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A LEGISLATOR’S LOOK AT HAGUE AND CHOICE OF LAW

Jack Davies*

INTRODUCTION

Three flags fly over the Minnesota Capitol: Old Glory above the senate chamber; the United Nations banner atop the house chamber; and the state flag above the Supreme Court chamber. I find no legal significance in the placement of the first two pennants, but the display of the state flag over the chamber of the Minnesota Supreme Court symbolizes nicely the patriotic fervor of that court when a conflict with the law of another jurisdiction occurs. The Minnesota Supreme Court acts as if the state’s manifest destiny is to rule all, that its own law is to be applied to any event, despite the state boundary.

Allstate Insurance Co. v. Hague1 was thus first decided in a state court that believes it can legitimately apply its own “better law”2 to the issues that come before it, a belief which rests upon that court’s interpretation3 of Professor Robert Leflar’s theories.4 The Minnesota court understands Leflar to say that a court should indeed choose the “better law” in conflicts cases.5 Whether Professor Leflar’s theory actually supports that belief, I leave to him.6

The United States Supreme Court narrowly affirmed the Minnesota court, basing its decision on the existence of some geographic contacts between the case and the state (Minnesota) whose rule was applied.7 The Supreme Court stressed in its plurality,8 concurring,9

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3. See id. at 165-68, 203 N.W.2d at 414-15.
5. See 289 N.W.2d at 49.
and dissenting opinions that, at a minimum, some facts must connect a case to a state before a legal rule from that state's body of law may be applied to the dispute. The Supreme Court plurality, however, did not require that the factual connections make relevant Minnesota's policy on stacking insurance coverage.11

For nearly twenty-three years much of my energy has gone into service as a Minnesota State Senator. In this article I offer five insights drawn in significant measure from this legislative experience: first, that the traditional conflicts idea of territoriality, temporarily in eclipse, has continuing validity; second, that each conflicts case should be evaluated not on the basis of its ad hoc justice but on whether, as a precedent, it establishes a sensible rule of general applicability—a quality we expect in every other judicial decision and a standard we should again demand of choice-of-law decisions; third, that acceptance of an issue-by-issue approach to conflicts law is imperative; fourth, that choices of law should be made so as to avoid discrimination; and fifth, that the “seat of the relationship” approach provides a viable methodology for choice of law, particularly when combined with an issue-by-issue approach.

geographical connections between the suit and Minnesota which were determinative: plaintiff's husband worked in Minnesota for fifteen years prior to his death, id. at 313-14; plaintiff became a Minnesota resident prior to the commencement of the action, id. at 318; and the defendant was present and doing business in Minnesota, id. at 317. As discussed later, however, none of these contacts were relevant to the questions at issue in this case which was whether insurance coverage under a multiple vehicle policy should be “stacked.” See notes 75-81 infra and accompanying text.

8. 449 U.S. at 308, 320 (Brennan, J., joined by White, Marshall, & Blackmun, JJ.).
9. Id. at 324 (Stevens, J., concurring in the judgment).
10. Id. at 332 (Powell, J., joined by Burger, C.J., & Rehnquist, J., dissenting). Justice Stewart took no part in the consideration of the case. Id. at 320.
11. Id. at 313. Specifically, the Court found most significant Mr. Hague's membership in Minnesota's workforce. Id. Yet, as forcefully argued in Justice Powell's dissent, that connection was irrelevant in the context of the Hague case. Justice Powell stated:

[T]he plurality emphasizes particularly that the insured worked in the forum State . . . . The fact that the insured was a nonresident employee in the forum State provides a significant contact for the furtherance of some local policies . . . . The insured's place of employment is not, however, significant in this case. Neither the nature of the insurance policy, the events related to the accident, nor the immediate question of stacking coverage are in any way affected or implicated by the insured's employment status.

Id. at 338-39 (Powell, J., dissenting) (citations omitted) (footnotes omitted). The dissent further argued persuasively that the post-accident residence of the plaintiff and the fact that the insurer did business in Minnesota were irrelevant to the choice-of-law issue within the facts of Hague. Id. at 337 (Powell, J., dissenting).
TERRITORIALITY

The fifth (1964) edition of the prestigious Cheatham casebook on Conflict of Laws begins with this statement: "The world is a legal checkerboard divided into nations now over one hundred and thirty in number, each with its own territory and its own set of laws and legal institutions." In the seventeen years since the 1964 edition of the Cheatham casebook, commentators have declared that conflicts law has moved away from the territorial principle. Illustrative of the changing attitude is that in the seventh (1978) edition of the Cheatham text the authors, Professors Reese and Rosenberg, subordinated the crisp, fundamental, and true statement with which the earlier edition began. First, they moved it into relative obscurity in the second paragraph. But worse, they introduced it with the tentative qualifying phrase "[i]n their view," referring to lawyers who still use this approach, so the statement now seems damned with implied rejection. It is made to appear as merely a useful crutch "for many lawyers," presumably lawyers not up to the subtle wisdom required by the new conflict-of-laws learning.

That new learning assaults territoriality. In fact, it may even have destroyed the usefulness of the word "territoriality" as a description of the reality that choice-of-law problems arise because governments hold exclusive policy-making sovereignty over delimited segments of the earth's surface.

The idea of territorial limits, however, still finds adherents among conflicts scholars. Professor Aaron Twerski and other commentators continue to champion what has been called "neo-territoriality." These scholars stubbornly insist that the starting point in


15. Equating the word "territoriality" with old doctrine is endemic to conflicts scholarship. E.g., R. LEFLAR, supra note 4, §§ 2, 86, 132, 133; Ratner, Procedural Due Process and Jurisdiction to Adjudicate: (a) Effective-Litigation Values vs. The Territorial Imperative; (b) The Uniform Child Custody Jurisdiction Act, 75 Nw. U.L. REV. 363, 368 (1980); Rendlemann, McMillan v. McMillan: Choice of Law in a Sinkhole, 67 VA. L. REV. 315, 316 (1981).

conflict-of-laws reasoning is the checkerboard of political sovereignty, and that it is this checkerboard which creates conflicts and forces us to make choices of law.

