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Allstate Insurance Company v. Hague: Abandonment of Meaningful Constitutional Controls on Choice of Law

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NOTE

ALLSTATE INSURANCE COMPANY v. HAGUE: ABANDONMENT OF MEANINGFUL CONSTITUTIONAL CONTROLS ON CHOICE OF LAW

With the tremendous growth of interstate activity experienced by this country in the last century, theories underlying both the ability of a state court to entertain lawsuits that have multi-state contacts and the application of local rules to those controversies have changed drastically.1 Traditional territorial concepts that restricted the scope of judicial jurisdiction to persons and things located physically within the state, and similarly restricted legislative jurisdiction2 to particular activities which took place in the state, have given way to more flexible rules based upon the contacts a forum has with the parties and the subject matter of the litigation.3 While the extent to which the Constitution limits the exercise of jurisdiction over parties has been the subject of much scrutiny by the Supreme Court in recent years,4 constitutional guidelines applicable to the forum’s choice of law have remained largely undefined.5

Recently, in Allstate Insurance Co. v. Hague,6 the Court was

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1 See generally R. LEFLAR, AMERICAN CONFLICTS LAW (3d ed. 1977); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (2d ed. 1980); RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

2 The phrase “legislative jurisdiction,” as it will be used here, refers to “the power of a state to apply its law to create or affect legal interests.” Reese, Legislative Jurisdiction, 78 COLUM. L. REV. 1587 (1978).


5 See text accompanying notes 38-60 infra for a discussion of relatively recent pronouncements by the Court in this area.

presented with an opportunity to clarify the extent of constitutional limits on the choice of law process and to explain how those limits relate to the controls on judicial jurisdiction.\(^7\) *Hague* involved a dispute over which state's law would determine the amount of automobile insurance proceeds payable as a result of the death of the respondent's husband in a motorcycle accident. The Minnesota Supreme Court\(^8\) held that, although the policy was issued in Wisconsin to the Hagues, who were Wisconsin domiciliaries, and although the accident took place in Wisconsin and involved only Wisconsin residents, Minnesota law could apply.\(^9\) The policy was interpreted differently under Minnesota law than it would have been interpreted under Wisconsin law, and the insured party was awarded three times as much as would have been awarded had the action been brought in Wisconsin.\(^10\) The Supreme Court affirmed\(^11\) in a plurality opinion\(^12\) written by Justice Brennan. The opinion stated that there was a "significant aggregation of contacts" with Minnesota consisting of the decedent insured's employment in Minnesota, the business activity of Allstate in Minnesota, and the post-accident move of the plaintiff, Mrs. Hague, to Minnesota.\(^13\) The presence of these contacts, according to the Court, insured that "the application of [Minnesota] law was neither arbitrary nor fundamentally unfair."\(^14\)

The Court's opinion in *Hague* fails to isolate the underlying

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\(^7\) Commentators have noted that the Court has failed in the past to analyze adequately the interplay between judicial and legislative jurisdiction. See, e.g., Silberman, *supra* note 3, at 80; Comment, *At the Intersection of Jurisdiction and Choice of Law*, 59 CALIF. L. REV. 1514, 1515 (1971).

\(^8\) *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43 (Minn. 1979).

\(^9\) *Id.* at 49. See Allstate Ins. Co. v. Hague, 449 U.S. at 306-07, for the Supreme Court's interpretation of the Minnesota Supreme Court's decision.


\(^12\) Justices White, Marshall and Blackmun joined in Justice Brennan's opinion. Justice Stevens wrote a separate concurring opinion. The dissenters were Powell, Burger and Rehnquist. Justice Stewart did not participate in the decision.


\(^14\) *Id.* at 320.
rationale which makes these contacts significant,\textsuperscript{15} and is therefore of dubious value in delineating the limits on a state court's choice of law.\textsuperscript{16} In the opinion of this author, however, a far more serious problem with the decision is that the Court, as a practical matter, has abandoned any meaningful choice of law restraints other than judicial jurisdictional controls that currently prevent a court from applying local law by preventing it from hearing the case.\textsuperscript{17}

The discussion which follows will initially show why the Court's opinion, when viewed in the context of modern developments of constitutional limits on judicial jurisdiction and choice of law, in effect permits a forum to apply its own law to a controversy without contacts in addition to those required simply to serve as the forum.\textsuperscript{18} The unfortunate consequences likely to follow the abandonment of significant choice of law controls, given the current trend in the conflicts field toward preference for forum law, will be demonstrated: the unleashing of parochialism and the concomitant encouragement of forum shopping.\textsuperscript{19} In addition, specific situations where the effect of such consequences will be most pronounced—where judicial jurisdiction is gained

\textsuperscript{15} The Court's "test" is: "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." \textit{Id.} at 312-13. The criteria necessary to distinguish significant contacts that create state interests from contacts that are not significant remain unclear.

\textsuperscript{16} One commentator has stated: "[T]he decision's lack of a clear theoretical underpinning for its aggregation approach renders its precedential value uncertain." \textit{Note, Contact-Interest Approach to Constitutional Limitations on State Choice of Law—Allstate Insurance Co. v. Hague, 11 SETON HALL L. REV. 770, 794 (1981).}

\textsuperscript{17} This Note does not take the position that \textit{Hague} has overturned those cases in which the Court mandated that a concrete choice of law rule be applied in special circumstances. \textit{See, e.g.}, Texas v. New Jersey, 379 U.S. 674 (1965) (intangible property can be escheated only by the state of each creditor's last known address); Order of United Commercial Travelers of America v. Wolfe, 331 U.S. 586 (1947) (law of fraternal benefit society's home state determines members' rights in society-provided insurance); Converse v. Hamilton, 224 U.S. 243 (1912) (stockholders' rights in an insolvent corporation governed by the law of the state of incorporation). The opinion in \textit{Hague} deals only with generally applicable constitutional controls on choice of law.

\textsuperscript{18} See the text accompanying notes 23-90 infra for development of this point.

\textsuperscript{19} See the text accompanying notes 91-125 infra for a discussion of why choice of law trends and differing judicial and legislative jurisdictional objectives suggest a need for separate choice of law controls.
through a defendant's fortuitous presence in a state having little or no contact with the dispute at hand—will be discussed.20

As a solution, this Note suggests that, although ideally a state court should be precluded from applying local rules of decision to a case unless that state's interest in the litigation is at least as strong as another state's competing interest, such an application of local rules should certainly be precluded unless the state possesses some connection to the specific facts underlying the controversy.21 The Hague Court's decision, by in essence leaving the choice of law decision to the local policy of the states, is inconsistent with "the implication of our federal system that the mutual limits of the states' powers are defined by the Constitution."22

I. EVOLVING CONSTITUTIONAL LIMITATIONS

To understand the implications of the Supreme Court's decision in Hague, it is necessary to view it both in the context of evolving constitutional limitations on the powers of courts to exercise judicial jurisdiction (without which they would not have the opportunity to choose any law), and with regard to the unsettled state of constitutional limitations on legislative jurisdiction at the time the decision was rendered.

A. Judicial Jurisdiction

It is now clear that in order to exercise judicial jurisdiction under the due process clause23 the forum must have minimum contacts with the defendant.24 Despite having contacts with the

20 See the text accompanying notes 126-44 infra for a discussion of the consequences likely to follow from the discarding of significant choice of law controls in specific areas where the effects of such consequences will be most pronounced.

21 See the text accompanying notes 145-56 infra for this author's conclusion.

22 Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 COLUM. L. REV. 1, 26 (1945).

23 The text of the clause reads: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. See note 111 infra and accompanying text for a discussion of the clause's role in the Court's judicial jurisdiction decisions.

