CONSTITUTIONAL LAW—CONFLICT OF LAWS—CONTACT-INTEREST APPROACH TO CONSTITUTIONAL LIMITATIONS ON STATE CHOICE OF LAW—*Allstate Insurance Co. v. Hague*, 101 S. Ct. 633 (1981).

Choice-of-law decisions arise whenever a lawsuit involving multistate facts is before a court. After the jurisdictional threshold has been met, the court must determine which state's law should govern the rights and liabilities of the parties. Generally, the forum court must decide whether to apply its own state's law or the law of another state, though a disinterested forum must choose between the laws of two foreign states.[1] While jurisdictional doctrines are predominantly of constitutional origin—due process being the linchpin of jurisdictional theory—choice-of-law theory is an individual state matter. Each state is free to adopt whatever choice-of-law methodology it chooses. It is even said that there is no federal law of the conflict of laws;[2] however, this is a half-truth. Every choice-of-law decision, whatever its degree of sophistication, must be made in compliance with the minimum standards required by the constitution.[3] Despite the diversity of conflicts methods employed by the states,[4] the ideal of uniformity in conflicts law is approached by the provision for a constitutional floor for every choice-of-law decision. The topic of constitutional limitations on state choice-of-law, however, is fraught with ambiguities and doubts concerning some of its most basic assumptions. The recent decision of the Supreme Court in *Allstate Insurance Co. v. Hague*[5] has brought a host of these internal problems to the fore.

Lavina and Ralph Hague were residents of Hager City, Wisconsin, when Ralph was fatally injured in an automobile accident.[6] Mr. Hague was a passenger on his son's motorcycle[7] when it was struck

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[1] *See, e.g.*, Long v. Pan American World Airways, 16 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965).

[2] *Cf.* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) (federal court to apply conflicts law of forum state where jurisdiction based upon diversity of citizenship).

[3] *See generally* Weintraub, *Due Process and Full Faith and Credit Limitations on States Choice of Law*, 44 IOWA L. REV. 449 (1959).

[4] For examples of the many "modern theories" of choice of law, see R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 4-7 (1971).

[5] 101 S. Ct. 633 (1981). *See* Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980). Professor Martin's article on *Hague* was written just after the Supreme Court granted certiorari and evidences the keen interest that the case has generated among commentators.

[6] 101 S. Ct. at 636.

[7] Hague v. Allstate Ins. Co., _____ Minn. _____ , 289 N.W.2d 43, 44 (1978), *aff'd on rehearing*, 289 N.W.2d 50 (1979), *aff'd*, 101 S. Ct. 633 (1981).

from behind by an automobile operated by another Wisconsin resident.[8] The accident occurred in Pierce County, Wisconsin, which lies adjacent to Red Wing, Minnesota.[9] Although Ralph Hague had been employed in Red Wing for the last fifteen years,[10] the accident did not occur in connection with his daily commute to Minnesota.[11] The trip began and was intended to end in Wisconsin.

Neither Hague's son nor the operator of the other vehicle involved in the accident carried valid automobile liability insurance.[12] Hague, however, held a policy with Allstate Insurance Company.[13] The policy, which was executed in Wisconsin,[14] covered three automobiles owned by Mr. Hague.[15] Separate premiums were paid for each automobile.[16] The policy also contained an uninsured motorist clause providing for a maximum of $15,000 coverage for each vehicle.[17] An additional premium was paid for each uninsured provision.[18]

After her husband's death, Lavina Hague moved first to Red Wing and then, upon her remarriage, to Savage, Minnesota.[19] She was later appointed representative of her late husband's estate by a Minnesota probate court.[20] She then brought an action for declaratory relief in Minnesota district court praying that the defendant, Allstate, stack[21] each of the separate uninsured motorist coverages to afford her a cumulative coverage of $45,000. Minnesota law unequivocally favored the practice of "stacking."[22] Allstate objected to the

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[8] 101 S. Ct. at 636. Hague's son, the operator of the motorcycle, was also a resident of Wisconsin. *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 641.

[12] *Id.* at 636.

[13] *Id.*

[14] *Id.* Although the policy was delivered in Wisconsin, Allstate signed the policy at its headquarters in Northbrook, Illinois. *Id.* at 641 n.21.

[15] *Id.* at 636.

[16] *Id.* at 636 n.3.

[17] *Id.* at 636.

[18] *Id.* at 636 n.3.

[19] *Id.* at 636.

[20] *Id.* The Supreme Court of Minnesota denied the defendant's *forum non conveniens* motion on the ground, *inter alia*, that "there [was] no showing that a personal representative [had been] appointed in Wisconsin." Hague v. Allstate Ins. Co., ____ Minn. ____, 289 N.W.2d 43, 46 (1979), *aff'd on rehearing*, 289 N.W.2d 50 (1979), *aff'd*, 101 S. Ct. 633 (1981).

[21] "The 'stacking' rule provides that all of the uninsured motorist coverage purchased by an insured party may be aggregated, or 'stacked,' to create a fund available to provide a recovery for a single accident." 101 S. Ct. at 648 n.18 (Stewart, J., concurring).

[22] *Id.* at 636. Minnesota's stacking policy was first enunciated in Van Tassel v. Horace Mann Mut. Ins. Co., 296 Minn. 181, 207 N.W.2d 348 (1973).

application of Minnesota law on the ground that all the events and persons involved in the litigation pointed to the application of Wisconsin law:[23] The accident occurred in Wisconsin, the insurance contract was executed in Wisconsin, and all the parties were residents of Wisconsin at the time of the accident.[24] Since Wisconsin law favored minimum recovery for the victims of uninsured motorists,[25] the defendant asserted that stacking should not be allowed.

The Minnesota district court rejected the defendant's argument.[26] The court found Wisconsin's position on the issue of stacking " 'inimical to the public policy of Minnesota' " and accordingly granted summary judgment for the plaintiff.[27] The Minnesota Supreme Court affirmed in *Hague v. Allstate Insurance Co.*[28] Finding there to be a conflict of laws,[29] the high court of Minnesota applied Professor Leflar's "choice influencing" approach to resolving such conflicts and upheld the choice of forum law as the "better rule of law."[30] Upon

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[23] 101 S. Ct. at 636.

[24] *Id.*

[25] For Wisconsin's anti-stacking policy, see Nelson v. Employers Mut. Cas. Co., 63 Wis. 2d 558, 217 N.W.2d 670 (1974) (construing WIS. STAT. § 204.30(5)(a) (1967)). In *Hague*, the respondent, Lavina Hague, argued unsuccessfully that the case presented a "false conflict," *see generally* R. LEFLAR, AMERICAN CONFLICTS LAW 188 (3d ed. 1977), on the ground that the status of Wisconsin's stacking policy was unclear because the statute construed in *Nelson* had been amended. Brief for the Respondent at 305, Allstate Ins. Co. v. Hague, 101 S. Ct. 633 (1981). The amended statute included the following provision:

> The uninsured motorist bodily injury coverage limits provided in an automobile liability or motor vehicle liability policy of insurance as required in this subsection shall not be reduced by the terms thereof to provide the insured with less protection than would be afforded him if he were injured by a motorist insured under an automobile or motor vehicle liability policy of insurance containing limits provided in this subsection.

WIS. STAT. § 204.30(5)(a) (1973). The *Nelson* court did not rule on the effect of this amended provision. *See* 63 Wis.2d at 569, 217 N.W.2d at 675. Thus, it was arguable that the as yet uninterpreted amended Wisconsin statute was potentially in harmony with Minnesota law. Neither the Supreme Court of Minnesota, _____ Minn. _____, 289 N.W.2d 43, 48 (1978), nor the Supreme Court of the United States, 101 S. Ct. at 636 n.6, was persuaded that the respondent's "false conflict" argument was valid. Moreover, the Supreme Court specifically indicated that only the constitutionality of a state's choice-of-law decision and not the propriety of the state's conflicts analysis in itself was of concern to the Court. 101 S. Ct. at 636 n.6, 637. *See also id.* at 650 (Stewart, J., concurring); note 82 *infra*.

[26] 101 S. Ct. at 636.

[27] *Id.* A state is not required to apply the law of a sister state if the foreign law contravenes the forum's public policy. *See, e.g.*, Nevada v. Hall, 440 U.S. 410, 424 (1979).

[28] _____ Minn. _____, 289 N.W.2d 43 (1978), *aff'd on rehearing*, 289 N.W.2d 50 (1979), *aff'd*, 101 S. Ct. 633 (1981).

[29] *Id.* at _____, 289 N.W.2d at 47-48.

