

**CONFLICTS CASES AND THE PROBLEM OF
RELEVANT TIME: A RESPONSE TO THE
HAGUE SYMPOSIUM**

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Ralph Hague, a resident of Wisconsin, was killed by an uninsured motorist in a collision in that state. Lavinia, his widow, moved to Minnesota, where she was appointed personal representative of Ralph's estate. In that capacity Lavinia went to court in her new home state seeking a declaration that the Allstate Insurance Company owed Ralph's estate \$45,000, the aggregate of the separate \$15,000 uninsured motorist coverages Ralph had bought for each of his three cars under a single insurance policy. At the time of the accident Ralph had been riding an uninsured motorcycle, and in such circumstances, under the terms of the policy, each of these coverages could be applied to the loss.¹ Allstate defended on the ground that under the laws of Wisconsin, where the policy was issued and the insured-motorist section of the policy would limit its liability to \$15,000. Minnesota applied its own law to the contrary in the widow's favor,² and, in *Allstate Insurance Co. v. Hague*, the United States Supreme Court eventually affirmed.³ Among the consequences was the *Hague* symposium in these pages,⁴ and the editors' kind invitation to this writer to respond

It is striking that among the symposium's thoughtful and serious contributions to conflicts literature, none clearly takes the position that, as a matter of ordinary choice-of-law process, the choice *1024 of Minnesota law in *Hague* was the right one; only two are willing to state the result without criticism.⁵ And although two of these very distinguished writers conclude that the Supreme Court properly sustained Minnesota's "parochial"⁶ choice of its own law as a matter of

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1. Policy issued by Allstate Insurance Co. § 2, condition 7, at 6 [hereinafter cited as Policy] (copy on file in office of *Hofstra Law Review*).

2. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43 (Minn. 1978), *aff'd on rehearing, id.* at 50 (Minn. 1979).

3. 499 U.S. 302 (1981), *aff'g* 289 N.W.2d 50 (Minn. 1979).

4. *Symposium: Choice-of-Law Theory After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 1 (1981).

5. Professor Sedler approves of the Supreme Court's ruling in *Hague*. Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59,74 (1981). He does not, however, express approval of the actual choice of law. Professor Leflar simply asserts that, now that the Supreme Court has spoken, most American courts would reach the same result as did the Minnesota Supreme Court in *Hague*. Leflar, *Choice of Law: States' Rights*, 10 HOFSTRA L. REV. 203, 204, 211 (1981).

6. Among symposium contributor's' various critical characterizations of the choice of forum law in *Hague*, see, e.g., 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, 103 (1981) ("state parochialism"); Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149,151 (1981) ("unrestrained state chauvinism"); von Mehren & Trautman, *Constitutional Control of Choice of Law: Some Reflections on Hague*, 10 HOFSTRA L. REV. 35, 43, 57 (1981) ("unprincipled"; "parochial"); Weintraub, *supra* note 1 at 32 ("bad, if not unconstitutional").

constitutional adjudication,⁷ others seem to be of the view that Minnesota's choice was so wrong that it ought to have been struck down as unconstitutional.⁸

This level of scholarly agreement is impressive, but somewhat unsettling, if, as Professor Leflar reasons, most American courts would reach the same result as did the Minnesota Supreme Court in the *Hague* case, if not before the Supreme Court's opinion in *Hague*, then surely after—that is, now that it is clear that they are free to do so.⁹ If Professor Leflar is right, are our courts concerned about something that the writers do not appreciate? Are the writers saying something to which the courts cannot respond?

The symposium contributors appear to reach their more-or-less negative conclusions about the *Hague* result through two distinct lines of reasoning, each of which is applicable on both the constitutional and the ordinary choice-of-law levels. One group focuses on the question whether Minnesota was as interested state, and finds that it was not.¹⁰ On the choice-of-law level, this view finds expression in the assertion that none of Minnesota's contacts with the case was significant. On the constitutional level the conclusion is that the choice of forum law was arbitrary and irrational, and thus forbidden by the due process clause. The second group focuses on the question whether—whatever Minnesota's interests in the matter may or may not have been—Wisconsin's interests were so great that its law ought to have been applied.¹¹ On the choice-of-law level this last argument comes down to the view that Wisconsin enjoyed so many contacts with the case that it was the “center of gravity” of the case for conflicts purposes; on the constitutional level, proponents of this view believe that, in the interest of federalism and comity, the full faith and credit clause ought to have required the application of Wisconsin Law.

It is the purpose of this brief comment to inquire into the relative interests of the two states in *Hague*. This will not require us to disregard for the occasion this author's recent insistence that minimal scrutiny for forum state interest alone is all that the Supreme Court affords or ought to afford in reviewing an application of forum law;¹² our inquiry can proceed usefully on the ordinary choice-of-law level. Today all modern approaches to choice of law invite a weighing of interests; the old controversy about the propriety of weighing interests seems stilled.¹³ Let us weigh them.

7. See Sedler, *supra* note 5, at 74; Weintraub, *supra* note 1, at 24.

8. See Martin, *The Constitution and Legislative Jurisdiction*, 10 HOFSTRA L. REV. 133, 143 (1981); Reese, *The Hague Case: An Opportunity Lost*, 10 HOFSTRA L. REV. 195, 200 (1981); Silberman, *supra*, note 6, at 131; Twerski, *supra* note 6 at 151-53, 169-70; von Mehren & Trautman, *supra* note 6, at 46.

9. Leflar, *supra* note 5, at 204, 211.

10. Martin, *supra* note 8, at 140-40; Silberman, *supra* note 6, at 106-07; von Mehren & Trautman *supra* note 6, at 42-43. The insufficiency of Minnesota's governmental interest was at the heart of Justice Powell's Dissenting opinion in *Hague*. 499 U.S. at 332 (Powell, J., dissenting).

11. Professors von Mehren and Trautman are of the view, assuming a “center of gravity” approach to the question, the Wisconsin was obviously the “center of gravity” in *Hague*. See von Mehren & Trautman, *supra* note 6, at 46. Professor Davies similarly concludes that Wisconsin was the “seat of the relationship.” Davies, *A Legislator's Look at Hague and Choice of Law*, 10 HOFSTRA L. REV. 171, 193 (1981). Professors Reese and Martin suggest that the choice of Minnesota law unduly interfered with the sovereign concerns of Wisconsin. Martin *supra* note 8, at 141-44; Reese, *supra* note 8, at 198. This latter view was discussed by Justice Stevens in his *Hague* concurrence. 449 U.S. at 322-26 (Stevens J., concurring).

