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Erratum
Page 26, footnote 109. The first decision should be "Real Forum Interest". Page 77, line 21. For "with true conflicts analysis" read "with the true conflicts".
Allstate Insurance Co. v. Hague: An Unprovided-for-Case in the Supreme Court

Clifford D. Allo*

Professor Allo uses a recent Supreme Court decision, Allstate Insurance Co. v. Hague, as a vehicle to propose improvements in conflict of laws analysis. Hague, according to the author, is decided correctly, but for wrong reasons. With extensive case development, Professor Allo advocates strict interest analysis, a modified version of the interest analysis of Professor Currie and others, as a superior analytical tool for reconciling precedent and deciding future cases. The Article's thesis is threefold: First, state interests should be construed strictly for choice of law; second, such strict construction permits the integration of choice of law with constitutional constraints, merging two issues heretofore treated separately; and third, state court jurisdiction over defendants having minimal contacts unrelated to the litigation should be strictly construed to simplify the choice of law problem.

INTRODUCTION

CONFLICT OF LAWS presents four major issues: choice of law, constitutional constraints on choice of law, jurisdiction, and recognition of judgments. Although these issues generally are regarded as separate, they can be related. A judgment, for example, is not worthy of recognition unless it was based in sound jurisdiction.1 The relationship between choice of law and the

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constitutional constraints on choice of law should seem important, but instead, that relationship often has been regarded as attenuated or peripheral. This Article urges that these two issues can and should be integrated. If state interests for the purpose of choice of law are construed strictly, then this strict interest analysis can provide a more complete explanation of the Supreme Court's choice of law decisions of the last two generations. Moreover, if state interests are construed strictly, state interests in choice of law and state interests for the constitutional constraints on choice of law can be equated, thereby unifying the issues. Additionally, if state court jurisdiction also is narrowed, several less desirable choices of law will be unnecessary. In particular, these adjustments provide a rational approach to a problem which largely has fallen through the cracks: the unprovided-for-case.

There are two types of courts: those that recognize the unprovided-for-case and those that do not. The distinction is not trivial. A court which overlooks the utility and importance of unprovided-for-cases faces several problems. If the court does not accept the rebuttable presumption that the forum's law applies, then it must make an affirmative case for the application of either the law of the forum or a law from outside of the forum. Unprovided-for-cases, however, do not provide affirmative arguments for any law. In seeking affirmative arguments, a court which does not acknowledge unprovided-for-cases instead must ponder and even exaggerate the significance of "contacts."

2. See, e.g., Restatement (Second) of Conflict of Laws §9 (1971).

3. It is assumed that the reader is generally familiar with the well known approaches to choice of law. In Currie's interest analysis, the unprovided-for-case is the case in which neither the forum nor any other state has an actual interest in the application of its law. B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 152-56 (1963) (a collection of articles from 1958 to 1963). These concepts are discussed further in infra notes 85-101 and accompanying text.


6. The term "policy" will be used to mean the purpose, aim, or social goal of a law. Policies will be construed narrowly and obvious policies will be preferred over interpretations of subtle or devious policies. This policy, however, is distinguishable from the "public policy" discussed in infra note 127. The term "interest" represents the congruence of policy and the relevant party which makes the law in question relevant for choice of law purposes.
no state's policies actually will be advanced, or frustrated, by the application of either of the laws, the contacts in an unprovided-for-case may be considered out of context, resulting in mistaken views of precedent. As courts interpret different sets of facts to support spurious interests or hold those facts to be sufficiently significant, the courts increasingly will establish misleading precedents. Those precedents, on later reflection, will be difficult to reconcile and, in turn, will suggest spurious true conflicts.

This Article suggests that any analysis based on the contacts in the Supreme Court's choice of law decisions obscures the true nature of the cases and misconstrues the constitutional constraints on state choice of law doctrines. Strict interest analysis of the Court's choice of law decisions yields a more consistent pattern than analyses based on either contacts or even the particular phrasings used in the Court's opinions. Moreover, this pattern is not inconsistent with accepted constitutional doctrines. It is not claimed that the views advanced in this Article can be deduced directly from the language of court decisions. The views, however, are concise, simple, and, unlike others, do reflect an ability to rationalize the decisions.

