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In Search of a Choice-of-Law Reviewing Standard—Reflections on *Allstate Insurance Co. v. Hague*

Gene R. Shreve*

"I think it difficult to point to any field in which the Court has more completely demonstrated or more candidly confessed the lack of guiding standards of a legal character than in trying to determine what choice of law is required by the Constitution."¹

I. INTRODUCTION

It had been eighteen years since the United States Supreme Court reviewed a state choice-of-law case;² hence legal scholars eagerly awaited³ the Court's recent choice-of-law decision in *Allstate Insurance Co. v. Hague*.⁴ Unfortunately, it is a disappointment. The *Hague* opinions reveal that the Court is split on issues it considers central to the controversy.⁵ Al-

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1. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 16 (1945).

2. The last case in which the Supreme Court reviewed the decision of a state court in a choice-of-law controversy—between private litigants—was *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964). Professor Brilmayer offers *Nevada v. Hall*, 440 U.S. 410 (1978) as another recent choice-of-law decision. See Brilmayer, *Legitimate Interests in Multistate Problems: As Between State & Federal Law*, 79 MICH. L. REV. 1315 (1981). In *Hall*, however, the sovereign immunity issue, raised by the state of Nevada, as a party, in part eclipsed and in part distorted the choice-of-law process. For a discussion of *Nevada v. Hall*, see note 137, *infra*.

3. See Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 872 (1980) (hereinafter cited as Martin, *Personal Jurisdiction*). While the *Hague* decision was pending, the case was the subject of the program of the section on conflict of laws at the 1981 meeting of the Association of American Law Schools.

4. 449 U.S. 302 (1981). For a different approach to examining this case than the one found in this Article, see Brilmayer, *supra* note 2.

5. See notes 118-20 *infra* and accompanying text.

though the particular choice-of-law result permitted by the Court's affirmance of the Minnesota Court decision⁶ is disquieting,⁷ the Court's failure to produce a desirable or even an intelligible choice-of-law reviewing standard is more troublesome.

This Article critiques the Supreme Court's failure to provide a viable conflict-of-law reviewing standard by examining three possible methods of reviewing Minnesota's choice-of-law decision. Under the first and most permissive approach, the Supreme Court would have employed recently developed standards of judicial jurisdiction as a surrogate for state choice-of-law review. Using the second and most restrictive approach, the Supreme Court would have reviewed state cases under an evolving federal common law of conflicts, displacing state conflict-of-law⁸ rules. Applying the third approach, the one closest to the Supreme Court's traditional view, the Court would have applied a rule of constitutional scrutiny intended to provide minimum guarantees of fairness to the parties in choice-of-law decision making.

This Article advances the position that the third reviewing approach is preferable to the first two, and that although the concept of fairness is somewhat inchoate, it is possible to reduce it to standards which the United States Supreme Court can administer to produce an effective and institutionally appropriate review of choice-of-law decisions. The Article concludes that the Court in *Hague* both lost an opportunity to enunciate and apply this standard, and reached the wrong result in the case before it.

II. THE DECISION

Plaintiff Hague's husband was killed when an automobile driven by an uninsured motorist struck the motorcycle upon which he was a passenger. At the time of the accident, the decedent had an insurance policy from defendant Allstate covering three vehicles; the coverage for each vehicle included risk from uninsured motorists to a maximum of \$15,000. Plaintiff

6. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43 (Minn. 1978).

7. See note 51 *infra* and accompanying text.

8. This Article will use the phrases "conflict of laws" and "choice of law" interchangeably to describe the issue created when the facts of a controversy implicate possibly irreconcilable rules of two or more jurisdictions. Neither is an entirely felicitous phrase, but both enjoy considerable use. On the etymology of "conflict of laws," see Trautman, *The Relation Between American Choice of Law and Federal Common Law*, 41 LAW & CONTEMP. PROB. 105, 105 n.2 (1977), and of "choice of law," see Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 179 (1933).

filed suit for declaratory judgment in a Minnesota district court, seeking a determination that Allstate's coverage limit for the accident was \$45,000. Plaintiff argued that the court should apply Minnesota insurance law, which permitted aggregation or "stacking" of the three coverage provisions.⁹ Defendant Allstate's position was that the law of Wisconsin forbidding stacking governed the coverage question, not Minnesota law.¹⁰

9. Brief for Petitioner at 3-5, *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). Both parties agreed that if Minnesota law applied, then stacking was permitted. 289 N.W.2d at 46 n.3. The most complete narrative of the facts in *Hague* is contained in the stipulation of the parties presented to the Minnesota Supreme Court and, subsequently, to the United States Supreme Court.

[T]his case . . . arises out of an automobile and motorcycle accident which occurred on July 1, 1974 in Pierce County, Wisconsin, which is immediately adjacent to the border near Red Wing, Minnesota. Ralph A. Hague was a passenger on a motorcycle owned and operated by his son, Ronald Hague.

The Hagues were traveling west . . . and they intended to turn left . . . onto a road that led to Elderwood Heights, Wisconsin. They slowed to an eventual stop and signaled their intention to make a left turn. While waiting for an eastbound car to pass in the oncoming or opposite lane, the motorcycle was struck from behind by an automobile owned and operated by Mr. Richard R. Borst, a resident of Ellsworth, Wisconsin. Mr. Ralph A. Hague died as a result of injuries sustained in this accident.

At the time of the accident, Ralph A. Hague resided with his wife, Lavinia Hague, in Hager City, Wisconsin, which is located just one and one-half . . . miles from Red Wing, Minnesota. Although Ralph A. Hague resided in Wisconsin, he was employed in Red Wing, Minnesota. . . . After the accident, and prior to the initiation of the above entitled matter, Lavinia Hague moved her residence to Red Wing, Minnesota. . . . Lavinia Hague . . . [later] married . . . a Minnesota resident . . . , and established residence . . . in Savage, Minnesota.

Ronnie Hague[s] . . . motorcycle was not insured. Mr. Richard R. Borst was without valid insurance coverage at the time of the accident.

Ralph A. Hague was insured, at the time of the accident, by Allstate, which had issued one policy to the decedent . . . , which policy extended coverage to three automobiles that Ralph A. Hague owned. A separate premium was paid for each such automobile. The policy . . . provided for uninsured motorist coverage to the limits of \$15,000.00 for each such automobile.

. . . Subsequent to her appointment as personal representative, Lavinia Hague initiated the above entitled action against Allstate.

The plaintiff in this action, Lavinia Hague, . . . is suing for declaratory relief construing the above indicated policy so as to "stack" the separate \$15,000.00 uninsured motorist coverages on each automobile and therefore afford coverage in the total amount of \$45,000.00.

Brief for Petitioner at 3-5, 449 U.S. 302.

This apparently served as the basis for the statement of facts used by Justice Brennan to open his plurality opinion. 449 U.S. at 305. Justice Stevens surmised, or somehow determined, the additional fact that the insurance contracts in question failed to contain express directives on either the stacking issue or choice-of-law provisions. *Id.* at 328-29.

10. The Minnesota Supreme Court accepted the defendant's antistacking view of Wisconsin law, observing that the rule might "be based in part on a desire to keep insurance premiums low while providing some protections against

The Minnesota district court granted plaintiff's motion for summary judgment, and Allstate appealed. A majority of the Minnesota Supreme Court¹¹ held that selection of the Minnesota stacking rule was both constitutional¹² and an appropriate application of its recently adopted "choice-influencing considerations" approach¹³ to choice of law.¹⁴

The United States Supreme Court affirmed the Minnesota Supreme Court decision;¹⁵ three Justices joined Justice Brennan in a plurality opinion,¹⁶ and Justice Stevens concurred separately.¹⁷ All members of the Court assumed that a conflict existed between the laws of Minnesota and Wisconsin.¹⁸ Five

uninsured motorists." 289 N.W.2d at 47. This is a supportable reading of the purpose of the antistacking rule, because a Wisconsin statute permitted that rule to operate. WIS. STAT. ANN. § 204.30(5) (West 1967); *Nelson v. Employers Mut. Cas. Co.*, 63 Wis. 558, 562 n.1, 217 N.W.2d 670, 672 n.1 (1974); *Scherr v. Drobac*, 53 Wis. 2d 308, 310, 193 N.W.2d 14, 15 (1972); *Leatherman v. American Family Mut. Ins. Co.*, 52 Wis. 2d 644, 651, 190 N.W.2d 904, 907 (1971).

Section 204.30(5) of the Wisconsin statute was amended, however, by Chapter 72, Laws of 1973. The amendment adds, under certain circumstances, a bar to the reduction of uninsured motorist coverage below comparable levels of insured motorist liability. In refusing to apply the amendment retroactively, the Wisconsin Supreme Court left open the question whether it would affect Wisconsin's antistacking rule in cases (like *Hague*) which arose after the effective date of the amendment. *Nelson v. Employers Mut. Cas. Co.*, 63 Wis. 558, 569, 217 N.W.2d 670, 675 (1974).

Noting this, the Minnesota Supreme Court nonetheless decided that the amended Wisconsin law was "essentially the same", 289 N.W.2d at 48 n.8, and concluded that "stacking would not be permitted if Wisconsin law were to apply." *Id.* at 48.

11. Justice Otis dissented on the grounds that the selection of the Minnesota rule was an undesirable choice-of-law result which violated the federal standard of due process. 289 N.W.2d at 50-54.

12. *Id.* at 50 (supplemental opinion of the majority after rehearing).

13. *Id.* at 46-49 (original opinion of the majority).

For further discussion of the "choice-influencing considerations" approach, see notes 78-81 *infra* and accompanying text.

14. *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973).

