

# Proposals of Marriage Between Jurisdiction and Choice of Law

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Professor Leflar aptly described the state courts' development of conflicts law in recent years as a "well-watered plateau."<sup>1</sup> In the United States Supreme Court, on the other hand, conflicts law experienced a rather long drought. The Court has not struck down a state court choice-of-law decision on constitutional grounds for more than thirty years.<sup>2</sup> Indeed, until 1979, with the exception of a laconic discussion permitting the application of forum law in *Clay v. Sun Insurance Office, Ltd.*<sup>3</sup> the Court's most recent non-dictum consideration of state choice of law was almost twenty-five years old.<sup>4</sup> In view of the dramatic changes which have occurred in choice-of-law theory in the past several decades, the Court's existing precedents in the field had become seriously out of touch with the realities of state court conflicts decisions.

On the jurisdictional side the drought was only slightly shorter. After the landmark case of *International Shoe Co. v. Washington*<sup>5</sup> in 1945, the Court accepted several cases in the next dozen years to illustrate<sup>6</sup> and limit<sup>7</sup> the teaching of *Inter-*

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<sup>1</sup> Leflar, *Choice of Law: A Well-Watered Plateau*, 41 L. & CONTEMP. PROB. 10 (1977).

<sup>2</sup> *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586 (1947). Aside from the peculiar and questionable rule for fraternal benefit associations involved there, the most recent case seems to be *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936). See also *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934).

<sup>3</sup> 377 U.S. 179 (1964).

<sup>4</sup> *Carroll v. Lanza*, 349 U.S. 408 (1955); cf. *Richards v. United States*, 369 U.S. 1 (1962) (discussing state court developments in conflict of laws, but in a federal law setting).

<sup>5</sup> 326 U.S. 310 (1945).

<sup>6</sup> *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); see *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

<sup>7</sup> *Hanson v. Denckla*, 357 U.S. 235 (1958).

*national Shoe*. From 1958, however, until *Shaffer v. Heitner*<sup>8</sup> in 1977, the Court also remained silent on state court exercise of conflicts jurisdiction.<sup>9</sup>

Now, in four short years, the Court has accepted and decided two cases dealing with state choice of law<sup>10</sup> and four more in the jurisdiction area.<sup>11</sup> Clearly the Supreme Court is back in the conflicts business. Or is it so clear? Certainly the recent cases raise as many questions as they answer. There are, in fact, those among us who regard the recent downpour as a form of "acid rain" and wish fervently for a new dry spell of unlimited duration.

My purpose here is neither to attack nor defend the recent cases in their particulars, though I will offer a few observations about some of them. My primary concern is with the relationship between jurisdiction and choice of law—a matter discussed in one way or another in most of the recent and a few of the earlier cases, but truly decided in none of them.

At the outset several assumptions should be made explicit. First, I believe that there is a body of law which can appropriately be called "modern choice-of-law theory." Like Professor Leflar,<sup>12</sup> my reading of the state cases suggests that few if any courts have adopted a choice theory which can be called *purist*, if that means fast adherence to any of the various theories more narrowly defined and debated in academic circles. Some years ago, in describing governmental interest analysis not as a theory but as a religion for its True Believers, I suggested in the same metaphor that the *Restatement (Second) of Conflict of Laws* was searching for an ecumenical role.<sup>13</sup> In retrospect it seems clear that a similar eclectic spirit has pervaded the case law of

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<sup>8</sup> 433 U.S. 186 (1977).

<sup>9</sup> Several cases were decided involving due process requirements of adequate notice, which of course have a bearing on conflicts cases, but these decisions were not in a conflicts setting. *E.g.*, *Schroeder v. City of New York*, 371 U.S. 208 (1962).

<sup>10</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Nevada v. Hall*, 440 U.S. 410 (1979).

<sup>11</sup> *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).

<sup>12</sup> Leflar, *supra* note 1, at 10, 26.

<sup>13</sup> Peterson, *Weighing Contacts in Conflicts Cases: The Handmaiden Axiom*, 9 Duq. L. Rev. 436, 441 n.30 (1971).

the past decade. The "modern choice theory" now actually used by a majority of American courts is a highly flexible amalgam of several more specific theories.

My second assumption is that this modern choice theory strongly encourages the application of forum law. Increasingly state courts have adopted an approach, articulated in disparate ways, under which the initial inquiry is whether or not forum law should be displaced.<sup>14</sup> It not infrequently is found to be displaced, but the result nonetheless is that forum law is now applied in a substantial proportion of cases where that would not have occurred under earlier theory.<sup>15</sup> Of course, forum bias was not unknown even under traditional choice theory, where it often took the form of various manipulative devices. The point is that modern theory provides a less devious vehicle, with the result that there has been a significant increase in applications of forum law. Moreover, preference for forum law has found new respectability—most recently in Justice Stevens' suggestion that the application of forum law enjoys a presumption of constitutional validity.<sup>16</sup> In light of these changes, resurrection of the

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<sup>14</sup> See Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958). It is clear that Professor Currie's work has been responsible not only for many of the ideas but also much of the terminology of modern conflicts theory.

