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WHO’S AFRAID OF CONSTITUTIONAL LIMITATIONS ON CHOICE OF LAW?©

Russell J. Weintraub*

I. Scope

Allstate Insurance Co. v. Hague® confirms the view that the due process® and full faith and credit® clauses impose few limitations on choice of law, and that a conflicts decision can be undesirable and unwise without violating constitutional standards.® This discussion of Hague first focuses on an object not clearly discernible in the opinions of the Minnesota State District Court,® the Supreme Court of Minnesota,® or the United States Supreme Court.® This dim object is the actual state-law issues involved in Hague.

The insurance issues in Hague reveal that no constitutional decision was necessary, and that Wisconsin would have reached the same result as Minnesota for reasons not discussed in any of the opinions. Perhaps more important for present purposes, a fuller understanding of the state-law issues® in Hague will illuminate the constitutional-law discussion that follows. In that discussion, I suggest that if a constitutional decision were necessary, Hague probably

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2. U.S. CONST. amend. XIV, § 1: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."
3. Id. art. IV, § 1: "Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."
8. See text accompanying notes 12-42 infra.
reached the right result. Then I discuss the contribution _Hague_ makes to an understanding of the relationship between constitutional limitations on choice of law and constitutional limitations on personal jurisdiction. Finally, I discuss _Hague_'s implications for choice-of-law methodology.

II. **Allstate Insurance Co. v. Hague: A False Conflict**

The place to begin discussion of the state law issues in _Hague_ is the “other insurance” clauses in the uninsured motorist section of the policy that Allstate issued to Mr. Hague. These clauses read as follows:

7. **Other Insurance.** With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance under this coverage shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance. Except as provided in the foregoing paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and Allstate shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

Two distinct problems arise concerning these standard clauses. The first is a problem of statutory construction. The second concerns construing the clauses themselves when their meaning is ambiguous.

The problem of statutory construction concerns the validity of “other insurance” clauses. There are situations in which the meaning of the clauses is certain and, if the clauses are valid, recovery under the insured’s policy is eliminated or reduced. The first paragraph of

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9. *See text accompanying notes 43-83 infra.*
10. *See text accompanying notes 84-94 infra.*
11. *See text accompanying notes 95-97 infra.*
12. I am grateful to Professor Andreas Lowenfeld, New York University School of Law, for providing me with a copy of the policy. Professor Lowenfeld argued for the insured before the United States Supreme Court and was “of counsel” on the brief.
clause seven is thus clearly applicable when all of the following concur: (1) the insured is injured by an uninsured motorist; (2) the insured is occupying an automobile owned by someone other than the insured; (3) the owner of the car has uninsured motorist insurance that covers the insured; and (4) the insured has uninsured motorist insurance that also covers him in these circumstances. The second paragraph of clause seven clearly applies, and therefore coverage is limited, when all of the following concur: (1) the insured is injured while a pedestrian; (2) there are two insurance policies covering two automobiles, issued by two insurance companies; and (3) both policies provide compensation to the insured under these circumstances: for example, the insured owns an automobile, his father owns another, and the insured is covered by the uninsured motorist provisions of his policy and of his father’s policy.

When, in circumstances like these, it is clear that the clauses apply to reduce coverage, the insured can “stack” uninsured motorist compensation only if the clauses are invalid under applicable state law. Here is where the problem of statutory construction enters. Many states have statutes requiring every policy to provide uninsured motorist protection that is not less than a sum stated in the statute. These statutes are ambiguous concerning their effect on “other insurance” clauses; the question is, do they invalidate such clauses and require every policy to provide coverage up to the statutory amount even though that coverage is also available under another policy, or do the statutes permit “other insurance” clauses to operate provided that the insured’s total recovery from all policies is not less than the amount the statute requires for one policy? There is a split of authority on this issue. Most states have construed their statutes to invalidate “other insurance” clauses; but some have not. Most states, then, require “stacking.” The states taking the minority position do not “forbid” stacking; they simply permit the insurance company to contract out of stacking by reasonably clear and explicit provisions in the insurance policy.

This distinction was misunderstood at every level of decision in

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16. “Stacking” permits recovery up to the policy limits under each applicable policy. If, as in Hague, there are three policies, each providing $15,000 uninsured motorist coverage, the insured can recover $15,000 under each policy for a total of $45,000. See 449 U.S. at 305.
17. For a list of states in each category, see Nelson v. Employers Mut. Cas. Co., 63 Wis. 2d at 565 n.2 (majority), 567 n.3 (minority), 217 N.W.2d at 673 nn.2 (majority) & 3 (minority).
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Hague. There are repeated statements that Minnesota allows stacking and that Wisconsin forbids stacking. In fact, however, Minnesota follows the majority of courts in interpreting its minimum coverage statute to require stacking, and Wisconsin construed an earlier version of its minimum-coverage statute to permit the parties to contract for or against stacking. This was the aspect of Wisconsin law in doubt at the time of the accident in Hague. The earlier version of the Wisconsin statute had been amended before the accident, and the resulting provision had yet to be construed in Wisconsin. The Minnesota Supreme Court, in deciding Hague, refused to find that the rather inconclusive wording changes would be construed by the Wisconsin Supreme Court to change Wisconsin law.

