

1982

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Recommended Citation

Lowenfeld, Andreas F. (1982) "Three Might-Have-Beens: A Reaction to the Symposium on Allstate Insurance Co. v. Hague," *Hofstra Law Review*: Vol. 10: Iss. 4, Article 3.

Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol10/iss4/3>

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THREE MIGHT-HAVE-BEENS: A REACTION TO THE SYMPOSIUM ON *ALLSTATE INSURANCE CO. V. HAGUE*

*Andreas F. Lowenfeld**

Judged by the amount of stimulating, informed, and nonrepetitive comment it generated, *Allstate Insurance Co. v. Hague*¹ must have been a great case. If not quite like *Marbury v. Madison*² or *Erie Railroad v. Tompkins*,³ *Hague* has nevertheless proved to be a rich field in which to sow, till, and harvest legal ideas—about justice, about federalism, about courts and legislatures, teachers and students, themes and anti-themes. Having had the good fortune to represent Mrs. Hague before the Supreme Court, I thought it was the better part of valor to stay out of the free-for-all among the conflicts cognoscenti that the case produced in the pages of this *Review*,⁴ at least in the first round. I could thus enjoy the compliments both of those who agreed with the result and those who implied that advocacy had overcome right and reason. The high quality of the contributions to the symposium (plus the prodding of the editors) have led me to reconsider my abstention and to offer this brief response to three of the papers.

I. VON MEHREN AND TRAUTMAN

Professors von Mehren and Trautman regret that the Supreme Court took the case at all, and wish that even after argument the Court had dismissed the writ of certiorari as improvidently granted.⁵ I was prepared to respond to that suggestion, had it been raised at

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1. 449 U.S. 302 (1981).

2. 5 U.S. (1 Cranch) 137 (1803).

3. 304 U.S. 64 (1938).

4. *Symposium: Choice-of-Law Theory After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. (1981).

5. See von Mehren & Trautman, *Constitutional Control of Choice of Law: Some Reflections on Hague*, 10 HOFSTRA L. REV. 35, 35 (1981).

oral argument. It seemed to me that the Court was altogether justified in addressing the question of its supervision over state court choice-of-law practice in the light of the four judicial jurisdiction cases it had decided in the period 1977-80,⁶ as well as the new look at full faith and credit in connection with workers' compensation awards.⁷ One might ask why *Hague* was a better vehicle for Supreme Court consideration of choice of law than, say, *Rosenthal v. Warren*⁸ or *O'Connor v. Lee-Hy Paving Corp.*,⁹ in both of which the Court had denied certiorari. But both *Rosenthal* and *O'Connor* involved issues of judicial jurisdiction as well as choice of law,¹⁰ and with the benefit of hindsight, at least, one can infer that had the Court agreed to hear either or both of those cases, the permissible range of state choice of law would probably not have been illuminated. Moreover, when the Court last considered a state choice-of-law case unencumbered by jurisdictional problems¹¹ the conflicts revolution had not yet run its course; *Babcock v. Jackson*¹² was only a year old, and the *Restatement (Second) of Conflict of Laws* was just over half way along the path from inception to publication. It seems to be altogether fitting that the Supreme Court consider state choice of law every ten or fifteen years, as it considers other aspects of our always evolving federalism.

The fact that the Court does not now agree with Professors von Mehren and Trautman that the burden should be on state courts to justify any departure from what they regard as generally accepted norms of choice of law is not, I submit, grounds for total abstention by the Court from thinking about the subject. The Court did think about the subject and gave a clear answer: State choice of law is not unfettered, but the burden is on those who would invoke the Constitution against choice of law by state courts (or by federal courts in diversity cases) to show outrageous or arbitrary action. That answer is far from meaningless, especially since (as I read the opinions) it

6. *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

7. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980).

8. 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973).

9. 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978).

10. Indeed in *O'Connor* the petition for certiorari raised only the jurisdictional question, based on attachment of the defendant's insurance policy in New York. See *Lee-Hy Paving Corp. v. O'Conner*, 439 U.S. 1034, 1034 (1978) (Powell, J., dissenting from denial of certiorari).

11. *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964).

12. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

has the unanimous support of all eight of the Justices who heard the case.¹³

II. REESE

Professor Reese does not regret that the case was decided, only its outcome. It was, he contends, an opportunity lost.¹⁴ I wondered as I read his piece just what that opportunity was. It was not, Reese concedes, to right an injustice to the insurer;¹⁵ nor "to lay down detailed rules" of choice of law;¹⁶ nor even to define "state interests" for choice-of-law purposes.¹⁷ It turns out that the lost opportunity was "to adopt guidelines for determining what necessary federal limitations to impose upon the power of a state to apply its law to foreign facts."¹⁸

Would the opportunity have been seized to Professor Reese's satisfaction if Justice Powell had been able to persuade two more Justices to join in his opinion? I must say that I fail to see how, unless the Court had said, for example, that for this purpose post-occurrence events do not count, or that plaintiff's domicile does not count, or (least likely) that aggregation of contacts is impermissible.

Professor Reese's aim seems more subtle. It is not so much whether Minnesota had sufficient interest to decide the controversy under its own law, but whether it had sufficient interest to frustrate Wisconsin's interest. He puts the case of spouses resident in state *X* who procure a divorce in state *Y* on the basis of personal jurisdiction (without any assertion or requirement of domicile), and on the basis of *Y*'s more liberal divorce law. He argues that *X*'s interest is impaired and *Y*'s interest is insignificant; therefore it "seems highly probable" that the application by *Y*'s courts of *Y*'s law would be unconstitutional.¹⁹ Perhaps this is right, as Judge Hastie suggests in

13. See *Hague*, 449 U.S. 307; *id.* at 323 (Stevens, J., concurring); *id.* at 332 (Powell, J., dissenting). The answer is not new, of course. For example, in his opinion for the Court in *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547-48 (1935), Justice Stone said: "*Prima facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right . . . assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum."

14. Reese, *The Hague Case: An Opportunity Lost*, 10 HOFSTRA L. REV. 195 (1981).

15. See *id.* at 197.

16. See *id.* at 201.

17. See *id.* at 200.

18. *Id.* at 201-02.

19. *Id.* at 196.

his dissent, cited by Reese,²⁰ in *Alton v. Alton*.²¹ I say "perhaps" because the conclusion depends on an ancient but declining assumption that the state has an interest in the marriage of its domiciliaries that goes beyond registration and dispute settlement. In other words, as "grounds" for divorce give way in more and more states to consent as a permissible basis for dissolution of a marriage, the concept that *X*'s interest, even in this deeply felt subject, generates a constitutional imperative that *Y* must respect becomes less persuasive. But the point is raised here only for comparison. State *X* may have an interest in the nonrecovery of its citizen, Mrs. Jones, in her action for divorce against Mr. Jones in state *Y*; the idea that state *X* (Wisconsin) has an interest in the nonrecovery of its citizen (at the time of her husband's death) in a transitory action against an insurance company brought in state *Y* on account of that death is wholly unpersuasive.

I have elsewhere talked and written about what I regard as real state interests in law suits, typically in public law cases such as embargoes under the Trading With the Enemy Act, government-initiated antitrust or securities fraud cases, and so on.²² Criminal cases, though rarely involving choice of law, usually involve a genuine state interest. Even in controversies where the state has no real involvement, interest analysis can serve a useful purpose in identifying false conflicts and sometimes in resolving true ones, provided one remembers that we are dealing essentially in metaphors. To forget this, and talk oneself into believing that Wisconsin is offended in a constitutional sense if its law is not applied to an insurance contract made in its territory, does violence, I submit, both to interest analysis and to the Constitution.²³

With all respect to Professor Reese, who has been a mentor to me and to a whole generation of conflicts specialists and whose labors as a Restater I am just beginning to appreciate fully, I do not see the opportunity that he says was lost. Even Justice Story, who loved conflict of laws as he did the United States Constitution, never (so far as I can discover) cited the latter in support of his views of

20. *Id.* at 196 n.11.

21. 207 F.2d 667, 685 (3d Cir. 1953) (Hastie, J., dissenting).

22. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for their Interaction*, 163 RECUEIL DES COURS 311 (Hague Academy of International Law 1979).