24 "[The due process] clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." International Shoe Co. v. Washington, 326 U.S. at 319. See Martin, Personal Jurisdiction and Choice of Law, 78 MICH. L. REV. 872, 874-76 (1980); Silberman, supra note 3, at 84.
plaintiff or with factual aspects of the litigation as in *Hanson v. Denckla,*26 *Shaffer v. Heitner,*26 *Kulko v. Superior Court,*27 and *World-Wide Volkswagen Corp. v. Woodson,*28 forums have been precluded from exercising judicial jurisdiction when the defendant has not "purposely avail[ed] [himself] of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."29

The "minimum contacts" test is, of course, the latest manifestation of the shift in theoretical underpinnings of constitutional limits away from strict territorialism.30 This shift has in some instances restricted the states' ability to exercise jurisdiction, but the overall effect has been the expansion of bases of judicial jurisdiction.31 For example, a state can no longer exercise *quasi in rem* jurisdiction over a defendant merely because intangible property he "owns" has its situs in that state, unless he also has minimum contacts with the state.32 On the other hand, a corporate defendant that transacts business in a variety of places is now amenable to suit in places other than its place of incorporation or principal place of business through application of the minimum contacts test.33 Moreover, the Supreme Court has made it clear that

25 357 U.S. 235 (1958) (Florida had contacts with beneficiaries, who differed over whether a power of appointment exercised in Florida by a Florida-domiciled testator was valid, but no contacts with an indispensable party defendant).

26 433 U.S. 186 (1977) (Delaware had contacts with the defendant's stock, sequestered there through a fictional situs concept, but insignificant contacts with corporate officer defendants who owned the stock).

27 436 U.S. 84 (1978) (California had contacts with the ex-wife, who attempted to increase child support for her children who lived in California with her, but insignificant contacts with the defendant father).

28 444 U.S. 286 (1980) (Oklahoma had contacts with an accident which took place within its borders and with the injured plaintiffs, but tenuous contacts with the defendants who distributed and sold the automobile).

29 357 U.S. at 253.

30 For examples of jurisdictions exercised utilizing notions of strict territorialism, see *Harris v. Balk,* 198 U.S. 215 (1905), and *Pennoyer v. Neff,* 95 U.S. 714 (1877).


32 Shaffer v. Heitner, 433 U.S. 186. By an extension of the same logic, it has been argued that a state should not be permitted to exercise jurisdiction over a defendant who is temporarily located within its boundaries unless more significant contacts are present as well. See Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens,* 65 Yale L.J. 289 (1956).

the contacts need not necessarily be related to the plaintiff's cause of action. This availability of alternative forums provides litigants involved in a significant class of cases with an increased opportunity for forum shopping.

While the bases of in personam jurisdiction have been expanding, however, the Supreme Court has made it clear that a forum's interest in subjecting a defendant to local law is not enough, in itself, to provide the court with jurisdiction over him. For example, in World-Wide Volkswagen Corp. v. Woodson, the Court noted that even if the forum State has a strong interest in applying its law to the controversy[,] even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

It is clear that the considerations underlying the ability of a court to require a defendant to defend and those underlying its ability to bind him by local laws are recognized as being different. These differences in conjunction with expansive trends in personal jurisdiction suggest that, conceptually, a plaintiff could have a choice of forums, none of which has the interest in seeing its law applied that another forum, unable to obtain jurisdiction over the defendant, might have.

36 Id. at 294. See Kulko v. Superior Court, 436 U.S. at 98 ("the fact that California may be the 'center of gravity' for choice-of-law purposes does not mean that California has personal jurisdiction over the defendant."); Shaffer v. Heitner, 433 U.S. at 215 ("We have rejected the argument that if a State's law can properly be applied to a dispute, its courts necessarily have jurisdiction over the parties to that dispute."); Hanson v. Denckla, 357 U.S. at 254 ("[The court] does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction not choice of law.").
37 Cf. 357 U.S. at 258 (Black, J., dissenting) ("True, the question whether the law of a state can be applied to a transaction is different from the question whether the courts of that State have jurisdiction to enter a judgment, but the two are often closely related and to a substantial degree depend upon similar considerations."). See also World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 310 n.15 (Brennan, J., dissenting); Shaffer v. Heitner, 433 U.S. at 225 (Brennan, J., dissenting).
B. Legislative Jurisdiction

The Supreme Court's recent pre-Hague decisions concerning constitutional limits on legislative jurisdiction, unlike those cases in the judicial jurisdiction area, have been few and have lacked coherence.38 This situation is probably a result of the metamorphosis which has been taking place recently in choice of law methodology. Whereas fifty years ago the territorialist vested rights approach dictated application of the law where the cause of action arose,39 today in a number of states, courts will apply forum law whenever there is some discernible local interest in the case.40 During the heyday of vested rights, the Supreme Court's opinions regarding limits on choice of law imposed by the due process and full faith and credit clauses41 suggested that the one proper vested rights law was also constitutionally required.42 It has been clear for some time now, however, that this position has

38 Commentators have formulated a remarkable diversity of theories in attempting to explain the cases. See R. LEFLAR, supra note 1, at 116; R. WEINTRAUB, supra note 1, at 505; Kirgis, The Roles of Due Process and Full Faith and Credit in Choice of Law, 62 CORNELL L. REV. 94, 103-04 (1976); Martin, Constitutional Limitations on Choice of Law, 61 CORNELL L. REV. 185, 211 (1976); Overton, State Decisions in Conflict of Laws and Review by the United States Supreme Court Under the Due Process Clause, 22 OR. L. REV. 109, 170 (1943); Reece, supra note 2, at 1596-97; Simson, State Autonomy in Choice of Law: A Suggested Approach, 52 S. CAL. L. REV. 61, 87 (1978).

39 See, e.g., RESTATEMENT OF CONFLICT OF LAWS § 379 (1934).

40 This is the approach espoused initially by the late Professor Brainerd Currie. See, e.g., B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963). However, in his later writings Currie suggested a softening of this approach. See, e.g., Currie, The Disinterested Third State, 28 LAW & CONTEMP. PROB. 754, 763 (1963). Examples of cases where a state's interest in a plaintiff provided the sole justification for the application of forum law include O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir.), cert. denied, 439 U.S. 1034 (1978), and Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972).

41 The text of the full faith and credit clause reads: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. Seven members of the Supreme Court in Hague agreed that the due process and full faith and credit clauses, in conjunction, are the source of limitations on a state's choice of law power, and that a similar analysis should be developed under both clauses to determine the extent of those limits. Allstate Ins. Co. v. Hague, 449 U.S. at 308 n.10 (plurality opinion); id. at 332-36 (Powell, J., dissenting). This procedure has generally been accepted since Carroll v. Lanza, 349 U.S. 408 (1955). Justice Stevens, in his concurring opinion in Hague, however, analyzed the inquiries under the two clauses separately. 449 U.S. at 320-32 (Stevens, J., concurring).

been abandoned and that more than one state’s law can constitutionally be applied to a case with multi-state contacts. What is not clear is when the contacts become important enough to permit application of a state’s rules within constitutional restraints.

In analyzing the focus of the Court’s opinions in this area it becomes apparent that, unlike cases concerning judicial jurisdiction, the Court has not emphasized the forum’s relationship with the defendant. Rather, the relationship between the forum and the underlying factual elements of the case, and to a lesser extent that between the forum and the plaintiff, seem significant in choice of law decisions. Prior to the Hague decision it was evident that a plaintiff-forum contact, alone, provided insufficient justification for imposition of local law. In two early cases generally regarded as viable precedents today by commentators and by the Court itself, Home Insurance Co. v. Dick and John Hancock Mutual Life Insurance Co. v. Yates, the Court struck down application of local law by a state forum when the plaintiff’s domicile in the state represented its only connection with the case.

Illustrative of the Court’s position is the following:
Where more than one State has a sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the states involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multi-state activity.


See Martin, supra note 24, at 876.

