missed opportunity to say something meaningful about interest analysis and choice of law. Instead, the Court talked about "contacts," and if you will forgive the pun, did some "stacking" of its own.

L: Before we got off on these various by-ways, I challenged you to turn criticism of the majority's opinion in *Hague* into an opinion of your own. It's about time you tried. Let me see if I

---

[50] *See* Currie, *The Constitution and the "Transitory" Cause of Action,* 73 HARV. L. REV. 36, 44-66 (1959) *reprinted in* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 283, 290-311 (1963).

[51] Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Methods,* 25 U. CHI. L. REV. 227 (1958), *reprinted in* B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 77-127 (1963). For a recent critique of interest analysis, see Brilmayer, *Interest Analysis and the Myth of Legislative Intent,* 78 MICH. L. REV. 392 (1980). A methodology for eliminating hypothetical and speculative interest is developed in another recent piece, Alexander, *The Concept of Function and the Basis of Regulatory Interests Under Functional Choice-of-Law Theory: The Significance of Benefit and the Insignificance of Intention,* 65 VA. L. REV. 1063 (1979).

[52] *See* Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction* (lectures delivered at the Academy of International Law, the Hague, 1979), 163 RECUEIL DES COURS 311 (1980).

can get you started.

> *. . . The Supreme Court should invalidate a forum state's decision to apply its own law only when (i) it had no interest in the controversy; or (ii) when its interests are clearly subordinate to those of another state . . . .*

S: I must acknowlege that the *Hague* case makes it hard to demonstrate the interest of the state which would impose a lesser liability. If I could point to substantially lower insurance rates in Wisconsin attributable to anti-stacking decisions—or better yet if I could point to a legislative decision not to permit stacking, I would have a stronger case.[53] But surely Minnesota's interest in recovery for its widow is spurious. Maybe neither state has a very strong interest, but Wisconsin has a closer relationship to the transaction, surely, than Minnesota . . . .

L: Forgive me for interrupting, but I fear you are back to contacts. I thought we were talking about the real interests of the states. And remember, we are talking not about how a state court should view the issue, but when the Supreme Court should interfere and on what basis. Go on with the paragraph I began.

S: I will in a moment. But before I go on, I want to respond to your accusation that I am confusing contacts and interests. That is a common trap, but you are unfair in accusing me of falling into it. It *is* interests that I am looking at and in particular the lack of any Minnesota interest in the *Hague* case. I agree with you that Currie has lent himself to catchword analyses that result in fuzzy thinking. The greatest abuse, demonstrated perfectly in *Hague,* is the equation of plaintiff's domicil in the forum state with an assertion of interest by the forum in applying its own law to a controversy centered elsewhere. We know that plaintiff's domicil is not sufficient to support jurisdiction.[54] *A fortiori,* I would think, plaintiff's domicil should not be the basis for application of a regime of law to the defendant. In *Hague,* the interests alleged to be derived from plaintiff's domicil are even more tenuous, since Minnesota's interest is the result of a

---

[53] *See,* Morris *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight,* 70 YALE L.J. 554 (1961) and Peck, *Comparative Negligence and Automobile Liability Insurance,* 58 MICH. L. REV. 689 (1960), both cited to the Supreme Court in *Hague* on behalf of plaintiff-respondent to show that there was very little likelihood that rates would be affected by the decision in a case such as *Hague.*

[54] Except of course, in divorce cases. *See* Williams v. North Carolina I, 317 U.S. 287 (1942).

post-accident event. In that sense *Hague* is in the tradition of cases like *Home Insurance Co. v. Dick* and *John Hancock Mutual Life Insurance Co. v. Yates*,[55] where the Supreme Court properly struck down the after-acquired domicil of plaintiffs as a basis for application of home-town justice.

L: Just a minute. Do you really argue that all the events of a claim arising out of an accident must be frozen as of the moment of impact? Aren't you slipping right back to the vested rights theory? I hadn't thought anyone, least of all you, still believed in vested rights as the basis for conflict of laws . . . .

