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CHOICE OF LAW: STATES’ RIGHTS

Robert A. Leflar*

The Hague case, in its successive stages, presents two separate questions, but gives at most a semi-authoritative answer to only one of them. Both questions are identified in the plurality opinion by Justice Brennan:

It is not for this Court to say whether the choice-of-law analysis suggested by Professor Leflar is to be preferred or whether we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court. Our sole function is to determine whether the Minnesota Supreme Court’s choice of its own substantive law in this case exceeded federal constitutional limitations.

The concurring opinion by Justice Stevens makes the same distinction more pointedly, saying that “the Minnesota courts’ decision to apply Minnesota law was plainly unsound as a matter of normal conflicts law,” but affirming the decision on the issue of constitutional permissibility. The dissenting Justices, though they would obviously disagree with the choice of Minnesota law, similarly confine their opinion to the constitutional question—the outer limits of legislative jurisdiction.

After noting the answer given by the Hague decision to the one question it addresses, this article considers the common law conflicts question as the Minnesota court, or the court of another state in which the same claim was filed, might today deal with that question.

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It is my conclusion that many American courts would reach the same choice-of-law result that the Minnesota court reached, though few of them would have reached that result prior to the *Hague* decision.

*Hague* makes it clear that states' rights,\(^7\) in the area of legislative jurisdiction, are more extensive than they were once thought to be. While the exact outer limits of that state jurisdiction are not firmly located, and may never be, we now know more than we knew before. We definitely know now that the common law on choice of law is not contained altogether within the federal constitution,\(^8\) but is still largely state law. And we know that the state courts, in making their choices of law, are free to take into account some formerly doubtful factors.

Seven of the eight Justices who participated in the *Hague* decision agreed that "a significant aggregation of contacts with the parties and the occurrence, creating state interests,"\(^9\) is the test for permissible application of any state's substantive law to a litigated issue.\(^10\) The language of the dissent closely paralleled that of the plurality opinion on the traditional phrasing of this test;\(^11\) they differed as to whether the facts in *Hague* satisfied the test. Only Justice Stevens, in his concurrence, formulated a new and possibly more exact test, or pair of tests, to be applied separately to the two constitutional clauses\(^12\) which all the Justices treated as controlling.\(^13\) The

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\(^7\) See, e.g., Comment, States' Rights in Conflict of Laws, 19 ARK. L. REV. 142 (1965).

\(^8\) Compare Ross, Has the Conflict of Laws Become a Branch of Constitutional Law?, 15 MINN. L. REV. 161, 178 (1931) with 449 U.S. at 307.

\(^9\) 449 U.S. at 320 (footnote omitted).

\(^10\) See id. (Brennan, J., joined by White, Marshall and Blackmun, JJ); *id.* at 332-33 (Powell, J., joined by Burger, C.J. and Rehnquist, J., dissenting). Justice Stewart was not involved in the *Hague* case. *Id.* at 320.

Separate issues in the same case, however, may be governed by the laws of different states. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58, 60 (1973). In such cases, legislative jurisdiction obviously must be considered separately for each issue.

\(^11\) See 449 U.S. at 333 (Powell, J., dissenting).

\(^12\) Justice Stevens' test for the full faith and credit clause is whether the question of choice of law posed a threat to national unity or to the sovereignty of the state whose law was not selected. *Id.* at 322-26 (Stevens, J., concurring in the judgment). His test for the due process clause is whether the choice was "totally arbitrary" or "fundamentally unfair to either litigant." *Id.* at 326 (Stevens, J., concurring in the judgment).

\(^13\) Justice Stevens alone differentiates between the due process clause and the full faith and credit clause. *Id.* at 320-22 (Stevens, J., concurring in the judgment). The other seven justices, in their two opinions, employed the single significant aggregation-of-contacts test to both clauses, while Stevens regarded both clauses as equally relevant. This seems to settle the recent debate as to which of the two clauses should be employed. Compare Martin, *Constitu-
seven Justices agreed that the substantive law of a state that has no substantial connection ("significant aggregation of contacts") with a set of facts may not be applied to govern those facts. We must look to other parts of these opinions for guidance as to what contacts satisfy the test.