My primary purpose in joining this symposium is to aid those who seek to rehabilitate the idea of territoriality. Furthermore, a symposium on this Minnesota case should have a Minnesota participant with a territorialist viewpoint, for no jurisdiction has more consistently contributed to the fallacy of non-territorial conflicts law than the State of Minnesota.17

Legislators and Territoriality

I find in the work product and in the outlook of my legislative colleagues an attitude toward the place of Minnesota law in our federal republic quite different from that displayed by the court which labors in another wing of our State Capitol. In Minnesota’s legislative acts there are no examples of legal imperialism comparable to those habitually announced and implemented by our State Supreme Court in conflict-of-laws cases. Nor do I find in the acts of other state legislatures18 evidence of the judicial and academic attitudes


17. See, e.g., Petty v. Allstate Ins. Co., 290 N.W.2d 763 (Minn. 1980); Evers v. Thunderbird Aviation, Inc., 289 N.W.2d 94 (Minn. 1979); Hague v. Allstate Ins. Co., 289 N.W.2d 43 (Minn. 1979), aff'd on rehearing, id. at 50 (Minn. 1979), aff'd, 449 U.S. 302 (1981); Hime v. State Farm Fire & Cas. Co., 284 N.W.2d 829 (Minn. 1979), cert. denied, 444 U.S. 1032 (1980); Follee v. Eastern Airlines, 271 N.W.2d 824 (Minn. 1978); Blamey v. Brown, 270 N.W.2d 884 (Minn. 1978), cert. denied, 444 U.S. 1070 (1980); Myers v. Government Employees Ins. Co., 302 Minn. 359, 225 N.W.2d 238 (1974); Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973); Allen v. Gannaway, 294 Minn. 1, 199 N.W.2d 424 (1972); Bolgrean v. Stich, 293 Minn. 8, 196 N.W.2d 442 (1972); Schneider v. Nichols, 280 Minn. 139, 158 N.W.2d 254 (1968); Kopp v. Rechtzigel, 273 Minn. 441, 141 N.W.2d 526 (1966). These cases came from the same court which 24 years ago contributed to conflict-of-laws jurisprudence one of its finest cases, Schmidt v. Driscoll Hotel, 249 Minn. 376, 82 N.W.2d 365 (1957).


The same problem has arisen with enforcement of the Sherman and Clayton Acts. This is evidenced by a recent Act passed by the United Kingdom Parliament. The Protection of Trading Interests Act, 1980, c. 11, noted in Lowe, Blocking Extraterritorial Jurisdiction: The
which have aided and comforted the Minnesota court as it moved down the road of parochial egocentricity in making choices of law.

Legislating, perhaps in contrast to professoring or judging, is a humbling line of work. Legislators face continual reminders of the limits on their power. Political, judicial, financial, economic, and bureaucratic checks intrude on a legislator's work with great frequency. These sensitizing constraints may be the reason that all legislators quickly accept state lines as boundaries to their authority. This limit is known in conflicts scholarship as "legislative jurisdiction." This awareness exists even though legislators rarely have the idea of legislative jurisdiction explained to them or even hear the phrase. Reality burns a consciousness of state boundaries into legislators from the beginning to the end of each legislative day. In the imposition of taxes, the provision of public services, the creation of criminal law, the supervision of local government, the establishment of commercial and occupational regulations, the mandating of conduct, and in almost everything else it does, the legislature's authority extends only to the state boundary. The responsibility to provide public services terminates where the sovereignties of sister states begin, and this every legislator understands.

Another truth legislators understand is that judges make laws,

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19. Two general types of jurisdiction are recognized: judicial jurisdiction, which refers to the power of a court to adjudicate legal interests brought before it, and legislative jurisdiction, which refers to the power of a state appropriately to prescribe rules of law. See generally R. LEFLAR, supra note 4, §§ 29-55. Professor Leflar stated: "The questions of what law may govern and what court may act are similar though not the same. The lines that delineate the answers to the questions seem to be converging but they have not merged." Id. § 55, at 106. The American Law Institute has been schizophrenic on legislative jurisdiction. The term is hard to find in the second Restatement of Conflicts though the idea appears in shadows throughout the document. But in the second Restatement of Foreign Relations, "jurisdiction to prescribe" has a prominent place. E.g., RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 6, 7, 17-19 (1962). In the revision of that Restatement, currently in progress, the focus on "jurisdiction to prescribe" is continued. See id. §§ 401-403 (Tent. Draft No. 2, 1981).
that courts are partners in the business of lawmaking. What I cannot comprehend, as a legislator, is why some judges and academics think that the judicial lawmaking power extends beyond the legislature's and into the territory of other states. While judges and academics may occasionally forget it, it is still true that the judicial branch of a state government holds no more extensive territorial power to make rules of law than does its legislature. The sovereign powers of other states circumscribe judicial lawmaking to precisely the same extent as they limit the legislature's jurisdiction to enact rules of law. *Hague* serves to illustrate this point. Were someone to arrive at a legislature as lobbyist, academic advisor, or legislative staff member, proposing a bill for an act codifying, as general law, the conflicts principle announced in *Hague*, that person would be promptly sent off to other tasks. The principle would not be codified because it inappropriately reaches across a state border and the pre-text for that reach cannot validly be generalized.

20. "Legislatures and courts are cooperative lawmaking bodies." E. Levi, *An Introduction to Legal Reasoning* 32 (1949). Judge Cardozo addressed the issue of judicial lawmaking as follows:

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. *I am not concerned to inquire whether judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life.*


21. The Supreme Court's decision might be codified as follows:

A state's law (may) (shall) be applied if a significant aggregation of contacts exists. Although all other contacts are with state *B*, an aggregation of contacts with state *A* exists if:

(a) a person significant to the action worked for 16 years in state *A*;
(b) the surviving spouse of that person moved to state *A*; and
(c) the insurer did business in state *A*;

notwithstanding that

(a) the action has nothing to do with the employment in state *A*;
(b) the surviving spouse's move to state *A* occurred after the obligation sued on is alleged to have arisen; and
(c) the insured event has no connection with the business done in state *A*.