Therefore, in this respect, there was a difference between Minnesota and Wisconsin law and not the "false conflict" that would have resulted if both states invalidated "other insurance" clauses. This was the "false conflict" which was urged upon the United States Supreme Court as a means of blunting the constitutional issue, and which was rejected by the Court.

There was, however, another kind of "false conflict" present in Hague. Minnesota and Wisconsin would have reached the same result, stacking, but for different reasons. Under Minnesota law, the "other insurance" clauses, even if applicable, were invalid. But on the facts of Hague, the clauses were ambiguous. Mr. Hague's policy insured three automobiles, each with uninsured motorist coverage for

18. See, e.g., 449 U.S. at 316 n.22 ("allow stacking," "prohibit stacking"); id. at 306 ("disallow stacking"); Allstate Ins. Co. v. Hague (Dist. Ct. Minn. Apr. 22, 1977), reprinted in Petition for Writ of Certiorari at A-27, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) ("Wisconsin does not permit stacking"). The Supreme Court of Minnesota came close to getting it right: "Thus, we find that Wisconsin law, in effect at the time of the writing of the policy, allowed 'excess insurance' clauses and that stacking would not be permitted if Wisconsin law were to apply." 289 N.W.2d at 48. The difficulty with this is that stacking would be permitted if the "other automobiles" clauses did not apply and, in Hague, they did not.

19. See Van Tassel v. Horace Mann Ins. Co., 296 Minn. 181, 207 N.W.2d 348 (1973). Ironically, this case was one in which the applicability of the "other insurance" clauses was ambiguous, but the court did not have to construe the clauses once it decided that, even if applicable, they were invalid.

21. Id. at 562 n.1, 217 N.W.2d at 672 n.1. The effective date of the amendment was July 22, 1973. The accident in Hague occurred on July 1, 1974. 289 N.W.2d at 44.

After the accident, the Wisconsin statute was again amended so that it unambiguously invalidated "other insurance" clauses. See Landvatter v. Globe Security Ins. Co., 100 Wis. 2d 21, 300 N.W.2d 875 (1980).
22. 289 N.W.2d at 48.

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which he had paid three premiums.\textsuperscript{25} It is not clear whether "other similar insurance" in the two paragraphs of clause seven of the policy\textsuperscript{26} referred to insurance issued by the same insurer to the same insured for an additional premium. The words "Allstate shall not be liable" in the proration clause of the second paragraph suggest that the reference was to insurance issued by another company. Furthermore, in the same policy Allstate demonstrated that it could make its meaning clear on this point. In the section on "Medical Expense,"\textsuperscript{27} the clause limiting the amount of Allstate's liability began "[r]egardless of the number of automobiles insured. . . ."\textsuperscript{28} Moreover, Allstate admitted that the clauses were ambiguous.\textsuperscript{29} Once this admission was made, it is surprising that the false conflict did not become apparent. Only some guy who doesn't like mom or apple pie would construe an ambiguous policy provision in favor of the insurance company.

Five courts have decided on the application of "other insurance" clauses identical with those in \textit{Hague} in situations similar to \textit{Hague}: multiple uninsured motorist coverage of the same insured by the same insurer. Four of these cases construed the "other insurance" clauses as inapplicable and recoveries were stacked. \textit{Safeco Insurance Co. of America v. Robey}\textsuperscript{30} is closest to the \textit{Hague} facts. In

\textsuperscript{25} \textit{Id.} at 305 n.3.
\textsuperscript{26} For the complete text of clause seven, see text accompanying notes 12-13 \textit{supra}.
\textsuperscript{27} Policy, \textit{supra} note 13, at 9-10.
\textsuperscript{28} \textit{Id.} at 10. This indicates that without this specific provision, the "other insurance" clause under "Medical Expense" would be ambiguous. The Medical Expense "other insurance" clause reads: "The insurance with respect to a . . . non-owned automobile shall be excess insurance over any other collectible automobile medical payments insurance and, with respect to . . . an additional automobile, shall not apply against a loss with respect to which the insured has other collectible automobile medical payments insurance." \textit{Id.}

A clause under "General Conditions" does not resolve the ambiguity in \textit{Hague}. "When two or more automobiles are insured by this policy, the terms of this policy shall apply separately to each." \textit{Id.} at 11.

\textsuperscript{29} See, e.g., Transcript of Oral Argument at 17, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981): "Question: It's a question of whether the policy should be construed as limited to the vehicle described in that policy or without saying anything pick up other vehicles and additional coverage, then? Mr. Nolan (attorney for Allstate): That's right." The central question before the United States Supreme Court seems to have been concerned with Minnesota's interpretation of a contract. \textit{See Petitioner's Brief at 3; Petition for Writ of Certiorari at 3, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).}

I am grateful to the editors of the \textit{Hofstra Law Review} for obtaining for me a transcript of the oral argument and copies of the petition for certiorari and briefs.

