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CONSTITUTIONAL CONTROL OF CHOICE OF LAW: SOME REFLECTIONS ON HAGUE

Arthur T. von Mehren* & Donald T. Trautman**

The Supreme Court’s decision in Allstate Insurance Co. v. Hague1 is, in several respects, unusual. The decision is so inconclusive on the subject matter it considers that one wonders why the Court, with so much to do, bothered to take the case. Once it heard argument and learned that the division on the Court was such that it could not contribute to the law on the subject, one wonders why it did not dismiss the writ of certiorari as being improvidently granted. This article examines both the reasons why the Court’s action was so unhelpful and the courses of action open to it that might have been more fruitful.

ISSUES IN HAGUE

The decision itself is at best fair warning to the profession that the Court continues to have little to contribute to the subject of constitutional control of choice of law.2 Seven of the eight Justices who took part in the decision of the case2 agreed that application of Minnesota law to the issue on which the case turned would be unconstitutional if Minnesota “had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.”3 The four Justices who comprised the

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3. Justice Brennan wrote the Court’s opinion, in which Justices White, Marshall and Blackmun joined. 449 U.S. at 304. Justice Stevens concurred in the judgment. Id. at 320. Justice Powell wrote a dissenting opinion, in which Chief Justice Burger and Justice Rehnquist joined. Id. at 332. Justice Stewart took no part in the consideration or decision of the case. Id. at 320.
4. 449 U.S. at 308.
plurality concluded that the required contacts were present; Justice Stevens, who concurred,5 and the three dissenters disagreed. Despite this near unanimity on the proposition that Minnesota could not apply her law unless she had some significant contact with the matter, none of the three opinions states clearly the precise substantive issue for which a choice of law was required.

We can only speculate as to why the Justices were silent on this issue. As a preliminary to such speculation, it is useful to state the substantive issue on which the Hague case turned. The point is simple: Was Condition 7 of Section II of the insurance policy issued by Allstate to the deceased valid? The language of Condition 7 embodies the understandable proposition that where there is multiple coverage for the same risk, the insurer’s liability under each coverage is reduced to a proportional contribution to a fund created by pooling all such coverages.6 The consequence in the Hague context is to prevent the aggregation of the insured’s multiple uninsured motorist coverages.

The insured in Hague had extended his policy to provide an uninsured motorist coverage of $15,000 per person and $30,000 per accident for each of his three cars. Condition 7 placed a ceiling of $15,000 per person on the insurer’s total possible liability under these coverages and thus prevented the aggregation or “stacking” of the three coverages to provide for a possible total coverage of $45,000 per person.

As a matter of general contract law, Condition 7 is plainly a part of the insurance agreement. The question remains, however, whether the Condition is valid under the statutes that regulated the writing of the insurance. Some states, including Wisconsin, interpret their statutes to permit such antistacking provisions;7 a larger number of states, including Minnesota, reach the opposite result under

5. Justice Stevens wrote that “there is little in this record other than the presumption in favor of the forum’s own law to support” the application of Minnesota law. 449 U.S. at 331-32 (Stevens, J., concurring in the judgment).

6. That Condition provided, inter alia, that

if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and Allstate shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.


their statutes. Since 1971 all insurance coverage written in Wisconsin was required to include uninsured motorist coverage; an insured could, if he wished, pay an additional premium and raise the uninsured-motorist-coverage limits up to the bodily-injury-liability limits.

The issue of the validity of Condition 7 in Mr. Hague's insurance policy arose in the following circumstances: Hague, a resident and domiciliary of Wisconsin, died of injuries suffered when a motorcycle on which he was a passenger was struck from behind by an automobile. The accident occurred in Wisconsin, immediately across the border from Red Wing, Minnesota, where Hague had been employed for the past fifteen years and to which he had commuted daily from his Wisconsin home. The operators of both vehicles were Wisconsin residents; neither carried insurance.

After the accident but before the present litigation was initiated, Hague's wife moved to Red Wing. Subsequently, she married a Minnesota resident and lived with him in Minnesota. The Minnesota Registrar of Probate appointed Hague's widow personal representative for his estate. In that capacity, she brought an action against Allstate to recover $45,000, representing an aggregation of the three $15,000 coverages contained in her late husband's insurance policy with Allstate.

Allstate argued that Condition 7 did not permit such aggregation so that its liability was limited to $15,000. Hague's widow contended that the Minnesota statute, which had been interpreted as prohibiting antistacking clauses, was applicable as a matter of choice of law. The Minnesota Supreme Court accepted her argument. 

Certiorari was granted and, in due course, the Supreme Court affirmed the judgment below.

BURDENS ON THE COURT

The Supreme Court's extreme reluctance to exercise constitutional control over state choice-of-law practices has long been clear...
and is understandable. This reluctance, based no doubt in consider-
able measure on a desire to avoid the heavy burdens that full-scale
involvement with this intractable subject matter would entail, has
become greater as functional or instrumental methods have increas-
ingly replaced more mechanical approaches to the choice-of-law
problem.\textsuperscript{12} Indeed, it has even been argued that the only realistic
position for the Supreme Court to take in the contemporary situation
is that neither full faith and credit nor due process prevents a state
from applying its own law even though no principled and coherent
choice-of-law method can justify this choice. This view is taken by
Justice Stevens.\textsuperscript{13} The choice of forum law need not be rational or
principled; it need only "not frustrate the reasonable expectations of
the contracting parties" and not result in any "fundamental unfair-
ness."\textsuperscript{14} For Justice Stevens, "[t]he choice-of-law decision of the
Minnesota courts is consistent with due process because it does not
result in unfairness to either litigant, not because Minnesota now has
an interest in the plaintiff as resident or formerly had an interest in
the decedent as employee."\textsuperscript{15}