A more generalized principle, in my view, cannot be gleaned from the Supreme Court's opinion.

22. When tested as a precedent to be generalized, one of the most praised modern cases,
What is being suggested here is that each choice-of-law case can be tested by trial codification. Thinking of the conflicts rule of a case as a legislatively enacted rule intended for broad application reveals whether or not the decision fits in a system of ordered and consistent justice. If a decision cannot meet this test, it lacks the foundation of legal principle upon which it may be generalized. We must not allow the subtleties of choice of law to undermine the validity of traditional patterns of judicial lawmaking. As much as on any other issue in any other lawsuit, adherence to stare decisis is required when a question arises as to which of two or more governments, each holding political sovereignty over separate geographic areas, legitimately ought to be the source of the rule of law. Judges are not free on choice-of-law issues to ignore the constraints of precedent on their actions; we must reject the attitude that the law on this subject is so unsettled that anything goes, including ad hoc justice.

Legislative Rules on Insurance-Law Territoriality

The Minnesota legislature has enacted generalized rules on the interstate reach of automobile insurance law, demonstrating that it is feasible to live with such rules. Shortly before the Hague accident, the Minnesota legislature confronted the question of the territorial applicability of Minnesota’s No-Fault Insurance Act. That Act, including its system of compulsory insurance, was approved in April, 1974, with an effective date of January 1, 1975. (The Hague accident occurred on July 1, 1974). The Minnesota legislature had not


23. Justice Cardozo commented on the role played by precedent in the judicial process. Although blind adherence to precedent would, in his view, result in manifest injustice, nonetheless he forcefully asserted that “adherence to precedent should be the rule and not the exception.” If this were not the case “the labor of judges would be increased almost to the breaking point if . . . one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.” B. CARDOZO, supra note 20, at 149. To pursue Justice Cardozo’s analogy one step further, if a precedent is not susceptible to generalization, one is indeed building a course of bricks, but some are set on level and some on end.

24. See generally E. LEVI, supra note 20, at 1-8 (discussing growth of law from precedent).


26. Minnesota No-Fault Automobile Insurance Act, 1974 Minn. Laws, ch. 408 (codified at MINN. STAT. ANN. §§ 65B.44-.71 (West Supp. 1981)). This author was the primary sponsor of this legislation and served on the drafting committee for the Uniform Motor Vehicle Accident Reparations Act, upon which its choice-of-law provisions were generally based.
been shy in reaching out and touching many insurance relationships. No-fault coverage was required (1) for every vehicle “required to be registered . . . in this state,”27 (2) for every vehicle “principally garaged in this state,”28 and (3) throughout “the period in which operation or use is contemplated.”29 As to vehicles registered or principally garaged in Minnesota, the coverage of all policies was made applicable to injuries to family members in accidents occurring anywhere within the United States and Canada.30 Furthermore, every automobile insurance policy wherever issued was, upon the entry of the insured vehicle into the state of Minnesota, converted to a policy which provided the coverages required under the Minnesota no-fault law.31

In addition to the provision relating to no-fault coverage, the Minnesota legislature has adopted auto insurance statutes relating to an assigned risk program,32 cancellation or nonrenewal of automobile policies,33 and insurance rating plans.34 In each of these legislative enactments the legislature carefully limited the reach of its rule by identifying relevant Minnesota contacts. The assigned risk plan, for example, must be made available to a person who “[i]s a resident of this state” and who “[o]wns a motor vehicle registered in accordance with the laws of this state.”35 It requires participation by companies which have “written automobile insurance in this state.”36 The apportionment of the financial burden is based on “voluntary car years written in this state” for private passenger automobiles.37 For all other types of vehicles, it is based on the “total Minnesota gross, direct automobile insurance premiums written.”38 Expenses for the plan are similarly apportioned through the use of a Minnesota contact.39

The statutes relating to cancellation cover policies “delivered or

28. Id.
29. Id.
30. Id. §§ 65B.43(5)(1)-(2), .46(2)(1).
31. Id. § 65B.50(2).
32. Id. § 65B.06.
33. Id. §§ 65B.14-.21.
34. Id. §§ 70A.01-.23.
35. Id. § 65B.02(2)(1)-(2); see id. § 65B.06 (“qualified applicant”).
36. Id. § 65B.02(4); see id. § 65B.06(2) (“participating members”).
37. Id. § 65B.02(7)(1); see id. § 65B.06(1) (“participation ratio”).
38. Id. § 65B.02(7)(2); see id. § 65B.06(3) (“applicable participation ratio”).
39. See id. § 65B.02(7)(3).
issued for delivery in this state." The insurance-rate-regulation provisions apply to insurance "on risks or operations in this state" and by cross reference is made applicable to "the compulsory plan of reparations security required by" the no-fault law. This picks up the registered, garaged, or operated-in-this-state standard of that law. Not one legislative rule of insurance regulation is made applicable to nonresident motorists operating vehicles outside the State of Minnesota; in Hague, however, that is the circumstance to which the Minnesota court applied its stacking rule.

Professor Robert Sedler has discussed at length the relationship between legislative and judicial efforts in the choice-of-law area. He takes the quixotic view that legislative silence represents an absence of legislative policy. In this, Professor Sedler is mistaken because, as previously noted, the knowledge that the authority of their acts extends only to the state boundaries is always present in the minds of legislators. No legislator would attempt to add "in this state" at every point in every act where the phrase could fit. In fact, choice-of-law provisions in statutes are exceptional. The provisions establishing the territorial reach of the mandated insurance coverages in the Minnesota no-fault law represent an awareness of a special need to spell out with some precision the circumstances to which various provisions of that act are to be applied. The detail was necessary, among other reasons, because failure to comply is a misdemeanor. In contrast to most bill drafts, it was not sufficient simply to let the map of the state be incorporated into the legislation by reference. Professor Sedler forgets this incorporation of the state map, which is implicit in all statutes, when he suggests that courts are free to ignore state borders in situations of legislative silence.