Discussion of developments in Minnesota conflict-of-laws doctrine may be found in Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975, 1007-09 (1977); Note, *The Minnesota Supreme Court: 1979*, 64 MINN. L. REV. 1181, 1187-91 (1980); Comment, *Conflict of Laws: Minnesota Rejects the "Significant Contacts" Doctrine in Favor of the "Better Law" Test*, 58 MINN. L. REV. 199 (1973). While doctrine has shifted, the result—selection and application of Minnesota law—has remained a characteristic of the Minnesota decisions. Sedler, *supra*, at 1007; Comment, *supra*, at 203.

15. *Allstate Ins. Co. v. Hague*, 449 U.S. 302. Justice Stewart did not participate. *Id.* at 320.

16. *Id.* at 305-320. Justices White, Marshall, and Blackmun joined Justice Brennan. Concerning the precedential significance of *Hague* as a plurality decision, see note 150 *infra*.

17. 449 U.S. at 320-32.

18. In argument before the United States Supreme Court, *Hague* raised

Justices also agreed that the selection of the Minnesota stacking rule did not present the Court with a federal question, because it did not violate the due process or the full faith and credit clauses of the United States Constitution.¹⁹ Although the quality of the Minnesota court's choice-of-law decision prompted criticism,²⁰ the Court refused to consider the case as an opportunity to displace state conflicts law with national choice-of-law rules.²¹

the possibility that no real conflict existed between Minnesota and Wisconsin law. Brief for Respondent at 3-5, 449 U.S. 302. See note 10 *supra*. Dismissing the point, Justice Brennan wrote for the plurality:

The court below rejected this contention and applied Minnesota law. Even though the Minnesota Supreme Court's choice of Minnesota law followed a discussion of whether this case presents a false conflict, the fact is that the court chose to apply Minnesota law. Thus the only question before this Court is whether that choice was constitutional.

449 U.S. at 306 n.6.

Though the status of Wisconsin's law was less than clear, this Article proceeds on the assumption—consistent with all the state and federal opinions—that Wisconsin law and policy continued to be represented by the antistacking rule. Justice Brennan's apparent lack of interest in examining the point, however, is troublesome. The Supreme Court was not bound to accept the Minnesota Supreme Court's interpretation of Wisconsin law. *Adam v. Saenger*, 303 U.S. 59 (1938). The failure of the Supreme Court to independently satisfy itself that a genuine conflict existed between the insurance coverage rules of Minnesota and Wisconsin suggests two problems.

First, whatever its content, the constitutionality of applying the Wisconsin rule is clear. See note 50 *infra* and accompanying text. If the Court interpreted both rules to permit stacking, resolution of the federal question of unconstitutionality argued from application of the Minnesota rule would have been immaterial to the outcome, and the policy against unnecessary review of state decisions suggested by such cases as *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935) and *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874), would have counselled against a decision on the merits in *Hague*. The answer to this criticism appears to lie in a series of Supreme Court decisions qualifying the *Murdock* doctrine to permit review "[i]f the state court explicitly bases its decision solely upon a determination of the federal question . . . even though the state court, consistently with the record, might have based its decision on an adequate state ground." R. STERN & E. GRESSMAN, *SUPREME COURT PRACTICE* 238 (5th ed. 1978).

The second problem created by the plurality's lack of interest in examining Wisconsin law is harder to dismiss. It is difficult to answer properly the question the plurality assigned itself, "whether [the Minnesota Supreme Court's] choice was constitutional," 449 U.S. at 306 n.6, without including in the inquiry a measurement of the extent of Wisconsin's interest in the controversy. See notes 133-49 *infra* and accompanying text.

19. See 449 U.S. at 320; *id.* at 332 (Stevens, J., concurring).

Justice Powell, joined by the Chief Justice and Justice Rehnquist, dissenting, were unable to find an interest which would justify Minnesota's application of its stacking law. They argued that the choice violated the due process and full faith and credit clauses. *Id.* at 332-40.

20. See note 51 *infra* and accompanying text.

21. See text accompanying notes 59-61 *infra*.

III. POSSIBLE APPROACHES TO REVIEW IN *HAGUE*

A. JUDICIAL JURISDICTION AS A SURROGATE FOR STATE CHOICE-OF-LAW REVIEW

The relationship between a court's assertion of judicial jurisdiction²² and choice of law is a subject which has attracted considerable interest.²³ The Supreme Court has stated frequently that constitutional reviewing standards for the two are separate.²⁴

There are signs in *Hague*, however, that the Court may become more indulgent in its choice-of-law review, because stricter standards for judicial jurisdiction²⁵ will eliminate cases which otherwise may produce unconstitutional choice-of-law results. In commenting on *Home Insurance Co. v. Dick*,²⁶ a

22. I adopt Professor Resse's definition of judicial jurisdiction. He defines the phrase as "the power of a state to try a case in its courts." Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1587 (1978). See 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79, at 100 (1971) (hereinafter cited as RESTATEMENT (SECOND)); Comment, *Federalism, Due Process, and Minimum Contacts*: World-Wide Volkswagen Corp. v. Woodson, 80 COLUM. L. REV. 1341 (1980).

23. Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 201-03 (1976) (hereinafter cited as Martin, *Constitutional Limitations*); Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 82-88 (1978); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1128-32 (1966). See generally Martin, *Personal Jurisdiction*, *supra* note 3.

24. In *Allstate Insurance Co. v. Hague*, the plurality opinion presented three prior decisions which noted that the failure of the state court under review to possess judicial jurisdiction did not necessarily imply that application of that state's governing law would also have been unconstitutional. 449 U.S. at 330 n.23. See *Kulko v. Superior Court*, 436 U.S. 84, 98 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 215 (1977); *Hanson v. Denckla*, 357 U.S. 235, 254, n.27 (1958). To this list may be added *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980).

Other signs in the *Hague* plurality opinion, however, suggest a softening of this distinction. See text accompanying notes 27, 30 *infra*.

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

For commentary examining these cases and their possible significance, see Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77; Kamp, *Beyond Minimum Contacts: The Supreme Court's New Jurisdictional Theory*, 15 GA. L. REV. 19 (1980); Martin, *Personal Jurisdiction*, *supra* note 23; Silberman, *supra* note 23; Comment, *supra* note 22.

26. 281 U.S. 397 (1930). (*Dick*, a Texan, acquired an interest in a vessel in Mexican waters. He received an assignment of a fire insurance policy covering the vessel in Mexican waters. The policy, originally issued by a Mexican insurance company to a Mexican resident, stipulated that suit for the collection of a claim must be filed within one year from the date of loss. *Dick* brought suit on the policy in a Texas court more than one year after the alleged loss. Jurisdiction was obtained by garnishing two American insurance companies who

case in which the Supreme Court held that the Texas state court's application of its law, unsupported by a Texas connection with the controversy, violated due process, the *Hague* plurality observed: "There would be no jurisdiction in the Texas Courts [*sic*] to entertain such a lawsuit today."²⁷ The plurality cited *Rush v. Savchuk*²⁸ and *Shaffer v. Heitner*²⁹ for this proposition and later added: "Here, of course, jurisdiction in the Minnesota courts is unquestioned, a factor not without significance in assessing the constitutionality of Minnesota's choice of its own substantive law."³⁰ The plurality also noted, "the decision that it is fair to bind a defendant by a State's laws and rules should prove to be highly relevant to the fairness of permitting that same State to accept jurisdiction for adjudicating the controversy"³¹ and that "both inquiries 'are often closely related and to a substantial degree depend upon similar considerations.'"³² Although only the plurality held this view of the relationship between jurisdictional and choice-of-law reviewing doctrines,³³ this movement toward their consolidation gives cause for concern.

The plurality is correct in suggesting that tightened standards for judicial jurisdiction will deprive some courts of the opportunity to reach questionable choice-of-law results. One can note additional troublesome, perhaps unconstitutional, choice-of-law decisions which could not recur after *Rush*. In both *O'Connor v. Lee-Hy Paving Corp.*³⁴ and *Rosenthal v. War-*

pleaded the one year contractual limitation as a defense. The United States Supreme Court held that Texas had insufficient contact with the controversy to make Texas law applicable.)

27. 449 U.S. at 325 n.12.

28. 444 U.S. 320 (1980).

Rush invalidated as a violation of due process the attempt by Minnesota courts to secure quasi in rem jurisdiction through the attachment of an insurance company's contractual obligation to its insured. The best known case employing this technique was *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). For a discussion of the *Seider* doctrine and its abolition by *Rush*, see *Kamp, supra* note 25, at 25-29.

Texas state court jurisdiction in *Home Insurance Co. v. Dick* was obtained through in rem garnishment of the reinsurance obligations of two New York insurers. *Home Ins. Co. v. Dick*, 281 U.S. 397, 402 (1930). The *Hague* plurality is correct in suggesting such jurisdiction is impossible after *Rush v. Savchuk*.

29. 433 U.S. 186 (1977).

30. 449 U.S. at 330 n.23.

31. *Id.* (quoting *Shaffer v. Heitner*, 433 U.S. 186, 225 (1977) (Brennan, J., concurring in part and dissenting in part)).

32. *Id.* (quoting *Shaffer v. Heitner*, 433 U.S. 224-25 (1977) (Brennan, J., concurring in part and dissenting in part)).

33. In his concurrence, Justice Stevens appears to resist softening the distinction between the two reviewing doctrines. *Id.* at 320-21 n.3.