S: You are being unfair. I didn't say that at all. What I do say is that plaintiff's deceased husband and the defendant made a contract in Wisconsin, and whatever that contract means should not be affected by the unilateral action of the plaintiff. As Justice Stevens suggests in his concurring opinion,[56] plaintiff's post-accident move is irrelevant and possibly even undermines the Court's conclusion. Justice Stevens emphasizes the expectations of the parties at the time of contracting as the central due process concern, and rightly concludes that an unanticipated post-accident occurrence ought not to be taken into account. Thus the Court is left with the important fact that the insurance contract was made in Wisconsin with a Wisconsin resident. Surely those events make Wisconsin rather than Minnesota . . . .

L: . . . the only constitutionally permitted forum? Why don't you try to resume the opinion we began a while ago.

S: Your start was quite right. Let me try to continue.

> . . . *Our first task, then, is to identify the competing interests of the various states in the controversy, if any. If one state has no interest in the controversy at all, to apply its law would be arbitrary and a violation of due process. When a state has some interest in the controversy, we must inquire whether some other state*

---

[55] 299 U.S. 178 (1936). A Massachusetts corporation had issued a life insurance policy to a resident of New York in New York. The insured had stated on his application that he was not under medical care, when in fact he was being treated for cancer. Following the death of the insured, his widow moved to Georgia, where she brought suit on the policy. Plaintiff offered to prove that her husband had orally given true answers to the insurance agent, and the Georgia courts allowed testimony to that effect to go before the jury, which found for plaintiff. The Supreme Court reversed, stating that "there was no occurrence, nothing done, to which the laws of Georgia could apply." *Id.* at 182.

[56] 449 U.S. at 331 (1981).

> *has a greater interest and that interest is entitled to protection as a matter of national interest. This is not to suggest that this Court should quickly act to intervene in choice of law decisions when more than one state has a genuine interest. It is not in every case that this Court acts as umpire to decide whether one state's interest or another's in a given controversy is more compelling. But* Allstate Insurance Co. v. Hague *does not present a question of balancing the interests of Minnesota and Wisconsin. Minnesota had no interest at all in the controversy, and therefore no basis for applying its law . . . .*

L: I am glad you are talking about interests and not engaging in the unsatisfying game of counting contacts that the plurality and dissenters in *Hague* seem to be quarreling about. I always thought the great weakness of *Babcock v. Jackson,*[57] which you and I like equally well, was that the discussion of interests and contacts was blended together so that one could not tell which was dispositive and which was merely reinforcing. You are right in focusing on the interest of Minnesota in this controversy. But I suggest you are too quick to dismiss that interest, just as the Supreme Court was too quick to dismiss Delaware's interest in the stockholder's action in *Shaffer v. Heitner.*

S: Well, what interests do you say Minnesota had in *Hague?* Are you implying that Minnesota's love for its newly-arrived widow, or scorn for insurance companies, rises to the dignity of a constitutionally recognizable state interest?

L: Not so fast with your sarcasm, please. If the object of tort law is to compensate victims of accidents, and the object of uninsured motorist laws is to assure compensation through the tort mechanism even when the wrongdoer is judgment proof,[58] I don't find it so difficult to say that Minnesota is interested in furthering the aims of the tort/insurance system. Putting aside the particular controversy, I shouldn't have thought you would be shocked by Minnesota's construing an ambiguous Wisconsin contract in favor of an insured or third-party plaintiff in a claim arising out of an accident in Minnesota, even if the plaintiff, the defendant, and the insurance contract were all from Wisconsin. Were you outraged, for instance, by the Minnesota case of *Milkovich v. Saari,*[59] in which the Minnesota courts applied

---

[57] 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[58] *See generally* A. Widiss, A Guide to Uninsured Motorist Coverage, ch.1 (1969).

