The Constitution and Legislative Jurisdiction

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Commentators have been struggling for years to flesh out the limits of a state's power to apply its law to private disputes—its legislative jurisdiction.¹ Often the results of their labors are stated in terms of such generality as to provide little guidance for deciding actual cases.² Even when the suggested limits on legislative jurisdiction are stated in much greater detail,³ one is left with the unsatisfactory feeling that those details are more the result of an attempt to accommodate a variety of case law than the result of basic principles. The field of legislative jurisdiction is noted for sporadic,⁴ uncoordinated⁵ efforts on the part of the Supreme Court.

Perhaps one of the most widely accepted formulas, though extremely general, is Professor Weintraub's statement that the states are forbidden to apply their own law when to do so would constitute

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1. Although some commentators disapprove the term "legislative jurisdiction," I find it less cumbersome than any other term that seems its equivalent, such as "constitutinal limitations on choice of law." It includes, of course, the outer limits on the appropriate scope of a state's common law as well as statutory law. See R. LEFLAR, AMERICAN CONFLICTS LAW § 55, at 105 (3d ed. 1977).

2. R. LEFLAR, supra note 1, § 60, at 117-18.


5. Professor Crosskey states:

[I]n general, it may be said that, whereas a single uniform system of nation-wide rules of the interstate conflict of laws is what was intended; what we actually have today is [fifty] different systems, varying unimportantly, but very troublesome, from state to state, with the Supreme Court's system of largely unpredictable interferences, in the name, sometimes, of "full Faith-and Credit" and, sometimes, of "due process of law," superimposed on top of these. And the result, as might be expected, is a vast chaos of complexity and uncertainty, instead of the simple nation-wide system for which the Constitution provided and still provides.

unfair surprise; but there are many problems with adopting unfair surprise as the sole criterion for constitutional limits on legislative jurisdiction. First, from a strictly logical point of view, surprise is an irrelevancy in a legal system that charges litigants with knowledge of the law — including the law of choice of law. Nonetheless, there is an element of factual surprise — failure to anticipate events that would connect a dispute with a particular state such as a change of domicile by one of the parties, or failure to anticipate jurisdiction being exercised by a given forum with an inclination toward applying its own law. When the surprise is understandable enough, and when taking advantage of the changed circumstances to apply unanticipated law would upset the reasonable planning of the parties, there is surely an inclination to label the assertion of legislative jurisdiction as unfair and hence a violation of due process.

Yet unfair surprise is not the only element of appropriate limitations on state legislative jurisdiction. Take, for example, a tort case in which the forum, having virtually no significant contacts with the case, applies its own law. Surely the evil in this act is not unfair surprise, genuine though the feelings of surprise may be, because the essence of unfair surprise is the disruption of planned affairs. Since the tort was unplanned, there can be no such disruption. Or, to put it another way, warning the parties in advance that a given law would be applied would not have changed their behavior; thus, surprise is immaterial to the wrong they suffer. In limits on legislative jurisdic-

7. This assertion is a partial recantation of an earlier assertion I made in Martin, Constitutional Limitations on Choice of Law, 61 Cornell L. Rev. 185 (1976). In that article I argued that unfairness was not an element of inappropriate choice of law. In the text above I concede that unfair surprise may be a violation of due process, but as the text below will indicate, I still believe that unfairness per se is not a useful characterization for violations of a state's legislative jurisdiction except in the relatively rare cases of surprise.
8. There are cases in which a sufficiently large enterprise may modify a product design, for example, in response to tort law. Such cases, however, do not explain the reaction of unfairness when individual litigants are involved.

Also, Professor Weintraub has noted that even in the leading case of Home Insurance Co. v. Dick, 281 U.S. 397 (1930), which is often taken as a case illustrating unfair surprise, the surprise may not have been as great as first appears. R. Weintraub, supra note 6, § 9.2A, at 502-03. In Dick the insurance contract has been assigned to Dick, a Texan resident in Mexico. The original insured was a Mexican company. 281 U.S. at 403. Thus, the surprise of applying Texas law on the basis of an assignee's citizenship seemed acute. But, as Professor Weintraub observed from an inspection of the record in the case, Dick was named as a possible assignee in the original insurance contract. R. Weintraub, supra note 6, § 9.2A, at 502-03. Professor Redish notes Weintraub's discovery but adds the possibility that the Court's failure to refer to the assignment clause may indicate that it assumed Dick to be an unfair surprise case. Redish,
tion, therefore, there is clearly a concept of unfairness that is not causally related to party expectations.