12. Weinberg, *Choice of Law and Minimal Scrutiny*, 49 CHI. L. REV. 440 (1982).

13. See Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L. J. 171, 173; Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 69 (1959) (“moderation and restraint” appropriate in construing reach of forum law in true conflict cases); see also *Bernhard v. Harrah's Club*, 546 P.2d 719, 723 (Cal. 1976), cert. denied, 429 U.S. 859 (1976); Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963) (“comparative impairment”). Compare R Leflar, *American Conflicts Law* 207 (3d ed. 1977) (maintenance of interstate and international order are among choice-influencing considerations; deliberate preference for local law and

We may find that the scales are not as self-evidently tipped on Wisconsin's side as contributors *1026 to the symposium have supposed.

I. MINNESOTA'S INTERESTS

It is no doubt a truism, except perhaps to the most unregenerate territorialist, that the power of a sovereign to regulate a controversy depends upon whether that controversy is within the sovereign's sphere of legitimate interest.¹⁴ But what is a sphere of interest? We say that a state must have power to make laws for the health, education, and safety—in short, the general welfare—of its people, and, in part for the reason, we concede that it had power also to make laws for the general welfare of others who may be within its territory. This is the police power, if you like, of the state.¹⁵ It is defined, it will be observed, by the needs of persons; it is not, at bottom, merely a power to make laws for events of property within state borders, as is sometimes suggested.¹⁶ It is true that events and property are regulated by the state, but only to benefit the general welfare of residents and other persons within the territory. Property does not have rights or obligations; events are equally immune to Hohfeldian analysis. The sovereign governs *people* by its laws.

This latter reflection counsels, too, that it will not be useful to label a state “parochial” for vindicating the interests of its residents in its courts, even—or especially—their “pocketbook” interests.¹⁷ It would be singularly unhelpful to limit state regulation to events and property within state boundaries in an effort to avoid such “parochialism.” *1027 Since the source of power over such events and property is the state's interest in advancing the general welfare of its residents, such a limitation would serve only to make choices of forum law *appear* less parochial, while in reality hindering state power to deal prudently with legitimate governmental concerns.¹⁸

local persons, unaccompanied by independent justification, would be in disregard of this consideration) with Currie, *Married Women's Contracts: A Study of Conflicts-Laws Method*, 25 U. CHI. L. REV. 227, 261 (1958) (choice between two interested states' laws is essentially political and ought to be made only by Congress; in case of true conflict, forum ought generally to apply to its own law). See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

14. See e.g., Justice Brandeis' classic formulation in *New York Life Ins. Co. v. Dodge*, 246 U.S. 357, 382-83 (1918) (Brandeis, J. dissenting): “Is the subject matter within the reasonable scope of regulation? Is the end legitimate? . . . If so, the act must be sustained.

15. The term appears in early prominence in *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 208, (1824) (“the acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens”). See, e.g., *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) (state has police power to impose its antipollution laws in vessels in interstate commerce absent preemptive action by Congress); *Skiriots v. Florida*, 313 U.S. 69, 77 (1941) (state has police power to govern conduct of its citizens on high seas where there is no conflicting federal responsibilities towards the nonresidents employee that are analogous, if somewhat less profound, than towards residents”).

16. See e.g., Martin, *supra* note 8, at 142-46. Professor Martin attempts to limit applications of forum law to cases involving property or events in the forum states. *Id.* at 142. Perceiving the limitations of this approach, *id.* at 144, he goes on to suggest that the state of joint domicile of the parties may also apply its own laws, where to do so would “not unduly interfere with the sovereignty of another connected jurisdiction.” *Id.* at 145. Here too, however, he perceives that such limitation would prevent a state from performing a legitimate governmental function—regulating the status of its residents. *Id.* at 146.

17. See von Mehren & Trautman, *supra* note 6, at 53.

18. For example, Professor Martin concedes that, regardless of the existence of property or the concurrence of events within the forum state, the forum must have power to settle disputes between its residents under its own laws. Martin, *supra* note 8, at 144. Similarly, Professor Martin concedes that whether or not there are events or property within the forum state, the state must have power to declare the status of a resident. *Id.* at 146. But the same sort of reasoning would also support state power with respect to one resident in a number of other circumstances. See, e.g., *Griffin v. McCoach*, 313 U.S. 498, 506-07 (1941).

Given this fundamental background, the question whether a local insurer may avoid its obligations to a locally-administered estate, to the disadvantage of a resident heir, by reliance on a policy interpretation impermissible under local law should give no trouble. It would not be the real world if the forum state lacked power to regulate under its laws such a controversy between its residents.

Why, then, is it so widely supposed by the symposium contributors that in the *Hague* case Minnesota was not an interested state? The great difficulty in the case, of course, was that the residence of the plaintiff was acquired only after all the events giving rise to the case had occurred. As the writers remind us, at all times relevant the plaintiff¹⁹ was not a resident of Minnesota, the forum state, but of Wisconsin; it thus seems inappropriate to rely on her unilateral²⁰ *1028 move to Minnesota after the events giving rise to the controversy had taken place. Even the Supreme Court plurality, ruling in the widow's favor and in part relying on her after-acquired residence in the forum state to justify the ruling, held this contact, although relevant, constitutionally insufficient to ground an exercise on the forum's law-making power.²¹

Now we have said that a state has power, as an initial proposition, to legislate for the general welfare of its residents. It cannot be true that this essential power of the state is somehow eclipsed with respect to a particular resident because that resident, until very recently, lived elsewhere.²² Lavinia Hague, like all other Minnesota residents, was entitled to Minnesota police protection and had to conform to Minnesota's laws. Her welfare, as the Minnesota Supreme Court pointed out, was within Minnesota's sphere of governmental interest. At the time of trial Lavinia's welfare was within no other state's sphere of interest.

Minnesota's rule interpreting "other insurance" clauses to permit "stacking" of uninsured-motorist coverages²³ was designed to make available the proceeds of paid-for insurance to cover the traffic injuries of its resident insureds - a category that did not include Ralph Hague. But is also (surely) was designed to make those proceeds available to its resident insurance beneficiaries generally, which Lavinia, as "legal representative" within the terms of the policy, most assuredly

A theory that state legislative jurisdiction is limited to events rather than persons within the territory will produce confusing or unpersuasive interpretations of Supreme Court conflicts cases. For example, it might be said that in *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954), a products liability case, the forum's law was sustained because the forum was the place of injury, and the defective product was purchased there. But the plaintiff in *Watson* was a resident of the forum state. Can it seriously be maintained that if Mrs. Watson had given herself the injurious home permanent in a Las Vegas motel room, and had then been brought home to Louisiana suffering from her injuries, Louisiana could not have applied its direct-action statute to create a forum for her lawsuit?