[59] 295 Minn. 155, 203 N.W.2d 408 (1973). In *Milkovich,* Minnesota law per-

Minnesota law to an accident in that state involving Ontario owners and an Ontario passenger?

S: But of course, *Milkovich* was different, because the accident happened in Minnesota. Here . . .

L: Yes, I know. " . . . the accident happened in Wisconsin." But if you really believe that fact is critical, aren't you back to "contact counting", which we both agree was unsatisfying? You say (i) if the accident had occurred 1½ miles away in Minnesota, or (ii) if Mr. Hague, the decedent, had been domiciled in Minnesota, or maybe (iii) if the survivor, Mrs. Hague, had been domiciled in Minnesota at the time of the accident, everything would be different. On the actual facts of *Hague,* you find no . . . well, no what?

S: No interest in Minnesota.

L: You mean no contact, no hook the court can hang on.

S: No, I mean no interest, and I mean on the day the crash occurred. And incidentally, I don't want to concede that finding interests is the end of *my* constitutional test.

L: As to interests, I believe a legitimate interest of the Minnesota court is to see that its courts do justice, and are not imposed upon to enforce unconscionable contracts. If, as here, there is a good (majority) and a bad (minority) view on interpretation of multiple vehicle coverage under a single policy,[60] I believe the Minnesota court has a genuine interest in doing what it believes to be right.[61] It did not apply the law of Liechtenstein to this controversy. It applied its own law, and followed its own recent precedent[62] (in an intra-state case) to reach the result you say is unconstitutional. Not only that, the Minnesota court applied its law in favor of a Minnesota resident administering a

---

mitting tort recovery was applied by the Minnesota courts to an accident in Minnesota involving an Ontario driver and his guest passenger. The interests advanced by the Ontario host-guest statute were subordinated to Minnesota's interest in deterring negligent driving and in benefiting its medical creditors, on the theory that Minnesota's common law rule represented the superior view of liability.

[60] *See* A. WIDISS, *supra* note 58, §§ 2.59-.61 (Supp. 1980); 2 R. LONG, THE LAW OF LIABILITY INSURANCE 24.38-.41 (Supp. 1979).

[61] The Minnesota Court relied for this proposition on Leflar, *Choice-Influencing Considerations in Conflict Law,* 41 N.Y.U.L. REV. 267, 295-304 (1966).

[62] Van Tassel v. Horace Mann Ins. Co., 296 Minn. 181, 207 N.W.2d 348 (1973), relied on by the Minnesota Supreme Court in Hague v. Allstate Ins. Co., 289 N.W.2d 43 (Minn. 1978), *aff'd on rehearing,* 289 N.W.2d 50 (Minn. 1979).

Minnesota estate.

S: As to the first point—that it is rational for the forum to apply its own law as part of its own view of justice—I gather you persuaded Justice Stevens alone.[63] Even there, of course, he would insist that such a rule not unfairly surprise or frustrate the justifiable expectations of the parties.[64] And as to the Minnesota interests relied upon by Justice Brennan—Mr. Hague as a member of Minnesota's work force, Mrs. Hague's post-accident domicil, and Allstate's business activities—they are irrelevant to the question of what law is to be applied. None of those activities bear any relationship to *this* accident and *this* claim.

L: I think you are a little too quick to dismiss those facts as giving rise to Minnesota interests. So long as the interest in the Minnesota widow has not been manipulated—that is, if Mrs. Hague moved to Minnesota to live with her son and not to take advantage of Minnesota's stacking law—Minnesota is free to assert that interest.

S: Before you go further, may I remind you that *Dick* and *Yates* support my position that after-acquired domicil is not a

---

[63] In his concurring opinion in *Hague,* Justice Stevens suggested that it might always be rational for a judge to apply the law of his own state, stating:

> . . . For judges are presumably familiar with their own state law and may find it difficult and time consuming to discover and apply correctly the law of another State. The forum state's interest in the fair and efficient administration of justice is therefore sufficient, in my judgment, to attach a presumption of validity to a forum state's decision to apply its own law to a dispute over which it has jurisdiction.

