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A WISHFUL THINKER'S REHEARING IN THE *HAGUE* CASE

*Frederic L. Kirgis, Jr.**

On March 2, 1981, the United States Supreme Court denied a petition for rehearing in *Allstate Insurance Co. v. Hague*.¹ Thus it missed an opportunity to extricate itself from a most unfortunate morass created not only by the absence of a majority opinion on its first try, but also by the lack of clear analysis on the part of those Justices who wrote opinions. This article proceeds as though the Supreme Court had granted the petition for rehearing, and supplies the majority, concurring, and dissenting opinions that should have been generated. The hypothetical majority opinion below reflects the analysis I find most persuasive on the *Hague* facts. The concurring opinion espouses a plausible position, and the dissent presents the arguments against the positions taken in the other two opinions. I do not presume to attribute my words to any particular Justices, so the majority opinion is *per curiam*; the concurring and dissenting opinions are anonymous.²

OPINION OF THE "COURT"

Per Curiam.

For the sake of clarity, we briefly restate the facts. Ralph Hague, a resident and domiciliary of Wisconsin, was employed for fifteen years immediately preceding his death just across the state boundary in Minnesota. He owned three automobiles, all insured by Allstate Insurance Company under a policy issued in Wisconsin. The policy included \$15,000 uninsured motorist coverage for each automobile. It contained a clause that, if valid and if construed as the

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1. 450 U.S. 971 (1981). The decision on the merits is reported in 449 U.S. 302 (1981).

2. Purists will note a few other departures from Supreme Court style. In accordance with normal law review practice, citations have been relegated to footnotes. To avoid confusion, the footnotes are numbered consecutively through the three opinions.

Minnesota court did, prohibited the "stacking" (aggregation) of the \$15,000 coverages if Mr. Hague were to be injured or killed through the fault of an uninsured motorist.³ Under Wisconsin law at the time of the decision below, the "no stacking" clause was valid and enforceable; under Minnesota law it was not.

Mr. Hague died as the result of an accident in Wisconsin. He was a passenger on a motorcycle operated by his son when they were hit from behind by a car owned and operated by another Wisconsin resident. Their intended destination apparently had been Elderwood Heights, Wisconsin.⁴ Mr. Hague was taken to a hospital in Minnesota, but was dead on arrival.⁵ Neither Mr. Hague's son nor the driver of the other vehicle was insured.

After Mr. Hague's death, his widow moved to Minnesota where she was appointed personal representative of her deceased husband's estate. She then brought this action in Minnesota against Allstate, seeking declaratory relief permitting the stacking of the \$15,000 uninsured motorist coverages despite the "no stacking" clause in the contract. Allstate was doing business in Minnesota, as it was in all fifty states, so it was subject to the Minnesota court's in personam jurisdiction.⁶ There is no indication that Mrs. Hague moved to Minnesota simply to avoid Wisconsin's then-extant rule validating "no stacking" clauses. She married a Minnesotan and apparently settled in that state.

The Minnesota Supreme Court applied Minnesota law to invalidate the "no stacking" clause, allowing Mrs. Hague to collect \$45,000. Following Minnesota precedent,⁷ that court applied Professor Robert A. Leflar's choice-influencing considerations to resolve the choice-of-law issue. The considerations are (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's

3. Policy issued by Allstate Insurance Co. at 6 (copy on file in office of *Hofstra Law Review*), quoted in Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?*, 10 HOFSTRA L. REV. 17, 18 (1981). Professor Weintraub points out a plausible interpretation of the clause that would not have precluded stacking even under Wisconsin law, *id.* at 19-21, but we accept the Minnesota court's interpretation for purposes of determining the constitutionality of its choice of law.

4. See *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 44 (Minn. 1978).

5. Transcript of Oral Argument at 21, *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (statement of Mr. Lowenfeld).

6. This point was not disputed by the parties. 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."

7. The leading Minnesota case is *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973).

governmental interests; and (5) application of the better rule of law.⁸ The Minnesota court relied heavily on the fifth consideration in reaching its result.⁹

The question presented is whether Minnesota could constitutionally proceed as it did. The answer is not easy, in part because of our own imprecision in prior cases. On reflection, we think clarity of analysis will be promoted if we distinguish between the due process and the full faith and credit limits on choice of law, since each reflects different constitutional values that could be applied. In so doing, we accept the distinction made by our brother Stevens on the first hearing in this case,¹⁰ but we do not apply it as he did.