Brainerd Currie has suggested that the forum could not constitutionally withhold the protections of its laws from its residents on the sole ground that they were injured elsewhere; in his view, such a discrimination would lack any rational basis, and thus might violate the equal protection clause. Currie, *The Constitution and the "Transitory" Cause of Action*, (pts.1-2) 73 HARV. L. REV. 36, 268 (1959). See generally *Hughes v. Fetter*, 341 U.S. 609 (1951).

19. Professors von Mehren and Trautman seem to take the view that the plaintiff, as representative of the estate, need not be taken into account; apart from the insurer, the only person relevant to the issue before the court - the validity of the anti-stacking clause - was the decedent. See von Mehren & Trautman, *supra* note 6, at 42-43; see also Martin, *supra* note 8, at 142. But see *infra* text accompanying notes 23-25.

20. See Silberman, *supra* note 6, at 110-14 (proposing "principle of non-unilateralism" for choice of law).

21. 449 U.S. at 319. The other four Justices found this interest constitutionally irrelevant. *Id.* at 331 (Stevens, J., concurring); *id.* at 337 (Powell J., joined by Burger, C.J. & Rehnquist, J., dissenting).

22. Indeed, the Supreme Court has now held that a state may not discriminate against its newer residents. *Zobel v. Williams*, 60 U.S.L.W. 4163 (1982) (legislation providing for cash distributions of oil revenues).

23. See *Van Tassel v. Horace Mann Ins. Co.*, 207 N.W.2d 348 (Minn. 1973).

was;²⁴ and the representative quality of her interest does not detract from that analysis, since the estate she represented was under administration in Minnesota. Finally, the Minnesota rule would also rationally apply to a resident successor in interest to a named insured, which Lavinia also undoubtedly was, as heir. To say that Minnesota could not apply its law to protect her is to misstate the constitutional position.²⁵*1029

Since Minnesota must have this sort of power the Supreme Court need not have aggregated Lavinia's after-acquired residence there with other "contacts" in the case to sustain the choice of Minnesota law. It did so, apparently, in an effort to reconcile the result with *John Hancock Mutual Life Insurance Co. v. Yates*,²⁶ in which, on vaguely similar facts,²⁷ the Supreme Court had ruled against the widow. But *Yates* is simply obsolete; the Court ruled as it did in *Yates* because it was then of the view²⁸ that each state, under the full faith and credit clause, would be obliged to apply the laws of the place of contracting to a contract case. No one supposes that to be the state of the law today. Surely the problem of the after-acquired residence in the conflict of laws warrants rethinking free from the supposed necessity of reconciling the result with fossils like *Yates*.

But once power to deal with the injury to Lavinia's interest is conceded, that conclusion is indeed fortified by the other contacts Justice Brennan relied on for that purpose in *Hague*.²⁹ It is true that *1030 Ralph's having been employed in Minnesota, standing alone, would seem to give Minnesota little interest in applying its own interpretation of the "other insurance" clause in Ralph's policy. But Ralph's Minnesota employment might have generated some additional Minnesota interest in full recovery for his estate, the local representative of which Minnesota had appointed, and more specifically in his survivor's welfare, interests of the "fringe benefit" kind

24. The "legal representative" of the insured was a named beneficiary of the uninsured motorist provisions of Ralph's policy. Policy, *supra* note 1, § 2, at 3.

25. Thus in *Lettieri v. Equitable Life Ins. Co.*, 627 F.2d 930 (9th Cir. 1980), on facts similar to those of *Hague*, the circuit court held for the widow. See also *Kulko v. Superior Court*, 436 U.S. 84, 98 (1978) (dictum) (California law could constitutionally apply in New York proceeding to force father to pay increased child support, where children living in California); *Hanson v. Denckla*, 357 U.S. 235, 253 (dictum) (state of after-acquired residence of decedent-settlor could determine validity of trust created in second state, where trust assets were being administered in third state); *de Lara v. Confederation Life Ass'n*, 257 So.2d 42 (Fla. 1971) (after-acquired residence of beneficiaries may award policy proceeds on American currency contrary to agreement made in Cuba), *cert. denied*, 409 U.S. 953 (1972). See generally Note, *Post Transaction of Occurrence Events on Conflict of Laws*, 69 COLUM L. REV. 843 (1969).

26. 299 U.S. 178 (1936).

27. In *Yates*, the forum's sole connection with the case was as the after-acquired residence of the plaintiff in an action on a life insurance policy. Under the laws of the place of contracting, if the insured's application failed to reveal a health problem known to the insured, the policy was invalidated. Under forum law, in view of an insurance agent's conflict of interest at the time of sale, evidence that the insured told the truth to the agent would be admissible. This rule rationally could be applied where either party was a resident of the forum state. Nor would it "matter" that neither the insured nor the beneficiary were residents of the forum at the time the insurance was applied for. The issue was whether the forum had power to allow its resident plaintiff to introduce evidence that would tend to show that there was no basis in fact for the insurer's refusal to fulfill its obligation to her. Nothing in that issue turns on the insured's or the beneficiary's previous residence; the widow's residence, and the insurer's obligation, were both in the forum state when the question of the admissibility of evidence arose. Thus, it appears that the forum state in *Yates* had a rational basis for putting the evidence to the jury -that is, it was an interested state. So *Yates* was not only obsoletely reasoned, but wrongly decided. See *Lettieri v. Equitable Life Assurance Soc'y*, 627 F.2d 930 (9th Cir. 1980) (holding for the widow in case on *Yates* facts).

28. See generally Cramton, R., Currie, D. & Kay, H., *Conflict of Laws* 407-11 (3d ed. 1981).

29. Justice Brennan, for the plurality, was able to sustain the choice of Minnesota law on an aggregation of contacts between the forum state and the controversy. Ralph's employment in the state, the insurer's presence in the state, and Lavinia's residence there combined to give Minnesota a rational basis for application of its law invalidating anti-stacking clauses in insurance policies. 449 U.S. at 313-20.

Professor Weintraub reluctantly identifies.³⁰ Those interests in turn would become all the stronger when the survivor had become a bona fide resident.

Similarly, that the defendant insurer was doing business in the forum would also lent support to the application of forum law, as Justice Black pointed out in *Clay v. Sun Insurance Office (Clay I)*.³¹ Of course, Allstate's doing business in Minnesota in no way distinguishes Allstate as a Minnesota company; Allstate does business in every state. But Allstate was a Minnesota company at the time of trial in the sense in which it was a Wisconsin company at the time it issued the policy to Ralph.³² It becomes much harder to say that Minnesota could not assist its resident in obtaining full recovery from a recalcitrant insurer once one recognizes that the insurer was within the adjudicatory and regulatory jurisdiction of the state for general purposes.