There is much to be said on both sides of the issue whether the
Supreme Court should relinquish direct constitutional control over
state choice of law to the extent that Justice Stevens proposes. Such
a discussion would require a full-length Article. For present pur-
poses, it is enough to suggest that, while on the one hand federal-
system considerations support the development of significant federal
control over choice of law, on the other, especially in view of the
great difficulties that contemporary choice-of-law methodology
encounters in developing dispositive rules,\textsuperscript{16} the conscientious admin-
istration of full-scale controls, at least under present institutional
arrangements,\textsuperscript{17} could place a significant—perhaps an intoler-
able—burden on the Supreme Court.

\begin{itemize}
\item \textsuperscript{12} For a general discussion, see von Mehren, \textit{Recent Trends in Choice-of-Law Method-
ology}, \textit{60} \textit{CORNELL L. REV.} \textit{927} (1975).
\item \textsuperscript{13} Justice Stevens can, indeed, be read as allowing the choice of the law of any jurisdic-
tion in which Allstate did business and in which the insured might have been expected to drive
at some time. \textit{See 449 U.S.} at 329-32 (Stevens, J., concurring in the judgment).
\item \textsuperscript{14} \textit{Id.} at 330-31 (Stevens, J., concurring in the judgment).
\item \textsuperscript{15} \textit{Id.} at 331 (Stevens, J., concurring in the judgment).
\item \textsuperscript{16} \textit{See Reese, Choice of Law: Rules or Approach, 57 CORNELL L. REV.} \textit{315} (1972).
\item \textsuperscript{17} Under present arrangements, a significant proportion of choice-of-law questions
come to the Supreme Court directly from the highest court of a state. Accordingly, in many
cases the Court would not have the benefit of prior consideration of the problem by the lower
federal courts.
\end{itemize}
Justice Stevens' position is unprecedented and will seem too extreme to those who understand the federal dimensions of the choice-of-law problem.\(^{18}\) The language of both the plurality and the dissenting opinions, although not the result reached by the plurality, accepts minimal federal control at least over essentially arbitrary choice-of-law practices.

**ARBITRARY OR REASONABLE?**

Results can be fairly described as arbitrary when they cannot be explained in a coherent and principled manner on the basis of an acceptable intellectual system. What is arbitrary from the perspective of one intellectual system may, of course, be reasonable from that of another. Whether Minnesota's choice of law in the *Hague* case was arbitrary depends, therefore, on whether there is any intellectual system that can explain in a principled and coherent fashion the application of Minnesota law in *Hague*; and, if so, whether such a system is constitutionally acceptable.

The first question is appropriately considered against the background of American thinking respecting the choice-of-law problem. At least three general approaches or theories are encountered in American practice. The first views choice of law in terms of broad policies respecting the requirements of social and economic intercourse among states. Thus, at an early stage in the development of American conflicts theory, Joseph Story wrote in his *Conflict of Laws* that

> [t]he true foundation, on which the administration of international law must rest, is that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.\(^{19}\)

A second American school of conflicts thinking is associated with Professor Beale and the first *Restatement of Conflict of Laws*.\(^{20}\)

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18. Historically, Justice Stevens' position has not attracted much of a following; however, occasionally in result, if not in reasoning, his view may have been approached as, for example, by Justice Douglas, speaking for the Court in *Carroll v. Lanza*, 349 U.S. 408 (1955), and in a related area by Justice Black in his separate opinion in *International Shoe Co. v. Washington*, 326 U.S. 310, 322 (1945) (Black, J.).


20. See generally J. Beale, Treatise on the Conflict of Laws (1935); Restate-
This school, which sought to provide a relatively simple system in which forum shopping would be discouraged so far as possible, based its solutions largely on the proposition that the territorial nature of substantive law is decisive for choice of law.\textsuperscript{21} It had the vision of the international community as a well-defined checkerboard with each state’s law confined within that state’s boundaries; moreover, each situation or transaction was thought to be firmly centered on one square so that overlapping would never occur.

A third school proceeds from the premise that legal rules reflect policies and, accordingly, whether they apply depends on a rational basis, in view of the connections between the circumstances and the rule’s legal order, for invoking the policy in the multistate situation presented.\textsuperscript{22} This approach, which has its intellectual roots in the writings of Walter Wheeler Cook and David Cavers in the 1920s and 1930s,\textsuperscript{23} has dominated American conflicts methodology since the early 1960s. This school’s instrumental methodology leaves various questions open. One particularly difficult question is how the degree, as distinguished from the existence, of concern is to be evaluated and how so-called true conflicts are to be resolved.\textsuperscript{24} But the theory’s basic premise is widely accepted today: It is arbitrary for a legal order to apply a legal rule in a given case unless the contacts between that legal order and the transaction or occurrence are such that there is a reason, in view of the policies related to the rule, to apply it to the particular issue presented.

Would one or several of these methodologies view Minnesota’s choice of law in \textit{Hague} as reasonable? Or would all conclude that it

\textsuperscript{21} Restatement of Conflict of Laws § 7, at 11-13 (1934).

\textsuperscript{22} This approach is rejected by orthodox continental European theory, which is, methodologically speaking, much closer to the first Restatement. E.g., Kegel, \textit{Paternal Home and Dream Home: Traditional Conflict of Laws and the American Reformers}, 27 Am. J. Comp. L. 615 (1979). But see, e.g., Audit, \textit{A Continental Lawyer Looks at Contemporary American Choice-of-Law Principles}, 27 Am. J. Comp. L. 589 (1979). In all events, the emergence in contemporary European conflicts theory of "unilateral choice-of-law rules" and the conception of "spatially conditioned rules" probably reflects some of the assumptions and considerations that have in recent decades guided American thinking respecting choice-of-law methodology. See, e.g., von Mehren, \textit{Comments}, 27 Am. J. Comp. L. 605 (1979). But the displacement in European thinking of the traditional method is only partial and could ultimately prove unacceptable.


