Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism

Robert A. Sedler
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Robert A. Sedler*

INTRODUCTION

When conflict of laws commentators consider the matter of constitutional limitations on choice of law, it seems that they usually approach it from what may be called a “conflicts perspective” — a perspective that assumes constitutional limitations on choice of law are necessary to promote “conflicts justice” and to accommodate the conflicting interests of states in a federal system. They then find such limitations inhering in the due process¹ and full faith and credit clauses² of the Constitution.³ The debate among conflict of laws commentators concerns the extent of and the respective roles of the due process and full faith and credit clauses in imposing constitutional limitations.⁴

* Professor of Law, Wayne State University. A.B., 1956, J.D., 1959, University of Pittsburgh.

¹ U.S. CONST. amend. XIV, § 1: “No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”
² Id. art. IV, § 1: “Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.”
⁴ Compare Martin, Constitutional Limitations on Choice of Law, supra note 3, with Kirgis, supra note 3. See generally Martin, A Reply to Professor Kirgis, 62 CORNELL L. REV. 151 (1976). The late Brainerd Currie contended that the fourteenth amendment’s equal protection clause and the privileges and immunities clause of article 4 should be construed as prohibiting “unconstitutional discrimination” in choice of law. See B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 445-583 (1963). It was my opinion, even prior to Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981), that the Supreme Court would not be willing to find
Conflicts commentators do not approach the matter from a “constitutional perspective,” or as I would put it, from the perspective of constitutional generalism. The perspective of constitutional generalism considers constitutional structure and doctrine and general principles of constitutional interpretation, and applies these to constitutional limitations on choice of law. Under this approach, it is not assumed that the Constitution imposes limitations on the power of state courts to make choice-of-law decisions simply because such limitations are necessary to promote “conflicts justice” or to accommodate the conflicting interests of states in a federal system. Rather, the fundamental inquiry is whether such limitations properly can be found to inhere in particular provisions of the Constitution. Constitutional generalism considers the broad, organic purpose and function of the due process and full faith and credit clauses as well as the “original understanding” of the framers and the doctrines the Court has developed in applying these provisions in other contexts. Should these constitutional clauses be interpreted as placing any limitations on the power of state courts to make choice of law decisions, and if so, what should those limitations be? As stated above, this inquiry differs from the perspective with which conflict of laws commentators have generally approached the matter of constitutional limita-

5. The “broad, organic purpose” of a constitutional provision refers to the fundamental objective that the framers sought to achieve by including that provision in the Constitution. Where governmental action occurring at some time subsequent to the adoption of a constitutional provision is inconsistent with its broad, organic purpose, such action will be declared unconstitutional regardless of whether the framers thought it would be unconstitutional when the constitutional provision was adopted. See, e.g., Loving v. Virginia, 388 U.S. 1, 9 (1967) (state antimiscegenation law unconstitutional as advancing no valid governmental purpose, independent of racial discrimination, because object of fourteenth amendment was to eliminate discrimination regardless of whether framers of fourteenth amendment understood that it would prohibit antimiscegenation laws).

6. The “original understanding” of the framers refers to the historical meaning of a particular constitutional provision and to the result that the framers would have intended that provision to require. See, e.g., Williams v. Florida, 399 U.S. 78, 86-103 (1970) (framers did not intend that sixth amendment’s guarantee of “trial by jury” necessarily required that jury consist of twelve persons); Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964) (framers intended by adoption of article 1, section 2, that apportionment of representation in United States House of Representatives should be based strictly on principle of equal representation for equal numbers of people, so that congressional districts of unequal population are proscribed by article 1, section 2).
Similarly, the Supreme Court's decisions in this area, including the recent decision in Allstate Insurance Co. v. Hague, do not focus sufficiently on the analysis suggested by the perspective of constitutional generalism. The Court treats conflicts issues as if the matter of constitutional limitations on choice of law is an independent "specialized" area not to be dealt with in terms of general principles of constitutional interpretation and the consistent application of constitutional doctrine. For example, the Court's treatment of due process as a limitation on choice of law has generally taken place without regard to the Court's application of substantive due process doctrine in other areas. The Court has also assumed that the full faith and credit clause imposes limitations on the power of state courts to make choice-of-law decisions without explicitly considering whether it is properly the function of the full faith and credit clause to impose such limitations. What has happened, then, is that conceptually, and in practice, the matter of constitutional limitations on choice of law has developed as an independent "specialized" area of constitutional law rather than within the framework of constitutional generalism.

In this article I demonstrate that when constitutional limitations on choice of law are approached from the perspective of constitutional generalism, the Constitution should be interpreted as placing only the most minimal limitations on the power of state courts to make choice-of-law decisions, and that in our constitutional system there should not be any significant constitutional limitations on choice of law.

The article begins by considering the rise and fall of constitutional limitations on choice of law in an historical context and shows that this rise and fall paralleled exactly the rise and fall of substantive due process as a significant limitation on governmental economic regulation. This analysis indicates that the historical explanation for imposing constitutional limitations on choice of law was that such

7. See authorities cited notes 3-4 supra.
11. I also demonstrate that the likely effect of the Court's holding in Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981), and of the doctrine subscribed to by five Justices in that case will be to place only the most minimal limitations on the power of state courts to make choice-of-law decisions.
limitations were considered necessary by the Court to protect "freedom of contract" from "improper" state court interference, just as the Court was protecting "freedom of contract" from "improper" governmental economic regulation. I then discuss the Court's current approach to constitutional limitations on choice of law, as reflected in the Hague decision, and show that under that approach it is not likely that there will be any significant constitutional limitations on choice of law. Most importantly, I analyze constitutional limitations on choice of law from the perspective of constitutional generalism and demonstrate that when analyzed from this perspective there should not be any significant constitutional limitations on choice of law. Indeed, in my view the only circumstances in which a state court's decision to apply its own law in a case containing a foreign element should be declared unconstitutional are circumstances in which a court would choose not to apply its own law in any event.

THE RISE AND FALL OF CONSTITUTIONAL LIMITATIONS ON CHOICE OF LAW: AN HISTORICAL ANALYSIS

Significant limitations on the power of state courts to make choice-of-law decisions were first imposed by the Supreme Court in the early part of the twentieth century during what may be called the "Dodge era."12 In the middle 1930's, the Court's approach to limitations on choice of law began to change,13 and by the early 1960's, its approach could properly be characterized as one of "judicial abstention."14 It seems clear, looking to the results of the Court's decisions, that a state's law constitutionally could be applied to any case where (1) that state had an interest in applying its law


14. See, e.g., Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964); Carroll v. Lanza, 349 U.S. 408 (1955). I tend to put great emphasis on the Supreme Court's "institutional behavior," which refers to the pattern of results reached by the Court in the cases coming before it for decision. The Court's institutional behavior evolves over a period of time and is not necessarily fully consistent with the doctrine articulated by the Court to explain the basis of its decisions. The "law" of the Constitution may generally be considered a reflection of the interaction between the Court's institutional behavior and its articulated doctrine.
on the point in issue in order to implement the policy reflected in its law, and the application of its law in the circumstances presented was not fundamentally unfair to the party against whom the law was applied, or, (2) that state had sufficient factual contacts with the underlying transaction making it reasonable for its law to be applied without regard to the state's "substantive" interest in doing so. Since the Supreme Court had given the states wide "constitutional latitude" in their power to make choice of law decisions, the state courts generally were not concerned with constitutional limitations on choice of law.

Of particular interest to those who work in both the fields of Constitutional Law and Conflict of Laws is that the rise and fall of constitutional limitations on choice of law occurred within the same time period and closely paralleled the rise and fall of substantive due process as a significant limitation on governmental economic regulation. The "Lochner era," characterized by the Court's invalidation of a number of state and federal economic regulatory laws, spanned the early part of the twentieth century. In the middle 1930's, Supreme Court decisions indicated a change in the Court's approach, and by the late 1930's the Lochner era was over.

15. By "substantive interest" is meant the state's interest in applying its law in order to implement the policy reflected in that law.

16. I saw the interest-and-fairness test as being supported by Clay v: Sun Ins. Office, Ltd., 377 U.S. 179 (1964), and the factual-contacts test as being supported by Carroll v. Lanza, 349 U.S. 408 (1955). I have also maintained that it was fully constitutional for the plaintiff's home state, under the interest-and-fairness test, to apply its own law allowing recovery where the plaintiff was injured in an out-of-state accident with a defendant from a non-recovery state, notwithstanding that the accident had no factual connection with the forum. See de Lara v. Confederation Life Ass'n, 257 So. 2d 42 (Fla. 1971), cert. denied, 409 U.S. 953, 954-56 (1972) (Brennan and Douglas, J.J., dissenting from denial of certiorari).

17. See R. Cramton & R. Sedler, supra note 16, at § 13.1330. The Supreme Court had last granted plenary review in a case involving a question of constitutional limitations on choice of law in Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964), and it had denied review in other cases where the choice-of-law result clearly seemed to be unconstitutional under existing standards. See de Lara v. Confederation Life Ass'n, 257 So. 2d 42 (Fla. 1971), cert. denied, 409 U.S. 953, 954-56 (1972) (Brennan and Douglas, J.J., dissenting from denial of certiorari).

18. So named after Lochner v. New York, 198 U.S. 45 (1905) (state law forbidding bakery employees from working more than 60 hours a week or 10 hours a day violative of due process).

19. For a review of these cases and their subsequent overruling, see W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law 439-41 (5th ed. 1980).

the early 1960's, it was clear that the Court's approach to the constitutionality of governmental economic regulation as a matter of due process had become one of judicial abstention.22

The parallel between the rise and fall of constitutional limitations on choice of law and the rise and fall of substantive due process as a significant limitation on governmental economic regulation is by no means coincidental. Substantive due process was the primary doctrinal vehicle by which the Supreme Court invalidated state court choice-of-law decisions in the "Dodge era."23 In every case in which the Supreme Court invalidated a state court choice-of-law decision, there was a contractual relationship between the parties. The Supreme Court's decisions protected "contractual rights" as established by the law of the state where the contract was "made."24 In other words, during the period when the Court was using substantive due process to protect business enterprises from what it considered to be "improper" governmental economic regulation, it was also using substantive due process, and in some cases, full faith and credit,25 to protect business enterprises from what it considered to be "improper" state court choice-of-law decisions interfering with their "contractual rights." Thus, the Court's application of due process doctrine in the choice-of-law context was fully consistent with its application of due process doctrine in the economic regulation context. The Court's decisions in both contexts emphasized a "freedom of contract" value that the Court found to be embodied in substantive


23. While John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 181-83 (1936), was expressly decided on full faith and credit grounds, this case, as Justice Stevens noted in Hague, is "best understood as a due process case." 449 U.S. at 321 n.4 (Stevens, J., concurring in the judgment). See generally notes 146-149 infra and accompanying text.

24. In all of these cases, the challenge to the state court choice-of-law decision was made by an insurance company or an employer, and the choice-of-law decision allegedly interfered with the "contractual rights" by invalidating the contractual provision relied on, or by ignoring it (as in Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932)). See cases cited note 12 supra.