E.g., R. LeFlore, supra note 1, at 108-09; Martin, supra note 24, at 878.

Both cases are cited with approval and distinguished by the plurality in Hague. 449 U.S. at 309-11. Other decisions from the same era have been disapproved, however. One case in this category is Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932), where it was held that only Vermont’s workmen’s compensation law could apply to a Vermont resident employed in Vermont but killed while temporarily working in New Hampshire. In Carroll v. Lanza, 349 U.S. at 412, the Court noted that Pacific Employers Ins. Co. v. Industrial Accident Comm’n, 306 U.S. 493 (1939), had “departed” from Clapper. More recently, in Thomas v. Washington Gas Light Co., 448 U.S. 261, 272 n.18 (1980), the Court indicated that “Carroll . . . for all intents and purposes buried whatever was left of Clapper after Pacific Employers. . . .” Another case now disapproved is Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934), where the Court struck down application of Mississippi law to a fidelity bond executed in Tennessee but covering Mississippi-based employees. The Hague Court described that decision as a vested rights period case which “has scant relevance for today.” 449 U.S. at 309 n.11.

281 U.S. 397 (1930).

299 U.S. 178 (1936).
Dick involved a suit filed in Texas on an insurance contract, made in Mexico between a Mexican insurance company and a Mexican domiciliary, which covered a tugboat operated in Mexican waters. The only contact that Texas had with the controversy was that the contract was assigned to Dick, a nominal Texas domiciliary at the time, who moved to Texas before filing the action. The Court noted that Dick's residence in Texas was "without significance." 49

In Yates, an action brought in Georgia on a life insurance contract entered into in New York, covering a New York domiciliary who died in New York, the only contact was the beneficiary's after-acquired Georgia residence. The Court held that there was "no occurrence, nothing done to which the law of Georgia could apply." 50 Dick and Yates made it clear that a state needed more than mere contacts with the plaintiff to support application of forum law.

This Note suggests that the common thread which ties the pre-Hague choice of law cases together was the requirement of a connection between the forum and the substantive aspects of the litigation in order to apply forum law. Such a connection, though not always emphasized in the Court's opinions, was present in each of these cases. 51 In addition, the Court has often noted

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49 281 U.S. at 408.

50 299 U.S. at 182.

51 In the Court's workmen's compensation cases, the connection has been either the making of the employment contract in the forum state, Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469 (1947) (District of Columbia law can determine recovery allowed for death of District resident hired by District employer to do work in Virginia, where he was killed); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935) (California can apply own law when alien worker hired there was injured in Alaska and returned afterwards to California), or the occurrence of the accident in the forum state, Carroll v. Lanza, 349 U.S. 408 (Arkansas choice of local law upheld where Missouri-based employee suffered injury on the job in Arkansas); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (California law can be applied when Massachusetts employee injured while temporarily in California).

The occurrence of the accident there has also provided the connecting factor for the forum state in a tort case. Nevada v. Hall, 440 U.S. 410 (1979) (California law can determine liability of Nevada for injuries inflicted by Nevada officials on California residents in California).

Location of the insured-against loss in the forum constituted a sufficient connection to apply forum law in cases involving the extent to which a state can regulate insurance contracts. Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964) (Florida statute of limitations can be applied to invalidate clause in insurance contract entered into in Illinois, when in-
the significance of contacts with the particular transaction which is the subject of the suit. For example, in *Watson v. Employers Liability Assurance Corp.*, the Court stated:

> As a consequence of the modern practice of conducting widespread business activities throughout the entire United States, this Court has in a series of cases held that more states than one may seize hold of *local activities* which are part of the multi-state transactions and may regulate to protect interests of its own people, even though other phases of the same transaction might justify regulatory legislation in other states.

Although the Court has not specifically held that the presence of local activities is a prerequisite to the exercise of legislative jurisdiction, the language used as well as the factual settings in the pre-*Hague* cases imply the existence of such a prerequisite.

In the last quarter century, however, the viability of this unarticulated requirement has become uncertain. During this period, the Supreme Court has said little concerning appropriate constitutional limitations on choice of law. The last notable pre-*Hague* case, *Clay v. Sun Insurance Office Ltd.*, was decided in 1964 when the vested rights choice of law theory was in the initial stages of its rejection by state courts. The *Clay* opinion, written by Justice Douglas, contained only a minimal analysis of the problem. *Clay* was an action on the insurance contract exec-

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sured moved to Florida before suffering a loss covered there); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954) (Louisiana direct action statute can be used to bring action on insurance contract entered into by out-of-state parties when the insured manufacturer's product caused damage in Louisiana). See also *Hooperston Canning Co. v. Cullen*, 318 U.S. 313 (1943). In *Hooperston*, burdensome New York regulations were imposed upon Illinois insurance associations that insured property located in New York.


53 Id. at 72 (emphasis added). Accord Richards v. United States, 369 U.S. at 15. For the text of a relevant portion of the *Richards* opinion, see note 43 supra.

54 377 U.S. 179 (1964). A more recent Supreme Court choice of law case is *Nevada v. Hall*, 440 U.S. 410, but that decision can be viewed as merely reaffirming an earlier case, *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493. See note 51 supra for a brief description of these cases. The only difference between the cases analytically is that the sister state policy overridden in *Hall*, Nevada's interest in limiting its own tort liability, was stronger than the sister state policy overridden in *Pacific Employers*, Alaska's interest in limiting workmen's compensation recoveries against employers who employed workers there.

uated in Illinois, but based on a loss which occurred within the insured's after-acquired Florida domicile. The opinion said only that the activities in Florida were not "too slight and too casual" to preclude application of the Florida statute of limitations. The most recent Supreme Court decisions which do contain relatively complete discussions on choice of law limitations were rendered nine to ten years earlier than Clay, at a time when the vested rights system was still solidly entrenched in the state courts.

Additional uncertainty has been generated by the Court's refusal to grant certiorari in Confederation Life Insurance Co. v. De Lara in 1972. There, the Florida courts had applied Florida law to determine obligations owed under a life insurance contract entered into in Cuba on the life of a Cuban citizen who died in Cuba but whose beneficiaries lived in Florida. Two dissenting justices observed that Florida had "no relationship to the insurance policy at issue" and that under any reasonable choice-of-law test it would be difficult to apply Florida law. De Lara is significant in that the Court was presented with an opportunity to reaffirm its holdings in Dick and Yates—that a plaintiff's domicile is insufficient, standing alone, to warrant the application of forum law—but declined to do so.

Likewise contributing to the uncertainty has been the obiter dicta concerning choice of law issues in recent Supreme Court jurisdiction cases. In Hanson v. Denckla, Shaffer v. Heitner, Kulko v. Superior Court, and World-Wide Volkswagen Corp. v. Woodson, the Court states that although the jurisdictions involved lacked sufficient contacts with the defen-

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56 377 U.S. at 181-82.
58 257 So. 2d 42 (Fla. 1971), cert. denied, 409 U.S. 953 (1972).
59 Justice Brennan wrote the dissenting opinion in which Justice Douglas concurred.
61 See note 36 supra and accompanying text for a discussion of choice of law issues in the context of judicial jurisdictional decisions.
64 436 U.S. 84, 98 (1978).
dants to constitutionally exercise judicial jurisdiction over them, they may have otherwise had sufficient connections to the facts to apply local law. Commentators have interpreted the Court's language as a suggestion that more forum-state contacts are typically needed for the exercise of jurisdiction than for the application of forum law and have questioned the appropriateness of the gratuitous statements. After all, it is reasoned, application of forum law will affect the substantive interests of the parties to a greater extent than the exercise of judicial jurisdiction by the forum. Being forced to litigate in a distant forum will inconvenience a party, but having an unexpected rule of law applied may jeopardize the ultimate disposition of his case.

