THE HAGUE CASE: AN OPPORTUNITY LOST

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Like Justice Powell, I agree essentially with the basic principles announced by the Court in Allstate Insurance Co. v. Hague,\(^1\) but like him, I cavil at the way these principles were applied and at the result that was reached.\(^2\)

The basic principle stated by Justice Brennan in his plurality opinion is 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."\(^3\) In his concurring opinion, Justice Stevens said that two inquiries must be pursued, namely, whether the forum's choice of law has satisfied the "federal interest" in ensuring that one state respect the sovereignty of other states as well as whether "the litigants' interests in a fair adjudication of their rights" have been preserved.\(^4\) The same values were also emphasized by Justice Powell in his dissent.\(^5\) In other words, all members of the Court\(^6\) agreed that there are constitutional limitations on choice of law and that two values are involved in determining the scope of these limitations. One of the values is fairness to the litigants, and the other is concerned with the needs of the federal system (or presumably, in an international case, of the international system).\(^7\)

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2. Id. at 332-40 (Powell, J., joined by Burger, C.J., & Rehnquist, J., dissenting).
3. Id. at 312-13.
4. Id. at 320 (Stevens, J., concurring in the judgment) (footnote omitted).
5. Id. at 336 (Powell, J., dissenting). Justice Powell's statement of the basic principle is as follows: "A contact, or a pattern of contacts, satisfies the Constitution when it protects the litigants from being unfairly surprised if the forum State applies its own law, and when the application of the forum's law reasonably can be understood to further a legitimate public policy of the forum State." Id. (Powell, J., dissenting).
6. Justice Stewart took no part in the consideration or decision of the case. Id. at 320.
7. See, e.g., Home Ins. Co. v. Dick, 281 U.S. 397 (1930) (forum law inapplicable where its interests are insignificant compared with foreign interests).
Clearly, the due process clause of either the fifth or the fourteenth amendment would be offended if a law is applied in an essentially unfair way. By way of extreme example, it would be unconstitutional to hold a party liable for having driven on the left side of the road when he or she had done so in a country where driving on that side of the road was required. Stated more generally, due process is likely to be offended when a party who has conformed his or her conduct to the requirements of the state where he or she did the act in question is held subject to a law of which he or she had no notice.\(^8\)

Although the point is perhaps more subtle, federal- or international-system values must also be considered. Inevitably, there are occasions when a state cannot legitimately apply its own law in disregard of the interests of another state.\(^9\) Take, for example, a situation where spouses are domiciled in state X under whose law adultery is the only ground for divorce. They wish to be divorced for some other reason and in the shortest possible time. Accordingly, the husband, without establishing domicile, files for divorce in state Y, which has liberal divorce laws and has made its courts competent to render a divorce on the basis of a general appearance by the defendant.\(^10\) The wife, who has never left state X, enters such an appearance through an attorney and the husband himself returns to state X after the divorce has been granted. If we assume that state Y had judicial jurisdiction under the due process clause to render the divorce, it nevertheless seems highly probable that the Constitution was violated by application of the state Y rules of divorce.\(^11\) This is because Y's interest, if any, in the marital status of the parties was insignificant when compared with that of X's.

Considerations of fairness to the parties are clearly regulated by


\(^10\) This jurisdictional basis was held constitutionally defective in Alton v. Alton, 207 F.2d 667, 677 (3d Cir. 1953). How the Supreme Court would today decide the question is uncertain. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 72, Comment b (1971).

\(^11\) So much was intimated by Judge Hastie in his dissenting opinion in Alton v. Alton, 207 F.2d at 685 (Hastie, J., dissenting).
the due process clause of either the fifth or the fourteenth amendment. It is less certain which constitutional provision requires appropriate respect for the interests of other states. In his plurality opinion, Justice Brennan found it unnecessary to determine whether the basis of this requirement is due process or full faith and credit. In his concurring opinion, Justice Stevens opted for full faith and credit, stating that it was this provision which "implicates the federal interest" by requiring respect for the "sovereignty" of other states. For the purposes of this discussion, it makes little difference which of these clauses is employed. It should be noted, however, that in the area of judicial jurisdiction, the Supreme Court has subsumed both values - fairness to the parties and protection of the federal system - under due process requirements. As Justice White said in World-Wide Volkswagen Corp. v. Woodson, due process serves "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 co-equal sovereigns in a federal system." Since due process serves these two functions in the case of judicial jurisdiction, there is no reason why it should not do the same with respect to constitutional limitations upon choice of law.