25. The Court's use of full faith and credit to "complement" due process in invalidating state court choice-of-law decisions may be likened to the Court's "commerce clause" decisions in the "Lochner era," where the Court invalidated federal regulatory legislation as not being within the commerce power of Congress. See, e.g., Hammer v. Dagenhart, 247 U.S. 251 (1918) (overruled in United States v. Darby, 312 U.S. 100, 103 (1941)).
The consistent application of due process doctrine in both contexts is illustrated by the striking similarity of the rationale and language of the Court's opinions in the economic regulation cases and in the choice-of-law cases. First, let us compare *Lochner v. New York*\(^26\) and *New York Life Ins. Co. v. Dodge*.\(^27\) When the Court invalidated the New York hours of employment law in *Lochner*, it stated:

> It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employés (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employés. Under such circumstances the freedom of master and employé to contract with each other in relation to their employment . . . cannot be prohibited or interfered with, without violating the Federal Constitution.\(^28\)

When the Court invalidated Missouri's application of its nonforfeiture statute to a "New York contract" in *Dodge*, it stated:

> Under the laws of New York, where the parties made the loan agreement now before us, it was valid; also it was one which the Missouri legislature could not destroy or prevent a citizen within its borders from making beyond them by direct inhibition. . . . As construed and applied by the . . . [state court] § 7897 transcends the power of the State. To hold otherwise would permit destruction of the right — often of great value — freely to borrow money upon a policy from the issuing company at its home office and would, moreover, sanction the impairment of that liberty of contract guaranteed to all by the Fourteenth Amendment.\(^29\)

The parallel between the Court's reversal in its view of the constitutionality of governmental regulation as a matter of due process and the reversal in its view of the constitutionality of a state court's application of its own law as a matter of due process is also illustrated by comparing the rationale and language in contemporary opinions in both areas. In *Nebbia v. New York*,\(^30\) where the Court upheld a milk price-fixing scheme designed to increase the income of milk producers, the Court stated:

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27. 246 U.S. 357 (1918).
28. 198 U.S. at 64.
29. 246 U.S. at 376-77.
So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. . . .

Similarly, in *Alaska Packers Association v. Industrial Accident Commission*, the Court upheld the application of California's workers' compensation act to a transient worker who signed on in and was to return to California, despite a contractual stipulation binding the worker to the Alaska workers' compensation law. The Court stated:

> California . . . had a legitimate public interest in controlling and regulating this employer-employee relationship in such fashion as to impose a liability upon the employer for an injury suffered by the employee and in providing a remedy available to him in California. . . . Indulging the presumption of constitutionality which attaches to every state statute, we cannot say that this one, as applied, lacks a rational basis or involved any arbitrary or unreasonable exercise of state power. . . .

Nor did the State of California exceed its constitutional power by prohibiting any stipulation exempting the employer from liability for the compensation prescribed by the California statute. Legislation otherwise within the scope of acknowledged state power, not unreasonably or arbitrarily exercised, cannot be condemned because it curtails the power of the individual to contract. As the state had the power to impose the liability in pursuance of state policy, it was a rational, and therefore a permissible, exercise of state power to prohibit any contract in evasion of it.

In other words, once the Court stopped protecting freedom of contract from governmental economic regulation, it likewise stopped protecting freedom of contract from state court choice-of-law decisions that applied forum law to invalidate contractual provisions and defeat "contractual expectations." At the time when the Court's approach to the constitutionality of governmental economic regulation

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31. *Id.* at 537.
32. 294 U.S. 532 (1935).
33. *Id.* at 542-43 (citations omitted).
under the due process clause was one of judicial abstention, it was likewise completely unwilling to invalidate state court choice-of-law decisions.\textsuperscript{34}

We have seen, then, that the rise and fall of constitutional limitations on choice of law paralleled exactly the rise and fall of substantive due process as a significant limitation on governmental economic regulation. It is reasonable to conclude the Court’s essential objective during the \textit{Dodge} era of protecting business enterprises from what it considered improper interferences with freedom of contract was the same as its objective in imposing significant limitations on the power of the government to enact economic regulation during the \textit{Lochner} era. Once the Court ceased using substantive due process to protect business enterprises from governmental economic regulation, it likewise ceased imposing constitutional limitations on choice of law to protect business enterprises from state court choice-of-law decisions interfering with “freedom of contract.”

The rise and fall of constitutional limitations on choice of law in an historical context indicates, at least from the perspective of constitutional generalism, that significant constitutional limitations on choice of law should be considered aberrations. They should be seen as the product of an earlier era when the Court was interpreting the Constitution in a manner that it has since repudiated.\textsuperscript{35} Just as it is now recognized that the due process clause does not operate to impose any significant limitations on the power of the government to enact economic regulation, it should be recognized that the due process and full faith and credit clauses do not operate to impose any significant limitations on the power of state courts to make choice-of-law decisions. The Court’s 1964 decision in \textit{Clay v. Sun Insurance Office},\textsuperscript{36} which gave the states wide constitutional latitude in their choice-of-law decisions, and its subsequent refusal until \textit{Hague} to grant review in any cases involving constitutional challenges to state court choice-of-law decisions,\textsuperscript{37} reinforces the view that the Court’s

\begin{itemize}
\item \textsuperscript{35} As the Court stated in Ferguson v. Skrupa, 372 U.S. 726, 730 (1963): “The doctrine that prevailed in \textit{Lochner} . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies . . . .”
\item \textsuperscript{36} 377 U.S. 179 (1964).
\item \textsuperscript{37} See discussion in note 17 \textit{supra}.
\end{itemize}
approach to constitutional limitations on choice of law was one of judicial abstention. It was generally assumed that a state court did not have to be concerned about whether its choice-of-law decision was constitutional any more than a state legislature had to be concerned about whether its regulation of economic activity would be subject to a successful due process attack. When analyzed from the perspective of constitutional generalism, such an assumption is surely correct.

**The Hague Decision**

In *Hague*, the Court granted certiorari to “determine whether the Due Process Clause of the Fourteenth Amendment or the Full Faith and Credit Clause of Art. IV, § 1, of the United States Constitution bars the Minnesota Supreme Court’s choice of substantive Minnesota law.” By so doing, it departed from its judicial abstention approach and necessarily revived the matter of constitutional limitations on choice of law. Why, may it be asked, did it do so? Recognizing, of course, that inquiry into the Court’s motivation for granting certiorari in a given case is necessarily speculative, I suggest two possible reasons why the Court may have decided that it should again consider what limitations, if any, the Constitution imposes on the power of state courts to make choice-of-law decisions. First, while the notion that substantive due process should operate as a significant limitation on governmental economic regulation has now been generally discredited, this has not been true of the notion...

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38. The last time that the Court had held a state court’s choice-of-law decision to be unconstitutional because violative of full faith and credit was in *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586, 588-89, 624-25 (1947), where in a 5-4 decision it held that, as a matter of full faith and credit, the law of the state where a fraternal benefit association was incorporated had to determine the validity of a “built-in” limitation provision contained in an insurance policy issued to a member. In *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 183 (1964), the Court characterized *Wolfe* as a “highly specialized decision dealing with unique facts,” and it is doubtful if it would be followed today. See discussion in notes 157-161 infra and accompanying text.

39. 449 U.S. at 304 (citations omitted).

40. As to the Court’s granting certiorari because of the “importance” of the issues involved, see R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 284-300 (5th ed. 1978). For a general discussion of the reasons why the Supreme Court denies certiorari, see *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917-20 (1950) (opinion of Frankfurter, J., respecting denial of petition for writ of certiorari).

41. Few, if any, constitutional law commentators will be found who advocate the revival of substantive due process as a limitation on governmental economic regulation. Indeed, the academic debate is over whether substantive due process should be used at all to invalidate governmental action interfering with personal liberty and individual property rights. Compare,
that there should be constitutional limitations on choice of law. Most conflict of laws commentators maintain that there should be some constitutional limitations on choice of law, and the academic debate is over how extensive these limitations should be. The courts have always given great weight to the views of academic commentators in conflicts cases, and the academic insistence that there should be constitutional limitations on choice of law may have had some influence on the Court's decision to grant certiorari in Hague.

Second, and likely to have been of greater influence, in recent years the Court has acted to define more precisely the permissible due process limits for the exercise of judicial jurisdiction. Constitutional limitations on the exercise of judicial jurisdiction and constitutional limitations on the application of a state's substantive law seem to be related in the sense that the same considerations that determine whether it is constitutionally permissible for a state to exercise judicial jurisdiction may also be relevant in determining whether it is constitutional for a state to apply its own substantive law in the same case.

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42. See authorities cited note 3 supra.
44. In my view, the effect of the Court's decisions in this area has been to impose limitations at the outer reaches of the permissible exercise of jurisdiction. Sedler, Response to Conflict of Laws Dialogue (to be published in Hastings Law Journal (1981)).
45. For example, whenever a state may constitutionally exercise jurisdiction under a long-arm statute the same reasons that make the exercise of such jurisdiction reasonable (and hence, constitutional) also render constitutional the application of that state's substantive law in the case. See Sedler, Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner, 63 IOWA L. REV. 1031, 1032 (1978). It has been argued that just as a state must have "minimum contacts" so as to be able to exercise judicial jurisdiction as a matter of due process, it must also have "minimum contacts" so as to be able to apply its own substantive law as a matter of due process. Martin, Personal Jurisdiction and Choice of Law, supra note 3, at 872, 879-83. It has also been argued that an expansion of the permissible limits for the exercise of judicial jurisdiction correlatively must limit the circumstances in which the forum should be able to apply its own substantive law. Silberman, Shaffer v. Heitner: The End of an Era, 53 N.Y.U. L. REV. 33, 97-101 (1978).

Justice Brennan has stated: "[T]he decision that it is fair to bind a defendant by a State's laws and rules should prove to be highly relevant to the fairness of permitting that same State to accept jurisdiction for adjudicating the controversy." Shaffer v. Heitner, 433 U.S. 186, 224-25 (1977) (Brennan, J., concurring in part and dissenting in part). As the Court has emphasized, however, the tests for determining the constitutionality of the exercise of judicial jurisdiction and the application of a state's substantive law are not fully co-extensive. See, e.g., Kulko v. Superior Court, 436 U.S. 84, 98 (1978); Shaffer v. Heitner, 433 U.S. at 215. As to the relationship between the constitutionality of the exercise of jurisdiction and the constitu-
The Court’s recent tendency to define the permissible due process limits for the exercise of judicial jurisdiction may have influenced its decision to grant certiorari in *Hague* in order to explicate more precisely what limitations the due process and full faith and credit clauses impose on the power of state courts to make choice-of-law decisions.