[30] *Id.* at _____, 289 N.W.2d at 49. *See generally* Leflar, *Choice-Influencing Considerations in Conflict Law*, 41 N.Y.U. L. REV. 267, 298 (1966), and Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584 (1966). Minnesota adopted Professor Leflar's approach in Milkovich v. Saari, 295 Minn. 155, 293 N.W.2d 408 (1973). For other

rehearing, the supreme court affirmed its earlier decision, dismissing the defendant's contention that Minnesota's exercise of jurisdiction violated the due process clause.[31] The Supreme Court of the United States granted certiorari[32] to determine whether Minnesota's choice of *lex fori*[33] violated either the due process clause[34] or the full faith and credit clause.[35]

On certiorari, the Supreme Court of the United States affirmed.[36] Justice Brennan, writing for a plurality of the Court,[37] held that Minnesota's choice of *lex fori* was constitutionally sound because that state had interests[38] in the litigation arising from the aggregate of

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jurisdictions that have adopted the approach, see Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Conklin v. Horner, 38 Wis.2d 468, 157 N.W.2d 579 (1968). For criticism of the "better law" approach, see Morris, *Law and Reason Triumphant or: How Not to Review a Restatement*, 21 AM. J. COMP. L. 322, 324 (1973).

[31] Hague v. Allstate Ins. Co., _____ Minn. _____ , 289 N.W.2d 50 (1979).

[32] Allstate Ins. Co. v. Hague, 444 U.S. 1070 (1980).

[33] The term "*lex fori*"—the law of the forum—indicates the application of the law of the jurisdiction where relief is sought. BLACK'S LAW DICTIONARY 819 (5th ed. 1979). For a discussion of the meaning of "law" in the choice-of-law context, see Weintraub, *supra* note 3, at 462-68 (procedural versus substantive categorization of "law").

[34] The due process clause of the fourteenth amendment provides in part that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[35] The full faith and credit clause is embodied in U.S. CONST. art. IV, § 1, which provides in full: "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." 28 U.S.C. § 1738 (1976) provides in part:

> Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

[36] 101 S. Ct. at 644.

[37] Justice Brennan was joined by Justices White, Marshall, and Blackmun. *Id.* at 635. Justice Stevens concurred in the judgment. *Id.* at 644 (Stevens, J., concurring). Justice Powell wrote a dissenting opinion in which he was joined by the Chief Justice and Justice Rehnquist. *Id.* at 650 (Powell, J., dissenting). Justice Stewart took no part in the consideration of the case. *Id.* at 644.

[38] The term "interests" as used in the constitutional sense refers to the government's stake in the outcome of the litigation before it. *See, e.g.*, Pacific Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939). The constitutional sense—which is broad and connotative—is to be distinguished from the use of the term in the choice-of-law context. Thus, "*interest*-analysis" refers to a specific methodology for making choice-of-law decisions. *See generally* Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 U.C.L.A. L. REV. 181 (1977). As such it is one of many conceptual models invented for that purpose. *See generally* R. CRAMTON, B. CURRIE & H. KAY, CONFLICT OF LAWS (2d ed. 1975). It is a mistake to equate the constitutional sense of "state interests" with "interest-analysis." Whatever affinities the reader may perceive between the two must not have the effect of blurring their divergent philosophical orientations.

contacts it had with the parties and the occurrence.[39] Hence, application of forum law was neither arbitrary nor fundamentally unfair.[40] Regardless of the method used by Minnesota in its choice-of-law decision,[41] that choice did not exceed constitutional limitations under either the due process clause or the full faith and credit clause.[42]

Justice Brennan stated that scrutiny of state choice-of-law decisions begins with an examination of the contacts that the state whose law was applied had with the parties and occurrences related to the litigation.[43] Such an examination satisfies both due process and full faith and credit requirements.[44] Invalidation of a state's choice of forum law is mandated only where there is neither a significant contact nor a significant aggregation of contacts existing between the state and the underlying litigation.[45] Absent such significant contacts a state does not have interests in the litigation sufficient to allow the application of its law.

In a brief outline of major precedents, Justice Brennan indicated the relation of *Hague* to both invalidating and validating cases. In the former category, *Home Insurance Co. v. Dick*[46] and *John Hancock Mutual Life Insurance v. Yates*[47] held, respectively, that neither nominal residence nor postoccurrence change of residence qualified as a significant contact between the state and the underlying litigation. No state interests were called into play by virtue of such contacts. Justice Brennan distinguished the holdings of both *Dick* and *Yates*, contending that in each case the choice of *lex fori* "rested exclusively on the presence of *one* nonsignificant forum contact,"[48] which, *standing alone*, was insufficient to warrant the selection of forum law.[49] By contrast, *Hague* involved a number of state contacts.

In the category of cases which have validated the choice of *lex fori*, Justice Brennan likened *Hague* to three cases. In *Alaska Packers Association v. Industrial Accident Commission*,[50] the plaintiff, who suffered an employment-related injury in Alaska, was permitted to recover under California's workmen's compensation statute on the

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[39] 101 S. Ct. at 644.
[40] *Id.*
[41] *Id.* at 637.
[42] *Id.* at 644.
[43] *Id.* at 637-38, 637 n.10.
[44] *Id.*
[45] *Id.* at 639. *See generally* Weintraub, *supra* note 3, at 455-56.
[46] 281 U.S. 397 (1930).
[47] 299 U.S. 178 (1936).
[48] 101 S. Ct. at 638 (emphasis added).
[49] *Id.* at 639.
[50] 294 U.S. 532 (1935).

basis of having executed an employment contract in California, the forum state. In *Cardillo v. Liberty Mutual Insurance Co.*,[51] a widow recovered under the forum state's workmen's compensation statute where her decedent husband had been injured in the course of his commute from his place of employment in the forum, despite the fact that the injury occurred outside the forum. Finally, in *Clay v. Sun Insurance Office, Ltd.*,[52] the Court allowed the plaintiff to recover under a property loss insurance policy where the policy provided for nationwide coverage, the plaintiff had been a resident of the forum state prior to the loss, the loss occurred in the forum, and the defendant insurance company was present and doing business in the forum state. Although no unified theory of constitutional scrutiny had been articulated in the cases cited by the Court, an attempt was made to organize their several holdings in support of the proposition that due process and full faith and credit require that the state whose law is to be applied have interests in the litigation on the basis of having a significant contact or a significant aggregation of contacts with the parties and the occurrence.[53]

Justice Brennan found three contacts prevailing between Minnesota, the parties, and the occurrence: The decedent had been a long-standing member of Minnesota's workforce;[54] the defendant was at all times present and doing business in Minnesota;[55] and, the plaintiff had become a resident of Minnesota prior to the initiation of the litigation.[56] The Court held that in the aggregate these contacts created state interests sufficient to support the selection of forum law.[57] The Court emphasized that it was upholding Minnesota's choice-of-law decision strictly on the basis of the *aggregate* of the contacts found.[58]

The first contact—the decedent's former employment status within the forum state—called forth Minnesota's police power responsibilities with respect to those employed within the state.[59] Employment status was held to be an important contact though admittedly

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[51] 330 U.S. 469 (1947).

[52] 377 U.S. 179 (1964).

[53] 101 S. Ct. at 640.

[54] *Id.*

[55] *Id.* at 642.

[56] *Id.* at 643.

[57] *Id.* at 640.

[58] *Id.* at 644 & n.29. "We express no view whether the first two contacts, either together or separately, would have sufficed to sustain the choice of Minnesota law made by the Minnesota Supreme Court." *Id.* at 644 n.29.

[59] *Id.* at 640.

less substantial than resident status.[60] An employee may avail himself of the services, amenities, and facilities of a state.[61] The state of employment is also concerned with the well-being and safety of commuters like Mr. Hague.[62] Finally, despite the fact that Mr. Hague's death did not create the same state interest that would have been created by an injury, it affected Minnesota's interest "more acutely" by extending it to the vindication of the rights of his estate.[63] Although the Court offered no explanation of Minnesota's interest in the estate of a nonresident employee, it did assert that Ralph Hague's residence in Wisconsin did not compel the application of Wisconsin law.[64]

The second contact—Allstate's corporate presence in Minnesota—implicated the state's interest in the regulation of the insurer's obligations, particularly as they affected a forum-appointed executrix who was also a forum resident.[65] Somewhat obliquely, the Court included Ralph Hague, as a longstanding member of Minnesota's workforce, within this protected class.[66] Furthermore, the selection of Minnesota law was not fundamentally unfair to Allstate because as

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[60] *Id.* at 640-41.

[61] *Id.* at 641.

[62] *Id.* (citing Cardillo, 330 U.S. at 475-76).

[63] 101 S. Ct. at 641.

[64] *Id.*

[65] *Id.* at 642-43. The Court relied upon Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943) (insurance of risks located within forum state), which stated that a state's "interest may be measured by highly realistic considerations such as the protection of the citizen insured or the protection of the state from the incidents of loss." *Id.* at 316.