34. 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978).

ren,³⁵ the Second Circuit permitted a New York plaintiff the benefit of New York tort law although virtually all other contacts were in defendant's home state. The choice-of-law results in both cases have been strongly criticized.³⁶ Because jurisdiction in both cases was premised on attachment of insurance obligations, neither can recur in light of *Rush v. Savchuk*.³⁷

In two other cases the Supreme Court averted a constitutional confrontation over choice of law when it invalidated assertions of judicial jurisdiction. In *Hanson v. Denckla*,³⁸ the Florida Supreme Court evaded Delaware trust law and applied its own. The result was so contrary to settled choice of law in trusts that it attracted wide criticism,³⁹ including suggestions of unconstitutionality.⁴⁰ It was not necessary, however, for the Supreme Court to resolve the issue, because it concluded that the Florida courts lacked jurisdiction in the case.⁴¹ In *Rush* itself, the majority assumed that the Minnesota court would follow Minnesota's law permitting automobile passengers to recover against their drivers.⁴² This would have posed constitutional difficulties, because the case arose from an automobile accident in Indiana involving two Indiana residents, and the Indiana guest statute would have prevented recovery.⁴³ The Court's ruling on jurisdiction again precluded the need to reach the conflict-of-law issue.⁴⁴

The Court did not question the jurisdiction of the Minnesota forum over Allstate.⁴⁵ Nor do the facts suggest that Allstate could have raised an effective challenge under current

35. 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973).

36. Regarding *Rosenthal*, see Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94, 135-36 (1976); Martin, *Constitutional Limitations*, *supra* note 23, at 225-27; Reese, *supra* note 22, at 1605-06. Regarding *O'Connor*, see Rosenberg, *A Comment on Neumeier*, 34 ARK. L. REV. 231, 240 (1980); Silberman, *supra* note 23, at 101.

37. Both *O'Connor* and *Rosenthal* relied on New York's *Seider* doctrine. Concerning the effect of *Rush* on *Seider*, see Kamp, *supra* note 25, at 25-29.

38. 357 U.S. 235 (1958).

39. See, e.g., Kirgis, *supra* note 36, at 146 n.201; von Mehren & Trautman, *supra* note 23, at 1174-75.

40. Kirgis, *supra* note 36, at 144-46.

41. For a general discussion of the case, see Scott, *Hanson v. Denckla*, 72 HARV. L. REV. 695 (1959).

42. 444 U.S. at 325 n.8. The majority's prediction would probably have been borne out. See note 14 *supra*.

43. 444 U.S. at 322. See generally notes 134-35 *infra* and accompanying text.

44. See note 28 *supra*.

45. See note 30 *supra* and accompanying text. Jurisdiction was conceded by the dissenting justice of the Minnesota Supreme Court, 289 N.W.2d at 50 (Otis, J., dissenting) and by Allstate, Brief for Petitioner at 6, 449 U.S. 302 (1981).

jurisdictional doctrine. Allstate did a substantial amount of business in Minnesota,⁴⁶ and there was nothing to suggest that Allstate would undergo hardship or great inconvenience if forced to defend in Minnesota instead of the neighboring state of Wisconsin where the accident occurred.⁴⁷

Exploration of considerations of relative fairness and convenience to the defendant in plaintiff's selection of a Minnesota forum is central to a contemporary inquiry concerning judicial jurisdiction.⁴⁸ The same inquiry provides little insight, how-

46. "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." Brief for Respondent at 6, 449 U.S. 302.

The multistate character of the business activity of insurance companies suggests that there may be many instances where the presence of the defendant insurer may be sufficient to support judicial jurisdiction, yet be insufficiently related to the controversy to support application of the forum rule as governing law. Cf. *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936) (Plaintiff sued in Georgia state court on a life insurance policy naming her as beneficiary. The policy was on her husband's life. The couple purchased the policy when they resided in New York, and plaintiff's husband died there prior to her move to Georgia. The decedent made misrepresentations in obtaining the policy, which would have made it unenforceable under New York law. The Georgia courts, however, applied forum law, which permitted the insurer's obligation to be enforced. The Supreme Court reversed. Writing for the Court, Justice Brandeis stated: "In respect to the accrual of the right asserted under the contract, or liability denied, there was no occurrence, nothing done, to which the law of Georgia could apply. Compare *Home Insurance Co. v. Dick*, 281 U.S. 397, 406." *Id.* at 182.)

47. When judicial jurisdiction is questioned, it seems sensible to measure relative inconvenience between forcing the defendant to defend in the forum selected by the plaintiff and permitting the defendant to defend in the least convenient of other forums which would clearly have jurisdiction over the case. One would expect the adjacent forum of Wisconsin to have been as inconvenient for the defendant as Minnesota. The power of Wisconsin to have imposed judicial jurisdiction in the case cannot be doubted, since both contract and tort dimensions of Hague's controversy with Allstate were centered in Wisconsin. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); RESTATEMENT (SECOND) *supra* note 22, at §§ 35-36; von Mehren & Trautman, *supra* note 23, at 1144-53.

Moreover, because of its policies issued and in force in Minnesota, Allstate probably had standing arrangements to defend suits brought there, and hence the inconvenience of defending the *Hague* case in Minnesota was not as great as it would have been if Minnesota were an unfamiliar forum. This point was noted by the *Hague* plurality, though in an inappropriate context. See note 111 *infra* and accompanying text.

48. Professors von Mehren and Trautman described "the relation of the parties litigant to the forum and litigational and enforcement considerations (for example, convenience of witnesses and feasibility of local enforcement)" as "basic to all thinking about jurisdiction to adjudicate . . ." von Mehren & Trautman, *supra* note 23, at 1128.

Following the "minimum contacts" approach of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), the Court in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) observed:

ever, into the propriety of the selection of Minnesota law to determine the rights and duties of the parties.⁴⁹ The Minnesota courts in *Hague* favored their own insurance law over what they assumed to be conflicting insurance law of Wisconsin, even though Wisconsin was the site of the accident, the residence of all parties to the accident, the residence of the plaintiff at the time of the accident, the place where all related vehicles were garaged and licensed, the place where the parties entered into the insurance contract, and the place where premiums were paid and the policy retained.⁵⁰ This is a disturbing choice-of-law result, one aptly described by Justice Stevens in his con-

The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

Id. at 291-92.

There is little material in the first function for purposive development of rules to control choice-of-law abuses. *See* note 49 *infra*. Similarly, the decisions of the Supreme Court have left the meaning of the second function something of a cipher. Comment, *supra* note 22, at 1345, 1352-53. The search for possible meanings of "federalism" in the context of "minimum contacts" has recently become active. Kamp, *supra* note 25, at 22-24; Reese, *supra* note 22, at 1591-94; Comment, *supra* note 22, at 1344-45.

The most plausible exegesis of "federalism" in this context is suggested in *Pennoyer v. Neff*, 95 U.S. 714 (1878). Within the federal system, the authority of judgments of a sister state was greater than those from the courts of foreign nations because of article IV, section 2 of the United States Constitution, the full faith and credit clause. But even that authority would under certain circumstances be open to question because of the due process clause of the fourteenth amendment.

The two provisions of the United States Constitution which are illuminated in striking the balance of the "minimum contacts" test of judicial jurisdiction are the same two most frequently employed in the constitutional review of choice-of-law decisions. *See* notes 101-06 *infra* and accompanying text. This may create confusion. It seems to me, however, that they are employed differently in each setting. To the extent that notions of "federalism" require a broader concept of judicial jurisdiction than can be accommodated solely by notions of fairness and convenience to the defendant in plaintiff's selection of a forum, completion of the concept requires embracing the function of the full faith and credit clause in the recognition and enforcement of judgments, a function distinctly different from use of the clause in choice-of-law review. *See* note 105 *infra* and accompanying text.

49. "[I]deally, the choice-of-law question—the relationship between the underlying controversy and the forum—should be of little significance for the jurisdictional problem." von Mehren & Trautman, *supra* note 23, at 1128-29. *See* Silberman, *supra* note 23, at 82-83.

While it is true that the desire to apply an unfairly parochial substantive rule might provide incentive for the assertion of judicial jurisdiction without "minimum contacts," it is preferable to be vigilant in administering the doctrine as it is, rather than larding it with new, choice-of-law dimensions. *But see* Martin, *Personal Jurisdiction*, *supra* note 3.

50. *See* note 9 *supra*. *See also* 289 N.W.2d at 51 (Otis, J., dissenting).

curing opinion as "plainly unsound as a matter of normal conflicts law."⁵¹

Although the doctrine of judicial jurisdiction may operate to preclude occasions of aberrant or excessively parochial state choice of law, there is a need for the Supreme Court to review state conflicts decisions. *Hague* and other court decisions⁵² demonstrate that the reach of the doctrine of judicial jurisdiction is insufficient to recommend it as an adequate surrogate for Supreme Court review of state choice-of-law decisions, and that it cannot be considered an adequate substitute for control of choice-of-law abuses through purposive doctrine.

B. NATIONAL CHOICE OF LAW AS A BASIS FOR STATE CHOICE-OF-LAW REVIEW

Commentators have advocated the creation of national choice-of-law rules.⁵³ Unfettered choice-of-law decision mak-

51. 449 U.S. at 324 (Stevens, J., concurring). For other criticisms of *Hague*, see Martin, *Personal Jurisdiction*, *supra* note 3, at 883; Note, *supra* note 14, at 1191.

52. See, e.g., *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964) (application of Oregon law to frustrate the recovery of a California plaintiff defrauded as the result of a contract solicited in California. The result is unsatisfactory and of questionable constitutionality.). See also Reese, *supra* note 22, at 1607. The facts of *Lilienthal* suggest that the application of Oregon law subjected the California plaintiff to unfair surprise. See note 109 *infra* and accompanying text. At the same time, the defendant's residence in Oregon provided judicial jurisdiction. *Milliken v. Meyer*, 311 U.S. 457 (1940); *von Mehren & Trautman*, *supra* note 23, at 1137.