\textsuperscript{24} See von Mehren, \textit{supra} note 12, at 936-41, 952-63.
was arbitrary?

No argument seems available to support the proposition that the choice of Minnesota law in *Hague* is respectful of mutual interest and utility or is acceptable in terms of broad policies respecting the requirements of social and economic intercourse among states. For Story, territorial considerations played a large role in determining mutual interest and utility. Thus he wrote that “A state may . . . regulate . . . the validity of contracts and other acts, done within it; [and] the resulting rights and duties growing out of these contracts and acts . . . .”25 His approach counseled self-restraint and mutual respect; he would certainly have found Minnesota’s choice of law in *Hague* self-serving and not in the mutual interest.

The choice of law in *Hague* fares no better when tested in terms of the territorial criteria on which Beale and the first *Restatement* put such great weight.26 The crucial events—taking out the insurance policy and the accident that gave rise to a claim under that policy—all occurred in Wisconsin. It would seem an impossible task to analyze the *Hague* case in first *Restatement* terms in such a way as to conclude that the decision was not arbitrary and unprincipled.

Is then the *Hague* result also arbitrary when tested in terms of an instrumental methodology? An essential characteristic of all instrumental analyses is that they, unlike the jurisdiction-selecting approach embodied in the first *Restatement*, do not approach the choice-of-law problem as requiring the selection of one governing law for all issues that arise from a given transaction or occurrence. Instead, choice of law proceeds issue by issue. Thus, the second *Restatement* states that

1. The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties.

2. These contacts are to be evaluated according to their relative importance with respect to the particular issue.27

Section 145, which sets out the general principle for choice of law for torts, uses the same formula: “[t]he local law of the state which, with respect to that issue, has the most significant relationship to the

26. See *Restatement of Conflict of Laws* § 7 (1934).
In the circumstances of the *Hague* case, an instrumental methodology asks, therefore, whether Minnesota has any principled basis for invoking its statutory prohibition of contract provisions like those of Condition 7 in Hague's policy against aggregating or stacking uninsured motorist coverages. Condition 7 of the policy was presumably designed to clarify the ambiguity that would otherwise exist as to the extent of the insurance company's exposure through the uninsured motorist coverage. Particularly where the stacking issue relates to uninsured motorist coverage contained in a single policy, the relation between that issue and the cost of the coverage seems clear. It should also be kept in mind that the insured in *Hague* could, by paying a larger premium, have raised his uninsured motorist coverage up to the bodily injury liability coverage that he carried.29

The effect of the Minnesota statutory prohibition of antistacking provisions is, therefore, to provide insureds who take out two or more insured motorist coverages in a single policy with higher coverage—which presumably will cause insurance companies to demand higher premiums.30

Two arguments can be advanced for a statutory prohibition of antistacking clauses in insurance contracts. The first is paternalistic: Individuals need, and should carry, more rather than less protection against the risk in question. In essence, the philosophy is the same as that which justifies requiring, as Wisconsin does, a motorist to carry uninsured motorist coverage. The second argument views insurance contracts as unnegotiated, obscure documents. As the typical insured will not fully understand the details of the coverage he is purchasing, the possibility of surprise should be reduced where possible. Accordingly, complex and ambiguous situations are to be definitively resolved in favor of the insured, at least where the resulting increase in premium cost is presumably small.

Does either the paternalistic or the consumer-oriented policy that can justify Minnesota's rule against antistacking provisions in

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28. *Id.* § 145.
29. See note 9 *supra* and accompanying text.
30. The same effect is produced where an insured takes out uninsured motorist coverage in separate policies, covering different cars.

The stacking problem can also arise in a more indirect and contingent fashion where the insured seeks to benefit by aggregating a coverage in his policy and one in a policy issued to a third person. An antistacking clause should reduce the cost of uninsured motorist coverage for these situations and thus produce a lower premium for the insured than would be the case were stacking permitted by his policy.
insurance contracts rationally reach the insured in the circumstances of the *Hague* case? The only connection or relation that could rationally connect these Minnesota policies with the *Hague* situation is Hague’s having worked for some fifteen years in Minnesota and commuted from his home in Wisconsin to his place of work in Minnesota. But it is hard to see how this connection with Minnesota grounds either the paternalistic or the consumer-protection policy that is the basis of the Minnesota rule. At all times relevant for choice-of-law purposes respecting these issues, Hague was clearly a member of the Wisconsin community. Moreover, the insurance transaction in question was entirely centered in Wisconsin: Hague lived there; his automobiles were garaged there; the insurance contract was concluded there. Considerations of predictability and comprehensibility, if they have weight, require that the insurance contract be regulated by Wisconsin law. In sum, when assessed in terms of an instrumental analysis, the position taken by Justice Stevens in his concurring opinion in *Hague* is plainly correct: “[T]he Minnesota courts’ decision to apply forum law . . . [is] unsound as a matter of conflicts law, and there is little in this record other than the presumption in favor of the forum’s own law to support that decision. . . .”31 Justice Powell, in his opinion for the dissenters, makes the same point even more succinctly when he characterizes as “trivial [the] contacts between the forum State and the litigation.”32

**THE ARBITRARY CHOICE OF LAW IN *Hague***

If the foregoing analysis is correct, the conclusion is inescapable that under all three of the general choice-of-law approaches that have been utilized in the last two centuries in the United States, the choice of law in *Hague* was unprincipled and arbitrary. Four of the eight Justices who participated in the *Hague* decision in effect accept this conclusion. Accordingly, the majority in the case results from Justice Stevens’ view that arbitrariness and lack of principle in choice of law are constitutionally acceptable unless, in the particular circumstances, the result is in some further and more basic sense fundamentally unfair. Four members of the Court who were apparently unwilling to accept Justice Stevens’ position, however, reached the conclusion that “Minnesota had a significant aggregation of contacts with the parties and the occurrence, creating state interests,

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31. 449 U.S. at 331-32 (Stevens, J., concurring in the judgment).
32. *Id.* at 332 (Powell, J., dissenting).
such that application of its law was neither arbitrary nor fundamentally unfair."33 How could the plurality reason as it did?