In the choice-of-law context, the due process clause¹¹ has been thought to reflect notions of fairness to the party resisting application of an unfavorable rule of law. The fairness test has commonly been formulated in terms of that party's expectations: Could the party reasonably have expected that the particular body of law (usually forum law) could be applied, or perhaps that some relevant event would occur in the particular state (usually the forum)?¹² All of our earlier opinions in this case recognize that constitutional considerations of fairness apply to choice of law,¹³ and we now reiterate that point. Nevertheless, as our judicial jurisdiction decisions demonstrate, the due process clause extends beyond protection against undue personal burdens: It also serves as a check on political and judicial power.¹⁴ In this respect, it embodies the widely shared belief that a political entity, acting through one of its governmental branches, exceeds its legitimate sphere of influence when it tries to control persons, events or relationships not tied to it by some relevant occurrence or effect within its territory.

This shared belief does not depend on individual parties' expectations, though it does reflect the expectations of society as a whole.

8. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282 (1966).

9. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 48-49 (Minn. 1978).

10. 449 U.S. at 320-32 (Stevens, J., concurring).

11. U.S. CONST. amend. XIV, § 1.

12. The same idea sometimes has been expressed as avoidance of undue surprise to the resisting party. See, e.g., R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 9.2A, at 505 (2d ed. 1980) (noting that surprise is not exclusive example of fairness test); Martin, *The Constitution and Legislative Jurisdiction*, 10 HOFSTRA L. REV. 133, 133-35 (1981).

13. *Allstate Ins. Co. v. Hague*, 449 U.S. at 308, 312-13; *id.* at 326 (Stevens, J., concurring); *id.* at 333 (Powell, J., dissenting).

14. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

It has, at times, been formulated as an aspect of federalism.¹⁵ This formulation is accurate in the limited sense that there would be no problem (beyond avoiding undue personal burdens) in noninternational situations if our nation were not carved into political entities with territorial boundaries. But the fundamental concern with preserving a workable federal system rests with other constitutional provisions,¹⁶ including the commerce,¹⁷ full faith and credit,¹⁸ and privileges and immunities clauses.¹⁹ Thus, the shared belief regarding the due process clause depends not so much on the needs of the federal system as on the conviction that it is presumptuous for a state, even more than it would be for an individual, to try to issue commands to all who might be within hearing distance. This conviction may be aroused when those commanded (or the events concerned) are in a foreign country, as in *Home Insurance Co. v. Dick*,²⁰ or in no country at all, and not just when they are under the federal umbrella by virtue of their presence in a sister state. And, it applies equally, if not more intensely, when the issue is choice of law rather than personal jurisdiction, since the assertion of authority affects persons' substantive rights and duties.²¹

We adhere to the view expressed in all of our earlier opinions that Minnesota did not defeat Allstate's reasonable expectations when it applied Minnesota law.²² Nevertheless, we hold that Minnesota overextended its power and thereby violated the due process clause.

When a state supplies the rule of law to settle a private contro-

15. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *McCluney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578, 582 (8th Cir.), *aff'd mem.*, 454 U.S. 1071 (1981); Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1589, 1591-92 (1978).

16. See generally Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112 (1981).

17. U.S. CONST. art. I, § 8.

18. U.S. CONST. art. IV, § 1.

19. U.S. CONST. art. IV, § 2.

20. 281 U.S. 397 (1930).

21. See Redish, *supra* note 16, at 1128-29, 1132-33; Reese, *The Hague Case: An Opportunity Lost*, 10 HOFSTRA L. REV. 195, 197, 201 (1981); Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 82-83, 87-88 (1978).