449 U.S. at 326.

[64] Application of forum law, according to Justice Stevens, is not appropriate if the rule is fundamentally unfair to one of the litigants. Unfairness can be demonstrated in several ways:

> . . . Concern about the fairness of the forum's choice of its own rule might arise if that rule favored residents over nonresidents, if it represented a dramatic departure from that rule that obtains in most American jurisdictions, or if the rule itself was unfair on its face or as applied.
>
> The application of an otherwise acceptable rule of law may result in unfairness to the litigants if, in engaging in the activity which is the subject of the litigation, they could not reasonably have anticipated that their actions would later be judged by this rule of law . . . .

Id. at 326-27. *See also* Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law,* 44 IOWA L. REV. 449 (1959).

constitutionally supportable interest.

L: Not so fast. As I believe I successfully argued before the Supreme Court, both *Dick* and *Yates* are readily distinguishable, and neither of those cases explicitly relies on the fact of after-acquired domicil as the basis for striking down forum law. In *Dick*, the plaintiff was the assignee of an insurance contract limited to local Mexican waters, and the defendant was a local insurance company that did not do business in the forum state of Texas. Texas had no interest in striking down the contractual limitations clause in that contract. By contrast, in *Hague* the insurance coverage was advertised and sold as being nation-wide, indeed covering all of North America.[65] Defendant Allstate does substantial business in Minnesota and is clearly subject to the state's insurance regulations. In fact, Allstate is the fourth largest automobile insurer in Minnesota.[66] And *Yates* was a case decided in an earlier era when the Supreme Court did exercise some control on choice of law through the due process and full faith and credit clauses.[67] Moreover, the Georgia lawsuit in *Yates* involved a New York life insurance contract under which the New York law on disclosure became a term of the contract. I agree with Justice Stevens' point that the parties to a life insurance contract normally would not expect a beneficiary's move to Georgia to have any bearing upon the proper construction of the policy, but in the case of a liability policy, the place of injury or loss might well be relevant.[68] The issuer of a motor vehicle policy, in contrast, has every reason to expect that laws other than those of the place where the policy was issued will apply—whether in respect to contributory negligence, liability for injury to guests, direct action against insurance companies, in-

---

[65] The policy explicitly stated that "This coverage applies only to accidents which occur on and after the effective date thereof, during the policy period and within the United States of America, its territories or possessions, or Canada." Allstate Automobile Policy, Allstate Insurance Company, Wisconsin, page 5. The Court noted this point in note 24 of its opinion.

[66] According to the Minnesota Insurance Division, Allstate in 1978 collected 4.74% of all private passenger vehicle premiums. Allstate is the fourth largest automobile insurer in Minnesota. Resp. Brief, Allstate Ins. Co. v. Hague, No. 79-938 at 10.

[67] *See, e.g.*, Bradford Elec. Light Co., v. Clapper, 286 U.S. 145 (1932), effectively overruled in Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939).

[68] Allstate Ins. Co. v. Hague, 449 U.S. at 324 n.11.

terspousal immunity, or—as in this case—the interpretation of the uninsured motorist clause. It is important to look at the details and not just the headnotes in these cases. When *Dick* and *Yates* are carefully compared with *Hague,* I think you can see that in our case there were several factors not present in the earlier ones which make application of Minnesota law not arbitrary in a constitutional sense even if the earlier cases were correctly decided, which I'm not ready to concede.

Certainly Minnesota has an interest in regulating its fourth largest insurance company and an interest in seeing that a member of its work force and his family are compensated.