The answer seems to be that the plurality overlooked a fundamental tenet of the choice-of-law methodology they embrace. They assume that an instrumental methodology is prepared to accept a choice of law as principled and nonarbitrary in the event of significant contacts or relations between the transaction or occurrence as a whole and the state whose rule is applied. As already stated, however, it is fundamental to contemporary instrumental choice-of-law methodology that analysis proceeds issue-by-issue rather than transaction-by-transaction or occurrence-by-occurrence.34 As Judge Fuld wrote in *Babcock v. Jackson*:

> Justice, fairness and "the best practical result" . . . may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation . . . .

As a transitional stage of the shift from the jurisdiction-selecting method of the first *Restatement*—where dépeçage was exceptional—to the instrumental method now dominant in American choice-of-law thinking—where the analysis proceeds, in principle, issue-by-issue—some courts did adopt a center-of-gravity or grouping-of-contacts theory.35 This approach sought to determine the legal order with which the transaction or occurrence as a whole was most closely connected. An approach along these lines, however, is inconsistent with an instrumental analysis: The significance of a contact with a legal order cannot be evaluated in the abstract. A relationship that is highly significant where policies respecting compensation are at stake may have little or no significance where conduct-regulating policies or policies relating to the planning of transactions are in question. As Judge Fuld remarked in *Babcock v. Jackson*, "[i]t is hardly necessary to say that Ontario's interest [with respect to the guest-statute issue] is quite different from what it would have been

33. *Id.* at 320.
36. Perhaps the best known example of this approach is Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954) (law applicable to a separation agreement).
had the issue related to the manner in which the defendant had been driving his car at the time of the accident.\textsuperscript{87}

**SOME CONCLUSIONS**

Several conclusions flow from the foregoing discussion. The first is that the result in *Hague* probably can be justified in Justice Stevens' terms. Even if Minnesota's choice of law is unprincipled and arbitrary, the result of its application is doubtless neither so shattering to the defendant nor so unforeseeable, especially given the tendency of some courts to unprincipled and arbitrary behavior in the conflicts field.\textsuperscript{38} as to result in fundamental unfairness. This view has the unattractive quality, however, of accepting Gresham's law where the constitutional dimensions of choice of law are in issue.

On the other hand, the plurality's position—that an unprincipled or arbitrary choice of law is unconstitutional—requires a reversal in *Hague* unless the center-of-gravity or grouping-of-contacts theory is, in the application given it by the Minnesota Supreme Court, constitutionally acceptable. It would seem constitutionally acceptable for a state to reject, in principle, the issue-by-issue approach utilized by the American instrumental school in favor of an approach that allowed, in principle, the legal order which is the transaction's center of gravity to apply its law to the entire controversy. The dépecage procedure is sufficiently problematical to permit a legal order to reject its use; for such a legal order a center-of-gravity approach to the transaction or occurrence as a whole is a rational alternative. And, in situations where several legal orders can reasonably claim to be the transaction's or occurrence's center of gravity, any of these could constitutionally apply its law to the situation as a whole. Where a legal order is plainly not the center of gravity, however, but has a relation with respect to one issue that may arise in connection with that transaction or occurrence, the grouping-of-contacts theory cannot rationally justify the application of that legal order's law. In such a case, the choice of law in question can be justified, if at all, only in terms of an instrumental analysis.

\textsuperscript{37} 12 N.Y.2d at 483, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

\textsuperscript{38} Compare Savchuk v. Rush, 311 Minn. 480, 272 N.W.2d 888 (1978), rev'd, 444 U.S. 320 (1980) (Minnesota jurisdiction over nonresident driver for accident in Indiana involving two Indiana residents based on attachment of obligation of defendant's insurance company to indemnify him) with Cornelison v. Chaney, 16 Cal. 3d 143, 545 P.2d 264, 127 Cal. Rptr. 352 (1976) (California has jurisdiction over defendant trucker in suit brought by California resident whose husband was killed in Nevada accident on ground that trucker was regularly engaged in runs to and from California).
In the Hague case, Minnesota was plainly not the center of gravity of the underlying transaction or occurrence. It follows that application of Minnesota's antistacking rule cannot be constitutionally justified in terms of a grouping-of-contacts approach. Therefore, unless the application of Minnesota's rule can be justified instrumentally, the choice of law in Hague was unconstitutional under the test set out by the plurality.

The result reached by the plurality in Hague is thus caused by their failure to understand the difference between a center-of-gravity methodology and an instrumental methodology. The coalescing of these two different approaches explains not only why these four Justices did not find it necessary either to state the precise choice-of-law issue on which Hague turned or to determine the significance, if any, of Minnesota's contacts with the occurrence and the parties with respect to that issue, but also how Justice Brennan could expatiate on Minnesota contacts that had no significance whatsoever for the issue of contract interpretation on which Hague turned:

Here . . . respondent's bona fide residence in Minnesota was not the sole contact Minnesota had with this litigation . . . [I]n connection with her residence in Minnesota, respondent was appointed personal representative of Mr. Hague's estate by the Registrar of Probate for the County of Goodhue, Minn. Respondent's residence and subsequent appointment in Minnesota as personal representative of her late husband's estate constitute a Minnesota contact which gives Minnesota an interest in respondent's recovery, an interest which the court below identified as full compensation for "resident accident victims" to keep them "off welfare rolls" and able "to meet financial obligations."39

ALTERNATIVE APPROACHES

If the foregoing is sound, it demonstrates that the Court has been digging itself into a morass. Is there an alternative?