<sup>15</sup> No detailed statistical analysis is available, and might prove nothing if it were, but it is at least interesting if not instructive to look at the "break-through" cases in the 29 states that Professor Sedler has identified as making the change to modern choice theory in torts. In 22 of the 29 critical cases, forum law was applied where traditional rules would have looked to the law of another state. In five cases the law of another state was applied where the traditional rule would have applied forum law. The other two cases were remanded for further factual determinations. See generally Sedler, *On Choice of Law and the Great Quest: A Critique of Special Multistate Solutions to Choice-of-Law Problems*, 7 HOFSTRA L. REV. 807 (1979); Sedler, *Rules of Choice of Law versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975 (1977). Advocates of the modern theory of course insist that it should not be used simply as an excuse for the application of forum law. E.g., R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 93, 290 (2d ed. 1980). The fact remains that modern theory provides the opportunity for perception and articulation of forum interests, consideration of which was at least theoretically precluded in traditional choice rules. The result appears to be the implementation of those interests through substantially increased use of forum law.

<sup>16</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 326 (1981) (Stevens, J., concurring):

term "legislative jurisdiction" seems useful to describe the constitutional propriety of choice of law, particularly as it relates to choice of forum law.<sup>17</sup>

A third assumption is concerned with the major consequence of the forum bias produced by modern choice theory. This consequence, I suggest, is that decisions about judicial jurisdiction often and perhaps even normally control choice of law. This is a matter to which I shall return, but if the proposition may at least tentatively be accepted then the consequence may be seen more specifically in two alternative situations. First, when only one forum is available, because only one state can exercise judicial jurisdiction, forum bias does not absolutely dictate but does strongly favor application of that state's law. Second, when more than one forum is available, forum bias obviously invites the plaintiff to shop for the most favorable law—and he can do so except to the extent that his selection of forum is constrained by restrictions on the exercise of judicial jurisdiction.

This consequence frames the central questions about the relationship between jurisdiction and choice of law which I would like to raise. Does judicial jurisdiction control choice of law without examination of the underlying choice-of-law considerations? Should it do so? If it does, then how can the developing concepts of jurisdiction and choice of law be "married" in ways that will advance the objectives of each, at a minimum of expense to the other?

That *some* relationship already exists between judicial jurisdiction and choice of law is difficult to deny. Consider the apparent anomaly arising from the situation where a state has sufficient connection with a case to justify application of its own law to a resolution of the dispute, but insufficient connection to exercise judicial jurisdiction under the rules developed from *International Shoe*. Arguments derived from that anomaly have been advanced in most of the conflicts-jurisdiction cases decided by

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I question whether a judge's decision to apply the law of his own State could ever be described as wholly irrational. . . . 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.

<sup>17</sup> Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978); see Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 874 n.9 (1980).

the Supreme Court over the past twenty-five years, usually from the plaintiff's side of the case. The shorthand version of the argument is as follows: It would be appropriate on the facts of this case for the state in which I brought my lawsuit to apply its own law to resolve the dispute, and this conclusion strongly supports the exercise of judicial jurisdiction by this forum over this defendant.

There is, of course, a converse paradox with its own set of arguments, which are fairly exemplified by the recent case of *Rush v. Savchuk*.<sup>18</sup> There the defendant argued that it would be highly inappropriate for the forum to apply its law to the case before it, but that there was some indication that it would do so;<sup>19</sup> therefore, the argument continued, the forum selected by plaintiff ought not to be permitted to exercise judicial jurisdiction. In the lower courts in *Allstate Insurance Co. v. Hague*,<sup>20</sup> an unsuccessful attempt was apparently made to extend this argument to the doctrine of *forum non conveniens*. Defendant Allstate conceded that judicial jurisdiction could be asserted in Minnesota because the company was doing business there, but urged that the exercise of such jurisdiction should be declined because forum law should not be applied and because the law of Wisconsin should govern the case.<sup>21</sup>

Counsel have thus persistently pressed these arguments based on a perceived relationship between jurisdictional and choice concepts. Thus far, however, the responses of the majority opinions of the Supreme Court have consistently turned the arguments aside, in dicta asserting that choice of law and jurisdiction present different issues. To the plaintiff's argument—in *Hanson v. Denckla*,<sup>22</sup> *Shaffer v. Heitner*<sup>23</sup> and *Kulko v. Superior*

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<sup>18</sup> 444 U.S. 320 (1980).

<sup>19</sup> In a somewhat similar situation, the forum (Minnesota) had applied its own comparative negligence rule, rather than Indiana's contributory negligence rule, to an accident occurring in Indiana. *Schwartz v. Consolidated Freightways Corp.*, 300 Minn. 487, 221 N.W.2d 665 (1974).

<sup>20</sup> 449 U.S. 302 (1981).

<sup>21</sup> The Minnesota Supreme Court had responded that "[t]he only 'inconvenience' is that Minnesota law, if applied, might be more liberal than Wisconsin law. . . . The mere fact that Wisconsin law may be different from Minnesota law is not sufficient reason to decline jurisdiction." *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 46 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981). On rehearing the Minnesota court added: "[T]he court is of the opinion that questions of jurisdiction and conflict of laws must be separated." *Id.* at 50.