23. Compare the debate between Judge Kaufman (writing for the majority) and Judge Friendly (writing for the dissent) in *Pearson v. Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962) (en banc), cert. denied, 372 U.S. 912 (1963).

the former. We are not ready to constitutionalize choice of law in this country as we have done with so much of the rest of our law, and I doubt that we ever will be.

III. SILBERMAN

Professor Silberman agrees that the constitutionalization of the choice-of-law process is unjustified.²⁴ But, she says, "basic choice-of-law limitations can and should be imposed upon the states as a matter of federal law,"²⁵ by which she means not statutory but common law. She feels ill at ease in the choice-of-law game without an umpire,²⁶ and she wants to do something about it.

I have a certain sympathy for Silberman's longing. I can imagine Marshall or Story taking the position that conflict of laws is common law and that the Supreme Court's vision of that law is binding on the states, though I know of no decision that contained such a suggestion.²⁷ What I cannot imagine is how a case like *Hague* could have been presented to the Supreme Court in 1980 on the basis that the state court had decided it wrongly, though not unconstitutionally.

It is my turn to play "might-have-been"—not in *Hague*, but four decades earlier. Suppose that the Supreme Court had granted certiorari in 1940 in *Sampson v. Channell*.²⁸ That case, it will be recalled, was the forerunner of *Klaxon Co. v. Stentor Electric Manufacturing Co.*,²⁹ and according to a report passed on by Professor Freund, the Supreme Court denied review because it did not think it could write as good an opinion as Judge Magruder had written for the First Circuit.³⁰ Apart from admiration for Magruder's style, the Court may well have preferred to review a decision that seemed wrong, and *Klaxon*,³¹ also written by an ex-professor (and indeed a conflicts scholar), Judge Goodrich, became the vehicle for the

24. Silberman, *Can the State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103, 104 (1981).

25. *Id.*

26. *Id.* at 129.

27. Justice Story in fact regarded conflict of laws as derived neither from the Constitution nor from common law, but from the law of nations. See J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC § 9, at 9 (1st ed. Boston 1834). His sources, accordingly, were predominantly continental, notably the Dutchman Huber.

28. 110 F.2d 754 (1st Cir.), cert. denied, 310 U.S. 650 (1940).

29. 313 U.S. 487 (1941).

30. Freund, *Federal-State Relations in the Opinions of Judge Magruder*, 72 HARV. L. REV. 1204, 1206-07 (1959).

31. 115 F.2d 268 (3d Cir. 1940), rev'd, 313 U.S. 487 (1941).

Court's straightforward but not very searching application of the *Erie* doctrine to choice-of-law issues arising in diversity cases. Consider what might have happened if the Court had taken up *Sampson*, and not *Klaxon*.

Sampson v. Channell concerned the burden of proof of contributory negligence, an issue likely to be decisive in an action stemming from collision of two automobiles, one of whose drivers had died in the crash. The issue for which the case is generally remembered is whether the federal district court sitting in Massachusetts should apply the rule of that state—burden on the defendant—or the rule of the state of the accident, Maine—burden on the plaintiff. The decision of Judge Magruder—the stroke of brilliance that the Supreme Court could not improve upon—was that the issue was “substantive” for *Erie* purposes, even though Massachusetts characterized the question as “procedural” for choice-of-law purposes.³² Judge Magruder explored a third alternative: Whether there might be a federal source of law concerning contributory negligence, for example Rule 8(c) of the then young Federal Rules of Civil Procedure,³³ which requires contributory negligence to be specially pleaded by the defendant as an affirmative defense. He concluded, it seems correctly, that Rule 8(c) relates only to pleading in the sense of raising the issue, and was not designed to allocate the burden of proof.³⁴ He also raised the question whether the Massachusetts court's application of the Massachusetts rule on burden of proof concerning an accident in Maine would be constitutional, and concluded that he knew of no decision indicating that the Supreme Court at the present time would reverse a decision of a state court in such circumstances.³⁵ As to the fourth alternative, an independent choice-of-law role for the federal courts, Judge Magruder thought that would make “the ghost of *Swift v. Tyson*” still walk abroad “somewhat shrunken in size, yet capable of much mischief.”³⁶

Now suppose the Supreme Court had agreed to review *Sampson* and had decided to look at the choice-of-law issue independently, undeterred by Magruder's warning about ghosts.³⁷ The Court would

32. 110 F.2d at 762.