\textsuperscript{30} 399 F.2d 330 (8th Cir. 1968). In Taft v. Cerwonka, 433 A.2d 215 (R.I. 1981), the insureds' child was killed in a one-car crash. The car was driven and owned by uninsured defendants. The insureds were permitted to stack the uninsured motorist coverages under their policy. The policy insured two automobiles and provided for two uninsured motorist premiums.
Safeco the insured was a passenger in an automobile owned by another when he was injured in a collision with an uninsured motorist. The insured owned two automobiles, insured each with the same insurer, and paid an uninsured motorist premium on each policy. He was permitted to stack his uninsured motorist coverage, deducting only the amount paid to him by another company that covered the automobile in which he had been riding.

Three cases construing "other insurance" clauses concerned insured pedestrians struck by uninsured motorists. Each opinion found the second paragraph of the "other insurance" provision to be ambiguous and construed it as inapplicable to multiple coverage by the same insurer. One of these cases, Glidden v. Farmers Auto Insurance Association, has language broad enough to cover both paragraphs of the "other insurance" clause involved in Hague:

When an insured purchases three distinct policies from an insurer, each providing the specified coverage, and pays a separate premium for each, does he reasonably contemplate that the 'other insurance' clauses therein are effective to reduce his recovery to what he would have obtained under one policy? We think not.

A decision from a Delaware trial court reached an opposite result in an insured pedestrian case and did so by miraculously finding the second paragraph of the "other insurance" clause clearly applicable, stating that if the clause were ambiguous it would be construed against the insurer. In Hague, it should be remembered, Allstate conceded that the clause was ambiguous.

Wisconsin, of course, construes ambiguities in insurance policies against the insurer. Rosar v. General Insurance Co. of America is further evidence that Wisconsin would have reached the same result as Minnesota in Hague. The Rosar court refused to allow the claimant to stack the insured's liability coverage, but distinguished cases

It is not clear whether the court is construing the Rhode Island statute requiring uninsured motorist coverage unless rejected by the insured (R.I. GEN. LAWS § 27-7-2.1 (1979)), or is construing the policy, or both. Both grounds are stated in the decision. 433 A.2d at 218.

32. 57 Ill. 2d 330, 312 N.E.2d 247 (1974).
33. Id. at 336, 312 N.E.2d at 250.
35. See authority cited note 29 supra.
37. 41 Wis. 2d 95, 163 N.W.2d 129 (1968).
from other states that had allowed stacking of medical payments, stating that "[t]he payment cases can be distinguished because of the broad protection afforded the named insured and each relative from bodily injury caused by an accident 'through being struck by an automobile.'" The court further noted that "[m]edical payment provisions are closely akin to a personal accident policy; recovery is completely independent of liability on the part of the insured." The same language and reasoning could be applied to uninsured motorist coverage such as that in *Hague*.

Some policies make clear the result intended when there is multiple uninsured motorist coverage by the same insurer. These policies specifically include in the "other insurance" clause "any other automobile insurance policy issued to the named insured by the company." In states where "other insurance" clauses are valid, these unambiguous clauses are enforced to prevent stacking.

The Minnesota Supreme Court could have avoided the need to choose between Minnesota and Wisconsin law by writing the following opinion: "This is a 'false conflict' because the same result would be reached in each state. If Minnesota law applies, coverage is stacked because the 'other insurance' clause, even if applicable, is invalid. If Wisconsin law applies, coverage is stacked because the clause does not clearly apply to multiple coverages of the same insured by the same insurer, and this ambiguity will be resolved against the insurer." But if this were done, there would have been no need for the Supreme Court of the United States to decide *Hague*, and, alas, no occasion for this symposium.

*Hague* was not the first case in which the Court needlessly shaped constitutional limitations on choice of law. Let us, there-

38. *Id.* at 101-02, 163 N.W.2d at 132.
39. *Id.,* 163 N.W.2d at 132 (quoting Government Employee's Ins. Co. v. Sweet, 186 So.2d 95, 96-97 (Fla. Dist. Ct. App. 1966)).
41. In Carroll v. Lanza, 349 U.S. 408 (1955), the majority rejected Justice Frankfurter's suggestion that the case be remanded for determination as to whether tort recovery against the general contractor could have been obtained under Missouri law as well as under Arkansas law. *Id.* at 422-26. In Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964), the policy could be cancelled by the company on five days' notice. Record at 3c. The company was informed that Clay had moved to Florida, 377 U.S at 182, and it did not cancel. There was, therefore, no more constitutional objection to applying Florida law to invalidate a term of the policy than if the policy had originally been issued in Florida.
fore, seize this occasion to talk of such limitations and, to borrow that magnificent phrase from Coleridge, invoke a "willing suspension of disbelief." Pretend that Hague was necessary.