22. *Allstate Ins. Co. v. Hague*, 449 U.S. at 317-18; *id.* at 328 (Stevens, J., concurring); *id.* at 336 (Powell, J., dissenting); see Reese, *supra* note 21, at 197-98. It is plausible to argue that the choice of Minnesota law was unfair to Allstate even though the choice did not defeat its reasonable expectations, since Allstate derived no benefit from Minnesota in this transaction. See Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94, 103, 106-09 (1976). Nevertheless, we do not base our decision on this rationale.

versy, it is exercising state power. To do so legitimately, it must have within its territorial grasp some occurrence or relationship that its rule is designed to regulate.²³ Justice Brennan's plurality opinion on the first hearing in this case implicitly recognized this by identifying three "contacts" with Minnesota.²⁴ In the aggregate, these contacts might be thought to justify its assertion of state power. On reflection, however, we think they are insufficient for that purpose.

The issue facing the Minnesota court was the validity of a "no stacking" clause in an insurance contract issued in Wisconsin to a Wisconsin domiciliary. The accident occurred during an intrastate excursion in Wisconsin. Although Mrs. Hague's subsequent move to Minnesota probably gave that state an interest in applying its own law invalidating the "no stacking" clause,²⁵ it came too late.²⁶ Nothing remained of the contract except the duty to pay. The "no stacking" clause was beyond amendment or rescission by agreement of the parties to the contract, and it should equally be beyond amendment or rescission by legislative fiat of a state that became interested only after the duty to pay had accrued. To hold otherwise is simply to say that the rational desire to exercise power is a reason to legitimate its use.

That leaves two contacts: Allstate was doing business in Minnesota, and Mr. Hague was employed there, at all pertinent times. Our reconsideration convinces us, however, that these two contacts are irrelevant for due process purposes.

As some commentators have pointed out, if Allstate's business in Minnesota is a relevant contact for choice of Minnesota law, it must also be a relevant contact for choice of the law of all fifty states.²⁷ Due process limitations are not so indiscriminating. In ad-

23. See Kirgis, *supra* note 22, at 103, 105-06.

24. 449 U.S. at 313-20.

25. See Weinberg, *Conflicts Cases and the Problem of Relevant Time: A Response to the Hague Symposium*, 10 HOFSTRA L. REV. 1023, 1028 (1982).

26. John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936), and Home Ins. Co. v. Dick, 281 U.S. 397 (1930), both involved a post-occurrence change of residence to the forum state. In both cases, forum law benefited the new resident; in both cases, the change of residence was deemed constitutionally irrelevant. *Accord Hague*, 449 U.S. at 337 (Powell, J., dissenting).

27. E.g., Reese, *supra* note 21, at 198; 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, 106 (1981); Weintraub, *supra* note 3, at 29-30. In a distinguishable but relevant context, we have rejected the notion that the "debt" owed by a nationwide insurance company to its insured is "present" wherever the company does business, since it would thus be present in all fifty states and the District of Columbia. *Rush v. Savchuk*, 444 U.S. 320, 330 (1980).

dition, contrary to what was said in the previous plurality opinion,²⁸ we think it important that even though the New York reinsurers in the *Dick* case transacted business in the forum state (Texas),²⁹ the due process clause precluded Texas from applying its own law to invalidate a provision in the reinsured contract.³⁰ In the present case, as in *Dick*, the rights and obligations under the contract were created outside the forum state. Further, forum law in both cases was unfavorable to the petitioning insurance companies. The Texas court in *Dick* had jurisdiction—and thus had the opportunity to apply its own law—only because the reinsurers transacted business in Texas,³¹ precisely as Minnesota's opportunity in this case depended on Allstate's business in Minnesota. Since we did not treat the reinsurers' business in Texas as a relevant contact permitting choice of Texas law,³² neither will we treat Allstate's Minnesota business as a relevant contact in the absence of some connection between that Minnesota business and the insurance contract at issue.³³

Mr. Hague's employment in Minnesota is also irrelevant. He was not driving to or from work when the accident happened. Minnesota's public policy—to maximize benefits available to insureds injured or killed by uninsured motorists—is not designed to protect its work force. This is shown most clearly by the Minnesota Supreme Court's emphasis on Minnesota's interest in protecting Mrs. Hague as a post-accident Minnesota resident; the court mentioned Mr. Hague's employment only to argue that because he commuted to work, "the risk which was covered by the policy was located in Minnesota as well as Wisconsin."³⁴ Moreover, scholarly analysis shows that the Minnesota stacking rule is not employment-related.³⁵ Thus

28. 449 U.S. at 310 n.12.