33. FED. R. CIV. P. 8(e).

34. 110 F.2d at 757. The Supreme Court agreed three years later. *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943).

35. 110 F.2d at 759.

36. *Id.* at 761 (footnote omitted).

37. As has often been pointed out, there was no discussion of choice of law in *Erie* itself. The Supreme Court saw the issue in *Erie* as federal general law versus Pennsylvania law,

probably have preferred the burden of proof of contributory negligence to follow the law otherwise applicable to the claim—here Maine, the state of the accident.³⁸ But if that proved unsound in this or a later case, the Court might have adopted a different set of guidelines, and perhaps even principles of preference. It would have been acting not under the full faith and credit clause, already abandoned for choice-of-law purposes in *Alaska Packers*³⁹ and *Pacific Employers*;⁴⁰ nor under the due process clause, which certainly would not have precluded application of either Massachusetts or Maine law in *Sampson*, but under the diversity of citizenship clause and the supervisory authority of the Court over the lower federal courts. Perhaps in the context of *Sampson*, which presented a much more interesting issue than the computation of interest involved in *Klaxon*, the Court might not have followed up Justice Brandeis' statement in *Erie* that there is no "federal general common law"⁴¹ with Justice Reed's statement in *Klaxon* that it is not for the federal courts to enforce an "independent 'general law' of conflict of laws."⁴²

To be sure, the particular potential for hometown justice inherent in modern choice-of-law techniques could not have been foreseen in 1940, the Sixth Year of the Reign of Restatement I. But the relation of diversity jurisdiction to interstate conflict-of-laws rules surely was apparent in 1940, as it was in 1787. And if a flexible set of guidelines had emerged for such cases as *Sampson v. Channell*, *Wells v. Simonds Abrasive Co.*,⁴³ *Pearson v. Northeast Airlines, Inc.*,⁴⁴ and even *Guaranty Trust Co. v. York*⁴⁵—for example a presumption instead of a binding rule of conformity with state practice—the Supreme Court might have participated in the development of the choice-of-law process without being compelled to rule every zig or zag by a state (or lower federal) court constitutional or unconstitutional. I think Professor Silberman would have liked that,

though the action had been brought in the Southern District of New York. See *Erie*, 304 U.S. at 69.

38. But Justice Jackson's efforts to make *lex loci* in tort cases into a constitutional principle never succeeded in commanding a majority of the Court. See, e.g., *First Nat'l Bank v. United Air Lines, Inc.*, 342 U.S. 396, 400 (1952) (Jackson, J., concurring); *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 520-22 (1953) (Jackson, J., dissenting).

39. *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935).

40. *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939).

41. *Erie*, 304 U.S. at 78.

42. *Klaxon*, 313 U.S. at 496.

43. 345 U.S. 514 (1953).

44. 309 F.2d 553 (2d Cir. 1962) (en banc), cert. denied, 372 U.S. 912 (1963).

45. 326 U.S. 99 (1945).

and so would those who complain that modern interest analysis is too plaintiff- or home-state oriented.⁴⁶

Of course if the Supreme Court had taken this approach, the rules for access and removal to federal courts would have become more important than they are now.⁴⁷ The common domicile cases, such as *Babcock v. Jackson*,⁴⁸ *Dym v. Gordon*,⁴⁹ or *Tooker v. Lopez*,⁵⁰ could not have been brought in federal court. But *Hague v. Allstate Insurance Co.*⁵¹ could have been, and so could most of the airline accident cases.⁵² Cases like *Rosenthal v. Warren*⁵³ and *O'Connor v. Lee-Hy Paving Corp.*,⁵⁴ which were heard in the federal courts, might have been decided with less attention to how the federal courts thought the state court would come out and more attention to views of choice of law meanwhile expressed by the Supreme Court.

