

CAN THE STATE OF MINNESOTA BIND THE NATION?: FEDERAL CHOICE-OF-LAW CONSTRAINTS AFTER *ALLSTATE* *INSURANCE CO. V. HAGUE*

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CHOICE-OF-LAW CONSENSUS

The Supreme Court's recent decision in *Allstate Insurance Co. v. Hague*¹ invites the conclusion that the federal system is unable to protect itself against state parochialism in the choice-of-law process. By effectively rejecting the possibility of constitutional constraints in conflicts cases,² the Court appears to have left itself and the federal system defenseless. The result is at sharp odds with the Court's recent ventures in the field of personal jurisdiction,³ where it has relied on the principles of fairness and the bounded reach of state sovereignty to fashion limitations on the extensions of a state's legal process.⁴

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1. 449 U.S. 302 (1981).

2. The Supreme Court's plurality opinion, written by Justice Brennan, did not totally reject constitutional limitations on choice of law. It held that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 312-13. However, by failing to superintend a state's characterization of its own interests and by finding that its enunciated principle did not reach the *Hague* facts, no useful standard of supervision over state choice of law can be said to exist. See Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315 (1981); Lowenfeld & Silberman, *Choice of Law and The Supreme Court: A Dialogue Inspired by Allstate Insurance Co. v. Hague*, 14 U. CAL. D. L. REV. 841 (1981).

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

4. In *World-Wide Volkswagen*, Justice White invoked the minimum contacts test as serving 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." 444 U.S. at 292. As I have noted in the past, unfair-

Hague presents conflict-of-laws theorists with something of a dilemma. There is little doubt that the decision of the Minnesota court to apply its own law was wrong,⁵ and would be condemned by most choice-of-law theories. At the same time, there is a widely shared sense that the constitutionalization of the choice-of-law process is unjustified given the paucity of principles which can legitimately be mined from the Constitution, and undesirable in light of the federal rigidity which would be introduced into state common law processes.⁶ I believe that the convergence of choice-of-law analyses over the facts of *Hague* reflects an important principle which ought to restrain states in a federal legal system. Moreover, I believe that basic choice-of-law limitations can and should be imposed upon the states as a matter of federal law, and that the drawbacks of enshrining these limitations in the Constitution can be avoided by placing

ness or sovereignty concerns are more likely to be implicated by applications of a state's law than assertions of jurisdiction. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 82-83 (1978); see Peterson, *Proposals of Marriage Between Jurisdiction and Choice of Law*, 14 U. CAL. D. L. REV. 869 (1981); Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U. L. REV. 1112, 1132-33 (1981). In his concurring opinion in *Hague*, Justice Stevens observed that respect for state sovereignty and litigants' interests in a fair adjudication of their rights were separate inquiries; the former to be considered under the full faith and credit clause and the latter under the due process clause. 449 U.S. at 320.

5. See text accompanying notes 32-34 *infra*. Justice Stevens wrote that he regarded the Minnesota courts' decisions to apply Minnesota law "as unsound as a matter of conflicts law," 449 U.S. at 331 (Stevens, J., concurring in the judgment), and that he found little to support the application of Minnesota law "other than the presumption in favor of the forum's own law" *Id.* at 332 (Stevens, J., concurring in the judgment).

6. Professor Andreas Lowenfeld, who argued the case for Mrs. Hague before the Supreme Court, took that position in his brief to the Court: "If the Court in the present case were to prescribe a particular choice of law to the Minnesota courts, it would open the door to the filing of hundreds of petitions for certiorari, each depending on some variation in contacts, expectations, preferences, or interests." Brief for Respondent at 19, *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). Additionally, he argued that Supreme Court interventions

would either end the experimentation of choice of law and signal the beginning of a new "Ice Age of conflict of laws jurisprudence," . . . or it would invite each losing party in an interstate transport accident, or medical malpractice, or products liability litigation to come to this Court alleging violation of its due process rights.

Id. at 21 (quoting *Pearson v. Northeast Airlines Inc.*, 309 F.2d 553, 557 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963)). Finally, he noted that:

[C]hoice of law in accident cases is not an area where a few well-chosen rules, or even guidelines, will suffice. Reversing the state court in the present case would not shed light on the others; and if certiorari had been granted in any of the others, the state (and lower federal courts) could not have drawn comfort from the Supreme Court's decision — at least absent some draconian return to the Ice Age of the First Restatement.

Id. at 24-25 (footnote omitted). See also Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, 14 U. CAL. D. L. REV. 907, 907 (1981).

them on a common law footing.

The Hague Case

The facts of *Hague* reduce to the following sketch: an action by a newly arrived Minnesota resident-beneficiary to collect proceeds under an automobile insurance policy made in Wisconsin covering automobiles owned by a Wisconsin resident.⁷ The issue: whether Minnesota's law, which permitted stacking of the coverages, or Wisconsin's which did not, was to be applied.

Traditional first *Restatement* choice-of-law reasoning⁸ would point to the application of Wisconsin law, regardless of how the characterization game — tort or contract — is played.⁹ The second *Restatement*, with its focus on various connections and contacts, would command a similar result.¹⁰ Even most interest analysts¹¹ would agree that the application of Wisconsin law was called for on the *Hague* facts. But this latter assertion may demand a closer look.

The Supreme Court plurality in *Hague* pointed to three inter-

7. 449 U.S. at 305.

8. Under this approach the applicable law was determined by locating territorially the relevant event or thing. See *RESTATEMENT OF CONFLICT OF LAWS* (1934); J. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* (1935).

9. Characterizing the particular substantive problem is a critical first step under the first *Restatement* since specific rules attach to legal categories—for example, place of injury for tort cases and place of contract for contract cases. Manipulation of the characterization process has often been used to achieve desired results. *E.g.*, *Haumschild v. Continental Gas Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959) (interspousal immunity question characterized by forum as "status" issue); *Levy v. Daniels' U*Drive Auto Renting Co.*, 108 Conn. 333, 143 A. 163 (1928) (statute imposing liability on rental car company characterized as contract rendering it applicable to local company in regard to out-of-state accident. The stacking issue involved in *Hague* is susceptible to either a tort or contract characterization).

10. Choice of law under the second *Restatement* is determined "by the local law of the state which, with respect to that issue, has the most significant relationship" to the parties and the transaction. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* §§ 145 (1) (Torts), 188(1) (Contracts) (1971). In tort cases, the relevant factors include the place of injury, place of conduct causing injury, domicile of parties, and place where the relationship between the parties is centered. *Id.* § 145(2). In contract cases, the relevant factors are the place of contracting, the place of negotiation, the place of performance, the location of the subject matter of the contract, and the domicile of the parties. *Id.* § 188(2). In *Hague*, under either a contract or tort characterization, the relevant criteria indicate that Wisconsin law should be applied.

11. Interest analysis requires an assessment of the rational purposes behind the state laws allegedly in conflict. In some instances, only one rule is rationally applicable to the case and thus some apparent conflicts are eliminated under this approach. In other cases, more than one state will have a legitimate interest in applying its law to the controversy; in such cases, a methodology for resolving this "true conflict" will then be necessary. See D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 63-64 (1965); Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 244-68 (1958).

ests — described as contacts in the opinion — that were relevant: (1) An interest in Mr. Hague, the decedent policyholder, who was a member of Minnesota's workforce and a commuter;¹² (2) an interest in regulating the obligations of insurance companies — here Allstate — doing business in Minnesota;¹³ and (3) an interest in providing protection for Mrs. Hague, the policy beneficiary, who had moved from Wisconsin to Minnesota following her husband's death.¹⁴

Like the dissenters,¹⁵ I find the first two interests somewhat specious. *Hague* is not a case like *Alaska Packers Association v. Industrial Accident Commission*,¹⁶ where the state's interest in compensating its nonresident workers was furthered through the local workmen's compensation scheme.¹⁷ And Allstate's other insurance activities, which provide a basis for suit in Minnesota, do not give rise to a regulatory interest in Minnesota relevant to the insurance contract and accident in question. A contrary conclusion would subject national companies to regulation by any state in which they were sued, regardless of a nexus with the events in question. Although just such a line of argument was taken by Justice Frankfurter in his concurring opinion in *Watson v. Employers Liability Assurance Corp.*,¹⁸ the question there was whether Louisiana's direct-action statute could be applied to an out-of-state insurance company doing substantial business in Louisiana on behalf of a Louisiana resident injured in Louisiana by goods purchased in Louisiana.

The last contact relied on by the *Hague* plurality — the post-accident residency of Mrs. Hague — was said to give Minnesota an interest in compensating its residents "to keep them 'off welfare rolls' and able 'to meet financial obligations.'"¹⁹ The Court also made passing reference to the Minnesota Supreme Court's assertion

12. 449 U.S. at 313-14.

13. *Id.* at 317-18.

14. *Id.* at 318-19.

15. *Id.* at 337-38 (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting).

16. 294 U.S. 532, 540-43 (1935), where the Supreme Court upheld an award of California workmen's compensation to a nonresident alien who had entered into his employment contract in California, but was injured while working in Alaska.

17. See Brilmayer, *supra* note 2, at 1326.

18. 348 U.S. 66, 74 (1954).

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

Id. at 78 (Frankfurter, J., concurring).