This concept might lead to a formula that substitutes simple fairness for unfair surprise: A state may not apply its own law to a private dispute when to do so would be unfair. But like Malory's advice to do after the good and leave the evil, the rule states goals that are unimpeachable while providing guidance that is inscrutable. We need to know more about why a particular act of overreaching by a state, even absent planning or surprise, can convey such an unmistakable impression of unfairness that it invites condemnation under the due process clause of the fourteenth amendment.

One peculiar characteristic of this unfairness, as I have pointed out elsewhere, is that it is not the garden variety of unfairness dealt with under the due process clause. Consider, for example, the statute that Texas attempted to apply in Home Insurance Co. v. Dick. The statute was one that invalidated contract clauses if those clauses limited the time for suing under the contract to a period of two years or less. There is nothing prima facie unfair about such a statute, and certainly nothing in the Dick opinion suggests otherwise. But, much more important for present purposes, there was nothing unfair—in the ordinary sense—in applying such a provision to a contract that has no connection with the State of Texas. If Texas believes in the principle that no one's right to sue should be cut off too early, there is nothing in such a principle that restricts it to contracts formed in Texas, involving Texas citizens, to be performed in Texas, or the like. The issue is not one of reliance or of different ways of looking at things in different cultures. The point is that the Texas legislature, presumably after considering the value of freedom of contract and


9. This moral was attributed to Malory's famous romance by his publisher William Caxton. For the original text see Caxton, Preface to T. Malory, Morte Darthur (W. Caxton ed. 1485), in 1 The Works of Sir Thomas Malory cxli (2d ed. E. Vinaver 1967).


11. Martin, supra note 7, at 188-91.


13. Id. at 404-05.

14. It is conceivable that in the Dick case there was either a statistical reliance before the fact (i.e., limiting the period for suing will, statistically, reduce the number of over-all suits) or after the fact (investing assets in a nonliquid manner after a year has passed rather than keeping them liquid in anticipation of a claim), but it is unlikely. Moreover, so long as there are cases in which reliance was not present, as there certainly must be, and so long as the result would be the same in those cases, as it certainly would be, the reliance is obviously not critical. See note 8 supra and accompanying text.
whatever else was relevant, determined that it was wrong to deprive a litigant of his right to a decent time in which to decide whether or not to sue, and invalidating clauses that said otherwise was a matter of simple fairness. It seems ironic to label as unfair the application of a statute whose goal is simple fairness and which has no inherent geographical orientation.

None of this is to say that Texas behaved properly, or that *Dick* was wrongly decided. While there are reasons for denying application of the Texas statute, they do not arise from some relationship between the State of Texas and the individual litigants. They arise, rather, because Texas applied its own law to a case in which it had insufficient interest to justify the imposition of its own brand of fairness; and it did so at the expense of the ideas of fairness to another sovereign, Mexico, which had an overwhelmingly better claim to regulate the transaction.

We could explain the intuitive feelings of unfairness concerning Texas' actions in the *Dick* case by asserting that Texas was being unfair to Mexico. A much more plausible explanation for the sense of unfairness, however, lies in the recollection that it is persons, not states, who are generally involved in litigation, and they have a right to complain that they are being treated unfairly if they are made to suffer as a result of the forum's failure to follow its legal duty to other sovereigns. In other words, the type of unfairness (and thus violation of due process) found in *Dick* is derivative, flowing from Texas' violation of an independent duty owed to Mexico.