It may be that this situation will arise less frequently than the one suggested by *Hague* and *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936). See note 46 *supra*. Plaintiff would typically look for a more hospitable forum than the one selected in *Lilienthal*. In many cases, if the substantive law favored by plaintiff can constitutionally be applied, he or she need only file suit in that law's home state. In her excellent article on jurisdiction, Professor Silberman suggested that "if a court has the power to apply its own law, it should have the power to exercise jurisdiction over the action." Silberman, *supra* note 23, at 88 (emphasis in original). The roots of constitutionally valid choice-of-law and judicial jurisdiction may be too dissimilar, however, to readily permit the assumption that satisfaction of the first invariably subsumes questions concerning the second. As a separate matter, it is at least arguable that a forum's power to impose judicial jurisdiction must be legislatively authorized before it becomes effective. See *Kulko v. Superior Court*, 436 U.S. 84, 98 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 214 (1977); cf. *Wuchter v. Pizzutti*, 276 U.S. 13 (1928) (Court struck down as a violation of due process a state statute providing that state residents could serve process on the Secretary of State as the agent of non-resident motor vehicle drivers on state highways, where there was no provision making it reasonably probable that the non-resident defendant would receive notice of service). But see *Shaffer v. Heitner*, 433 U.S. 186, 221 (1977) (Brennan, J., concurring in part and dissenting in part).

53. Horowitz, *Toward a Federal Common Law of Choice of Law: A Suggested Approach*, 14 U.C.L.A. L. REV. 119 (1967); Stimson, *Simplifying the Con-*

ing⁵⁴ may arguably produce results that impinge on federal interests.⁵⁵ Judges can create federal common law to protect and to advance these interests.⁵⁶ Although Congress would undoubtedly have the authority to enact choice-of-law rules, it is ill-suited to the task.⁵⁷ Conflicts law would more easily evolve as federal common law.⁵⁸

The *Hague* court, however, expressly declined the opportunity to create national conflicts law. Justice Brennan began his analysis in the plurality opinion by disavowing an intent either to question the Minnesota Supreme Court's choice of a conflicts methodology,⁵⁹ or to indicate "whether we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court."⁶⁰ Justice Stevens in his concurrence stated the Court's position even more directly: "It is not this Court's function to establish and impose upon state courts a federal choice-of-law rule"⁶¹

In many respects, the case for initiating a federal common law of conflicts in *Hague* was attractive. Over the past twenty years local bias in choice of law has become a growing concern.⁶² National choice-of-law rules could reverse that trend.

dict of Laws: A Bill Proposed for Enactment by the Congress, 36 A.B.A. J. 1003 (1950); Trautman, *supra* note 8.

54. See note 62 *infra*.

55. Underpinnings of federal concern which provide the authority for the creation of national choice of law include the full faith and credit clause and the fourteenth amendment. Trautman, *supra* note 8, at 114 n.36. But see A. EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS 29 (1962). Regarding other sources of authority, see Horowitz, *supra* note 53, at 1195 (the Commerce Clause); *id.* at 1204-05 (the Rules of Decision Act, 28 U.S.C. § 1652 (1976)); Trautman, *supra* note 8, at 114 n.36 and Horowitz, *supra* note 53, at 1201 (federal questions arising from interstate disputes). To the list could be added the Privileges and Immunities Clause. U.S. CONST. art. IV, § 2.

56. See Trautman, *supra* note 8, at 114.

57. "[S]ince codification of choice-of-law rules runs in the teeth of the current trend in choice of law and is ill-adapted to the needs of a federal system, a choice-of-law code does not offer an appealing solution." Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROB. 706, 752 (1963).

58. Horowitz, *supra* note 53, at 1194; Trautman, *supra* note 8, at 114. But see Stimson, *supra* note 53.

59. 449 U.S. at 307.

60. *Id.*

61. *Id.* at 332.

62. "[C]ourts frequently appear all too eager to use contemporary choice-of-law analysis to justify local regulation of multistate disputes despite insubstantial local relationships." 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. 1063-64 (1979). See also Sedler, *supra* note 14, at 995 n.87; von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 944-46 (1975). For case ex-

National choice of law would produce the additional benefit of freeing federal diversity courts from the difficult problem of determining and applying local conflict-of-law rules.⁶³

amples in addition to *Hague*, see Alexander, *supra*, at 1064 n.5; notes 34-35 *supra* and accompanying text. But, for examples of principled forum self-denial, see Trautman, *supra* note 8, at 108, n.11.

63. *Klaxon v. Stentor*, 313 U.S. 487 (1941).

During the period between the Supreme Court decisions in *Erie v. Tompkins*, 304 U.S. 64 (1938) and *Klaxon*, there was uncertainty whether choice-of-law rules for federal courts sitting in diversity were still permissible or whether they were part of the general common law invalidated by *Erie*. *Klaxon* determined them to be the latter and, hence, impermissible. Federal diversity courts were instructed to apply the choice-of-law rules of the states where they sat.

The range of critical response to *Klaxon* has run from disapproval, Baxter, *Choice of Law and Federal System*, 16 STAN. L. REV. 1, 41 (1963); Weintraub, *The Erie Doctrine and State Conflict-of-Laws Rules*, 39 IND. L.J. 228 (1964), to approval, ALL STUDY OF THE DIVISION OF JURISDICTIONS OF STATE AND FEDERAL COURTS 376 n.7 (1969).

Klaxon did not naturally follow from *Erie*. *Erie* stopped the intrusion of federal general common law on expressions of local policy reflected in state rules of liability, an intrusion typified in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928). The pull of federal interest in such cases was weak. On the other hand, the federal interests in ameliorating the effects of parochial choice of law are far easier to grasp. See note 55 *supra*. It seems inappropriate, if not untoward, for federal diversity judges to be as chauvinistic in championing local state law as their state court counterparts.

Additional analytic problems have taxed federal courts in administering the *Klaxon* rule. First, ascertaining state law when the same "is confused or nonexistent" is a perennial problem under *Erie*. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 290 (1946). See, e.g., *Mason v. American Emery Wheel Works*, 241 F.2d 906 (1st Cir. 1957). Nowhere is the problem greater than in ascertaining state conflicts law under *Klaxon*. This is due in part to the inherent difficulty of conflicts doctrine, see note 94 *infra* and accompanying text, and in part to the inconsistency of state choice of law brought about by local bias. For instance, New York state decisions have favored home state litigants: *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 432, 335 N.Y.S.2d 64 (1972); home state law: *Kell v. Henderson*, 26 A.D.2d 595, 270 N.Y.S.2d 552 (1966); or both: *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968). Second, administration of the *Klaxon* rule has posed perplexing federal venue problems. It is now settled that the state choice-of-law rule of the transferor forum is generally to be applied. *VanDusen v. Barrack*, 376 U.S. 612 (1964). The troublesome question remains whether *VanDusen* should be followed in transfers under 28 U.S.C. § 1404(a) when plaintiff's case clearly would have been dismissed on *forum non conveniens* grounds if he had filed in the state court of the transferor forum. To follow *VanDusen* in such a case would appear to give plaintiff unfair leverage in shopping for favorable conflicts law. Yet, this was the result in *In re Air Crash Disaster at Boston, Mass.*, 399 F. Supp. 1106 (D. Mass. 1975).

Despite the problems posed by *Klaxon*, the Supreme Court recently reiterated the rule in *Day & Zimmerman v. Challoner*, 423 U.S. 3 (1975), and federal diversity judges generally seem unabashed by the character of state conflicts law they are called upon to apply. See notes 34-36 *supra* and accompanying text. If conflicts law became federal common law, all choice-of-law doctrine

The facts of *Hague* also made it a good vehicle for the introduction of national common law. The harshness of the case would have illuminated and reinforced the Court's lawmaking justification. The relative simplicity of the case would have permitted the Court to postpone refining or elaborating on its new conflicts doctrine until closer and, hence, more difficult cases appeared.⁶⁴

Had the Supreme Court been willing to take the step advocated by the national choice-of-law argument, both the result in *Hague* and the decisional method used to reach it would have changed. A sound choice-of-law result⁶⁵ would have replaced the "plainly unsound"⁶⁶ result reached by the Minnesota Supreme Court, and the *ratio decidendi* in the opinion explaining the reversal would have comprised the initial phase of an evolving federal common law of conflicts. The constitutional dimension of the Supreme Court's review would have eventually shifted in focus from due process and full faith and credit⁶⁷ to the paramount authority of federal common law under the supremacy clause.⁶⁸

When the nature and implications of the option are examined further, however, the *Hague* court seems correct in declining to make federal conflicts law. Approaches to choice-of-law decision making are not infinite in number and, should the Supreme Court supervise⁶⁹ the creation of a body of national

would become as federal in character as choice of law now is in federal cases where federal questions are adjudicated, *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973); *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189 (2d Cir. 1955), and *Klaxon* would not be so much as overruled as superceded.

64. See H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 156-57 (10th ed. 1958); E. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 4, 8-9 (1948). For an interesting discussion of growth and change of choice of law through the judicial process, see Powers, *Formalism and Nonformalism in Choice-of-Law Methodology*, 52 WASH. L. REV. 27 (1976).

65. A sound choice-of-law result would have been the Supreme Court's selection of Wisconsin law. See note 50 *supra* and accompanying text.

66. See note 51 *supra* and accompanying text.

67. See notes 101-06 *infra* and accompanying text.

68. U.S. CONST. art. VI. See A. EHRENZWEIG, *supra* note 55, at 29; Baxter, *supra* note 63, at 42.

On the relationship between supremacy clause doctrine and more familiar concepts of unconstitutionality, see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 970 (2d ed. 1973).

69. Ideally, a good deal of the formulation of national choice of law would be undertaken by state and federal courts while the Supreme Court would use its jurisdiction to rectify off-course movements and create essential elements of the methodology. On the contemporary significance of Supreme Court lawmaking, see P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 31-39

conflicts law, the result would probably resemble one of the four choice-of-law methodologies now generally in use:⁷⁰ the late Professor Currie's government interest analysis,⁷¹ Professor Leflar's choice-influencing considerations,⁷² the First Restatement,⁷³ or the Second Restatement.⁷⁴ Discussion concerning the meanings of these methodologies and their merits and demerits⁷⁵ in application have produced a vast amount of commentary. It is important for the purposes of this Article, however, to assess how each methodology would work as a vehicle of national choice of law and, ultimately, whether any of them could produce satisfactory results. That makes it necessary to determine whether each methodology tolerates forum favoritism or tries to impose neutrality.