The Hague decision indicates that two approaches are now explicitly under consideration at the Court: Justice Stevens' view that the Court should abdicate responsibility for controlling choice of law except in cases so egregious as to be almost unthinkable; and the view of the other seven Justices in Hague that the Court should take each close case and decide for itself whether there is too little or enough to pass constitutional muster.

39. 449 U.S. at 319 (citation omitted).
Justice Stevens' refusal to exercise control over choice of law is ultimately untenable and will inevitably create pressure to develop alternative devices\(^4\) which may or may not be sound. For example, one way of viewing the decision in *Hanson v. Denckla*\(^4\) is to see it as restricting the jurisdiction of the Florida courts in response to an egregious choice of law by those courts which the Court was reluctant or unwilling to control directly. As a matter of the development of jurisdictional thinking, absent the choice-of-law consideration, *Hanson v. Denckla* seems out of line with salutary developments beginning with *McGee*\(^4\) in elaborating *International Shoe's*\(^4\) fundamental fairness test; if Florida's choice of law in *Hanson v. Denckla* were required to satisfy reasonably strict standards, much could be said in favor of the exercise of jurisdiction by the Florida courts over the Delaware trustee.

The Supreme Court's failure in *Hague* to control choice of law may, however, have desirable repercussions for jurisdictional thinking. Unfettered choice of law in the *Hague* situation could well lead the Court to strike down assumptions of jurisdiction over foreign corporations based on the doing of business where the cause arose from business unrelated to activities of the corporation within the jurisdiction. Minnesota would thus be barred from exercising jurisdiction over Allstate in the circumstances of the *Hague* case. In short, as we have urged elsewhere,\(^4\) jurisdiction based on a foreign corporation's doing of business locally would be seen as another instance in which specific but not general jurisdiction would be appropriate. All that can be said, therefore, for Justice Stevens' view so far as conflictual thinking is concerned is that it may, by indirection, speed up desirable reform in some areas of jurisdictional practice.

The second approach, apparently adopted by the other seven Justices of the *Hague* court, is more attractive in at least acknowledging a potentially significant federal responsibility in the area of choice of law. Proper regard for the institutional demands on the Court to provide meaningful review, however, counsels against what the seven Justices undertook to do in the *Hague* case. It is always


\(^{41}\) 357 U.S. 235 (1958).


\(^{44}\) See von Mehren & Trautman, *supra* note 40 at 1141-44.
inefficient and unproductive for the Court to decide how much is too much, or how little is too little, unless it formulates the issues in a way that requires the lower courts to chew the problem over thoroughly before the Supreme Court considers it. The history, for example, of the Supreme Court's handling of the issue of whether an employee seeking relief under the F.E.L.A. was engaged in interstate commerce, and the issue of what constitutes coercion of a confession under the fifth amendment is a sorry one. Perhaps the slow process of elaboration of standards in these two instances was necessary because no good alternative existed. Even if that is so, and regardless of one's own view of the relative importance of elaborating proper standards of negligence and coercion on the one hand and of developing standards for the proper functioning of the legal orders of the federal system on the other, history suggests that the Supreme Court is unlikely to regard choice of law as worthy of a comparable effort.

In the case of choice of law another approach seems possible, an approach that does not abdicate responsibility but seeks to avoid the pitfalls of case-by-case review of the close cases. The Court could adopt minimal standards of control but at the same time exercise its supervisory powers vigorously and insist on application of these standards by the courts being reviewed so that the Court's job of reviewing will be performed less frequently, be better focused, and be measurably more manageable.

In this section are set forth several propositions about constitutional control of choice of law designed to implement such an approach. The propositions are minimal in calling for suppression only of excessive parochialism or grossly inadequate respect for the interests of other states or of the multistate system. In keeping with the


47. For useful summaries of the Supreme Court's activity in constitutional control of choice of law and illustration of the extent to which the Court has retreated from the rigorous control that seemed to be emerging through the 1930's, see R. Leflar, American Conflicts Law §§ 55-62 (3d ed. 1977); R. Weintraub, Commentary on the Conflict of Laws §§ 9.1-9.4 (2d ed. 1980).
view that wise control has been and should continue to be evolutionary, they take as their premise not the construction of a static set of principles expected to remain valid for all time but the rather more manageable task of comparing what has occurred in a particular case with the accepted norms of the day. They are also manageable because they require the lower courts to justify departures from norms rather than allowing them to make the reviewing authority justify federal interference.

Within the constraints just suggested, three steps can be taken. Each has a solid body of precedent to support it, at least if one takes a constructive view of the implications of that precedent. Each is a small step that can yield great profits. Each is regardful of the demands of the federal system and appropriate as a further step in the evolution of thinking about improvement of the functioning of that system.

The proposed steps rest on the constitutional premise that, at a minimum, the courts of the constituent states of the federal system must respect the obligations of membership in such a federal system. This premise, as will become evident, seeks in large measure to reflect values embodied in the full faith and credit clause. In simplest form, membership in a federal system ought to involve respect of a minimal sort for the other members, so that (1) no member will favor itself, its law or its residents without advancing a principled basis for doing so, (2) no member will depart from generally accepted or recognized norms of choice of law that may exist from time to time without giving compelling reasons for doing so, and (3) no member will refuse to respect a claim for national uniformity, based on generally accepted or recognized practices of referring to the law of a particular member in order to achieve uniform treatment of all persons involved in a transaction, without giving compelling reasons for doing so. These three steps are all neutral in the double sense that unexplained preference of one member's law to another is impermissible and that each member should be prepared, in a Kantian or Rawlsian fashion, to accept the burdens and advantages of the arrangement as what free and rational states would select in a position of initial equality.