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40. *Id.* § 65B.14(2).
41. *Id.* § 70A.02(1).
42. *Id.* § 65B.70(2).
44. See *Sedler, supra* note 43, at 32, 44, 45, 65. Professor Reese has also contributed fundamental support to the quixotic view. In his discussion of the conflicts approach to statutory interpretation, he concludes that: "[L]egislatures normally do not give thought to what should be the extraterritorial range of a statute but legislate only with the intrastate situation in mind." Reese, *Conflict of Laws and the Restatement Second*, 28 Law & Contemp. Prob. 679, 682 (1963).
45. See text accompanying notes 18-19 *supra*.
legislature is usually silent simply because in most circumstances it feels safe leaving choice-of-law determinations to the judges. But the limit of the state line is absolutely present either expressly or implicitly in every legislative act. And that limit must be in every court-made rule of law as well. Neither legislature nor court has power to make it otherwise.

Seeking Territorial Relevance

Scholars’ comments and judicial dictum have declared that territoriality has been abandoned in conflict of laws. But, by taking the academics at their word, the Hague Court may force a reappraisal of the wisdom of interring territoriality and foster a new search for a territorial conflicts law constructed on legally relevant contacts.

An elementary step in the education of lawyers is to learn that some facts have relevance and other facts do not. The Minnesota court has been perfectly willing, however, to connect any fact to that state, regardless of its lack of legal significance. With a claim of being modern, the Minnesota court has justified its conflicts decisions by reliance on any or all contacts, whether or not related to the policy of the rules in conflict. In Hague the United States Supreme Court has given a reluctant approval to this thoughtless “aggrega-

50. See, e.g., Petty v. Allstate Ins. Co., 290 N.W.2d 763, 765-66 (Minn. 1980) (court stacked coverages of two California vehicles although neither was involved in accident); Ewers v. Thunderbird Aviation, Inc., 289 N.W.2d 94, 100 (Minn. 1979) (Otis, J., dissenting) (noting that majority construction “would impose vicarious liability on an owner if an aircraft owned, licensed, and hangared in . . . Washington passed over a corner of Minnesota for as briefly as 60 seconds and proceeded to crash land in New York”); Hime v. State Farm & Cas. Co., 284 N.W.2d 829, 833 (Minn. 1979) (court cited fact that defendant was former Minnesota resident returning to visit former home), cert. denied, 444 U.S. 1032 (1980); Follese v. Eastern Airlines, 271 N.W.2d 824, 830-32 (Minn. 1978) (court noted that plaintiff interviewed for job in Minnesota and that after cause of action arose, returned to state and married Minnesota resident); Blamey v. Brown, 270 N.W.2d 884, 886 (Minn. 1978) (court noted that defendant’s tavern, although in Wisconsin, was within fifteen miles of a Minnesota metropolitan area), cert. denied, 444 U.S. 1070 (1980); cf. Howells v. McKibben, 281 N.W.2d 154, 155 (Minn. 1979) (finding personal jurisdiction for paternity action, court noted defendant had dinner with plaintiff in St. Paul); Savchuk v. Rush, 311 Minn. 480, 482, 245 N.W.2d 624, 626 (1976) (finding quasi in rem jurisdiction over defendant, court noted that plaintiff moved to Minnesota after cause of action arose), vacated and remanded, 433 U.S. 902 (1977), aff’d on re-

mand, 272 N.W.2d 888 (Minn. 1978), rev’d, 444 U.S. 320 (1980).
tion of contacts."

But irrelevancies aggregated are irrelevancies still.

As modern scholars led the law away from its misdirected attention to vested rights, they were thought to have rejected the whole idea of territoriality and to have substituted an unstructured pursuit of public policy. In actuality much conflicts writing of the past two decades has had an unintended effect: It has caused the law to stumble into a new mechanical jurisprudence. Today's fad is to identify residence and forum (especially when they coincide) as the universally relevant factors. Residence or forum seem now to be the basis for a hidden territoriality looked to as thoughtlessly as was the lex loci of the first Restatement.

In the flood of conflicts commentary preceding and following the collapse of the first Restatement, I find nowhere, except in Professor Leflar's better-law "consideration," an explicit divorcing of...
choice of law from all geographic factors. Nor do I find in the modern cases, even the Minnesota cases, any that lack territorial echoes.\textsuperscript{56} What I do find is a mechanical hitching of law choices to residence and forum, which in many cases turn out to be simply new irrelevancies.\textsuperscript{57} To move choice-of-law analysis forward, we must again focus the process on what Cramton, Currie, and Kay identified as the passé “traditional approach” of locating territorially a relevant event or thing.\textsuperscript{58} But now we need to determine legal relevance thoughtfully rather than mechanically. And—to introduce one more essential idea—we must determine relevance issue-by-issue, rather than case-by-case.

**Dépeçage: Issue-by-Issue Choice of Law**

Dépeçage\textsuperscript{59} or, as I prefer to call it, issue-by-issue choice of law, together with territoriality, is essential to a realistic, predictable choice-of-law process. The old conflicts idea that the rules of the case should be drawn from a single jurisdiction is foreign to the legislative way of thinking. Because the legislative focus is on legal rules, not on lawsuits, a legislator finds it reasonable to draw the rules regulating the cluster of relationships involved in a legal “situation” from previously adopted statutes, acts of Congress, the Federal Constitution, common law, and legislative acts of other states.