Is the Court actually implying that more contacts are needed for judicial jurisdiction than for legislative jurisdiction? A more plausible explanation for the seemingly inconsistent treatment of the two constitutional restrictions is that the Court feels that the controls placed upon the exercise of judicial jurisdiction by International Shoe and its progeny will adequately protect against an unrelated state's arbitrary choice of its own law. That is, if a court unconnected with the facts of a case is prevented from hearing it, there would be no opportunity for that court to apply an incongruous rule of law. This approach has been suggested by Professor Ehrenzweig, who has advocated that the choice of a forum be restricted to those whose contacts with the case justify application of forum law. However, it is difficult to draw the

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66 See note 36 supra and accompanying text for the exact language used by the Court in these cases.

67 See Leathers, Substantive Due Process Controls of Quasi in Rem Jurisdiction, 66 KY. L.J. 1, 35-36 (1977-78); Martin, supra note 24, at 879-80; Silberman, supra note 3, at 82-88.


Compare the position taken by Justice Black in his concurring opinion in International Shoe Co. v. Washington, 326 U.S. at 323, in which he maintains, essentially, that if a court can constitutionally apply its own law, it should be able to exercise jurisdiction. If this were the rule, the constitutional controls on choice of law would provide the only restraint upon arbitrary exercises of judicial jurisdiction by state courts. The problem with the approach is that the scope of choice of law controls today is unclear. See notes 38-60 supra and accompanying text for a discussion of the lack of coherence in this area.
Conclusion that constitutional controls on choice of law are becoming obsolete by extrapolating upon the dictum found within these judicial jurisdiction cases. Rather, the Court would need to consider a case where the lower court concededly had judicial jurisdiction and where only the existence of legislative jurisdiction was in question. This Note suggests that, having been faced with such a situation in *Allstate Insurance Co. v. Hague*, the Court is signaling the abandonment of significant choice of law limits.

II. THE COURT'S OPINION IN *HAGUE*

In *Hague*, the Minnesota court indisputably had jurisdiction over the parties, but its connection with the underlying transactions was tenuous. Although the decedent had procured the insurance while domiciled in Wisconsin, and the accident that claimed his life took place there, Allstate was amenable to suit on the policy in Minnesota because the company transacted unrelated business there. Thus, the Court was squarely presented with the issue of what additional contacts, if any, a state must have to apply forum law beyond the "minimum contacts" already necessary for the exercise of judicial jurisdiction.

The Supreme Court identified three Minnesota contacts which provided a sufficient connection to justify application of Minnesota law: first, that the decedent was employed in Minnesota; second, that the insurance company did business in Minnesota;...
sota; and third, that the decedent’s wife moved to Minnesota before initiating the lawsuit. Perhaps in an effort to detract attention from the meaninglessness of these individual contacts, the plurality opinion noted that “[i]n the aggregate” the contacts provided Minnesota with justification for applying its law. Inasmuch as the whole cannot be greater than the sum of its parts, however, an analysis of each of the contacts is necessary. Such an analysis reveals that, for practical purposes, the Court is requiring no contacts beyond those necessary to permit a state to force an unwilling party to litigate within its boundaries and that for choice of law purposes, no additional constitutional restraints of any consequence exist.

With regard to the Minnesota employment contact, the Court mandates only that the forum state have a contact with the decedent, whether or not the contact is related to his claim. Hague’s employment was unrelated because his insurance was not “affected [n]or implicated by [his] employment status,” and because the accident itself did not take place as he was going to or from work. In the plurality opinion, Justice Brennan attempts to show a relationship by noting the “state concern for the safety and well-being of its workforce,” but auto insurance does not help assure the employability of Minnesota workers—it merely assumes that covered parties, regardless of where employed, are compensated for their losses. The Court is obviously satisfied with the presence of forum contacts which have, at best, little to do with the substance of the controversy.

71 Id. at 313.
72 Describing the Hague Court’s methodology, one author notes: “The Doctrine that emerges from the aggregation approach is quite radical: a cluster of individually nonsignificant contacts is significant for constitutional purposes. The otherwise empty contacts somehow gather content when grouped as a whole.” Note, supra note 16, at 787-88.
73 Professor Martin reached the conclusion that Hague should be reversed, before the case was decided by the Court, on the basis of both his proposed minimum contacts approach and traditional standards. See Martin, supra note 24, at 887-88.
75 Id. at 314.
76 Another possible explanation for the Court’s emphasis upon the decedent’s employment contact, suggested to this writer by Professor John Leathers, University of Kentucky College of Law, is that the Court was dissatisfied with the concept of domicile as presently defined and felt that the Minnesota employment made Hague a quasi-Minnesota domiciliary.
The control over a state's ability to apply local law provided by the requirement of an unrelated contact is minimal at best. There are possibly infinite irrelevant contacts that a court could seize upon to justify the application of forum law. Vague state interests furthered thereby could always be unearthed. For example, the presence of virtually any close relatives of the decedent Hague in Minnesota could support the application of Minnesota law if the court notes a possibility that those relatives would have to provide for Hague if he were injured, or for his immediate family if he were killed, and that the insurance coverage provided under sister state law was insufficient.

It could be maintained that a requirement of an unrelated forum contact at least prevents application of the law of a forum chosen by a plaintiff with no contacts. In practice, however, it is highly unlikely that even a state which favors the application of its law will want to apply it simply because a non-resident chose the forum. In most instances, the state would refuse to hear the case through the forum non conveniens doctrine. Thus, the unrelated Minnesota employment contact stressed as a limiting factor in Hague does not perceptibly alter a state forum's ability to apply the law of its choice.

The second contact noted in Hague, the insurer's presence in Minnesota, is, of course, the same contact needed by Minnesota to exercise judicial jurisdiction over Allstate. No additional restrictions are placed upon the forum's ability to apply its own law by a precondition that such a contact exist. Absent minimum contacts between the forum and the defendant, that state forum would not have the opportunity to apply its own law because constitutional limits upon judicial jurisdiction would preclude it from hearing the case to begin with.

Finally, regarding the plaintiff's post-accident move to Minnesota, much like the decedent's Minnesota employment, the Court articulates only another unrelated contact requirement. The plaintiff's post-accident move is plainly irrelevant to the

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78 The contact requirement, as described in the judicial jurisdiction context, is "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. at 253.
question of which state's rules should be applied to the legal issues involved in a suit upon that accident. As is the case with forum-employment contacts, a requirement that a plaintiff have established a contact with the forum at a point in time after the claim arose does not provide a meaningful limit upon a state's ability to apply its own law. Of course, this requirement will prevent a state from applying its law when a non-resident litigant sues there provided there are no other contacts. Constitutional limitations aside, even a forum which tends to apply forum law whenever it has some interest in the case will not be inclined to do so when its only contact with the plaintiff is his choice of that court. Thus, the forum's desired choice of law will not be discernibly restricted by the requirement that the state have an unrelated contact such as the plaintiff's after-acquired domicile.