More important, I think, the Supreme Court would itself have viewed conflict of laws from a different perspective, and might well have had an influence in this field far greater than it has been able to exercise from the perspective only of constitutional veto. It is interesting that when not shackled by constitutional limits on its review of state-created actions, as in the maritime cases, the Court has been quite sensitive to modern choice-of-law approaches. For example, in a series of seaman's injury claims in the period 1953-1970, the Supreme Court displayed a quite enlightened version of emerging contacts/interest analysis. In *Lauritzen v. Larsen*,⁵⁵ the Court held that Danish rather than United States law should apply to a claim of a Danish seaman against a Danish shipping line although the seaman had signed the shipping articles (contract of employment) in New

46. Even those who would not have liked that result concede, for the most part, that it would have been constitutional. See, e.g., Cavers, *The Changing Choice-of-Law Process And the Federal Courts*, 28 LAW & CONTEMP. PROBS. 732, 735-37 (1963); Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 541, 546-68 (1958).

47. A relatively easy corrective would have been to preclude plaintiffs from bringing diversity actions in federal courts in the state of their citizenship.

48. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

49. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

50. 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969).

51. 289 N.W.2d 43 (Minn. 1978), *aff'd on rehearing, id.* at 50 (Minn. 1979), *aff'd*, 449 U.S. 302 (1981).

52. E.g., *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961); *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964).

53. 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973).

54. 579 F.2d 194 (2d Cir.), *cert. denied*, 439 U.S. 1034 (1978).

55. 345 U.S. 571 (1953).

York; in *Romero v. International Terminal Operating Co.*,⁵⁶ putting aside a barely comprehensible debate about federal jurisdiction over general maritime claims,⁵⁷ the Court held that Spanish and not United States law should be applied to a claim of a Spanish seaman against a Spanish shipping line although the injury had occurred while the ship was in port in Hoboken, New Jersey; and in *Hellenic Lines Ltd. v. Rhoditis*,⁵⁸ the Court pierced the veil of a Greek vessel owned by a Greek corporation to apply United States law to an operation essentially based in the United States and owned ninety-five percent by a person who had resided in the United States for a quarter century.⁵⁹ In *The Bremen v. Zapata Off-Shore Co.*,⁶⁰ the Supreme Court gave a major boost to party autonomy in selection of forums for dispute settlement, overturning earlier doctrine opposed to "ousting the jurisdiction" of courts. While the decision was binding only on federal admiralty suits (and perhaps only on those arising out of international carriage), *Zapata* had a much wider influence, particularly when the Court had occasion to build on it just two years later in *Scherk v. Alberto-Culver Co.*,⁶¹ where the Court upheld an agreement between the buyer and seller of a business to arbitrate all disputes in Paris against an attempt to bring the dispute before United States courts under the Securities and Exchange Act. In both *Zapata* and *Alberto-Culver* the courts of appeals had (by divided votes) held otherwise, that is, they sustained the jurisdiction of the United States courts rather than remitting the parties to adjudication in London⁶² or arbitration in Paris.⁶³ Those decisions were rational, plausible, and certainly not unconstitutional. Yet I believe the Supreme Court was correct in reviewing both cases and in the results it achieved. But all of these cases arose under federal law, and all involved United States versus foreign, rather than Wisconsin versus Minnesota or New York versus Massachusetts choice of law.

56. 358 U.S. 354 (1959).

57. See *id.* at 359-80. For an explanation of this debate, see G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 468-72 (2d ed. 1975).

58. 398 U.S. 306 (1970).

59. For an analysis of these decisions and their impact on the lower courts in handling seamen's claims, see G. GILMORE & C. BLACK, *supra* note 57, at 471-84.

60. 407 U.S. 1 (1972).

61. 417 U.S. 506 (1974).

62. In *Re Unterweser Reederei, G.m.B.H.*, 446 F.2d 907 (5th Cir. 1971) (en banc) (per curiam), *aff'g* 428 F.2d 888 (5th Cir. 1970) (panel), *rev'd sub nom.* *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

63. *Alberto-Culver Co. v. Scherk*, 484 F.2d 611 (7th Cir. 1973), *rev'd*, 417 U.S. 506 (1974).

I mention them only to point out on the one hand that the Court is not necessarily paralyzed when it comes to conflict of laws,⁶⁴ and on the other hand that the idea of a ripple effect from occasional decisions by the Supreme Court may well have substantial basis.