If we conclude then with the Supreme Court plurality,³³ as we probably must, that Minnesota was an "interested" state—that is, that it had some rational basis for regulating Allstate's policies on behalf of Lavinia—the only remaining question on the constitutional level is whether some further, more restrictive scrutiny should have been launched by the Supreme Court. The opportunity to impose such further review is presumably the one Professor Reese regrets as "lost."³⁴

I have pointed out elsewhere that a move beyond minimal scrutiny for state interest alone would constitute a real change in existing *1031 law.³⁵ The Supreme Court has, with few exceptions,³⁶ given only minimal scrutiny³⁷ in conflicts cases since *Pacific Employers Insurance Co. v. Industrial Accident Commission*.³⁸ There are basically three possible approaches to restrictive constitutional review of an interested forum's choice of its own law,³⁹ any of which would represent a new departure.

30. Weintraub, *supra* note 6, at 28-29.

31. 363 U.S. 207, 221 (1960) (Black, J., dissenting), *quoted with approval in Hague*, 449 U.S. at 318; *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 182 (1964) (*Clay II*). It should be noted, however, that the Sun Insurance Office may not have been doing business in all other states.

32. The policy was issued from Illinois. 449U.S. at 315-16 n. 21. Although Allstate is licensed to do business in Wisconsin it is not a Wisconsin corporation.

33. Justice Brennan wrote the Court's opinion, in which Justices White, Marshall, and Blackmun joined. 449 U.S. at 304. Justice Stevens concurring in the judgement. *Id.* at 320. Justice Powell wrote a dissenting opinion, in which Chief Justice Burger and Justice Rehnquist joined. *Id.* at 332. Justice Stewart took no part in the consideration of the case. *Id.* at 320.

34. Reese, *supra* note 8, at 201-02.

35. Weinberg, *supra* note 12, at 447-52.

36. The exceptions include *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947), where the choice of the law of an interested state was given restrictive scrutiny, and *Day & Zimmermen, Inc. v. Challoner*, 423 U.S. 3 (1975), where the choice of the law of a noninterested sovereign was given no scrutiny. The exceptions do not include *Hughes v. Fetter*, 341 U.S. 609 (1951), or *First Nat'l Bank v. United Air Lines, Inc.*, 342 U.S. 396 (1952). In those cases the forum's excluding rule was properly struck down as without basis in any legitimate governmental interest.

37. By the term "minimal scrutiny" I mean the theoretical concept developed in Weinberg, *supra* note 12, corresponding to rational-basis scrutiny in other constitutional contexts. The term also fairly describes the underlying tendency of Supreme Courts cases when *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) is read broadly and in conjunction with *Pacific Employers Ins, Co, v, Industrial Accident Comm'n*, 306 U.S. 493 (1939), although there are exceptions. *See supra* note 36.

38. 306 U.S. 493 (1939).

39. Much of this analysis is developed on a general theoretical level in Weinberg, *supra* note 12.

First, the rational-basis test could be abandoned and state interest defined in some highly specific way.⁴⁰ Second, in addition or in the alternative, the exercise of an interested state's lawmaking power could be reviewed for assurances of fairness (foreseeability) beyond those implied by the regulated party's impingement on the forum's policy concerns.⁴¹ Third, in addition or in the alternative, the exercise of an interested state's lawmaking power could be reviewed for assurances of deference to principles of federalism or comity beyond those implied by the regulated party's impingement on the forum's policy concerns.⁴² *1032

We need not trouble ourselves about the second possibility, since it seems broadly conceded that there was no problem of unfairness in *Hague*.⁴³ That leaves two questions: (1) whether Minnesota's interest ought to have been more precisely scrutinized or more substantial, and (2) whether principles of federalism ought to have required deference to Wisconsin's more apparent interests.

In the essay to which I have already referred,⁴⁴ I took the position that minimal scrutiny for state interest alone was the appropriate level of constitutional review of state choices of law,⁴⁵ a position shared by symposium contributors Weintraub⁴⁶ and Sedler.⁴⁷ I shall not reargue that position as a theoretical matter here. I am this precluded from discussing these two further questions on the constitutional level. But both these questions are easily couched in ordinary choice-of-law terms, and can easily be considered by us on that level. What these questions come down to on the facts of *Hague* is a reconsideration of the relative interests of the two concerned states. The question is whether Minnesota, despite its constitutionally sufficient interest in applying its own law in *Hague*, ought to have perceived the weakness of that interest, identified Wisconsin's interest with greater sensitivity, weighed that state's interest against its own, and ultimately deferred to Wisconsin. *1033

40. See generally Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH L. REV. 1315 (1981). Professor Martin has recently proposed that conflicts cases be afforded "minimum contacts" scrutiny in line with jurisdiction cases. Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH L. REV. 872 (1980). But see Weinberg, *supra* note 12 at 478-82.

41. Presumably, this review would proceed under the due process clause, as would the preliminary scrutiny for state interest which ensures nonarbitrary law.

42. Presumably this review would proceed under the full faith and credit clause. See, e.g., *Hague*, 449 U.S. at 320-32 (Stevens, J., concurring); Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 229 (1976); Reese, *Legislative Jurisdiction*, 78 COLUM L. REV. 1587, 1698 (1978).

43. The foreseeability of the application of Minnesota law was conceded in all of the *Hague* opinions, 449 U.S. at 308; *id.* at 327-28 (Stevens, J., concurring); *id.* at 336 (Powell, J., dissenting), and seems generally conceded by all writers. Not only did the insurance policy afford nationwide coverage, but Allstate was aware of Ralph's daily commute to Minnesota. Interestingly, with the exception of Justice Brennan, 449 U.S. at 316 n.22, writers have tended to draw from these territorial facts the inference that Minnesota law might come to affect the policy terms, although, of course, Minnesota does not apply territorial choice rules. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 34 (Minn. 1978); *Milkovich v. Saari*, 203 N.W.2d 408 (Minn. 1973) see generally R. LEFLAR, *AMERICAN CONFLICTS LAW* § 96 (3d ed. 1977).

44. Weinberg, *supra* note 12.

45. See generally Weinberg, *supra* note 12. As I there elaborate, proposals for heightened scrutiny seem somewhat insensitive both to very real concerns of federalism manifest in the interstate litigation system and to widely-shared regulatory and remedial policies; moreover, as Professors von Mehren & Trautman agree in part, institutional constraints upon the Supreme Court, together with certain doctrinal constraints, counsel that no such heightened scrutiny be undertaken; von Mehren & Trautman, *supra* note 6, at 37-38.