The first step proposed is that any choice-of-law methodology that without reason or principle weights the scales in favor of the law of the forum is impermissible. This step treats such a preference as

48. U.S. Const. art. IV, § 1; see notes 61-64 infra and accompanying text.
irrational and lawless in a properly functioning federal system.

Removal of this essentially lawless ingredient in the decisional process would be sound and produce satisfactory results. It is doubtful that the Minnesota Supreme Court could responsibly have applied its law in the Hague case except on the basis that it was forum law. Adoption by the Supreme Court of this first step would put the burden of responsible, principled decision on the Minnesota court and free the Supreme Court from doing more than asking whether the reasons given below show that the Minnesota court is properly discharging its functions as a supreme court of a member state of a federal union. The burden would be shifted; the Supreme Court would no longer be in the position of seeking to justify a state's highest court's decision; the Court would in a case such as Hague vacate and remand for a further decision below that would have the burden of explaining and justifying what had been done. The explanation could not include reliance on forum law simply because it was forum law. The second and third steps would call for response by the state court to further questions.

49. An example of the efficacy of such a step is F.C.C. v. RCA Communications, Inc., 346 U.S. 86 (1953), in which the Supreme Court struck down the grant of authority by the FCC to a radiotelegraph company to open two new international circuits. Although there are other strands to the opinion, the basic point was that the Commission tried to take the easy way out. Its mandate was to be guided by the "public interest, convenience, or necessity;" instead, it was found to have rested its opinion on "a national policy favoring competition." The Court, quite rightly it seems in this context, held that the Commission could not rest on a finding that competition was "reasonably feasible" but must find explicitly that the public interest, convenience or necessity would be served:

To say that national policy without more suffices for authorization of a competing carrier wherever competition is reasonably feasible would authorize the Commission to abdicate what would seem to us one of the primary duties imposed on it by Congress . . . . We think it not inadmissible for the Commission, when it makes manifest that in so doing it is conscientiously exercising the discretion given it by Congress, to reach a conclusion whereby authorizations would be granted wherever competition is reasonably feasible. This is so precisely because the exercise of its functions gives it accumulating insight not vouchsafed to courts dealing episodically with the practical problems involved in such determination. Here, however, the conclusion was not based on the Commission's own judgment but rather on the unjustified assumption that it was Congress' judgment that such authorizations are desirable.

Id. at 95-96.

50. Therefore, it would be impermissible for the forum to justify application of its own law solely on the ground that it finds its law easier to apply or that it regards its own law as better law simply because it is its own law. Equally impermissible would be any methodology arbitrarily weighting the scales in favor of forum law. See, e.g., Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 DUKE L.J. 171, reprinted in B. Currie, SELECTED ESSAYS ON CONFLICT OF LAWS 177 (1963).
CONSTITUTIONAL CONTROL

The second step can be briefly stated but needs considerable explanation, as the statement itself is somewhat impressionistic: A court that departs from choice-of-law norms has a burden of adducing persuasive reasons for the departure. The appropriateness of such an attitude on the part of courts in a federal system hardly requires extended discussion. What may appear far more difficult is to give enough concreteness and clarity to the conception of norms to make the test workable—both as a guide to decision by lower courts and as a standard for appellate review.

To the extent that the test is expressed abstractly, and without reference to history and a comparative study of the evolution of choice-of-law practice in the United States, it appears to pose a serious, perhaps recursive, definitional problem: What is meant by a norm? The problem may not be as difficult as it may seem. In many situations the norm will be obvious, as it has been in most of the cases in which an argument for constitutional control has been made: The Hague, Clay, Dodge, Liebing and Dick cases all exemplify this situation; in Hague, for example, no one can or did dispute that the norm under any current (or traditional) choice-of-law methodology would be to apply the law of Wisconsin, which was not only the place of injury, the location of the insurance risk, and the residence of the parties but in the circumstances a state (unlike Minnesota) which clearly had an interest in the degree of protection afforded to persons contracting for insurance. On occasion, the norm may comprehend alternative acceptable views, as for example Carroll v. Lanza in effect did for workmen's compensation, putting application of the workmen's compensation laws either of the place of employment contract or of the place of injury beyond scrutiny but leaving any other community, for example the workman's domicile, to justify application of its law.

Since the step proposed aims at encouraging an attitude of national perspective and responsibility rather than laying down rules

55. 349 U.S. 408 (1955). The Court gave notice that there would no longer be examination of the actual interests of the place of injury; they "are to be weighed not only in the light of the facts of this case but by the kind of situation presented. For we write not only for this case and this day alone, but for this type of case." Id. at 413.
applicable only to particular and precise categories of cases, the norms involved need not be defined with precision. At an earlier time, one could say with confidence that the norms were those of the first Restatement; the consequence, however, would not have been that the first Restatement's rules applied so as to exclude any other choice but simply to require explanation of departures from those rules. Today, the norms are certainly not as rigid as those once prevailing, but it is not an insurmountable task, in light of the precedents in the Supreme Court, and the evolution of choice-of-law thinking as evidenced in the cases, the literature, and the second Restatement, to say for any given area what the norms now are.

In light of the difficulty the Hague Court created for itself by failing to appreciate the distinction between a center-of-gravity approach and a more functional instrumental approach, two separate stages can be mapped out that should simplify application of this second step. In almost all situations, no constitutional objection can be raised if the place that is the center of gravity applies its law. The first stage of the step, then, is to inquire whether that place's law has been applied. Thus, in the Hague case, Wisconsin law would be the norm from which departure would require justification not only because Wisconsin was indicated as the place of accident and the place where the insurance risk was located but also because other significant relationships, such as the domicile of all the parties at the time of the accident, were with Wisconsin.