There were three opinions in *Hague*, and the Court split 5-3 on the question of whether the application of Minnesota law in that case by the Minnesota Supreme Court was constitutional.\(^{46}\) Doctrinally, both the plurality opinion of Justice Brennan,\(^{47}\) joined by Justices White, Marshall and Blackmun, and the dissenting opinion of Justice Powell,\(^{48}\) joined by Chief Justice Burger and Justice Rehnquist, treated the tests under due process and full faith and credit to be coextensive. Only Justice Stevens, in a concurring opinion, expressly drew a distinction between due process and full faith and credit as constitutional limitations on choice of law.\(^{49}\)

The Brennan plurality stated the constitutional test as follows: "[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."\(^{50}\) Applying that test, the plurality concluded that the application of Minnesota law on the issue of stacking coverage under the policies was fully constitutional.\(^{51}\) Justice Brennan identified three contacts that Minnesota had with the parties which, in the aggregate, rendered constitutionally permissible the application of Minnesota law on the question of stacking. They were: (1) the decedent's regular employment in Minnesota and his daily commute to his Minnesota workplace while covered by the uninsured motorist provisions of the insurance policies; (2) Allstate's doing of business in Minnesota and Minnesota's interest in regulating Allstate's relationship with a long-time member of the Minnesota workforce; (3) the widow's post-occurrence change of residence to Minnesota and her position as the decedent's court-appointed representative.\(^{52}\) Justice Brennan stated

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\(^{46}\) Justice Stewart did not participate. 449 U.S. at 320.

\(^{47}\) 449 U.S. at 307-20 (Brennan, J., joined by White, Marshall and Blackmun, JJ.).

\(^{48}\) *Id.* at 332-36 (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting).

\(^{49}\) *Id.* at 320-32 (Stevens, J., concurring in the judgment).

\(^{50}\) *Id.* at 312-13.

\(^{51}\) *Id.* at 320.

\(^{52}\) *Id.* at 313-19.
in conclusion: "In sum, Minnesota has a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair."  

Justice Stevens took the position that a choice of law would violate due process only if it were totally arbitrary or fundamentally unfair, and specifically rejected the notion that the due process question was affected in any way by Minnesota’s “interest” in applying its own law. He found no unfairness to Allstate in the application of Minnesota law since the policy provided for coverage throughout the United States and it was foreseeable that the law of states other than Wisconsin could govern particular claims arising under the policy. Further, Justice Stevens contended that full faith and credit, in certain instances, required that one state respect the sovereignty of another state and refrain from applying its own law. He concluded, however, that Wisconsin’s sovereignty could not be infringed by applying Minnesota law, because the insurance policy’s coverage of accidents occurring in other states deprived Wisconsin of any interest in insisting that the contract be interpreted in accordance with Wisconsin law.

The dissenters, in an opinion by Justice Powell, stated that they agreed with the doctrinal position of the Brennan plurality, but disagreed with its application to the facts of the present case. It appears, however, that the dissenters’ characterization of their doctrinal position as to constitutional limitations on choice of law is not completely in line with the plurality’s. Justice Powell maintained that in order to apply its own law constitutionally the forum state must have a legitimate policy interest in the outcome of the litigation and concluded that the application of Minnesota law did not reasonably further a legitimate state interest. Justice Powell appears to be saying that the state must have an “interest” as that term is used in the interest analysis approach to choice of law — under which the state must be interested in applying its law in order

53. Id. at 320 (footnote omitted).
54. Id. at 331 (Stevens, J., concurring in the judgment).
55. Id. at 326-31 (Stevens, J., concurring in the judgment).
56. Id. at 322-23 (Stevens, J., concurring in the judgment).
57. Id. at 323-26 (Stevens, J., concurring in the judgment).
58. Id. at 332 (Powell, J., dissenting).
59. Id. at 334 (Powell, J., dissenting).
60. Id. at 336-39 (Powell, J., dissenting).
to implement the policy reflected in that law. Justice Brennan, on the other hand, appears to be using the concept of "interest" more broadly, to include the "generalized interest" of a state in applying its law on the basis of the factual contacts that the parties and the transaction have with the state. Although Justice Powell would not say that it was unconstitutional for a state to apply its own law where that state had significant factual contacts with the underlying transaction, he appears to be demanding a more qualitative kind of interest than is demanded by Justice Brennan, either in terms of the state's factual contacts with the underlying transaction, or in terms of the state's interest in applying its law in order to implement the policy reflected in that law.

To a constitutional law scholar, the formulation, by both the plurality and concurrence, of the doctrine applicable to constitutional limitations on choice of law, as well as the application of the doctrine to the facts of Hague, seems to place fairly minimal limitations on the power of state courts to make choice-of-law decisions. The "significant contact or significant aggregation of contacts" test, as defined and applied by the Brennan plurality, makes clear that the forum can apply its own law either on the basis of factual contacts with the underlying transaction or on the basis of its interest in applying its own law in order to implement the policy reflected in


63. For example, the state where the accident occurred has a general interest in applying its law to determine liability arising from the accident. See, e.g., Carroll v. Lanza, 349 U.S. 408 (1955). The application of that state's law to determine liability in the particular case may not advance the policy reflected in that law, such as where that law would deny recovery and both the plaintiff and the defendant are from a recovery state. See Schiltz v. Meyer, 29 Ohio St. 2d 169, 280 N.E.2d 925 (1972) (Ohio guest statute applies to bar suit in which two parties from Kentucky, a non-guest statute state, were involved in accident in Ohio).

64. Justice Powell specifically stated that if the accident had occurred in Minnesota, Minnesota law constitutionally could be applied. 449 U.S. at 336 (Powell, J., dissenting).

65. Justice Powell also maintained that the state's interest in applying its own law had to be determined at the time the accident occurred rather than in light of post-occurrence events. 449 U.S. at 336-37 (Powell, J., dissenting).

66. In order for constitutional doctrine to be binding on the lower courts and on the Court itself in future cases, the doctrine must command the support of five Justices. The binding constitutional doctrine that emerges from Hague, then, is that which is consistent with both the Brennan and Stevens formulations.

67. See test accompanying notes 50-53 supra.
that law.68 Justice Stevens would allow the application of the forum's law as a matter of due process in any case as long as this would not be fundamentally unfair to the other party.69 He also indicated that the circumstances under which full faith and credit would invalidate a choice of law otherwise valid as a matter of due process, were fairly limited.70 Both the Brennan71 and Stevens72 opinions support the proposition that as a matter of due process, the plaintiff's home state constitutionally can apply its own law to allow recovery where the plaintiff is injured in an out-of-state accident having no factual connection with the forum.

Further, both opinions make clear that from a constitutional standpoint, a state's interest in the application of its own law can be determined in light of post-occurrence changes as long as this produces no fundamental unfairness to the party against whom the law is being applied.73

The Powell dissent disagreed on this point.74 In its view, Minnesota lacked a legitimate state interest because the insured was a Wisconsin resident at the time of the fatal accident and the accident did not occur in Minnesota.75 If the fatal accident had occurred in Minnesota, the Court would unanimously have agreed that Minnesota could constitutionally apply its own law on the point in issue.76

68. In my view, this was the operational test prior to Hague as well. See discussion in notes 13-17 supra and accompanying text.
69. See 449 U.S. at 326 (Stevens, J., concurring in the judgment).
70. See id. at 326-27 (Stevens, J., concurring in the judgment). This view is illustrated by his holding on the full faith and credit question in that case, as well as by his formulation of full faith and credit doctrine. See id. at 322-26 (Stevens, J., concurring in the judgment).
71. See 449 U.S. at 314. As Justice Brennan stated: "An automobile accident need not occur within a particular jurisdiction for that jurisdiction to be connected with the occurrence." Id. A valid state contact creating state interest can occur in other ways: "The injury or death of a resident of State A in State B is a contact of State A with the occurrence in State B." Id. at 315 n.20.
72. See id. at 328-30 (Stevens, J., concurring in the judgment). Since ordinarily no unfairness will result to the defendant or the insurer in this situation, Justice Stevens would find the application of the law of the plaintiff's home state valid as a matter of due process. Id. at 331 (Stevens, J., concurring in the judgment). I have long maintained this position and am pleased to see that it has now been endorsed by the Supreme Court. See Sedler, supra note 16, at 402-04. Courts that have applied their own law in this situation have assumed that they could do so without any constitutional objection, even prior to Hague. See, e.g., Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974); Schwartz v. Consolidated Freightways Corp. 300 Minn. 487, 221 N.W.2d 665 (1974).
73. See 449 U.S. at 318-19 (plurality opinion), 331 (Stevens, J., concurring in the judgment).
74. See id. at 337 (Powell, J., dissenting).
75. See id. at 337-39 (Powell, J., dissenting).
76. Since the occurrence of an accident is within a state, and presumably the making of
Finally, since all but Justice Stevens said the constitutional tests for applying a state's law under due process and full faith and credit are coextensive, it is reasonable to assume that ordinarily full faith and credit will not be an independent constitutional limitation on choice of law.  

It is submitted, therefore, that the holding and doctrinal formulations in *Hague* reinforce the previously existing operational test for determining the constitutionality of a state court's choice of law. Thus, a state's law may constitutionally be applied in any case where (1) the state had an interest in applying its law on the point in issue in order to implement the policy reflected in that law, and the application of its law in the circumstances presented was not fundamentally unfair to the party against whom the law was applied; *or* (2) the state had sufficient factual contacts with the transaction making it reasonable for its law to be applied to the transaction despite its lack of a substantive interest in doing so. Now that the Court has explicated more precisely the nature of the limitations that the due process and full faith and credit clauses impose upon the power of state courts to make choice-of-law decisions, the Court may again return to its approach of judicial abstention. In any event, it seems clear that the effect of the Court's holding in *Hague*, and of its doctrinal formulation of constitutional limitations on choice of law, is to place only the most minimal limitations on the power of state courts to make choice-of-law decisions.

**The Perspective of Constitutional Generalism**

*The Need for This Perspective*

Although I approve of the result in *Hague* and of what will most likely be the effect of the doctrine formulated in the Brennan and Stevens opinions, I am nonetheless troubled by the failure of the Court to deal with constitutional limitations on choice of law from the perspective of constitutional generalism; that is, from a perspec-

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77. The only case where the Court had held that a choice of law that was valid as a matter of due process was violative of full faith and credit was *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947), and it is doubtful if that case would be followed today.

78. See discussion in notes 14-17 *supra* and accompanying text.
CONSTITUTIONAL GENERALISM

All of the opinions in Hague appear to treat constitutional limitations on choice of law as a specialized area and to approach choice-of-law questions independent of general principles of constitutional doctrine. For example, all the opinions focus on due process as a limitation on choice of law, but there is no discussion whatsoever of the relationship between general due process doctrine and due process as a limitation on choice of law. Nor is there mention of the Court's application of due process doctrine in other contexts. From an analytical standpoint, it seems that constitutional limitations on choice of law still remain removed from the constitutional mainstream.

Because the Court has failed to deal with constitutional limitations on choice of law from the perspective of constitutional generalism, it is likely that Hague will intensify rather than mute the academic debate over constitutional control of choice of law. In their search for constitutional limitations on choice of law, many of my Conflict of Law colleagues will probably scrutinize Brennan's "significant contact or significant aggregation of contacts, creating state interests" language, as if it were a talismanic test for determining whether a state court's choice of law would be found unconstitutional. Similarly, there is likely to be close scrutiny of Powell's dissent in order to identify cases where the Brennan plurality and the Powell dissenters might agree that a particular choice of law is unconstitutional. Moreover, I expect there will be renewed debate over whether full faith and credit should be an independent limitation on choice of law, as contended by Justice Stevens, and if so, when a state court's choice of its own law improperly impinges on the sovereignty of another state. I believe the Court was sending out a behav-

79. The only cases discussed in any of the opinions are the "leading" cases dealing with constitutional limitations on choice of law and the more recent cases involving due process limitations on the exercise of judicial jurisdiction. See, e.g., 449 U.S. at 309-13 (plurality opinion), 322-25 (Stevens, J., concurring in the judgment), 332-36 (Powell, J., dissenting).