46. This is the tenor of Professor Weintraub's article. See Weintraub, *supra* note 1, at 25-31.

47. Professor Sedler brings an interesting historical insight to his conclusion, which I share, that rational-basis scrutiny is the appropriate level of review. Sedler, *supra* note 5, at 61, 101.

The Minnesota Supreme Court did note, in fact, articulate any grounds for trepidation on its part in applying Minnesota law. But the choice of forum law in *Hague* surely warranted reconsideration. Despite what we have said thus far, there remains a residue of reservation in our minds about the significance of the residences of the *Hague* parties as “Minnesota” contacts. With most of the symposium contributors, we observe that at all times relevant⁴⁸ to the underlying events in the case—the time of transacting and even the time of occurrence of the insured-against risk—the insured was a Wisconsin resident and Allstate a Wisconsin insurer. And we need to consider, as well, that Lavinia’s move to Minnesota was a “unilateral” one,⁴⁹ which the insurer had no way of anticipating. Looked at with a sympathetic eye, these considerations help explain what symposium contributors have found to be “unprincipled”⁵⁰ in the treatment of the parties as Minnesota, rather than Wisconsin, residents. When coupled with the fact that it was, in a practical sense, a “Wisconsin” contract that Minnesota was purporting to interpret,⁵¹ the argument appears powerful that Minnesota, even it an “interested” state in some minimal constitutional sense, should more seriously have considered deferring to Wisconsin.

Since arguments countering the view that Minnesota’s interests were trivial cannot easily be disentangled from arguments countering the view that Wisconsin’s interests were preponderant, it will be convenient if we postpone responding to the former until we examine and are ready to respond to the latter.

II. WISCONSIN’S INTERESTS

Curiously, contributors to the *Hague* symposium, by and large, do not bother to identify Wisconsin’s interests.⁵² They tend to discuss *1034 the case in terms of Wisconsin’s contacts with the case. At the time of transacting both parties as well as the decedent resident there; Wisconsin was the place of transacting; and Wisconsin was the place of occurrence of the insured-against risk.

We can clear out of the way at once that Wisconsin was the place of occurrence of the insured-against risk. The place of occurrence of an insured-against risk can have little bearing on the interpretation of a policy affording nationwide coverage.⁵³ More importantly, nothing could have turned on the location of the accident from the point of view of either of the concerned states. Wisconsin, as the place of injury, was of course concerned in a general way about safety, but that interest could not be advanced by applying its law in this case. There is no way in which

48. E.g., von Mehren & Trautman, *supra* note 6, at 42.

49. E.g., Silberman, *supra* note 6, at 110-12.

50. See *supra* note 6.

51. Although the policy was applied for and delivered in Wisconsin, it was executed in Illinois and issued from the Illinois offices of Allstate, See 499 U.S. at 315-16 n.21.

52. The issue is raised by Professor Leflar, *supra* note 5, at 209, and by Professor Silberman, *supra* note 6, at 107-07. The Wisconsin “interests” identified by the Minnesota Supreme Court did not include either the interest in validating Wisconsin agreements of the more compelling interest in encouraging insurers to do business in Wisconsin. See *infra* text accompanying notes 56-57, 84. Instead, the court spoke of Wisconsin’s interest in “insuring minimum recovery on the part of the victim of uninsured motorists.” *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43-47 (Minn. 1978) (emphasis omitted). But clearly the rule permitting anti-stacking clauses was intended to furnish a ceiling and not a floor on recovery, so that the court’s explanation seems wide of the mark. The court also suggested that Wisconsin had an interest in keeping premiums low while providing at least some protections against uninsured motorists. *Id.* But here, too, the analysis seems unpersuasive. Premiums are doubled or trebled to those who take out multiple coverages on which they are not permitted to recover in the aggregate.

53. *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 180, 182 (1964) (quoting *Clay I*, 363 U.S. at 222 (1960) (Black J., dissenting)).

interpreting “other insurance” clauses to limit uninsured motorist coverage will encourage safer driving by uninsured motorists. Not could Minnesota “care” where the accident occurred, as far as its effort to get the insurance proceeds to the widow was concerned.⁵⁴ These reflections reinforce our earlier observation that state regulatory power is not a function of events simply, but turns on the need to regulate those events for the benefit of residents and others within state territory.

It will give more pause that Wisconsin may be considered to *1035 have been the place of contracting.⁵⁵ It seems to us somehow inappropriate for Minnesota to purport to interpret under its own laws an insurance policy applied for and delivered in Wisconsin. Yet it had not been supposed for some time that the location of the place of making of a contract should necessarily “matter” to a forum elsewhere with policy concerns of its own. Professor Currie long ago displayed to our startled eyes, in the memorable charts and tables of *Married Women’s Contracts*, the irrelevance (at least for the facts there under discussion), of the place contracting.⁵⁶ Professor Currie would surely say that the Wisconsin location of the contract in *Hague* could not affect Minnesota’s interest in enforcing its resident plaintiff’s rights against the defendant insurer doing business there; Minnesota’s protective concerns would not vary depending upon where the contract terms might have been agreed upon.

But the analysis in *Married Women’s Contracts* would have been somewhere more complex had Professor Currie taken into account the general validating concerns of the place of making. Today it would appear that as the presumed place of contracting in the *Hague* case, Wisconsin would have had some generalized interest in enforcing all agreements made in its territory and authorized by its laws when made. That interest derives from the state’s power to legislate for the general welfare of its residents; Wisconsin will encourage transactions in its territory and therefore enhance the commercial welfare of its residents by taking a validating view. From this it may be concluded that Wisconsin had an interest in validating the “other insurance” clause of Ralph’s policy in the circumstances of the *Hague* case. Even were the insurer a nonresident who happened to have sold the policy in Wisconsin, Wisconsin as the place of contracting might have asserted this interest, one which is obviously fortified by the fact that the defendant insurer was doing business there.

54. For similar reasons the place of a resident’s injury is understood to be of no legitimate concern to a state providing remedies for injured residents. *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 476 (1947); *see also Hughes v. Fetter*, 341 U.S. 609 (1951).