In many situations instrumental approaches may have arrived at a sufficiently settled conclusion that an additional norm—or possibly even a norm that supplants the center-of-gravity norm—exists. Where that is so, the second stage of the step could come into play, and only departure from that norm would require justification. Thus, if Minnesota had been the residence of the insured so that Minnesota had a rational basis for invoking its law respecting the validity

56. Restatement of Conflict of Laws (1934); see text accompanying notes 20-21 supra.

57. The only exception would be a case in which a settled contrary norm had developed under an instrumental approach. See notes 58-59 infra and accompanying text.

58. For example, it is possible today that the norm for interspousal suits in tort is the common domicile of the parties, at least when the domicile permits suit and the place of injury does not, and that the place of accident is no longer an acceptable norm even if it were regarded as the center of gravity of the occurrence. See, e.g., Haumschild v. Continental Cas. Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959); Restatement (Second) of Conflict of Laws § 169 (1971). On another view, this situation may be the rare one—rare at least today—in which no respectable authority would accept thinking in terms of a center of gravity in the place of accident.
of antistacking provisions in insurance policies as against, for example, the place of accident's permissive rule, probably no further constitutional scrutiny would have been necessary. But in the *Hague* case, as both Justice Stevens' concurring opinion and Justice Powell's dissenting opinion conclude, Minnesota lacked an interest in the plaintiff as resident or the decedent as employee that would rationally call for applying Minnesota law with respect to the issue in question. No Minnesota interest requiring the protection of Minnesota policy existed; at best, the application of Minnesota law would advance the pecuniary interest of a person now a Minnesota resident, and such parochial pocketbook arguments ought to have no place in a properly functioning federal system. In short, the federal interest in avoiding the traps, surprises, and forum shopping that may occur because of the existence of jurisdictional boundaries and varying systems of law justifies requiring Minnesota to give more adequate reasons than it did, or probably could, for the application of Minnesota law.

The third step may in some cases differ very little from the second step, but, because it is inspired by the national interest in integrating the legal systems of the nation expressed through the full faith and credit clause, it should be separately articulated. The basic proposition is that where a "federal interest in national unity" exists or should be found to exist, a very heavy burden must be met in order to justify interfering with or departing from that interest. This step is presumably not involved in the *Hague* case as probably no overwhelming interest in national unity can there be made out—at least in the ways that the interest in national unity has come to be understood. Good examples of situations in which the interest in national unity has been recognized in the past include the rights of members of a fraternal benefit society and the obligations of shareholders to contribute equally to pay off the debts of an insolvent bank.

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59. That would clearly be so once the Supreme Court had so ruled in such a case. See note 57 *supra* and accompanying text.


61. 449 U.S. at 323 (Stevens, J., concurring in the judgment).

62. Especially illuminating in the history of efforts to invoke the full faith and credit clause as an integrating force to achieve national unity have been the cases involving assessments against shareholders or members of associations or insurance plans. See A. VON MEHREN & D. TRAUTMAN, *supra* note 40, at 1248-50. In the Supreme Court the relevance of the clause itself has been clear, although the cases have tended to blur the question whether its
Just where the line comes between treating participants in some associations equally—all shareholders of certain banks or all persons insured by fraternal benefit societies—and giving effect to the protective interest of a state that is not the place of incorporation but usually (unlike Hague) the residence of the participant, cannot be stated dogmatically, nor can the line be expected to be static. History and sensitivity to the various substantive interests at issue inform the decision about where the line is drawn.

To elaborate on this theme would require a separate article; all that is required here is to suggest a structure for the ordering and maturing of a variety of expressions of need for national unity and integration of the legal systems of the states. Where the need for a

impact is to compel respect for judicial proceedings in the state of incorporation seeking to impose an obligation to pay assessments on all members or to compel respect in some less precise way for the law of the home state of the organization. Initially a theory of respect for the judicial proceeding seems to have been dominant, as in Hancock Nat'l Bank v. Farnum, 176 U.S. 640 (1900), and Converse v. Hamilton, 224 U.S. 243 (1912). In Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915), decision was rested on the binding effect of a class action, but the Court also stated that the law of the place of incorporation of a mutual fund must govern so as not to "[destroy] the very equality the Assessment plan was intended to secure." Id. at 671. On the same day, in a case involving an assessment against members of a fraternal benefit association, Supreme Council of the Royal Arcanum v. Green, 237 U.S. 531 (1915), perhaps the most delphic of all statements on the subject was made, by Chief Justice White: "[I]f the laws of Massachusetts were not applicable, the full faith and credit due to the judgment would require only its enforcement to the extent that it constituted the thing adjudged as between the parties to the record in the ordinary sense, and on the other hand, if the Massachusetts law applies, the full faith and credit due to the judgment additionally exacts that the right of the corporation to stand in judgment as to all members as to controversies concerning the power and duty to levy assessments must be recognized." Id. at 545. The Court in that case ultimately concluded that Massachusetts law controlled. Although emphasis on the incorporating state's judgment continued to predominate for some time, see, e.g., Chandler v. Peketz, 297 U.S. 609 (1936) (per curiam); Marin v. Augedahl, 247 U.S. 142 (1918), ultimately full faith and credit has come to be recognized as the appropriate instrument for compelling respect for another state's law, e.g., Order of United Commercial Travelers of Am. v. Wolfe, 331 U.S. 586 (1947) (fraternal benefit association), and for invalidating local procedural impediments to entertaining foreign causes of action, e.g., Broderick v. Rosner, 294 U.S. 629 (1935) (assessment on bank shareholders); cf. Hughes v. Fetter, 341 U.S. 609 (1951) (foreign wrongful death action). Justice Frankfurter once attempted a broad survey of the cases and evidently thought the unifying thread to be the extent to which the Court found a need for uniformity. See Carroll v. Lanza, 349 U.S. 408, 414 (1955) (Frankfurter, J., dissenting). The cases illustrate considerable disagreement about the situations which require uniformity but very little disagreement that if uniformity is called for, an appropriate instrument for achieving it is full faith and credit.