None of the Justices, including those in dissent, felt that an injustice had been done to Allstate by application of the Minnesota rule of stacking. This conclusion seems irrefutable. Stacking is permitted by Minnesota law and, on the facts of the case, Allstate can be presumed to have been aware that the insured would drive his automobiles into Minnesota. In addition, it appears that stacking is permitted by a great majority of states, and it was to be anticipated that the automobile might be driven into some of these other states as well. Hence, Allstate could clearly have foreseen application of the law of a state that permitted stacking. In addition, it

12. 449 U.S. at 307-09.
13. Id. at 320 (Stevens, J., concurring in the judgment).
14. In many conflict situations the choice of the governing clause may be important. See, e.g., Martin, supra note 9, at 192 (full faith and credit); Reese, supra note 8, at 1589 (due process).
16. Id. at 291-92.
17. 449 U.S. at 320 (plurality opinion), 328 (Stevens, J., concurring in the judgment), 335-38 (Powell, J., dissenting).
18. Id. at 316 n.22.
seems highly probable that Allstate issued the policy without having given thought to problems of choice of law. Under these circumstances, no injustice was done Allstate by application of the Minnesota rule of stacking.\textsuperscript{19}

Where the Court erred, in the opinion of this writer, was in its disregard of federal-system values. One can do little but applaud Justice Stevens' statement in his concurring opinion that if there has been no unfairness to the parties, a state court's application of its own law should not be invalidated "unless that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State."\textsuperscript{20}

Justice Stevens believed that there had been no such infringement because Allstate had not entered into the insurance contract in reliance upon the application of Wisconsin law.\textsuperscript{21} The difficulty with his reasoning arises because considerations of fairness to Allstate are quite irrelevant to the question of whether Minnesota had applied its law to matters that were beyond the proper scope of its legislative competence and in a way that was inimical to the interests of our federal system.

Justice Brennan, in his plurality opinion, took a different approach and held that application of the Minnesota stacking rule was constitutionally justified because of Minnesota's interest in the case.\textsuperscript{22} In large part, this interest stems from Hague's employment in the state which made "[v]indication of the rights of [his] estate" an "important state concern."\textsuperscript{23} To a lesser degree, Minnesota's interest was also derived from Allstate's doing of business in the state\textsuperscript{24} and from Mrs. Hague's acquisition of a domicile there after the accident that resulted in her husband's death.\textsuperscript{25} Allstate's doing of business in the state seems of dubious significance because Allstate does business in every state of the United States. Therefore, if Justice Brennan is taken seriously, each of these states has an interest in regulating all of Allstate's insurance policies, including those issued in other states to residents of those states. Further, attaching weight to Mrs. Hague's acquisition of a Minnesota domicile after the death of her

\textsuperscript{19} See id. at 327-30 (Stevens, J., concurring in the judgment).
\textsuperscript{20} Id. at 324 (Stevens, J., concurring in the judgment).
\textsuperscript{21} Id. at 324, 329 (Stevens, J., concurring in the judgment).
\textsuperscript{22} Id. at 320.
\textsuperscript{23} Id. at 314-15.
\textsuperscript{24} Id. at 317-19.
\textsuperscript{25} Id. at 318-20.
husband bids fair to open Pandora's box. Minnesota, to be sure, has
an interest in the welfare of its domiciliaries. But the issue in this
case concerned the obligations assumed by Allstate under a policy
issued in Wisconsin to a resident of that state. The suggestion that
the nature of these obligations can be affected by a beneficiary's
move to another state following an accident\(^ \text{28}\) establishes a dangerous
precedent. It will, undoubtedly, encourage forum shopping and,
worse still, by taking subsequent events into consideration, will make
it difficult for parties to predict with any confidence what law may
ultimately be applied to determine their rights and duties under a
contract. More than forty years ago, the Supreme Court held unani-

mously in \textit{John Hancock Mutual Life Insurance Co. v. Yates}\(^ \text{27}\) that
a state to which a widow had moved following her husband's death
could not constitutionally apply its law to determine the widow's
rights under a policy insuring the husband's life.\(^ \text{28}\) The authority of
this case has now been eroded.

Undoubtedly, Minnesota could be said to have an interest in
Mr. Hague by reason of his employment in the state. The question is
whether this interest is material to the case. This leads to the further
inquiry of whether a "state interest," without further qualification, is
a term that can usefully be employed in determining the propriety of
a state's choice of law. The difficulty is that in most cases there will
be some reason for saying that the interest of a state would be served
by application of its law. Somewhat extravagantly, yet not irration-
ally, Minnesota, as part of our federal union, can be said to have an
interest in the welfare of all persons living in the United States.
Hence, when Minnesota feels that application of its own law would
lead to the most just result, Minnesota might justifiably claim an
interest in having this law applied even in a situation where the par-
ties involved have no relationship whatever with the state.\(^ \text{29}\) Less pro-
vocatively, but suggestive of the same result, Minnesota has an inter-