S: Now who's talking about contacts rather than interests? *Hague* is not a case like *Alaska Packers Association v. Industrial Accident Commission of California,*[69] where the state's interest in compensating its non-resident workers is furthered through its local workmen's compensation scheme. And even you, I take it, are not saying that just because Allstate can be sued in Minnesota (as it can in every state of the union), Minnesota courts can freely apply their own law. For example, if Mrs. Hague had remained domiciled in Wisconsin after the accident and had brought suit in Ohio or California or even Minnesota, I don't think you would still say that the forum state had an interest in applying its law. If I remember correctly, you conceded in oral argument that in those circumstances, such a choice of law decision would be "very close to arbitrary action." So, aren't we really back to your reliance on Mrs. Hague's newly acquired domicil?

L: I don't think so. If Allstate did as much business in Ohio or California as it did in Minnesota, I would say that Ohio or California had an interest in regulating a large insurance company in the type of uninsured motorist coverage it provided.

S: From a planning and business point of view, I find your position distressing. When Allstate sets its insurance rates for Wisconsin, suppose it takes into account the Wisconsin anti-stacking rule. Even conceding that as to out-of-state accidents it can probably not rely on the application of Wisconsin law, it can probably estimate the number of out-of-state accidents that might require imposition of a stacking rule and calculate its

---

[69] 294 U.S. 532 (1935), where the Supreme Court upheld an award of California workmen's compensation to a nonresident alien who had been employed in California and injured while fishing for salmon in Alaska.

rates accordingly. It would be most unfair if a plaintiff could always destroy these expectations by suing Allstate in any of the fifty states in which it does business in order to take advantage of the most favorable stacking scheme. Let me remind you of the *Blamey*[70] case, which you cited with approval in your brief. To me, *Blamey* is another case in which the forum state (in fact, Minnesota) reflexively and parochially enforced its own rules at the expense of the defendant's expectations. In *Blamey*, the fifteen year-old plaintiff and her sixteen year-old companion, both Minnesotans, had driven across the state line into Wisconsin, where a local Wisconsin bar sold them beer. Having purchased two twelve-packs of strong beer they drove back to Minnesota and were involved in a one-car accident, allegedly the result of the companion's intoxication. Plaintiff brought an action in the Minnesota state court against the Wisconsin tavern owner. Interestingly, jurisdiction in Minnesota over the Wisconsin bar was predicated on the Minnesota long-arm statute, which asserts jurisdiction over non-residents who commit in-state acts of negligence and who cause in-state injuries. Like many such statutes, when there is an out-of-state act and an in-state injury, some additional activity in Minnesota by the non-resident defendant must be found in order to assert jurisdiction.[71] This particular Wisconsin bar did not engage in any sub-

---

[70] Blamey v. Brown, 270 N.W.2d 884 (Minn. 1978), *cert. denied* 444 U.S. 1070 (1980).

[71] MINN. STAT. 1976 § 543.19, subd. 1 provided in part:

> . . . As to a cause of action arising from any acts enumerated in this subdivision, a court of this state with jurisdiction of the subject matter may exercise personal jurisdiction over any . . . non-resident individual . . . in the same manner as if . . . he were a resident of this state. The section applies if . . . the . . . non-resident individual . . .
>
> (c) Commits any tort in Minnesota causing injury or property damage . . .
>
> (d) Commits any tort outside of Minnesota causing injury or property damage within Minnesota, if, (1) at the time of the injury, solicitation or service activities were carried on within Minnesota by or on behalf of the defendant, or (2) products, materials or things processed, serviced or manufactured by the defendant were used or consumed within Minnesota in the ordinary course of trade.

In 1978, subdivision 1(d) was amended to provide:

> . . . (d) Commits any act outside of Minnesota causing injury or property damage in Minnesota, subject to the following exceptions

stantial interstate activity; it is described in the decision as a neighborhood spot which accommodates about 20 people.[72] However, the Minnesota court construed the language of the Minnesota statute—"commits any tort in Minnesota causing injury or property damage"—to include the in-state injury despite the fact that a separate section of the statute authorized jurisdiction for commission of a "tort outside of Minnesota causing injury or property damage within Minnesota." The assertion of Minnesota jurisdiction in this case doesn't particularly trouble me, although I wonder if it would be decided the same way after *Volkswagen*. What is more troubling is the choice of Minnesota law, which imposed liability on the Wisconsin bar, despite the fact that under Wisconsin law, no liability attached unless a specific request had been made by a relative or guardian of the minor not to serve the minor.