<sup>22</sup> 357 U.S. 235, 253 (1958).

*Court*<sup>24</sup>—the Court has replied that the interest of the forum in the litigation may justify the application of forum law, but it does not necessarily follow that the forum can constitutionally require defendant to answer in its courts. To the defendant in *Savchuk* the Court said simply: “The constitutionality of a choice of law rule that would apply forum law in these circumstances is not before us.”<sup>25</sup>

In every case, the Court found a violation of due process in the forum’s attempt to exercise judicial jurisdiction. In those cases where the Court suggested that the law of the state might be applied, even though the state could not exercise judicial jurisdiction, the inference seems to be that a forum that could exercise such jurisdiction could permissibly also apply the law of the state lacking jurisdiction. To the extent that this may be understood as an assertion that the jurisdictional decision did not control choice of law, the assertion is clearly out of touch with reality—even in some of the cases in which the suggestions were offered.<sup>26</sup>

Perhaps the clearest example is *Hanson*. The Florida court applied Florida law, invalidating the exercise of a reserved

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<sup>23</sup> 433 U.S. 186, 215 (1977).

<sup>24</sup> 436 U.S. 84, 98 (1978).

<sup>25</sup> *Rush v. Savchuk*, 444 U.S. 320, 325 n.8 (1980).

<sup>26</sup> In *Savchuk* the Court, understandably, did not even offer the suggestion that Indiana might apply Minnesota law. Quite apart from the “direct action” question raised by the exercise of garnishment jurisdiction, it appeared that any attempt to sue in Indiana would have been time-barred, *Id.* at 322 n.2, as well as barred by the Indiana guest statute. *Id.* at 322. For an argument that application of a forum’s *longer* statute of limitations raises a due process issue, as would have been the case had plaintiff prevailed in Minnesota, see R. WEINTRAUB, *supra* note 15, at 517.

The suggestion that some other forum might apply Delaware law in *Shaffer* may in fact be realistic, since many states would apply the law of the state of incorporation to determine the liability of officers and directors. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 309 (1971). As the Court itself notes in *Shaffer*, however, this is not a universal rule. *Shaffer v. Heitner*, 433 U.S. 186, 215 n.44 (1977) (*citing* CAL. CORP. CODE § 2115 (West 1977)). It is not clear in *Shaffer* what other states were potential fora. These might have included Arizona (home office of corporation), Oregon (place of the alleged misconduct), or even California (since it appears that some of the appellants were affiliated only with a California subsidiary; see 433 U.S. at 213 n.41). Indeed, it is not clear whether any other single forum could have acquired personal jurisdiction over all defendants. *But see* 433 U.S. at 211 n.37.

power of appointment.<sup>27</sup> The Delaware court refused to recognize the Florida judgment and proceeded to apply its own law, validating the appointment.<sup>28</sup> Was the Delaware court required to give full faith and credit to the Florida judgment? No, said the Court, because Florida lacked personal jurisdiction over the Delaware trustee.<sup>29</sup> To suggest that Delaware could apply Florida law under these circumstances is essentially meaningless, and it is clear that the jurisdictional decision controlled the law to be applied.

Similarly, in *Kulko*, the suggestion that the obligor father's state (New York) could apply the law of the state of the dependents' residence (California), which had unsuccessfully sought to assert judicial jurisdiction in the case, is simply unrealistic. Moreover, if plaintiff had proceeded under the Uniform Reciprocal Enforcement of Support Act of 1968, as the Court suggests,<sup>30</sup> she would have found a statutory choice-of-law rule in Section 7 of the Act directing the application of New York law.<sup>31</sup> In *Kulko* no less than in *Hanson*, the jurisdictional decision effectively controlled the law to be applied.

Another case demonstrating the primacy of jurisdictional over choice-of-law analysis is *Home Insurance Co. v. Dick*,<sup>32</sup> at least if this older decision is viewed retrospectively. There the plaintiff sued two New York insurance companies in Texas, on a garnishment theory of jurisdiction. The legislative jurisdiction question presented was whether or not Texas could apply its own law to the insurance contract since under Texas law the contractual limitations period for bringing suit would have been invalid. The Court decided that the application of Texas law was a violation of due process because Texas lacked a sufficient relation to the controversy. Although the case has generally been

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<sup>27</sup> *Hanson v. Denckla*, 100 So.2d 378, 383, 385 (Fla. 1956), *rev'd*, 357 U.S. 235 (1958).

<sup>28</sup> *Lewis v. Hanson*, 36 Del. Ch. 235, 261, 128 A.2d 819, 835 (Del. 1957), *aff'd*, 357 U.S. 235 (1938).

<sup>29</sup> *Hanson v. Denckla*, 357 U.S. 235, 255 (1958).

<sup>30</sup> *Kulko v. Superior Court*, 436 U.S. 84, 99, 100 (1978).