Both the government interest and choice-influencing con-

(1976); Betten, *Institutional Reform in the Federal Appellate Courts*, 52 IND. L.J. 63, 68 (1976).

70. For a state by state survey of choice-of-law methodologies in use, see *Gutierrez v. Collins*, 583 S.W.2d 312, 316 n.2 (Tex. 1979). In addition, see R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 305-06 n.47 (2d ed. 1971).

Prior writings on federal intervention in the choice-of-law process seem to suggest that one could stop short of the creation of an entire choice-of-law methodology, Baxter, *supra* note 63, or, at least, that the evolving methodology need not closely resemble one of the four now in general use. Horowitz, *supra* note 53; Trautman, *supra* note 8. These assumptions about how state and lower federal courts could be guided no longer seem realistic. Case developments formed the four methodologies into irresistible frames of judicial reference.

71. For contemporary descriptions of this methodology, see Cavers, *Contemporary Conflicts Law in American Perspective*, III RECUEIL DES COURS 75, 146-49 (1970); Sedler, *The Government Interest Approach to Choice of Law: An Analysis and Reformation*, 25 U.C.L.A. L. REV. 181 (1977).

72. See R. LEFLAR, AMERICAN CONFLICTS LAW 205-19 (3d ed. 1977); Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966) (hereinafter cited as Leflar, *Choice-Influencing*).

73. RESTATEMENT OF CONFLICT LAWS (1934). The original Restatement was largely a reflection of the conflicts thinking of Professor Joseph Beale. Beale's approach is discussed in von Mehren, *supra* note 62, at 929-30, 943-45.

74. RESTATEMENT (SECOND), *supra* note 22. On the approach of the RESTATEMENT (SECOND), see Cavers, *supra* note 71, at 143-44, 222-23; Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROB. 679 (1963); note 89 *infra*.

75. Each methodology has had its detractors. A representative list of criticism of the four methodologies includes the following: Government interest: Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); Rosenberg, *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 551 (1968); Choice-Influencing Considerations: W. REESE & M. ROSENBERG, CASES AND MATERIALS ON CONFLICT OF LAWS 473-74 (7th ed. 1978); Trautman, *Rule or Reason in Choice of Law: A Comment on Neumeier*, 1 VT. L. REV. 1, 14 (1976); First Restatement: W. COOK, THE LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS (1942); Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Second Restatement: Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for its Withdrawal*, 113 U. PA. L. REV. 1230 (1965); Sedler, *supra* note 14.

siderations methodologies lack an overriding assurance of neutrality in choice-of-law results. In its early form, the government interest approach appeared to require the application of forum law whenever "the court finds that the forum state has interest in the application of its policy."⁷⁶ Professor Currie's later writings suggest a more subdued endorsement of local law,⁷⁷ but not the desideratum of neutrality. In contrast, Professor Leflar's choice-influencing considerations⁷⁸ provide material for principles of forbearance in the application of local law when the court is satisfied that fairness, multistate policies, or the mere pressing interest of another state calls for a different result.⁷⁹ The problem is that the Leflar methodology is pluralistic enough to also include the parochial concern of the government interest analysis,⁸⁰ and so loose-textured that it can easily be manipulated to produce the same results as a government interest approach.⁸¹

76. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 184 (1963). Professor Currie rejected the argument that this approach might be unsatisfactory even if it was determined that the interests of a second state were more affected. He wrote that "a court is in no position to 'weigh' the competing interests, or evaluate relative merits, and choose between them accordingly." *Id.* at 181.

77. See, e.g., Currie, *The Disinterested Third State*, 28 *LAW & CONTEMP. PROB.* 754, 763 (1963). See also Professor Cavers' formulation of Currie's later methodology in Cavers, *supra* note 71, at 146-47.

78. The considerations include:

- A. Predictability of results;
- B. Maintenance of interstate and international order;
- C. Simplification of the judicial task;
- D. Advancement of the forum's governmental interests;
- E. Application of the better rule of law.

Leflar, *Choice-Influencing*, *supra* note 72, at 267.

79. See Rosenberg, *Symposium: Conflict of Laws Round Table: The Value of Principled Preferences*, 49 *TEX. L. REV.* 211, 231 (1971); von Mehren, *supra* note 62, at 952.

80. Forum interests are promoted chiefly through Professor Leflar's final two considerations, "government interest" and the "better rule of law."

81. Professor Leflar offered many hypothetical examples to illustrate applications of his considerations. See Leflar, *Choice-Influencing*, *supra* note 72, at 311-24 (1966); Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 *CAL. L. REV.* 1584, 1588-98 (1966). But he does not appear to advocate that his considerations be given equal weight by judges or that particular considerations always be applied. He seems willing to trust the application of this methodology to the considerable discretion it creates for the judges who use it. See R. LEFLAR, *supra* note 72, at 218. Professor Leflar's methodology has become popular with courts. See W. REESE & M. ROSENBERG, *supra* note 75, at 473. Generally, the results of its application favor the forum state to the same extent as does Professor Currie's test. See, e.g., *Turcotte v. Ford Motor Co.*, 494 F.2d 173 (1st Cir. 1974); *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43 (Minn. 1979); *Schwartz v. Consolidated Freightways Corp.*, 300 Minn. 487, 223 N.W.2d 470, *cert. denied*, 425 U.S. 959 (1976); *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973); *Haines v. Mid-Century Ins. Co.*, 47 Wis. 2d 442, 177 N.W.2d 328 (1970).

The administration of the government interest and choice-influencing considerations tests do not foreclose forum bias. Since the first test exalts parochialism and the second tolerates it, both are inconsistent with the justification for national choice of law⁸² and are unsuitable common law models for the Supreme Court. National common law based upon either approach would be a contradiction in terms.⁸³

The formalistic "vested rights" approach of the First Restatement,⁸⁴ though ostensibly neutral,⁸⁵ has been thoroughly discredited.⁸⁶ The Second Restatement,⁸⁷ the policy-centered yet neutral⁸⁸ methodology that succeeded it, is likely to provide the best model of the four for national choice of law. Yet because the structure of the Second Restatement is both intricate and elastic,⁸⁹ it is amenable to result-oriented judicial

82. See note 62 *supra* and accompanying text.

83. Supreme Court tolerance for the interested forum's advancement of its laws suggests the reason why the Supreme Court declined to make national choice of law in *Hague*. *Allstate Ins. Co. v. Hague*, 449 U.S. at 308-9 n.11. See *Nevada v. Hall*, 440 U.S. 410, 421-22 (1978); *Richards v. United States*, 369 U.S. 1, 15 (1962); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547-48 (1935).

84. See note 73 *supra*.

85. Efforts to avoid the policy-blind rigors of the First Restatement and to reach and apply forum law led to the conceptualization of a number of escape doctrines. This eroded the actual neutrality of the First Restatement. See R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS: CASES-COMMENTS-QUESTIONS* 69-76, 138-43 (2d ed. 1975); Morse, *Characterization: Shadow or Substance?*, 49 COLUM. L. REV. 1027, 1056-62 (1949); Paulson & Sovern, "Public Policy" in the *Conflict of Laws*, 56 COLUM. L. REV. 969, 970-71 (1956).

86. W. REESE & M. ROSENBERG, *supra* note 75, at 664; Powers, *supra* note 64, at 27, 37-38; Sedler, *Choice of Law in Michigan: A Time to Go Modern*, 24 WAYNE L. REV. 829, 830-36; von Mehren, *supra* note 62, at 945.

87. See note 74 *supra*.

88. "[T]he Restatement is written from the viewpoint of a neutral forum which has no interest of its own to protect and is seeking only to apply the most appropriate law." Reese, *supra* note 74, at 692.

89. Section 6 of the Second Restatement contains a constellation of choice-of-law policy considerations ("principles") which is longer than, but (except for omission of the "better rule" test) not unlike, Leflar's list of choice-influencing considerations. See note 78 *supra*. The user is instructed to determine which state's law has the most "significant relationship" to the case. Factual characteristics most likely to be significant to the inquiry are identified as "contacts" to be evaluated. "Contacts" vary according to the substantive nature of the lawsuit. See RESTATEMENT (SECOND) *supra* note 22, at § 145 (torts), § 188 (contracts). Choice-of-law presumptions are made in narrower substantive contexts, subject to the possibility that another state may have a more "significant relationship." *Id.* § 175 (wrongful death—presumptive choice is of "the local law of the state where the injury occurred . . .").

While retaining the First Restatement's outward appearance of providing an extensive regime of rules, the Second Restatement differs sharply by emphasizing party fairness and an instrumental sensitivity to the substantive policies behind rules vying for selection. Consequently, "[a] comparison [of the

manipulation.⁹⁰

Actual instances of unprincipled manipulation of the Second Restatement undoubtedly would have been greater if courts had not felt free to abandon it in favor of methodologies giving legitimating recognition to forum bias.⁹¹ If the Supreme Court imposed a neutral, policy-centered choice-of-law methodology like the Second Restatement, it would face the dilemma of either undertaking a debilitating amount of superintendence through judicial review of state decisions⁹² or presiding over only the illusion of neutrality in the choice-of-law process.