[66] 101 S. Ct. at 643. The Court's statement reads in full: "Moreover, Allstate's presence in Minnesota gave Minnesota an interest in regulating the company's insurance obligations insofar as they *affected both a Minnesota resident and court appointed representative—respondent—and a long standing member of Minnesota's workforce—Mr. Hague.*" *Id.* (emphasis added).

Mr. Hague's status as a member of Minnesota's workforce ceased upon his death. But the Court appeared to imply that Minnesota *continues* to have interests in Mr. Hague based upon his employment status even after his death. The Court categorically segregated Minnesota's regulatory interests as to each party and on the basis of each party's distinct status. But could it be said that Minnesota had interests *simultaneously* in the plaintiff and the decedent? Its interest in Mrs. Hague as resident and executrix did not arise until its interest in Mr. Hague as a nonresident employee had ceased. In fact, Mr. Hague's death was the occasion for if not the cause of Mrs. Hague's assumption of the role of executrix of his estate and her status as resident of Minnesota. Thus, if the Court meant to derive state interests from the respective status' of the plaintiff and the decedent, then the temporal and logical gap between those status' seems to render the putative interests contradictory. But outside the incongruity of the respective status' of the parties, it would follow that given a state interest in nonresident employees the state could argue that it consequently has an interest in the vindication of the rights of the estate of such a deceased employee. *See id.* at 641.

a consequence of doing business in Minnesota, Allstate should have known that it could be sued in the courts of that state.[67]

The third contact—the plaintiff's pre-litigation change of residence into the forum—although an inadequate contact in itself,[68] became relevant when coupled with the fact of Mrs. Hague's appointment as executrix of her late husband's estate.[69] Minnesota had a vital interest in the administration of Ralph Hague's estate. Also, given the possibility that Mrs. Hague could become a public charge, Minnesota had an interest in her recovery.[70] The Court viewed the plaintiff's post-occurrence residence in the forum state as "bona fide and not motivated by litigation considerations."[71]

In summary, Justice Brennan concluded that on the basis of Minnesota's contacts with the parties and the accident, and the resulting state interests, the application of Minnesota law to this litigation "was neither arbitrary nor fundamentally unfair."[72] The aggregate of contacts found in the context of *Hague* assured that Minnesota's application of its own law was not unconstitutional.[73]

Justice Stevens, concurring in the judgment, agreed that the full faith and credit clause did not compel Minnesota to apply the law of Wisconsin to this case.[74] The full faith and credit clause protects the cardinal virtue of the federal system: national unity.[75] As such it requires a forum to respect the legitimate interests of a sister state by applying the sister state's law to a matter in which it has a stake.[76]

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[67] *Id.* (citing Clay v. Sun Ins. Office, Ltd. (Clay I), 363 U.S. 207, 221 (1960) (Black, J., dissenting)).

[68] 101 S. Ct. at 643-44. *See* John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936).

[69] 101 S. Ct. at 643.

[70] *Id.* at 644.

[71] *Id.* at 643 n.28. Thus, the danger of forum-shopping was not presented in this case. *Id.* at 643 & n.28. *Contra, id.* at 653 (Powell, J., dissenting).

[72] *Id.* at 644.

[73] *Id.*

[74] *Id.* at 647 (Stevens, J., concurring).

[75] *Id.* at 645 (Stevens, J., concurring). *See* Thomas v. Washington Gas Light Co., 100 S. Ct. 2647 (1980); Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935); R. LEFLAR, *supra* note 25, § 73, at 143; Sumner, *The Full-Faith-and-Credit-Clause—Its History and Purpose*, 34 OR. L. REV. 224, 242 (1955); Weintraub, *supra* note 3, at 477.

[76] 101 S. Ct. at 644 (Stevens, J., concurring). Of course, full faith and credit is not an inflexible requirement. Thus, an oft-quoted passage reads:

> A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.

Alaska Packers Ass'n, 294 U.S. at 547. As a sovereign in its own right the forum would not be required "to apply another State's law in violation of its own legitimate public policy." Nevada v. Hall, 440 U.S. 410, 422 (1979).

Yet Justice Stevens found that Wisconsin simply had no interest in an adjudication of the parties' rights under this contract because the parties had not relied upon Wisconsin law at the time of contracting.[77] All of the surrounding factors—the lack of a choice-of-law clause,[78] the nature of the policy,[79] the broad geographical coverage afforded under the contract[80]—signified that there was no justification for either party to expect that Wisconsin law would govern a dispute arising out of the contract.[81] Although Minnesota's decision was "plainly unsound as a matter of normal conflicts law,"[82] it did not threaten the sovereignty of Wisconsin.[83]

Thus, absent a foreign interest in the litigation, Minnesota could apply its own law without overreaching.[84] Furthermore, Justice

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[77] 101 S. Ct. at 646 (Stevens, J., concurring). Justice Stevens seemed to recognize the anomaly of basing the full faith and credit analysis—its object being the preservation of national unity—upon an analysis of the parties' expectations—the traditional due process concern. *See id.* at 646 n.11. He cited *Yates* to demonstrate the concern for the justifiable expectations of contracting parties in a full faith and credit context. *Id.* at 646 n.11. *Cf.* Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1233 (1946) (describing *Yates* as the Court's "most ambitious application of the full faith and credit clause").

[78] 101 S. Ct. at 646 (Stevens, J., concurring). The contracting parties in this case failed to covenant for either the application of a particular state's law or for a particular rule of substantive law. *Id.* But such covenants are not always dispositive. *Compare* Home Ins. Co. v. Dick, 281 U.S. 397, 403-04 (1930) (parties' expectations under contract provisions upheld) *with* Clay v. Sun Ins. Office, Ltd., 377 U.S. at 181-82 (choice of *lex fori* upheld despite contractual provision to contrary). *See also* 101 S. Ct. at 648-49 nn.20 & 23 (Stevens, J., concurring).

[79] 101 S. Ct. at 646 n.11 (Stevens, J., concurring). Justice Stevens noted that while the law of the place of death should not figure into the interpretation of a life insurance contract, the law of the *locus delicti* may very well be relevant to the interpretation of a liability policy. *Id. See generally* C. CARNAHAN, CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS, § 15, at 51-52, § 47, at 264-65, 267-68, § 60, at 325-27 (2d ed. 1958). Thus, although Minnesota was not the *locus delicti*, the expectation that it could have been, formed at the time of contracting, is enough to support the application of Minnesota law as a matter of fairness. *See* note 92 *infra* and accompanying text.

[80] 101 S. Ct. at 646 (Stevens, J., concurring). *Cf.* Clay v. Sun Ins. Office, Ltd., 377 U.S. at 181 (ambulatory nature of contract dispositive factor even though contract contained provision, valid in place of making, which would have disallowed suit in forum if given effect).

[81] 101 S. Ct. 646 & n.11 (Stevens, J., concurring).

[82] *Id.* at 646. "Both the execution of the insurance contract and the accident giving rise to the litigation took place in Wisconsin. Moreover, when both of those events occurred the plaintiff, the decedent, and the operators of both vehicles were all residents of Wisconsin." *Id.* It appears that this statement, which lacks mention of any particular choice-of-law theory, was apparently intended to show that the major contacts in the case pointed to the application of Wisconsin law under almost any theory. Additionally, the quoted statement lends support to the distinction between interests for choice-of-law purposes and interests for constitutional purposes. *See* note 38 *supra*.

[83] "[W]hile Wisconsin may have an interest in ensuring that contracts formed in Wisconsin in reliance upon Wisconsin law are interpreted in accordance with that law, that interest is not implicated in this case." 101 S. Ct. at 646 (Stevens, J., concurring).

[84] *Id.* at 647 (Stevens, J., concurring). *Cf.* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (due process restrictions upon exercise of jurisdiction). In *World-Wide*, the

Stevens held that the absence of a threat to another sovereign obviated the need to examine the nature of Minnesota's own interests in the case for full faith and credit purposes.[85]

In a separate analysis,[86] Justice Stevens held that Minnesota's choice of *lex fori* was also permissible as a matter of due process.[87] In contrast to the full faith and credit concern for national unity, the due process clause protects the rights of the litigants by insuring that their justifiable expectations are not frustrated by the choice of *lex fori*.[88] Only the expectations formed at the time of contracting are relevant to this inquiry.[89] As noted above, the factors surrounding the contract revealed a distinct lack of expectations regarding the applicable law.[90] In addition, the defendant Allstate was presumed to know that stacking was permitted by a majority of states.[91] And inasmuch as the loss covered by the contract was not geographically limited, the parties could have anticipated that the law of any state would conceivably apply.[92] Justice Stevens also noted that there was a correlation between the rule of stacking and the fact that Mr. Hague had paid separate premiums for each vehicle and for each uninsured motorist provision,[93] intimating that the imposition of the stacking rule did not unfairly expand the contractual obligations of the insurer.