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  \item \textbf{26.} Such a change in domicile after an accident was given this effect in Miller v. Miller,
  2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967) (residence and domicile at time of accident are
  relevant residence and domicile for choice-of-law considerations).
  \item \textbf{27.} 299 U.S. 178 (1936).
  \item \textbf{28.} \textit{Id.} at 182-83.
  \item \textbf{29.} \textit{Cf.} Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973) (Minnesota can
  apply its own law of negligence, even though all parties were residents of Ontario and automo-
  bile was garaged, registered, and insured in Ontario, because choice-of-law decision can be
  based on advancement of forum's legitimate governmental interests and application of better
  law).
\end{itemize}
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This in having its courts apply Minnesota law in all cases that come before them, since it is easier for their courts to apply their own law than that of another state. Again, Minnesota can be said to be interested in the application of its law in all cases where a Minnesota domiciliary is involved. Finally, Minnesota can be said to have an interest in all corporations that do business within its territory. This interest could provide a reason why Minnesota should be permitted to apply its law to control the activities of these corporations throughout the entire world. One could go on and on. The boundaries of a state's interests can be extended as far as the imagination will permit. Surely, it is difficult to determine on any rational basis the point beyond which a state's interests do not extend.

This leads to the conclusion that "state interests" should not be employed without qualification in determining the constitutional limits on the extraterritorial reach of a state's law. Instead, the interest of a state in having a particular local law applied should be assessed in light of the policy, or policies, which the rule was designed to serve. Only if the policy (or at least one of the policies) would be served by the rule's application can the state be legitimately interested in having the rule applied. From this point of view, Minnesota's interest in the application of its stacking rule seems tenuous indeed. It is hard to believe that this policy was directed to insurance policies issued in another state to a resident of that state at least in situations where the accident in question occurred there.

Both the plurality and concurring opinions have a self-defeating quality. They declare in unequivocal terms that there are two aspects of constitutional control of choice of law — fairness to the parties and interstate values. But then both opinions find the interstate aspect satisfied for reasons that essentially rob this test of any significance. Justice Brennan's plurality opinion creates this effect by giving a broad and undiscriminating meaning to the term "state interest." In his concurring opinion, Justice Stevens seems to say no more than that the federal interest in respect for state sovereignty is satisfied if the parties are not unfairly treated by a court's applica-


32. See 449 U.S. at 312-20.
tion of a particular law.\textsuperscript{33} The net effect of the decision is, unfortunately, to make fairness to the parties the predominant, if not the only, value that may be considered in determining the constitutional power of a state to apply its law. The Supreme Court has recently held that federal-system values must be considered in determining whether a state has jurisdiction under due process to hear a case in its courts.\textsuperscript{34} There is good reason for supposing that these values should play an even more significant role when it comes to assessing the propriety of a court's choice of law. Surely, a state's interests are more likely to be affected by the application of a foreign law to determine the rights of the parties than when the court of another state simply entertains the case.

Earlier rejections by the Supreme Court of a state's choice of law appear to have been based largely on federal-system values and only incidentally on considerations of fairness to the parties.\textsuperscript{35} Taken literally, the plurality and concurring opinions would indicate that the Supreme Court has withdrawn almost entirely from the choice-of-law field. This is to be regretted. To be sure, the Court should not attempt to lay down detailed rules of full faith and credit in this area.\textsuperscript{36} Choice of law is presently too underdeveloped for such attempts to be successful. In addition, the Supreme Court clearly does not have the time to hear and decide the many cases that would arise. As Justice Powell said in dissent, the proper role of the Court is to exercise a "modest check" on state powers in the area of choice of law.\textsuperscript{37} The Supreme Court has played just such a role in limiting the power of the states to entertain suit in their courts.\textsuperscript{38} There is good reason for the Court to exercise a similar restraining force over the application of law. The Hague case offered the Court an occasion to adopt guidelines for determining what necessary federal limitations to impose upon the power of a state to apply its law to

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\item \textsuperscript{33} See id. at 326-32 (Stevens, J., concurring in the judgment).
\item \textsuperscript{34} World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).
\item \textsuperscript{35} See, e.g., Home Ins. Co. v. Dick, 281 U.S. 397, 408-10 (1930), discussed in Martin, supra note 9, at 186-201.
\item \textsuperscript{36} Previous attempts by the Supreme Court to lay down rules of this type were unsuccessful and have been abandoned. Compare New York Life Ins. Co. v. Dodge, 246 U.S. 357, 375-77 (1918) with Hooper Canning Co. v. Cullen, 318 U.S. 313, 316-22 (1943); compare Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 154-59 (1932) with Carroll v. Lanza, 349 U.S. 408, 411-14 (1955).
\item \textsuperscript{37} 449 U.S. at 332 (Powell, J., dissenting).
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foreign facts. This was an opportunity lost. This was a backward step in the development of constitutional control of choice of law.