80. My Constitutional Law colleagues were astonished, for example, that Justice Rehnquist concluded that the choice-of-law decision of the Minnesota Supreme Court violated due process, since Justice Rehnquist has inveighed against the use of substantive due process to invalidate governmental action. See, e.g., Carey v. Population Servs. Int'l, 431 U.S. 678, 717-19 (1977) (Rehnquist, J., dissenting); Roe v. Wade, 410 U.S. 113, 173-77 (1973) (Rehnquist, J., dissenting).

81. 449 U.S. at 313.

82. This test conveniently ignores the "neither arbitrary nor fundamentally unfair" part of the formulation.

83. 449 U.S. at 322-23 (Stevens, J., concurring in the judgment).
ioral message that there are few, if any, significant constitutional limitations on choice of law and that courts should generally abstain from considering such questions. This message is not as loud and clear as it would have been, however, had the Court dealt with constitutional limitations on choice of law from the perspective of constitutional generalism. When viewed from the perspective of constitutional generalism, the due process and full faith and credit clauses properly should be interpreted as imposing only the most minimal limitations on the power of state courts to make choice-of-law decisions.

*Due Process*

Structurally, the due process clause operates as a potential limitation on the power of state courts to make choice-of-law decisions, in the same manner as it operates as a limitation on the power of courts to take any action in the civil litigation process. The due process clause is applicable to any governmental action affecting property interests. In resolving private disputes in the civil litigation process, courts necessarily affect property rights. Thus, the procedural component of due process imposes limitations on the exercise of judicial jurisdiction by the courts and requires that the litigants receive fair notice of the proceedings and an opportunity to defend. Its substantive component, theoretically at least, could render a court's substantive disposition of a case violative of due process as well.

From the perspective of constitutional generalism, the most important step in the analysis of due process as a limitation on choice of law is to relate the Court's application of general due process doctrine in other contexts to due process as a limitation on choice of law. The fundamental question is whether, in light of general due

84. "Behavioral message" refers to the results that the Supreme Court indicates it wants the lower courts to reach in light of its decision in a particular case or series of cases. For an example of a behavioral message in another context, see Sedler, *Metropolitan Desegregation in the Wake of Milliken — On Losing Big Battles and Winning Small Wars: The View Largely From Within*, 1975 WASH. U.L.Q. 535, 575-76.


88. Therefore, it is proper, from the perspective of constitutional generalism, to assume that constitutional limitations on choice of law do inhere in the due process clause, and the issue is framed in terms of what those limitations should be. This is not so with respect to the full faith and credit clause.
process doctrine and the principles that the Court applies to determine whether governmental action is violative of due process in other contexts, due process should impose any limitations on the power of state courts to make choice-of-law decisions, and if so, what those limitations should be.

In determining the constitutionality of governmental action challenged as being violative of due process, the Court has articulated a two-tier standard of review. Where the challenged governmental action impinges on a fundamental right, such action must advance a compelling governmental interest that cannot be advanced by a less restrictive alternative than the restriction in question.\textsuperscript{89} Where the challenged governmental action does not impinge on a fundamental right, its constitutionality as a matter of due process is tested under the purportedly less restrictive rational basis standard: The restriction in question must be reasonably related to the advancement of a legitimate governmental interest.\textsuperscript{90} Despite the Court's articulation of a two-tier standard of review, the Court may in practice be using a sliding-scale approach, under which the degree of scrutiny of the governmental action varies depending upon the importance of the individual interest in relation to the importance of the asserted governmental interest.\textsuperscript{91} In any event, whether the Court actually follows a two-tier or a sliding-scale standard of review, actions taken by a state court in the civil litigation process or-


\textsuperscript{91} See, e.g., Moore v. City of East Cleveland, 431 U.S. 494 (1977). There the Court struck down a housing ordinance that limited occupancy to narrowly defined single families on substantive due process grounds because the State's legitimate interest in preventing overcrowding and minimizing congestion did not justify intrusion into family living arrangements. The Court's examination of the ordinance went beyond the rational-basis test, since the Court conceded that the State's purpose was achieved, although marginally, by the ordinance. Id. at 500. But the Court also stopped short of calling the underlying right "fundamental." Instead, the Court compared the importance of the underlying right (the right to have members of the extended family live in the same house) to the importance of the State's objective (avoiding overcrowding), id. at 499, and found that the State's interest, although legitimate, was outweighed by the importance of the family relationship. Id. at 504-06.

In Vlandis v. Kline, 412 U.S. 441 (1973), there was a challenge to a Connecticut statute that permanently classified students as nonresidents for tuition purposes if they resided out of state for a certain period prior to their application. In finding the statute violative of the Constitution on due process grounds, the Court's analysis went beyond the rational-basis test, though the Court did not classify the underlying right as fundamental. Id. at 452-53.

The middle-tier level of constitutional review occurs most frequently in equal protection cases. See, e.g., Craig v. Boren, 429 U.S. 190 (1976) (statute requiring that males be older than females in order to purchase beer held violative of equal protection clause).
ordinarily do not invoke a heightened degree of scrutiny. The general due process doctrine that would be applicable to determine the constitutionality of state court choice-of-law decisions, therefore, is the rational-basis test. Under that test, it must be established whether the government "has acted in an arbitrary and irrational way" so as to violate due process, or whether it has acted reasonably and fairly.

The considerations in determining whether the government has acted in an arbitrary or irrational way are reasonableness and fairness. When a state has some factual connections with the underlying transaction, the choice of that state's law to govern rights and liabilities arising from that transaction would seem to be reasonable, notwithstanding that another state may have even more factual connections with that transaction. Likewise, when application of a state's law to a given factual situation advances the policy reflected in that law, it surely seems reasonable for a court to hold that that state's law should apply, again notwithstanding that another state may appear to have a "greater interest."

While the consideration

92. A heightened degree of scrutiny would only be required in cases that involve "fundamental rights," such as the right to divorce. Cf. Boddie v. Connecticut, 401 U.S. 371 (1971) (state may not bar divorce action because of inability to pay filing fees).

93. Duke Power Co. v. Carolina Envt'l Study Group, 438 U.S. 59, 83-84 (1978). The arbitrary and irrational test, it will be recalled, is the due process test formulated by Justice Stevens in Hague, 449 U.S. at 326 (Stevens, J., concurring in the judgment), as well as, in part, by the Brennan plurality, id. at 307-13. It will be remembered that Justice Brennan imposed an additional requirement that there be a "significant contact or significant aggregation of contacts, creating state interests." Id. at 313. It may be asked whether Justice Brennan intended that this language convey something beyond the arbitrary and irrational test, or whether he intended that the two components of the formulation be related to each other. The exact language of the formulation was as follows: "[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." Id. at 312-13.

94. This is most clearly illustrated by the Court's application of the arbitrary and irrational test in Duke Power Co. v. Carolina Envt'l Study Group, 438 U.S. 59, 84-93 (1978). Professor Weintraub makes the same point in regard to due process as a limitation on choice of law:

When, then, is it a denial of due process to apply the law of a state to an interstate transaction? The safest, but not very helpful, answer is when it is not reasonable to apply the law of that state. Reasonableness is the basic, core concept of due process. Any further elaborations of this "reasonableness" standard are attempts to give this vague standard more specific content in order to facilitate its application to specific cases.


95. This assumes that it can be determined that one state's interest in the application of its law is "greater" than that of another state.
of fairness is more frequently involved with respect to procedural due process, it may also be involved with respect to substantive due process. A state rule of substantive law that interferes with the enjoyment of liberty or property interests in a fundamentally unfair way may be found to be violative of substantive due process. Fairness to the parties is an independent choice-of-law consideration, particularly where consensual transactions are involved. Where the choice of a state's law in the circumstances presented unfairly defeats the legitimate expectations of a party, it would be consistent with general due process doctrine to hold that the choice of law is violative of due process. It is submitted that the constitutionality of a particular choice of law should be governed by the reasonableness and fairness test. A choice of law should not be held to be violative of due process unless, under the circumstances presented, the application of the law of the chosen state is clearly unreasonable or fundamentally unfair to one of the parties.

If the constitutionality of a state court's choice-of-law decision, as a matter of due process, is tested against the arbitrary and irrational standard, neither the purported interest of the other involved state in having its law applied nor the purported multistate concerns should play any part in the constitutional analysis. Another state's apparently "greater interest" in having its own law applied, or multistate concerns dictating that the law of that state apply instead of the law of the forum, does not make the application of the forum's law unreasonable or unfair. If the application of the forum's law is not unreasonable or unfair, due process has been satisfied.

Cases from *Alaska Packers* through *Clay* that rejected due process challenges to state court choice-of-law decisions are easily explainable in terms of the reasonableness and fairness criteria. In all of these cases, the underlying transaction had factual connections with the forum, and the forum had at least a generalized interest in applying its law on the basis of those factual connections.

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96. "Fundamental fairness," of course, lies at the heart of due process limitations on the exercise of judicial jurisdiction. In the final analysis, the constitutional question in such cases revolves around whether the court that seeks to exercise jurisdiction is a "fair forum." *Kulko v. Superior Court*, 436 U.S. 84, 100 (1978).

97. See, e.g., *Vlandis v. Kline*, 412 U.S. 441, 446-54 (1973) (statutory conclusive presumption that student whose legal address was outside of state at time of enrollment in publicly-supported university remains nonresident throughout period of enrollment is violative of due process).

98. See *Sedler*, supra note 61, at 222.

99. See *Carroll v. Lanza*, 349 U.S. 408, 413 (1955) (discussing forum's "generalized")
larly, because of the factual connections with the underlying transaction, the party against whom the law was applied could have reasonably foreseen the application of the forum's law on the point in issue, and thus the application of that law could not have been fundamentally unfair to that party. In all of these cases, had it not been for the legacy of the Dodge era, and had constitutional limitations on choice of law not been an independent specialized area, there would not even have been a serious question as to the constitutionality of the state court's choice-of-law decision. In no case could it seriously be contended that by choosing to apply its own law on the point in issue, the state court had acted in an arbitrary and irrational way.

Let us now consider Hague in light of general due process doctrine. Hague differs from the other cases in that the underlying transaction had no factual connection with the forum. The vehicle was registered and insured in Wisconsin, and the accident occurred in Wisconsin. The application of Minnesota law in Hague, however, like the application of the law of the forum in all of the cases from Alaska Packers through Clay, is consistent with general due process doctrine in that there is a reasonable basis for the application of Minnesota law, and the application of Minnesota law was not fundamentally unfair to Allstate.

To simplify the analysis of Hague in light of general due process doctrine, let us assume that the Minnesota legislature had enacted the following statute:

interest in applying its own law).