III. CONSTITUTIONAL LIMITATIONS ON CHOICE OF LAW

A. Bad But Constitutional Result

I believe that Hague reached the right result on the constitutional issue even though I also agree with Justice Stevens that the Minnesota Supreme Court decision was "plainly unsound as a matter of normal conflicts law." Minnesota did not, as the insurer argued on appeal, apply its law to "interpret" an ambiguous clause in the policy. Rather, the Minnesota insurance statute was applied to invalidate a clause valid in Wisconsin. Minnesota did this even though, as indicated in the constitutional law discussion to follow, there was no contact with Minnesota, save the widow's subsequent move to Minnesota, that gave Minnesota an "interest" in having its law applied. Minnesota had an "interest" in this context only if, because of some connection with the parties or the events, Minnesota was likely to experience the social consequences of validating the "other insurance" clause. Minnesota should have desisted from asserting an interest derived solely from the widow's post-accident move because use of this contact appears unfair to the insurer even though the insurer would not, and probably could not, have altered its conduct in any way if it had foreseen what Minnesota would do.

Minnesota also should have applied Wisconsin law because the validity of the contract between insured and insurer would be best determined by the law of the state where the car was principally garaged and registered and where the insured resided. The Minnesota legislature seems to have recognized this; the statute requiring uninsured motorist coverage, which the Minnesota Supreme Court had interpreted to invalidate "other insurance" clauses, reads: "[n]o . . . policy . . . shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally

42. 2 S. COLERIDGE, BIOGRAPHIA LITERARIA 6 (J. Shawcross ed. 1907).
43. For a contrary view expressed before the United States Supreme Court's decision, see Martin, Personal Jurisdiction and Choice of Law, 78 MICH. L. REV. 872, 883 (1980).
44. 449 U.S. at 324 (Stevens, J., concurring in the judgment).
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garaged in this state unless [uninsured motorist] coverage is provided . . . .”

B. No Full Faith and Credit Violation

The full faith and credit clause should not prevent application of the law of one state unless there are cogent reasons for mandating a uniform national result under the public act, record, or judicial proceeding of another state. Rarely if ever will this standard require choice of one state’s law to apply to a controversy not yet reduced to judgment. This is not, as Justice Brennan’s plurality opinion suggests, because full faith and credit and due process choice-of-law standards are similar. They are not. It is because there is not likely to be a compelling need for a uniform national choice-of-law result.

Hague does not furnish an appropriate setting for the rare emergence of full faith and credit as a limitation on choice of law. An argument can be made that the validity of automobile insurance agreements as between insurer and insured should always be determined by the law of the state where the car is principally garaged and where the insured resides. This argument is as strong as that

47. Minn. Stat. Ann. § 65B.22(1) (West 1968) (repealed 1975) (emphasis added). See Minn. Stat. Ann. § 72A.149 (West Supp. 1981) (indicating that this section was renumbered as 65B.22); id. § 65B.22 (West Supp. 1981) (indicating that this section was in effect until January 1, 1975); cf. Ewers v. Thunderbird Aviation, Inc., 289 N.W.2d 94, 97 (Minn. 1979) (words “within the airspace above this state” in airplane owners’ liability statute mean at any time during flight even though crash is in another state). In this case all parties were Minnesota residents and, at least without a statutory provision determining territorial applicability, the result makes eminent conflicts sense.

48. See 449 U.S. at 323 (Stevens, J., concurring in the judgment); R. Weintraub, supra note 4, § 9.3A, at 528.

49. See, e.g., Nevada v. Hall, 440 U.S. 410 (1979) (California need not give full faith and credit to Nevada’s limited waiver of sovereign immunity).

Perhaps there are circumstances in which a state’s interest in applying its own law is greater than even the national need for full faith and credit to sister-state judgments. On two occasions, Justice Frankfurter said this was so in child custody adjudications. See Kovacs v. Brewer, 356 U.S. 604, 611-12 (1958) (Frankfurter, J., dissenting); May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring); cf. Thomas v. Washington Gas Light Co., 448 U.S. 261, 268 (1980) (Stevens, J., stating in plurality opinion that full faith and credit need not be given to workers’ compensation award that expressly seeks to prevent supplemental award under law of another state).

50. 449 U.S. at 308 n.10 (Brennan, J., joined by White, Marshall, and Blackmun, JJ.).

51. See id. at 321-22 (Stevens, J., concurring in the judgment).

52. But see Simson, State Autonomy in Choice of Law: A Suggested Approach, 52 S. Cal. L. Rev. 61, 73 (1978) (full faith and credit to internal law and conflicts law of most interested state).

53. See R. Weintraub, supra note 4, § 9.3A.
which has led the United States Supreme Court, in Order of United Commercial Travelers of America v. Wolfe, 54 to require that the validity of fraternal beneficiary insurance contracts be determined by the law of place of incorporation of the fraternal society. 55 But this and similar decisions 56 were ill-advised. They gave too little effect to the policies of the state where the insured resided and made too much of the supposed distinction between fraternal beneficiary insurance and other life insurance. They are ripe for overruling should the occasion arise 57 and their invocation of the full faith and credit clause should not be followed for automobile insurance. 58 Due process is a better tool than full faith and credit for measuring the reasonableness of choice of law against the facts of a particular case.