29. *Home Ins. Co. v. Dick*, 15 S.W.2d 1028, 1029 (Tex. 1929).

30. 281 U.S. at 407-08.

31. The garnishment procedure used in *Dick* would not be permissible today as a means of obtaining jurisdiction over the original insurer. See *Rush v. Savchuk*, 444 U.S. 320 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

32. 281 U.S. at 408.

33. We realize that the clause at issue here was in an insurance contract issued (in Wisconsin) by Allstate, whereas the clause at issue in *Dick* was in an insurance contract issued (in Mexico) by a Mexican company and not by the reinsurers. The important point is not, however, whether the party doing business in the forum state issued the insurance contract, but whether (a) it had any relationship in that state with the insured, or perhaps with the beneficiary of the insurance, at any relevant time, or (b) the contract itself had any connection with the forum state.

34. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 47 (Minn. 1978).

35. Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315, 1343-47 (1981); see von Mehren & Trautman, *Constitu-*

Mr. Hague's Minnesota employment does not support Minnesota's attempt to apply its rule invalidating the "no stacking" provision in the insurance contract.

Since Minnesota's exercise of the power to supply its rule of law was not based on any relevant occurrence or relationship in Minnesota, it violated the due process clause. This being so, there is no need to decide whether Minnesota also violated the full faith and credit clause.

Reversed.

ONE JUSTICE, CONCURRING IN THE RESULT

I agree that the judgment below must be reversed, but I think its infirmity is more demonstrable under the full faith and credit clause than under the due process clause. Thus I would prefer to base our reversal solely on full faith and credit grounds.

The full faith and credit clause is the principal guardian of federal interests in the choice-of-law context.³⁶ In part, it imposes national uniformity when there are important reasons to apply a single body of law in determining the rights or liabilities of persons related to a particular transaction or entity.³⁷ But it also serves to correct serious distortions in the normal choice-of-law process.³⁸ In this latter respect, it preserves federal values by maintaining some sense of multistate order in those (fortunately rare) cases where a state appears to be manipulating choice-of-law rules to reach predetermined results without giving heed to the interests of other states.³⁹ This is to be distinguished, of course, from cases where a state simply errs in applying its choice-of-law rules.⁴⁰

The real significance of *John Hancock Mutual Life Insurance*

tional Control of Choice of Law: Some Reflections on Hague, 10 HOFSTRA L. REV. 35, 42-43 (1981).

36. See, e.g., Martin, *supra* note 12, at 136-40; Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149, 162 n.36 (1981). But see Reese, *supra* note 15, at 1587-91; Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59, 92-100 (1981); Weintraub, *supra* note 3, at 25-26.

37. See Kirgis, *supra* note 22, at 120; Sedler, *supra* note 36, at 92-100; von Mehren & Trautman, *supra* note 35, at 49, 53-56.

38. See Kirgis, *supra* note 22, at 120, 122; von Mehren & Trautman, *supra* note 35, at 49, 51-53.

39. See *infra* text accompanying notes 41-57.

40. See *Hague*, 449 U.S. at 332 (Stevens, J., concurring); cf. Weintraub, *supra* note 3, at 25 (distinguishing evaluation of the constitutional issue from evaluation of the Minnesota decision as a matter of normal conflicts law).

*Co. v. Yates*⁴¹ is not simply that the relationship of the forum state to the parties and the transaction was attenuated,⁴² but that the Georgia Supreme Court manipulated its normal choice-of-law approach to reach the desired outcome: choice of Georgia law. This it did by treating as “procedural”—and thus subject to Georgia’s permissive rule—the question whether a material misrepresentation in New York on an application for an insurance policy could be neutralized by a showing that the applicant orally gave the true facts to the agent.⁴³ Such an unprincipled choice of law subverts interstate legal order, in violation of the full faith and credit clause.

