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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

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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 decision is disquieting, 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-law 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

7. See note 51 infra and accompanying text.
8. This Article will use the phrases "conflict of laws" and "choice of law" interchangably 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. Defendant Allstate's position was that the law of Wisconsin forbidding stacking governed the coverage question, not Minnesota law.

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 Court held that selection of the Minnesota stacking rule was both constitutional and an appropriate application of its recently adopted "choice-influencing considerations" approach to choice of law.

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

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.


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. Although the quality of the Minnesota court's choice-of-law decision prompted criticism, the Court refused to consider the case as an opportunity to displace state conflicts law with national choice-of-law rules.

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 this 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 jurisdiction\(^2\) and choice of law is a subject which has attracted considerable interest.\(^2\) The Supreme Court has stated frequently that constitutional reviewing standards for the two are separate.\(^2\)

There are signs in *Hague*, however, that the Court may become more indulgent in its choice-of-law review, because stricter standards for judicial jurisdiction\(^2\) will eliminate cases which otherwise may produce unconstitutional choice-of-law results. In commenting on *Home Insurance Co. v. Dick*,\(^2\) a

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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. 166, 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.


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 \textit{Hague} plurality observed: "There would be no jurisdiction in the Texas Courts [sic] to entertain such a lawsuit today." \textsuperscript{27} The plurality cited \textit{Rush v. Savchuk}\textsuperscript{28} and \textit{Shaffer v. Heitner}\textsuperscript{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." \textsuperscript{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" \textsuperscript{31} and that "both inquiries 'are often closely related and to a substantial degree depend upon similar considerations.'" \textsuperscript{32} Although only the plurality held this view of the relationship between jurisdictional and choice-of-law reviewing doctrines,\textsuperscript{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 \textit{Rush}. In both \textit{O'Connor v. Lee-Hy Paving Corp.}\textsuperscript{34} and \textit{Rosenthal v. War-}

\textsuperscript{27} 449 U.S. at 325 n.12.
\textsuperscript{28} 444 U.S. 320 (1980).
\textit{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 \textit{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 \textit{Seider} doctrine and its abolition by \textit{Rush}, see Kamp, \textit{supra} note 25, at 25-29.


\textsuperscript{29} 433 U.S. 186 (1977).
\textsuperscript{30} 449 U.S. at 330 n.23.
\textsuperscript{31} \textit{Id.} (quoting \textit{Shaffer v. Heitner}, 433 U.S. 186, 225 (1977) (Brennan, J., concurring in part and dissenting in part)).
\textsuperscript{32} \textit{Id.} (quoting \textit{Shaffer v. Heitner}, 433 U.S. 224-25 (1977) (Brennan, J., concurring in part and dissenting in part)).
\textsuperscript{33} In his concurrence, Justice Stevens appears to resist softening the distinction between the two reviewing doctrines. \textit{Id.} at 320-21 n.3.
\textsuperscript{34} 579 F.2d 194 (2d Cir.), \textit{cert. denied}, 439 U.S. 1034 (1978).
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. Because jurisdiction in both cases was premised on attachment of insurance obligations, neither can recur in light of Rush v. Savchuk.

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, 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, including suggestions of unconstitutionality. 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. In Rush itself, the majority assumed that the Minnesota court would follow Minnesota's law permitting automobile passengers to recover against their drivers. 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. The Court's ruling on jurisdiction again precluded the need to reach the conflict-of-law issue.

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

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 HARY. 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, 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.

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. 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 de-
termine 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 resi-
dence 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 re-
lated, 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 deci-
sions of the Supreme Court have left the meaning of the second function some-
ting 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
countries because of article IV, section 2 of the United States Constitution, the
full faith and credit clause. But even that authority would under certain cir-
cumstances be open to question because of the due process clause of the four-
teenth 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 differ-
ently 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 func-
tion 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 do-
ctrine 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).
cursing 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 decisions 52 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).

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

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, or to indicate "whether we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court." 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 . . . ."

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. National choice-of-law rules could reverse that trend.

\textit{A Bill Proposed for Enactment by the Congress, 36 A.B.A. J. 1003 (1950); \textit{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. \textit{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); \textit{id. at 1204-05 (the Rules of Decision Act, 28 U.S.C. § 1652 (1976)); \textit{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 \textit{Trautman, supra note 8, at 114.


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

59. 449 U.S. at 307.

60. \textit{Id.}

61. \textit{Id. at 332.

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.\textsuperscript{63}

\textsuperscript{63} Klaxon v. Stentor, 313 U.S. 487 (1941).