<sup>31</sup> *See Danis v. Stillerman*, 66 A.D.2d 818, 411 N.Y.S.2d 353 (1978) (holding that New York law governed New York father's obligations, even though it was less favorable to him than the Florida law under which the Enforcement of Support proceeding was commenced). *See generally* H. CLARK, *THE LAW OF DOMESTIC RELATIONS* 211 (1968).

<sup>32</sup> 281 U.S. 397 (1930).

regarded as a landmark in the use of the due process clause as a restraint on choice of law it is clear that if the same case were now presented for decision the Court would never reach the choice-of-law issue. Instead, probably since *Shaffer*<sup>33</sup> and most certainly since *Savchuk*, the Court would simply have denied that Texas had constitutional authority to exercise judicial jurisdiction in this way.<sup>34</sup> As a result, the jurisdictional decision controls choice of law without examination of the choice issue.

An alternative explanation for the Court's penchant for calling attention to the possible use of a state's law, even where the state in question cannot exercise judicial jurisdiction, is that this language is intended simply to emphasize the separateness of the jurisdictional and choice concepts. If that is an appropriate interpretation, however, it raises a further question: Why is the emphasis on separateness necessary? No one asserts that judicial jurisdiction and choice of law (or legislative jurisdiction) are identical, only that they are related and that the decision of one issue may have some sensible bearing on the decision of the other. Perhaps the insistence on a clear dichotomy is a remnant of the Court's attempt in the New Deal era to redefine its own role with regard to distinctions between procedural and substantive due process. So viewed, jurisdictional decisions would seem somehow more permissible because they seem procedural, while due process restraints on choice of law might be suspect because of their substantive flavor. But if, as now seems clear, the jurisdictional decision will normally control choice of law without examination of the merits of the choice, maintenance of the dichotomy for these purposes seems irrational.

Whatever the proper understanding of the historical development may be, an overview of the more recent cases suggests that greater clarity may be forthcoming. Dissents in several cases, beginning with that of Justice Black in *Hanson*, argued that jurisdiction and choice of law, although separate inquiries, "are often closely related and to a substantial degree depend upon similar considerations."<sup>35</sup> In *Shaffer* Justice Brennan pointed out that "the decision that it is fair to bind a defendant by a State's laws

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<sup>33</sup> See generally Silberman, *Shaffer v. Heitner: End of an Era*, 53 N.Y.U. L. Rev. 33 (1978).

<sup>34</sup> At least a plurality of the Court concedes that this is how *Dick* would be treated. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310 n.12 (1981).

<sup>35</sup> *Hanson v. Denckla*, 357 U.S. 235, 258 (1958) (Black, J., dissenting).

and rules should prove to be highly relevant to the fairness of permitting that same State to accept jurisdiction for adjudicating the controversy."<sup>36</sup> The suggestion that forum bias in the choice process may also be relevant to the exercise of jurisdiction appears in Justice Brennan's dissent in *World-Wide Volkswagen Corp. v. Woodson* and *Rush v. Savchuk*: "One consideration that might create some unfairness [in permitting judicial jurisdiction to be exercised] would be if the choice of forum also imposed on the defendant an unfavorable substantive law which the defendant could justly have assumed would not apply."<sup>37</sup>

These suggestions foreshadowed the position taken by the Court in its most recent decision in this area, *Allstate Insurance Co. v. Hague*.<sup>38</sup> There Minnesota applied its own law, permitting "stacking" of uninsured-motorist coverages, in a case where the accident occurred in Wisconsin on a purely intrastate trip. The collision involved an uninsured Wisconsin resident and the insured decedent, who was and had for many years also been a Wisconsin resident. Although conceding that the interests of the forum in the case (decedent's employment in Minnesota and his widow's subsequent move to the state) did not mandate the application of Minnesota law, the Minnesota Supreme Court nevertheless applied its "stacking rule" on the ground that it was the "better law."<sup>39</sup> Justice Brennan's plurality opinion, announcing the United States Supreme Court's affirmance, drew the concurrence of Justices White, Marshall and Blackmun, while Justice Stevens concurred in the judgment in a separate opinion.<sup>40</sup>

As noted earlier, in the Minnesota courts Allstate sought to extend the anomaly argument to *forum non conveniens*.<sup>41</sup> In the Supreme Court, however, Allstate abandoned that approach

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<sup>36</sup> *Shaffer v. Heitner*, 433 U.S. 86, 225 (1977) (Brennan, J., concurring in part and dissenting in part).

<sup>37</sup> 444 U.S. 286, 311 n.19 (Brennan, J., dissenting).

<sup>38</sup> 449 U.S. 302 (1981).

<sup>39</sup> *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1979).

<sup>40</sup> Justice Powell dissented in an opinion joined by Justice Rehnquist and the Chief Justice. Justice Stewart did not participate in the case. This division left several issues open—for example, the relevance of the widow's post-occurrence move to the forum. The plurality opinion found it relevant and insisted that giving it effect would not invite forum-shopping because in this case the move was bona fide. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 319 n.28 (1981). Both Justice Stevens, *id.* at 331, and the dissent, *id.* at 337, found it irrelevant, leaving the eight participating justices equally divided on the issue.

<sup>41</sup> See notes 20-21 and accompanying text *supra*.