Choice of law, however, has been thought of as a problem that arises in the course of litigation. In the context of a lawsuit, a court could, and for too many generations routinely did, choose a jurisdic-

\textsuperscript{56} In one Minnesota case, however, the territorial echoes are indeed faint. See Howells v. McKibben, 281 N.W.2d 154 (Minn. 1979). In Howells, the Minnesota court exercised personal jurisdiction over a Wisconsin defendant in a paternity action in which a Minnesota plaintiff sought damages for expenses incurred during pregnancy and for child support, maintenance, and education. The child was born in Minnesota but conceived in Wisconsin. The court found that the contacts between the Wisconsin defendant and Minnesota were sufficient to sustain jurisdiction in a Minnesota court. Among the contacts the court cited were that the couple had eaten dinner in Minnesota on the reproductive evening, although the child was actually conceived in Wisconsin. \textit{Id.} at 157. If dinner had been limited to beverage and salad, one wonders if this fact might not have been outcome determinative.

\textsuperscript{57} See note 50 supra and accompanying text.

\textsuperscript{58} R. Cramton, supra note 12, at 15.

\textsuperscript{59} \textit{Id.} at 383:

(1) Dépeçage is a French name for a simple phenomenon: applying the rules of different states to determine different issues. When a case presents more than one choice-of-law issue and each is analyzed separately, situations arise in which it is claimed that the law of one state should govern one issue and that of another a second.
tion from which the law of the case—all of the law—was drawn. After time, some issues came to be characterized as procedural and forum law was applied on those questions. Later still, contract issues relating to performance were found to deserve separate choice-of-law treatment so legal rules from the “place of performance” could be chosen on those questions.

The application of issue-by-issue choice of law—full dépêçage—is a recent development. As late as 1963 Professor Cavers still found it necessary to attack “jurisdiction selecting” and to argue for adoption of a “rule selective” process as a major theme in The Choice-of-Law Process. Prominent articles of the 1970’s show the thought still needed elaboration.

Almost everyone now realizes that the choice-of-law process must focus, not on cases, but rather on sets of conflicting rules for each separate issue in the case. With this established, the principle of territorial sovereignty can finally be applied in a nonmechanical way. Territorial contacts can be examined issue-by-issue with full attention given to the relevance of each contact to the particular

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60. See generally Wilde, Dépeçage in the Choice of Tort Law, 41 S. Cal. L. Rev. 329, 331-33 (1968).
64. See, e.g., Reese, Dépeçage: A Common Phenomenon in Choice of Law, 73 Colum. L. Rev. 58 (1973); Weintraub, Beyond Dépeçage: A “New Rule” Approach to Choice of Law in Consumer Credit Transactions and a Critique of the Territorial Application of the Uniform Consumer Credit Code, 25 Case W. Res. L. Rev. 16 (1974); von Mehren, Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology, 88 Harv. L. Rev. 347 (1974). Even now an occasional court demonstrates that it has not learned the great lesson of issue-by-issue choice of law. The Virginia Supreme Court, for example, appears to follow the first Restatement version of “jurisdiction-selecting” choice of law. Although only one conflict issue was present, language in McMillan v. McMillan, 219 Va. 1127, 253 S.E.2d 662 (1979) suggests that Virginia was retaining “jurisdiction-selecting” principles. “In resolving conflicts of laws, the settled rule in Virginia is that the substantive rights of the parties in a multistate tort action are governed by the law of the place of the wrong.” Id. at 1128, 253 S.E.2d at 663 (emphasis added) (citation omitted). Although the Texas Supreme Court rejected the lex loci delicti rule in Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979), the court stated that “in the future all conflicts cases sounding in tort will be governed by the ‘most significant relationship’ test.” Id. at 318 (emphasis added).
65. The Minnesota court may practice “jurisdiction-selecting” of a different variety. Because it applies the better law, and a priori Minnesota has the better rule on every issue, choices of law in Minnesota courts are made with a single sweep. All issues are determined by forum law. See note 17 supra.
rules in conflict. Unless relevant to the policy of the conflicting rules, we ought not focus our choice of law on residence any more than on "loci." Avoiding the mechanical choices of law which have plagued the legal system for centuries will make it possible to achieve the great purposes of the law, including predictability, rationality, and, most significant for this discussion, nondiscrimination.

**Nondiscrimination**

A methodology based on nondiscrimination is a logical and practical approach to choice-of-law analysis. The test has three strengths: First, it invites no artificial thinking in that lawyers and judges are not led, invited, or seduced to error; second, it orders no wrong results as did the first *Restatement* and the whole vested rights regime; third, and most significantly, it is built on an attitude universally shared by most competent lawyers. This test asks whether a distinction can be made which is based on a legally relevant difference. This is a question arising from the most fundamental principle of legal analysis: that those who are similarly situated should be similarly treated.66

I now urge the use of this principle for its ordinary common law utility.67 Hague, of course, went to the United States Supreme Court on constitutional grounds, yet neither the equal protection clause68 nor the privileges and immunities clause69 was urged upon the Supreme Court as a basis for reversing the Minnesota decision. One or both of these nondiscrimination clauses could have been asserted. The lawyers for Allstate, however, with a strong due process argument,68 chose not to complicate the litigation, especially since the

65. This objective is found in our Constitution in the privileges and immunities clause, U.S. Const. art. IV, § 2, as well as the equal protection clause. Id. amend. XIV, § 1.
66. But see discussion in note 70 infra.
68. Id. art. IV, § 2. That these two constitutional clauses were not discussed is apparent from the briefs submitted in Hague.
69. Arguably, Allstate would not have standing to challenge allegedly unlawful discrimination because the corporation itself was not within the class discriminated against. A recent decision of the United States Supreme Court, however, would control the standing issue and would appear to permit Allstate to challenge the application of Minnesota law under the equal protection clause and privileges and immunities clause. Craig v. Boren, 429 U.S. 190 (1976). In Craig, a licensed vendor of 3.2% beer brought an action for declaratory and injunctive relief against Okalhoma statutes which prohibited the sale of 3.2% beer to males under 21 years of age and females under 18 years of age. Although not within the discriminated-against class, the Court held that the vendor had standing to raise an equal protection challenge to the age-sex differential of the statutes. Id. at 192-97. The Court stated that "limitations on a litigant's assertion of *jus tertii* are not constitutionally mandated, but rather stem from a salutary "rule
Supreme Court has never clearly ruled against a choice of law on the basis of equal protection or privileges and immunities. The situation would have been much different had the Court of self-restraint designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative.”