Justice Powell dissented from the Court's opinion largely on the ground that Minnesota did not have a legitimate interest in the outcome

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Court subsumed under the due process clause the function of preserving national unity, which Justice Stevens attributed exclusively to the full faith and credit clause:

> The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

Id. at 291-92.

[85] 101 S. Ct. at 647 (Stevens, J., concurring). By contrast, Justice Powell held that the forum *must* have interests in the outcome of the litigation in order to constitutionally apply its law. *Id.* at 651 (Powell, J., dissenting).

[86] Justice Stevens treated the due process clause and the full faith and credit clause as separate considerations. He contended that each posed a different question and protected a different interest. *Id.* at 644 (Stevens, J., concurring). Due process may be implemented to *prevent* the application of *lex fori* if the reasonable expectations of the parties would be frustrated by such application. By contrast, the full faith and credit clause *compels* the forum to apply the law of a foreign state if the latter's sovereignty would be threatened by the application of *lex fori*. *Id.*

[87] *Id.* at 649 (Stevens, J., concurring).

[88] *Id.* at 648 (Stevens, J., concurring).

[89] *Id.* at 648-49 (Stevens, J., concurring).

[90] *See* notes 78, 79 & 80 *supra* and accompanying text.

[91] 101 S. Ct. at 649 (Stevens, J., concurring).

[92] *Id.*

[93] *Id.* at 648 (Stevens, J., concurring).

of the litigation.[94] He agreed with the plurality's formulation of the law[95] and conceded that Minnesota's choice of *lex fori* did not frustrate the parties' expectations.[96]

But, in stark contrast to the plurality's application of the law, Justice Powell concluded that the full faith and credit clause compelled Minnesota to acquiesce to Wisconsin's legitimate interests in this litigation.[97] There, full faith and credit was due to Wisconsin's law because there was no legitimate state interest that would be furthered by application of Minnesota's own law.[98] If there had been some local interest at stake, then Minnesota would not have been required to sacrifice its interests or to evaluate them in light of Wisconsin's possible interests.[99] Because Minnesota's public policies had not been stirred by the facts of the case, however, there was no state " 'interest in the application of its policy in this instance.' "[100]

Justice Powell denigrated the contacts found by the plurality.[101] He dismissed the plaintiff's post-occurrence residence in the forum on the basis of *Dick* and *Yates* and added that a contrary holding would simply make "the invitation to forum shopping . . . irresistible."[102] Moreover, both the defendant's corporate presence and the decedent's former employment status in Minnesota were rejected as inapposite.[103] Minnesota had no interest in regulating Allstate's conduct "unrelated to the property, persons or contracts executed within

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[94] *Id.* at 653 (Powell, J., dissenting).

[95] *Id.* at 650 (Powell, J., dissenting). Like the plurality, Justice Powell did not draw a distinction between the due process and full faith and credit inquiries. He stated that "both [clauses] are satisfied if the forum has such significant contacts with the litigation that it has a legitimate state interest in applying its own law." *Id.* at 651 (Powell, J., dissenting). *But see* note 114 *infra*.

[96] 101 S. Ct. at 652 (Powell, J., dissenting). Justice Powell, in agreement with the plurality, *id.* at 643 n.24 (Powell, J., dissenting), thought it significant that the insurance policy was "not geographically limited." *Id.* at 652 (Powell, J., dissenting). "Minnesota could have applied its own law to an accident occurring within its borders . . . . The fact that the accident did not, in fact, occur in Minnesota is not controlling because the expectations of the litigants *before* the cause of action accrues provide the pertinent perspective." *Id.* at 652-53 (Powell, J., dissenting) (emphasis in original).

[97] *Id.* at 653-54 (Powell, J., dissenting). For analytical support, Justice Powell relied upon Pacific Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939).

[98] 101 S. Ct. at 653-54 (Powell, J., dissenting).

[99] *Id.* at 651 (Powell, J., dissenting)." '[T]he full faith and credit clause does not require one state to substitute for its own statute, *applicable to persons and events within it*, the conflicting statute of another state.' " *Id.* (quoting Pacific Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 502 (1939) (emphasis added)).

[100] 101 S. Ct. at 652 (Powell, J., dissenting) (quoting B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS, 188, 189 (1963).

[101] 101 S. Ct. at 652-54 (Powell, J., dissenting).

[102] *Id.* at 653 (Powell, J., dissenting).

[103] *Id.* at 653-54 (Powell, J., dissenting).

Minnesota."[104] Likewise, the substantive legal issues in the case were not "in any way affected or implicated by the insured's employment status."[105]

DISCUSSION

Contact-interest analysis considers the relationship between a state and the litigation to which that state has applied its own law. It is the medium through which the constitutional inquiry into choice-of-law questions is effected. Traditionally, that inquiry originated in the due process clause of the fourteenth amendment and the full faith and credit clause of article IV.[106] The *Hague* Court nodded to the traditional bipartite origin of constitutional limitations on choice-of-law but hastened to add that the approach under both clauses was similar.[107] In one sense the Court was correct. Under both clauses the contact-interest principle has provided the impetus for analysis since *Alaska Packers*.[108] But a like approach under both clauses does not force the conclusion that both clauses protect the same interests or even that the same result is inevitable under both clauses.[109] Given the proper analytical distinction between the two clauses it is conceivable that a forum state may be required to apply the law of another state under the full faith and credit clause despite the fact that *either* state may have applied *lex fori* as a matter of due process.[110]

The *Hague* Court premised its merger of due process and full faith and credit upon the view that the Court has retreated from the position of applying a higher standard under the full faith and credit clause.[111] The Court based this conclusion on the abandonment of the discredited balancing of interests approach of *Alaska Packers*. While it is undoubtedly true that *Alaska Packers* no longer represents

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[104] *Id.* at 653 (Powell, J., dissenting) (footnote omitted) (citing Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943)). *See* note 65 *supra*.

[105] 101 S. Ct. at 654 (Powell, J., dissenting). *But see, e.g.*, Pacific Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935). It must be noted that employment status in both *Pacific Insurance* and *Alaska Packers* figured as a contact between the forum state and the plaintiff who suffered an employment-related injury and sought recovery under the forum's workmen's compensation act.

[106] *See generally* Weintraub, *supra* note 3.

[107] 101 S. Ct. at 637 & n.10 (plurality).

[108] *See, e.g.*, Nevada v. Hall, 440 U.S. 410 (1979).

[109] *See generally* Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94 (1976); Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185 (1976); Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587 (1978).

[110] *See* Reese, *supra* note 109, at 1590 nn.18-23 and accompanying text.

[111] 101 S. Ct. at 637 n.10.

an accepted approach to full faith and credit,[112] this does not necessarily imply that the interests of another involved state may never figure into a court's analysis under the full faith and credit clause.[113] If there is no practical difference between the due process clause and the full faith and credit clause, then it is superfluous to maintain that both clauses are satisfied under the same criteria.

Hague may have sounded the death knell of the full faith and credit clause as an independent limitation on choice of law. Justice Stevens and Justice Powell, however, did recognize an analytical distinction between the due process and full faith and credit questions.[114] Contrary to the suggestions of commentators that one or the other of the clauses be made the exclusive constitutional reference,[115]

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[112] *See, e.g.*, Carroll v. Lanza, 349 U.S. 408 (1955). Some years prior to the *Carroll* decision, Justice Jackson had written that

> [O]nly a singularly balanced mind could weigh relative state interests . . . except by resort to what are likely to be strong preferences in sociology, economics, governmental theory, and politics. There are no judicial standards of valuation of such imponderables. How can we know which is the greater interest when one state is moved by one set of considerations—economic, perhaps—to one policy, and another by different considerations—social welfare, perhaps—to a conflicting one.

Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L.REV. 1, 28 (1945). It may be added that faith and credit toward sister-state judgments presents a concern different from faith and credit to foreign law. 100 S. Ct. at 637 n.10. For the most recent case involving recognition of judgments, see Thomas v. Washington Gas Light Co., 100 S. Ct. 2647 (1980). As Justice Jackson wrote:

> Questions as to faith and credit for foreign law seem inherently more difficult than questions as to recognition of judgments. There is comparatively little trouble to whom and to what a judgment applies, for that is what the very process of adjudication settles. But the effect to be given to the law of a sister state generally turns on whether the state itself has the right to reach and govern a particular transaction, or property, or person, because of some relationship which confers what roughly may be described as 'legislative jurisdiction.'

Jackson, *supra*, at 11.

[113] *See, e.g.*, 101 S. Ct. at 645-46 (Stevens, J., concurring).