(which assumes some relationship between judicial jurisdiction and choice of law) in favor of an argument that Allstate's business activities in Minnesota were irrelevant for choice-of-law purposes (in effect urging that no such relationship ought to be recognized).<sup>43</sup> In rejecting this view, the plurality opinion identified these unrelated business activities, together with the decedent's employment in Minnesota and the widow's subsequent move to that state, as the three "contacts" that, taken in the aggregate, justified the application of forum law for constitutional purposes.<sup>43</sup> In his concurring opinion Justice Stevens focused on the doing-business contact as critical, and characterized the other two contacts as "either irrelevant to or possibly even tend[ing] to undermine the plurality's conclusion."<sup>44</sup>

The interesting outcome of this rather complicated state of affairs is that a majority of the members of the Court have identified themselves with the view that judicial jurisdiction and choice of law *are* related, at least in the overlapping character of the factors to be considered, and probably beyond that in the sense that there is a recognition of interplay between the concepts. The fact that this proposition must be extrapolated from several opinions obscures but does not alter the conclusion. The relationship thus recognized is rather ill-defined, and it is certainly no "marriage" at this point. Pursuing the metaphor, perhaps it would be fair to describe the relationship as falling somewhere between an illicit love affair, where the parties meet in secret, and one of the modern forms of cohabitation, in which the parties openly share their lives but make no commitments as to the future.

Shortly before the *Allstate* decision, Professor Martin proposed a sort of shotgun wedding between jurisdiction and choice of law which would have defined their relationship more clearly.<sup>45</sup> Drawing on Professor Reese's argument that the same

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<sup>43</sup> Brief for the Petitioner at 13, *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

<sup>43</sup> *Id.* at 302, 313. In a rather strange footnote the plurality said: "We express no view whether the first two contacts, either taken together or separately, would have sufficed to sustain the choice of Minnesota law made by the Minnesota Supreme Court." *Id.* at 320 n.29. Does this mean that the third contact, plaintiff's post-occurrence move to the forum, would have sufficed independently?

<sup>44</sup> *Id.* at 331.

<sup>45</sup> Martin, *supra* note 17.

basic principles of due process govern the exercise of both judicial and legislative jurisdiction,<sup>46</sup> Professor Martin suggested that the Supreme Court develop a "minimum contacts" theory for choice of law. In his view, the key to the contacts required on the choice-of-law side lies in the already articulated standards for judicial jurisdiction developed under *International Shoe*. Thus he argued that a forum would have legislative jurisdiction if, but only if, judicial jurisdiction could be sustained solely on the basis of connections between the forum and the defendant which are related to the case at issue. Where the forum has judicial jurisdiction arising from connections with the defendant which are unrelated to the case before it, it could still hear and decide the case but could not apply its own law. Professor Martin would therefore have denied legislative jurisdiction to Minnesota in *Allstate*, while permitting the Minnesota courts to hear the case.<sup>47</sup> His assumption, if I understand it correctly, is that the minimum contacts for legislative jurisdiction ought to be identical with the case-related requirements for judicial jurisdiction.

A primary justification for Professor Martin's attempt to formalize the relationship lies in his concern that the major risk of unfairness to the defendant in conflicts cases arises from possible imposition upon him of an unfavorable substantive law.<sup>48</sup> In this era of modern communication and transportation technology, the expense and inconvenience imposed on a defendant required to appear and defend, even in a distant forum, are usually insignificant in comparison with the risk that an unfavorable law will determine the outcome of the case. Professor Martin's insistence that application of forum law be restricted to cases where the forum has case-related contacts with defendant, sufficient for judicial jurisdiction, would seem to assure that defendant would not be subjected to unfair surprise.

This approach was apparently rejected by all eight of the justices participating in the *Allstate* decision. None suggested that

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<sup>46</sup> Reese, *supra* note 17.

<sup>47</sup> Martin, *supra* note 17, at 887.

<sup>48</sup> *Id.* at 880. As one analyst put it: "To believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether." Silberman, *supra* note 33, at 88.

the business activities of Allstate in Minnesota, although unrelated to this case, were insufficient to protect defendant from unfair surprise; indeed, all eight agreed that the application of Minnesota law on the facts of this case was foreseeable,<sup>49</sup> or would not frustrate the parties' expectations.<sup>50</sup> The Martin test was thought to go too far, since foreseeability could exist without the jurisdictional contacts being case-related.

I agree that the choice-of-law risk run by defendant ordinarily outweighs the inconvenience and expense of appearing and defending in another forum, and that this conclusion offers strong support for the proposition that decisions concerning judicial jurisdiction should not be allowed to control choice of law without consideration of the reasons for choice of law. But I find Professor Martin's proposal unpersuasive, not only because it goes too far, but also because it does not go far enough. With its tight focus on fairness to the defendant, the proposal leaves out of the equation any consideration of state interests or competing claims of fairness to the plaintiff.<sup>51</sup>

It may be useful at this point to recall the obvious: The minimum contacts test for judicial jurisdiction under *International Shoe* was mainly, although perhaps not exclusively,<sup>52</sup> designed to

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<sup>49</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 317-18 (1981).