102. Since this was so, the accident would be charged to Wisconsin's loss experience regardless of where it occurred, so that the defendant was a Wisconsin insurer for choice-of-law purposes.

103. As stated previously, if the accident had occurred in Minnesota, there would be no question that Minnesota law constitutionally could have been applied. See discussion in note 76 supra and accompanying text. See generally Carroll v. Lanza, 349 U.S. 408, 412-13 (1955).

104. The statute has been drafted to incorporate the factual situation presented in Hague.
Whenever an automobile liability insurance policy contains a provision for uninsured motorist coverage and more than one vehicle is included within the coverage of the policy, the coverage limits for each automobile shall be aggregated, and in the event of an accident involving an uninsured motorist, the insured shall be entitled to recover the aggregate sum.

The provisions of this statute shall apply to automobile policies issued by insurance companies licensed to do business in this state in the following circumstances:

(a) One or more of the insured automobiles is registered in this state;

(b) Although none of the insured automobiles is registered in this state, either:
   (i) The insured was regularly employed in this state at the time of the accident in question and regularly drove one of the insured automobiles to and from the workplace in this state; or
   (ii) Subsequent to the occurrence of the accident, the insured, or in the event of the insured's death due to accident, the insured's spouse or dependent minor child, has established permanent residence in this state.

The statute controls the disposition of Ms. Hague's claim against Allstate, pursuant to both parts of subsection (b), and the statute must be applied by the Minnesota courts unless such application would be unconstitutional. Assume Allstate in this hypothetical challenges such application as being violative of due process.

In light of general due process doctrine, it is clear that the challenge must fail. Under the rational basis standard of review, the application of the statute to the disposition of Ms. Hague's claim, as directed by subsection 2(b), is not arbitrary or unfair. A key factor making the application of the statute reasonable for due process purposes is that it regulates an automobile liability insurance contract that was issued by an insurance company licensed to do business in Minnesota. Since Allstate has availed itself of the privilege of conducting business in Minnesota, Minnesota has wide latitude in regulating the business activities of Allstate where those business activities impact on Minnesota interests. Subsection (2)(b) limits the application of

105. A state court must follow a legislative directive as to choice of law, like any other statutory provision, assuming that it is constitutional.

106. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (corporation availing itself of privilege of conducting business in state subjects itself to jurisdiction of that state). Since this is so, Allstate can constitutionally be subject to the exercise of judicial jurisdiction in Minnesota, and is on notice that Minnesota substantive law could be applied to
the statute to those circumstances where Minnesota may properly assert an interest in allowing a higher level of recovery on the insurance contract. In light of subsection 2(b), it is reasonable for Minnesota to be concerned about the welfare of the insured, a member of the Minnesota work force, and the insured's dependents, and this gives Minnesota a constitutionally sufficient "interest" in applying its law to determine the amount of recovery under the insurance contract. Under 2(b)(i), Minnesota has limited any possible assertion of interest to a situation where the insured regularly drove one of the insured vehicles to and from the Minnesota workplace. Although Minnesota's interest here may not be as strong as it would be if the decedent had been a resident of Minnesota, it is of sufficient strength to make the application of Minnesota law reasonable for due process purposes. Minnesota's interest in applying its law becomes even stronger, however, under 2(b)(ii), where the insured or the insured's dependents become residents of Minnesota. Minnesota is now affected by the social and economic consequences of the accident in which the insured was involved. For these reasons, it cannot be disputed that under the hypothetical statute, the application of Minnesota law to the kind of factual situation presented in Hague satisfies the due process test of reasonableness.

It is equally clear that the application of Minnesota law to this situation satisfies the due process test of fairness. Precisely because Allstate does business in Minnesota, it cannot claim unfair surprise by being made subject to the requirements of Minnesota insurance law. Nor can it properly claim the protection of Wisconsin law so as to put its activities beyond Minnesota's regulatory reach.

107. But it is at least as "strong" as the interest of the forum in Carroll v. Lanza, 349 U.S. 408 (1955), where the forum applied its law to allow recovery to a nonresident who was injured there while working for a subcontractor, but who had no other connection with that state.

108. Its interest in this regard is the same as if the insured had been a resident of Minnesota at the time of the accident.

109. As to the absence of "unfair surprise" on the part of an automobile liability insurer in any event, see R. Weintraub, supra note 94, § 6.5, at 272-73.

110. The hypothetical Minnesota statute does not require Allstate to do anything that it is prohibited from doing by Wisconsin law. Moreover, since the Minnesota statute treats foreign insurance companies in exactly the same manner as it treats domestic insurance companies, it does not discriminate against interstate commerce. Nor does it burden interstate commerce by preventing the movement of Wisconsin-insured vehicles into Minnesota. Thus, the application of the Minnesota statute to determine the liability of the Wisconsin-based insurer does not violate the commerce clause. See, e.g., Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 125-29 (1978).
over, any claim of unfairness is completely obviated by the fact that, under Wisconsin law, Allstate was required to cover the insured’s vehicles while they were being driven in other states and thus could anticipate the application of another state’s law on the issue of stacking.\footnote{111}

The above analysis in terms of general due process doctrine does not differ significantly from the analysis of the Brennan plurality in \textit{Hague}.\footnote{112} The plurality opinion stated: “In sum, Minnesota had a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair.”\footnote{113} General due process doctrine focuses on whether the application of Minnesota law is arbitrary or fundamentally unfair, rather than on sufficient aggregation of contacts or state interests, but the conclusion in a particular case is not likely to differ under either formulation. This is because, as pointed out previously, whenever the underlying transaction has a factual connection with the forum, or whenever the forum has an interest in applying its law in order to implement the policy reflected in that law, the application of the forum’s law is not arbitrary, and in those circumstances, it is not likely to be fundamentally unfair either.

The analysis of the Powell dissent, however, is completely inconsistent with an analysis in terms of general due process doctrine. The Powell dissent contended that due process required that there be “reasonable policy-related contacts in choice-of-law cases,”\footnote{114} and concluded that such contacts were lacking here. Allstate’s doing of business in Minnesota was not a sufficient contact, according to Justice Powell, because this did not give Minnesota an interest in regulating the conduct of the insurer unrelated to property, persons or contracts executed in Minnesota.\footnote{115} Justice Powell also stated that it did not matter that the insured was a member of the Minnesota workforce, because allowing additional recovery under an insurance contract to a nonresident member of the Minnesota workforce does

\begin{footnotesize}
\begin{enumerate}
\item Justice Stevens emphasized this in \textit{Hague}. See text accompanying notes 54-57 \textit{supra}. Our hypothetical Minnesota statute has been enacted on the assumption that, under the laws of all the states, automobile liability insurance policies must cover the vehicle whenever it is driven into another state.
\item While Justice Stevens’ due process analysis focuses on “fairness,” it presumably incorporates “reasonableness” as well.
\item 449 U.S. at 320 (footnote omitted).
\item \textit{Id.} at 340 (Powell, J., dissenting).
\item \textit{Id.} at 337-38 (Powell, J., dissenting).
\end{enumerate}
\end{footnotesize}
not "further any substantial state interest relating to employment." Finally, Justice Powell argued that post-occurrence changes of residence and the resulting interest on the part of Minnesota in applying its own law, could not be taken into account because this would encourage forum-shopping, and would permit the defendant's reasonable expectations at the time the cause of action accrued to be frustrated.117

None of Justice Powell's points show why the application of Minnesota law to the factual situation presented in *Hague* was arbitrary or unfair. The requirements that Justice Powell would have the due process clause impose on a state court's power to make choice-of-law decisions are not the kind of requirements that the due process clause, under the rational-basis standard of review, has been found to impose on governmental action in other contexts. The rational-basis standard of review requires only that the state show a legitimate interest in enacting particular legislation or in undertaking particular action, not that the interest be substantial118 or of a certain quality. Minnesota clearly has a legitimate state interest in regulating an automobile liability insurance contract when a vehicle regularly driven to and from a Minnesota workplace is covered by an insurance company doing business in Minnesota. Likewise, Minnesota has a legitimate state interest in regulating liability under such a contract where the insured or the insured’s dependents subsequently become Minnesota residents and the social and economic consequences of the accident will be felt in Minnesota. This interest does not become any less legitimate under the rational-basis standard of review simply because it might encourage forum-shopping.119 Further, although applying Minnesota law on the point in issue might defeat Allstate's expectations at the time the cause of action accrued, this produces no unfairness since Allstate was not entitled to expect the application of Wisconsin law on the question of stacking at the time it entered into the contract or while the contract was in force.120

116. *Id.* at 339 (Powell, J., dissenting).
117. *Id.* at 337 (Powell, J., dissenting).
119. Under the rational-basis standard of review, it would be said that it was reasonable for the legislature to "choose to pay the price of forum-shopping" in order to advance an otherwise legitimate state interest.
120. Justice Powell explicitly recognized this. 449 U.S. at 336-37 (Powell, J., dissenting).
The analysis of the Powell dissent appears to proceed on the assumption that the matter of due process limitations on choice of law is a specialized area\textsuperscript{121} divorced from general due process doctrine. Unlike the Brennan-Stevens view, the Powell analysis may lead to results inconsistent with general due process doctrine. It is incumbent on the dissenters, therefore, to show why due process as a limitation on choice of law should be a specialized area and why the due process clause should be used to invalidate state court choice-of-law decisions that would otherwise pass constitutional muster under the rational-basis standard of review. This the dissenters do not do. In contrast, the operational test formulated in the Brennan and Stevens opinions for determining the constitutionality of a state court's choice-of-law decision is consistent with general due process doctrine. The likely effect of that operational test is to place only the most minimal limitations on the power of state courts to make choice-of-law decisions. This is the conclusion that should be drawn from an analysis in terms of general due process doctrine.

We may now consider under what circumstances a state court's choice-of-law decision should, under general due process doctrine,\textsuperscript{122} be found arbitrary and fundamentally unfair and thus violative of due process. The application of a state's law to govern liability in civil litigation should be held arbitrary for due process purposes only where that state does not have an interest in applying its law in order to implement the policy reflected in that law or where that state does not have a significant factual connection with the underlying transaction, making it reasonable to apply the law of that state on the point in issue.\textsuperscript{123} The application of a state's law should be held unfair only where (1) the party against whom the law is applied could not reasonably have foreseen its application to the transaction in question at the time the party entered into the transaction, and (2) the party conformed its conduct to the requirements imposed by the law of another state, in justifiable reliance that the state's law would apply to the transaction.\textsuperscript{124} In either of these situations, it is highly unlikely that any present-day court would choose to apply its

\textsuperscript{121}. See notes 8-10 supra and accompanying text.

\textsuperscript{122}. This, in my view, will produce the same result as the operational test contained in the Brennan and Stevens formulations in \textit{Hague}.

\textsuperscript{123}. If neither criterion is satisfied, there is simply no rational basis for the application of that state's law.

\textsuperscript{124}. For a discussion of this point, see 449 U.S. at 333 (Powell, J., dissenting).
own law; the forum will generally stop short of applying its own law before the permissible limits of due process have been reached. Thus, we would not expect, under this formulation, that a state court's choice-of-law decision would be found violative of due process.