The source of this duty is found in the full faith and credit clause — a clause specifically designed to allow federal regulation of various relationships between the quasi-sovereign states. Although there may appear to be problems in finding within the text of that clause authority for requiring some deference to the common law of another state, as well as to its statutory law (since the clause

15. 281 U.S. at 408-09.
16. *Id.* at 408.
17. Thus there are two possible types of violation of due process in these cases: the direct type arising from unfair surprise and the indirect or derivative type which relies for its existence on an independent constitutional violation and hence need not be analyzed in terms of due process.
19. Professor Crosskey refers to the application of due process to the conflict-of-laws question as the Supreme Court's "fanciful modern theory of 'due process of law.'" W. Crosskey, *supra* note 5, at 555. Crosskey argues that the full faith and credit clause was meant not only to be the only important *limitation* on state choice-of-law theories, but also to *prescribe* choice-of-law rules for the states. *Id.* at 553-55.
refers to the "public Acts" of the states), Professor Crosskey has convincingly demonstrated that the term "Records" used in the clause refers to the judicial decisions of the states, i.e., their common law.20 A further problem arises because the clause requires granting full faith and credit only to the laws of other "States"; thus the utility of a due process approach in such cases as Dick, where the other sovereign is a country and not a state of the United States, is obvious. Nonetheless, it is not difficult to develop a theory of federal common law, patterned on the law of full faith and credit among the states, and justified by the supremacy clause and the power of the federal government to regulate foreign relations, in order to fill that gap.21

Professor Redish has recently taken an approach in the area of judicial jurisdiction similar to this general approach to legislative jur-

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20. Id. If a purely historical argument is deemed insufficient, a convincing argument can be made that the regulation of state choice of law is "inherently federal." This is so because the states are hardly in a position to be fair arbitrators of whether or not they have overstepped the bounds of their authority with respect to other states. Professor Redish cautions against finding "implicit" federal powers of this general sort in the Constitution:

[W]hile the Court may necessarily exercise considerable freedom in defining and applying constitutional language, it does not follow that it can supplement the specific provisions of the Constitution by writing new ones, rather than interpreting existing ones. For, if recognized, such a power knows no logical bounds: if the Court's constitutional pronouncements are not required to have at least an arguable basis in the document's language, the Court's decisions inescapably become mere fiat, insulated from reasoned debate other than in the purely legislative sense of debating the normative wisdom of whatever "constitutional" rule the Court is considering devising.

Redish, supra note 8, at 1130. Although these words may represent wise cautions against general judicial constitution-drafting, there are reasons not to be so concerned in the present context. First, the command of full faith and credit to the acts of another state would provide virtually absolute guidance for the content of a rule commanding full faith and credit to the common law of another state. Thus there would indeed be "logical bounds" to the process, and rather severe ones at that. Second, the Court has chosen such a path in at least one other context with less basis for choosing the substantive rules. In Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961), the Court ruled that one state may not escheat funds supposedly held by the Western Union Company within its borders, unless it could provide reasonable assurance that another state would not attempt to escheat the same funds by applying a different theory as to where the intangible funds were located. Id. at 80. Since no state could require another to defend in its own courts (absent special circumstances like those in Nevada v. Hall, 440 U.S. 410 (1979)), in order to resolve the location of the funds authoritatively between the contending states, the issue appeared to be at an impasse. The Supreme Court solved the problem, however, by laying down a substantive rule of law, without any textual basis in the Constitution, for resolving such escheat questions between the states. 368 U.S. at 77-80. Thus, even though Nevada v. Hall demonstrates that not all invitations to discover a federal refereeing function in the framework of the Constitution will be honored, some have, and have been successful.

21. For such an argument, see Martin, supra note 7, at 196-200.
He notes that there are two main elements in current due process analysis of state judicial jurisdiction—fairness and federalism. He asserts that, despite the apparent emphasis on fairness in the leading case of *International Shoe Co. v. Washington*, federalism has played the dominant role. The federalism that he discusses seems to be identical with the concern for state sovereignty that I have already discussed, and I hereby adopt the term, despite some difficulties that might ensue from taking it too literally.

Perhaps Redish's most striking and original observation is the lack of authority for finding any element of federalism in the idea of due process. The concept of due process certainly existed in England, yet obviously the states (or other similar quasi-sovereign entities) did not exist in the English system. Thus, whatever element of federalism due process may have absorbed clearly did not come from England but from American judicial interpretations of the text of the Constitution. Redish convincingly demonstrates that "the infusion of federalism into a due process analysis" occurred unsupported by history or precedent in *Pennoyer v. Neff.* One of Professor Redish's conclusions is, quite simply, that the due process clause was intended to regulate the relationship between the individual and the sovereign, while constitutional restrictions based upon ideas of federalism must necessarily spring from other sources, chiefly the full faith and credit clause.