<sup>50</sup> *Id.* at 330 (Stevens, J., concurring); *id.* at 336 (Powell, J., dissenting).

<sup>51</sup> Professor Martin candidly recognizes this implication of his proposal but seeks to justify it on several grounds—none of which is persuasive. Martin, *supra* note 45, at 880-81. I am particularly troubled by one such justification, namely, that the lack of case-related minimum contacts in the forum selected by plaintiff means that there "must be" some alternative potential forum which has much more substantial contacts. Perhaps I do not fully understand what he has in mind, but as a justification for ignoring plaintiff's and the forum's interests this argument seems circular. To be sure, in most cases in which the forum lacks case-related minimum contacts with the defendant, there will probably be another potential forum which has more significant contacts with the defendant. But it does not follow that the forum selected by plaintiff has insufficient contacts or interest to apply its own law. That conclusion is reached only by defining the defendant's interests as crucial. In short, one must accept the major premise of the proposal before this justification has any meaning, and the meaning it then acquires is derived from the major premise itself.

<sup>52</sup> To be sure, the Court has mentioned, and recently resurrected, a two-fold role for the minimum contacts theory, the second branch of which is the limitation of state sovereignty necessary to a federal system. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). What this means is less than clear. If

protect the defendant from unfair surprise with respect to the forum in which he might be summoned to defend. Whether cast in the form of the "purposeful availment" doctrine or some other aspect of foreseeability, the main thrust of the test is a requirement of "reasonable" contacts from which the defendant could infer that he might have to defend in the forum in question.<sup>53</sup>

At least until *Allstate*, the generally accepted view of the constitutional test for the exercise of legislative jurisdiction was very similar: A forum could apply its own law only if it was "reasonable" for it to do so; once the demon of the vested rights theory was exorcised, the principal means for testing reasonableness was found in the avoidance of unfair surprise to the defendant.<sup>54</sup>

An important product of the *Allstate* decision is its emphasis on factors in addition to fairness to the defendant. Part II of Justice Brennan's plurality opinion states the test as follows:

[F]or 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.<sup>55</sup>

Although Justice Stevens and the dissenters disagreed with the way in which the test was applied in this case, none found fault with the test itself. Indeed, Justice Powell's dissent emphasizes the narrowness of the area of disagreement and says flatly: "I accept with few reservations Part II of the majority opinion, which sets forth the basic principles that guide us in reviewing state choice-of-law decisions under the Constitution."<sup>56</sup>

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what is intended is some broader reference to "other interstate or international values" of the kind discussed by Professor Reese, Reese, *supra* note 17, at 1599-1607, then the relevance of these is clearly consistent with an expanded view of the relationship between jurisdiction and choice of law. If what is intended is that due process should be used to allocate adjudicative jurisdiction between the states, then, in view of the tendency of jurisdictional decisions to control choice of law, the result would be an indirect but unfortunate return to the Court's earlier and long since abandoned attempts to allocate legislative jurisdiction.

<sup>53</sup> See *Shaffer v. Heitner*, 433 U.S. 186, 213-16 (1977).

<sup>54</sup> See R. WEINTRAUB, *supra* note 15, at 505-06; Reese, *supra* note 17, at 1595-99.

<sup>55</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981).

<sup>56</sup> *Id.* at 332.

Several intriguing possibilities suggested by this reformulated test will no doubt engage the attention of lower courts and conflicts scholars for some time to come. Is the Court, after its long silence on state choice of law, playing catch-up with modern conflicts theory? More specifically, are the state interests now deemed essential to constitutionally permissible choice of law those same state interests derived from governmental interest analysis, for choice purposes, or do they have some other meaning in this constitutional setting? Moreover, since the test now requires not only significant contacts but also the creation of state interests, and since the test is framed broadly enough to cover choice of another state's law as well as that of the forum, states still clinging to traditional choice rules seem charged with a new and probably unwelcome responsibility. Taken literally, the test would not be satisfied simply by identification of a contact recognized as the "connecting factor" in a traditional choice rule, but would require in addition the identification of the interest created by that contact in the state to which the rule leads. What then of the case in which the traditional rule points to a state that, in terms of modern choice theory, has no interest or only an insignificant interest in the case?

For purposes of the present inquiry, the reformulation of the test suggests another and perhaps less obvious possibility. Given the Court's recognition of a relationship between jurisdiction and choice of law as discussed above,<sup>57</sup> and given the abandonment of a tight focus on defendant-fairness in the choice-of-law test, is the Court now ready to recognize a mutual interplay between jurisdiction and choice of law? *Allstate* itself may be read as a demonstration of one form of such interplay; the unrelated business activities of defendant in Minnesota, essentially a jurisdictional concept, satisfied the defendant-fairness requirement of the choice-of-law test.<sup>58</sup> Is this a one-way street, or does it portend a marriage in which choice-of-law considerations also have a bearing on jurisdictional analysis?

Such a marriage is long overdue, in my view, to avoid the result of cases like *Hanson v. Denckla*.<sup>59</sup> As pointed out earlier, *Hanson* was clearly a case in which concepts of judicial jurisdiction, primarily oriented to defendant-fairness, were permitted to

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<sup>57</sup> See text accompanying notes 43-44 *supra*.