Although I am reluctant to accuse any state of manipulating its rules to reach desired outcomes, I must conclude that Minnesota has done so when it has been presented with choice-of-law issues in personal injury or death cases. Since it decided *Milkovich v. Saari*⁴⁴ in 1973, the Minnesota Supreme Court has used Professor Robert A. Leflar’s “choice-influencing considerations” as its choice-of-law method. As noted in the majority opinion, these considerations are (1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum’s governmental interests; and (5) application of the better rule of law.⁴⁵ Professor Leflar has made clear that these considerations should not result in an automatic preference for forum law, nor should they operate to favor “preferred parties” (as distinguished from preferred rules of law, under the last consideration).⁴⁶ Yet, the Minnesota Supreme Court, from the time it adopted the Leflar approach, has consistently chosen the plaintiff-favoring law in personal injury and death cases, selecting its own law whenever possible and the other state’s law on the rare occasions when Minnesota law would favor the defendant.

In *Milkovich*, the Minnesota Supreme Court applied Minnesota law to permit an Ontario automobile passenger to recover from a negligent Ontario host when they had an accident on a brief visit to Minnesota. Minnesota had no guest statute; Ontario did. In its next choice-of-law case, *Schwartz v. Consolidated Freightways Corp.*,⁴⁷

41. 299 U.S. 178 (1936).

42. *Hague*, 449 U.S. at 310 (plurality opinion).

43. 182 Ga. 213, 214, 185 S.E. 268, 269 (1936).

44. 295 Minn. 155, 203 N.W.2d 408 (1973).

45. Leflar, *supra* note 8, at 282.

46. *Id.* at 299, 303; Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1588 (1966).

47. 300 Minn. 487, 221 N.W.2d 665 (1974), *cert. denied*, 425 U.S. 959 (1976).

the Minnesota court applied the Minnesota comparative negligence rule to benefit a Minnesota plaintiff whose contributory negligence in an Indiana accident would have barred recovery under Indiana law. The defendants' only known contact with Minnesota was that they were licensed to do business there. Then, in *Myers v. Government Employees Insurance Co.*,⁴⁸ the Minnesota court found that the forum's governmental interests (Leflar's fourth consideration) would be advanced by combining Louisiana's direct action statute⁴⁹ with Minnesota's long statute of limitations⁵⁰ to give a Minnesota resident, injured in Louisiana, a remedy against the tortfeasor's insurance company. Next, in *Blamey v. Brown*,⁵¹ the court held that the Minnesota Dram Shop Act⁵² did not impose liability on the owner of a small Wisconsin bar for an intoxicated patron's negligence in Minnesota on his way home. Minnesota common law, however, came to the Minnesota plaintiff's rescue despite the bar owner's nonliability under Wisconsin law. In *Follese v. Eastern Airlines*,⁵³ a flight attendant hired outside Minnesota and based in Florida was allowed to obtain Minnesota workers' compensation benefits for injuries incurred outside Minnesota during scheduled flights.⁵⁴ When injured, she was a Florida resident, although she may have retained her pre-existing Minnesota domicile, to which she returned after she left her employment.⁵⁵ Finally, in *Hime v. State Farm Fire & Casualty Co.*,⁵⁶ the Minnesota Supreme Court used Minnesota law to invalidate an intra-family immunity clause in an insurance policy issued in Florida to a Floridian whose negligence in Minnesota was partly responsible for an injury to his spouse. Other Minnesota decisions with interstate fact situations have similarly interpreted Minnesota statutes generously for plaintiffs.⁵⁷

48. 302 Minn. 359, 225 N.W.2d 238 (1974).

49. LA. REV. STAT. ANN. tit. 22 § 655 (West 1978).

50. MINN. STAT. ANN. § 541.14 (West 1947) (repealed 1977).

51. 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980).

52. MINN. STAT. ANN. § 340.95 (West Supp. 1981).

53. 271 N.W.2d 824 (Minn. 1978).

54. Benefits were denied in connection with one accident that occurred after the Minnesota compensation statute was amended to preclude its application to out-of-state injuries incurred by a worker neither hired nor based in the state. *Id.* at 832-33.

55. *Id.* at 830-31.

56. 284 N.W.2d 829 (Minn. 1979), *cert. denied*, 444 U.S. 1032 (1980).

57. See *Petty v. Allstate Ins. Co.*, 290 N.W.2d 763 (Minn. 1980); *Ewers v. Thunderbird Aviation, Inc.*, 289 N.W.2d 94 (Minn. 1979). See generally *Davies, A Legislator's Look at Hague and Choice of Law*, 10 HOFSTRA L. REV. 171 (1981) (pointing out Minnesota's consistent preference for application of its own rules of law).