With these observations in mind we can be much clearer about the import of *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 180 (1964). There, the after-acquired residence of an insured was permitted to apply its law in the insured’s favor to reopen an action barred by the policy, validly so under the law of the place of contracting and original residence. Although the insured property was removed to the forum state, and the insured-against risk occurred there, those features of the case, given the foregoing analysis, can be seen to be irrelevant to the result. Thus the result in fact turned on the interests of the forum as the place of the plaintiff’s residence and a place where the defendant was licensed to do business, and was buttressed by the consideration that the policy coverage was worldwide. Assuming no change in the nature of Supreme Court review of such cases, it ought to have made no difference that in *Hague* the beneficiary moved to the forum state after, rather than before, the occurrence of the insured-against risk; the result in *Hague* should follow inevitably from *Clay*. *See Traynor, Conflict of Laws: Professor Currie’s Restrained and Enlightening Forum*, 49 CALIF. L. REV. 845, 868-70 (1971) (suggesting *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954), settles the supposed retroactivity problem of *Clay*).

55. *See supra* note 51. Of course, there is no constitutional compulsion to apply the law of the place of contracting. *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 493 (1939).

56. Currie, *supra* note 13, at 233. A rudimentary interest analysis of each possible case in the array displayed in Professor Currie’s Table 1 quickly reveals that of the four “Factors” charted, the place of contracting is uniquely irrelevant to the forum’s policy concerns on any permutation of the facts.

The short answer to this line of reasoning is that Wisconsin's generally validating concerns were subordinated in *Hague* (to the extent the contractual defense was good);⁵⁷ the issue was the enforceability *1036 of a clause that purported to *invalidate* two thirds of the paid-for coverage available under the policy. The generally validating attitudes we attribute to courts do not always characterize their adjudication of contractual defenses.⁵⁸ The policies of a state favoring a widely disfavored⁵⁹ contract defence rationally may be advanced only if that state is the defendant's place of business, as it was in *Hague*. But those policies have little to do with the state qua place of contracting.

But what of the expectations of the parties? Even with respect to a contractual defense in a policy of insurance, we may feel with Chief Justice Grey⁶⁰ and other expositors of the "place of making" rule⁶¹ that parties to a contract expect its terms to be enforced, and that they have a right to rely for interpretation of their agreements on the laws of the place where they strike their bargain. When those laws would validate a contractual defense, it is the "presumed intention of the parties"⁶² to be bound by that defense as so interpreted. In short, we may feel that Allstate had a right to rely on its "other insurance" clause as preventing stacking of Ralph's coverages, since the policy was delivered in Wisconsin at a time when Wisconsin presumably would have interpreted the clause in that way.⁶³

Let us examine our concern for the insurer—its right to rely on its "other insurance" clause. Let us, for a moment, put to one side that Lavinia Hague, who stood to benefit from the estate's recovery and who as legal representative was a beneficiary of the policy,⁶⁴ was not a party to the agreement. Let us put to one side that prior to the Supreme Court's decision, but after the Minnesota Supreme Court's decision, Wisconsin repented of its view and now has law similar to *1037 Minnesota's on the issue.⁶⁵ Let us even put to one side the independent foreseeability to the insurer of Minnesota law, given the nationwide coverage of the policy and the fact that Ralph Hague drove his car to work in Minnesota daily. But let us keep in view the "economics of a contractual relationship"⁶⁶ under which paid-for insurance proceeds would have been available to spread the risk of a traffic accident but for the supposed Wisconsin interpretation of a policy clause to the contrary. Let us also keep in mind that the clause (even had it been ambiguous) was unbargained-for small print in a contract of adhesion between parties of unequal bargaining power. Those factors were clearly at the core of Minnesota's legislative concern.

57. The clause in question was ambiguous, and, as Professor Weintraub points out, would have been construed against the insurer even in Wisconsin. Weintraub, *supra* note 1, at 21-22.

58. It is familiar learning that courts give careful scrutiny to contractual defenses, particularly in agreements between parties of unequal bargaining power. *See, e.g.,* *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) (exculpatory clause); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942) (seaman's release); *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960) (limited warranty). *But see* *Seigelman v. Cunard White Star Ltd.*, 221 F.2d 189 (2d Cir. 1959) (choice-of-law clause).

59. Weintraub, *supra* note 1, at 19, points out that most states do not interpret "other insurance" clauses in favor of the insurer in cases like *Hague*.

60. *Milliken v. Pratt*, 125 Mass. 374, 375 (1878).

61. *E.g.,* Beale, *What Law Governs the Validity of a Contract*, 23 HARV L. REV. 260, 270-72 (1910).

62. *Pritchard v. Norton*, 106 U.S. 124 (1882).

63. Weintraub, *supra* note 1, at 20.

64. Policy, *supra* note 1 & 2 at 3.

65. *Landvetter v. Globe Sec. Ins. Co.*, 300 N.W.2d 875 (Wis. Ct. App. 1980), *review denied*, 306 N.W.2d 251 (Wis. 1981).

66. 499 U.S. at 328 (Stevens J. concurring): "Moreover, the rule is consistent with the economics of a contractual relationship in which the policy holder paid three separate premiums for insurance coverage for three automobiles, including a separate premium for each uninsured motorist coverage."

From the point of view of the insurer, as Professors von Mehren and Trautman argue, “other insurance” clauses simply limit coverage, where there is other insurance, to a proportionate contribution.⁶⁷ The purpose is to avoid exhausting the policy limits in a way unfair to the particular company when other insurance exists. But of course “other insurance” in that sense was not available to Ralph Hague. Ralph’s three separate “uninsured-motorist” coverages were part of a single policy; only one company was involved. As Professor Weintraub points out, in this situation few states would treat the separate coverages as “other insurance” within the meaning of the clause.⁶⁸

Moreover, Ralph had paid a separate premium for each of his three uninsured-motorist coverages. The insurer might be warranted in charging Ralph a somewhat higher premium for \$15,000 of coverage,⁶⁹ since any of Ralph’s three different insured vehicles might be involved in an accident. But Ralph’s premium was *trebled*. Thus, it is hard to avoid the thought that if Allstate was relying on its “other insurance” clause at the time it sold this package to Ralph, it “knew” it was not giving value for money. Conversely, if Allstate was not planning to short-change Ralph or his legal representative, then it could not have been relying on the clause.

The insurer should not be heard to complain that it would have *1038 raised its premiums for uninsured-motorist coverage had it been aware that it could lose the benefit of local law in cases of this kind. Insurers are in the business of, and indeed are uniquely well-equipped for, calculating those as well as other risks, and are free to reflect those risks in their premiums. On the particular facts of *Hague*, all courts and commentators agree that the ultimate application of Minnesota law to a motor vehicle accident involving Ralph Hague was always foreseeable to Allstate, given Ralph’s daily drive to Minnesota, so that Allstate could always have set Ralph’s premium so as to take into account that possible application of Minnesota law.