All the opinions were concerned with the effect to be given to post-event occurrences. The eight Justices were divided evenly on whether such occurrences could be included among the significant aggregation of contacts or other factors required for constitutionality, so that no answer was actually given to that part of the one question the Court undertook to answer. Five of the Justices, however, agreed that once a state is found to have the contacts or other factors necessary to sustain constitutionality, the state is free to take post-event occurrences into account in deciding what law it will apply to the case. Thus, if post-event occurrences are a state's only contacts, it may not be constitutionally permissible for its law to govern; if it is constitutionally permissible to apply a particular state's

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15. See note 12 supra and accompanying text.

16. The four Justices joining in the plurality opinion said that post-event occurrences were relevant in determining constitutionality as well as common law choice of law. 449 U.S. at 319. The three dissenters thought they were relevant on neither, id. at 337 (Powell, J., dissenting), and Justice Stevens said they should not be considered (at least in a contracts case) on the constitutional question, but might be considered by the state court in reaching its own choice-of-law decision. Id. at 331 (Stevens, J., concurring in the judgment). Justice Stevens added that it is not the Supreme Court's "function to ensure that state courts correctly apply whatever choice-of-law rules they have themselves adopted." Id. at 332 (Stevens, J., concurring in the judgment) (footnote omitted).

17. The four Justices making up the plurality, plus Justice Stevens. See note 16 supra and accompanying text.

18. This would be true in determining what law governs a contract or other consensual transaction. Issues sounding altogether in tort might be distinguished.
law, then the forum court may consider post-event occurrences in determining whether to apply that law, as long as the occurrences do not have forum-shopping significance.

In short, the legislative jurisdiction question broached by Hague is incompletely answered. We are told that for a state’s law (either the forum’s law, or, presumably, the law of any other chosen state) to be applied, the state must have a substantial connection (“significant aggregation of contacts, creating state interests”) with the facts, and we gather that these contacts may be more minimal than was previously supposed. Beyond that, the matter is governed by state conflicts law, which can be as diverse as it was in the past, and possibly even more diverse.

In view of that prospect, it should be interesting to inquire how Minnesota, Wisconsin, or any other state might today, now that the Supreme Court has spoken, handle the Hague facts. This assumes that a state may employ this author’s “five choice-influencing considerations” approach to choice of law, or that these considerations may be combined in eclectic fashion with other modern approaches to conflicts law, or that various other rules and approaches may be employed. For purposes of this analysis, it will also have to be as-

19. There is one situation in which the law of state A might be considered though only post-event occurrences were located there. This would be when the event was originally tied to states B and C, with states A and B having the same rules of law, while state C’s law was different. It may be assumed to be constitutionally permissible to apply B’s law. In choosing to apply AB law rather than C law, a forum court might consider B’s and A’s combined contacts as being more significant than C’s. See, e.g., Pfau v. Trent Aluminum Co., 55 N.J. 511, 263 A. 2d 129 (1970) (substantive law of New Jersey and Connecticut identical; that law applied to accident occurring in Iowa in action by Connecticut guest passenger against New Jersey driver). See also Leflar, True “False Conflicts,” Et Alia, 48 B.U. L. Rev. 164 (1968); Comment, False Conflicts, 55 CALIF. L. REV. 74 (1967).

20. Had the Court feared that Mrs. Hague was forum shopping, it may have reached a contrary decision. The Court, however, dismissed the presence of this fear: “There is no suggestion that Mrs. Hague moved to Minnesota in anticipation of this litigation or for the purpose of finding a legal climate especially hospitable to her claim. The stipulated facts . . . negate any such inference.” 449 U.S. at 319 (footnote omitted). The dissenters did not contend that Mrs. Hague was forum shopping, but they did note that “[i]f a plaintiff could choose the substantive rules to be applied to an action by moving to a hospitable forum, the invitation to forum shopping would be irresistible.” Id. at 337 (Powell, J., dissenting).

21. Id. at 313. The reference to state interests does not add much to the test, since it is always possible for counsel and courts to discover some local interest arising out of any local contact, and to deny that any equally important interest exists in a different state.

sumed that the 1980 Wisconsin decision rendering the relevant Wisconsin insurance law the same as the Minnesota law applies only prospectively. The choice-of-law problem would otherwise cease to exist.