19. 449 U.S. at 319 (quoting *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1978)).

that a Minnesota interest in the administration of estates was implicated by the facts of *Hague*.²⁰ In contrast, the dissenters in *Hague*, relying on *Home Insurance Co. v. Dick*²¹ and *John Hancock Mutual Life Insurance Co. v. Yates*,²² argued that the post-transaction event of Mrs. Hague's move to Minnesota was constitutionally irrelevant and unrelated to the substantive legal issues presented by the litigation.²³ I would go even further than the dissenters and suggest that, in general, a state's interest in its plaintiff-domiciliary should be viewed more critically than it has been heretofore in choice-of-law theory.²⁴ Standing alone, this interest cannot justify application of that state's law. To this issue I will return.

The sole function of the Supreme Court in *Hague* was to "determine whether the Minnesota Supreme Court's choice of its own substantive law in this case exceeded federal constitutional limitations."²⁵ The Court did not have to indulge in choice-of-law analysis to say whether the Minnesota interests were to be furthered at the expense of the interests of Wisconsin. Nonetheless, it is interesting to note that Justice Stevens, in his concurring opinion, observed that the Minnesota court's decision to apply Minnesota law was plainly unsound as a matter of normal conflicts law.²⁶ And Justice Stevens was clearly right.

The spurned Wisconsin interests were at least noted by the Minnesota state court; it referred to a Wisconsin policy of "insuring *minimum* recovery on the part of victims of uninsured motorists."²⁷ The Minnesota Supreme Court also speculated that the Wisconsin policy was "based in part on a desire to keep insurance premiums low while providing some protections against uninsured motorists."²⁸ Interestingly, it was at least arguable that Wisconsin law at the time of *Hague* did permit stacking and that the interpretation rendered in

20. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 47 (Minn. 1978), *aff'd. on rehearing*, 289 N.W.2d 50 (Minn. 1979). But the principal asset of the estate was the claim itself. Brief for Respondent at 11, *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

21. 281 U.S. 397 (1930); see note 54, and text accompanying notes 116-119 *infra*.

22. 299 U.S. 178 (1936); see text accompanying notes 120-121 *infra*.

23. 449 U.S. at 337 (Powell, J., dissenting). Reliance on post-accident residence was also seen as an invitation to forum shopping and frustration of a defendant's reasonable expectations at the time the cause of action accrues. *Id.*

24. Silberman, *supra* note 4, at 84-89.

25. 449 U.S. at 307.

26. *Id.* at 331 (Stevens, J., concurring in the judgment).

27. *Hague v. Allstate Ins. Co.*, 289 N.W.2d at 47 (emphasis in original) (citing *Nelson v. Employers Mutual Cas. Co.*, 63 Wis. 2d 558, 217 N.W. 2d 670 (1974)).

28. *Id.* at 47.

the earlier Wisconsin case of *Nelson v. Employers Mutual Casualty Co.*²⁹ had in fact been overruled by a new amendment to the uninsured motorist coverage statute.³⁰ That point was never considered by the Minnesota court.

There are thus doubts on all sides about the state interests which the Minnesota court and the Supreme Court considered pertinent in *Hague*; and the harder one looks the weaker is the case for the application of Minnesota law. Still, let us take the competing interests of Wisconsin and Minnesota at face value. We then have what modern choice-of-law terminology designates a true conflict,³¹ but one which does not give choice-of-law theorists much trouble. Most modern approaches call for the application of Wisconsin law in *Hague*.

Professor David Cavers, in his eloquent classic, *The Choice-of-Law Process*,³² formulated rules and principles for deciding conflicts cases and offered an escape from the abyss of ad hoc and chaotic decisionmaking that characterized the choice-of-law process.³³ Cavers' principles direct a court to apply Wisconsin law in *Hague*, because all of the events in question — the making of the contract and the accident — occurred in the state with a lower degree of financial protection, and no relationship between the plaintiff and the defendant was centered in the state offering a higher degree of protection.³⁴ Similarly, Professor Twerski's view of party expectations,³⁵ and arguably Professor Weintraub's focus on the defendant's conduct as a necessary condition for applying a law favoring the plaintiff,³⁶ should also result in the application of Wisconsin law. Profes-

29. 63 Wis. 2d 558, 217 N.W.2d 670 (1974).

30. WIS. STAT. § 204.30(5)(a) (1973) (current version at WIS. STAT. § 632.32(3)); see Comment, *Conflicts of Law—Uninsured Motorist Provisions—Stacking of Wisconsin Insurance Upheld Under Minnesota Law*, 4 HAMLINE L. REV. 109, 119-20 (1980).

31. See Currie, *supra* note 11, at 251-52.

32. D. CAVERS, *supra* note 11.

33. *Id.* at 239-89.

34. *Id.* at 139-81.

35. In Twerski's view, *Hague* would be a case where the time and space dimensions were all in Wisconsin. See Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149 (1981); Twerski, *Enlightened Territorialism and Professor Cavers — The Pennsylvania Method*, 9 DUQ. L. REV. 373, 382 (1971).

36. In a true conflict, Professor Weintraub argues that the forum should apply the law that favors the plaintiff unless "(a) THAT LAW IS ANACHRONISTIC OR ABERRATIONAL [or] (b) THE STATE WITH THAT LAW DOES NOT HAVE SUFFICIENT CONTACT WITH THE DEFENDANT OR THE DEFENDANT'S ACTUAL OR INTENDED COURSE OF CONDUCT TO MAKE APPLICATION OF ITS LAW REASONABLE." R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 346 (2d ed. 1980);

sor Baxter's comparative impairment approach,³⁷ recently revitalized in California,³⁸ points to subordination of Minnesota's interests to those of Wisconsin. Even Professor Currie, who advocated a kind of hometown justice,³⁹ and at first glance might be thought to favor Minnesota law in *Hague*, was sympathetic to and approved of a case like *Bernkrant v. Fowler*.⁴⁰ With such moderation of his forum law bias, he too might agree that Wisconsin law was applicable.⁴¹ Finally, despite the Minnesota Supreme Court's contrary interpretation, the five-pronged test advocated by Professor Leflar for resolving

see Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449, 457 (1959) [hereinafter cited as Weintraub, *Due Process*].

In his article in this symposium, Professor Weintraub argues that Minnesota should have applied Wisconsin law because the validity of the contract between insured and insurer is best determined by the law of the state where the car was principally garaged and registered and where the insured resided. In his view, Minnesota should have refrained from asserting an interest derived from the post-accident move to Minnesota, although he ultimately concedes that such an interest is sufficient "to squeeze past a due process standard." See Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?*, 10 HOFSTRA L. REV. 17, 31 (1981).

37. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963). Baxter argues that states have not only internal policy objectives but also external objectives to be achieved in interstate cases. Baxter proposes to "subordinate, in the particular case, the external objective of the state whose internal objective will be least impaired in general scope and impact by subordination in cases like the one at hand." *Id.* at 18.

38. See, e.g., *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978); *Bernhard v. Harrah's Club*, 16 Cal. 2d 313, 546 P.2d 719, 128 Cal. Rptr. 215, cert. denied, 429 U.S. 859 (1976); Kanowitz, *Comparative Impairment and Better Law: Grand Illusions in the Conflict of Laws*, 30 HASTINGS L. REV. 255 (1978); Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CALIF. L. REV. 577, 580 (1980).

39. In the case of the true conflict, Currie argued that the sensible and constitutional course for a court to take is to advance the policy of its own state and to apply its own law. Currie, *supra* note 11, at 261.

40. 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961). In *Bernkrant*, Nevada plaintiffs brought suit in California against the estate of a California decedent to cancel a trust deed covering Nevada property. The plaintiffs claimed that the decedent had promised to forgive the debt in exchange for partial payment, which they had carried out. The oral promise would have been valid under the law of Nevada but invalid under the California statute of frauds. Although it appeared that California would have an interest in applying its statute to protect local estates from fraudulent claims, the California Supreme Court held that its interest did not extend to contracts made in Nevada and involving obligations arising from the sale of Nevada land. Professor Currie found the *Bernkrant* decision consistent with his brand of interest analysis, observing that there was room for restraint and enlightenment in determining state policies and interests. Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963).

41. Minnesota's interest might be found not to extend to insurance contracts with non-residents where there was no in-state accident. Cf. *People v. One 1953 Ford Victoria*, 48 Cal. 2d 595, 311 P.2d 480 (1957) (California law requiring automobile mortgagee to investigate character of purchaser not applicable to nonresident mortgagee).

conflicts,⁴² correctly analyzed, leads to the application of Wisconsin law.⁴³

Undoubtedly, a more complete survey would turn up some dissenters to the proposition that the common law of choice of law overwhelmingly favors the application of Wisconsin law in *Hague*.⁴⁴ Nonetheless, the kind of state parochialism that is sanctioned in *Hague* and other recent cases⁴⁵ suggests that limitations of some kind are in order.

THE PRINCIPLE OF NON-UNILATERALISM

The cause of this state parochialism can be traced to the undue emphasis that is placed on the state's interest in its plaintiff for choice-of-law purposes. For example, in *Rosenthal v. Warren*⁴⁶ and

42. Five different considerations are outlined for evaluating a choice-of-law decision under the Leflar approach: predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interests, and application of the better rule of law. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282 (1966). Although no one factor is decisive, the Minnesota Supreme Court's decision seemed to rest on its perception of the Minnesota rule as the better one. 289 N.W.2d at 49.