At one time, numbed by months of wrestling with these elusive concepts and the rigors of responding to an excellent and scholarly criticism of my thoughts, I wrote: "What difference does it make which [constitutional clause] guides the exercise of state power in conflicts cases? In a sense it does not matter. The argument is as idle as the infamous dispute on the terpsichorean talents of angels." Even at the time that statement was made it was hyperbolic in light of remarks that followed it, but because it has been given

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25. I emphasize that I wish to embrace deference to the laws of other countries as well as other states. See note 21 *supra* and accompanying text.
27. *Id.* at 1124.
28. 95 U.S. 714 (1877).
some prominence elsewhere,\textsuperscript{39} I hereby publicly recant it. Professor Redish has noted,\textsuperscript{38} as I once did much more briefly,\textsuperscript{44} that no other aspect of the sprawling subject of due process contains any notions of federalism.\textsuperscript{38} The single dominant theme of due process is the relationship between the individual and the sovereign.\textsuperscript{38} Thus, due process analysis in the choice-of-law area ought to be limited to cases involving that relationship—the relatively small number of cases containing an element of genuine unfair surprise. The remaining cases ought to be analyzed under full faith and credit, with its emphasis on federalism.

Identifying the dominant theme, however, is not the equivalent of unearthing a treasure trove of readymade constitutional rules. Among the broad choices that could be made in this area, however, is to impose rules that would purport, at least in theory, to choose the law of one and only one state for all occasions, as a matter of constitutional law.\textsuperscript{37} At one time it appeared that the Supreme Court was headed in that direction, but it soon turned to the second choice—a system of limitations rather than proscription.\textsuperscript{38} Thus there are many cases, and issues in cases, which could constitutionally be governed by the law of several states. There are also cases, and issues in cases, that are so close to one state and far from another that the Constitution is interpreted to permit one law to govern while excluding the other.

Since the full faith and credit clause obviously provides no textual detail, and since the Congress has chosen not to do so, the Supreme Court is left with the task of providing a rational system of constitutional limitations.\textsuperscript{39} To the extent possible, such a system should be simple, appeal to informed intuition, and do minimum vio-

\textsuperscript{33} Redish, supra note 8, at 1126-29.
\textsuperscript{34} Martin, supra note 7, at 192; Martin, supra note 31, at 152-53.
\textsuperscript{35} The limits on a state's power to tax under the due process clause do not involve federalism. Redish, supra note 8, at 1129.
\textsuperscript{36} Id. at 1122.
\textsuperscript{37} Professor Crosskey argued that that was the original intent of the drafters. See W. Crosskey, supra note 5, at 553-55.
\textsuperscript{38} R. Leflar, supra note 1, § 55, at 105.
\textsuperscript{39} The constitutional text leaves it open to Congress to proscribe such rules, but Congress has never done so. Crosskey argued that the framers intended that the common law of private international law would control pending congressional action. W. Crosskey, supra note 5, at 547-50. Even if such a general limitation is recognized, however, it is clear that there is no longer a single prevailing "private international law" or body of conflicts law. See R. Leflar, supra note 1, §§ 8, at 12.
lence to established case law. The case law of the Supreme Court, specifically dealing with constitutional limitations, and the case law of the lower courts, applying various choice-of-law theories without ever feeling any reason to doubt their constitutionality, should be treated deferentially.

Professor Lea Brilmayer has introduced an as yet incomplete test for legislative jurisdiction that seems to satisfy the goals set out above. So far her approach is more effective at identifying what lies beyond the permissible rather than what lies within it. Her approach starts with a division of a state's policies into domestic policies and multistate policies, where "multistate policies are those that refer to state lines." A contact, in order to give rise to a legitimate interest, which would justify application of forum law, must be a person, event, or item of property that domestic policy is intended to regulate. The most straightforward demonstration that a particular contact is one intended to be regulated by state law is that the contact is a formal requirement of a cause of action based upon the regulation. Thus, the occurrence of an accident within a state gives it a legitimate interest in applying its own law to a claim based upon the accident, but "[p]resumably the fact that Lavinia Hague's lawyer was licensed to practice in Minnesota would not create a Minnesota interest, even if her lawyer was working for a contingent fee."