If a court still uses Bealian rules, its mode of analysis is easily predicted, though exact results will be less certain. In a tort case, lex loci delicti would continue to apply. If, however, the court dislikes the resultant law, it may characterize the issue as sounding in some legal area other than tort, allowing a different state's law to govern. Cases involving contracts would automatically be referred to the law of the place where the contract was made, unless the issue could be allocated to some other automatic rule. Other mechanical choice-of-law rules will continue to be applied; the Hague decision will have little effect upon conflicts law in such courts.

Nor will courts undertaking to follow Currie's governmental interest approach, or its variations, be affected much by Hague, though Hague affords these courts the option of increased freedom. Identification of governmental interests in a state, most often in the forum state, depends upon factual contacts with that state. Courts as well as counsel are adept at perceiving and magnifying state interests wherever contacts are found. Insofar as the Hague decision adds to the scope of contacts that can be taken into account in the choice-of-law process, it increases the potential for discovering state governmental interests. A court applying Currie's governmental

26. Actually, it does not appear to be prospective only.
28. See, e.g., Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953) (tort survival characterized as procedural question); Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 A. 163 (1928) (bailor liability for negligent tort characterized as contracts problem).
31. See note 21 supra.
32. For example, post-occurrence contacts may now be considered in certain cases. See text accompanying notes 14-20 supra.
interest analysis to the facts in Hague could come up with exactly the same result reached by the Minnesota Supreme Court, and a few governmental interest courts may do just that.

The "most significant relationship" test promulgated in the Restatement (Second) of Conflict of Laws\(^{33}\) is slightly more precise than interest analysis, though the two operate almost identically if the latter is deemed, contrary to Currie's explanation, to call for a comparison of governmental interests.\(^{34}\) The greater interest and the most significant relationship are nearly identical, permitting leeway for forum courts to decide which is greater or more significant. It would rarely happen that a court, conscientiously endeavoring to determine which state had the most significant relationship to the Hague facts, would decide in Minnesota's favor. Such a decision is conceivable, however, and the United States Supreme Court would allow the decision to stand.

Similarly, the New York approach to choice of law, presumably represented by Neumeier v. Kuehner\(^{35}\) and Rosenthal v. Warren\(^{36}\) and purporting to illustrate Professor Cavers' "principles of preference,"\(^{37}\) seems only marginally affected by the Hague decision. Applying a kind of interest analysis, the two New York cases appear to hold that a New York court determining liability for an extrastate tort should favor the New York resident, whether he or she is the plaintiff or the defendant. Hague indicates that such a result-selective party preference may at least not be unconstitutional.\(^{38}\)

Let us next consider how a Wisconsin court would today decide a case identical to Hague. The Supreme Court's decision in Hague makes it clear that either Wisconsin or Minnesota law may be applied to that case. On local conflicts law, both states are committed

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34. Most of the courts that employ Currie's interest analysis actually do so by comparing the purported interests of the contacted states.
38. The contrary view is that such a result-selective party preference might constitute a denial of the equal protection of the laws to nonresident parties. Currie & Schreter, Equal Protection, supra note 13, at 12-14. The Hague decision, basing legislative jurisdiction primarily on the due process and full faith and credit clauses, apparently attaches less significance to the equal protection clause for that purpose. See note 10 supra.
to the same “five choice-influencing considerations” approach, which requires that each consideration be weighed in light of the specific facts, with no more intrinsic importance attached to any one consideration than to another. Wisconsin's technique in employing the approach is well established.

Predictability of legal result, the first consideration, is of little importance in tort cases, such as those that arise from motor accidents, since they are not preplanned. This, however, is an insurance contract action, based on a contract made in Wisconsin between a Wisconsin resident and an insurer doing business in many states, covering Wisconsin cars and accidents that might happen anywhere, but limiting the coverage to a particular type of accident. Obviously, if predictability of the contract's coverage is important, Wisconsin's law will be favored, because Wisconsin is the only state having significant contacts with that transaction at the time the contract was made. But the importance of this predictability will have to be weighed against the importance of the other considerations.

Maintenance of interstate order, or orderliness, presents no problems. Interstate auto traffic will not be affected, neither state's socio-economic or political concerns will be harmed, nor is there danger of affronting any state's sovereignty. Similarly, there is no need to worry about simplifying the judicial task as both Wisconsin's and Minnesota's rules on stacking are simple and easy to apply.