That significant constitutional choice of law controls have now been discontinued becomes apparent when the earlier Supreme Court cases which limited state court choice of law, *Home Insurance Co. v. Dick* and *John Hancock Mutual Life Insurance Co. v. Yates*, are reexamined in the light of *Hague*. Although Justice Brennan purports to distinguish *Yates* it is clear that *Hague* overrules it. The cases are almost identical. In both, the decedent-husband had been insured and had died in one state, but the plaintiff-wife had moved to another state before filing suit on an insurance policy (the only difference being that in *Yates* a life insurance policy instead of an auto policy was involved). The dissent in *Hague* noted another similarity—that the

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8. 281 U.S. 397 (1930). See the text accompanying note 49 supra for a brief synopsis of the facts of the case.
82. See 449 U.S. at 310-11.
83. Justice Stevens, in his concurring opinion, seems to appreciate the similarities between *Hague* and *Yates*; he notes that the latter case “was one of a series of constitutional decisions in the 1930's that have been limited by subsequent cases.” *Id.* at 325 n.11 (Stevens, J., concurring). However, the majority opinions in the cases cited by Justice Stevens as supporting his contention that *Yates* was no longer valid at the time of the *Hague* decision contain no references to *Yates*. The only reference to *Yates* at all in the cases cited by Justice Stevens appears in a dissenting opinion where the case is merely mentioned in a general discussion. *See* Carroll v. Lanza, 349 U.S. at 416 (Frankfurter, J., dissenting).
defendant insurance company in *Yates* did business in the forum state, a contact stressed in the *Hague* plurality opinion but considered meaningless for choice of law purposes in *Yates*. The only factual difference between the two cases is the presence in *Hague* of an additional unrelated contact—the decedent’s employment in Minnesota. However, considering the emphasis that the Court in *Yates* placed upon the absence of a connection between the Georgia forum and the subject matter—the insurance contract sued upon—it is doubtful that an unrelated contact would have altered the outcome of *Yates*. Moreover, it is possible in *Yates* that some family ties did actually exist between the plaintiff-wife and Georgia, and that the insurance company could have anticipated her move there in the event of her husband’s death. Under the Court’s analysis in *Yates* the existence of such an unrelated contact would have been irrelevant. The ruling of the Court in *Hague*, however, given the similarity of the facts in the case to those in *Yates* and the different result, indicates that forum contacts with the substance of the litigation are no longer necessary to justify the application of forum law.

*Dick*, while not overturned by *Hague*, has lost its signif-

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84 Cited by Justice Powell was *The Insurance Almanac* 715 (1935). 449 U.S. at 338 n.4 (Powell, J., dissenting) (discussing *Yates*).

85 The Court in *Yates* did not think the fact important enough to even warrant mention. See 449 U.S. at 338 n.4 (Powell, J., dissenting) (“This Court did not hint in *Yates* that [the] fact [that the insurance company did business in the forum state] was of the slightest significance to the choice-of-law question. . . .”).

86 See the text accompanying notes 74-76 *supra* for an explanation of why this contact is unrelated to the claim.

87 “[In respect to the accrual of the right asserted under the contract, or liability denied, there was no occurrence, nothing done, to which the law of Georgia could apply.]” 299 U.S. at 182.

88 The contacts that Texas had with the dispute in *Dick* were significantly more tenuous than those in *Hague*. For example, the insurer with whom Dick’s predecessor contracted had never done any business in Texas. See 281 U.S. at 402. However, much of the language in *Dick* appears inconsistent with the essence of the Court’s opinion in *Hague*. In discussing the extent to which a state could affect the terms of a contract, the Court in *Dick* said:

A State may, of course, prohibit and declare invalid the making of certain contracts within its borders. Ordinarily, it may prohibit performance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the State and their performance would violate its laws. But, in the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in
icance because the fact situation in the case could not arise today. In *Dick*, jurisdiction was obtained *quasi-in-rem* over the reinsurers of Dick's policy by garnishing their reinsurance obligation. Since this method of obtaining judicial jurisdiction over defendants was declared unconstitutional in *Rush v. Savchuk*, the Court, today, would affirm the result in *Dick* (Texas cannot apply Texas law), but for a different reason: no constitutional controls on choice of law would be necessary because the judicial jurisdiction controls would prevent Texas from *hearing* the case initially.

The effect of evolving judicial jurisdictional concepts upon a state's opportunity to apply its own law, as illustrated by conceptualizing *Dick* in a present-day setting, helps explain the Court's position in *Hague*. The Court appears to be saying that limits upon the exercise of state court jurisdiction set by the minimum contacts standard provide adequate protection against irrational selection of applicable law.

### III. THE NEED FOR CONSTITUTIONAL CONTROL ON CHOICE OF LAW

To understand the impact of *Hague*'s virtual abandonment of constitutional restraints upon choice of law, the case must be viewed in the context of a trend in many states toward favoring forum law. In light of this trend, this author suggests that the Court's decision in *Hague* was shortsighted. Because the goal of interstate allocation of judicial business sought to be achieved by judicial jurisdictional rules differs from the goal of interstate allocation of the states' substantive policies sought to be achieved by choice of law rules, separate choice of law restraints are still needed.91

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Texas . . . At all times here material, [Dick] was physically present and acting in Mexico.

*Id.* at 407-08.

89 *Id.* at 402. This is essentially the same procedure through which judicial jurisdiction was obtained in Seider v. Roth, 269 N.Y.S.2d 99 (1966).

90 444 U.S. 320 (1980). The Supreme Court in *Hague* notes in reference to *Dick* that "[t]here would be no jurisdiction in the Texas Courts to entertain such a lawsuit today." 449 U.S. at 310 n.12.

A. Trends Toward Preference for Forum Law

It is ironic that controls on choice of law have been virtually eliminated at a time when state courts are becoming less inhibited about choosing the law they prefer and, in the process, are abandoning traditional choice of law theories. In attempting to fill the void left by their renunciation of the vested rights principles of the original Restatement of Conflict of Laws, courts have been less enamoured of interest-balancing approaches suggested by some theorists and have tended to prefer their own variations of the "governmental interests" theory first espoused by the late Professor Brainerd Currie. According to Currie's theory, if a forum state's connection with the dispute gives it a "legitimate interest," its law can be applied, even if another state's interests are arguably more important (and even if the other state would have applied local law if the case had been litigated there). Typically, state courts have not adhered consistently to one theoretical approach, but have chosen ad hoc from among the various "scholarly camps." Currie's theory has been appealing, primarily because of its preference for forum law. It is, after all, easier for a state judge to apply local law than to interpret and apply that of another state.

Conflicts decisions from Kentucky and from New York exemplify the trend toward application of forum law. Kentucky's highest court concluded that "the conflicts question should not be determined on the basis of a weighing of interests, but simply on the basis of whether Kentucky has enough contacts to justify applying Kentucky law." This proposition was utilized in Fos-
ter v. Leggett to reject an Ohio guest statute defense of an Ohio-domiciled driver who was involved in an Ohio accident that killed his Kentucky passenger. The Court noted as significant Kentucky contacts that the driver worked and had "social relationships" in Kentucky. Since an Ohio court would have applied its guest statute in the same situation, it is apparent that Kentucky's preference for forum law increases the possibility that the outcome in a particular case will vary according to whether the suit is initiated in Kentucky or elsewhere.

In New York, similar consequences flow from that state's recent trend toward favoring recovery for New York-domiciled plaintiffs regardless of where they happen to be injured and regardless of other interested states' inconsistent policies designed to limit defendants' liability. The application of New York law, under New York choice of law rules, to benefit local plaintiffs is illustrated by O'Connor v. Lee-Hy Paving Corp. In that case, a New York domiciliary was injured by a Virginia corporate defendant in Virginia. The plaintiff's sole remedy under Virginia law

though Ohio did not allow tort actions between husband and wife and also had a guest statute precluding recovery, the Kentucky court applied Kentucky law on the grounds that the accident occurred in Kentucky.

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99 484 S.W.2d at 829. The Kentucky court apparently obtained judicial jurisdiction over the defendant through personal service on him while he was temporarily within Kentucky.

A federal district court sitting in Kentucky applied Kentucky law in a case with similar facts. See Bennett v. Macy, 324 F. Supp. 409 (W.D. Ky. 1971).

For a case in another jurisdiction with a conclusion opposite to that of Foster see Cipolla v. Shaposka, 267 A.2d 854 (Pa. 1970).

100 See 484 S.W.2d at 831 (Reed, J., dissenting).

101 New York, unlike Kentucky, has exhibited a preference for forum law only when local plaintiffs are involved. Thus, in Neumeier v. Kuehner, 335 N.Y.S.2d 64 (1972), an action for the wrongful death of an Ontario resident who died in an Ontario accident while a guest in a New York resident's car, the New York Court of Appeals held that Ontario's guest statute precluded liability.