In Hague, the Court briefly discussed the two "classic" cases, Home Insurance Co. v. Dick and John Hancock Mutual Life Insurance Co. v. Yates, both decided in the 1930's, where a state court's choice of law was held to be unconstitutional. The Court noted that both cases were "instructive as extreme examples of selection of forum law," and that in both cases, "the selection of forum law rested exclusively on the presence of one nonsignificant forum contact." The Court stated:

Dick and Yates stand for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional. Dick concluded that nominal residence—standing alone—was inadequate; Yates held that a postoccurrence change of residence to the forum state — standing alone — was insufficient to justify application of forum law.

The results in Dick and Yates serve to illustrate where a state court's choice of law would be "arbitrary" or "unfair" under general due process doctrine. They also illustrate why those circumstances are extremely limited and unlikely to occur in practice.

In Dick, a Mexican company issued a fire insurance policy, containing a built-in one year statute of limitations, to Bonner, a resident of Mexico. The policy was assigned, in Mexico, to Dick, a

125. In practice, courts generally will not apply their own law where they conclude that the policy reflected in that law will not be significantly advanced by its application in the circumstances presented. See Sedler, supra note 61, at 222-27. Where the forum has a real interest in applying its law on the point in issue, the application of its law is not likely to be fundamentally unfair to the other party. Conversely, the same factors that would produce possible unfairness in the application of a state's law often will also indicate the lack of a real interest in applying that law. Id. at 222.
126. 281 U.S. 397 (1930).
127. 299 U.S. 178 (1936).
128. While John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936), was decided on full faith and credit grounds, id. at 183, the result can be explained on due process grounds. See discussion in notes 146-149 infra and accompanying text.
129. 449 U.S. at 311.
130. Id. at 309.
131. Id. at 310-11 (footnote omitted).
132. 281 U.S. at 403 n.1.
Texas citizen residing temporarily in Mexico. The policy covered the vessel only when used in certain Mexican waters, required that the premium be paid in Mexico, and was expressly made subject to Mexican law. The built-in limitations provision was valid under Mexican law, but invalid under Texas law.

Dick, of course, could not arise on its precise facts today because the insurer in that case did not do business in Texas and jurisdiction was obtained by the now unconstitutional method of garnishing the reinsurer obligation of the New York reinsurer which was doing business in Texas. Let us, however, change the facts in Dick to have the insurance company conducting business in Texas, making it subject to jurisdiction there. Further, to eliminate any other possible jurisdiction problems, let us assume Dick is the original owner of the vessel and a true resident of Texas.

If the case were to arise today on these facts, it is difficult to believe that Texas would choose to apply its law, as it did in Dick, on the issue of the validity of the built-in limitations. The policy behind the Texas rule of substantive law is primarily a transaction-regulating policy rather than a people-protecting policy. Texas is not trying to protect a class of persons from its own improvidence when engaging in contractual transactions; rather, it is trying to regulate the kinds of provisions that can be contained in insurance contracts. Texas has no interest in applying this regulatory policy to a contract of risk insurance executed in Mexico and covering the vessel only when it is used in certain Mexican waters. Nor will there be

133. Id. at 403-04.
134. Id. at 403 & n.2.
135. The Court noted this in Hague. 449 U.S. at 310 n.12.
136. A law embodies a transaction-regulating policy when its purpose is to control how certain transactions should be conducted. A state that has a statute of frauds, for example, has decided that it will not enforce contracts unless the parties have shown that they are sufficiently serious about their transaction to embody their understanding in a certain formalized manner. Similarly, if a state voids built-in limitation periods that are contained in contracts, it has decided that it does not want parties to be able to limit the enforcement of contractual obligations in this way. A law embodies a people-protecting policy when its purpose is to protect a class of persons, such as minors or spendthrifts, from the consequences of their improvidence by prohibiting them from entering into enforceable transactions. For a discussion of transaction-regulating policy, see Sedler, On Choice of Law and the Great Quest: A Critique of Special Multistate Solutions to Choice-of-Law Problems, 7 Hofstra L. Rev. 807, 827-28 (1979).
137. A state's interest in applying its law to implement a transaction-regulating policy is premised on significant factual contacts with the underlying transaction rather than on the residence of any party in that state. See, e.g., Pallavicini v. International Tel. & Tel. Corp., 41 A.D. 2d 66, 341 N.Y.S.2d 281 (1973), aff'd, 34 N.Y.2d 913, 316 N.E.2d 722, 359 N.Y.S.2d
any significant social or economic consequences in Texas if the Texas plaintiff cannot obtain insurance recovery for the loss of a vessel used only in Mexican waters.138 Thus, Texas does not have a real interest in applying its law on the point in issue and, I contend, would not do so.138

If Texas were to apply its own law on the point in issue, however, such application would be "arbitrary" and thus violative of due process. This is because, as pointed out above, Texas does not have an interest in applying its law in order to implement the policy reflected in that law, and because it does not have any factual connection with the underlying transaction making it reasonable for Texas to apply its law on the point in issue.

The plaintiff's residence in Texas is not a sufficient factual connection making it reasonable for Texas to assert an interest in allowing the plaintiff to recover on a contract of risk insurance covering a vessel that was used only in Mexico.140 Although the insurance company does do business in Texas, its activity with respect to the matter in issue, unlike the situation in Hague, does not affect any Texas interests. In Hague, the vehicles covered by the insurance pol-

290 (1974); Sedler, supra note 136, at 829-31. On the other hand, where a law embodies a people-protecting policy, the home state of the party sought to be protected has an interest in applying its law to any transaction involving that party, even if it is connected entirely with another state. See Lilienthal v. Kaufman, 239 Or. 1, 395 P.2d 543 (1964); Potlatch No. 1 Fed. Credit Union v. Kennedy, 76 Wash. 2d 806, 459 P.2d 32 (1969). There is no unfairness in applying the law of a party's home state on the issue of a party's competency to engage in a contractual transaction, since application of the law of the incompetent party's home state, on this issue, could have been foreseen at the time the parties entered into the contract. 138. A different situation would result, for example, if the plaintiff could not obtain insurance recovery for an automobile accident occurring in another state.

139. In a case such as Lilienthal v. Kaufman, 239 Or. 1, 395 P.2d 543 (1964), for example, if the defendant had asserted a statute of frauds defense under Oregon law rather than the defense of spendthrift immunity, the Oregon court probably would not have applied Oregon law on the point in issue and would have rejected the defense because an important Oregon policy would no longer be at issue. See id. at 16, 395 P.2d at 549. For a discussion of the general principles involved here, see Sedler, Characterization, Identification of the Problem Area and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method, 2 Rut-Cam. L.J. 8, 83-84 (1970). Cf. Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906 (1961) (California declined to apply its statute of frauds to void oral contract, valid in Nevada, involving refinancing of obligations involving sale of Nevada land to Nevada residents even though vendor may have been domiciled in California when contract was made).

140. This is because the denial of recovery on a contract of risk insurance covering property only when it is being used in another state will not produce any social or economic consequences in Texas. But since denial of recovery to a Texas resident on a liability insurance contract would produce social and economic consequences in Texas, Texas can properly assert an interest in applying its law to allow recovery on that contract, notwithstanding that the accident occurred in another state or that the contract was "centered" in that state.
icy were regularly driven by the insured to his Minnesota workplace, while here the insurance policy covered the vessel only while it was being used in certain Mexican waters. For these reasons, the application of Texas law to invalidate the built-in limitation period in this modern variant of *Dick* would be arbitrary and violative of due process.\textsuperscript{141}

In *Yates*, however, Georgia's application of its law to the question of insurer liability was not arbitrary because Georgia had a real interest in applying its law. In *Yates*, a life insurance policy was applied for, issued, and delivered in New York.\textsuperscript{142} The beneficiaries of the policy, however, moved to Georgia shortly after the insured's death.\textsuperscript{143} At issue was which state's law — New York's or Georgia's — should apply to determine whether false representations made on a life insurance application should bar recovery.\textsuperscript{144} The insurance policy contained the insured's statement that he had not been treated for any illness for the five-year period prior to making his insurance application. Undisputed testimony showed that the insured had received medical treatment five times within one month of the application. Under New York law, the entire contract between the parties had to be embodied in the policy itself, while Georgia law permitted the jury to consider parol evidence showing that the insured truthfully answered all questions, but that the insurance agent incorrectly recorded the answers on the application.\textsuperscript{145}

Once the beneficiaries became Georgia residents, Georgia necessarily became concerned with their welfare. Enabling the beneficiaries to recover the insurance proceeds through the application of Georgia law advanced Georgia's policy of generally permitting recovery unless there were material false representations. This interest is at least as strong as Minnesota's interest in *Hague* in applying its law on the issue of stacking because of the spouse's post-occurrence change of residence to Minnesota. In *Yates*, then, the beneficiaries' post-occurrence change of residence to Georgia — standing alone — gave Georgia a real interest in applying its law on the point in issue.

\textsuperscript{141} This is totally apart from the question of whether the application of Texas law in *Dick* would have been fundamentally unfair to the insurer. A number of commentators have maintained that there was no unfairness in the application of Texas law in *Dick*. See R. Weintraub, *supra* note 94, § 9.2A, at 502-03; Martin, *Constitutional Limitations on Choice of Law*, *supra* note 3, at 188-91. \textit{But see} Kirgis, *supra* note 3, at 107-09.

\textsuperscript{142} 299 U.S. at 179.

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} \textit{Id.} at 179-81.

\textsuperscript{145} \textit{Id.}
Therefore, the application of Georgia law allowing recovery on the insurance policy in *Yates* cannot be said to be arbitrary.

Georgia's application of its own law in *Yates*, however, was in fact violative of due process because, under the circumstances, application of Georgia law was fundamentally unfair to the insurer. The application of a state's law is unfair for due process purposes where the party against whom the law is applied could not reasonably have foreseen application of the law at the time it entered into the transaction, and conformed its conduct to the law of another state in justifiable reliance on the fact that that state's law would determine its rights with respect to that transaction. It cannot be argued that prior to the beneficiary's post-occurrence move to Georgia, New York law was the only possible law applicable to the issue of the beneficiaries' recovery under the policy. In *Hague*, by contrast, the insurance policy covered the vehicle in all states into which it was driven, so that the application of the law of a state other than Wisconsin on the issue of stacking was, at the outset, fully foreseeable to Allstate.\(^4\) It is unfair to give effect to the law of the state of the post-occurrence move if the conduct of one of the parties "would have been different if the present rule had been known and the change foreseen."\(^4\) In *Yates*, the insurer, in reliance on New York law, would assume that it did not have to be concerned about the accuracy of the information contained in the insured's application until the insured died and a claim was made by the beneficiaries. At that time it could assert the provisions of New York law absolutely voiding the contract because of false representations as to medical care, whether material or not. If the insurer had known that a different standard, such as Georgia's material-representation standard, were applicable, presumably the insurer would have checked the application more carefully before issuing the policy or would have taken steps to cancel the policy at an earlier time, when proof of materiality was more likely to have been available. The unfairness of applying Georgia law to the point in issue in *Yates* is not altered by the fact that the insurer was also doing business in Georgia because the insurer was entitled

\(^{146}\) This point was emphasized by Justice Stevens. See 449 U.S. at 324 (Stevens, J., concurring in the judgment). Likewise, in Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964), the insured had changed his residence to Florida prior to the time the loss occurred, and since the insurer continued the contract in effect, the insurer could have anticipated the application of Florida law on the issue of the validity of the built-in limitation period.

to assume that this life insurance contract on the life of a New York resident would be governed by New York law. In the precise circumstances of Yates, then, the application of Georgia law on the issue of the insurer's liability was so fundamentally unfair as to be violative of due process.