L: *Blamey* is an interesting case, though you neglected to mention that the Supreme Court denied certiorari. If it had taken that case instead of *Hague*, the Court would have had to decide whether expectations play any role at all in tort cases, and if so, whether a tavern-keeper on a state border can be expected to expect to be sued in, or by residents of, the state next door. As you know, another case almost exactly like *Blamey* had come up a few years earlier, involving the California-Nevada boundary. In *Bernhard v. Harrah's Club*,[73] however, the tavern-keeper was a big fellow, who advertised and solicited business in California. Was *Harrah's* correct and *Blamey* incorrect because of that distinction? It is hard to see how that kind of detail rises to the dignity of a constitutional principle. My real point, however, is that an opinion of the Supreme Court in *Harrah's* would

---

when no jurisdiction shall be found;

(1) Minnesota has no substantial interest in providing a forum; or

(2) the burden placed on the defendant by being brought under the state's jurisdiction would violate fairness and substantial justice; or

(3) the cause of action lies in defamation or privacy.

1978 Minn. Laws, c. 780 § 2.

[72] 270 N.W.2d at 886. The court also noted that the defendant had not procured liquor liability insurance, and that some injustice was likely to result since the legal ramifications of the defendant's actions were not predictable to him when he acted. *Id.* at 891.

[73] 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (en banc), *cert. denied*, 429 U.S. 859 (1976).

not have decided *Blamey,* an opinion in *Blamey* would not have decided *Hague,* and your opinion in *Hague*—which I'm still waiting for you to finish—wouldn't decide the next case that came along. It is not just that the Supreme Court's docket is crowded; the point is you can draw lines, but you can't articulate a constitutional principle. At least you haven't yet.

S: Well, let me try once more. I say unilateral behavior on the part of plaintiff should not impose standards of financial responsibility on the defendant. I concede that both in *Blamey* and in *Hague* the state boundary was only a few miles away and either defendant could have foreseen an automobile accident on the other side of the state line, or even a change of domicil by the plaintiff.[74] Nonetheless, I prefer to draw the expectations line congruent with the state line, rather than developing concepts of foreseeable regions where any number of possible laws can be said not to frustrate the defendant's expectations.

L: If I understand you correctly, you would then limit the scope of interests that can be asserted as a basis for choice of law. Your opinion would go on (from p. 859)

> *. . . No interest in the forum state can accrue after the facts which give rise to this action. Further, those facts include only (i) the signing of an insurance contract; and (ii) the collision in which Mr. Hague perished. The appointment of the widow as personal representative of the estate, and the filing of the action in the district court for Hennepin County (Minnesota) are litigation activity, not the kind of primary activity on which interests—genuine interests of states—are founded. Finally, a defendant's conduct and connection with a state asserting an interest in applying its law must be such that he could reasonably expect to have his conduct and actions judged by such rule.*

With all respect, I don't find that a great constitutional principle. Even if it is supportable as a choice of law guideline, I don't believe Madison and Franklin and Hamilton (or even the anonymous draftsmen after the Civil War) lived and died for such a

---

[74] *See* Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line,* 9 DUQ. L. REV. 394 (1971). Sedler argues that the forum may apply its own law on the ground that the plaintiff is a resident of that state where: (1) the fact of residency gives it an interest in applying its law on the issue as to which a conflict exists, and (2) the application of its law does not produce fundamental unfairness or defeat the legitimate expectations of the other party. For a different view on party "expectations", see Twerski, *Enlightened Territorialism and Professor Cavers—The Pennsylvania Method,* 9 DUQ. L. REV. 373, 382 (1971).

principle.