102 A good summary of the New York cases in this area is found in Roseenthal v. Warren, 475 F.2d 438 (2d Cir. 1973), a diversity case. In Roseenthal, a wrongful death action was brought in New York against a physician who had performed an operation on the New York decedent in Massachusetts. Although under Massachusetts law recovery was limited to $50,000, the Second Circuit held New York law applicable because of that state's policy of "fully compensating the harm from wrongful death." Id. at 445.

For a critique of Roseenthal, see Reese, supra note 2, at 1605-06.

103 579 F.2d 194 (2d Cir. 1978).
was provided by that state's workmen's compensation statute. The Second Circuit, applying the New York conflicts rules in a diversity action, held that New York law, which permitted a tort action, was properly utilized by the district court. The tenacious nature of the forum contacts in O'Connor becomes evident by looking at how jurisdiction over the defendant corporation (which had no contacts with New York) was obtained by garnishing obligations to insure it under Seider v. Roth. But for the fortuitous circumstance that the defendant's insurer's presence in New York gave New York judicial jurisdiction, the plaintiff would have been forced to bring the action in Virginia, where her recovery would have been limited.

Choice of law systems such as Kentucky's and New York's that significantly favor forum law will inevitably promote forum shopping, and if a litigant succeeds in obtaining a favorable judgment in one forum, the full faith and credit clause mandates that a sister state recognize the judgment. The possibility that a sister state may have had a superior interest in the litigation and would not have considered applying any law but its own demonstrates the need for controls at the choice of law level. In an age of increasing commercial interdependence, some judicial consistency among the states is necessary to maintain the willingness of individuals to participate in interstate dealings.

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106 In other cases, the application of New York rules, when New York had extremely limited contacts with the controversy, has produced results inconsistent with the probable outcome of the case had it been litigated elsewhere. See, e.g., Rosenthal v. Warren, 475 F.2d 438 (see note 102 supra for a description of this case); Holzsager v. Valley Hospital, 482 F. Supp. 629 (S.D.N.Y. 1979) (New Jersey charitable immunity was not applied in a suit against a hospital by a wife for injuries suffered when her husband died while both resided within New Jersey; the wife moved to New York prior to filing suit); Miller v. Miller, 290 N.Y.S.2d 734 (1968) (Maine limit on wrongful death recovery not applied when a New York resident was killed in Maine in a vehicle operated by his Maine-domiciled brother who subsequently moved to New York).
107 See Fauntleroy v. Lum, 210 U.S. 230 (1908).
108 See Reese, supra note 2, at 1606-07.
B. The Differing Objectives of Judicial and Legislative Jurisdiction Controls

Is a separate set of constitutional controls on choice of law really necessary to prevent forum shopping? In many instances, the "minimum contacts" limits upon judicial jurisdiction do prevent blatant forum shopping. If a case with the facts of O'Connor arose today, a forum having no connection with the defendant would be precluded from applying its law by the jurisdictional "minimum contacts" requirement. However, problems exist that are not resolved by the tightening of judicial jurisdiction controls. Generally, the concern in both the choice of forum and choice of law areas is one of rationally allocating judicial business in a federal system; but the specific goals sought to be attained in the respective areas differ.

In the area of judicial jurisdiction, constitutional limits focus on fair treatment of the defendant and insure against the burden of litigating in a distant forum with which the defendant has no contacts. In contrast, choice of law limits have traditionally focused upon contacts between the forum and the factual elements of the case, suggesting an interest in the obligation of one state to respect the rights of sister states to govern within their respective spheres of influence. Thus, a forum which lacked contacts with the factual elements of the controversy was not necessarily precluded from exercising judicial jurisdiction, provided the requisite defendant-forum contacts were present, but the forum could not apply its own law to that controversy. This distinction between judicial and legislative jurisdictional interests has intuitive appeal. For example, if a dispute arises between

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109 See note 103 supra and accompanying text for a discussion of the facts of O'Connor.
111 The Supreme Court, in International Shoe, stated: "[The due process clause] does not contemplate that a state may make a binding judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." 326 U.S. at 319. See Martin, supra note 38, at 202-03. Cf. Reese, supra note 2, at 1591. Reese argues that the basic principle underlying judicial jurisdiction has both a fairness and a federalism component.
112 See note 51 supra and accompanying text for a discussion of the importance of this type of contact in the Court's choice of law decisions.
113 See Martin, supra note 38, at 202-03.
two parties from activities undertaken by each within the state of New York, and both parties later moved to California, the more convenient forum is California, and that state should be free to entertain the lawsuit. However, because the events had ramifications only within New York and only New York has an interest in regulating them, New York law should be applied to the merits of the controversy.

The distinction between the functions of controls on judicial jurisdiction and controls on choice of law also manifests itself in the underlying constitutional doctrine. While the due process clause has always provided the foundation for the Supreme Court's judicial jurisdiction decisions,114 the Court has relied on both due process115 and full faith and credit116 in its choice of law opinions.

Some observers maintain that the full faith and credit clause alone better explains the rationale behind choice of law limits.117 Professor James Martin has argued that the due process clause, with its emphasis on the relationship between the state and the individual, is typically not offended when a state with jurisdiction over the parties applies an otherwise irreproachable local law.118 Local laws are applied regularly with no contention that the laws, in and of themselves, are fundamentally unfair. Any notion that such laws cannot be applied to out-of-state activities because due process leaves the forum state without "power" to affect transactions taking place outside its boundaries is pre-

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114 The initial case to identify due process as the doctrinal basis for judicial jurisdictional control was Pennoyer v. Neff, 95 U.S. at 733, although the fourteenth amendment was not ratified until 1868, subsequent to the time that Neff's property was attached and sold pursuant to judgment.
117 See, e.g., Martin, supra note 38; Comment, supra note 7, at 1532-39. But see Kirgis, supra note 38, at 94 (disagreeing with Martin's analysis); Martin, A Reply to Professor Kirgis, 62 CORNELL L. REV. 151 (1977).
118 See Martin, supra note 38, at 202-03.
cluded by contemporary judicial jurisdiction decisions. In most cases, because the parties are generally unaware of the varying content of each state's laws, there is no reliance on the laws of any particular state that requires the protection of due process. Rather, the interests that are offended by the application of the law of an unrelated state are the regulatory rights of the related state or states that the full faith and credit clause was meant to protect. The basic postulate of our federal system is state sovereignty, which "presupposes that each state will be permitted to effectuate, to the extent consistent with the identical right of every other state, the policies it adopts." When a sister state's policies are superceded by an unrelated forum's mere preference for local law, its rights under the full faith and credit clause are denied.

Controls, apart from those on judicial jurisdiction, are necessary to protect a state's interest in furthering its own substantive policies. There is nothing improper in one state's exercising judicial jurisdiction over litigation centered in another state if that forum is more convenient for the parties. The interested state's concern is not with the location of the litigation; it may very well prefer, because of congestion and expense considerations, that the case not be litigated within its own court system. However, an unrelated forum's decision to apply its own substantive law in this situation (perhaps merely because it is simpler to do so) presents an entirely different situation. The interested state's substantive policies are ignored, yet such action on the part of the forum cannot be prevented by the controls upon judicial jurisdiction alone.