It does not follow, however, that it would have been fundamentally unfair for Georgia to have applied its law on a different issue in a case such as Yates, despite the absence of contacts between the insured and Georgia during his lifetime. Assume, for example, that the point in issue was the validity of a suicide provision contained in the policy, and that under New York law the insurer was not liable in the event of suicide, while under Georgia law the suicide did not relieve the insurer of the obligation to pay unless it occurred within one year of the issuance of the policy. Assume further that the insured committed suicide more than one year after issuance of the policy. Regardless of which state's law is applicable to determine the effect of the insured's suicide at the time of the insured's death or thereafter, there was nothing that the insurer could have done differently prior to the time of the suicide. The insurer's conduct would not "have been different if the present rule had been known and the change foreseen." Since Georgia now has a real interest in applying its law on the point in issue, and since the application of Georgia law on this point produces no unfairness to the insurer, application of Georgia law is not arbitrary or unfair, and thus is not violative of due process even though Georgia's only contact is the beneficiaries' post-occurrence change of residence to Georgia.

148. A contrary situation is presented in Hague because the insurer was not entitled to assume that the stacking question would be determined by Wisconsin law, since the insurance contract covered the vehicles when they were being driven in different states. In Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964), the location of the insured risk had changed to Florida, so the application of Florida law on the issue of the validity of the built-in limitation period could have been anticipated prior to the time the loss occurred. And in Watson v. Employers Liab. Assurance Corp., 348 U.S. 66 (1954), the application of Louisiana law on the issue of the validity of the direct-action provision could have been anticipated, because the insured sent its products into Louisiana.

149. For an explanation of Yates based on unfairness, see R. Weintraub, supra note 94, § 9.2A, at 506; Reese, supra note 3, at 1597-98.


151. I am thus troubled by the statement of the Brennan plurality to the effect that, "Yates held that a postoccurrence change of residence to the forum State — standing alone — was insufficient to justify application of forum law." 449 U.S. at 311. And while Justice Stevens explained Yates primarily in terms of fundamental unfairness, he also stated that in the case of a life insurance contract, "it is likely that neither party would expect the law of any
As the above discussion indicates, it is only in extreme cases such as *Dick* and *Yates*, where the forum is not likely to apply its own law in any event,¹⁸² that a state court's decision to apply its own law should be held to be violative of due process. When due process as a limitation on choice of law is viewed from the perspective of constitutional generalism and the question is approached in terms of general due process doctrine, due process should not act as a significant limitation on the power of state courts to make choice-of-law decisions.¹⁸³

**Full Faith and Credit**

In *Hague*, only Justice Stevens indicated that the constitutional test for the application of a state's law as a matter of full faith and credit differed from the constitutional test for the application of a state's law as a matter of due process. Justice Stevens stated the full faith and credit limitation on choice of law to be as follows:

> The Full Faith and Credit Clause is one of several provisions in the Federal Constitution designed to transform the several States from independent sovereignties into a single, unified Nation. The Full Faith and Credit Clause implements this design by directing that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty. The Clause does not, however, rigidly require the forum State to apply foreign law whenever another State has a valid interest in the litigation. On the contrary, in view of the fact that the forum State is also a sovereign in its own right, in appropriate cases it may attach para-

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¹⁸² A court following a modern approach to choice of law will not apply its own law in any case where it does not see a real interest in doing so or where the application of its law would be fundamentally unfair to the other party. See discussion in note 125 *supra*. Some courts, however, in the absence of a borrowing statute, apply their own law on the issue of the statute of limitations so as to allow a suit that is barred by the statute of limitations of the state whose substantive law they are applying. Assuming that the forum has no proper basis for the application of its own substantive law, to allow a suit that is barred by the statute of limitations of the only interested state clearly is arbitrary and should be held to be violative of due process. See R. Weintraub, *supra* note 94, § 9.2B, at 516-17; Martin, *Constitutional Limitations on Choice of Law, supra* note 3, at 221-23.

¹⁸³ It appears that this was the intention of both the Brennan and Stevens formulations of the constitutional test. See notes 112-113 *supra* and accompanying text.
mount importance to its own legitimate interests. Accordingly, the fact that a choice-of-law decision may be unsound as a matter of conflicts law does not necessarily implicate the federal concerns embodied in the Full Faith and Credit Clause. Rather, in my opinion, the Clause should not invalidate a state court’s choice of forum law unless that choice threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another state.\textsuperscript{155}

Justice Stevens concluded that there was no threat to national unity and no violation of Wisconsin’s sovereignty by the application of Minnesota law in \textit{Hague} because the insurance policy covered accidents that might occur in other states. Wisconsin, therefore, had no interest in insuring that contracts formed in Wisconsin in reliance on Wisconsin law be interpreted in accordance with that law.\textsuperscript{156}

The emphasis in Justice Stevens’ analysis is on the federal interest in national unity.\textsuperscript{156} In his view, one state is required by full faith and credit in a choice-of-law case to respect the sovereignty of another state where failure to do so would significantly impair the federal interest in national unity. Under Justice Stevens’ formulation, it would seem to be a rare instance where a state court’s application of its own law in a conflicts case, which is valid as a matter of due process, would be held violative of full faith and credit. Where a state court’s choice of its own law is neither so arbitrary nor fundamentally unfair as to be violative of due process, it is difficult to see how the federal interest in national unity ordinarily would require that another state’s law be applied.\textsuperscript{157}

Some conflicts commentators have argued for a more expansive view of full faith and credit as a constitutional control on state court choice-of-law decisions. They believe that when a state court makes choice-of-law decisions, full faith and credit requires that the court respect the sovereignty of sister states where those states have a much greater interest in controlling the outcome of the particular litigation.\textsuperscript{158} Such an approach requires a weighing and balancing of

\textsuperscript{154} 449 U.S. at 322-23 (Stevens, J., concurring in the judgment) (citations omitted).
\textsuperscript{155} \textit{Id.} at 324-26 (Stevens, J., concurring in the judgment).
\textsuperscript{156} \textit{Id.} at 324 (Stevens, J., concurring in the judgment).
\textsuperscript{157} The only time that a choice of law, valid as a matter of due process, has been held to be violative of full faith and credit, was in \textit{Order of United Commercial Travelers v. Wolfe}, 331 U.S. 586 (1947), and it is questionable whether that case would be followed today. \textit{See} discussion in note 38 \textit{supra}.
\textsuperscript{158} \textit{Martin, Constitutional Limitations on Choice of Law, supra} note 3; \textit{Simson, supra} note 3. The seminal piece, arguing that full faith and credit should be a significant constitu-
the strength and legitimacy of the conflicting state interests and of the contacts that the transaction and parties have with each of the involved states. Additionally, it precludes the application of the law of a state whose interests and contacts are "relatively insignificant" in comparison with those of the other involved state. One commentator has gone so far as to propose that full faith and credit requires deference to the "decisionmaking authority" of the state that is the "most interested in influencing the outcome of the case under review."160

In analyzing this position from the perspective of constitutional generalism, the fundamental inquiry must be whether there is any justification for interpreting the full faith and credit clause as imposing a constitutional control on state court choice-of-law decisions.161 Such justification would have to be found by analyzing the broad organic purpose and function of the full faith and credit clause162 or by analyzing the purpose and effect of the clause as found in the original understanding of the framers.163

No justification for interpreting the clause as imposing a constitutional control on choice of law can be found. First, the historical circumstances surrounding the adoption of the full faith and credit clause make it clear that the framers would not have intended that the clause operate as a limitation on state court choice-of-law decisions. Second, a significant limitation on the power of state courts to make choice-of-law decisions would seem to be inconsistent with the broad, organic purpose of the full faith and credit clause and its function in our constitutional scheme.

It is agreed that there is nothing in the language or history of the full faith and credit clause that indicates that the framers intended this clause to control state court choice-of-law decisions or relate in any way to the degree of "respect due the laws of other

159. Martin, Constitutional Limitations on Choice of Law, supra note 3, at 211-16. 230; Simson, supra note 3, at 73-78.

160. Simson, supra note 3, at 87.

161. I am leaving aside the question of how it is to be determined whether one state has a "much greater interest" than another state in having its law applied on the point in issue or which state is the one that is "most interested" in influencing the outcome of the case under review.

162. For a discussion of the meaning of "broad, organic purpose" in constitutional analysis, see note 5 supra.

163. For a discussion of the meaning of "original understanding" in constitutional analysis, see note 6 supra.
It has been argued, however, that notwithstanding the absence of language or history indicating this as the intention of the framers, the original understanding of the framers supports the proposition that

the clause is most reasonably interpreted as requiring uniformity among the various states in the laws that their courts would apply to decide any particular case. From this perspective, the clause broadly captures a vision of a nation in which people’s legal rights and liabilities, whether or not declared by a court to date, do not vary according to the state in which they are placed in issue. This interpretation of original intent derives substantial support from two considerations. First, a legal order in which the outcome of a case could be expected to turn on the forum in which the cause of action is tried understandably may have offended the Framers’ sense of justice. Under this theory, the Framers opted for a unified system of justice at least partly because they believed, as an equitable matter, that plaintiffs’ and defendants’ relative ingenuity in forum-shopping and forum-avoiding should not determine which side prevails. Second, the Framers reasonably may have concluded that an integrated judicial system would provide an important adhesive among the various states. Under this analysis, the Framers insisted on such a system at least in part because they saw it as an essential reminder to the states that, though separate in many ways, they are above all integral parts of a nation that frequently must act as one.  

The basic problem with this argument as to the framers’ original understanding is that it ignores history. The framers could not have intended the full faith and credit clause to operate as a limit on the power of state courts to make choice-of-law decisions, because at the time of the adoption of the Constitution, the concept of choice of law simply did not exist in this country.