[114] Justice Stevens explicitly separated the constitutional analyses under both clauses. *See id.* at 644 (Stevens, J., concurring). Although Justice Powell did not consciously separate the lines of inquiry, *see* note 95 *supra*, the structure of his opinion strongly suggests that his conclusion rested upon his view of the full faith and credit clause. On one hand, Justice Powell accepted the plurality's view "that both . . . [c]lauses are satisfied if the forum has such significant contacts with the litigation that it has a legitimate interest in applying its own law." 101 S. Ct. at 651 (Powell, J., dissenting). He then asserted that the contacts analysis was guided by two constitutional policies: *Lex fori* must not frustrate the reasonable expectations of the parties; and, there must be legitimate forum interests in the outcome of the litigation. *Id.* Finding no frustration of the parties' expectations, *id.* at 652 (Powell, J., dissenting), Justice Powell based his dissent upon his view that the contacts found by the plurality did not further "any public policy in Minnesota." *Id.* at 653 (Powell, J., dissenting). His discussion of "legitimate interests" concentrated upon the requirements of the full faith and credit clause. *See id.* at 651-52 (Powell, J., dissenting). *See* notes 117 to 125 *infra* and accompanying text.

[115] *Compare* Kirgis, *supra* note 109 (due process), *with* Martin, *supra* note 109 (full faith and credit).

both Justices developed separate lines of inquiry under each clause. Of these, Justice Powell's theory presents a more workable and realistic standard.[116]

Justice Powell, in his dissent, asserted that the full faith and credit clause does not require a forum to apply the law of another interested state if the forum has a legitimate interest in the outcome of the litigation.[117] Such an interest exists where the forum has a legitimate public policy that would be furthered by the application of *lex fori*.[118] The test for determining whether a policy of the forum is at stake in a particular instance is whether "the facts to which the rule will be applied have created effects within the State, toward which the State's public policy is directed."[119] In other words, do the contacts that exist "between the forum and the litigation . . . form a reasonable link between the litigation and a state policy"?[120]

Justice Powell's full faith and credit theory avoids such pitfalls as the discredited practice of balancing state interests[121] and the dependence upon party reliance on state law.[122] He focuses upon the existence of a valid public policy to which the facts of the case are directly tied. The theory looks to a meaningful relationship between the activities under review and the state interests allegedly implicated. Absent its own legitimate interest in the outcome of the litigation, the forum should defer to the law of the state that has such related

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[116] Justice Stevens urged that the full faith and credit clause provides a distinct question to be asked in choice-of-law cases: Is the forum required to apply the law of another interested state? 101 S. Ct. at 64 (Stevens, J., concurring). The thrust of the clause is an affirmative command, a directive. *See also* Reese, *supra* note 109, at 1590. The test he offered was whether the application of *lex fori* "threatened the federal interest in national unity by unjustifiably infringing upon the legitimate interests of" another state. 101 S. Ct. at 646 (Stevens, J., concurring) (footnote omitted). Originally, the full faith and credit clause was intended to provide a principle of unification for our federalist system. *See generally* Sumner, *supra* note 75, at 242. The states are related to one another as coequal sovereigns. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980). Where there is a threat to the sovereignty of a sister state, the federal concern for unification arises. As noted above, Justice Stevens held that Wisconsin's interests were not implicated in this litigation because the parties had not relied upon Wisconsin law in their contract. *See* note 83 *supra* and accompanying text. Aside from the questionability of the reliance argument, *see* note 134 *infra* and accompanying text, it is suggested that the threat-to-national-unity test, though consistent with the historical origin of the full faith and credit clause, may prove an unworkable standard. Justice Stevens found no threat to national unity precisely because he found no reliance upon Wisconsin law. He offered nothing beyond the reliance test by which to assess the threat to national unity posed in a state choice-of-law decision.

[117] 101 S. Ct. at 653 (Powell, J., dissenting).

[118] *Id.*

[119] *Id.* at 651 (Powell, J., dissenting).

[120] *Id.*

[121] Under Justice Powell's view, full faith and credit requires an introspective assessment of the forum state's own interests in the litigation, rather than a comparison of these interests with those of another state. *See* note 99 *supra* and accompanying text.

[122] *See* note 134 *infra* and accompanying text.

interests.[123] Additionally, if both states have related interests, full faith and credit will not operate to deprive the forum of the opportunity to further its parochial interests. Thus, although the danger of forum-shopping exists in some degree,[124] it is checked by the legitimate forum interests at stake. Because this means that the facts of the case are tied to the forum in some way, it is presumed that the parties would have expected that state to become involved.[125]

Although the full faith and credit analyses differed, the due process inquiry in each of the separate opinions was essentially the same. The focus in each was upon whether Minnesota's choice of forum law frustrated the parties' justifiable expectations as formed before the cause of action accrued.[126] It was noted, for instance, that the insurance contract between Allstate and Ralph Hague provided for nationwide coverage.[127] Furthermore, the insurer was aware of Ralph Hague's daily commutation to Minnesota.[128] Taken together, these facts indicated that "there was a reasonable probability that the risk would materialize in Minnesota."[129] The expectation formed by this probability was made at the time of contracting and was unaffected by the fortuity of the actual *locus delicti*.[130] It was further noted that at the time of contracting, the parties failed to covenant either for the application of the law of a particular state or for a particular substantive rule of law concerning the question of stacking.[131] The plurality added to this analysis that, as a consequence of doing business in Minnesota, the defendant Allstate was aware of its own amenability to suit in that state.[132]

Several aspects of the due process arguments put forth deserve comment. Justice Stevens, finding it significant that the parties had not relied upon Wisconsin law when executing their contract, concluded that "Wisconsin['s] . . . interest in ensuring that contracts formed in Wisconsin in reliance upon Wisconsin law are interpreted

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[123] 101 S. Ct. at 652 (Powell, J., dissenting) (citing *Yates* as illustrative of this principle).

[124] Presumably, the plaintiff could shop for favorable law limiting his choice of *fora* to states that have a bare minimum of the required interest in the outcome of the litigation while excluding states with greater interests but unfavorable law. Absent a workable and realistic balancing of interests test, *see* note 112 *supra*, there is no check upon this less egregious brand of forum-shopping.

[125] Hence, the expectations of the parties would not have been frustrated as long as it was foreseeable that the forum was even minimally tied to the litigation.

[126] 101 S. Ct. at 648-49 (Stevens, J., concurring); *id.* at 651 (Powell, J., dissenting).

[127] *Id.* at 649 (Stevens, J., concurring); *id.* at 652 (Powell, J., dissenting).

[128] *Id.* at 652 (Powell, J., dissenting).

[129] *Id.*

[130] *Id.* at 653 (Powell, J., dissenting).

[131] *Id.* at 648-49 (Stevens, J., concurring).

[132] *Id.* at 642-43 (plurality).

in accordance with that law" was not implicated.[133] In other words, Wisconsin's potential interests did not come into being simply because the parties had not relied upon its law in the contract. But to predicate the existence of state interests upon the reliance of the parties is ill-conceived.[134] State interests either exist or do not exist. It is anomalous to deny the furtherance of legitimate public policies on the ground that the lack of party reliance renders the underlying state interests inoperative.[135]

An objection may also be entered against the view that the absence of party expectations at the time of contracting justifies the conclusion that there is no frustration of expectations when a state other than that of *locus contractus* applies its law to the contract. There is a degree of artificiality in the logic of saying that because there were no expectations, no expectations could be frustrated.[136] Indeed, the policy's coverage was not geographically limited.[137] But it might be argued that in light of the policy's unlimited coverage the only reasonable expectation that could have been formed was that the insured would be entitled to compensation for injuries suffered in another state. It does not follow that the parties would thereby expect *the law* of the foreign state to automatically apply to the interpretation of the contract.[138] Because the issue is not one of tort, the concept of *locus delicti* should not have been a factor. As stated above,

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[133] *Id.* at 648-49 (Stevens, J., concurring).

[134] *See id.* at 654 n.6 (Powell, J., dissenting).

[135] A related issue is the questionable value of a covenant for the application of a substantive rule of law such as stacking in a contract executed in a state where such a rule contravenes public policy. *Cf.* Nevada v. Hall, 440 U.S. 410, 422 (1979) ("the Full Faith and Credit Clause does not require a state to apply another State's law in violation of its own legitimate public policy") (footnote omitted). *See generally* A. CORBIN, CORBIN ON CONTRACTS § 1375 (One Vol. Ed. 1952). Thus, had the parties covenanted for an anti-stacking provision in the standard insurance contract, they could not have expected a pro-stacking state, such as Minnesota, to enforce the contractual term. Similarly, a pro-stacking contractual clause would contravene the law of Wisconsin, the *locus contractus*. Hence, even though Allstate could have reasonably relied upon an anti-stacking clause executed in Wisconsin, that expectation would by necessity be frustrated in Minnesota. It is unlikely that the *Hague* plurality would have reached a different result given either contractual provision. Indeed, the very notion that private covenants are of constitutional significance is overestimated. *See* note 78 *supra* and accompanying text.