I. Allstate Insurance Co. v. Hague

Allstate Insurance Co. v. Hague is an example of an unacknowledged unprovided-for-case. Justice Stevens, who cast the deciding vote in that case, indicated that the law of the forum applies unless displaced. Parts of the Court's opinions and the result of the decision reflect strict interest analysis, and the Court might have adopted its phrasings had they been available. Blessed with
sounder instincts than analytical tools, the Supreme Court affirmed the use of the Minnesota forum’s law in an unpri-vided-for-case with opinions which are unlikely to provide comfort to most commentators.

A. The Facts

Ralph Hague, a passenger on his son’s motorcycle, was injured fatally when the cycle was struck by an automobile. While neither driver carried insurance, Hague had three policies with Allstate, each providing $15,000 in uninsured motorist coverage. All three policies had been delivered in Wisconsin, the state in which Hague resided and in which the accident occurred. Shortly before bringing suit, Hague’s widow moved to Minnesota for reasons unconnected with the litigation. Suit then was filed in a Minnesota state court. The key issue was whether the federal Constitution permitted the Minnesota Court to apply its own law, which, like a majority of states, “stacked”11 the separate uninsured motorist coverages, or whether the Constitution required the Minnesota court to defer to Wisconsin, the state of Hague’s residence and injury, which might not have stacked the separate coverages.

B. Hague in the Minnesota Supreme Court

The Minnesota Supreme Court listed three alternatives: (1) decline jurisdiction and thus defer to the Wisconsin courts; (2) grant jurisdiction and apply Wisconsin law; or (3) apply Minnesota law.2

Having noted that stacking was the only disputed issue, the Minnesota court first examined Gulf Oil Corp. v. Gilbert13 to decide whether to disturb plaintiff's choice of court by finding Min-

10. Hague's home was in Hager City, Wisconsin, a town of under 2,000 directly across the Mississippi River from Red Wing, Minnesota, where Hague worked and to which Mrs. Hague moved after his death. The accident occurred 10 miles north of Hager City. Mrs. Hague later remarried and moved to Savage, Minnesota, a town 40 miles northwest of Red Wing and 10 miles south of the Twin Cities. Hague v. Allstate Ins. Co., 289 N.W.2d 44, 45 (Minn. 1979).

11. When more than one uninsured coverage may be available, insurance contracts often provide, in effect, that only the largest of the coverages shall be available. These contractual clauses forbid "stacking" the separate coverages. The majority of states, including Minnesota, however, refuse to enforce such clauses and provide that the coverages must be stacked. Nelson v. Emp. Mut. Cas. Co., 63 Wis. 2d 558, 563, 217 N.W.2d 670, 673 (1974). See infra note 16.

12. 289 N.W.2d at 45.

13. 330 U.S. 501 (1947). "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Id. at 508.
nnesota to be an inconvenient forum. The court concluded that "the mere fact that Wisconsin law may be different from Minnesota law is not sufficient reason to decline jurisdiction."14

The court next focused on choice of law. After determining both that Minnesota law could be applied15 and that Wisconsin's law actually differed,16 the court made the choice of law according

14. 289 N.W.2d at 46.
15. Although no mention was made of any constitutional authority, it will be assumed, in light of the choice of law discussion which follows, that the Minnesota court was concerned with whether it had the power to apply its own law. The court listed several contacts between Minnesota and the parties in the facts of the case: Mrs. Hague's new residence; Allstate's license to do business in Minnesota; Allstate's conduct of business in Minnesota; Minnesota's role as a "justice administering state"; and Hague's history of commuting within Minnesota. Minnesota also claimed interests "in maximizing the tort recovery of plaintiffs who are involved in accidents involving uninsured motorists," and in "the administration of estates." Id. at 47. These contacts, however, are constitutionally insufficient to give Minnesota affirmative legislative power over the Hague litigation. Mrs. Hague's new residence is insufficient. John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936). Allstate's presence is also insufficient. Home Ins. Co. v. Dick, 281 U.S. 397 (1930). Furthermore, the Court did not develop the relevance of Hague's death occurring while on a recreational motorcycle to his commuting to work. Minnesota's role as a justice administering state does not make a constitutional difference, even if other states might have no interest in administering justice.