Unless one argues that, under Professor Leflar's fifth consideration, the rule favoring the plaintiff is always the better rule of law—an argument neither Professor Leflar nor the Minnesota Supreme Court makes outright—it is difficult to characterize Minnesota's application of the Leflar approach as anything other than manipulative. It is true that individual examination of the case before us (or any other individual case in the *Milkovich* line) does not easily reveal choice-of-law manipulation. But we should not blind ourselves to the larger picture. This Court may legitimately ask whether the cumulative effect of a state court's decisions over a period of time would impair federal interests, even though any single decision would not. That is precisely what was done in another context in *Zschernig v. Miller*,⁵⁸ where the Court struck down an Oregon probate law because the Oregon courts had applied it over the years in ways that intruded upon the federal government's effective conduct of the nation's foreign policy. In that case, as in the present dispute, the occasion was and is appropriate to put an end to state obstruction of federal goals, even though the obstruction in the case at hand, considered alone, is not major.⁵⁹

Since I believe Minnesota has violated the full faith and credit clause, I would not reach the due process issue.

THREE JUSTICES, DISSENTING

For purposes of argument, we accept the proposition that the due process and full faith and credit clauses provide separate tests for the constitutionality of state choice of law. We think Minnesota violated neither clause in this case.

The majority concedes that Minnesota did not defeat Allstate's expectations.⁶⁰ That should have ended the due process inquiry.⁶¹ Instead, the majority goes on to apply a due process "power" test, and determines that Minnesota exceeded appropriate limits upon its power to subject Allstate to its substantive rule of law. There is,

58. 389 U.S. 429 (1968).

59. *Zschernig* struck down the Oregon statute even though the Justice Department had disclaimed any undue interference with the conduct of American foreign relations in the circumstances of that particular case. *Id.* at 434. In *Rush v. Savchuk*, 444 U.S. 320, 332 (1980), this Court considered the subtle shift from focus on the defendant to focus on the plaintiff in a string of *quasi in rem* jurisdiction cases; we said that "[s]uch an approach is forbidden by *International Shoe* and its progeny." If we could look at trends in *Rush*, and not just at the case then before us, there is no reason to refrain from doing so here.

60. See *supra* text accompanying note 22.

61. See Martin, *supra* note 12, at 133-36.

however, no assertion that Minnesota lacked the power to hear the case.⁶²

If the exertion of state power is a due process concern at all, it should be so only when the issue relates to the exercise of a court's jurisdiction over a defendant. When a state court attempts to exercise its jurisdiction, it is exerting power over the parties—power that may be enforced, for example, by use of the contempt process or by attachment and execution against the parties' property. It is this tangible exertion of power that has concerned this Court in cases like *World-Wide Volkswagen Corp. v. Woodson*⁶³ and *Hanson v. Denckla*.⁶⁴

Absent a showing of unfair surprise to a party, we have not heretofore concerned ourselves with the power of a state under the due process clause to apply its own law in any case lacking an international dimension, once a court has legitimately asserted personal jurisdiction over the parties. The reason, we submit, is that any necessary limit upon the power of a state to apply its own law, apart from limits imposed by notions of fairness to individual parties, is based on the needs of federalism embodied in the full faith and credit clause. The sole exception, if *Home Insurance Co. v. Dick*⁶⁵ is still good law, is in cases where the only "state" involved other than the forum is a foreign nation. Thus, in the absence of some convincing demonstration of unfairness in this case, there is no due process reason to strike down Minnesota's application of its own law.⁶⁶

The concurring opinion attempts to identify a federal interest in avoiding manipulation of choice-of-law rules, and finds this interest expressed in the full faith and credit clause.⁶⁷ The opinion concedes, however, that manipulation is to be distinguished from simple error in applying choice-of-law rules.⁶⁸ We think Minnesota committed a simple error, at most.⁶⁹

62. See *supra* text accompanying note 6.

63. 444 U.S. 286 (1980).

64. 357 U.S. 235 (1958).

65. 281 U.S. 397 (1930).

66. The majority suggests that application of Minnesota law may have been unfair in this case, but the point is not developed. See *supra* note 22. We simply note that Allstate could have foreseen the application of Minnesota law.