43. In at least one context, Professor Leflar has stated that the residency of the plaintiff is probably not enough to satisfy the constitutional due process of law requirement for legislative jurisdiction. R. LEFLAR, *AMERICAN CONFLICTS LAW* 25 (3d ed. 1977). But in his article in this symposium, Professor Leflar indicates that his five choice-influencing considerations should lead both Minnesota and Wisconsin to select Minnesota law. Leflar, *Choice of Law: States' Rights*, 10 HOFSTRA L. REV. 203, 210 (1981).

44. Professor Sedler is one such probable dissenter. Sedler, *Constitutional Limitations on Choice of Law: The Perspective on Constitutional Generalism*, 10 HOFSTRA L. REV. 59 (1981). Sedler argues that the forum may apply its own law on the ground that the plaintiff is a resident of that state if (1) the fact of residency gives the state an interest in applying its law to the issue giving rise to the conflict, and (2) the application of its law does not produce fundamental unfairness or defeat the legitimate expectations of the other party. Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 DUQ. L. REV. 394, 403 (1971). In other contexts, Professor Sedler has stated that an insurer who carries on substantial activity in the forum cannot be heard to complain of fundamental unfairness when forum law is applied to an out-of-state accident. Sedler claims that the insurance company is not really prejudiced in that its rates are based on the loss experience of many insureds, and the tort law of any particular state is only peripheral in the setting of rates. Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner*, 63 IOWA L. REV. 1031, 1038 (1978).

45. See text accompanying notes 46-59 *infra*.

46. 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973). In *Rosenthal*, a New York widow brought a wrongful death action against a Massachusetts hospital and a Massachusetts surgeon based on their improper medical treatment of her husband, who died in Massachusetts shortly after an operation at the defendant hospital. New York's unlimited damage recovery rule was applied in preference to the Massachusetts \$50,000 damage limit. *Id.* at 440-44.

O'Connor v. Lee-Hy Paving,⁴⁷ the Second Circuit favored New York's interest in furthering compensation for the New York plaintiff as against sister-state rules aimed at protecting defendants and providing only limited recoveries. In both cases, the forum state's opportunity to hear the case and apply its own law turned on the tenuous jurisdictional ground of attachment.⁴⁸ After the Supreme Court's decision in *Rush v. Savchuk*,⁴⁹ neither of these cases could be brought in the plaintiff's home state,⁵⁰ and it is unlikely that the courts of any alternative forum state — usually that of the defendant's domicile or the place where the injury occurred — would reject their own limited recovery rule in favor of the New York rule. *Hague, World-Wide Volkswagen Corp. v. Woodson*,⁵¹ and *Rush* reaffirm the implicit premise of the Supreme Court's decision in *Hanson v. Denckla*:⁵² that the only limitations on choice of law will come via restrictions on jurisdiction.⁵³ In some instances, this approach will surely help. The choice-of-law issue in an attachment case like *Dick*,⁵⁴ not to mention those that surfaced in *O'Connor* and *Rosen-*

47. 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978). In *O'Connor*, a New York widow brought a wrongful death action against a Virginia corporation for the death of her husband, who was killed in a Virginia industrial accident caused by the alleged negligence of one of the defendant's employees. The plaintiff was permitted to pursue a more favorable tort remedy under New York law and was not limited to the Virginia Workmen's Compensation scheme. *Id.* at 205-06.

48. In both *Rosenthal* and *O'Connor*, jurisdiction was based on the attachment of insurance obligations owing to the defendants. The obligations had a situs in New York on the basis of the insurance company's activities there. *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). Both the New York Court of Appeals and the Second Circuit had previously upheld *Seider* against constitutional challenges. *Minichiello v. Rosenberg*, 410 F.2d 106 (2d Cir.), *aff'd en banc*, 410 F.2d 117 (2d Cir.), *cert. denied*, 396 U.S. 844 (1969); *Simpson v. Loehmann*, 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1967). After the decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), these courts reaffirmed their adherence to the *Seider* principle. *O'Connor v. Lee-Hy Paving*, 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978); *Baden v. Staples*, 45 N.Y.2d 889, 383 N.E.2d 110, 410 N.Y.S.2d 808 (1978).

49. 444 U.S. 320 (1980).

50. In *Rush*, the Supreme Court held that jurisdiction based on the attachment of an insurance obligation was unconstitutional. 444 U.S. at 327-33. The decision is thoroughly analyzed in Comment, *Rush v. Savchuk: Is the Seider Spoiled or Just Getting Harder?*, 9 HOFSTRA L. REV. 247 (1980).

51. 444 U.S. 286 (1980).

52. 357 U.S. 235 (1958).

53. *Id.*

54. 281 U.S. 397 (1930). In *Dick*, a Texas court attempted to apply Texas law to strike down a contractual-limitations clause in a fire insurance policy. 8 S.W.2d 354 (Tex. Civ. App. 1928). The policy, covering a vessel located in Mexican waters, was issued in Mexico to a Mexican citizen, but was later assigned to a Texas resident. The Texas court asserted jurisdiction by garnishing the insurance company's reinsurance obligation to a company doing busi-

thal and lurked in the background in *Rush*,⁵⁶ will be averted. *World-Wide Volkswagen's* shortening of the long arm might alter the parochial application of choice of law in a case like *Blamey v. Brown*,⁵⁷ where Minnesota interpreted the statutory language, "[c]ommits any [tort] in Minnesota,"⁵⁷ to give it jurisdiction over a nonresident tavern owner who had served a minor in Wisconsin who subsequently caused an injury in Minnesota.⁵⁸ The Minnesota court imposed liability on the Wisconsin tavern even though no liability attached under Wisconsin law and the tavern was in all respects a local entity.⁵⁹

The choice-of-law rulings in *Hague*, *O'Connor*, *Rosenthal*, and *Blamey* have a common vice. Each holds a defendant accountable to a legal standard without any purposeful involvement on his part with the regime of law that imposes the standard; only the unilateral conduct of the plaintiff has engaged the body of state law to which the defendant in each is held liable. This is what makes these cases seem unjust; and this, I think, is what makes them wrong. Choice-of-law outcomes should be restrained by a principle of non-unilateralism, which would make activity by the defendant amounting to purposeful involvement in a state regime of law a prerequisite to the choice of that state's law.

In the jurisdictional cases, particularly *Hanson* and *World-Wide Volkswagen*, the Supreme Court has enunciated the principle that jurisdiction will not lie in a forum absent "some act by which the

ness in Texas. Jurisdiction in Texas was never discussed by the Supreme Court, which found application of Texas law on these facts a violation of due process. 281 U.S. at 407-08.

55. Choice-of-law considerations may well have motivated the *Rush* plaintiff's selection of the Minnesota forum for his personal injury action: (1) The suit was filed after the two year statute of limitations in Indiana—the place of injury—had run; (2) Minnesota law embraced the doctrine of comparative negligence while Indiana retained contributory negligence as a defense; and (3) Indiana had a guest statute in effect. Moreover, the plaintiff had been an Indiana resident at the time of the accident; he moved to Minnesota and filed suit and had moved to Pennsylvania after the Supreme Court appeal was filed. 444 U.S. at 322 n.1. The Supreme Court indicated that Minnesota conflicts law would have led a Minnesota court to apply Minnesota law to the controversy, but noted that the constitutionality of applying Minnesota law in these circumstances was not before the Court. *Id.* at 325 n.8.

56. 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980).

57. MINN. STAT. ANN. § 543.19(1)(c) (West Supp. 1981).

58. 270 N.W.2d at 888. After *World-Wide Volkswagen*, the injury in Minnesota might not suffice as a basis for jurisdiction, particularly where the defendant was a local Wisconsin tavern with no marketing activities directed into Minnesota.

59. Interestingly, the Minnesota court held that its civil liability statute extended only to Minnesota vendors who made illegal sales within Minnesota, but added that its common law rule could reach the out-of-state seller. 270 N.W.2d at 889-91.

defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.”⁶⁰ Yet, as a jurisdictional limitation only, it leaves some cases — like *Hague* — unaccounted for. Unlike *Blamey*, *O'Connor*, or *Rosenthal*, there can be no question that Minnesota properly asserted jurisdiction over Allstate.⁶¹ But the principle of non-unilateralism is nonetheless offended when Minnesota law is applied to events unconnected to the defendant’s activity in Minnesota.

The idea that there should be outer limits — perhaps of constitutional stature — on state discretion in choice of law is not novel. The problem has been giving reasonably stable, useful content to such limits. Professor Martin has called for a “minimum contacts” standard;⁶² Professors Reese and Weintraub have proffered a test of “reasonableness.”⁶³ While I share with them the sense of necessary restraint on state parochialism, I am in some doubt as to the actual guidance which these tests provide. Contacts is an easily abused concept, as indicated by the *Hague* Court’s emphasis on Mr. Hague’s

60. *Hanson v. Denckla*, 357 U.S. at 253. Similarly, in *World-Wide Volkswagen*, the Court refused to find such purposeful activity on the part of the New York dealer and distributor who had only local or tristate markets. The Court agreed that it was possible that a purchaser of a car in New York might take it to Oklahoma and, in that sense, the injury in Oklahoma was “foreseeable.” 444 U.S. at 295. But the Court added that the “mere unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.” *Id.* at 298 (quoting *Hanson v. Denckla*, 357 U.S. at 253).

61. Allstate’s status as the fourth largest insurance company in Minnesota attests to the presence of the necessary jurisdictional contacts.

62. Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 879 (1980).