C. No Due Process Violation

The constitutional choice-of-law standard set forth in Hague says “that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” 59 In general, I agree with this standard and with the majority's conclusion that it was met.

Minnesota law was applied in Hague to invalidate a clause affecting the rights of the insured against the insurer. If such a clause is valid under the law of the state where the car is principally ga-

54. 331 U.S. 586 (1947).
55. Id. at 589.
56. See Sovereign Camp of the Woodmen of the World v. Bolin, 305 U.S. 66 (1938) (validity of bylaw excusing assessments after 20 years must be determined under law of state where society is incorporated); Modern Woodmen of Am. v. Mixer, 267 U.S. 544 (1925) (same holding for validity of retroactive bylaw withholding benefits); Supreme Counsel of the Royal Arcanum v. Green, 237 U.S. 531 (1915) (same holding for validity of bylaws under which assessments were increased).
58. Several court decisions suggest that the rule of Order of United Commercial Travelers should be limited to circumstances which are factually alike. See, e.g., Clay v. Sun Ins. Office, Ltd., 377 U.S. 179, 183 (1964) (Court did not apply rule of Order of United Commercial Travelers because “it is a highly specialized decision dealing with unique facts . . .”); Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 558 n.12 (2d Cir. 1962) (court questioned validity of Order of United Commercial Travelers on interest analysis basis and further stated that opinion of case implies that it be limited to circumstances factually alike); United States v. Jacobs, 155 F. Supp. 182, 197 (D.N.J. 1957) (court determined that Order of United Commercial Travelers “must be viewed . . . as not extending beyond the confines of a very restricted field . . .”).
raged and the insured resides, however, its validity should not be changed because of an injury incurred in another state. It is true that Watson v. Employers Liability Assurance Corp., for example, permitted invalidation of a no-direct-action clause under the law of Louisiana where a product user was injured, but Watson was significantly different on this point. The plaintiff in Watson was not the insured, and had not promised to refrain from direct action.

Nevertheless, Allstate cannot claim unfair surprise for two reasons. First, the clause invalidated was ambiguous. It did not state clearly that coverage provided by the same insurer to the same insured for additional premiums could not be stacked. The more ambiguous the clause, the less justifiable is reliance on it. Second, the contract was one of insurance. Insurance rates are based on the loss experience of automobiles principally garaged in a particular rating district. If, because of Hague, the loss experience of automobiles principally garaged in rating districts in Wisconsin near the Minnesota border rises, the insurance rates for these cars will increase. Moreover, the “loss” experience used in setting rates includes “loss reserves.” The loss reserve for a particular accident is the estimated payment. This estimate is reviewed and adjusted from time to time until final payment of the claim. To talk of surprising an insurer by applying a rule of law that makes a particular loss greater than it would have been under a different law is talking nonsense.

60. Cf. Decker v. Great American Ins. Co., 392 So.2d 965 (Fla. Dist. Ct. App. 1980) (dictum that forum law would not be applied to determine amount of uninsured motorist compensation if there were no other contact with forum except place of accident). But see Hime v. State Farm Fire & Cas. Co., 284 N.W.2d 829 (Minn. 1979), cert. denied, 444 U.S. 1032 (1980) (Minnesota law applied to invalidate family liability exclusion when accident was in Minnesota and Florida insured was hospitalized in Minnesota); Kemp v. Allstate Ins. Co., 601 P.2d 20 (Mont. 1979) (law of place of accident, characterized as “place of performance,” applied to determine amount of uninsured motorist coverage).


62. Id. at 67-69.

63. See 449 U.S. at 324 (Stevens, J., concurring in the judgment) (noting ambiguity of clause).

The opinion also noted that the policy contained no choice-of-law clause and suggested that this is a further indication that Allstate was not relying on Wisconsin law. See id. at 318 n.24 (plurality opinion), 329-30 (Stevens, J., concurring in the judgment). The policy did state: "Such terms of this policy as are in conflict with statutes of the state in which this policy is issued are hereby amended to conform." Policy, supra note 13, at 12. This assumes that the laws of that state would govern validity and, if not an express, is an implied-in-fact choice of that law.