S: You have a point there. But the American system doesn't work with great statements of principle—a general part, then special parts, like the German Civil Code. We take our cases as we find them, and my proposed opinion would have been a start. The next case, and the one after that, might move on from there to develop the kind of discussion about fairness, justified expectations, possibly even sovereignty that we have recently seen in the jurisdiction cases.[75]

L: You may be surprised to find that here I disagree, on two counts. First, while you are right in describing the movement of Anglo-American common law generally, the U.S. Constitution *is* a general statement, and for all the changing conceptions on particular issues, I believe, with Justice Black, that the Bill of Rights has a quite clear focus—to shield individuals from arbitrary action by government. I find it very hard to fit any decision by the Minnesota court in *Hague*, or the Florida court in our variant on *Hanson v. Denckla*, into the rubric of arbitrary governmental action, such as a trial without counsel or indictment, a search without a warrant, a police interrogation without warnings, or, in the civil litigation area, a hearing without notice to a party.

S: Are you saying only . . . ?

L: Let me finish, please. My second point is that I doubt very much whether your hope of step-by-step building of a federal doctrine of permissible choice of law is justified. If the Supreme Court were able to sit as a higher court correcting the court below—say like the House of Lords in England or the Cour de Cassation in France, there might be a chance to bring the Supreme Court into the on-going experimentation with choice of law. But if the Court hears a case every five years, and decides on the basis of the Constitution, so that no lower court, no state legislature, not even the Congress can change the result, I am afraid any decision of the Supreme Court imposing its will would be either trivial or grossly inhibiting. Professor Freund warned of this back in 1946,[76] and Judge Kaufman repeated the

---

[75] Suggestions along these lines have been made by other conflicts scholars. *See* Martin, *supra* note 31, at 879-83; Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1607-08 (1978).

[76] Reviewing the work of Chief Justice Stone in the field of conflict of laws, Professor Paul Freund wrote:

warning in *Pearson v. Northeast Airlines.*[77] So I am afraid the downside risk in your approach is greater than the prospect for the kind of development you look for.

S: Perhaps our difference, then, does come down to a definition of fairness. Justice Stevens joins with the plurality rather than the dissent because he does not find that the reasonable expectations of the parties are frustrated on these facts. Had he been convinced that insurance rates were affected by differences in the stacking rules, he might have decided otherwise. The plurality and dissent in *Hague* agree that a given choice of law is "fair" when it furthers a state interest; they disagree about which contacts are sufficient to support particular state interests. You say a case may be rightly or wrongly decided, but still may not be so unfair as to amount to arbitrary governmental action, which is the standard you require. I say that fairness includes in the present context a set of guidelines for choice of law decision-making, which will produce the kind of "substantial justice" that *International Shoe* taught us was demanded by the due process clause.

. . . and so on, far into the night.

> Problems in choice of law have not lent themselves to satisfactory solution as constitutional questions, and that in their nature they cannot be expected to.
>
> . . . If the task of Conflict of Laws is to understand, harmonize, and weigh competing interests in multistate events, and if the desideratum of uniformity will be approached most satisfactorily by evolving rules that deliberately seek these objectives then we seem to be hardly ready for a set of precepts imposed in the process of Supreme Court decision as fixed canons of constitutional law.

Freund, *Chief Justice Stone and the Conflict of Laws,* 59 HARV. L. REV. 1210, 1235-36 (1946). It is interesting that Justice Jackson took quite a different view. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution,* 45 COLUM. L. REV. 1, 24-30 (1945).

[77] 309 F.2d 553, 563 (2d Cir. 1962) (en banc). Judge Kaufman wrote:

> The field of conflict of laws, the most underdeveloped in our jurisprudence from a practical standpoint, is just now breaking loose from the ritualistic thinking of the last century. Recent opinions of the Supreme Court and the great wave of academic writing reinforce this trend toward flexible and articulate selection of the law governing multistate transactions. The development will be stillborn if we impose inflexible constitutional strictures in the name of national unity, restrictions which could not be repaired by state or federal legislation.