[136] The Respondent, Lavina Hague, pushed the logic of the expectation argument to its limit in saying that at the time of contracting "*none of the circumstances of a loss is known* and thus it is *impossible for one to form any expectations.*" Brief for the Respondent at 8, Allstate Ins. Co. v. Hague, 101 S. Ct. 633 (1981) (emphasis added). The Supreme Court did not reiterate this but contented itself to note that "[t]here [was] no element of unfair surprise or frustration of legitimate expectations as a result of Minnesota's choice of its law." 101 S. Ct. at 643 n.24.

[137] *See* note 96 *supra* and accompanying text.

[138] The modern trend away from the rigidity of traditional concepts such as *locus delicti* supports this point. *See, e.g.*, Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (original case in this line).

it was additionally noted that the insurer knew of Ralph Hague's daily journey to Minnesota.[139] Thus, the likelihood of Minnesota's potential interest in applying its law was great.

Objection can be made to the use of Hague's commutation as a dispositive element of the parties' expectations. It might be argued that the insurer should have reasonably expected the application of Minnesota law to a case where the insured was injured in the course of his ride to or from work. On the contrary, there is no basis upon which to assume that the insurer would expect Minnesota law to apply where, except for Hague's commutation, there was no other factual connection with Minnesota. To illustrate, if Hague lived at the juncture of three states and commuted from state *A* to two separate part-time jobs, one in state *B* and the other in state *C*, then the importance of the commutation to *B* would be diminished where *B* applied its law to an accident occurring in *C*.[140]

Finally, Allstate's corporate presence in Minnesota rendered it amenable to suit there.[141] "But," as Justice Powell indicated, "this argument proves too much."[142] Indeed, Allstate, by doing business in all fifty states, was amenable to suit in all of those states.[143] The

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[139] *See* note 128 *supra* and accompanying text.

[140] The potential interests of *B*, as a state to which an employee commuted, would not be evoked where the employee was injured while commuting to *C*. *B*'s interest in its commuters cannot logically be implicated to the same extent as *C*'s interest in its commuters where the focal event, the accident, occured in *C*. In such a situation, when two states claim the same contact, there must be a "hierarchy of interests" that would dictate the content or value of the contact as between the competing states. *See* Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227, 230-33 (1967). The seed of *Hague*'s use of state interests in the abstract may be found in the Court's earlier statements, such as, "[The forum] therefore has a legitimate interest in opening her courts to suits of this nature, even though in this case [the plaintiff's] injury may have cast no burden on her institutions." Carroll v. Lanza, 349 U.S. 408, 413 (1954). In *Carroll*, however, the forum was factually connected to the injury inasmuch as it was the *locus delicti*.

[141] 101 S. Ct. at 642-43.

[142] *Id.* at 653 (Powell, J., dissenting).

[143] Consider the attitude of the Court in its recent statement, in the context of quasi-in-rem jurisdiction, that

> State Farm [the defendant] is 'found,' in the sense of doing business, in all 50 states and the District of Columbia. Under Appellee's theory, the 'debt' owed to Rush would be 'present' in each of those jurisdictions simultaneously. It is apparent that such a 'contact' can have no jurisdictional significance.

Rush v. Savchuck, 100 S. Ct. 571, 578 (1980). Admittedly, the quasi-in-rem context of *Rush* provides the conceptual background for this statement. Jurisdiction over the defendant was sought by means of a *Seider*-type attachment of his insurer's debt to him. *See generally* Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966); Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 90-99 (1978). Nonetheless, the close attention paid by the Court to the quality and nature of the ties between the forum and the parties for purposes of jurisdiction stands in contrast to the lack of such attention on the part of the *Hague* Court for purposes of choice-of-law. *Cf.* Silberman, *supra*, at 79-90 (choice-of-law more determinative than exercise of jurisdiction regarding rights and liabilities of parties).

plurality derived the defendant's expectations as to the applicability of Minnesota law from its expectations as to its amenability to *in personam* jurisdiction.[144] This subtle intermixing of two distinct concerns,[145] although not irrational, was inappropriate in this instance because no other material facts pointed to the application of Minnesota law. It becomes meaningless to say that a corporation should expect that the law of any state in which it does business may be applied to its conduct and obligations unrelated to the forum.[146]

The major difficulty presented by the *Hague* Court's contact-interest approach[147] is the notion that an aggregation of otherwise attenuated contacts is sufficient to support the selection of *lex fori*.[148] The Court expressly viewed the contacts of residence, employment, and presence as significant only in their aggregation.[149] In a footnote, the Court specifically added that it expressed no opinion as to whether employment or presence, "either together or separately," would have sufficed.[150] Standing alone, the plaintiff's residence was undoubtedly inadequate under *Yates*[151] and *Dick*.[152] *Yates*, moreover, viewed post-occurrence change of residence as insignificant in itself and made no attempt at aggregating such residence with corporate presence, which was the jurisdictional contact in that case.[153] The doctrine that emerges from the aggregation approach is quite radical: a cluster

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[144] *See* note 67 *supra* and accompanying text.

[145] *See* 101 S. Ct. at 642 n.23.

[146] One commentator has stressed that "[t]he impact of a conflicts of law decision more seriously affects the rights of the parties than a decision on jurisdiction." Silberman, *supra* note 143, at 82.

[147] The phrase "contact-interest" refers to the method of locating the state's interest in the litigation through an examination of the factual contacts between the state and the parties and events underlying the case. *See generally* B. CURRIE, *supra* note 100.

[148] Ideally, the emphasis in a contact-interest analysis should be upon the significance of the interests discovered and not upon the counting of contacts. Although the *Hague* Court articulated conceivable state interests in the litigation, its analysis is better described as a "minimum contacts" approach. *Cf.* 101 S. Ct. at 654 n.6 (1981) (Powell, J., dissenting) ("this case cannot be justified by the existence of relevant minimum contacts"). "Minimum contacts," of course, refers to the requirement that the forum state support its exercise of jurisdiction by having a minimum level of contact with the defendant. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945). When used in the context of choice-of-law the phrase "minimum contacts" is used in a much looser sense, referring to the state's various contacts with *either* the plaintiff *or* the defendant, or with the events that gave rise to the case. Such usage often clouds the sense that is intended. In describing the *Hague* Court's analysis as an adoption of the minimum contacts model, the point intended is that the decision concentrates upon the existence of factual contacts instead of the quality of the interests that were said to arise by virtue of these contacts.

[149] 101 S. Ct. at 644 & n.29.

[150] *Id.* at 644 n.29.

[151] *See* note 47 *supra*.

[152] *See* note 46 *supra*.

[153] *See* 101 S. Ct. at 653 n.4 (Powell, J., dissenting).

of individually nonsignificant contacts is significant for constitutional purposes. The otherwise empty contacts somehow gather content when grouped as a whole.

The criticism that the contacts and resulting interests extolled by the *Hague* Court were inadequate to support the application of Minnesota law due to a lack of "relatedness" to the underlying litigation applies across the board. The Court found that by virtue of the decedent's prior employment status that the forum's police power responsibilities were called into play.[154] But the opinion is devoid of any indication as to the nature of these police power responsibilities and what state interest they engender.

The Court reasoned that although the decedent was not a resident of Minnesota he was a "commuting nonresident employee."[155] Thus, employment status, although concededly indicative of lesser state interests than resident status,[156] qualified as a viable contact. The fact that the accident did not occur in connection with Ralph Hague's daily commute to Minnesota did not present an obstacle to the Court. Justice Brennan rebuffed the lack of a connecting factor between the contact and the facts by noting that "an automobile accident need not occur within a particular jurisdiction for that jurisdiction to be connected to the occurrence."[157] In other words, the *locus delicti* is not of controlling constitutional value. But in each of the cases cited in support of this proposition the forum was either the residence of the accident victim at the time of the injury or death,[158] or it was the locus of the employment contract upon which the victim sought recovery in an employment-related injury.[159] In each of those cases, the derogation of *locus delicti* was incidental to the discovery of state interests on the basis of other contacts or connecting factors. In *Hague*, the Court merely waved the discrediting of the concept of *locus delicti* as justification for the forum-contact of employment status.[160]

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[154] 101 S. Ct. at 640.

[155] *Id.* at 641.

[156] *Id.* at 640.

[157] *Id.* at 640, 641 nn.19 & 20.

[158] *See* Rosenthal v. Warren, 475 F.2d 438 (2d Cir.), *cert. denied*, 414 U.S. 856 (1973); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[159] *See* Cardillo v. Liberty Mut. Ins. Co. 330 U.S. 469 (1947); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935).