63. Professor Reese suggests that the principle for determining questions of legislative jurisdiction is whether it would be reasonable in the context of our federal system of government for the state in question to apply its law in the particular case. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1594 (1978). Reasonableness, according to Reese, must take into account the expectations of the parties and their ability to foresee the application of a particular law, *id.* at 1595, the competing interests of states, *id.* at 1601, and other values of a federal or international system, *id.* at 1606.

In discussing due process limitations on choice of law, Professor Weintraub concedes that a state’s contacts with the parties or with the facts may make it reasonable to apply that state’s law to a controversy arising between the parties on those facts. He notes, however, that a contact acquired late in the history of the transaction in dispute may result in disregard for the justifiable expectations of the parties and thus violate due process. Weintraub, *supra* note 36, at 457. Professor Weintraub also calls attention to what he terms the “nexus problem:” What contact, if any, other than residence of the plaintiff, should the forum have before applying its own pro-plaintiff rule? Professor Weintraub offers no conclusive answer, but he does suggest that in some cases the lack of such nexus may violate due process. R. WEINTRAUB, *supra* note 36, at 325-28, 328 n.40.

Minnesota employment and Allstate's Minnesota activities.⁶⁴ Professor Martin has fortified his test with the distinction between related and unrelated contacts, but that distinction itself is somewhat elusive; and in some instances I think that it may misdirect the analysis.⁶⁵ As for "reasonableness," it is a standard that highlights the pertinent question but goes little distance towards providing answers in particular cases. The division between the plurality and the dissent in *Hague* amply demonstrates this shortcoming.

The non-unilateralism principle helps to clarify the problem of unfairness in extreme instances of self-regarding choice-of-law behavior by state courts. It isolates one important element that justifies the conclusion that a state has behaved unreasonably, an element that is common to troublesome cases like *Hague*, *Rosenthal*, *O'Connor*, and *Blamey*. The emphasis in such cases on domiciliary interests — in Judge Breitel's terms, the unfortunate shift to a personal-law approach to conflicts⁶⁶ — ignores the question of purposeful activity by the defendant and invites results justified only by the plaintiff's relationship to a case. We have firmly rejected exclusively plaintiff-based extensions of state judicial authority in recent personal-jurisdiction decisions, and we ought likewise to reject comparable extensions of state legislative authority in choice-of-law decisions.

THE RELATIONSHIP BETWEEN CHOICE OF LAW AND JURISDICTION

The potential unfairness to defendants which is threatened by an unrestrained choice-of-law process is magnified by procedural doctrines which secure to plaintiffs any choice-of-law advantage they can gain by forum shopping. A recent Supreme Court decision has somewhat diminished the dominance of the plaintiffs in the choice of

64. Justice Powell, in his dissent, noted the contact of the insurer's business in the forum state, but did not accept the plurality's view that Minnesota had an interest in regulating the conduct of an insurer unrelated to property, persons, or contracts in Minnesota. 449 U.S. at 337-38 (Powell, J., dissenting). The dissenters also disregarded the decedent's employment in Minnesota since neither the policy nor the stacking issue were in any way affected or implicated by that status. *Id.* at 339-40 (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist, J.). See generally Brilmayer, *supra* note 2, at 1341-47.

65. Professor Martin himself seems to have realized the necessity for further elaboration. See Martin, *The Constitution and Legislative Jurisdiction*, 10 HOFSTRA L. REV. 133 (1981). Ultimately, however, I believe that the related/unrelated distinction is unsatisfactory for identifying those cases in which a state's extension of its legislative jurisdiction has gone too far. See text accompanying notes 124-143 *infra*.

66. See *Tooker v. Lopez*, 24 N.Y.2d 569, 597, 249 N.E.2d 394, 411-12, 301 N.Y.S.2d 519, 543 (1969) (Breitel, J., dissenting); D. CAVERS, *supra* note 11, at 150-56.

forum and law process. In *Piper Aircraft Co. v. Reyno*,⁶⁷ the Supreme Court reviewed a Third Circuit decision which held that a forum non conveniens dismissal in a diversity case was improper because it relegated the plaintiffs to a forum (Scotland) where the law that would be applied to the case was less advantageous to the plaintiffs (no strict liability). The Supreme Court rejected this limitation on forum non conveniens and reversed; in so doing it preserved for defendants a limited opportunity to engage in reverse forum shopping.⁶⁸ But this tempering of plaintiffs' choice-of-law monopoly is not mirrored elsewhere. Thus, when a case is transferred within the federal system, the transferee court is obliged to apply the choice-of-law doctrine of the transferor state.⁶⁹ And to the extent that parochialism pervades the choice-of-law process, the plaintiff is encouraged to bring suit in such a forum and permitted to retain those benefits even when a change of forum is ultimately required for convenience reasons. While the Supreme Court's decision in *Reyno* brings some measure of balance into the picture, permitting defendants to forum shop in some cases is a hopelessly crude and indirect way of curbing the unfairness to defendants wrought by untethered parochial state choice-of-law decisions. Minimal concerns of fairness need to be injected into the choice-of-law process itself; that is the purpose of the

67. 50 U.S.L.W. 4055 (U.S. 1981) (No. 80-848), *rev'g* 630 F.2d 149 (3d Cir. 1980). The Third Circuit had reversed the district court's dismissal of a federal court action in Pennsylvania on grounds of forum non conveniens because of the choice-of-law disadvantage to the plaintiff resulting from such a dismissal. The Supreme Court opined that the possibility of a change in the substantive law should not be given substantial weight in the forum non conveniens inquiry.

It should be noted that *Reyno* did not involve the kind of parochialism that I have been describing. The strict liability rules imposed on the defendant manufacturers were those of their home states. However, the Minnesota Court's rejection of the defendant's forum non motion did advance parochial interests. The Minnesota Supreme Court rejected the contention that it should consider the question of the applicable law in deciding the issue: "The mere fact that Wisconsin law may be different from Minnesota law is not sufficient reason to decline jurisdiction." 289 N.W.2d at 46.

68. In *Reyno*, plaintiff argued that defendants' forum non motion was prompted by a desire to take advantage of Scottish choice of law. The Court acknowledged that defendants might be engaged in "reverse forum shopping" but held that so long as defendants could satisfy the burden of showing that trial in the forum chosen by plaintiff would be unnecessarily burdensome, dismissal was appropriate—even though defendant was also motivated by a desire to obtain a more favorable choice-of-law result. 50 U.S.L.W. at 4060 n.19.

69. See *Van Dusen v. Barrack*, 376 U.S. 612 (1964). The rule is particularly troublesome in multidistrict litigation where the transferee court may be confronted with ascertaining the applicable conflicts doctrine in the several states from which actions have been transferred. *E.g.*, In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979, 644 F.2d 594 (7th Cir. 1981).

non-unilateralism principle.

One accommodation between jurisdiction and choice of law is proposed in a recent article by Professor Courtland Peterson.⁷⁰ He argues that choice-of-law considerations should "inform" and "enlighten" jurisdictional determinations. Such a course would require courts to engage in an exercise of complex comparative choice-of-law analysis, a prospect that the Supreme Court in *Reyno* strained to avoid, and seems to be an unnecessarily tenuous and uncertain means of reaching a desirable result.

I would prefer a set of formal limitations on choice of law which balance plaintiff and defendant interests, leaving jurisdiction to be appropriately handled in discretionary *forum non conveniens* fashion. In light of modern developments in transportation and communication, there is little hardship, inconvenience, or expense to a defendant in being haled before a distant forum.⁷¹ Apart from choice of law, the most serious prejudice is likely to arise from inflated jury verdicts or other types of jury prejudice.⁷² Such problems, along with particular instances of hardship or inconvenience, can be assessed by trial judges and handled as matters of discretion.⁷³ Accordingly, jurisdictional determinations would be directed to ascertaining the convenience of litigating in a particular forum.

The recent jurisdiction cases reduce the practicality of any such jurisdictional transformation. Nonetheless, a set of formal limitations are required to remedy the domiciliary focus of choice of law.⁷⁴ Since the consequences of a choice-of-law determination have a greater impact than a choice-of-forum decision, domiciliary interests ought not be accorded more weight than they have received in the jurisdictional context.⁷⁵

The point can be made perhaps even more dramatically with a comparison of analyses that predominate in jurisdictional and choice-of-law methodologies. Attachment jurisdiction and direct-ac-

70. Peterson, *supra* note 4.

71. *See id.* at 885-87.

72. *See, e.g.,* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947); *Reyno v. Piper Aircraft Co.*, 630 F.2d 149 (3rd Cir. 1980), *cert. granted*, 101 S.Ct. 1346 (1981).

73. Lowenfeld & Silberman, *supra* note 2, at 848-49; *see* Dooling, *Seider v. Roth After Shaffer v. Heitner*, 45 BROOKLYN L. REV. 505 (1979).

74. In an earlier article, I argued that the primary inquiry ought to be in terms of choice of law, and that a court having power to apply its own law should also be allowed to assert jurisdiction. Silberman, *supra* note 4, at 79-90. My point here is that even with the jurisdictional restraints of *World-Wide Volkswagen* and *Rush*, independent choice-of-law restrictions are necessary.