But before the discussion gets too fascinating, let us remember that all of this is under the heading of "might have been." The Supreme Court did not hear *Sampson*; it decided in *Klaxon* in favor of vertical conformity and against federal independence in interstate choice of law. To invent in 1981 a new role for the federal courts—or for the Supreme Court—in choice of law, independent of the Constitution, is not only to tilt at windmills, but to urge a change in the allocation of judicial functions far more disturbing to the values of the American legal system than any possible gain to soundness in choice of law in claims against insurance companies.⁶⁵ What might have been possible in the context of the one great upheaval in that system—the shift from *Swift* to *Erie*—seems to me wholly inconceivable forty years later.

Professor Silberman grasps at the straw offered by Professor Monaghan—"a tacitly developed body of federal common law rules which resonate to constitutional values."⁶⁶ I am grateful to her for inducing me to reread Monaghan; he makes an interesting point about the relation between Congress' ability, in limited areas, to redirect certain decisions taken by the Supreme Court in implementation of the Constitution,⁶⁷ which one might think would not be possible if everything the Court did in such decisions were written on Mosaic tablets of constitutional law. Monaghan points out, for example, that holding certain statements given by persons under arrest in police stations to be violations of the privilege against self-incrimination is quite different from prescribing the "*Miranda* warnings" that every policeman carries in a pocket card to read to suspects when they are arrested.⁶⁸ Congress could not, by statute, legalize co-

64. I thus want to put some distance between myself and Professor Juenger when he says "there is little reason to trust [the Supreme Court's] ability to cultivate the conflicts jungle," though he and I come out alike in concluding that the Constitution is not in danger in cases such as *Hague*. Juenger, *Supreme Court Intervention in Jurisdiction and Choice of Law: A Dismal Prospect*, 14 U.C.D. L. REV. 907, 916 (1981).

65. At the risk of irrelevancy, I find it interesting to raise the question why virtually every interstate choice-of-law case that has gone to the Supreme Court has involved an insurance company as a named party.

66. Silberman, *supra* note 24, at 130 (citing Monaghan, *The Supreme Court 1974 Term, Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975)).

67. Monaghan, *supra* note 66, at 13-17.

68. *Id.* at 33.

erced confessions, but it might, Monaghan suggests, modify the requirement of the four warnings by concentrating, for instance, on the presence of counsel as a condition to introduction of a confession into evidence.⁶⁹ Closer to our present subject, Monaghan says that Congress may authorize regulation by the states of certain aspects of interstate commerce which, without Congress' intervention, the Court would hold (or had held) to be impermissible interference by states with the power to regulate interstate commerce committed by the Constitution to Congress.⁷⁰ If that is true, he says, there is a twilight zone between constitutional law and common law, and we should recognize it as such.⁷¹ I am not sure that he is right on what he calls the "negative-impact commerce clause cases,"⁷² because I grew up believing in the Supreme Court's formulation in *Southern Pacific Co. v. Arizona*:⁷³

For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, *where Congress has not acted*, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.⁷⁴

In other words, if Congress acts to authorize state regulation in an area, it is not really redirecting the Court's interpretation of the Constitution, but simply exercising the authority committed to it by the Constitution.⁷⁵ But Professor Silberman would push the proposi-

69. *Id.* at 33-34.

70. *Id.* at 14-17.

71. *Id.* at 17.

72. *Id.*

73. 325 U.S. 761 (1945).

74. *Id.* at 769 (emphasis added) (citations omitted).

75. An interesting example is § 208 of the Air Quality Act of 1967. Pub. L. No. 90-148, § 208, 81 Stat. 485, 501 (1967) (current version at 42 U.S.C. § 7543 (Supp. III 1979)). The Act prohibited any state or political subdivision from enforcing any standard relating to the control of new motor vehicle emissions, *id.*, § 208(a), 81 Stat. 501, but then authorized the Secretary of HEW (later the Administrator of the EPA) to waive the prohibition on the basis of certain findings, *id.*, § 208(b), 81 Stat. 501. The Administrator did issue a waiver to California, permitting that state to enforce stricter requirements than those in effect nationally. 38 Fed. Reg. 10317 (1973). Whether or not California's regulations concerning auto emissions would have been an unconstitutional restraint on interstate commerce without the action by Congress and the Administrator—*compare, e.g.,* *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) (local smoke regulations upheld) *with* *Air Transp. Ass'n of Am. v. Crotti*, 389 F. Supp. 58 (N.D. Cal. 1975) (enforcement of state aircraft noise regulations enjoined)—it seems clear that with such action California's regulations are permissible. How-

tion one giant step further and apply it, without reference to what the Congress might do, to decisions by the Supreme Court when not wearing its constitutional mitre.⁷⁶