<sup>58</sup> *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 317-18, 337-38 (1981).

<sup>59</sup> 357 U.S. 235 (1958).

control choice of law without any examination of the reasons for choice of law.<sup>60</sup> Surely Florida in that case was not only a highly convenient forum for most of the parties involved, but in addition had significant contacts with the controversy which gave rise to Florida interests.<sup>61</sup> In those circumstances the application of Florida law by the Florida courts could scarcely be regarded as "arbitrary." Yet the Court denied the application of Florida law by finding that Florida had insufficient contact with the Delaware trustee to exercise judicial jurisdiction over him, primarily on the ground that the trustee had not "purposefully availed" himself of the privileges and protections of Florida law. But what unfairness to the defendant trustee would have been involved in requiring him to defend there? As Justice Douglas pointed out in his dissent, the trustee ran no risks of personal liability through the application of Florida law, since he was in effect a mere stakeholder.<sup>62</sup> At most his duty to defend the trust would have required him to attempt to persuade the Florida court to apply Delaware law. Even his expenses and inconvenience of appearing in Florida would normally be reimbursed from the funds of the trust.<sup>63</sup> To be sure, the Court might have held the trustee subject to the personal jurisdiction of the Florida courts simply on the ground that his contacts with the state were sufficient to satisfy the minimum contacts test.<sup>64</sup> The point is, however, that such a result would have been much easier to reach, if not be compelled, by an examination of the underlying choice-of-law considerations.<sup>65</sup>

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<sup>60</sup> See text accompanying notes 27-29 *supra*.

<sup>61</sup> Florida's interest in the validity of Mrs. Donner's 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 Mrs. Donner's estate and with finally determining what property was to be distributed under her will. In fact this suit was brought for that very purpose.

*Hanson v. Denkla*, 357 U.S. 235, 259 (1958) (Black, J., dissenting).

<sup>62</sup> *Id.* at 263 (Douglas, J., dissenting).

<sup>63</sup> See G. BOGERT, *THE LAW OF TRUSTS* § 98, at 358 (5th ed. 1973); 2 A. SCOTT, *THE LAW OF TRUSTS* 178, 188.4 (3d ed. 1967). Professor Scott approved the result in *Hanson*. The basis of his reasoning, apart from traditional rules, appears to have been a validation theory. Scott, *Hanson v. Denckla*, 72 *HARV. L. REV.* 695, 699, 708 (1959).

<sup>64</sup> See *Hanson v. Denkla*, 357 U.S. 235, 263, 264 (1958) (Douglas, J., dissenting).

<sup>65</sup> This approach is probably a fair characterization of Justice Black's dis-

The marriage needed between judicial jurisdiction and choice of law should not deny the separateness of the inquiries into jurisdiction and choice of law. Each has its own functions. Like all good marriages, the one proposed would both recognize the individuality of the partners and operate as a symbiotic relationship.

For example, it is probably not possible, even if it were desirable, to avoid some control of judicial jurisdiction over choice of law. Where each of several states would clearly have legislative jurisdiction and would apply different rules, plaintiff's selection of forum would also control choice of law if it were determined that the forum chosen satisfied the requirements for judicial jurisdiction. The defendant in such a case is simply left with the unenviable burden of persuading the selected forum to sublimate its forum bias. In such "true conflict" cases, disuniformity of result is simply the price of federalism.<sup>66</sup> The most the Supreme Court could do would be to ameliorate the impact of traditional rules by abolishing such devices as jurisdiction acquired solely by personal service on transient defendants.<sup>67</sup>

In other cases, however, the symbiotic nature of the proposed relationship would permit interplay between the concepts. For example, in one class of cases the questions raised might be purely jurisdictional, in the sense that either (or all) of several potential fora would apply the same or highly similar rules of substantive law. This would be true not only where the internal rules of the fora are the same, but also in two other situations: first, where the states involved have different internal rules but one of them remains committed to a traditional choice rule, which would lead it to apply the internal law of the other potential forum; and second, where the internal rules of one potential forum are different, but the probabilities are high that it would not regard its interests as sufficiently implicated to apply its own

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sent, in which Justices Burton and Brennan joined. *Id.* at 256-62; see Silberman, *supra* note 33, at 80-88.

<sup>66</sup> See B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 182, 290 (1963).