75. *See* Silberman, *supra* note 4, at 82-90.

tion statutes are two devices that can be used to achieve a substantially similar purpose — providing a forum for resident plaintiffs against nonresident drivers in out-of-state accidents. In *Rush v. Savchuk*,⁷⁶ the Supreme Court held unconstitutional the exercise of such jurisdiction by the Minnesota courts on behalf of a Minnesota resident based on the attachment of an insurance obligation owed to a nonresident driver. In criticizing “[t]his subtle shift in focus from the defendant to the plaintiff,”⁷⁷ the Court stated:

The justifications offered in support of *Seider* jurisdiction share a common characteristic: they shift the focus of the inquiry from the relationship among *the defendant, the forum, and the litigation* to that among the plaintiff, the forum, the insurer, and the litigation. The insurer’s contacts with the forum are attributed to the defendant because the policy was taken out in anticipation of such litigation. The State’s interests in providing a forum for its residents and in regulating the activities of insurance companies are substituted for its contacts with the defendant and the cause of action.⁷⁸

Noting the limitation on *Seider* jurisdiction in actions by resident plaintiffs, the Supreme Court added that “the plaintiff’s contacts with the forum are decisive in determining whether the defendant’s due process rights are violated.”⁷⁹ Thus, the Supreme Court quite consciously imposed a limitation on consideration of the plaintiff’s domiciliary interests as a jurisdictional matter.

If, however, the question was whether the Minnesota court in *Rush* could apply its own direct-action statute (assuming it had one)⁸⁰ as a choice-of-law matter, the analysis is likely to change. The Supreme Court hints as much when it asserts without explanation that “*Seider* actions are not equivalent to direct actions.”⁸¹ Formally, of course, the statement is correct. In the direct-action con-

76. 444 U.S. 320 (1980).

77. *Id.* at 332.

78. *Id.* (emphasis added).

79. *Id.*

80. Many states have such statutes which make a liability insurer directly liable to the tortiously injured person. *E.g.*, ARK. STAT. ANN. § 66-3244 (1980); LA. REV. STAT. ANN. § 22:655 (West 1978); R.I. GEN. LAWS § 27-7-1 (1979). Interestingly, the Minnesota attachment in *Rush* was exercised pursuant to a Minnesota statute permitting attachment of insurance obligations. Its form, however, authorized attachment of the property of the insured and thus, unlike a direct-action statute, did not create a substantive cause of action against the insurance company. MINN. STAT. § 571.41(2)(b)(3) (1978).

81. 444 U.S. at 330.

text, the named defendant is the insurance company, which is subject to jurisdiction in Minnesota. But as a practical matter, with the limited judgment in any attachment action and the concomitant no-collateral-estoppel rule, *Seider* is the virtual equivalent of the direct action.⁸²

When choice-of-law analysis is brought to bear on the application of this hypothetical Minnesota direct-action statute, a result contrary to *Rush* is nonetheless likely. If *Hague* and *Blamey* are examples of the Minnesota courts' proclivities, the interests of Minnesota in providing immediate compensation and in offering a convenient forum are interests that Minnesota would further at the expense of a no-direct-action rule in the home state of the driver or insurance company — a rule perhaps aimed at keeping insurance premiums low. Minnesota's application of its own direct-action statute could be justified by its interest in a Minnesota resident — perhaps even a newly acquired resident as in *Rush* — and by the defendant's general business activities in Minnesota. The *Hague* Court apparently found these interests to be constitutionally sufficient to justify the application of Minnesota law;⁸³ yet in *Rush*, under a ju-

82. Initially, these limitations were judicially imposed in *Seider*-type actions. See *Minichiello v. Rosenberg*, 410 F.2d 106, 111 (2d Cir. 1968), *aff'd en banc*, 410 F.2d 117 (2d Cir.), *cert. denied*, 396 U.S. 844 (1969); *Simpson v. Loehmann*, 21 N.Y.2d 305, 310, 234 N.E.2d 669, 671, 287 N.Y.S.2d 633, 636-37 (1967). The New York legislature later limited the judgment against the insured to the amount of the policy itself. See N.Y. CIV. PRAC. LAW § 320(c) (McKinney 1972). Numerous courts and commentators have taken the position that *Seider* attachments are direct-action statutes in different dress. See, e.g., *Baden v. Staples*, 45 N.Y.2d 889, 383 N.E.2d 110, 410 N.Y.S.2d 808 (1978); Silberman, *supra* note 4, at 90-99; Note, *The Constitutionality of Seider v. Roth After Shaffer v. Heitner*, 78 COLUM. L. REV. 409, 413 (1978).

83. Professor Leflar has raised doubts as to the scope of a state's direct-action statute when there is neither an occurrence of injury nor a contract made in the state, and the only basis for the application of the statute is the plaintiff's residency. See Leflar, *A Response From the Author*, 31 S.C. L. REV. 457, 463-65 (1980). After *Hague*, however, a state's interest in a plaintiff bringing an action against a nationwide insurance company would appear to suffice to allow a state court to apply its own direct-action statute. In *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 70-73 (1954), the Supreme Court affirmed the application of Louisiana's direct-action statute when applied to a nonresident insurance company that had entered into the insurance contract outside the state. As in *Hague*, the Supreme Court emphasized the forum state's interest in protecting its residents; but, in contrast to *Hague*, both the injury and the sale of the product took place in the forum state.

When direct-action statutes are applied to out-of-state accidents, the plaintiff's domicile is often coupled with the making of the insurance contract in the state. See, e.g., *Webb v. Zurich Ins. Co.*, 251 La. 558, 563, 205 So.2d 398, 402 (1967). In some instances, courts have applied their state's direct-action statute when the only state contact was the residency of the plaintiff. But the rationale used is that the matter is one of procedure, justifying the use of forum law. See, e.g., *Davidson v. Garden Properties, Inc.*, 386 F. Supp. 900, 901 (N.D. Fla. 1975). Appli-

jurisdictional mode of analysis, the same result was held to be unconstitutional.⁸⁴ Something has to give.

It might be possible to resolve this tension if the problem is seen as a specialized one relating only to direct-action statutes, aimed at providing a local plaintiff with a home forum for suits arising from out-of-state events. Thus, it could be argued that the jurisdictional reasoning of *Rush* and *World-Wide Volkswagen* is appropriate in this context, but not for other choice-of-law issues. Still, other interests, such as providing immediate compensation and avoiding delay in satisfaction of a judgment, are also associated with direct-action statutes, and for this reason, the anomaly cannot be so lightly dismissed. As I see it, the relationship is clear: If the interest in the plaintiff is an insufficient basis for asserting jurisdiction, then it cannot be the primary factor in deciding a choice-of-law question arising from application of direct-action statutes or other rules imposing standards of conduct or levels of financial protection.

PURPOSEFUL-ACTIVITY CRITERIA

The jurisdiction cases emphasize the element that has been unarticulated in choice-of-law analysis — a focus on the purposefulness of a particular party's activity in relationship to the events in question. What is missing in both the direct-action hypothetical and in *Hague* is any mention of activity by the defendant that renders it appropriate to subject the defendant to rules that a state invokes to further its interest in a resident plaintiff.

That does not mean, of course, that courts rendering conflicts decisions are totally unaware of the purposefulness criteria. A survey of the writings of various scholars⁸⁵ and the case law⁸⁶ indicate an

cation of the Arkansas direct-action statute is expressly authorized for claims arising outside the United States when the only connection with the state is the residency of the plaintiff, ARK. STAT. ANN. § 66-3244 (1980), but the validity of such scope has not been judicially tested. For a general discussion on the choice-of-law aspects of direct-action statutes, see Speidel, *Extraterritorial Assertion of the Direct Action Statute: Due Process, Full Faith and Credit and the Search for Governmental Interest*, 53 NW. U. L. REV. 179 (1958); Note, *Direct-Action Statutes: Their Operational and Conflict-of-Law Problems*, 74 HARV. L. REV. 357 (1960).

84. 444 U.S. at 333-34 (Stevens, J., dissenting).

85. Professor Cavers' principles of preference reflect this sense of "conflicts justice." See D. CAVERS, *supra* note 11, at 33-303. Professor Weintraub also endorses the requirement of some nexus between a state's assertion of an interest in its resident plaintiff and the defendant in satisfying the fairness demands of choice-of-law methodology. See R. WEINTRAUB, *supra* note 36, at 325-38. Similarly, Professor Reese is highly critical of states' parochial assertions of interests in compensating its residents. Reese, *supra* note 63, at 1601-06. Indeed, although

adherence to the non-unilateralism principle, even when it remains unarticulated.

For corroboration, one need only look at a number of well-known conflicts cases in which the ostensible reasons for the application of a given rule were the state's interest in its plaintiff. A closer look reveals that additional factors, whether expressly mentioned or not, show that a party held to a particular standard has purposefully submitted to the rule in question. In *Rosenthal*,⁸⁷ for example, New York's interest in providing its resident with an unlimited recovery against a Massachusetts doctor, who was protected by a Massachusetts damage limitation, was buttressed by the doctor's "world-wide following."⁸⁸ One can quarrel with the court's conclusion that the purposefulness criteria is satisfied by that evidence, but it nevertheless indicates the court's sensitivity to the issue. Similarly, in *Bernhard v. Harrah's Club*,⁸⁹ the California Supreme Court extended its dramshop statute to cover a nonresident defendant, who, "by the course of its chosen commercial practice . . . put itself at the heart of California's regulatory interest, namely to prevent tavern keepers from selling alcoholic beverages to obviously intoxicated persons who are likely to act in California in the intoxicated state."⁹⁰ The court found that this policy could only be effectuated if it included "out-of-state tavern keepers, such as the defendant who regularly and purposely sell intoxicating beverages to California residents in places and under conditions in which it is reasonably certain these residents

the plurality cited Professor Weintraub, 449 U.S. at 308 n.10, 311 n.14, and the concurrence cited Professor Reese, *id.* at 321 nn.3 & 4 (Stevens, J., concurring in the judgment), in support of their respective decisions in *Hague*, I suspect that on closer examination of these scholars' views, the Justices would have found that their proposed standards of constitutionality were not met.