During the period between the Supreme Court decisions in \textit{Erie v. Tompkins}, 304 U.S. 64 (1938) and \textit{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 \textit{Erie}. \textit{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.


\textit{Klaxon} did not naturally follow from \textit{Erie}. \textit{Erie} stopped the intrusion of federal general common law on expressions of local policy reflected in state rules of liability, an intrusion typified in \textit{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 \textit{Klaxon} rule. First, ascertaining state law when the same "is confused or nonexistent" is a perennial problem under \textit{Erie}. Clark, \textit{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 \textit{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 505, 270 N.Y.S.2d 552 (1966); or both: Tooker v. Lopez, 24 N.Y.2d 595, 270 N.Y.S.2d 552 (1966); Miller v. Miller, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968). Second, administration of the \textit{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. \textit{VanDusen v. Barrack}, 376 U.S. 612 (1964). The troublesome question remains whether \textit{VanDusen} should be followed in transfers under 28 U.S.C. § 1404(a) when plaintiff's case clearly would have been dismissed on \textit{forum non conveniens} grounds if he had filed in the state court of the transferor forum. To follow \textit{VanDusen} in such a case would appear to give plaintiff unfair leverage in shopping for favorable conflicts law. Yet, this was the result in \textit{In re Air Crash Disaster at Boston, Mass.}, 399 F. Supp. 1106 (D. Mass. 1975).

Despite the problems posed by \textit{Klaxon}, the Supreme Court recently reiterated the rule in \textit{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

\textsuperscript{63} Klaxon v. Stentor, 313 U.S. 487 (1941)
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.\(^6\)

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 result\(^5\) would have replaced the "plainly unsound"\(^4\) 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 credit\(^6\) to the paramount authority of federal common law under the supremacy clause.\(^6\)

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 supervise\(^6\) the creation of a body of national


\(^{65}\) 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.


\(^{69}\) 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-

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70. For a state by state survey of choice-of-law methodologies in use, see Gutierrez v. Collins, 553 S.W.2d 312, 316 n.2 (Tex. 1979). In addition, see R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 305-06 n.67 (2d ed. 1971).


73. RESTATEMENT OF CONFICT 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.

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." Professor Currie's later writings suggest a more subdued endorsement of local law, but not the desideratum of neutrality. In contrast, Professor Leflar's choice-influencing considerations 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. The problem is that the Leflar methodology is pluralistic enough to also include the parochial concern of the government interest analysis, and so loose-textured that it can easily be manipulated to produce the same results as a government interest approach.

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 law and are unsuitable common law models for the Supreme Court. National common law based upon either approach would be a contradiction in terms.

The formalistic "vested rights" approach of the First Restatement, though ostensibly neutral, has been thoroughly discredited. The Second Restatement, the policy-centered yet neutral 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, it is amenable to result-oriented judicial

82. See note 62 supra and accompanying text.
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
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. 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 decisions 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. It becomes relevant, therefore, to question whether the cure of federal common law administered in this most difficult of doctrinal areas 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).


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).


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 great\textsuperscript{95} 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 \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{98} But a valid local policy of judicial administration may support the initial presumption of the applicability of forum law.\textsuperscript{99} To the extent that national choice of law would invalidate that presumption, it might exceed the appropriate limitations of federal common law.\textsuperscript{100}

\textbf{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

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

\textsuperscript{96} 449 U.S. at 326 n.14 (Stevens, J., dissenting). \textit{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.").

\textsuperscript{97} See B. Currie, \textit{supra} note 76, at 82; von Mehren, \textit{supra} note 62, at 942.

\textsuperscript{98} See notes 133-49 \textit{infra} and accompanying text.

\textsuperscript{99} See notes 96-97 \textit{supra} and accompanying text.

\textsuperscript{100} See generally Hart, \textit{The Relations Between State and Federal Law}, 54 \textit{COLUM. L. REV.} 489 (1954).
direction. It appears sensible to confine constitutional source material to the due process and full faith and credit clauses as all the Hague opinions do. 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, both function in similar ways.


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

103. U.S. Const. art. IV, § 1.

104. 449 U.S. at 304.


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 . . . .


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. It is important, therefore, to confine the adoption of reviewing standards to a very few.