<sup>67</sup> See Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The Power Myth and Forum Conveniens*, 65 *YALE L.J.* 289 (1956); Riesenfeld, *Shaffer v. Heitner: Holdings, Implications, Forebodings*, 30 *HASTINGS L.J.* 1183, 1204 (1979). The Georgia Supreme Court recently declined to abandon the doctrine of transient jurisdiction, upholding service on a South Carolina resident who was "in Georgia one day to bowl." *Humphrey v. Langford*, 246 Ga. 732, 732, 273 S.E.2d 22, 22 (1980).

law. Since the risk of an unfavorable judgment based on a forum-shopped law is not involved in these cases, and since this is usually the major risk of unfairness the defendant faces, I would argue that the *absence* of this risk ought to be an important factor in deciding whether or not to require the defendant to appear in the forum selected by the plaintiff. At least in the absence of a showing that the forum was selected to cause unnecessary expense or inconvenience to the defendant, less in the way of connections between that forum and the defendant should be required in such cases because there is less risk of unfairness to the defendant.<sup>68</sup>

Even in those cases where more than one potential forum might have legislative jurisdiction and where their laws are different, it is surely possible that choice-of-law considerations could inform and enlighten the application of due process standards for judicial jurisdiction. Perhaps the best example is found in the classic anomaly cases mentioned earlier, where the interests of the forum in the application of its own law are clear, and the forum has a clear connection with the litigation but less than normally adequate connections with the defendant.<sup>69</sup> It would probably go too far to suggest that proceedings in such a state be permitted even if the forum had no contact with defendant. The proposed symbiosis does not mean that choice of law should control jurisdiction in the way that jurisdiction so frequently controls choice of law. But at least the interests of the forum are relevant to the question of *how much* connection with the defendant should be required.

The reasoning developed under the cases following *International Shoe* can also usefully inform and enlighten decisions about legislative jurisdiction, apart from the illustration already offered by *Allstate*. As indicated earlier, it goes too far to say that case-related connections with the defendant for judicial jurisdictional purposes are essential criteria for legislative jurisdiction.<sup>70</sup> But such connections are obviously relevant to the question of reasonableness in the application of forum law. If, for example, the defendant has engaged in some case-related "pur-

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<sup>68</sup> A similar argument would support Florida's exercise of judicial jurisdiction over the Delaware trustee in *Hanson*. See text accompanying note 61 *supra*.

<sup>69</sup> See text accompanying notes 18-19 *supra*.

<sup>70</sup> See text accompanying notes 49-51 *supra*.

poseful act" which demonstrates his voluntary subjection to the burdens as well as the benefits of forum law, that determination should be an important factor in the evaluation of legislative jurisdiction.<sup>71</sup>

Other applications and uses of the relationship between judicial jurisdiction and choice of law will no doubt suggest themselves, once the door to such exploration is opened by recognition of the problem.<sup>72</sup> My purpose here has been to raise possibilities, not to exhaust them.

Writing on this subject about fifteen years ago, Professors von Mehren and Trautman suggested that "ideally, the choice-of-law question—the relationship between the underlying controversy and the forum—should be of little significance for the jurisdictional problem."<sup>73</sup> They went on to recognize that in some areas, such as divorce or worker's compensation, no such conceptual separation was usually possible, because the exercise of judicial jurisdiction itself presupposed the application of forum law.

With rare foresight these authors also raised the question of what the impact might be "if for a substantial proportion of multistate litigation it were concluded that . . . the best or only solution was for the forum to apply its domestic rule whenever the local community has a discernible domestic interest?"<sup>74</sup> Answering their own question, although in a vein suggesting that they regarded this situation as improbable, they thought that the impact on the individual judge would be small and would consist mainly of "psychological repercussions."<sup>75</sup> For the work of the Supreme Court, however, they foresaw that such a situation could have several important implications, particularly in terms of pressure to refine constitutional controls on choice of

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<sup>71</sup> Cf. *Shaffer v. Heitner*, 433 U.S. 186, 227, 228 (1977) (Brennan, J., dissenting). See also *Kulko v. Superior Court*, 19 Cal. 3d 514, 524, 564 P.2d 353, 358, 138 Cal. Rptr 586, 591 (1977), *rev'd*, 436 U.S. 84 (1978).

<sup>72</sup> No doubt the exploration will also raise problems. One such difficulty that may be perceived is the disturbance of the normal order of considering the issues. Although the determination of jurisdiction is generally a threshold matter, and choice of law has generally been left to later consideration, the overlapping if not interlocking nature of the factual determinations which must be made for both purposes seem to me to make this no more than a formal if not a false objection.

<sup>73</sup> von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1128-29 (1966).

<sup>74</sup> *Id.* at 1131.

<sup>75</sup> *Id.*

law, and to develop new constitutional controls on state assertions of judicial jurisdiction.<sup>76</sup> How prophetic some of these suggestions have been!

In fact, the situation described by von Mehren and Trautman has for all practical purposes arrived, for indeed "a substantial proportion of multistate litigation" is now resolved by the application of forum law. That may be a departure from the "ideal" which they hoped for, but it is not a clock likely to be turned backward. An important interdependence between jurisdiction and choice of law already exists. For much too long the Supreme Court sought to solve the problems posed by this interdependence simply by ignoring them, by insisting that the concepts were separate, and by dealing with choice-of-law problems only if the cases in question could not be disposed of by limiting the exercise of judicial jurisdiction. That approach made the problems still more acute by inviting still greater control over choice of law through the imposition of jurisdictional standards.

For all its importance, *Allstate* is not a great "breakthrough" case for the issues described here. It does suggest, however, that the Court may now be ready to confront these issues, not by attempting to define them out of existence, but by trying to manage them in ways which reach coordinated and sensible results.

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<sup>76</sup> *Id.* at 1132-33.