Contacts need not be part of the formal requirement of the cause of action, however, in order to qualify. Some rules are designed to regulate certain conduct but are not stated in terms of that conduct. Professor Brilmayer's example is a rule refusing enforcement to consumer-warranty disclaimers. The rule may have been based upon a fear of merchant overreaching, but the difficulty of proving overreaching may have led to a rule making no explicit reference to it. If so, the occurrence of the overreaching in the forum would justify the application of forum law.

One of the most appealing parts of Brilmayer's approach is its simple, straightforward justification: The state, in applying its own law under the circumstances described above, behaves normally by

42. Id. at 1326.
43. Id. at 1329.
44. Id. at 1329-30.
regulating the normal objects of its regulatory efforts. Because a conflicts case necessarily contains circumstances related to other states, the forum is necessarily regulating events that are within the jurisdiction of another state. But since by hypothesis the case has multistate elements, that effect is inevitable; and it is justified because such regulation is incidental to regulating events within its normal and accepted jurisdiction.

In her article, Professor Brilmayer restricted herself to the application of this test to one of the three contacts identified in Hague—the decedent's employment in Minnesota. Obviously, the decedent's employment was not a formal element of the cause of action in Hague, but her approach requires her to ask further whether employment bears "informal policy relevance" to the stacking question in the manner that overreaching bears to the issue of warranty disclaimers. Professor Brilmayer's approach offers hope for a rational approach to the problem of legislative jurisdiction. Along this line I suggest modifications, extend them to the other two contacts in Hague—Lavinia Hague's after-acquired domicile and the conduct of extensive but unrelated business in Minnesota by the defendant—and explore their application in a few other areas. I do so, of course, on my own: Professor Brilmayer may not see my efforts as the logical extension of her work.

Mrs. Hague's after-acquired residence itself is not a contact in the Brilmayer sense—it is she, as a person, who constitutes the contact, since a contact is "a circumstance—a person, event, or item of property—that connects the controversy with one of the involved states." Her residence, however, is what connects her with Minnesota. Since a contact does not justify the application of forum law unless it bears a formal substantive relevance or informal policy relevance to the state's regulatory effort, it is necessary to analyze Mrs. Hague's relevance to Minnesota's regulatory effort. The Minnesota courts in Hague faced the stacking issue. The regulatory effort has to do with the amount of insurance proceeds recoverable from a

45. See id. at 1317.
46. Id. at 1341.
47. Although the question could probably have been answered without extensive research, Professor Brilmayer researched the question carefully and concluded that employment was unrelated to the stacking issue in this way. See id. at 1344.
48. Id. at 1329.
given accident under multiple policies. It therefore formally involves directly only the plaintiff insured and the beneficiary of the insurance contracts. The beneficiary was the estate of the decedent, of which Mrs. Hague was the representative. Clearly her move to Minnesota, however, was not a move as a representative of the estate, nor did the estate itself in any sense move. In fact, the estate was itself simply a representative of Mr. Hague's interests. Thus it would be his connection to Minnesota through his employment, and not hers, that would provide possible formal substantive relevance. It follows that Mrs. Hague's domicile, whenever acquired, has no formal substantive relevance to Minnesota's regulatory efforts.

The informal policy relevance of her domicile is harder to gauge. It is undoubtedly true that a significant number of automobile accidents involving insurance result in death for one of the beneficiaries. It is thus reasonable to conclude that Minnesota's regulation of the stacking issue was designed to benefit not only the insured, but also the beneficiaries of the formal insured—surviving spouses in particular. On that basis, Mrs. Hague's after-acquired domicile might justify application of Minnesota law.

Allstate's doing unrelated business in Minnesota leads to a similar conclusion: As defendant, its contact bears formal relevance to the state's regulatory efforts.

It should be emphasized that under Professor Brilmayer's approach, the formal substantive relevance or informal policy relevance of a contact is not alone sufficient to justify application of forum law; one or the other is simply a necessary condition. Thus, these two conclusions do not necessarily lead, under her theory, to upholding the result in Hague.