64. See McNamara, Automobile Liability Insurance Rates, 35 INS. COUNSEL J. 398, 401 (1968); Stern, Ratemaking Procedures for Automobile Liability Insurance, 52 PROC. CASUALTY ACTUARIAL SOC'Y 139, 144-45 (1965).
Given that the application of Minnesota law caused no outrageous surprise to Allstate, is any more needed to accord with due process? Yes. The plurality opinion said that Minnesota "must have a significant contact or significant aggregation of contacts, creating state interests . . . ." There are two quite different ways to evaluate the due process significance of a contact between a state and the parties or the events. First, it could be required that the contact be such that the state is likely to experience the social consequences if its law is not applied. Second, the contact could simply be one that, viewed without regard to the policies underlying any law of that state, seems "significant"—a visceral, not analytical, designation. In the light of the words "creating state interests" in the plurality formulation, the first meaning seems intended. But is it? Does each of the "contacts" relied on by the plurality make it likely that adverse social consequences will be experienced in Minnesota if the "other insurance" clause is not invalidated and recovery raised from $15,000 to $45,000?

The first contact referred to was that Mr. Hague worked in Minnesota for fifteen years and commuted to work there. It is said to be "very important [that] Mr. Hague was a member of Minnesota's work force. . . ." But why does this give Minnesota an "interest" in increasing the compensation to his widow? If Mr. Hague were injured, not killed, perhaps higher compensation would speed his rehabilitation and return to work in Minnesota, thus benefiting the Minnesota employer and the Minnesota economy. But Mr. Hague was dead on arrival at the Minnesota hospital to which he was taken after the accident. Yet the Court stated:

Mr. Hague's death affects Minnesota's interest still more acutely, even though Mr. Hague will not return to the Minnesota work force. Minnesota's work force is surely affected by the level of protection the State extends to it, either directly or indirectly. Vindication of the rights of the estate of a Minnesota employee, therefore, is an important state concern.

Is this cogent? Perhaps the concept is that higher uninsured motorist coverage is a fringe benefit of working in Minnesota—like Minne-

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65. 449 U.S. at 313.
66. Id.
68. 449 U.S. at 315.
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sota-regulated employee pensions or life insurance. The better the benefits, the happier and more productive Minnesota workers are likely to be. Yet I doubt that application of the Minnesota uninsured-motorist-coverage stacking rule for beneficiaries of a deceased employee could have been considered by or have influenced the performance of an employee.

It is interesting that the Minnesota Supreme Court made almost no mention of the fact that Mr. Hague worked in Minnesota. When the Minnesota court explained its "governmental interest" in applying its law it spoke only about its concern for "fully compensating resident accident victims and thus keeping them off welfare rolls and enabling them to meet financial obligations." Earlier in the opinion, when the court was deciding whether there are Minnesota interests that conflict with Wisconsin interests, it mentioned the fact that the decedent traveled to work in Minnesota, but it did not explain why this triggered a Minnesota "interest." All the court said was "thus, the risk which was covered by the policy was located in Minnesota as well as Wisconsin." If, as seems likely, the court meant that the insurer could therefore foresee that the automobile might be driven into Minnesota, the opinion later indicates that this was taken care of by the mere fact that an automobile insurance policy was involved.

The second contact mentioned by the plurality was that "Allstate was at all times present and doing business in Minnesota." If it is assumed, as it was in Hague, that doing a large volume of

69. Cf. 81 HARV. L. REV. 1342 (1968). The author argued that a state's "statutory wrongful death action is designed to compensate the plaintiffs for the losses sustained by them due to the victim's death. It is analogous in this sense to a life insurance policy—a form of security which the state gives its citizens against wrongful death, ensuring them that their survivors may be provided for through institution of suit against the tortfeasor." Id. at 1345-46 (footnote omitted).

70. For a discussion of the employment "contact" in Hague, see Brilmayer, Legitimate Interests in Multistate Problems: As Between State and Federal Law, 79 MICH. L. REV. 1315, 1341-47 (1981). I am grateful to Professor Brilmayer for the opportunity to read her article in manuscript.

71. 289 N.W.2d at 49.


73. 289 N.W.2d at 50.

74. 449 U.S. at 317 (footnote omitted).

75. See Petitioner's Brief at 6, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981): "There is no dispute in this case as to jurisdiction." For an examination of this assumption, see text accompanying notes 88-94 infra.
business in a state is a constitutional, generally affiliating basis for personal jurisdiction, Allstate could therefore be sued in Minnesota. Does this mean that any state in which “Allstate” is doing business can provide a forum to invalidate a clause in a policy if there is no other contact with that state? I hope not. Qualifying to do business in a state permits the state to regulate the business in some ways. But invalidating a policy on a car principally garaged elsewhere is going too far. In *John Hancock Mutual Life Insurance Co. v. Yates*, an insurer was doing business in Georgia. Georgia, however, was not permitted to apply its rule on materiality of misrepresentation, even under the guise of a rule of “procedure.” *Yates* was treated in *Hague* as still good law.

The third contact invoked by the plurality was Mrs. Hague’s move to Minnesota after her husband’s death. The Court noted that the motives for this move were not connected with the litigation and that Mrs. Hague’s Minnesota residency at the time of decision gave that state an “interest” in increasing the compensation paid to her because Minnesota might then experience the social consequences of inadequate compensation to the widow. The due process question was whether it is fair and reasonable for Minnesota to assert this interest in the light of Minnesota’s other contacts with the

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76. A contact is “generally affiliating” if it permits exercise of jurisdiction over the defendant in any action, even one not related to the contact. See A. von Mehren & D. Trautman, *The Law of Multistate Problems* 656 (1965).