So our concern for the defendant in this case may have been misplaced. And it may often happen that we give undue consideration to the state of mind of the defendant at the time of the transaction or occurrence when we say, loosely, that we think the defendant has a right to rely on the transaction state’s law. At the time of contracting, a contract debtor may be relying expressly on a bargained-for loophole which is essential to its financial survival. On the other hand, the debtor may be relying on defensive law of which the creditor is unaware, and-to put it crudely-committing fraud.⁷⁰ Similarly, at the time of occurrence of a tort, the tortfeasor cannot be relying on defensive law unless planning mischief. Occasionally the tort defendant may be underinsured in reliance on local defensive law.⁷¹ This would seem to be attributable to undue optimism on the part of the defendant; the question having arisen in a conflicts case, the defendant *ex hypothesi* has

67. See von Mehren & Trautman, *supra* note 6, at 36.

68. Weintraub, *supra* note 1, at 20-21.

69. Weintraub, private communication to the author.

70. E.g., *Lilienthal v. Kaufman*, 395 P.2d 543, 549 (Or. 1964).

71. A related argument is that insurance premiums would have been higher had the local defense been available. Such arguments rarely seem to withstand scrutiny under the facts of the cases they are aimed at. In *Rosenthal v. Warren*, 475 F.2d 248 (2d Cir. 1973), for example, the federal court, sitting in New York, was held free to deny the defendant Massachusetts, the place of injury. Apparently, the surgeon was not underinsured in reliance on the local defense; had the victim survived, adequate policy proceeds would have been available, and a single premium was paid to cover liabilities for both deaths and personal injuries. *Id.* at 444. As for the insurer, it was free to raise premiums to the surgeon, whom it knew to have an international practice, if it was concerned that it might lose the benefit of the local defense. Finally, even if the effect of *Rosenthal* is to raise insurance premiums to a higher level in Massachusetts, I fail to see how that alone would justify a New York court in throwing the chief burden of her husband’s death on the widow residing in New York, when the New York law would have protected her.

been unable to confine the tort to its home state.⁷² Finally, at the time of setting premiums an insurer *1039 ought not to be relying on local defensive laws exclusively; it is free to calculate and to take into account all risks, including the risk of foreign law.

If, then, we can find little significance in Wisconsin's contact with the case *qua* "place of contracting," the writers' conviction that Wisconsin law ought to have been applied must be traceable to other factors. Much is made of the fact that at the time of the events in the suit both parties to the contract, as well as Lavinia, "resided" in Wisconsin. The feeling that the parties' original Wisconsin residence is dispositive, gathering force from the fact that Wisconsin may be considered the place of contracting as well, comes down to the view that at the time of Ralph's contracting with Allstate, Ralph and Allstate entered into a relationship which, so far as their then contemplation was concerned, must be conceded to have had Wisconsin as its "seat."⁷³ Wisconsin seems, in other word, to be the "center of gravity" of the case.⁷⁴ By whatever formulation, the seat of a contractual relationship may simply seem the most appropriate source of law for interpretation of the contract that is the foundation of that relationship. But the facts that the parties resided in Wisconsin at the time of transacting and continued to do so until after the occurrence there of the insured-against risk, even when aggregated with the facts that Wisconsin was the place of that occurrence and the place of transacting, seem to me to be conclusive only on the question whether Wisconsin during that period was the "seat of the relationship." It does not seem conclusive on the conflicts issue before the Minnesota courts.

Should it "matter" to the interpretation of any continuing relationship that there is in effect at another place where that relation was "centered" or had its "seat" a set of laws and policies different from those where the obligation of the relationship must be carried out today? The view that it *should* "matter" seems a species of originalism, to use that term loosely, proponents of which would urge that the only principled way to adjudicate the legality of a contract term *1040 is under the laws in effect when the contract was made. Now originalism of this kind in contract interpretation doubtless has many virtues. But it is subject to the same sorts of criticisms as originalism in statutory interpretation proper, or in constitutional interpretation.⁷⁵ It is the real world we are trying to govern, not one long passed from view.⁷⁶ If the only principled mode of

72. In *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir. 1973), to continue with that example, the plaintiff and the decedent were not residents of the surgeon's home state, but rather of the forum state, as the surgeon was aware when he undertook to operate.

73. See Davies, *supra* note 9, at 193; F. SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS 133 (2d ed. W. Guthrie ed. & transl. 1980). See also D. CAVERS, THE CHOICE OF LAW PROCESS 166 (1965) ("I am employing [the concept] as a stopgap and am not prepared to defend it against all comers"); Professor Cavers disapproves of allowing the seat of a relationship in tort cases to favor the defendant. D. CAVERS, *supra*, at 177. Cavers does not use the concept in discussing contract cases, but simply refers to the extent to which a given transaction may be "centered" in a given state. *Id.* at 188.

74. See von Mehren & Trautman, *supra* note 6, at 46.

75. See generally, L. FULLER, THE MORALITY OF LAW 145-51 (rev. ed. 1969); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. Rev. 204 (1980); Fuller, *Positivism and Fidelity to Law - A reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). With respect to retroactive applicability of current policy, see *e.g.*, *Hamm v. City of Rock Hill*, 379 U.S. 266 (1964) (preemption of criminal law applicable to prior convictions); *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952) (assuming without discussion that foreign law under which defendant acted was irrelevant when repealed by time of trial).

76. Indeed, it is the established modern position that the forum should take into account policies *relevant at the time of decision*. *E.G.*, Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1586-87 (1966): "A state's governmental interest . . . need not coincide with its rules of local law, especially of the local rules, whether statutory or judge-made, are old or out of tune with the times. A state's . . . interest . . . is to be viewed as of the time when the question is presented." Professor Leflar is referring here to a somewhat different

adjudication is to defer, because they were in effect at a time and place supposed relevant, to laws that further policies considered illegal by us in the here and now, then one may say with Dickens' Mr. Bumble, "The law is a ass—a idiot."

The time "relevant" to governance of an ongoing contractual relationship need not be, a priori, the time when the parties entered into it, or when they carried out their initial contractual obligations. The governing power of a sovereign cannot be hedged round with supposed rules of that kind. If the relation has since become illegal, for example, the state as a practical matter would have to be able to step in and modify it. That is why the contract clause of the Constitution has never been interpreted to forbid legitimate exercises of state police power affecting the obligations of contracts.⁷⁷

And that is why it does not help to say that "at all times relevant" the defendant insurer in *Hague* was a Wisconsin company or that the plaintiff was a Wisconsin resident. At the time of the trial the defendant in *Hague* was, from the forum's point of view, a Minnesota company, and one that was evading an obligation to the (by that time) Minnesota plaintiff in violation of Minnesota law.