63. At one point in his celebrated Cardozo lecture on full faith and credit, Justice Jackson stated: "Always to be kept in mind . . . is that the policy ultimately to be served in application of the clause is the federal policy of 'a more perfect union' of our legal systems." Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 COLUM. L. REV. 1, 27 (1945). Should the Court undertake explicitly to examine them there already exist fruit-
nationally unifying solution is identified, only the most compelling reasons—or careful distinctions—would suffice to satisfy scrutiny by the Supreme Court.

It is unnecessary to these proposals to join in the debate over the constitutional text—due process, full faith and credit, privileges and immunities, or even the commerce clause—that supports constitutional control of choice of law. At one level, there seems much to be said for viewing the question of how much is needed before a state can apply its own law as a due process problem and the question of the circumstances in which a state, even though it has sufficient interest to apply its own law under due process, is required to defer to the superior interest of another state as a full faith and credit problem. That appears, for example, to reflect Chief Justice Stone’s view of the situation in the workmen’s compensation cases and Justice Black’s statements in Watson. It seems to provide persuasive basis both for what the Court has done and for what is proposed here.

Another view of the matter would take some of what Justice Jackson surmised about full faith and credit and explore the potential of that clause alone as the basis for constitutional control. It may not be farfetched to suppose that the full faith and credit clause could perform a role for the legal system somewhat analogous to the one that the commerce clause has come to be understood as playing for the economic and commercial interests of the states and of the

ful underpinnings for study and growth. See Note, Some Reflections on the “Nationally Unifying” Role of Full Faith and Credit, in A. von Mehren & D. Trautman, supra note 40, at 1458. Particularly illuminating, for example, might be examination of the implications of the decision in Yarborough v. Yarborough, 290 U.S. 202 (1933), requiring South Carolina to respect a Georgia decision terminating a father’s obligation to support his child. Although it is by no means clear in the circumstances that the Georgia determination should have been held conclusive in South Carolina, full faith and credit overcame technical hurdles produced by great dissimilarity in the procedural arrangements for providing child support; the Supreme Court, viewing the problem functionally, was quite innovative in integrating the relevant rules and institutions of Georgia and South Carolina as they came to bear in the particular context. See A. von Mehren & D. Trautman, supra note 40, at 1460. Local variations in procedural detail or substantive right are overcome by federal principles that operate to maintain or facilitate uniformity in legal concepts and thus to promote the orderly establishment and recognition of rights across state boundaries, id. at 1462-63, federal functions that can also be performed of course by federal common law. See text accompanying note 69 infra.

64. See, e.g., Pink v. A.A.A. Highway Express, Inc., 314 U.S. 201 (1941).
67. See note 63 supra.
nation. In this view, as Justice Jackson suggested, full faith and credit has a large integrating role to play, fostering unity and uniformity in those areas and for those questions where they are required.

In general, full faith and credit—perhaps more comfortably and more obviously than other constitutional text—has the potential occasionally realized in the cases, of alleviating uncertainties created by state boundaries and by the resulting plurality of legal frameworks within which human activity is conducted. When activity has been undertaken with obvious relation to and reliance on one state's jurisprudence, either because the activity has occurred there or because—as in the shareholder assessment and fraternal benefit association cases—a relationship of primary concern to that state has emerged, full faith and credit is available to make that state's solution the national solution.\(^8\)

Furthermore, there are more ambitious ways of dealing with these problems which might be preferable, although in light of the Court's decision in *Hague* it seems highly unlikely that the system is prepared for any such developments. For example, to some extent what is articulated as constitutional law may on analysis prove to be federal common law,\(^6\)\(^9\) and nothing said here would be incompatible with parallel or further development of these principles as federal common law. The ultimate difference between constitutional law and federal common law comes to a matter of allocation of function or separation of powers: Congress can legislate to overcome judicially created federal law. Although it seems doubtful that Congress would alter judge-made rules of choice of law under the full faith and credit clause, its attempt to do so analytically raises the question whether the Court had been articulating constitutional law or federal common law. Yet in concrete cases the Court might welcome legislative assistance and conclude that what had seemed initially to be constitutional law was indeed simply federal common law subject to correction and improvement by Congress.

Furthermore, the typical operation of constitutional controls as boundaries on permissible state action can be performed equally well by federal common law, which often quite appropriately functions to provide floors or ceilings on state law rather than to supplant it.\(^7\)

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70. See Trautman, *The Relation Between American Conflicts Law and Federal Com-
Until much more experience with these questions is had, it may be just as well not to try to define the line between constitutional law and federal common law.71

In our view the Hague case would best have been left undecided. In particular, the Court's failure to appreciate the differences between center-of-gravity and instrumental approaches is a disservice. It would be better if the Court could see its way open to abandoning its present attitude of interfering only in outrageous cases in favor of putting the burden on the states to develop responsible attitudes as member states of the federal community. We have proposed three steps to implement such an approach. All three steps rely chiefly on the wisdom of the lower court judges; the basic assumption is that the Supreme Court's role can best be played by requiring the lower courts to approach choice of law with a less parochial attitude than that of the Minnesota Supreme Court in Hague. The requirement that departures from choice-of-law norms be justified should bring notable improvement to the whole process of understanding and giving fair scope to the national significance and impact of choice-of-law decisions.

71. See id. at 114 n.37.