For the purposes of the standing issue, Hague and Craig appear remarkably similar. The constitutionality of the Minnesota Court’s extra-territorial application of the Minnesota insurance stacking rule is not an issue “ill-defined or speculative.” No compelling reason is apparent for not resolving the discrimination issues in a suit by Allstate. Furthermore, Allstate clearly suffered an economic detriment as a result of the decision of the Minnesota Supreme Court. Thus, had Allstate raised the discrimination issues, it is likely that the Supreme Court would have entertained them.

470. See R. Weintraub, Commentary on the Conflict of Laws § 9.4, at 543 (2d ed. 1980); Currie & Schreter, Unconstitutional Discrimination in the Conflict of Laws: Equal Protection, 28 U. CHI. L. REV. 1 (1960); Currie & Schreter, Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities, 69 YALE L.J. 1323 (1960); Leflar, Constitutional Limits on the Free Choice of Law, 28 LAW & CONTEMP. PROB. 706, 708-09 (1963). See generally Wengler, The Significance of the Principle of Equality in the Conflict of Laws, 28 LAW & CONTEMP. PROB. 822 (1963). In Hague, majority and dissenting Justices viewed two clauses of the Constitution as potential controls on choice-of-law decisions, the due process and full faith and credit clauses. 449 U.S. at 307-08 (Brennan, J., joined by White, Marshall & Blackmun, JJ.); id. at 320 (Stevens, J., concurring in the judgment); id. at 332 (Powell, J., joined by Burger, C.J., & Rehnquist, J., dissenting). Neither of these clauses has provided a workable analytical framework to aid and limit choice-of-law determinations. A prerequisite to constitutional analysis under the clauses is an assessment as to which among the conflicting rules properly ought to apply. Until the right rule is discoverable, analysis under the due process and full faith and credit clauses essentially begs the question. It is apparent in the aftermath of the Hague decision that, not only must the constitutional limits be better defined, but an analytical model must be developed to guide choice-of-law determinations.

The principles of the equal protection clause and the privileges and immunities clause provide not only a more focused constitutional inquiry but also offer a more appropriate common law framework to solve choice-of-law issues. It is far more workable to examine whether or not legal rules are applied equally to different citizens in comparable situations than to assess the “governmental interest” in an issue. In this sense, thinking in terms of equal protection provides a choice-of-law methodology which is not question-begging, subject to manipulation, or unfathomable.

Justice Stevens in a concurring opinion in Hague noted the possibility of employing the concept of discrimination in choice-of-law analysis. Id. at 327 n.15 (Stevens, J., concurring in the judgment). As Justice Stevens stated: “Discrimination against nonresidents would be constitutionally suspect even if the Due Process Clause were not a check upon a State's choice-of-law decisions.” Id. (Stevens, J., concurring in the judgment) (citations omitted).

71. But note that the United States Supreme Court has clearly indicated that the actions of state courts and judicial officers are state action within the meaning of the fourteenth amendment. Shelley v. Kraemer, 334 U.S. 1, 14 (1948). In Shelley, the Court refused, on equal protection grounds, to enforce a racially restrictive covenant. Although Shelley involved a “suspect” classification (race) which triggers a more rigorous standard of review than that which would be employed in Hague, it illustrates that judicial as well as legislative and execu-
been reviewing a legislative enactment codifying the resident-favoring rule of *Hague*. Allstate's lawyers could then have pointed to the statutory words and asserted that an inappropriate discrimination against nonresidents was apparent on the face of the statute. The Court would have been examining the actions of a legislature accused of unconstitutional discrimination in its lawmaking function. It would have been easy for a court, focusing on a suspicious statute, to rule that Allstate was not obligated to pay benefits to a Minnesota resident when, under the statute, it would not have been required to make payment to a resident of Wisconsin otherwise identically situated.

The strength of the nondiscrimination analysis arises from its reliance upon the common sense which underlies ordinary judicial behavior. The test uses the basic proposition that persons similarly situated should be similarly treated. Our legal system achieves that objective by asking whether particular differences of fact justify dissimilar treatment. Academics, judges, and legislators all find the answer by using hypotheticals to divide factual relevancies from irrelevancies. In conflicts analysis, a factual relevancy or irrelevancy should be determined by asking whether a fact or contact is connected to the particular issue under consideration. Where a contact is irrelevant, that contact cannot justify dissimilar treatment of persons otherwise similarly situated.

Minnesota's law on stacking insurance coverage under multiple contracts was applied in *Hague*, first, because Mrs. Hague moved to Minnesota after the death of her husband in the Wisconsin accident. The relevance or irrelevance of this move to choice of law can be tested by assuming that the widow of another rider on the motorcycle, otherwise identically situated, declined to move to Minnesota, but nonetheless sought and was denied application of Minnesota law to stack insurance policies. From her perspective, and from the perspective of the insurer, should she be treated differently from Hague's widow? Our sense of nondiscrimination tells us the two
widows should be treated the same, for indeed Mrs. Hague's post-accident move is not connected in any way to the insurance contract. Thus, the move is irrelevant and cannot justify the dissimilar treatment of the two widows.

Second, the court applied Minnesota's insurance stacking rule because Hague worked in a charming Minnesota river city, Red Wing. Assume now that the other motorcycle rider whose widow seeks to stack insurance policies never worked in Minnesota, but that his widow is otherwise identically situated. Again, applying the above analysis, the two widows should be identically treated in relation to this accident because the place of Hague's employment is irrelevant to this insurance contract and to the State's public policy relating to non-commercial, family auto insurance.

A third alleged justification for applying Minnesota's rule in Hague was the "closeness" of the family residence to the Gopher State. But if we now imagine another fatally injured rider who was a resident of Milwaukee or New York, we again find our sense of nondiscrimination offended. Closeness to the Minnesota border can hardly be considered a contact relevant to the policy of the insurance laws. Widows from Milwaukee and New York who move to Minnesota deserve the same legal treatment as Mrs. Hague, a former Wisconsin resident who lived "close" to, but beyond, the Minnesota border.