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 surprise to the litigant disadvantaged by it. The suggestion in the Hague dissent 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. This analysis confuses Allstate's susceptibility to Minnesota's judicial jurisdiction with the appropriateness of Minnesota's choice-of-law result. Just-
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.\textsuperscript{113} This analysis seems to place an onerous burden of anticipation on Allstate.\textsuperscript{114}

Although a better argument for unfair surprise in \textit{Hague} may exist,\textsuperscript{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.\textsuperscript{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 \textit{Hague}.\textsuperscript{117}

2. \textit{Demonstrable State Interest}

The dissenters in \textit{Hague} agreed “that no reasonable expectations of the parties were frustrated.”\textsuperscript{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.”\textsuperscript{119}

In his plurality opinion, Justice Brennan wrote that “the Minnesota contacts with the parties and the occurrence are obviously significant.”\textsuperscript{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.\textsuperscript{121} The opinion argued that these contacts affected the choice-of-law question.

\textsuperscript{113} 449 U.S. at 330 (Stevens, J., concurring).
\textsuperscript{115} \textit{See} 289 N.W.2d at 54 (Otis, J., dissenting); \textit{Note, supra} note 14, at 1190-91 (1980).
\textsuperscript{116} \textit{See} notes 113-14 \textit{supra} and accompanying text.
\textsuperscript{117} \textit{See} note 135 \textit{infra} and accompanying text.
\textsuperscript{118} 449 U.S. at 336 (Powell, J., dissenting).
\textsuperscript{119} \textit{Id.} at 337 (Powell, J., dissenting).
\textsuperscript{120} \textit{Id.} at 311.
\textsuperscript{121} \textit{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.\textsuperscript{122} The dissent correctly rejected the purported contacts as "either trivial or irrelevant to the furthering of any public policy of Minnesota,"\textsuperscript{123} and correctly found the plurality's attempt to fit the facts of \textit{Hague} under existing precedent as unpersuasive.\textsuperscript{124}

\textsuperscript{122} Id. at 307-19. The seven cases advanced by the plurality are reviewed at note 124 infra.

\textsuperscript{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. \textit{Id.} To put the matter another way, the plaintiff in \textit{Hague} should not have the power to change the substantive character of the suit through acts unilaterally taken after the cause of action arose. \textit{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).


It is easy to conclude that the dissenters had the better argument concerning precedent. \textit{Hague} is far closer to \textit{Home Ins. Co. v. Dick}, 281 U.S. 397 (1930), \textit{see} notes 26-28 supra and accompanying text, and \textit{John Hancock Mut. Life Ins. Co. v. Yates}, 299 U.S. 178 (1936), \textit{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. \textit{See} \textit{Shaffer v. Heitner}, 433 U.S. 186, 224 (1977) (Brennan, J., concurring in part and dissenting in part); \textit{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 it\(^{125}\) 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 \textit{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 doctrine\(^ {131}\) and was unable to find, yet, they should have provided sufficient\(^{132}\) justification to declare the state court decisions in \textit{Hague} unconstitutional. The situation presented in \textit{Hague} required new doctrine.

\section*{IV. Toward Resolution of the Problem in \textit{Hague}}

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

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\underline{125.} 449 U.S. at 331 (Stevens, J., concurring).

\underline{126.} \textit{Id.} at 320-32 (Stevens, J., concurring).

\underline{127.} For the rationale supporting the initial presumption, see notes 96-97 \textit{supra} and accompanying text.

\underline{128.} 449 U.S. at 331 (Stevens, J., concurring).

\underline{129.} \textit{Id.} at 324 (Stevens, J., concurring).

\underline{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." \textit{Id.} at 331-32 (Stevens, J., concurring).

\underline{131.} See notes 128-29 \textit{supra} and accompanying text.

\underline{132.} See note 141 \textit{infra}.
\end{quote}
conflicts decisions.\textsuperscript{133} This standard explains, in part, the cases upon which Allstate principally relied.\textsuperscript{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.\textsuperscript{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 \textit{Hague} disclose.\textsuperscript{136} It seems clear that if Wisconsin were not merely interested, but extremely interested in the case,\textsuperscript{137} the Court would have decided \textit{Hague}.


Professor Weintraub found the possibility of unfair surprise in all three cases, Weintraub, \textit{Limitations, supra} note 109, at 457-60. He later questioned that conclusion with reference to \textit{Home Insurance Co. v. Dick}. See R. Weintraub, \textit{supra} note 70, at 502-03. But see Kirgis, \textit{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).

\textsuperscript{135} Cf. Alexander, \textit{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.").

\textsuperscript{136} See note 10 \textit{supra} and accompanying text.

\textsuperscript{137} Wisconsin's interest could be contrasted with the extreme interest of the State of Nevada in \textit{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.\(^\text{138}\) 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.\(^\text{139}\)

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.\(^\text{140}\) 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

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\(^{138}\) 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.


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 *Blarney* 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 *Blarney* 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." Rheinstein, *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 standard 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).