It is an intriguing idea, though hard to recognize even in Monaghan's more modest version where only the relations between Congress and the Court are involved. Monaghan himself calls on "old Ezra who, when asked if he believed in infant baptism, replied: 'Believe in it? Why, man, I've seen it done!'"⁷⁷ With all respect to Professors Monaghan and Silberman, I have not seen it done in the choice-of-law area, and I do not expect to.⁷⁸ Imagine preparing a petition for certiorari in a case such as *Hague*, or Professor Silberman's favorite, *Blamey v. Brown*,⁷⁹ the case of the Wisconsin tavernkeeper sued in Minnesota under that state's dramshop law:

The Court is requested to review this case because the Supreme Court of Minnesota applied Minnesota law to a case that should have been governed by Wisconsin law. While the decision below does not violate the full faith and credit or due process clauses of the Constitution, it violates the integrity of the choice-of-law process.

Of course none of the cases that Monaghan cites came up in this way. They all came up as assertions that the Constitution had been violated, whether by a conviction based on a coerced confession or

ever, this seems not to illustrate a great area of common law, but simply a carrying out of the respective responsibilities of the several branches of our complicated government.

76. See Silberman, *supra* note 24, at 131.

77. Monaghan, *supra* note 66, at 26.

78. I am not, of course, speaking of federally created rights, which might make provision for choice of law to be exercised by courts as appropriate. See, e.g., S. 3305, 90th Cong., 2d Sess., 114 CONG. REC. 9435 (1968) (the so-called Tydings Bill). That Bill would have made suits against airlines arising out of accidents triable exclusively in federal courts, and would have provided that the rights of the parties in any such action "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." *Id.*, 114 CONG. REC. at 9436. I testified that such a bill would be constitutional, even if it called for application of choice of law in certain respects, but that I would prefer more specific provisions to establish a uniform federal law. Professor Trautman, testifying at the same hearing, agreed with me on the issue of constitutionality, but thought the Committee should give more attention to permitting state law to determine such questions as who is entitled to sue on behalf of a person killed in a crash, though not to permitting state law to impose a ceiling on recoveries. *Aircraft Crash Litigation: Hearings on S. 3305 and S. 3306 before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 1-7 (1968) (proposed legislation); *id.* at 91-100 (testimony of Professor Andreas Lowenfeld); *id.* at 110-22 (testimony of Professor Donald T. Trautman).

79. 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980).

unreasonable search, or by a state regulation interfering with the free flow of commerce. Further, with very few exceptions, the Court holds that the Constitution either has or has not been violated.⁸⁰ Moreover, the Court is quite strict in linking its pronouncements to the basis on which its jurisdiction is invoked. I am wholly unpersuaded that it would reject a claim of violation of the Constitution by a state court and then go on—as if by pendent jurisdiction—to pronounce that as a matter of federal common law the decision below reflected misunderstanding of sound conflict-of-laws analysis and must therefore be set aside.

* * *

The reader should not be surprised if I conclude where I began—pleased with the result in *Allstate v. Hague*. I was, after all, not an unbiased observer; while I tried to present the case from a broad and scholarly perspective, I appeared not as *amicus curiae*, but as advocate for a bereaved plaintiff. Not only does the Republic still stand after *Hague*, but so does conflict of laws—for all of us to practice our skills, sharpen our minds, and continue our search.

80. Not being a specialist in constitutional law, I am perhaps out of my depth in making this statement. The only decisions that occur to me that may require qualification of the statement in text are *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958), where the Court spoke of “the influence—if not the command—of the [Constitution],” and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964), where the Court spoke of “‘constitutional’ underpinnings.”