Advancing the Wisconsin forum's governmental interests is a bit more troublesome. If the plaintiff, the insured decedent's widow and personal representative, still lived in Wisconsin, that state's interest in her welfare would be evident. That interest, however, has been minimized by her post-accident removal to Minnesota. There might be some abstract, even chauvinistic interest in the dominance of local law—a forum preference. Such an interest often exists, and could control, perhaps sub silentio. However evaluated, this fourth consideration favors Wisconsin law, but the preference is not a strong one.

The fifth consideration, a preference for application of the better rule of law, forwarding the state's prime governmental interest in dispensing justice, can present difficulties. This consideration does not call for a mere preference for the forum's own law; Wisconsin has already made that clear by holding that the choice-influencing

39. See note 22 supra.
considerations may require the application of another state's law.41 It is always possible that a local law may be antiquated, anachronistic, or ripe for overruling, so that the local court could not intelligently call it "better" than the more modern law that has replaced it in another state. This reasoning would be applicable to the Wisconsin no stacking rule for uninsured motorist clauses in liability insurance policies. The no stacking rule was superseded in Wisconsin42 even when the United States Supreme Court handed down the Hague decision.43 A Wisconsin court hearing the choice-of-law issue after the superseding decision was rendered would almost surely hold that Minnesota's rule, now copied in Wisconsin, was the better law. Even before the new Wisconsin rule was announced, a court that was about to announce it would probably agree that the Minnesota law was better than the old Wisconsin rule.

The net effect of the five choice-influencing considerations, as Wisconsin might apply them, is not hard to calculate. The first and fourth considerations lean slightly toward the old Wisconsin rule, but the fifth consideration, buttressed as it is by Wisconsin's own current policy, is definitely the strongest. Wisconsin would therefore probably choose to apply the Minnesota rule.44

As to what the Minnesota court would do today, the Hague decision, coupled with the change in Wisconsin's law, leaves little doubt. The Minnesota decision would be the same as it was before,45 though this time it might be rendered by a unanimous court.

Finally, a current tendency among many courts is to lump together all or most of these relatively new approaches to choice-of-law problems,46 identifying them as "the modern" or "the new" as distinguished from "the old" choice of law, and concluding that results can be supported by citation to any authority that proposes new ways to solve conflicts problems.47 It is riskier to predict how such a

41. Hunker v. Royal Indem. Co., 57 Wis. 2d 588, 204 N.W.2d 897 (1973) (Ohio law applied; Wisconsin law not better than Ohio's).
43. Nothing in the United States Supreme Court's opinion indicates that it was influenced by Wisconsin law's having apparently become the same as the Minnesota law.
44. This, it must be remembered, is a post-Hague analysis and assumes that the Wisconsin court now knows that Minnesota's contacts are constitutionally sufficient to permit Minnesota law to be applied.
45. 289 N.W.2d 43, aff'd on rehearing, id. at 50 (Minn. 1979), followed in Petty v. Allstate Ins. Co., 290 N.W.2d 763 (Minn. 1980).
46. See notes 25-34 supra and accompanying text.
47. See Leflar, Choice of Law: A Well-Watered Plateau, 41 LAW & CONTEMP. PROB.
court, perhaps in a disinterested third state, would today decide a case with facts and conflicts identical to *Hague*. The answer probably depends on how much weight, if any, the particular court gives to the better law consideration. Some authorities would give it no weight at all, and in such a case, the superseded Wisconsin law might be applied. Most forum states, however, would have the same insurance law as Minnesota, permitting stacking, and their courts would be tempted to follow Currie’s suggestion to apply the law most like the forum’s.\(^4\)

In conclusion, most American courts today, faced with the facts in *Hague*, would reach the same choice-of-law result that the Minnesota court reached, though few of them would have reached that result before the United States Supreme Court made it clear that they are constitutionally free to do so.

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10 (Spring 1977).

48. "If the forum is disinterested, but an unavoidable conflict exists between the interests of two other states, . . . it should apply the law of the forum, at least if that law corresponds with the law of one of the other states." Currie, *The Governmental Interest Methodology*, in W. Reese & M. Rosenberg, *Cases and Materials on Conflict of Laws* 469, 470 (7th ed. 1978).