As one who would like to see greater predictive power from this appealing theory, and as one who intuitively recoils from the result in Hague, I suggest two modifications of Professor Brilmayer's theory:

1) A contact is an event that takes place within the forum or an item of property located there that connects the controversy with one of the involved states.

2) A state may apply its own law to an issue in a case if at least one contact bears formal substantive relevance or informal policy relevance.

51. Id.
52. Professor Brilmayer considers and disposes of the employment relationship. See Brilmayer, supra note 41, at 1343-44.
relevance to the state’s regulatory effort, but not otherwise.

Two things should be noted about this proposed modification: First, it eliminates “persons” as contacts; second, it makes the connection stated in the second rule not only necessary but sufficient. The reader familiar with the cases will recognize that one of the chief motivations for such a modification is to obtain a rule of higher predictive power which is nonetheless consistent with the bedrock of legislative jurisdiction, *Home Insurance Co. v. Dick.* There is little dissent from a central principle of that case—that the domicile of one of the parties does not by itself justify the imposition of forum law, except, perhaps, in cases involving status.

This tinkering may appear ad hoc. Why should people, in whose favor laws are made, not be “contacts” of the most important type? The answer lies, I believe, in the first part of this essay: If the only consideration were the relationship between the forum and the individuals, the desire of the forum to protect one of its own domiciliaries would be more than enough justification for applying its own law. But if the problem is perceived chiefly as a reasonable distribution of legislative power among sovereigns, accepting domicile as a basis for asserting legislative jurisdiction goes too far, since it is a rare conflicts case in which none of the parties is a domiciliary of the forum. It is, however, a reasonable limitation to assert that states may legitimately protect their domiciliaries and others with relation to in-state events. Thus, modification of Professor Brilmayer’s test to exclude “persons” as contacts seems reasonable.

On this basis it is clear that the two nonemployment “contacts” in *Hague* would be insufficient to justify application of Minnesota law. Professor Brilmayer has already demonstrated that the employment contact is insufficient. Unless contacts that by themselves are insufficient may cumulate into significance, as the *Hague* plurality believed, it follows that *Hague* was wrongly decided. Is there any place in an appropriate theory for allowing such cumulation? It is certainly logically possible to have a consistent theory in which contacts individually insufficient may cumulate, but from a practical standpoint it is highly undesirable. The attractiveness of Professor

53. 281 U.S. 397 (1930).
54. Professor Ehrenzweig, however, expressed doubt. See A. Ehrenzweig, Private International Law 35 (1972).
55. 281 U.S. at 408.
56. See notes 8-16 supra and accompanying text.
57. Brilmayer, supra note 41, at 1343-47.
Brilmayer's theory lies in the combination of its plausibility and its concreteness. Although one could hardly accuse it of being a cookbook recipe, it is certainly a more workable theory—providing more guidance to lower courts, for example—than such generalized tests as "fair play and substantial justice" or "minimum contacts." Adding a wrinkle to the effect that the insufficient may accumulate into the sufficient requires subsidiary rules to answer the simple question: When will they accumulate, and when will they not? It is precisely the question that the Hague plurality answered with deafening silence.58

At least two troublesome points remain, if a theory of the type proposed by Professor Brilmayer can be worked out. First, the theory as stated in modified form above seems to outlaw the result in Babcock v. Jackson.59 In Babcock two New Yorkers were involved in an Ontario accident. Under the Ontario guest statute, no recovery was possible. Under New York common law it was, and the New York Court of Appeals chose to apply New York law.60 To all but the archdefender of vested rights, the result is at least constitutional, if not also desirable. If an insurance motive behind the New York common law can be perceived, there is no difficulty with the constitutionality of the result under the modified Brilmayer approach since the insurance is so obviously connected with a New York insured and an insurance company that was doing business in New York when it issued the policy. But what if insurance had not been involved, and the simple disagreement between New York and Ontario was what was fair? In other words, what if Ontario felt that one who accepted a gratuitous ride should not sue while New York felt otherwise? Then insurance would have no formal or informal relevance to the regulatory effort of New York, and New York therefore would have no constitutional basis for applying its own law. This is only one example of the general problem of the case in which two domiciliaries of the same state perform an act or acts in a second state, but where we are willing to say that the domicile of the parties, rather than the

58. The plurality's only reference to the cumulative effect of the contacts it discussed comes at the end of the opinion where it says: "In sum, Minnesota had a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair." 449 U.S. at 320 (footnote omitted). In the footnote the plurality states that it expresses no view on whether two of the three contacts—decedent's employment in the forum state and defendant's business presence in the forum state—would have been enough. Id. n.29.