Instances of Supreme Court creation of federal common law have been episodic and undisciplined.⁹³ It becomes relevant, therefore, to question whether the cure of federal common law administered in this most difficult of doctrinal areas⁹⁴ would not be worse than the disease of unprincipled state

First Restatement with the Second Restatement] at almost any point will illustrate the shift away from the rule orientation of the former toward the rather general, often amorphous 'principles' of the latter." Holland, *Modernizing Res Judicata: Reflections on the Parklane Doctrine*, 55 IND. L.J. 615, 619 n.14 (1980).

90. Much of the approach of the Second Restatement depends upon the term "significant relationship." See note 89 *supra*. The term suffers from the lack of a clear meaning. See A. EHRENZWEIG, *supra* note 55, at 361-62; Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 212-13 (1969). Professor von Mehren faults the Second Restatement generally for its failure to "significantly refine and discipline theory and analysis." von Mehren, *supra* note 62, at 964.

91. Compare *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) with *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968). Compare *Bolgrean v. Stich*, 293 Minn. 8, 196 N.W.2d 442 (1972) with *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973).

92. As it is, "[t]he Supreme Court is no longer capable of providing the supervision of federal judicial lawmaking that it once provided." Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 553 (1969). Federal courts of appeals consequently developed "the ability to create and to balkanize national law." Betten, *supra* note 69, at 68. See Shreve, *Questioning Intervention of Right—Toward a New Methodology of Decisionmaking*, 74 NW. U.L. REV. 894, 922 n.116 (1980).

93. See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Jackson, *supra* note 1, at 1. But see Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

The Supreme Court recently expressed reservations about adopting an expansive view of federal law. *City of Milwaukee v. Illinois*, 101 S. Ct. 1784 (1981); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615 (1981).

94. Commentators have called conflicts the "most difficult and most confused of all branches of the law," Rheinstein, *How to Review a Festschrift*, 11 AM. J. COMP. L. 632, 655 (1962); "the most elusive and difficult branch of private international law," von Mehren, *supra* note 62, at 928; and "one of the most baf-

choice-of-law decisions. The potential number of truly bad state choice-of-law decisions may not be sufficiently great⁹⁵ that the benefits from their rectification would justify the convulsive effects that a federal common law of conflicts would produce on conflicts doctrine and judicial administration.

Moreover, some degree of state court parochialism in choice of law may be defensible and even desirable. Justice Stevens correctly observed in *Hague* that the law with which the state judge is familiar, and the only law which the judge's time and library resources may permit him or her to comprehend, is the law of the forum.⁹⁶ The state judges' experience in adjudicating the purely domestic cases which compose the vast majority of most judicial caseloads forms the basis of their relationship with the forum law.⁹⁷ A state judge's initial presumption of the applicability of forum law in every case may be less an act of chauvinism than an understandable and perhaps inevitable institutional reflex.

It is desirable for foreign law carrying a superior claim for application to displace presumptive forum law. In extreme cases, displacement should be constitutionally required.⁹⁸ But a valid local policy of judicial administration may support the initial presumption of the applicability of forum law.⁹⁹ To the extent that national choice of law would invalidate that presumption, it might exceed the appropriate limitations of federal common law.¹⁰⁰

C. CONSTITUTIONAL DOCTRINE AS A BASIS FOR STATE CHOICE-OF-LAW REVIEW

None of the portions of the United States Constitution suggested as possibly governing state choice of law provides clear

filing subjects of legal science," B. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 67 (1928), quoted in Jackson, *supra* note 1, at 2.

95. It is questionable whether the number of greatly troublesome conflicts results is large when compared to all conflicts cases decided. See Reese, *supra* note 22, at 1594 n.37. Tightened judicial jurisdiction doctrine will decrease the number even more. See notes 27-44 *supra* and accompanying text.

96. 449 U.S. at 326 n.14 (Stevens, J., dissenting). But cf. *Resor-Hill Corp. v. Harrison*, 220 Ark. 521, 524, 249 S.W.2d 994, 996 (1952) ("In our library we have the statutes and decisions of every other State and it seldom takes more than a few hours to find the answer to a particular question.").

97. See B. CURRIE, *supra* note 76, at 82; von Mehren, *supra* note 62, at 942.

98. See notes 133-49 *infra* and accompanying text.

99. See notes 96-97 *supra* and accompanying text.

100. See generally Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

direction.¹⁰¹ It appears sensible to confine constitutional source material to the due process¹⁰² and full faith and credit¹⁰³ clauses as all the *Hague* opinions do.¹⁰⁴ It is not profitable to make fine distinctions between the respective reaches of the two clauses, because in the context of choice-of-law review,¹⁰⁵ both function in similar ways.¹⁰⁶

101. For surveys of textual portions of the Constitution which courts have considered with reference to the choice-of-law problem, see Martin, *Constitutional Limitations*, *supra* note 23, at 145-46; Note, *Unconstitutional Discrimination in Choice of Law*, 77 COLUM. L. REV. 272, 273 (1977).

102. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

103. U.S. CONST. art. IV, § 1.

104. 449 U.S. at 304.

"[T]he only provisions successfully invoked with any regularity are the due process and full faith and credit clauses." Martin, *Constitutional Limitations*, *supra* note 23, at 186. See also Simson, *State Autonomy in Choice of Law: A Suggested Approach*, 52 S. CAL. L. REV. 61 (1978).

It is the position of this Article that the due process and full faith and credit clauses provide the best material for formulating constitutional standards of choice-of-law review. For suggestions to the contrary, see Kirgis, *supra* note 36, at 95 n.3; Note, *supra* note 101.

105. The full faith and credit clause produces unique and far more stringent constitutional reviewing doctrine when the question is, instead, whether to recognize and enforce a sister-state judgment. The clause generally places states under a compulsion to honor sister-state judgments, *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935), subject only to the possible avenues of collateral attack permitted by due process. See note 48 *supra*. On extensions of the doctrine to govern relations between state and federal courts, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 226 n.5 (1978).

Professor Paul Freund offered the following reasons for the different effects of the full faith and credit clause in the choice-of-law and judgment enforcement contexts:

Partly the difference lies in the opportunity theretofore given for reversing the judgment on direct review and the policy of putting an end to litigation Partly the difference may be due to the relatively more settled doctrines of merger, bar and res judicata, as compared with the overlapping reach of statutes in a mobile society. Partly the difference is traceable . . . to the different treatment accorded judgments and statutes in a mobile society. Partly the difference is traceable . . . to different treatment accorded judgments and statutes in the acts of Congress carrying out the Full Faith and Credit Clause

Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1225 (1946).

106. "When the question is limited to choice of law in cases not yet reduced to judgment, . . . the only apparent significant distinction between the two clauses is that due process may require adherence to the law of another country, whereas full faith and credit is limited to interstate applications." Martin, *Constitutional Limitations*, *supra* note 23, at 186. Absent that distinction it makes no practical difference whether the decision is based upon the failure to give full faith and credit to the law of the only state that could constitutionally apply its law or upon the inability of the forum state under due process to apply its own law in determining the case. Reese, *supra* note 22, at 1589. In addition, see Cavers, *supra* note 71, at 110.

At the same time, an apparently intractable disagreement exists over which of the two clauses is best capable of accommodating a theory of conflicts

Attempts by the Supreme Court to develop from the due process and full faith and credit clauses an extensive framework of rules for choice-of-law review would verge on the creation of national choice of law.¹⁰⁷ It is important, therefore, to confine the adoption of reviewing standards to a very few.¹⁰⁸

The *Hague* opinions provide evidence of two choice-of-law reviewing standards. The first is that the choice-of-law result should satisfy notions of predictability. More precisely, the law chosen should not cause unfair surprise¹⁰⁹ to the litigant disadvantaged by it. The suggestion in the *Hague* dissent¹¹⁰ that the Court should have permitted the Minnesota Supreme Court to apply its law only if it were legitimately interested in the case represents a partial formation of a second standard. It is the position of this Article that this second standard, with greater development, should have served as a basis for reversal of the Minnesota Supreme Court's decision.

1. *Unreasonable Surprise*

None of the *Hague* opinions indicate that Allstate would suffer unfair surprise if Minnesota law were applied in the case. Justice Brennan argued for the plurality that Allstate did business in Minnesota and, therefore, had notice of Minnesota law, including its choice-of-law rule.¹¹¹ This analysis confuses Allstate's susceptibility to Minnesota's judicial jurisdiction with the appropriateness of Minnesota's choice-of-law result.¹¹² Jus-

review. Compare Reese, *supra* note 22; Kirgis, *supra* note 36 (advocating due process) with Martin, *Constitutional Limitations*, *supra* note 23; Martin, *A Reply to Professor Kirgis*, 62 CORNELL L. REV. 151 (1976) (advocating full faith and credit). To a large degree, the debate is over precedent and it seems unprofitable to extend it here, particularly since constitutional precedent on conflicts is clouded and insufficiently complete to provide a final answer for the situation presented in *Hague*. See note 124 *infra*. See generally notes 133-49 *infra* and accompanying text.

107. A precise line between the two would be difficult to draw. See Trautman, *supra* note 8, at 114 n.37.

108. The constitutional latitude thus afforded the states by virtue of their respective interests is not, of course, necessarily the measure of what may be desirable as a choice of law by either state, any more than the point at which a state may constitutionally curb picketing is necessarily the soundest limit on picketing as a matter of labor law. Freund, *supra* note 105, at 1223.

109. The term and concept are taken from Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449, 457-60 (1959) (hereinafter cited as Weintraub, *Limitations*). See also R. WEINTRAUB, *supra* note 70, at 271-72.

110. 449 U.S. at 334 (Powell, J., dissenting).

111. 449 U.S. at 317-18.