At the time of the adoption of the Constitution, no common law of conflicts had been received from England, because no conflicts law existed there. In all cases coming before the English courts only English law was applied. It was not until the latter part of the eighteenth century that the English courts even considered displacing English law in such a case. Similarly, at the time of the adoption

164. Simson, supra note 3, at 66.

165. Id. at 67-68 (footnotes omitted).


It was not until the eighteenth century, when the common law courts extended their
of the Constitution, differences between the laws of sister states in this country must have been exceedingly rare because of a nearly uniform common law.\textsuperscript{167} Thus, the framers of the Constitution were, in all likelihood, not cognizant of any concept of choice of law. If they gave any thought at all to the law that should be applied by a state court in interstate cases, they most likely would have assumed they should apply the law of the forum as the English courts had done in international cases.\textsuperscript{168} Whatever else the framers intended to accomplish by the promulgation of the full faith and credit clause, it is apparent that they did not intend the clause to operate to control state court choice-of-law decisions.\textsuperscript{169}

No justification for interpreting the full faith and credit clause as a constitutional control on state court choice-of-law decisions can be found in the clause’s broad, organic purpose or in its function in our constitutional scheme. The purpose and function of a constitutional provision may be ascertained from its textual language and structural position in the Constitution, as well as from the historical circumstances surrounding its adoption. In addition to the full faith and credit clause, article IV, the “federalism” article, includes a provision prohibiting discrimination against the citizens of sister states,\textsuperscript{170} and one requiring the United States to guarantee to each state a “republican form of government.”\textsuperscript{171} Read together, the provisions of article IV and the historical circumstances surrounding their adoption,\textsuperscript{172} seem to indicate quite clearly that the broad, or-

\textsuperscript{167} Id. at 35 (quoting A. Dicey, Conflict of Laws 5 (6th ed. J. Morris 1949)).

\textsuperscript{168} See A. Ehrenzweig, Conflict of Laws 4 (1962).

\textsuperscript{169} See id. at 5; Sedler, supra note 166, at 34-35.

\textsuperscript{170} The limited available historical evidence shows that the framers intended that the full faith and credit clause operate only to require recognition of the judgments of sister state courts and of legislative acts of insolvency. See Reese & Johnson, The Scope of Full Faith and Credit to Judgments, 49 Colum. L. Rev. 153, 153-55 (1949).

\textsuperscript{171} U.S. Const. art. IV, § 2, cl. 1. This provision is referred to as the “comity” clause, and its essential thrust has been to prevent unreasonable discrimination against residents of sister states. Compare Baldwin v. Montana Fish and Game Comm’n, 436 U.S. 371 (1978) with Hicklin v. Orbeck, 437 U.S. 518 (1978). As to the comity clause as a possible limitation on choice of law, see discussion in note 4 supra.

\textsuperscript{172} Clauses 2 and 3 of article IV, section 2, deal with extradition and fugitive slaves. Clause 1 of article IV, section 3, deals with the admission of new states, and forbids the
ganic purpose of the full faith and credit clause was to promote equality among the states and respect for the sovereignty of each state in the federal system.\textsuperscript{173} In light of this purpose, the Supreme Court has quite properly interpreted the full faith and credit clause as precluding one state from discriminating against the laws of another state, and requiring that each state enforce, without discrimination, claims existing under the laws of a sister state.\textsuperscript{174} Likewise, in light of this broad, organic purpose, the Supreme Court has again quite properly interpreted the full faith and credit clause as imposing virtually no limits on the power of state courts to make choice-of-law decisions.\textsuperscript{175}

An essential attribute of state sovereignty in our federal system is the authority of the states under their police power to prescribe the controlling law in civil litigation.\textsuperscript{176} This attribute of state sovereignty includes the power of each state to decide when its own law formation of any new state within any existing state or of any new state from all or part of two other states. Clause 2 of article IV, section 3, deals with the disposition of federal property, and does not appear to have a federalism component.

173. The full faith and credit clause and the comity clause may be seen as parallel "non-discrimination" clauses, in the sense that the full faith and credit clause forbids discrimination against sister-state judgments, laws and public acts, while the comity clause forbids discrimination against citizens of sister states. The extradition provision requires one state to facilitate another state's enforcement of its criminal law. The restrictions on the formation of new states contained in section 3, and the guaranty clause of section 4 impose certain obligations on the federal government with respect to the states. All of this adds up to a structural constitutional recognition of the states as sovereign equals in our federal system.

174. Hughes v. Fetter, 341 U.S. 609 (1951). Since a state is not discriminating against claims existing under the laws of sister states by applying the same statute of limitations to bar such claims as it applies to bar claims existing under its own law, the forum may apply its statute of limitations to bar a suit under sister-state law. Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953).

175. For the strongest rejections of full faith and credit as a constitutional control on state choice-of-law decisions, see Watson v. Employers Liab. Assurance Corp., 348 U.S. 66, 73 (1954); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501-04 (1939). Since Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932), has been apparently overruled by Carroll v. Lanza, 349 U.S. 408 (1955), and John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936), has been explained in due process terms, see discussion in notes 146-51 supra and accompanying text, the only case supporting full faith and credit as an independent limitation on choice of law is Order of United Commercial Travelers v. Wolfe, 331 U.S. 586, 589-99 (1947), which is of dubious vitality today. See discussion in notes 38, 157-161 supra and accompanying text.

176. For a discussion of this point, see Sedler, Book Review (to be published in Northwestern University Law Review). Regard for this attribute of state sovereignty has caused the Supreme Court to limit the circumstances in which the federal courts can create "federal common law" to displace state law in civil litigation. See generally M. Redish, Federal Jurisdiction 79-107 (1980).
applies to a case containing a foreign element. Since the broad, organic purpose of the full faith and credit clause is to promote equality among the states and respect for the sovereignty of each state in the federal system, it would be anomalous and inconsistent for the Court to interpret it to require that one state yield this attribute of sovereignty to another state because the latter state had a greater interest in controlling the outcome of a particular case. To put it another way, the notion that one state can have a greater interest than another in the exercise of sovereignty reflected in the application of its substantive law in civil litigation, is inconsistent with the broad, organic purpose of the full faith and credit clause which was designed to maintain the states as sovereign equals in our federal system.

The sovereign equality of the states in our federal system properly requires the reciprocal enforcement of sister-state judgments and properly requires the non-discriminatory enforcement of claims existing under the laws of sister states. It also, however, precludes interference with the power of a state court to apply its own law simply because it is asserted that another state has a greater interest in applying its law.

The values embodied in the full faith and credit clause dictate that each state, acting in its sovereign capacity, must decide for itself whether it is interested in applying its own law to a case that is before its courts. The Supreme Court has stated:

While the purpose of that provision was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states, the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.

Since an attribute of state sovereignty is the power to prescribe, whether by statute or judicial decision, the scope of the application of its own law, a choice of law by a state court ordinarily is not a

177. In this sense the forum court is exercising the sovereignty of the state when it decides that the forum's law shall apply to the case before it, in the same manner as the legislature would be exercising the state's sovereignty by the enactment of a choice-of-law directive.

violation of full faith and credit. From the perspective of constitutional generalism, the Supreme Court’s interpretation of the full faith and credit clause as embodying such a principle is mandated by the broad, organic purpose of the clause and its function in our constitutional scheme.

The only full faith and credit limitation on the power of a state court to make choice-of-law decisions that can properly be imposed, consistent with the clause’s broad, organic purpose, is the very narrow one recognized by Justice Stevens in *Hague*. As Justice Stevens noted, the full faith and credit clause, among other constitutional provisions, is “designed to transform the several States from independent sovereignties into a single, unified Nation.”[^179] Where the action of a state court in applying its own law instead of the law of a sister state threatens the federal interest in national unity, it is consistent with the broad, organic purpose of the full faith and credit clause to hold that the interest in national unity prevails. The circumstances, however, in which the federal interest in national unity will be impaired by the decision of a state court to apply its own law in civil litigation involving private parties, are exceedingly rare. In *Supreme Council of the Royal Arcanum v. Green*,[^180] a case involving the now obsolete matter of deficiency assessments against members of fraternal benefit associations, it may be argued that the federal interest in national unity dictated that a single law apply to determine the validity of the assessments. If the deficiency assessments could be valid in some states and invalid in others, the association could not effectively function on a national basis. The Supreme Court observed:

> The contradiction in terms is apparent which would rise from holding on the one hand that there was a collective and unified standard of duty and obligation on the part of the members themselves and the corporation, and saying on the other hand that the duty of members was to be tested isolatedly and individually by resorting not to one source of authority applicable to all but by applying many divergent, variable and conflicting criteria.[^181]

In this case then, the application of the law of the state of incorporation to determine the validity of the deficiency assessment was mandated not because that state had a “greater interest” in having its

[^179]: 449 U.S. at 322 (Stevens, J., concurring in the judgment).
[^180]: 237 U.S. 531 (1915).
[^181]: Id. at 542.
law applied on the point in issue than the member's home state, but because the federal interest in national unity required the application of a uniform law, and the most appropriate law for that purpose was the law of the state of incorporation.

This rationale, however, would not require the application of the law of the state of incorporation in a case such as *Order of United Commercial Travelers v. Wolfe*,\(^1\) and similar cases,\(^2\) where the matter in issue was not the validity of an assessment against the member, but the rights of the member against the association. In *Wolfe*, the charter of the association provided for a built-in limitations period for the assertion of claims.\(^3\) The provision was valid under the law of the state of incorporation, but invalid under the law of the member's home state.\(^4\) The ability of the association to function on a national level would not be impaired if it could invoke the built-in limitations period to defeat the claims of some members, but not others. Thus, no federal interest in national unity dictating that a single law apply on the issue of the validity of the built-in limitations period exists in this case, and the application of the law of the member's home state on this issue should not be violative of full faith and credit. It is difficult to posit any situations likely to arise in practice today where the federal interest in a national unity would require the application of a uniform law.

Beyond the very narrow limitation suggested by Justice Stevens in *Hague*, the full faith and credit clause, when viewed from the perspective of constitutional generalism, should not operate at all to limit the power of state courts to make choice-of-law decisions.

**CONCLUSION**

This article has analyzed the matter of constitutional limitations on choice of law from the perspective of constitutional generalism. Utilizing general principles of constitutional interpretation and the consistent application of constitutional doctrine as guidelines, it has been demonstrated that neither the due process clause nor the full faith and credit clause places any significant limitations on the power of state courts to make choice-of-law decisions.\(^5\)

\(^1\) 331 U.S. 586 (1947).
\(^2\) Sovereign Camp of the Woodmen of the World v. Bolin, 305 U.S. 66 (1938);
\(^3\) 331 U.S. at 588 n.2.
\(^4\) Id. at 588-89.
\(^5\) We have not considered, from the perspective of constitutional generalism, whether
been demonstrated that a similar result should follow from the operational test, formulated in the Brennan and Stevens opinions in *Hague* for determining the constitutionality of a state court's choice of law. This is as it should be, and in our constitutional system, there should not be any significant constitutional limitations on choice of law.¹⁸⁷

¹⁸⁷ Constitutional limitations on choice of law might be found to inhere in the comity clause and the equal protection clause, as suggested by Brainerd Currie, or in the commerce clause, as suggested by Professor Horowitz. See B. Currie, *supra* note 4; Horowitz, *The Commerce Clause as a Limitation on State Choice-of-Law Doctrine*, 84 Harv. L. Rev. 806 (1971). I consider it highly unlikely that the Supreme Court will find such limitations inhereing in the comity clause or the equal protection clause. See Sedler, *supra* note 4. I also believe that it is difficult to see how a state court choice-of-law decision could be found to discriminate against interstate commerce in favor of local commerce or to place an undue burden on interstate commerce. See discussion in note 110 *supra*.

¹⁸⁷ While most of my Constitutional Law colleagues will agree with this conclusion, I strongly suspect that most of my Conflict of Laws colleagues will not.