86. In *Maguire v. Exeter & Hampton Elec. Co.*, 114 N.H. 589, 325 A.2d 778 (N.H. 1974), the New Hampshire court applied its own damage limitation in an action between a Maine employee and his New Hampshire employer arising out of a New Hampshire injury. The court noted that its usual approach was to apply the "better law," and proceeded to find that the Maine rule was better. Yet, the court chose not to apply the Maine rule, concluding that the residency of the plaintiff, standing alone, could not justify the application of Maine law to the issue of damages. *Id.* at 592, 325 A.2d at 780. Similarly, in *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970), the Pennsylvania court applied the Delaware guest statute to an action by a Pennsylvania guest passenger against his Delaware host driver arising out of a Delaware accident. *Id.* at 439, 267 A.2d at 856. The court noted that it seemed "only fair to permit a defendant to rely on his home state law when he is acting within that state." *Id.*

87. 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973); *see note 46 supra*.

88. 475 F.2d at 444. Perhaps the court reasoned that the Massachusetts doctor could have "foreseen" or expected other than Massachusetts law.

89. 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert denied*, 429 U.S. 859 (1976).

90. *Id.* at 322-23, 546 P.2d at 725, 128 Cal. Rptr. at 221.

will return to California and act therein while still in an intoxicated state.”⁹¹ In contrast to *Bernhard*, a California appellate court in *Cable v. Sahara Tahoe Corp.*⁹² subordinated the same California dramshop statute to Nevada’s non-liability rule when a California resident was injured in an accident in Nevada after having been served liquor while intoxicated in Nevada. Distinguishing *Bernhard*, the court noted that although the two defendant taverns had engaged in equally extensive advertising and solicitation in California inducing Californians to come to Nevada, California’s policy was unconcerned with Nevada accidents.⁹³

Vested-rights adherents may be tempted to read *Bernhard* and *Cable* as a welcome return to the place of injury rule, particularly in light of another recent dramshop case — this one in Minnesota — *Blamey v. Brown*.⁹⁴ Minnesota, though limiting its dramshop statute to Minnesota tavern owners, extended its common law liability rule to a Wisconsin tavern owner who sold liquor in Wisconsin to a Minnesota minor, resulting in a car accident in Minnesota in which the minor’s Minnesota passenger was injured.⁹⁵ The court characterized the defendant as a “neighborhood bar” which “could accommodate about 20 people,” and noted that the “defendant neither advertised in Minnesota nor attempted to attract Minnesota residents or young people to his establishment.”⁹⁶ Nevertheless, the court found that Minnesota’s interest in compensating resident-accident victims and assuring that Minnesota creditors were paid dictated the application of Minnesota law.⁹⁷

The rationale of the three dramshop decisions vary,⁹⁸ but the focus for my purposes is the nature and character of the defendant’s activity in each. And, although both *Blamey* and *Bernhard* involved in-state accidents, I think that *Bernhard* is right and *Blamey* is wrong. *Cable* also seems wrongly decided — at least in light of *Bernhard* — if the defendant’s activities were as extensive as those of the

91. *Id.*

92. 93 Cal. App. 3d 384, 155 Cal. Rptr. 770 (1979).

93. *Id.* at 396, 155 Cal. Rptr. at 778.

94. 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980).

95. *Id.* at 885-86, 889-91.

96. *Id.* at 886.

97. *Id.* at 891.

98. *Bernhard* and *Cable* were purportedly decided under the “comparative impairment” approach, Kay, *supra* note 38, at 604, while *Blamey* is an example of the Minnesota court’s adoption of Professor Leflar’s choice-influencing considerations, with an emphasis on the “better law” approach. See Todd, *A Judge’s View*, 31 S.C. L. Rev. 435, 440 (1980).

Bernhard defendant, and if the court regarded the plaintiff as a Californian to whom California extended its protective interest.⁹⁹ I do agree with the court's statement in *Cable* that the plaintiff's status as a California domiciliary does not suffice to "control the allocation of Nevada's and California's respective spheres of law-making influence,"¹⁰⁰ but here, the defendant's purposeful activity should have placed it within the scope of California's regulatory policy.¹⁰¹ In a recent dialogue with me, my colleague, Professor Andreas Lowenfeld, who argued the *Hague* case before the Supreme Court, has asserted that neither the size of the respective defendants in *Blamey* and *Bernhard* nor their advertising activities were the kind of detail that "rises to the dignity of a constitutional principle."¹⁰² But indeed, it is just these aspects of a party's purposeful activity that the Supreme Court relied upon so heavily in *World-Wide Volkswagen*,¹⁰³ and that are critical to choice-of-law thinking.

Another recent conflicts case, decided by the Second Department of the New York Appellate Division, bears examination in these terms. In *Rakaric v. Croation Cultural Club*,¹⁰⁴ a New York minor plaintiff was injured while clearing land in New Jersey; the injury was the result of the alleged negligence of the New Jersey club defendant. The plaintiff had responded to solicitations over the radio for volunteer help on the defendant's New Jersey property; he

99. The court in *Cable* conceded that the defendant's advertising and other solicitation of California residents to drink and gamble in Nevada were as extensive as those of the defendant in *Bernhard*. 93 Cal. App. 3d at 397, 155 Cal. Rptr. at 778. The court's rationale for applying the California strict-liability statute was that California's interest only extended to California residents injured in California. *Id.* at 396, 155 Cal. Rptr. at 778. Although nothing in *Bernhard* suggested such a limitation, the court was obviously influenced by the California Legislature's eradication in 1978 of the entire doctrine of civil dramshop liability. CAL. BUS. & PROF. CODE § 25602 (West 1978); *Cable v. Sahara Tahoe Corp.*, 93 Cal. App. 3d at 389, 155 Cal. Rptr. at 773. Additionally, although the *Cable* court treated the plaintiff as a California resident based on her prior residence there and her post-accident return, it is noteworthy that she had been occasionally staying at a mobile home in Nevada and had applied for and received a Nevada driver's license. 93 Cal. App. 3d at 386, 155 Cal. Rptr. at 772.

100. 93 Cal. App. 3d at 397, 155 Cal. Rptr. at 779.

101. Indeed, the California court conceded as much in first determining that the case involved a true conflict. *Id.* at 393, 155 Cal. Rptr. at 776. In attempting, however, to resolve the conflict in terms of the comparative-impairment doctrine, it then found that the application of the Nevada rule, denying recovery in a case in which both the wrong and the injury occurred in Nevada, could not impair the California policy. *Id.* at 396, 155 Cal. Rptr. at 778. For the view that *Cable* is more correctly seen as a false conflict, see Kay, *supra* note 38, at 593.

102. Lowenfeld & Silberman, *supra* note 2, at 865.

103. 444 U.S. at 295-99.

104. 76 A.D.2d 619, 430 N.Y.S.2d 829 (1980).

was driven there by the pastor of the Croation Church, which functioned in close association with the defendant corporation.¹⁰⁵ The plaintiff brought suit in New York, and the defendant asserted the New Jersey charitable-immunity statute as a defense. The trial court upheld the New Jersey defense, but the appellate division reversed, holding that under New York conflicts rules, the case presents "extraordinary circumstances" warranting a departure from the doctrine of *lex loci delicti*.¹⁰⁶

The *Rakaric* facts, like those in *Cable*, present a true conflict, with the forum asserting a compensatory interest in its resident plaintiff and the defendant relying on a protective rule of his home state — the place where he acted and the injury occurred. The *Rakaric* court did not explain the basis for its jurisdiction over the New Jersey defendant, but conceivably the corporation's other activities in New York or its relationship with a New York sister-club subjected it to New York's jurisdiction.¹⁰⁷ If the *Rakaric* choice-of-law result is a just one, it seems to be so because of the defendant's solicitation activities in New York, which led to its relationship with the plaintiff.¹⁰⁸ *Rakaric*, as one of the charitable-immunity cases that Professor Cavers "left for the class,"¹⁰⁹ conceivably fits his fourth principle of preference opting for a higher standard of financial protection when imposed by a state which is the "seat of the relationship" between the parties.¹¹⁰

105. *Id.* at 620-21, 430 N.Y.S.2d at 831.

106. *Id.* at 627, 430 N.Y.S.2d at 835 (citing *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972); *Cousins v. Instrument Flyers*, 44 N.Y.2d 698, 376 N.E.2d 914, 405 N.Y.S.2d 441 (1978)).

107. The court described the New Jersey defendant as functioning in close association with, and in furtherance of, the religious and beneficent purposes of Saint Cyril's Church, located in New York City. *Id.* at 620, 430 N.Y.S.2d at 831. Traditionally, substantial activities, although unrelated to the cause of action, will suffice for jurisdiction. *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 446-49 (1952). For an interesting discussion of related and unrelated contacts, see Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, [1980] S. CT. REV. 77.

108. In an effort to recruit volunteers for its land-clearing activity in New Jersey, announcements and solicitations for volunteers were made in the church bulletin and by radio broadcasts. 76 A.D.2d at 621, 430 N.Y.S.2d at 831.