An illustration of the danger inherent in combining the judicial jurisdiction and choice of law analyses is presented by Alton v. Alton, a case concerning permissible bases of divorce juris-

120 An exception arises when the parties explicitly contract that a particular rule of law, other than that of the forum, shall be applicable. See Home Ins. Co. v. Dick, 281 U.S. 397.
122 207 F.2d 667 (3d Cir. 1953), vacated as moot, 347 U.S. 610 (1954).
There, a majority of the Third Circuit held that the Virgin Islands Legislature could not give its courts judicial jurisdiction over divorce actions based solely upon both parties' voluntary appearance before the court. The Alton court reasoned that the traditional basis of divorce jurisdiction—domicile of one of the parties—was constitutionally required by due process. The majority's holding ignored the distinction between the due process-judicial jurisdiction aspects and the full faith and credit-choice of law aspects underlying the case. As Judge Hastie pointed out in his dissent, no one's due process rights were infringed upon when the parties willingly submitted to the court's jurisdiction. The proper resolution of an Alton situation would be to uphold judicial jurisdiction but require application of the law of an interested state—a jurisdiction where one or the other party is domiciled. Thus, the action would be heard in a forum convenient to the parties, but that unrelated forum would be unable to override the policies of sister states having substantive interests in the case.

C. Problem Areas: Where Controls on Judicial Jurisdiction Are Inadequate

If a court's ability to apply forum law is limited only by the minimum contacts necessary for the exercise of judicial jurisdic-

123 Divorce proceedings have traditionally been considered in rem actions, utilizing a fiction that the marital relationship is a res having its situs at the married parties' domicile. Thus these proceedings have been analyzed separately from non-divorce cases. See R. Leflar, supra note 1, at 455. This Note takes the position that, nonetheless, a useful analogy can be drawn between what has transpired in the divorce area concerning judicial jurisdiction/choice of law distinctions and what could possibly occur in other areas as a result of the Hague decision.

124 The court in Alton analyzed Bill No. 55, 17th Legislative Assembly of the Virgin Islands (1953) (amending § 9 of the Divorce Law of 1944), which it found provided: [I]f the plaintiff is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicile, and where the defendant has been personally served within the district or enters a general appearance in the action, then the Court shall have jurisdiction of the action and of the parties thereto without further reference to domicile or to the place where the marriage was solemnized or the cause of action arose.

207 F.2d at 669 (emphasis added).

125 207 F.2d at 680 (Hastie, J., dissenting).
tion, situations will arise wherein that court is free to choose local law despite a lack of contacts with the operative events giving rise to the claim. As a result, forum shopping opportunities may increase dramatically unless constitutional limits on choice of law are imposed. Situations most vulnerable to abuse in the absence of choice of law limits are those in which a corporation transacts business, unrelated to the litigation, within a number of states, and those involving an individual defendant's post-occurrence move from the state where the controversy is centered to an unrelated forum state.126

The Hague case itself illustrates the heightened potential for forum shopping in controversies which involve a multi-state corporation.127 In Hague, the defendant, Allstate Insurance Company, transacted business in all fifty states.128 The plaintiff moved to one of these states, which afforded her a greater measure of recovery,129 and the Court held that the application of local law by the new state was permissible. The Court explained its rationale by quoting Clay v. Sun Insurance Office, Ltd.:130 "Particularly since the company was licensed to do business in [the forum], it must have known it might be sued there, and that [the forum] courts would feel bound by [forum] law."131 However, it is neither foreseeable nor desirable that a forum in which a corporate defendant merely transacts unrelated business should impose its substantive policies upon activities that took place completely within other jurisdictions.132

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126 Forum shopping opportunities are not necessarily limited to plaintiffs. In some circumstances, a party with potential liability would be able to "shop" for a declaratory judgment which would later be entitled to a res judicata effect.

127 See the text accompanying notes 6-14 supra for a brief outline of the facts in Hague.


129 The Hague plurality opinion notes that there was no indication that the change of residence was motivated by litigation considerations. 449 U.S. at 319 n.28. However, the discovery of the moving party's subjective intent would be, in many cases, difficult if not impossible.


131 449 U.S. at 318 (quoting 377 U.S. at 182). The language originally appeared in Justice Black's dissent in the Court's first opinion in Clay v. Sun Ins. Office, Ltd., 363 U.S. 207, 221 (1960) (Black, J., dissenting), where the lower court's decision was vacated and the case remanded to obtain an authoritative construction of state law. In the final Clay decision the majority adopted Black's language into the Court's opinion. 377 U.S. at 182.

132 Jurisdiction founded upon "doing business" within a state is likely to re-
An illustration of the problem, suggested by Professor Martin, centers around the potential liability of an airline as a result of an airplane crash. The mere possibility that the accident could have taken place anywhere within several hundred miles of the scheduled route should not give a nearby state sufficient justification to apply its own law in favor of survivors that are or later become local residents. The minimum contacts between a corporation and a forum which enable that forum to exercise judicial jurisdiction are often totally unrelated to the corporation's dealings with its trial adversary and do not adequately protect against arbitrary choices of forum law.

An additional factor in the multi-state corporate context reveals the inadequacy of the jurisdictional minimum contacts test as a choice of law control: a state's ability to apply forum law is dependent upon the length of its long arm statute. A litigant's attempt to forum shop for substantive law will be successful if the chosen forum has passed legislation permitting it to exercise jurisdiction over the defendant on the basis of unrelated contacts. Examples of such long arm statutes are found in those states that permit the assertion of jurisdiction whenever constitutionally permissible, or in states such as Minnesota that permit such an assertion whenever a corporation transacts any business within the state. Those litigants whose chosen forum lacks the statutory authority necessary to assert judicial jurisdiction are not given the same opportunity to forum shop for substantive law.

Moreover, it is possible that the state with the greatest connection to and interest in a controversy will be unable, statutorily, to acquire jurisdiction over the defendant, while another state with mere unrelated defendant contacts (sufficient to exercise judicial jurisdiction) is free to invoke its substantive law, al-

Note, supra note 16, at 793.

133 See Martin, supra note 24, at 887.


though it has no connection with the actual controversy.\textsuperscript{136} As an alternative, the exercise of \textit{judicial} jurisdiction could be limited to those situations in which the forum has contacts with the facts underlying the litigation, but such an alternative fails to satisfy the fairness objectives of judicial jurisdictional controls.\textsuperscript{137} If the forum suits the convenience of the parties it should be free to hear the case. It is not the exercise of jurisdiction, but rather the forum's choice of law in such a case that should be regulated.

Analogous to the multi-state corporate context are those situations wherein judicial jurisdiction is obtained over an individual defendant based upon his or her presence in the forum sometime after the claim arose for reasons unrelated to the claim. The defendant is either served while temporarily within the forum state or served after changing his or her domicile to that state. Post-occurrence relocation of defendants exposes, in many instances, the inadequacy of judicial jurisdictional controls for choice of law purposes. Jurisdiction over transients who lack minimum contacts\textsuperscript{138} poses less difficulty as it is likely to be declared unconstitutional\textsuperscript{139} in the wake of the \textit{Shaffer v. Heitner}\textsuperscript{140} expansion of "minimum contacts" to jurisdiction based on the presence of unrelated property; however, inherent choice of law problems will continue to arise when a state exercises jurisdiction over a defendant whose minimum contact is an unrelated after-acquired domicile. For example, in \textit{Miller v. Miller},\textsuperscript{141} New York acquired jurisdiction over the defendant because he fortuitously (for the plaintiff, at any rate) moved to New York after being involved in a traffic accident. The accident occurred in Maine, the defendant's domicile at the time, and claimed the life of the plaintiff's decedent, who was a passenger in the defendant's car.

\textsuperscript{136} See, e.g., Lilienthal v. Kaufman, 395 P.2d 543 (Or. 1964) (Oregon defendant defaulted on notes executed in California with California plaintiff who had no contacts with Oregon; plaintiff was forced to sue in Oregon because the long arm statute in force at the time in California was not broad enough to give its courts jurisdiction over the defendant).

\textsuperscript{137} See note 111 \textit{supra} and accompanying text for a brief discussion of the objectives sought to be obtained by such controls.

\textsuperscript{138} See, e.g., Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959) (the defendant was served with process while flying over Arkansas in an airplane and judicial jurisdiction was upheld).