And this must also be the answer to the view that Minnesota's *1041 interests in the case were insubstantial. At the time of trial Minnesota's interests may indeed have become almost -if not quite- exclusive. With due respect to those holding the view that Wisconsin was the "center of gravity"⁷⁸ of the "seat of the relationship"⁷⁹ of the state whose interests would warrant even an interest analyst to apply Wisconsin law,⁸⁰ let us press on with the argument, if only to see how far it will go, that the center of gravity in *Hague* was not Wisconsin at all, but Minnesota.

What were Wisconsin's actual interests in *Hague*? Thus far we have found little significance in Wisconsin's several distinct contacts with the case as the place of past residence of the plaintiff,⁸¹ as the place of injury,⁸² as the place of transacting,⁸³ or as the "seat of the relationship."⁸⁴ But Wisconsin did have a further contact with the case which has clear significance: At the time of trial the defendant insurer was doing business there, and was thus in some sense a "Wisconsin" enterprise. Wisconsin would have had an interest in applying its enterprise-protecting law to limit the liability of "its" local enterprise. Moreover, observers reluctant to take such a view of the power of the state of residence of a party, might rationally conclude by aggregating elements from Ralph's previous residence in Wisconsin -the policy's having been applied for and delivered there and Ralph's vehicles having been garaged there- that application of Wisconsin law in *Hague* would encourage insurers to do business in Wisconsin; they could then expect with greater confidence that the "other insurance" clauses in their policies would be interpreted to prevent "stacking" of uninsured motorist coverages, even in multistate cases. Now at the time of trial this was a real interest, notwithstanding that it may be doubted whether the insurer would abandon the Wisconsin market if its "other insurance" clauses lost anti-stacking validity there. (Indeed, the subsequent

problem from that posed by the *Hague* case, related to his "better law" approach; but the message would be the same whether the forum wound up applying forum or foreign law: the relevant time is the time when the question is presented. See generally Note, *supra* note 25.

77. See generally G. GUNTHER, CONSTITUTIONAL LAW 557-62 (10th ed. 1980).

78. See von Mehren & Trautman, *supra* note 6, at 46.

79. Davies, *supra* note 11, at 193.

80. Silberman, *supra* note 6, at 105. But see Leflar, *supra* note 5, at 207-08.

81. See *supra* text accompanying notes 19-28.

82. See *supra* text accompanying notes 53-55.

83. See *supra* text accompanying notes 56-70.

84. See *supra* text accompanying notes 73-80.

change in Wisconsin law on the point still finds Allstate offering uninsured-motorist coverages in Wisconsin.) But although this interest may establish that *Hague* was a true conflict case, it hardly makes Wisconsin the “center of gravity” *1042 of the case. Indeed, upon reflection we will probably agree with Professors Weintraub and Leflar that had Wisconsin been the Forum state it might well have refused to apply its own law.⁸⁵

If Wisconsin had been the forum state, and had attempted to rule in favor of the insurer to assert the interests we have identified, it would have had to disengage itself from its own evolving ideas of the propriety of enforcing anti-stacking provisions,⁸⁶ while noting that the burdens of ruling adverse to the nonresident widow would have had to be borne in Minnesota. The question for Wisconsin would have been whether to allow a Wisconsin company to default on a portion of its obligation to the estate of a decedent who had died domiciled in Wisconsin, to the disadvantage of a nonresident widow, on the strength of a clause in the policy to which the widow was not a party and which Wisconsin would probably no longer enforce even as against its own resident insureds.⁸⁷ Applying its own conflicts rules, Wisconsin almost certainly would have applied Minnesota law.⁸⁸

But to the Minnesota court, *Hague* was a dispute between two Minnesota residents about promises made by one for the benefit of the other; the question was whether to allow the Minnesota company to avoid its full obligation to the estate and ultimately the Minnesota widow by relying on a boilerplate clause, which (if it had the meaning contended for) was unenforceable in Minnesota. The answer in Minnesota is a foregone conclusion, once the case is looked at in this Minnesota light.

And that is what Professor Leflar is talking about when he concludes that virtually every nontraditionalist court in the country would reach the same result today.⁸⁹ Whether a court rejects a “moderate and restrained view” of the reach of its own law through Professor Leflar’s “choice-influencing considerations,” or through *1043 “comparative impairment” analysis or other modern technique, the result is unlikely to differ.⁹⁰

CONCLUSION

In perceiving the choice of Minnesota law in *Hague* as parochial and unprincipled, commentators have been relying on concepts which, as we have seen, are rather hollow ones for the *Hague* case; that “at all times relevant” the parties were “Wisconsin” parties and the contract was a “Wisconsin” contract, that the “seat of the relationship” was in Wisconsin, that the defendant

85. Leflar, *supra* note 5, at 208-10; Weintraub, *supra* note 1, at 20-21.

86. Weintraub, *supra* note 1, at 20; *see supra* note 64 and accompanying text.

87. *See supra* note 65 and accompanying text.

88. Presumably Wisconsin would have identified its own enterprise-encouraging interests, but those interests would have seemed weakened by the process of ambiguous amendment and reinterpretation then eroding its enterprise-encouraging statute. *See supra* note 86. Since Wisconsin applies Professor Leflar’s “choice-influencing considerations,” *Hunker v. Royal Indem Co.*, 204 N.W.2d 897, 902-04 (Wis. 1973), Wisconsin would certainly have taken note of the “better law” in Minnesota.

89. Leflar, *supra* note 5, at 208, 211.

90. *See, e.g.*, *Lettiere v. Equitable Life Assurance Soc’y*, 627 F.2d 930 (9th Cir. 1980) (using California’s “governmental interest analysis” to let the widow prove her case under forum state law on facts analogous to those in *Hague*).

had a right to rely on Wisconsin law. What accounts for this? It may be that we have never succeeded wholly in disembarassing ourselves of the remnants of vested rights theory.⁹¹

Of course, the tension between the set of ideas entertained by those clinging to originalism and “vested rights” theory on the one hand, and those more consistently embracing policy and functional analyses on the other, cannot be resolved in a brief essay, and I do not pretend to have accomplished that. But perhaps this effort will encourage some modest reassessment of *Allstate Insurance Co. v. Hague*.

91. See generally J. BEALE, TREATISE ON THE CONFLICT OF LAWS (1935). Professor Lowenfeld also makes this diagnosis in Lowenfeld & Silberman, *Choice of Law and the Supreme Court: A Dialogue inspired by Allstate Insurance Co. v. Hague*, 14 U.C.D. L. Rev. 841, 858 (1981).