109. Readers of *The Choice-of-Law Process* will recognize *Rakaric* as a variation of one of Cavers' Five Imaginary Cases. See D. CAVERS, *supra* note 11, at 19-58.

110. Where the law of a state in which a relationship has its seat has imposed a standard of conduct or of financial protection on one party to that relationship for the benefit of the other party which is higher than the like standard imposed by the state of injury, the law of the former state should determine the standard of conduct or of financial protection applicable to the case for the benefit of the party protected by that state's law.

The *Rakaric* court relied on both *Kilberg v. Northeast Airlines*¹¹¹ and *Rosenthal*¹¹² to support its conclusion that New York law should apply. Although *Rosenthal* seems to be a departure from the principles laid down by the New York Court of Appeals in *Neumeier v. Kuehner*,¹¹³ *Kilberg* does present a close analogue. As Professor Cavers observed many years ago,¹¹⁴ it is the element of the carrier-passenger relationship in New York that may be most important in explaining the application of New York law in *Kilberg*. In my terms, that relationship suffices as the purposeful New York activity on the part of the defendant by which he submits — or if you will — consents to the New York protective rule.

This array of conflicts cases, decided under different conflict-of-laws methodologies for resolving true conflicts, isolates a factor that has not been fully appreciated as a principle of justice for deciding conflict-of-laws cases. Professor Cavers adopted the concept in molding the principles of preference outlined in *The Choice-of-Law Process*.¹¹⁵ I want to go even further, however, and suggest that not only should the purposefulness-as-consent criteria operate as a neutral principle of justice for deciding conflicts cases, but that it ought to be a major factor in the development of federal limitations on the state choice-of-law process.

The leading constitutional cases, prior to *Hague*, offer some support for this proposition. In *Dick*,¹¹⁶ the forum state's (Texas) interest in the plaintiff, the assignee of an insurance contract, was constitutionally insufficient to justify the application of its law to strike down a contractual limitations clause in the contract. The defendant was a Mexican insurance company that did not do any business in the forum state of Texas.¹¹⁷ Apparently, the company did approve of

D. CAVERS, *supra* note 11, at 166 (emphasis omitted).

111. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

112. 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973); *see* note 46 *supra*.

113. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 6 (1972). In *Neumeier*, Judge Fuld set forth three principles for resolving conflicts cases involving guest statutes. The second rule, covering the case of a plaintiff guest from a liability-imposing state and a defendant driver from an immunity state, opted for immunity when the driver's conduct occurred in his home state, and for liability when the guest was injured in his home state. *Id.* at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70 (citing *Tooker v. Lopez*, 24 N.Y.2d 569, 585, 249 N.E.2d 394, 404, 301 N.Y.S.2d 519, 532 (1969) (Fuld, J., concurring)).

114. D. CAVERS, *supra* note 11, at 170-73.

115. *Id.* at 139-202.

116. 281 U.S. 397, 410 (1930); *see* note 54 *supra*.

117. *Id.* at 410.

the assignment from the original insured to the Texas plaintiff,¹¹⁸ but the scope of the policy covered the vessel only in Mexican waters.¹¹⁹

In *Yates*,¹²⁰ the newly acquired Georgia residence of the widow beneficiary of a life insurance contract issued in New York to a New York resident did not provide a valid basis for application of a Georgia law permitting testimony contradicting answers on the policy application. Although both *Dick* and *Yates* were decided in an era when the Supreme Court exercised greater control over choice of law through the due process and full faith and credit clauses,¹²¹ they suggest more contemporary limitations that may operate on choice of law. *Hague*, of course, and to some extent, *Clay v. Sun Insurance Office*,¹²² cast any limitations into doubt. In *Clay*, the Supreme Court held that neither the due process nor the full faith and credit clauses prevented a Florida court from applying its law to nullify a contractual-limitations clause in a property-floater insurance policy made in Illinois with an Illinois resident, who later moved to Florida where the loss occurred.¹²³ The purposeful activity threshold may still have been met, however, since the insurance company continued its relationship with the insured after the move to Florida and *before* the loss occurred and undertook to be bound by losses anywhere.

The purposeful activity principle was examined in the jurisdictional context in *Kulko v. Superior Court*,¹²⁴ where the Supreme Court refused to permit a California court to assert jurisdiction over a nonresident father in a support action, when the basis for jurisdiction was the father's acquiescence in having his children spend substantially more time with their mother in California than was re-

118. See R. WEINTRAUB, *supra* note 36, at 502-03.

119. 281 U.S. at 403.

120. 299 U.S. 178 (1936).

121. See, e.g., *Order of Commercial Travelers of Am. v. Wolfe*, 331 U.S. 586 (1947) (full faith and credit); *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178 (1936) (full faith and credit); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932) (full faith and credit); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (due process); *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389 (1924) (due process); *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918) (due process). See generally Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958); Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1 (1945); Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94 (1976); Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1976).

122. 377 U.S. 179 (1964).

123. *Id.* at 181.

124. 436 U.S. 84 (1978).

quired by the separation agreement.¹²⁵ The Court found that this was not the kind of "purposeful act" that justified the burden of litigating a child-support suit in a forum 3,000 miles away from defendant's home.¹²⁶ Somewhat paradoxically, the Court hinted that the contacts that did exist with California — the presence of the children and one parent — might favor application of California law in a lawsuit in New York.¹²⁷ But as I noted earlier,¹²⁸ the "purposeful act" requirement ought to have an important bearing on the choice-of-law question, and just as the defendant in *Kulko* ought not to bear the burdens of litigation in a distant forum in which he did not engage in any "purposeful act," he ought not to be subject to a regime of law when the connection results from the unilateral activity of the plaintiff. Interestingly, the alternative procedure available to the *Kulko* plaintiff under the Uniform Reciprocal Enforcement of Support Act¹²⁹ strikes precisely this balance.¹³⁰ The bifurcated procedure under the Act allows the California resident to file her petition in California and the obligor to respond in the state of his residence.¹³¹ The appropriate law to be applied is specified as that of the state where the obligor was present for the period for which support is sought.¹³²

Obviously, refinements on the purposeful activity criteria need to be developed. For example, the reasoning in *Clay* might suggest that in *Hague*, the purposefulness might be satisfied if the accident had occurred in Minnesota because in insuring Wisconsin drivers, Allstate may be consenting — or if you will purposefully submitting — to the degree of financial protection offered in a state where the accident occurs.

Yates and *Dick* also offer help in delineating a definition of "purposeful activity." What remains of them after *Hague* is unclear, although the Supreme Court did attempt to distinguish both.¹³³ A recent case in the California federal courts, decided pre-*Hague*,

125. *Id.* at 94.

126. *Id.*

127. *Id.* at 98.

128. See text accompanying notes 114-123 *supra*.

129. CAL. CIV. PROC. CODE §§ 1650-1699 (West 1972 & Supp. 1980).

130. The Supreme Court in *Kulko* noted that California's interest in insuring the support of children resident in California was served by the adoption of the Revised Uniform Reciprocal Enforcement of Support Act. 436 U.S. at 98-100.

131. CAL. CIV. PROC. CODE § 1673 (West Supp. 1981).

132. *Id.* § 1670 (West 1972).

133. 449 U.S. at 309-13.

squarely poses the problem. *Lettieri v. Equitable Life Assurance Society*¹³⁴ is a gem for a conflict-of-laws examination, with facts almost identical to *Yates*. The decedent, a New Jersey resident, purchased a life insurance policy from the defendant company in New York and obtained the required medical examination in New York. The insurance policy application failed to disclose the decedent's earlier heroin addiction, although beneficiaries claimed that the information was disclosed to the examining physician. At the decedent's death, the insurance company denied liability on the policy, asserting a right to rescind upon discovery of the misrepresentations. The beneficiaries — the decedent's son, a California resident, and the widow, a New Jersey resident who moved to California after her husband's death — brought suit on the policy, alleging that California law permitted them to offer an explanation for the falsehoods, leaving the issue of material misrepresentation for the jury. The district court ruled that New York law governed and the false statements were conclusively presumed to be material misrepresentations.¹³⁵ The Ninth Circuit reversed. Characterizing the case as a true conflict, the court found that New York had an interest in protecting its resident insurance companies from fraudulent claims and in regulating conduct within its borders, and that California was concerned with protecting its residents from an erroneous denial of insurance proceeds. The court held that it was bound to resolve the conflict under California's "comparative impairment" approach, and ruled that California law should be applied.¹³⁶

Although *Yates* is cited at one point in the opinion,¹³⁷ the Ninth Circuit never discusses its implications or addresses the potential constitutional difficulties that may be presented by the application of California law. Rejecting the practical difficulties of relying on the law of the state of the beneficiaries, the court concludes only as follows:

The insurer knew from the time the policy was issued that one beneficiary was a California resident. It thus had notice that a claim might arise from that state and the insurer could have protected itself better at the onset by conducting an investigation appropriate to the risk being underwritten.¹³⁸

134. 627 F.2d 930 (9th Cir. 1980).

135. *Id.* at 931.

136. *Id.* at 933-34.

137. *Id.* at 931.

138. *Id.* at 934.