A fourth asserted justification for applying Minnesota's stacking rule is that Allstate conducted business in Minnesota. The relevance of this contact may be tested by assuming another victim who is insured by a company writing coverage only for Wisconsin residents. Allstate's doing of business in Minnesota may be relevant for some purposes, but not for determining liabilities on Wisconsin insurance contracts upon the occurrence of a Wisconsin accident. Thus, if the two widows are, in all other respects, identically situated, extension of the privilege of stacking policies to Mrs. Hague and not to a widow insured by "Wisconsin Local Insurance" is offensive to our sense of nondiscrimination.

Finally, the Hague case was in a Minnesota court. Assume,
however, that one of the two suits must be commenced in a Wisconsin court in order to include a malpractice claim based on medical treatment in Wisconsin. One widow is in court in Wisconsin and the other in Minnesota. On the question of stacking, it should be clear that the widows should not be treated differently. The existence of a separate tort action, irrelevant to the insurance contract, should not be a basis for determining the applicability of the stacking rule.

Earlier, I suggested that any decision which, reasonably interpreted, establishes a precedent that could not be codified by a legislature is erroneous. These last few paragraphs expose the discriminatory and unfair results which could flow from the rule of law announced in *Hague*: a rule that no legislature would enact. As a legislator, I do not understand why a court should presume to discriminate against nonresidents as a legislature could not and would not.

The tests of nondiscrimination and of trial codification would not show every difference to be irrelevant, of course. To cite a territorially relevant difference, however, we must imagine a Minnesota contact not actually present in *Hague*. Assume, therefore, that Mr. Hague had purchased his insurance in Minnesota from a Minnesota agent and that the agent had used the policy form approved by the Minnesota insurance department rather than a Wisconsin form. Dealing with a Minnesota insurance agent might give a motorist different coverage from what would be obtained from a Wisconsin agent. The whole scheme of insurance regulation, including agent licensing, policy forms, permitted offerings, and premium taxes, changes at the state line. In this hypothetical premiums likely would have been set in contemplation of Minnesota loss experiences and exposures, rather than on a Wisconsin rating territory. This seems to be a relevant difference, significant for both public policy and commercial reasons, which could well justify applying the Minnesota stacking rule.

**SEAT OF THE RELATIONSHIP**

A legislator’s viewpoint has contributed significantly to the development of the proposal that all choices of law be made through a seat-of-the-relationship methodology. As a lawmaking legislator

82. See text accompanying notes 20-24 supra.
84. See F. SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS, 133 (2d W. Guthrie ed.)
of many years' experience, I know in my bones that when a legislature makes a legal rule it aims at some class of relationships among persons. The legislature intends each rule enacted to affect certain relationships; the intended impact on those relationships represents the "governmental interest" of the enacting legislature. Previously, I built my case favoring this methodology with the assertion that "[l]egal relationships universally underlie legal rules, because each legal rule is designed to affect a kind of legal relationship."® In 1975, with a legislator's confidence, I rested the proposition on a footnote only its author could love: "The reader should make this assumption in lieu of what would certainly be a pedantic and inconclusive marshalling of authority."® I soon realized that the assumption I asked for was more than others were ready to make; therefore, when a rehearing was granted by the Minnesota Supreme Court in the Hague case, I prepared pro bono an amicus brief® and produced substantial authority for my "relationship" focus.®

I argued: Taking account of legislative jurisdiction and making choices issue-by-issue are two of the three principles upon which a rational choice-of-law method can be constructed. The missing idea—the third leg necessary to construct a theory which can stand—is this: There must be some essential element underlying every rule of law that can be connected with one government or another so as to give that government territorial lawmaking legitimacy as to that element. The question is, is there a legal sine qua non

& trans. 1880). "[T]he whole problem comes to be—To discover for every legal relationship (case) that legal territory to which, in its proper nature, it belongs or is subject (in which it has its seat)." Id. (emphasis in original). Savigny's theory is today the basis of choice-of-law rules in several European countries. East Germany, Austria, Hungary, and Switzerland have codified choice of law and relied largely upon his theories. See McDougal, Codification of Choice of Law: A Critique of the Recent European Trend, 55 TUL. L. REV. 114, 116 (1980). For a discussion and translation of Hungary's codification of choice of law, where the relationship approach is pervasive, see Gabor, A Socialist Approach to Codification of Private International Law In Hungary: Comments and Translation, 55 TUL. L. REV. 63 (1980).


86. Id. n.14.

87. Brief for Amicus Curiae, Hague v. Allstate Ins. Co., 289 N.W. 2d 50 (Minn. 1979), affg on rehearing, id. at 43 (Minn. 1978). The text accompanying notes 88-104 infra is substantially the original argument presented to the Minnesota Supreme Court. See Brief for Amicus Curiae at 30-40, 45-47.

88. Among the factors that reinforced my belief was a superb article by Professor Ian Macneil on the relational nature of contracts in the real world contrasted with the transactional nature of hornbook contract doctrine. Macneil, Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law, 72 NW. U. L. REV. 854 (1978).
uniting the governmental policy interest behind each legal rule, the territory of the government promulgating the rule, and the facts of the case relevant to each legal rule?