60. Id. at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 751-52.
place of their acting, is the more significant "contact." Thus, I would modify the rules accordingly:

1) A contact is an event that takes place within the forum or an item of property located there that connects the controversy with one of the involved states.

2) A state may apply its own law to an issue in a case if at least one contact bears formal substantive relevance or informal policy relevance to the state's regulatory effort or satisfies rule 3, but not otherwise.

3) A state may apply its own law to an issue in a case if the person disadvantaged by it is a domiciliary of the forum and such an application does not unduly interfere with the sovereignty of another connected jurisdiction.

Again there may seem to be an ad hoc quality to the modification unless one reflects on the underlying source of limitation on legislative jurisdiction: federalism. The starting point for the original test was not the question whether a state might have some reasonable basis for regulating a dispute, but whether, in light of the dispute's connection with other jurisdictions, it should be allowed to do so. When the only claim for regulation was the domicile of one of the parties, reasonable federalism would not permit the assertion of legislative jurisdiction. But when a state acts to apply its own law to the disadvantage of one of its own domiciliaries, it is unlikely to be interfering with any but the altruistic interests of another state. Of course, a state otherwise unconnected with the case may not be inclined to apply its unfavorable law against one of its own domiciliaries unless to do so will benefit another domiciliary. Thus, the state's motive may be the domicile of the party benefiting from the application of its law, but its constitutional justification is the domicile of the party disadvantaged by it.

The final "fudge factor," limiting rule 3 when "such application does not unduly interfere with the sovereignty of another connected jurisdiction," is designed to accommodate a situation in which state A may have a paramount interest in protecting a domiciliary of state B. For example, assume that state A has a good samaritan statute and that a doctor from state B renders service at the site of an accident in state A in a manner that is negligent but not grossly negligent. It would be inappropriate to apply the ordinary-negligence standard of state B against the defendant based upon his domicile in state B, because to do so might frustrate an important policy of state A.
Rule 3 should not be read as justifying the result in Hague, even if one neglects to notice that one of the parties acquired Minnesota domicile after the relevant facts of the case. Rule 3 is inapplicable to Hague because it is inappropriate to equate the domicile of a natural person to the “presence” of a corporation based upon its substantial business within a state: A natural person has only one domicile, while a corporation may be doing substantial business in many states. Thus, while applying unfavorable forum law against an individual based upon his domicile means that no more than the altruistic interests of other states might be infringed, applying unfavorable forum law on no basis other than substantial business within the forum will automatically impose a burden inconsistent with the policies of other states (such as that of incorporation or of chief place of business) with a substantial interest in the well-being of the corporation.

A second troublesome point, which I am not now prepared to pursue in detail, is the question of status. For example, it is clear that under American law a state that is the domicile of one party to a marriage may assert both legislative and judicial jurisdiction on the basis of that domicile alone.62 This is true regardless of what “events” have taken place within the forum. Without elaborating the details of a theory that is both consistent and broad enough to incorporate questions of status, one can observe that underlying principles of federalism remain the same while the occasions for applying them are different. Allowing the assertion of legislative jurisdiction on the basis of domicile goes too far, while limiting the basis for legislative jurisdiction to events seems a natural approach. That approach may work for cases that arise out of factors that may be localized in time—“events”—but it does not work for status precisely because status is a legal description of a phenomenon that is continuing rather than localized in time. Also, most questions of status involve issues of intense state concern (such as marital status) where it is not clear that the rules provided for areas of lesser concern may be transplanted wholesale. Finally, most issues of status are ones as to which there is almost universal concern for certainty and uniformity—goals that may be promoted by the present domicile-oriented approach.