The result in *Lettieri* is difficult to justify if *Yates* is still good law. Of course, *Yates* may have been effectively overruled by *Hague*, but the *Hague* plurality suggested something of a survival for *Yates*.¹³⁹ Justice Stevens, in his concurring opinion, was even more specific:

The parties to a life insurance contract normally would not expect the place of death to have any bearing upon the proper construction of the policy; by way of contrast, in the case of a liability policy, the place of the tort might well be relevant. For that reason, in a life insurance contract relationship, it is likely that neither party would expect the law of any State other than the place of contracting to have any relevance in possible subsequent litigation.¹⁴⁰

Both *Yates* and *Lettieri* involved life insurance policies issued in a state where false representations on the application precluded claims under the policy. Moreover, the insurance company's general California business activities in *Lettieri* were the equivalent of the defendant company's Georgia activities in *Yates*, where the Supreme Court held that there was "nothing" to which the law of Georgia could apply.¹⁴¹ Of course, in *Lettieri*, unlike *Yates*, one of the beneficiaries was a resident of the protective state at the time the insurance policy was issued. This contact might satisfy vague notions of foreseeability, or might be relied upon to persuade critics of *Hague*, like myself, that purposeful conduct by an insurance company writing a policy in favor of a California beneficiary makes *Lettieri* a closer analogue to *Clay* than to *Hague*. On the other hand, it is less clearly the purposeful activity that the Supreme Court has demanded in other contexts.¹⁴²

139. The *Hague* plurality viewed *Yates* as a case in which "the selection of forum law rested exclusively on the presence of one nonsignificant forum contact," 449 U.S. at 309, and cited it approvingly in enunciating the principle that a "[s]tate must have a significant . . . aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 313. Of course, *Yates*, like *Hague*, involved a nationwide insurance-company defendant, but the Court read *Yates* as holding only that "a post-occurrence change of residence to the forum State was insufficient in and of itself to confer power on the forum State to choose its law." *Id.* at 319.

140. *Id.* at 325 n.11 (Stevens, J., concurring in the judgment).

141. *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. at 182.

142. In *Kulko v. Superior Court*, 436 U.S. 84 (1978), the Supreme Court held that a father who agreed to allow his children to spend more time with their mother in California than was required under a separation agreement could not be said to have availed himself of the benefits and protections of California's laws. *Id.* at 94. Similarly, in *World-Wide Volkswagen*, the Court did not find purposeful activity on the part of the nonresident dealer and

For constitutional purposes, such fine line distinctions — whether between automobile and life insurance policies (*Yates* and *Hague*) or between resident and nonresident beneficiaries (*Yates* and *Lettieri*) — can be justified only if the Supreme Court adopts a coherent approach to choice of law in the federal system. Such an approach might refine the permissible scope of state interests — for example, a narrow no-post-transaction interest rule might have disposed of the *Hague* case¹⁴³ — or impose a requirement of purposeful activity by the defendant as it did in the jurisdiction cases. Without such guidance, however, the choice-of-law game is left without an umpire; the courts of each individual state are free to call their own balls and strikes, and the resulting free-for-all is dismaying.

FEDERAL COMMON LAW LIMITATIONS

One feels, however, a certain sympathy with the Court in *Hague*. Judicial second-guessing of the substantiality of state interests is uncomfortably reminiscent of the era of substantive due process.¹⁴⁴ It is particularly difficult to characterize as utterly arbitrary a state's decision to apply its legal norms to litigation in its own courts when the defendant is a multistate giant which regularly does business within its borders. It is hard in a case like *Hague* to conceive of the Minnesota court's action as deeply unfair to Allstate, or as an affront to Allstate's constitutional rights. What is at stake in *Hague* is the appropriate allocation of state lawmaking authority, and the behavior of the Minnesota court clearly demonstrates the

distributor of Volkswagen automobiles based on substantial revenue they may have earned from goods used in Oklahoma. 444 U.S. at 296-98.

143. See, e.g., *Reich v. Purcell*, 67 Cal. 2d 551, 555, 432 P.2d 727, 730, 63 Cal. Rptr. 31, 34 (1967), where the court noted that "if the choice of law were made to turn on events happening after the accident, forum shopping would be encouraged." Similarly, Professor Weintraub has noted:

Even though a state may have a significant contact with the parties or with the facts, if that contact was acquired so late in the history of the transaction in dispute that application of that state's law would result in a serious disregard of the justifiable expectations of one of the parties, use of that state's law will violate due process.

Weintraub, *Due Process*, *supra* note 36, at 490; accord, Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 U.C.L.A. L. REV. 181, 236-42 (1977); Note, *Post Transaction or Occurrence Events in Conflict of Laws*, 69 COLUM. L. REV. 843, 855 (1969).

144. *Lochner v. New York*, 198 U.S. 45 (1905), is often invoked as a prototype of this discredited constitutional tradition. In *Lochner*, the Supreme Court struck down a statute setting maximum hours of employment for bakery employees. *Id.* at 53. The fall from judicial grace of the doctrine is detailed in McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, [1962] SUP. CT. REV. 34.

need for some restraints at the margin of state extension. The difficulty lies in translating this need into sharply edged rules whose provenance is demonstrably constitutional. Better by far would be a set of more detailed rules, clearly in service of the constitutional structure of federalism, but avowedly the product of judicial judgment and development.

But in this diagnosis there inheres a prescription for the appropriate means of restraining state excess in choice of law, namely, a set of federal common law restraints, founded upon and in service of the full faith and credit clause and the basic structure of the federal system contemplated in the Constitution. This approach is quite unlike the proposals set forth by Professors Baxter and Horowitz, calling for a full body of federal choice-of-law rules which would displace state court choice-of-law authority.¹⁴⁵ What is contemplated is a set of outer limits on state choice-of-law decisions, bearing to state choice of law much the same relationship as the rules developed in the negative commerce clause cases bear to state legislation which touches on interstate commerce.¹⁴⁶ Like the negative commerce clause restraints developed by the federal judiciary, these choice-of-law restraints would be subject to revision and displacement at the hands of Congress,¹⁴⁷ greatly reducing the threat of rigidity which the constitutionalization of the state choice-of-law process might be seen to harbor. While the negative commerce clause cases present themselves as constitutional decisions, Professor Monaghan has convincingly argued that they are prime examples of a tacitly developed body of federal common law rules which resonate to constitutional values.¹⁴⁸

145. Baxter, *supra* note 37; Horowitz, *Toward a Federal Common Law of Choice of Law*, 14 U.C.L.A. L. REV. 1191 (1967).

146. See, e.g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

147. It might be argued that the negative commerce clause cases are better read as constitutional decisions which have rather tenuous roots in the Constitution and happen to be subject to displacement by Congress. Likewise, it could be argued that the Supreme Court has rather flexible options under the full faith and credit clause, without any invocation of a constitutional common law, and that Congress' authority under that clause to "prescribe the Manner in which . . . [other states'] Acts, Records and Proceedings shall be proved, and the Effect thereof," U.S. CONST. art. IV, § 1, will permit Congress to displace the Court's rulings. I am inclined to favor Professor Monaghan's explanation of the negative commerce clause cases, see note 148 *infra* and accompanying text, and to see such a reading of the power of the Court and of Congress under the full faith and credit clause as strained. But I am more interested in establishing the propriety of flexible and displaceable federal court restraints on the choice-of-law process here than in contesting the precise constitutional status of such restraints.

148. Monaghan, *The Supreme Court 1974 Term, Foreward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

This proposal is not at war with the *Klaxon* doctrine.¹⁴⁹ A separate body of conflicts law for the federal courts is not contemplated. The restraints which would be developed in this constitutional common law would apply to both federal and state courts, and *Klaxon* would govern everywhere but at the extremes of state self-preference. Initially, it may well be that federal judges in diversity cases will be important actors in the application of these federal restraints, but the accommodation of the federal constitutional common law will be the responsibility of all judges who decide choice-of-law cases. The federal common law limitations would not themselves be a basis for "arising under" jurisdiction in the federal courts, so the balance of federal and state court involvement in conflicts cases would not be disturbed.¹⁵⁰

With federal restraints placed on a common law footing, reasonably broad latitude would be available to the Supreme Court to develop specific benchmarks to distinguish legitimate state court preferences for their own laws from instances where state interests have been reflexively and parochially asserted without appropriate regard for competing interests. As I have indicated, the purposefulness criteria should play a central role in the development of such benchmarks.

As to *Hague* itself, my own view is that the application of Minnesota's stacking rule transgressed these suggested limitations. Arguably, however, nationwide insurance companies might be deemed to have engaged in the kind of purposeful activity that warrants the application of a state's regulatory rule even when the rule bears no direct connection to the claim involved. As to defendants with more localized ties, such as doctors or uninsured tavern owners, a different response might be forthcoming.

Ultimately, the identification and development of basic values in this federal constitutional common law may serve to induce a greater

149. In *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), the Supreme Court held that a federal court in a diversity action is bound to follow the conflict rules of the state in which it is sitting. *Klaxon*, of course, is not without its critics, see Baxter, *supra* note 145, at 32-42; Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513-15 (1954), but my point here is not to suggest a body of conflicts rules for the federal courts alone.

150. Although a claim based on federal common law may be brought in a federal court as "arising under" federal law for purposes of 28 U.S.C. § 1331, see *Illinois v. City of Milwaukee, Wisconsin*, 406 U.S. 91 (1972), a federal common law limitation on choice of law operates as a defense and would not provide a basis for original federal court jurisdiction. See *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908).

consensus in conflicts cases. But whether or not this consensus occurs, the generation of such a body of common law restraints would serve to restore integrity to the choice-of-law process. Different melody lines may continue, but harmony ought to be assured.