[160] The Court reasoned as follows:

> [T]he occurrence of a crash fatal to a Minnesota employee in another State is a Minnesota contact. If Mr. Hague had only been injured and missed work for a few weeks the effect on the Minnesota employer would have been palpable and Minnesota's interest in having its employee made whole would be evident. Mr. Hague's

The workmen's compensation cases provide an example of the use of a contact such as employment status as a "related" contact. For instance, in *Alaska Packers*, California was faced with a Hobson's choice regarding the claim made by a nonresident alien who was injured in Alaska: either make the injured party whole or accept him as a public charge.[161] This "choice" was based upon the fact that it is not customary for one state to enforce the compensation laws of another state.[162] Thus, because California was not the *locus delicti*, its obvious interests in making the plaintiff whole had to be grounded in some other contact. The plaintiff's execution of his employment contract in California filled this need. The locus of the employment contract, and, *a fortiori*, of the employment relationship, qualified as a significant contact for the underlying employment-related injury.[163] The Court allowed the forum to apply its law despite the absence of contact with the injury; it did so on the basis of the crucial interests of the forum that were at stake. Citing *Alaska Packers*, the *Hague* Court stated that employment status is an important contact creating state interests.[164] Why such was the case in *Alaska Packers* is clear. The contact of employment status, however, loses all of the significance it had in *Alaska Packers* when transplanted into the facts of *Hague*.[165]

The contact of "commuting" provides another example of the Court's use of "established" contacts in an incongruous setting.[166] In *Cardillo*, the Court expended much effort determining whether the accident therein had occurred "in the course of employment," a prerequisite to the operation of the compensation statute involved.[167] In

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> death affects Minnesota's interest still more acutely, even though Mr. Hague will not return to the Minnesota workforce. Minnesota's workforce 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.

101 S. Ct. at 641 (footnotes omitted).

[161] B. CURRIE, *supra* note 100, at 202. *See* Alaska Packers Ass'n, 294 U.S. at 542.

[162] B. CURRIE, *supra* note 100, at 202.

[163] Alaska Packers Ass'n, 294 U.S. at 540-41.

[164] 101 S. Ct. at 639.

[165] It may be further noted that liability under workmen's compensation acts is not grounded in tort, but in a status-related cause of action "imposed as an incident of the employment relationship." Alaska Packers Ass'n, 294 U.S. at 541. *See* Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 158 (1932). Thus, the *Hague* facts are not only distinguishable because this status-related cause of action was absent, but also because Mr. Hague's status was totally unrelated to the cause of action in issue, which was based on liability on an insurance contract where the status of the insured as one who is covered by the policy is uncontested.

[166] 101 S. Ct. at 639-40.

[167] Cardillo, 330 U.S. at 478-79.

that context, the fact that the plaintiff was injured while commuting from his job in the foreign state to his home in the forum state became significant.[168] In *Hague*, the Court read *Cardillo* as having given some constitutional significance to "commuting" as a contact in itself.[169]

The interest of a state in the recovery of a person likely to become a public charge was used in *Hague* to support the plaintiff's residence in the forum as a contact.[170] But rejection of *lex fori* would not have resulted in the plaintiff's automatic reliance upon the support of the state. The precise issue in *Hague* was not whether the plaintiff would recover at all, but how much she would recover.[171] If Wisconsin law were applied, the plaintiff was bound to recover a lesser amount. Moreover, the rejection of *lex fori* would not have extinguished the plaintiff's cause of action. Thus, it is difficult to see how the danger of forum-shopping is not the consequence of holding that a post-occurrence residence in the forum state is sufficient to implicate the maximum-recovery policy of that state in an accident that occurred elsewhere between residents of another state.

The jurisdictional contact of the defendant's corporate presence was also unrelated to the facts of the case.[172] The Court held that the business activities of Allstate in Minnesota evoked the regulatory interests of that state in Allstate's obligations toward a Minnesota resident.[173] If this was intended to mean that Minnesota had an interest in the plaintiff's recovery, then the jurisdictional contact adds nothing to the contact of the plaintiff's residence. As noted above, the rejection of *lex fori* would not have resulted in the extinguishment of the plaintiff's cause of action against the insurer. Moreover, there was no evidence that Allstate contested its liability toward the plaintiff. On the other hand, if Minnesota's regulatory interest in Allstate's insurance obligations toward the plaintiff refers to its obligations under the laws of Minnesota, then the argument is truly circular. Under this interpretation, the Court would be deriving the constitutionality of *lex fori* from the parochial desire of a state to effectuate its own policies.[174] Thus, under the guise of calling this a regulatory interest,

[168] *Id.* at 482-83.

[169] *See* 101 S. Ct. at 639-41.

[170] *Id.* at 644.

[171] *See id.* at 654 (Powell, J., dissenting). *Cf.* Alaska Packers Ass'n, 294 U.S. at 542 (absent recovery in forum, plaintiff would have no remedies).

[172] *See* 101 S. Ct. at 642-43.

[173] *Id. Contra, id.* at 653 n.4 (Powell, J., dissenting). *See also* Hay, *The Interrelation of Jurisdiction and Choice-of-Law*, 28 INT'L & COMP. L. Q. 161, 164 (1979) ("amenability to suit as a consequence of doing business" should be conceptually linked to substantive issue).

[174] It is noteworthy that *Hague* involved the constitutionality of a choice-of-law decision made pursuant to a conflicts theory that virtually compels the selection of *lex fori*. Admittedly, the

the Court would simply be endorsing a particular state policy. There was no showing that Allstate did anything in Minnesota with regard to the plaintiff or the decedent that would implicate Minnesota's regulatory interests in Allstate's relationship to these parties.[175]

It has been stated throughout the foregoing discussion that in *Hague* the Court used the jurisdictional contact of the defendant's corporate presence in the forum as one of the aggregated contacts supporting the application of *lex fori*.[176] This aspect of the case has great significance to the controversy over the interrelation of jurisdiction and choice-of-law theories.[177] A brief statement of that controversy will show *Hague*'s bearing upon the issue.

Jurisdiction and choice-of-law may be viewed as two aspects of the same problem.[178] In a controversy involving foreign facts, the forum court is presented with the interrelated issues of its own exercise of jurisdiction, the duty to recognize foreign law, and the applicability of foreign or forum law.[179] At first glance, it appears that the purely

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constitutional issue does not require consideration of the underlying conflicts method. Nonetheless, it is anomolous that a decision may be "plainly unsound as a matter of normal conflicts law," 101 S. Ct. at 646 (Stevens, J., concurring), yet pass constitutional muster.

It has often been remarked that whereas a judge is an "expert" in applying *lex fori*, he is a "dilettante" in applying foreign law. *See* Zweigert, *Some Reflections on the Sociological Dimensions of Private International Law or: What is Justice in the Conflict of Laws?*, 44 U. COLO. L. REV. 283, 293 (1973). *See also* 101 S. Ct. at 647 n.14 (Stevens, J., concurring); Shaffer v. Heitner, 433 U.S. 186, 225-26 (1977) (Brennan, J., dissenting in part). *But see* Hay, *supra* note 173, at 162 n.3. Moreover, even if foreign law were easily ascertained, it is a formidable task to determine what state policies underlie any rule of law, particularly if it is foreign. *See* Sedler, *supra* note 38, at 194-201. Thus, the natural tendency in choice-of-law is not altruism. But under the rubric of Professor Leflar's "better law" approach, *see* note 30 *supra*, this natural predilection for *lex fori* becomes dogma. *Cf.* R. CRAMTON, B. CURRIE & H. KAY, *supra* note 38, at 323 ("The experience thus far suggests that judicial use of the 'better law' approach seems to tend irresistibly toward application of forum law").

Therefore, the use of "regulatory interests" in support of the choice of *lex fori*, particularly where that choice was made pursuant to the "better law" approach, subserves the parochialism of the *lex fori* approach. *Cf.* Hay, *supra* note 173, at 174 (use of governmental-interest approach in area of jurisdiction replaces "the *jurisdictional* territorialism of *Pennoyer v. Neff*" with "the new territorialism of the *lex fori*") (emphasis in original) (footnote omitted).

[175] *Cf.* Shaffer v. Heitner, 433 U.S. 186, 214-15 (1977) ("if Delaware perceived its interest in securing jurisdiction [on the grounds alleged] . . . , we would expect it to have enacted a statute more clearly designed to protect that interest").

[176] For the related question as to the derivation of jurisdiction from choice-of-law contacts, see Hay, *supra* note 173, at 161.

[177] *See generally* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 290-92 (1956); Hay, *supra* note 173, at 161; Martin, *supra* note 5; Martin, *supra* note 109, at 201-03; Reese, *supra* note 111, at 1588-89; Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of Shaffer v. Heitner*, 63 IOWA L. REV. 1031 (1978); Silberman, *supra* note 143, at 79-90; von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1128-33 (1966).

[178] *See* Ehrenzweig, *A Proper Law in a Proper Forum: A "Restatement" of the "Lex Fori Approach,"* 18 OKLA. L. REV. 340 (1965).