77. In *Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66 (1954), Justice Frankfurter concurred on the ground that the insurer had consented to direct suit in order to get a certificate to do business in Louisiana. *Id.* at 74 (Frankfurter, J., concurring in the judgment). In *National Mut. Bldg. & Loan Ass'n v. Brahan*, 193 U.S. 635, 645 (1904), the Court allowed forum usury law to be applied partly on the ground that the company qualified to do business there. In *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), the Court noted that the insurer was not doing business in Texas and remarked: “We need not consider how far the State may go in imposing restrictions on the conduct of its own residents, and of foreign corporations which have received permission to do business within its borders . . .” *Id.* at 410. *Petty v. Allstate Ins. Co.*, 290 N.W.2d 763 (Minn. 1980), applied Minnesota law to require stacking under two California policies of a California resident injured in Minnesota while driving his daughter’s automobile. The court stated: “Allstate's obligation to allow stacking of policies in this case arises from the duties imposed upon it for the privilege of doing business in Minnesota, not its private contract with the [insured].” *Id.* at 766.

78. 299 U.S. 178 (1936).

79. See, e.g., 449 U.S. at 312 (citing *Yates* as one of sources of constitutional standard articulated). But see *Lettieri v. Equitable Life Assur. Soc'y*, 627 F.2d 930, 931 (9th Cir. 1980) (reaching opposite result on facts substantially the same as *Yates* and citing *Yates* only for substantive content of New York law).

80. 449 U.S. at 319.

81. *Id.*
parties and the transaction. If *Yates* is still good law, the move itself would not have been sufficient, unless *Yates* can be distinguished. Perhaps in *Yates* the insurer would have acted sooner to obtain evidence concerning Mr. Yates' conversation with the agent if the insurer could have foreseen that this conversation would be admissible. But this is highly speculative, and it may be that the evidence could not have been rebutted in any event: it may have been true.

Whether it was fair and reasonable for Minnesota to assert its interest in compensating the widow poses a close question. I conclude that it was not fair and reasonable for sound conflicts analysis but was sufficiently fair to squeeze past a due process standard. It is unlikely that the other Minnesota contacts (Hague's working-commuting and Allstate's doing business) were sufficient to give Minnesota an "interest" in applying its law if "interest" means that, because of the contact, Minnesota is likely to experience a social consequence its law seeks to avoid. But the existence of these contacts, particularly working-commuting, may keep an assertion of Minnesota's late-acquired "interest" in the widow from evoking the visceral feelings of outrage that would trigger a due process interdiction.

A contact with Minnesota not mentioned in the opinion was that Mr. Hague was taken to a Minnesota hospital near the Wisconsin border. Had he received substantial medical treatment, Minnesota would have had an interest in increasing compensation to make it more likely that Minnesota medical creditors would be paid. In fact, however, Mr. Hague was dead on arrival at the hospital and the expense incurred could not have been substantial. But suppose the medical expense were substantial and Minnesota doctors would go unpaid if the uninsured motorist recovery were not increased by $30,000. This should not be enough for application of Minnesota law to invalidate the term of an insurance policy settling the rights and duties of the contracting parties and valid in Wisconsin. This medical-compensation interest of the place of injury may justify application of the rules of tort recovery of the place of injury, but not application of its insurance regulations: Justifiable expectations are not likely to be based on rules concerning unintentional torts.

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83. Id.
IV. THE RELATIONSHIP BETWEEN CONSTITUTIONAL LIMITATIONS ON CHOICE OF LAW AND ON PERSONAL JURISDICTION

Allstate Insurance Co. v. Hague and Rush v. Savchuck, another recent case from the Minnesota Supreme Court, illustrate the relationship between constitutional limitations on choice of law and personal jurisdiction. In Hague, the Minnesota Supreme Court exercised jurisdiction over the insurer on the basis of the insurer's doing business in Minnesota, even though the cause of action did not arise from Allstate's Minnesota business. The result was a choice-of-law decision so questionable that three Supreme Court Justices thought it unconstitutional. In Rush, the Minnesota courts sought to exercise jurisdiction over an automobile accident case even though the defendant driver resided in Indiana, where the accident happened. After the accident, the plaintiff moved to Minnesota from Indiana. Jurisdiction was based on garnishment of the Indiana defendant's liability insurance, or more specifically, the insurer's obligation to defend and indemnify the defendant. If jurisdiction were exercised, the defendant asserted that Minnesota courts would then proceed to apply Minnesota law, which differed from Indiana law on two crucial issues: Minnesota had comparative rather than contributory negligence and Minnesota had no guest statute. The Minnesota courts were not given the opportunity to commit this choice-of-law outrage, however, because their exercise of jurisdiction was held unconstitutional.