67. See *supra* text accompanying notes 36-39.

68. See *supra* text accompanying note 40.

69. Professor Leflar, whose methodology Minnesota employs, has examined the result in this case and does not accuse the Minnesota court of manipulation. He implies that the choice of Minnesota law may have been erroneous, but that is not tantamount to saying it was manipulative. If he does not think there was manipulation, we fail to see how our concurring col-

It is said, however, that this is just one of a series of Minnesota choice-of-law decisions favoring plaintiffs, and that the cumulative effect of these decisions amounts to a full faith and credit violation.⁷⁰ Even if we assume *arguendo* that it is appropriate to rely on cumulative effect rather than limiting our analysis to the case at hand,⁷¹ one must recognize that the choice-of-law method espoused by Minnesota places considerable emphasis on applying "the better rule of law."⁷² The modern trend in personal injury and death cases, whether or not they involve choice-of-law issues, is to spread rather than concentrate the risk.⁷³ That implies, of course, that plaintiff-oriented rules are likely to be regarded as "better;" Minnesota should not, therefore, be accused of manipulation if it chooses those rules in multistate personal injury and death cases.

Since there is no other plausible reason to think that Minnesota violated either the due process or the full faith and credit clause, the judgment below should be affirmed.

THE WISHFUL THINKER'S CONCLUSION

Persons should not be subjected to the adverse rules of a state with which they have no contact or affiliation relevant to the particular rules involved. This is the most persuasive reading of the *Dick* case, and it should be reaffirmed. The *Dick* Court employed the due process clause to reach this result, using the clause not as a matter of federalism nor even of international comity, but as a means of reining in a political entity (Texas) that had used its power excessively. Minnesota similarly transgressed in *Hague* and should have suffered the same fate. To use the due process clause to reach this result would strain neither the language nor the purpose of the clause, since it could hardly be "due process" for a state to dictate to all it can catch how they should behave.⁷⁴

league could think otherwise. See Leflar, *Choice of Law: States' Rights*, 10 HOFSTRA L. REV. 203, 204 (1981).

70. See *supra* text accompanying notes 44-59.

71. We note that *Zschernig v. Miller*, 389 U.S. 429 (1968), upon which the concurring opinion relies, dealt with the delicate area of state interference with the federal foreign affairs power, and did not involve the full faith and credit clause.

72. See Leflar, *supra* note 8, at 295-304; Leflar, *supra* note 46, at 1587-88.

73. See generally *Symposium, Products Liability: Economic Analysis and the Law*, 38 U. CHI. L. REV. 1 (1970). In the tort area, "substantive rules have shown a continual development in favor of recovery." R. WEINTRAUB, *supra* note 12, § 6.4, at 271 (footnote omitted).

74. I am sensitive to Professor Redish's criticism of the way the due process clause has been used in personal jurisdiction cases. See Redish, *supra* note 16, *passim*. I agree that it is not an appropriate tool for requiring states to respect federal interests, but its primary focus on

The hypothetical concurring opinion, though plausible, is less convincing than the majority opinion. As the dissent points out, Professor Leflar's methodology virtually cries out for the choice of plaintiff-favoring rules in personal injury and death cases. One might say that the Leflar approach openly invites manipulation,⁷⁵ but one must ask whether that manipulation offends federal interests if it does not inevitably result in choice of forum law over all other states' law. In Minnesota there is a strong forum preference,⁷⁶ but an even stronger plaintiff preference. The latter, in itself, probably should not be a full faith and credit concern.

The trouble with the dissent is that it takes too narrow a view of the due process clause. We do need some check on the states' rulemaking power even when other states' interests are not seriously impaired,⁷⁷ and the due process clause provides the appropriate means. Minnesota, and its sister states, should be given that message.

the interests of persons does make this clause an appropriate tool for restraining states' attempts to dictate rules of law for persons to obey.

75. Cf. Shreve, *In Search of a Choice-of-Law Reviewing Standard—Reflections on Allstate Insurance Co. v. Hague*, 66 MINN. L. REV. 327, 342 (1982) (Leflar methodology can be manipulated to produce the same results as interest analysis).

76. See Davies, *supra* note 57, at 171-82.

77. See *supra* notes 47-57, and accompanying text.