The Sine Qua Non is Legal Relation

What is law? Professor Arthur L. Corbin wrote the following description:

It is commonly believed, not incorrectly, that law consists of rules by which men's legal relations with each other can be determined . . . . It is conceivable that this statement itself is mistaken, in which case there would indeed be a huge mistake of law; not a mistake as to a particular rule, but as to the existence and nature of all rules.89

Dean Roscoe Pound gave law a similar definition, stating that the term "is used to mean the regime of ordering human activities and adjusting human relations through the systematic application of the force of a politically organized society."90

Analyzing tort law, Dean William Prosser suggested that "tort obligations of conduct are imposed by reason of the relation in which the parties stand toward one another . . . ."91 Furthermore, "[l]iability in tort is based upon the relations of men with another; and those relations may arise generally, with large groups or classes or persons, or singly, with an individual."92 Addressing property law, Professors John Cribbett and Ray Brown developed the same refrain. According to Dean Cribbett, "[p]roperty consists . . . of the legal relations among people in regard to a thing."93

Professor Brown similarly stated that "law consists of those rules and principles by which the state recognizes, protects, and adjusts . . . many varied personal and social interests."94 The law is thus "a device for adjusting through the instrumentality of government our constantly clashing and conflicting human relations."95

Finally, Professor Karl Llewellyn wrote:

89. 3 A. CORBIN, CONTRACTS § 616, at 746 (2d ed. 1960) (emphasis added).
90. 1 R. POUND, JURISPRUDENCE 13 (1959) (emphasis added).
92. Id. (emphasis added).
95. Id. (emphasis added).
But in each one of your cases, if you look closely, you will find the issue centering about some one of these Hohfeldian categories [of legal relations] between two distinct people. Was there a given duty, or was there not, to the plaintiff—and has there been a failure by the defendant in “performance” of its content? Was there a given privilege, or was there not, in the defendant to do what he did, as against the plaintiff? Was there a given power, or was there not—and if there was, was it duly exercised? Some one of these [relationships] is in the center of the fight.98

Scholars and commentators thus define law in terms of its role in guiding the conduct of individuals. Implicit in such definitions, however, is a recognition of the profound impact which the law has in shaping the contour of human relationships. Each individual acts as part of a larger society, and his conduct affects his relations with others in some fashion. Professor Julius Stone makes this point: “The norms which law embraces in a complex unity are social norms, that is, they generally regulate behavior of a member of society vis à vis others, and only exceptionally, as in the rules against suicide, in relation to himself.”97

Many conflict-of-laws scholars have recognized the importance of a “legal relationship” view of law and choice-of-law. Each failed, however, to reach the point of asserting “legal relationships” as a fundamental principal in choice-of-law analysis. But some certainly have come close.

For example, the provision on “Wrongs” in the second Restatement of Conflict of Laws recognizes the significance of legal relationships.98 Among the “[c]ontacts to be taken into account” is “the place where the relationship, if any, between the parties is centered.”99 If any?! The observations of Corbin, Prosser, Cribbett, and others on the connection between legal rules and legal relations make it clear that there is always a real (or alleged) relationship between plaintiff and defendant, whatever the subject of the dispute. Therefore, the “special” category of relationship-based rules contemplated by this Restatement section is as broad as the full body of law. The method proposed for this “special” category of rules must be appropriate for all choices of law. Unfortunately, the American Law Institute did not carry its analysis to this logical conclusion.

98. Restatement (Second) of Conflict of Laws § 145 (1971).
99. Id. § 145(d) (emphasis added).
Dean Eugene Scoles came close to a “legal relationship” analysis in 1967 when he asked: “Does all law and litigation concern the relationship persons have with each other? If so, perhaps our choice-of-law rules are only concerned with identification of the rules and purposes most relevant to particular aspects of a relationship between plaintiff and defendant.”

Professor David Cavers made “relationship” the focus of three of the five “principles of preference” offered in his classic, The Choice of Law Process. He did not extend that focus to the full spectrum of choice-of-law problems. There is in Cavers’ work, however, no denial of the potential for finding in legal relations a conflicts synthesis of universal applicability.

One German conflicts scholar, Friedrich K. von Savigny, identified legal relations as the sine qua non for choice of law as early as 1869. Unfortunately, Savigny’s generation failed to recognize the need to make choices on single rules rather than to select one jurisdiction from which all rules for a case would be drawn. This defect in Savigny’s analysis can now be corrected 110 years later.

The primary reason legal relationships work as the legal element upon which choice-of-law analysis should focus is that relations are, in fact, the target of all law. But another reason relationship analysis works is that a relationship can usually be assigned a geographic location without undue difficulty. The facts which create or extinguish a legal relationship and facts which change an existing relationship to one with modified rights, privileges, powers, and immunities are almost always quite clearly connected to a jurisdiction in which the relationship can be seated. No matter how valid the idea of legal relationships as the underpinning of all rules of law may be, its attraction for choice of law would dissipate if experience showed relationships to be ethereal, metaphysical, transient, and geographically fickle. But that is not the case. It is only occasionally difficult to assign a seat to the legal relationship identified. Often-times it is dramatically easy, as when planes collide. In one such situation, an American citizen on board an American plane was killed in a collision with a Brazilian airplane in Brazilian airspace.

101. D. Cavers, supra note 63, at 159-81 (discussing tort principles).
102. F. Savigny, supra note 84, at 133.
The court, which applied the Brazilian law on limitations of damages, noted that the plaintiff’s "'relationship' with [the defendant airline] commenced and ended in Brazil in one shattering moment." 104

Application of the seat-of-the-relationship theory to the Hague case is not difficult. The insurance policy, from which the legal obligation arose, was issued in Wisconsin to a Wisconsin resident for a vehicle registered and principally garaged in Wisconsin. Clearly, the legal relationship underlying the issue of stacking the coverages under that policy had Wisconsin as its situs, therefore the Wisconsin rule, and not the rule of Minnesota, should have been applied.

CONCLUSION

The suggestions offered in this article, although far from choice-of-law orthodoxy, deserve to be viewed as fundamentally conservative. To depart from the conflicts orthodoxy of today, which looks to many observers like anarchy or lottery, may lead to order. I can think of no proposal more temperate than one asking that choice-of-law decisions be treated as common law precedent and be tested by the standard of whether or not each can be lived with; one asking that in making choices of law we look to the basic nature of law as a regulator of relationships; and one asking that courts stop using confusion as an excuse to assume greater geographic lawmaking authority than their sovereign legislatures.

My optimistic view is that we have now tried so many wrong approaches to choice of law that few options are left. The odds on finding the correct path, if we admit to the errors already committed, get better and better.

104. Id. at 472.