112. See notes 48-49 *supra* and accompanying text.

tice Stevens believed that the application of Minnesota law would not upset Allstate's reasonable expectations, since it failed to include either a choice-of-law provision or an anti-stacking provision in the decedent's policy.¹¹³ This analysis seems to place an onerous burden of anticipation on Allstate.¹¹⁴

Although a better argument for unfair surprise in *Hague* may exist,¹¹⁵ none of the Supreme Court opinions recognized one, and the extent to which foreseeability inquiry could have led to reversal to establish it is uncertain.¹¹⁶ The case then raises the issue whether the Court might administer a second constitutional standard, one not grounded on concerns of foreseeability, to overturn *Hague*.¹¹⁷

2. *Demonstrable State Interest*

The dissenters in *Hague* agreed "that no reasonable expectations of the parties were frustrated."¹¹⁸ Yet they would have reversed the Minnesota Supreme Court's decision, because they were unable to conclude that "application of Minnesota's substantive law reasonably furthers a legitimate state interest."¹¹⁹

In his plurality opinion, Justice Brennan wrote that "the Minnesota contacts with the parties and the occurrence are obviously significant."¹²⁰ The three "contacts" offered in the opinion were that: (1) the decedent commuted to work in Minnesota for fifteen years prior to his death, (2) Allstate was licensed and doing business in Minnesota, and (3) plaintiff became a Minnesota resident after her husband's death and commenced probate proceedings in Minnesota.¹²¹ The opinion argued that these contacts affected the choice-of-law question

113. 449 U.S. at 330 (Stevens, J., concurring).

114. Nevertheless, Professor Weintraub surveyed insurance industry practices, and concluded that "to talk of 'surprising' the insurer is very likely to be talking nonsense." R. WEINTRAUB, *supra* note 70, at 272-73. See also Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 YALE L.J. 554 (1961); Comment, *Driving Under the Influence of Alcohol: A Wisconsin Study*, 1970 WIS. L. REV. 495. But see John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936), summarized in note 46 *supra*; Weintraub, *Limitations*, *supra* note 109, at 457-58 (suggesting an element of unfair surprise to the insurer in Yates from the application of forum law).

115. See 289 N.W.2d at 54 (Otis, J., dissenting); Note, *supra* note 14, at 1190-91 (1980).

116. See notes 113-14 *supra* and accompanying text.

117. See note 135 *infra* and accompanying text.

118. 449 U.S. at 336 (Powell, J., dissenting).

119. *Id.* at 337 (Powell, J., dissenting).

120. *Id.* at 311.

121. *Id.* at 313-19.

presented to the Minnesota courts and that they brought the case under Supreme Court precedents upholding the forum's choice of its law.¹²² The dissent correctly rejected the purported contacts as "either trivial or irrelevant to the furthering of any public policy of Minnesota,"¹²³ and correctly found the plurality's attempt to fit the facts of *Hague* under existing precedent as unpersuasive.¹²⁴

122. *Id.* at 307-19. The seven cases advanced by the plurality are reviewed at note 124 *infra*.

123. *Id.* at 337 (Powell, J., dissenting). An argument can be made that Minnesota has an interest in applying its rule permitting greater compensation for plaintiffs domiciled in Minnesota at the time of suit. "It is not apparent why the degree of a state's interest in the welfare of a domiciliary should necessarily depend upon the length of time that he has been domiciled there." Reese, *supra* note 22, at 1603.

Yet, if one wishes to impute an interest to Minnesota in this sense, then it arose too late to be fairly counted in the choice-of-law inquiry. *Id.* To put the matter another way, the plaintiff in *Hague* should not have the power to change the substantive character of the suit through acts unilaterally taken after the cause of action arose. See Note, *supra* note 14, at 1190-91; Address by Prof. Linda Silberman, Meeting of Conflict of Laws Section, Conference of Association of American Law Schools (Jan. 4, 1981).

124. 449 U.S. 332-40 (Powell, J., dissenting). The dissent actually distinguished only three of the plurality's cases: *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939); and *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935). The other four cases advanced by the plurality, *Nevada v. Hall*, 440 U.S. 410 (1979); *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964); *Carroll v. Lanza*, 349 U.S. 408 (1955); and *Watson v. Employers Liab. Assurance Corp.* 348 U.S. 66 (1954), are distinguishable, however, on the same basis.

It is helpful to read past precedent supporting application of forum law by identifying a "clear critical event within the state whose law is being applied . . ." Martin, *Constitutional Limitations*, *supra* note 23, at 201. All of the plurality's seven precedents involve such an event: *Nevada v. Hall*, 440 U.S. 410 (1979) (tort—*injury in forum state*); *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964) (insurance coverage—*casualty loss in the forum state*); *Carroll v. Lanza*, 349 U.S. 408 (1955) (tort—*injury in forum state*); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954) (direct action against insurer—*injury in forum state*); *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947) (death recovery—*employer and decedent domiciled in the District of Columbia, site of the forum*); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939) (worker's compensation—*injury in forum state*); and *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935) (worker's compensation—*employment contract made in forum state*). In contrast, it is not possible to place a "clear critical event" in the *Hague* case within Minnesota. See note 123 *supra* and accompanying text.

It is easy to conclude that the dissenters had the better argument concerning precedent. *Hague* is far closer to *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), see notes 26-28 *supra* and accompanying text, and *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936), see note 46 *supra*, than it is to the cases advanced by the plurality.

It is questionable, however, whether the matter should be left there. Supreme Court reviewing doctrine is unsettled. See *Shaffer v. Heitner*, 433 U.S. 186, 224 (1977) (Brennan, J., concurring in part and dissenting in part); *Jackson*, *supra* note 1, at 1. Even if it were otherwise, the pull of *stare decisis* should not

The approach to affirmance taken by Justice Stevens in his concurrence, however, is more difficult to dismiss. Justice Stevens, also troubled by the plurality's contacts analysis, disassociated himself from it¹²⁵ and posed a different challenge to the dissent:¹²⁶ if state courts were entitled to an initial presumption that selection of their own law is constitutional,¹²⁷ then only a showing of tangible harm from selection of forum law could overcome that presumption. Justice Stevens found no tangible harm in the selection of the Minnesota stacking rule, observing that the choice neither created "unfairness to either litigant"¹²⁸ nor posed "any threat to national unity or Wisconsin's sovereignty . . .".¹²⁹ He concluded that the defendants had not overcome the presumption of validity which Minnesota courts should enjoy in the selection of their own law. Although he expressed disapproval of the choice-of-law approach in *Hague*, he was not prepared to declare it unconstitutional.¹³⁰

Justice Stevens may have overcome the arguments actually offered by the dissent, but the result he reached was unsatisfactory. Adverse effects from the selection of the Minnesota stacking rule may have been less palpable than the ones Justice Stevens searched for under existing doctrine¹³¹ and was unable to find; yet, they should have provided sufficient¹³² justification to declare the state court decisions in *Hague* unconstitutional. The situation presented in *Hague* required new doctrine.

IV. TOWARD RESOLUTION OF THE PROBLEM IN *HAGUE*

The standard of foreseeability, or avoidance of unfair surprise, has proven the most durable for constitutional review of

be as great, because reviewing doctrine is a constitutional matter. *See Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627, n.2 (1974) (Powell, J., concurring); E. LEVI, AN INTRODUCTION TO LEGAL REASONING 7-8 (1948); Frankfurter, *supra* note 93, at 537 (1947). In a search for the most enlightened and institutionally appropriate standards for Supreme Court review, opportunities created by current precedent might be too confining.

125. 449 U.S. at 331 (Stevens, J., concurring).

126. *Id.* at 320-32 (Stevens, J., concurring).

127. For the rationale supporting the initial presumption, see notes 96-97 *supra* and accompanying text.

128. 449 U.S. at 331 (Stevens, J., concurring).

129. *Id.* at 324 (Stevens, J., concurring).

130. "Although I regard the Minnesota court's decision to apply forum law as unsound as a matter of conflicts law, and there is little in the record other than the presumption in favor of the forum's own law to support that decision, I concur in the plurality's judgment." *Id.* at 331-32 (Stevens, J., concurring).

131. *See* notes 128-29 *supra* and accompanying text.

132. *See* note 141 *infra*.

conflicts decisions.¹³³ This standard explains, in part, the cases upon which Allstate principally relied.¹³⁴ If one were willing to assume that Minnesota's choice of its stacking law did not subject Allstate to unfair surprise, then the Court could have reversed the decision only if it were willing to evaluate the result with reference to a second constitutional standard. This Article suggests that the subsequent standard is that, at least in cases in which the application of the conflicting law of another, *interested* state is an option, a state may constitutionally apply its law only in situations in which the state has a policy which it has some demonstrable interest in advancing. Interest, as used in this Article with reference to the forum or another jurisdiction, is determined by the extent to which the controversy tends to implicate the function or purpose of the substantive rule under consideration.¹³⁵

If values of interstate or international order formed the entire basis for this second standard, it would differ from the predictability standard, which is based on considerations of party fairness. The second standard would then have little applicability to *Hague*. The force of Wisconsin's continuing interest in the antistacking rule is open to greater question than any of the Supreme Court opinions in *Hague* disclose.¹³⁶ It seems clear that if Wisconsin were not merely interested, but extremely interested in the case,¹³⁷ the Court would have decided *Hague*

133. See Rheinstein, Book Review, 32 U. CHI. L. REV. 369, 372 (1965) (reviewing A. EHRENZWEIG, TREATISE ON CONFLICT OF LAWS (1962)); note 109 *supra* and accompanying text.

134. The petitioner relied principally on *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936); *Hartford Accident and Indem. Co. v. Delta Pine and Land Co.*, 292 U.S. 143 (1934); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). Brief for Petitioner at 7-9, *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

Professor Weintraub found the possibility of unfair surprise in all three cases, Weintraub, *Limitations*, *supra* note 109, at 457-60. He later questioned that conclusion with reference to *Home Insurance Co. v. Dick*. See R. WEINTRAUB, *supra* note 70, at 502-03. But see Kirgis, *supra* note 36, at 108 n.53. Justice Stevens found all three cases understandable in terms of foreseeability. 449 U.S. at 327 n.16 (Stevens, J., concurring).