[179] G. STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 1 n.1 (3d ed. 1963).

introspective determination of jurisdiction[180] logically precedes the need to treat the choice-of-law issue. Certainly, if the jurisdictional issue is resolved against the forum, then the choice-of-law issue becomes moot.[181] But the logical sequence is illusory. If forum-shopping means anything it is that choice of forum carries with it an *a priori* choice of forum law. Forum-oriented choice-of-law models,[182] escape devices,[183] and at least one wing of the interest-analysis approach[184] are some of the ways by which *lex fori* becomes almost dictated by the exercise of jurisdiction. Thus, it is significant that the *Hague* Court placed its constitutional imprimatur upon the applicability of *lex fori* as a consequence of pre-existing jurisdiction. Ever since *Hanson v. Denckla*,[185] the Court has maintained that the converse is not true; that is, jurisdiction does not exist merely as a consequence of the applicability of *lex fori*.[186]

In *Hague, in personam* jurisdiction over the defendant was obtained by virtue of Allstate's corporate presence in the state. Thus, jurisdiction was based upon the activities unrelated to the underlying litigation.[187] This jurisdictional contact, like transitory jurisdiction,[188] is a lower level minimum contact.[189]

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[180] *See generally Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909 (1960).

[181] *Cf.* 101 S. Ct. at 644 n.3 (Stevens, J., concurring) (choice-of-law issue arises only after there exists jurisdiction).

[182] *E.g.*, B. CURRIE, *supra* note 100 (interest analysis); A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW (1974) (proper law in proper forum); Leflar, *supra* note 30 (choice-influencing considerations).

[183] *See generally* R. CRAMTON, B. CURRIE, & H. KAY, *supra* note 38, at 61-143. For example, Ehrenzweig noted that

> [t]here is little disagreement as to the unsatisfactory state of our conflicts law bearing upon the statute of limitations. It now seems settled that any state is free to apply its own statute rather than that under which the cause of action arose. Yet by applying the local statute a court may deny the valid claim of a nonresident creditor who was compelled by our law of personal jurisdiction to follow his debtor into the state of the forum. On the other hand, a court may offer its own law for the revival of a stale claim by a nonresident creditor who, again by our law of personal jurisdiction, was enabled to 'catch' his unwary debtor in the state of the forum.

Ehrenzweig, *supra* note 177, at 291 (footnotes omitted).

[184] In the case of a "true conflict," Currie insists that the forum not sacrifice its own interests by preferring the interests of another state. *See* Sedler, *supra* note 38, at 188-89.

[185] 357 U.S. 235 (1958).

[186] "[The State] does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for the litigation. The issue is personal jurisdiction, not choice of law." *Id.* at 254. *Accord*, Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186, 215 (1977). *Contra*, Silberman, *supra* note 143, at 88 ("If a court *has the power to apply its own law*, it should have the power to exercise jurisdiction over the action") (emphasis in original).

[187] *See generally* Martin, *supra* note 5.

[188] *See* B. CURRIE, *supra* note 100, at 283-360; Ehrenzweig, *supra* note 177.

[189] In Martin's terminology, "minimum contacts" at the lower level refer to contacts unrelated to the case. *See* Martin, *supra* note 5, at 872 nn.1 & 2.

Absent this tenuous connection with the forum state, Allstate could not have otherwise been sued in Minnesota given the facts of the case.[190] Thus, the factors that make it reasonable to exercise such jurisdiction are not the same factors that make it reasonable to apply forum law.[191] For example, long-arm jurisdiction is predicated upon the effects created in the state by the defendant.[192] These effects arise from the same facts that gave rise to the underlying litigation. It is reasonable, under the theory of long-arm jurisdiction, to subject the defendant to the laws of the state in which he has created effects. But jurisdiction founded upon "doing business" within a state is likely to require the defendant to defend against claims unrelated to the forum. It is a significant extension of this doctrine to hold that the defendant's rights and liabilities arising from the non-forum related claim may be adjudicated according to the law of the forum.

CONCLUSION

Under the contact-interest approach, the exercise of locating contacts is not an end in itself. Rather, it culminates and has for its purpose the finding of state interests in the litigation under review.[193] It is ultimately on the basis of state interests that the constitutional inquiry into choice-of-law rests. A court's resolution of a conflict may be patently "unsound as a matter of normal conflicts of law,"[194] yet remain constitutionally inviolable; the constitutional inquiry does not turn upon the integrity of the choice-of-law decision itself.[195] Although *Hague* correctly identified these general principles of the scope of constitutional review, it subtly changed the course of their evolution. *Hague* permitted the selection of *lex fori* on the basis of state interests that bore little or no relation to the facts of the litigation.[196]

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[190] *Id.* at 873.

[191] *See* Sedler, *supra* note 177, at 1032. *See, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[192] Sedler, *supra* note 177, at 1032.

[193] 101 S. Ct. at 637-38 & n.10.

[194] *Id.* at 646 (Stevens, J., concurring).

[195] *See e.g.*, Kryger v. Wilson, 242 U.S. 171, 176 (1916), where the Court wrote:

> The most that the plaintiff in error can say is that the state court made a mistaken application of doctrines of the conflict of laws in deciding that the cancellation of a land contract is governed by the law of the situs instead of the place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned.

Id. For critical comment on this oft-quoted passage, see B. CURRIE, *supra* note 100, at 268-69.

[196] The Court concentrated upon party contracts—corporate presence, employment status, residence—to the exclusion of the candidate jurisdiction's contacts with the occurrences and the transactions that gave rise to the case.

Minnesota had only specious interests at stake.[197] The Court's uncritical view of the substantive value of these interests undermines the efficacy of constitutional restraints on choice-of-law.[198] At the same time, the decision's lack of a clear theoretical underpinning for its aggregation approach renders its precedential value uncertain.[199] There is simply no rational rule of thumb by which to delineate either the minimum aggregate of nonsignificant contacts allowable under *Hague* or the extent to which a state's interests may be tangential without making the selection of *lex fori* unconstitutional.

The aggregation approach to contacts presents a conceptual problem: How can the aggregate of contacts be significant while the individual contacts are not? Obviously, the premise of the theory cannot be that by merely aggregating contacts they magically become "significant." The gist of the contact-interest approach is that there are state interests in the litigation arising from the contacts that the state has with the parties and occurrence or transaction.[200] Therefore, despite the inadequacy of individual contacts, each must have some relative significance to the extent that it is the bearer of one or more state interests. Regardless of its inadequacy outside the quantum, each contact must be of a certain quality when considered as part of the whole. The complexity of the constitutional inquiry is based in part upon the fact that there is no closed-system of contacts that invariably compels or denies the application of *lex fori*. No one contact has been raised by the Court to constitutional dignity for all circumstances. If the *Hague* Court has properly read the evolution of constitutional limitations on choice-of-law, then it is clear that state interests may arise from even the most tenuous contacts.

One virtue of *Hague* is the sensitivity the Court displayed to the notion that no one isolated fact is of controlling constitutional significance.[201] On the basis of cases like *Alaska Packers*, it is clear, for instance, that *locus delicti* has no such controlling force.[202] But the

[197] This is not to suggest that the weighing-of-interests approach followed in cases like *Alaska Packers* should be resuscitated. *Lex fori* could be disallowed not because the forum has lesser interests as compared to the foreign state but because the forum's interests fall short of a minimum standard. If the weighing-of-interests approach were feasible it would merely serve to determine a quantitative value. But interests may be "weighed" or compared qualitatively. *See* Carrington & Martin, *supra* note 140, at 231-33.

[198] The demise of the minimal control of choice-of-law provided by due process and full faith and credit raises the fear that "conflicts law [will] be left forever to the 'local' whim of the forum." Ehrenzweig, *supra* note 177, at 292.

[199] That is, although the Court reviewed the applicable law governing this type of case, it neither documented nor explained the theoretical foundation of the aggregate theory.

[200] *See, e.g.*, Carroll v. Lanza, 349 U.S. 408, 412-13 (1955).

[201] *See* 101 S. Ct. at 641 n.21, 642 n.22 (plurality).

[202] *See* B. CURRIE, *supra* note 100, at 201, showing how *Alaska Packers* simultaneously ended the domination of the concept of *locus delicti* for constitutional purposes and introduced in its

Hague Court may have over-read that aspect of *Alaska Packers*. Isolated facts are the stuff of which contacts are made. The ritualism of the traditional concepts of conflict of laws theory should not be replaced by an equally ritualistic derogation of those concepts. The essential goal is to find state interests adequate to support the selection of *lex fori* and, absent such interests to require the forum to apply the law of the state whose interests are truly significant.

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stead the idea that the validity of the selection of *lex fori* depends upon whether the forum has legitimate interests. In *Alaska Packers*, the Court upheld the application of California law to a suit based upon an injury sustained in Alaska.