There are two distinct routes that might be taken to prevent choice-of-law decisions like Hague, which are bad, if not unconstitutional, and which give the new conflicts methodology a reputation for "forum preference" and "discrimination in favor of forum residents." One route is closer constitutional supervision of conflicts

84. 444 U.S. 320 (1980).
85. See 449 U.S. at 317 n.23. This Court indicated that different answers may be given to the constitutionality of jurisdiction and choice of law. The Court said, however, that the two questions "are often closely related and to a substantial degree depend upon similar considerations." Id. (quoting Shaffer v. Heitner, 433 U.S. 186, 224-25 (1977) (Brennan, J., concurring in part and dissenting in part) (quoting Hanson v. Denckla, 357 U.S. 235, 258 (1958) (Black, J., dissenting))).
86. 444 U.S. at 325 n.8.
decisions. *Hague* indicates that this route will not be taken. The other route is to restrict jurisdiction to a state whose contacts with the parties and with the transaction make it desirable for the law of that state to be applied.\(^{88}\) The most obvious departures from this route today are the generally affiliating bases for jurisdiction: doing business (*Hague*),\(^{88}\) personal presence, and, to a lesser extent,\(^{89}\) domicile and incorporation. *Shaffer v. Heitner*’s\(^{91}\) statement that “all assertions of state court jurisdiction must be evaluated according to the standards [of fair play and substantial justice] set forth in *International Shoe* and its progeny”\(^{92}\) has given rise to hope that transient presence will no longer suffice as a basis for jurisdiction.\(^{93}\) But with this possible exception, it is unlikely that the generally affiliating bases for jurisdiction will be or should be abolished. *Hague* itself is a good example. It was not unreasonable to make Allstate defend in a state where it was doing a huge volume of business, less than 100 miles from the crash site,\(^{94}\) especially in a case in which there were no significant fact issues. Allstate’s legitimate complaint was that it had Minnesota law imposed on it. This was the complaint rejected in *Hague*.

V. IMPLICATIONS FOR CHOICE-OF-LAW METHODOLOGY

*Hague* places the imprimatur of the United States Supreme Court on the new choice-of-law methodology and the abandonment of territorially oriented rules. The plurality opinion speaks disparagingly of “the wooden *lex loci delicti* doctrine”\(^{95}\) and cites with apparent approval cases in the vanguard of modern interest-functional analysis.\(^{96}\) The three dissenters would go so far as to raise interest

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88. *Cf.* Martin, *supra* note 43, at 872-73 (suggesting that if forum has only generally affiliating jurisdiction, it may not apply its own law).
89. *See also* Schreiber v. Allis Chalmers Corp., 611 F.2d 790 (10th Cir. 1979) (plaintiff found forum in which defendant was doing business and which had long statute of limitations and no statutory exception to rule that statutes of limitations are “procedural”).
90. To a “lesser extent” because the contacts of domicile and incorporation are likely to make it reasonable to apply the law of that state.
92. *Id.* at 212.
94. The trial in *Hague* was in Hennepin County. 289 N.W.2d 43 (Minn. 1979).
95. 449 U.S. at 316 n.22.
96. *Id.* at 314 n.19. This note also cites Rosenthal v. Warren, 475 F.2d 438 (2d Cir.),
analysis, à la Brainerd Currie, to a constitutional requirement. This should help still any remaining suggestions here or abroad that the new methods are a fad and that the hot-blooded revolutionaries will soon return to their senses and the “certainty” of sticking pins in maps. *Hague* also indicates how far we have to travel. We have not articulated a cogent, coherent, reasonably administrable conflicts methodology to whose banner all reasonable courts will rally.

### VI. Conclusion

If a choice of law does not outrageously surprise one of the parties, it will rarely be held unconstitutional. The state whose law is applied need have only sufficient nexus with the parties or with the transaction to keep the choice from appearing patently arbitrary. Absent the testing of contacts by interest analysis, as advocated by the *Hague* dissent, it is not easy to predict when the boundary of arbitrariness is crossed.

It is probably undesirable to abolish all generally affiliating bases for jurisdiction or to raise interest analysis to a constitutional requirement. We may wince when some benighted place of injury applies its law to deny a cause of action between parties who reside where recovery would be permitted. But opinions like *Hague* indicate that much more choice-of-law experimentation is needed. And *Hague* does promise that we will protect the party who most needs protection from choice-of-law madness. He who justifiably plans his conduct under the law of one state will not have that conduct judged by the different law of another state if he had no reason to foresee the application of that law. This is half a loaf, but it will sustain us in our task of clarifying and improving conflicts analysis.

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*cert. denied*, 414 U.S. 856 (1973), which applied New York law to increase recovery for the death of a New Yorker operated on in Massachusetts. Most commentators thought the decision bad, some so bad as to be unconstitutional. *See, e.g.*, Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1605 (1978) (arguing that *Rosenthal* violated due process). The citation of *Rosenthal* without comment may indicate that the decision did not cross the due process line but, I trust, does not mean that the case reached the proper result.