135. Cf. Alexander, *supra* note 62, at 1069 ("Functional choice-of-law analysis premises the existence of a state's 'interest' upon a finding that the state's rule functionally is relevant to the immediate circumstances of the case. In determining whether a state is legitimately interested, then, the court must identify the functions of the rule whose application is advocated.").

136. See note 10 *supra* and accompanying text.

137. Wisconsin's interest could be contrasted with the extreme interest of the State of Nevada in *Nevada v. Hall*, 440 U.S. 410 (1979). The interest of the State of Nevada in the application of Nevada law was great. The University of Nevada and the State of Nevada were defendants in an automobile tort case filed in California. Under Nevada law, sovereign immunity for such suits was waived only up to \$25,000 and then only in Nevada courts. Following, in es-

differently. Given the actual situation, the result in *Hague* appears to impinge less on the sovereign interests of the State of Wisconsin than on the petitioner, Allstate.

The second norm nonetheless applies to *Hague*, because it is also justifiable in terms of party fairness, with only secondary importance attributed to the interests of Wisconsin.¹³⁸ It is a function of the judicial process to attach retrospective and authoritative significance to the behavior of the litigants. It is fair to subject a party to legal detriment—for example, to subject a defendant to liability for his or her past behavior—only if the law creating that detriment reflects some demonstrable interest of the state from which the law is drawn. This should, at the minimum, be true in cases in which application of the law of another state would remove or reduce the detriment and that state has a demonstrable interest in having its law applied.¹³⁹

Cases violating this standard may also suffer from the flaw of unfair surprise. Application of the second standard, however, entails more than retracing ground covered by a predictability inquiry. An analysis of *Hague* indicates that the results of a predictability test can be uncertain.¹⁴⁰ The Court should not always require constitutional challengers to become so well aware of the choice-of-law consequences of their behavior that they experience “unfair surprise” from a subsequent judicial decision. It should have been sufficient in *Hague* that because Minnesota had no genuine interest in the controversy, it could not fairly interpose Minnesota law to deprive Allstate of the

sence, the law of the forum, the California courts permitted a recovery of \$1,150,000. If California's interest in the case had been as minimal as Minnesota's interest in *Hague*, the vindication of the sovereign interests of Nevada would have required reversal. See note 123 *supra* and accompanying text. California's interests were actually much greater, however, since the plaintiffs resided there from the time of the accident, and since the accident occurred in California. Regarding *Nevada v. Hall*, see generally Note, *Sovereign Immunity in Sister-State Courts: Full Faith and Credit and Federal Common Law Solutions*, 80 COLUM. L. REV. 1493 (1980).

138. There can be cases, of course, where the sovereign interests of other jurisdictions have greater importance. See Reese, *supra* note 22, at 1601-05; note 137 *supra* and accompanying text. *Hague*, however, is not an appropriate vehicle for the elaboration of doctrine to guide and explain the regulation of these cases.

139. In cases where, arguably, neither the forum state nor any other jurisdiction appears interested in the controversy, room should be left for forums to apply their own law. See notes 96, 97, 123, 130 *supra* and accompanying text (discussion of Justice Stevens's presumptive validity analysis).

140. See notes 114-16 *supra* and accompanying text.

benefit of the law of an interested state, Wisconsin.¹⁴¹

A limited constitutional right to the application of a particular law, founded upon party fairness without regard to foreseeability, approximates the rights of the parties in an entirely intrastate setting. If all material events in *Hague* occurred in Wisconsin, Allstate would not have had to prove reliance or foreseeability to obtain the benefit of the Wisconsin rule. This is because the case would have fallen within the rational compass of the Wisconsin rule and none other. Insofar as that rule established a relative advantage for insurers, it would operate as an entitlement for Allstate. Returning to the actual events in *Hague*, Allstate's entitlement should not have automatically ended because suit was brought in Minnesota and some colorable argument was made that Minnesota also had an interest in the case. It is unfair to separate Allstate from its entitlement unless Minnesota can establish such an interest.

This concept of party entitlement may suggest a resurrection of the discredited theory of legislative jurisdiction and the related concept of "vested rights."¹⁴² Atavistic return to vested rights is unnecessary, however. A party entitlement would not "vest" for all time. A court would honor it only if the law which created it remained that of an interested jurisdiction, and only if it were not displaced by the law of an interested forum.

Some cases will satisfy the second constitutional standard of demonstrable forum state interest, yet fail to satisfy the first standard of avoiding unfair surprise. An example is *Blamey v. Brown*,¹⁴³ another recent Minnesota Supreme Court choice-of-law decision in which a Minnesota plaintiff sued the former proprietor of a Wisconsin tavern for injuries she suffered in a Minnesota automobile accident. Plaintiff alleged that the driver of the car in which she was a guest drove from a point in Minnesota to the Wisconsin tavern, purchased a quantity of beer, and wrecked the car after returning to Minnesota. In addition, plaintiff alleged that the driver's consumption of the purchased beer caused the accident and that, under the statutory and

141. This formulation answers the challenge posed by Justice Stevens in *Hague*, see notes 125-30 *supra* and accompanying text, by overcoming the bare presumption of the validity of forum law.

142. See A. VON MEHREN & D. TRAUTMAN, *THE LAW OF MULTI-STATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS* 179-80 (1965); Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for its Withdrawal*, 113 U. PA. L. REV. 1230, 1234 (1965).

143. 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070. Interestingly, certiorari was denied in *Blamey* on the same day it was granted in *Hague*: February 19, 1980.

common law of Minnesota, the defendant was liable for plaintiff's injuries.

The *Blamey* court found the statute applicable only to Minnesota tavern keepers, but held that a cause of action existed against the defendant under Minnesota common law. To reach this result, the Minnesota Supreme Court rejected the common law of Wisconsin, which would not have permitted recovery.¹⁴⁴ Although the town in which the tavern was located was near the Minnesota-Wisconsin state line, it was a neighborhood bar, and it had never attempted to attract Minnesota patrons.¹⁴⁵

Minnesota's genuine interest in compensating its residents, particularly when injuries occur within the state, clearly support its application of the Minnesota rule of liability. At the same time, however, the result appears to subject the defendant to unfair surprise in violation of the first standard.

The two standards of constitutional review discussed in this Article really do not present ends in themselves. Rather, they combine to provide a constitutional floor of party fairness in conflicts decision making.¹⁴⁶ The somewhat inchoate character of the ideal of fairness,¹⁴⁷ and the threshold difficulty of conflicts doctrine,¹⁴⁸ at the same time, suggest that constitutional review of choice of law is a somewhat uncertain undertaking. It is nonetheless possible to develop standards of constitutional review to rectify unprincipled cases and to influence principled decisions in many others. In addition, states could be left largely free to develop their own conflicts law.¹⁴⁹

144. The court attempted to justify this result through application of Professor Leflar's "Choice-Influencing Considerations," adopted in *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973). 270 N.W.2d at 890.

145. *Id.* at 886. The *Blamey* court acknowledged that the defendant failed to procure liquor liability insurance since he assumed that only the laws of Wisconsin created his liability. "These laws impose no liability upon him in the present case and thus if Minnesota law is applied some injustice will result to the defendant since the legal ramifications of his actions were not predictable to him at the time he acted." *Id.* at 891.

146. "[T]he primary policy, indeed the very *raison d'être* of conflicts law, is the policy of mitigating for individuals the inconveniences and problems that can arise through the actual or potential conflict of differing states' norms of judicial decision." Rheinsteinst, *supra* note 133, at 375.

147. In his thoughtful article on conflicts review, Professor Kirgis writes: "The truly difficult task is defining the fairness standard. One must explain the leading cases and supply a normative test that is both useful in deciding most or all future cases and consistent with widely shared American values." Kirgis, *supra* note 36, at 106.

148. See note 94 *supra*.

149. See Freund, *supra* note 105, at 1223.

V. CONCLUSION

The *Hague* case and others suggest the need to impose restraints on excessively parochial and, hence, unprincipled choice-of-law decision making. Jurisdictional doctrine is a poor surrogate for choice-of-law review, because some decisions which need rectification will not receive it, for lack of a purposeful reviewing doctrine. The common law creation of federal choice of law would supply reviewing doctrine, but only with serious threats to federalism and judicial administration.

A middle ground, a more tenable basis for choice-of-law review, existed in *Hague*. The inability of the Court to pursue it is the chief failing of the case. The Court should have found that Minnesota's decision exceeded minimum constitutional standards of party fairness. It should have ruled that, because Minnesota had no genuine interest in the controversy, it could not fairly interpose Minnesota law to deprive Allstate of the benefit of the law of an interested state, Wisconsin.

The failure of a majority of the *Hague* Court to reach agreement on the conflicts-of-law reviewing standard¹⁵⁰ invites the hope of further Supreme Court deliberations and the development of more intelligible and enlightened conflicts reviewing doctrine in future cases. Meanwhile, the *Hague* decision serves as an interesting if somewhat disturbing stimulus for discussion.

150. Without the vote of Justice Stevens for affirmance, the court would have been evenly divided. Had this happened, the court would have affirmed the Minnesota decision without written opinion, "thus depriving the affirmance of any value as precedent." R. STERN & E. GRESSMAN, *supra* note 18, at 2. Justice Stevens's refusal to follow Justice Brennan, see note 125 *supra* and accompanying text, deprived the Brennan opinion of majority status and weakened it considerably. "It is hardly necessary to state that only a majority can speak for the Court or determine what is the 'central meaning' of any judgment of the Court." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 408 n.1 (1978) (Stevens, J., concurring in part and dissenting in part).

On the growing phenomenon of Supreme Court plurality decisions, see Davis & Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59; Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981).