It is not clear whether Professor Brilmayer’s efforts, or my suggestions concerning them, have any chance for consideration. In

61. Except as noted in the discussion of the good samaritan hypothetical above.
other words, does *Hague* foreclose the analysis suggested here? *Hague*, of course, has no majority opinion. The plurality's opinion is the least analytical of the three. Yet, because it has so little to say about doctrine, it may not shackle future decisions as much as many had initially feared. Justice Stevens' one-man opinion gives some reason for hope that a principled theory will yet emerge. His division of the question into due process and full faith and credit components has a firm basis in the cases. His emphasis upon undue interference with the sovereignty of other states under the full faith and credit test is encouraging. My only point of disagreement is his apparent unwillingness to find undue interference in most ordinary cases. I would find such interference more often, keeping in mind that sovereignty is interfered with not only when the direct economic interests of the states are involved, but also when one of their primary functions—the regulation of private disputes—is interfered with.

I am also hopeful that the due process side of his analysis will eventually be seen as somewhat overemphasized. He gives three examples of due process violations when a forum has chosen its own substantive law: "if that rule favored residents over nonresidents, if it represented a dramatic departure from the rule that obtains in most American jurisdictions, or if the rule itself was unfair on its face or as applied." Two of these Justice Stevens himself acknowledged as at least "suspect" even without any due process theory of legislative jurisdiction, the first because of the equal protection and privileges and immunities clauses, and the third because of ordinary substantive or procedural due process. The second—the unusualness of the forum's rule—is more problematical if it is meant to suggest a lower status for departures from the norm simply because they are departures. If it is meant simply to tag situations in which the potential for unfair surprise is greatest, it is consistent with the analysis made above.

No matter what rules eventually emerge, the legal community has the right to ask of the Court a case with a majority opinion, a

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63. 449 U.S. at 321 n.4 (Stevens, J., concurring in the judgment).
64. Id. at 322-23 (Stevens, J., concurring in the judgment).
65. Id. at 327 (Stevens, J., concurring in the judgment).
66. Id. at 327 n.15 (Stevens, J., concurring in the judgment).
67. Upon finding that it had no majority, would not it have been simpler and less confusing to lawyers, lower courts, and the rest of us, simply to dismiss the writ of certiorari as improvidently granted? After all, the presumed purpose of granting certiorari in such cases is to clarify the law, and whatever else *Hague* did, without a majority opinion it did not clarify. (Confusing things further, the original published unofficial version of the dissent referred to
majority opinion with clearer rules, and perhaps even a case that does not involve an insurance company, so that we can see the rules operating in a context with fewer special considerations. The grim alternative is the need for yet more symposiums.

68. The only cases in the last thirty years or so to consider these problems have been insurance cases. Traditionally insurance companies get the short end of the stick when it comes to doubtful cases, quite simply because of a pervasive tendency to spread the risk of loss as widely as possible. Moreover, a majority of insurance companies likely to be involved in major litigation (and to have the resources to carry matters to the Supreme Court) are insurance companies with nationwide business. Such were the insurance companies in Watson v. Employers Liab. Assurance Corp., 348 U.S. 66 (1954), Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1964), and Hague. It invites a distortion of the law in this area constantly to choose cases involving litigants least likely to excite our sympathies. Even though the Court often emphasizes the foreseeability that can be attributed to an insurance company, and in Hague emphasizes that the defendant was doing business in the forum, even though there is recognition of factors that may tend to make the insurance companies atypical, the Court's choice of cases, along with their results, has created an atmosphere of "anything goes" in choice of law.

There are hard choice-of-law cases that do not involve insurance. See, e.g., McCluney v. Schlitz Brewing Co., 649 F.2d 578 (8th Cir.), aff'd, 50 U.S.L.W. 3445 (U.S. Dec. 1, 1981). In McCluney, the Eighth Circuit held that due process prevents the application of a Missouri statute requiring employers, upon request, to provide discharged employees with a statement of reasons for discharge where the employee was hired in Missouri but promoted and transferred to other states over a period of years. The Supreme Court affirmed without even a per curiam opinion, even though there was a dissenting opinion at the court of appeals level and the Court itself had provided no majority opinion in Hague.