\textsuperscript{139} See Sedler, \textit{supra} note 91, at 1035.

\textsuperscript{140} 433 U.S. 186 (1977).

\textsuperscript{141} 290 N.Y.S.2d 734 (1968).
Although the defendant's only contacts with New York arose after the operative events took place, and although those events took place entirely within Maine, the New York forum refused to apply Maine's limit upon wrongful death recovery.

Miller clearly illustrates that the law applied to a case should not depend upon fortuitous party relocations in the interim between the accrual of the claim and service of the complaint. Again in this context, a rule making the defendant amenable to suit within the state of his domicile regardless of other contacts is not the offensive element. The rule is a valid one because it secures one place where the defendant is always subject to suit—creating a type of residual jurisdiction. The problem, ultimately, is in the inadequate protection provided by judicial jurisdictional controls against a forum's arbitrary and unfair choice of law. Only separate constitutional limits on a state's choice of law can prevent that arbitrary unfairness.

IV. REIMPOSING CONSTITUTIONAL CONTROLS ON CHOICE OF LAW

Assuming that controls beyond those provided by judicial jurisdictional minimum contacts are needed to limit a state's choice of law, a question remains regarding the proper form of those controls. Although reform could conceivably be accomplished through a number of agencies other than the Supreme Court, this Note will concentrate on judicially imposed solutions. The Court is the only agency through which universal choice of law limits have been imposed in the past. Possible limit-

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142 An additional motivation for the court's decision was that Maine had repealed its limit in the interim between the accident and the trial. Id. at 742.
144 See von Mehren & Trautman, supra note 31, at 1179.
145 An example is uniform legislation in narrowly defined substantive areas. See, e.g., Uniform Reciprocal Enforcement of Support Act § 7 (1952 version) ("Duties of support applicable under this law [act] are those imposed or imposable under the laws of any state where the obligor was present during the period for which support is sought.") U.C.C. § 9-102 (1962 version) ("[T]his Article applies so far as concerns any personal property and fixtures within the jurisdiction of this state. . . .").

Other suggested vehicles of reform include Congress, see Horowitz, The Commerce Clause as a Limitation on State Choice of Law Doctrine, 84 Harv. L. Rev. 806 (1971), and interstate compacts, see Comment, supra note 7, at 1545-47.
ing approaches include: a return to the pre-Hague emphasis on the state’s justifiable regulatory interests suggested by cases such as Watson; a balancing approach designed to pinpoint the most interested state; and a modified minimum contacts approach, with the operative contacts being those contacts with the facts underlying the litigation.

The disadvantage of the pre-Hague approach was its characteristic vagueness. A methodology could not be extracted from inconsistent cases to determine when “the activities in the State of the forum [became] too slight and too casual . . . to make application of local law consistent with due process.”146 The pre-Hague cases were susceptible to such a variety of interpretations147 that the Court in Hague was able to rely on, for example, cases such as Dick and Yates which are at the very least opposed in spirit to the decision reached in Hague.148 For practical purposes, any choice of law guidelines provided before Hague were limited to the specific fact situations in the few cases heard by the Court.

A balancing of the different states’ interests was suggested as a way of limiting arbitrary choice of law in Alaska Packers Ass’n v. Industrial Accident Commission.149 Such a weighing process is more in harmony than other approaches with the theory of limited state sovereignty within the federal system that the full faith and credit clause was designed to insure.150 However, the process of assigning varying weights to ephemeral state interests has proven difficult if not impossible. The preference of state courts in Professor Currie’s anti-balancing theories151 as opposed to the more complicated balancing approaches suggested by others152 indicates the difficulties courts have had with a weigh-

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147 See note 38 supra for examples of theories offered by commentators to explain the cases.
148 See notes 88-90 supra and accompanying text for an evaluation of these cases in light of Hague.
149 294 U.S. 532, 547 (1935). See also the gratuitous language to this effect in Watson v. Employers Liab. Assurance Corp., 348 U.S. at 73 (“[Massachusetts’ interests] cannot outweigh the interest of Louisiana in taking care of those injured in Louisiana.”).
150 See notes 117-21 supra and accompanying text for a discussion of why the full faith and credit clause better explains the rationale behind choice of law limits.
151 See notes 40 & 95 supra for examples of Professor Currie’s work.
152 See note 93 supra for some of the sources of such theories.
ing process. Adoption of a balancing method would also necessi-
tate disapproving the language in contemporary Supreme Court
choice of law cases\textsuperscript{153} stating that more than one state's law can
constitutionally be applied to cases with interstate connections.
Some degree of inconsistency in the outcome of cases depending
on where they are litigated is unavoidable; it is impossible to
neatly characterize truly interstate transactions as being primar-
ily associated with one rather than another state.

Perhaps the most workable proposal for constitutional con-
trols upon choice of law is the quasi-minimum contacts approach
suggested by Professor Martin.\textsuperscript{154} Under his approach, a forum
can apply local law only if it has contacts with the underlying
substance of the controversy.\textsuperscript{155} Thus, a state having the ability to
exercise judicial jurisdiction based on unrelated contacts with the
defendant would not be permitted to apply forum law. Inter-
ested states, therefore, would be protected against arbitrary ap-
plication of forum law when the forum state is unconnected to
the transaction. This approach, because it is similar mechanical-
ly to the judicial jurisdiction minimum contacts test, facilitates a
proper application by state courts. It is, as Professor Martin
points out, also reconcilable with the Supreme Court's choice of
law opinions prior to \textit{Hague}.\textsuperscript{156} Adoption of this approach would
not prevent forum shopping entirely in cases with multiple state
contacts, but would effectively preclude those blatant instances
of forum shopping wherein the chosen forum has no contacts
with the facts underlying the claim.

\textbf{CONCLUSION}

The Supreme Court, rather than utilizing \textit{Allstate Insurance
Co. v. Hague}\textsuperscript{157} as a vehicle to promulgate workable constitution-
al limits upon a state's choice of law, has for all practical pur-
poses abandoned such controls. In view of its decision, the Court
apparently believes that existing controls on the power of a state

\textsuperscript{153} E.g., Carroll v. Lanza, 349 U.S. at 412.
\textsuperscript{154} See Martin, \textit{supra} note 24.
\textsuperscript{155} \textit{Id.} at 873.
\textsuperscript{156} \textit{Id.} at 883-86.
\textsuperscript{157} \textit{449 U.S. 302} (1981).
to exercise judicial jurisdiction will adequately protect against the arbitrary application of forum law by jurisdictions having no factual contacts with the case. However, the Court overlooks the distinction between the objectives underlying controls on judicial jurisdiction, and those underlying controls on choice of law. While it is undeniably fair to require a defendant to litigate in a forum from which he has derived benefits, it is unreasonable, when the suit involves a transaction unrelated to the forum, to allow that forum to ignore the substantive policies of sister states. Yet now, in light of Hague, not only can a state force a defendant to litigate in its tribunals, it can also, on the basis of contacts unrelated to the transaction, subject a defendant to local law.

The Court's decision represents the adoption of a laissez-faire attitude at a time when more restraint upon arbitrary state action is needed. Recently, state courts have become less inhibited in applying forum law, regardless of the conflicting policies of interested states and regardless of the lack of contacts with the circumstances of the claim. The absence of meaningful control in Hague can only be encouraging to those litigants (and their attorneys) who are in the market for a forum willing to apply a law more sympathetic to their claims or defenses. Assuming that multi-state activity will inevitably increase, resulting in additional cases involving choice of law problems, the Court's decision in Hague signals an unacceptable retreat toward a parochial states' rights view of federalism. Hopefully, however, this case is merely an aberration and the Court will reimpose choice of law controls which require that the forum state have some relationship to a controversy before it can apply local substantive rules to the resolution.

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