Minnesota's other claimed interests are similarly overstated and attenuated. Minnesota's interest in maximizing the recovery of plaintiffs injured by an uninsured motorist cannot include all plaintiffs wherever they reside or are injured. The Minnesota policy should be limited to plaintiffs residing in Minnesota or who, at the time of the injury, were otherwise sufficiently affiliated with Minnesota that failure to receive compensation would burden Minnesota's resources. In addition, Minnesota's claim to an interest in estates also includes too much, especially when the estate's primary asset in Minnesota is the cause of action from the accident.

Thus, contact analysis is insufficient to explain the Hague case, but nevertheless, application of Minnesota law is appropriate for an unprovided-for-case such as Hague when viewed under strict interest analysis. See infra notes 262-67 and accompanying text.


One of the arguments in Nelson, however, is of great relevance:

It is argued that the legislature meant that uninsured-motorist coverage if provided under this section, has to provide absolutely the amount of coverage stated in the section. Thus the amount of coverage provided by statute was the minimum for each policy and not the maximum coverage afforded in fact by several policies. It is contended this view is correct because after our decision in Leatherman, sec. 204.-30(5)(a), Stats. 1967, was amended by the legislature by ch. 72, Laws of 1973. This section now expressly provides that the uninsured-motorist coverage shall not be reduced by the terms thereof to provide the insured with less protection than would be afforded him of [sic] he were injured by a motorist insured under an automobile policy containing the limits provided in this subsection. We do not hereby construe this section or intimate any interpretation; we point out the amendment because of the argument made.

Id. at 568, 217 N.W.2d at 675. The amendment was effective July 22, 1973. Hague was injured July 1, 1974. It appears, therefore, that there was no actual conflict of laws.
to Professor Leflar's criteria discussed in *Milkovich v. Saari.* Predictability of results slightly favored the application of Wisconsin law to benefit Allstate, apparently because the policy reflected Wisconsin insurance rules. Maintenance of interstate order favored Minnesota law because of the Minnesota contacts. The court, however, did not indicate that this factor favored Minnesota law. Leflar's third factor, simplification of the judicial task, was irrelevant because Wisconsin law was accessible. Minnesota law was more likely to promote advancement of the forum's governmental interest than Wisconsin law, but the thin Minnesota contacts failed to persuade the court to apply forum law. Leflar's fifth criterion ultimately controlled as Minnesota law was chosen as the better rule of law.

2. *Rehearing*

On rehearing, the issues shifted. The majority reaffirmed its reasoning and after a brief discussion of the automobile as a movable object, concluded that "[a]pplication of Minnesota law in this case is, therefore, not so arbitrary and unreasonable as to violate due process." Whether "so" implied an admission that the application of Minnesota law is somewhat arbitrary and unreasonable is unclear. To the extent that application of Minnesota law required justification and that justification was sought in either restatement, the court may well have been uneasy: the accident and the contract were both in Wisconsin.

The dissent by Justice Otis advanced three themes. The first argument attempted to link judicial and legislative jurisdiction via justified expectations. The dissent cited arguments by Justices

17. Leflar, *Choice-Influencing Considerations in Conflicts Law,* 41 N.Y.U. L. Rev. 267 (1966). These criteria are: (1) predictability of result; (2) maintenance of interstate order; (3) simplification of the judicial task; (4) advancement of forum's governmental interest; and (5) better rule of law.

18. 295 Minn. 155, 161, 203 N.W.2d 408, 412 (1973). Simply because Minnesota law was thought to be better than Ontario law, an Ontario gratuitous guest plaintiff received the benefits of Minnesota law against his negligent Ontario host-driver, notwithstanding the Ontario guest act and that no medical expenses were incurred in Minnesota.

19. Even though Wisconsin law was accessible, it was misread. *See supra* note 16.

20. *See infra* note 162 for a discussion of the relationship of Leflar's aproach to strict interest analysis.

21. 289 N.W.2d 50 (Minn. 1979).

22. *Id.* (emphasis added).

23. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* (1971); *RESTATEMENT OF CONFLICT OF LAWS* (1934); *see infra* notes 62-84 and accompanying text.
Black and Brennan in *Hanson v. Denckla*\(^{24}\) and *Shaffer v. Heitner*\(^{25}\) that choice of law should have greater influence on jurisdiction.\(^{26}\) Justice Otis, however, seems to have twisted the argument to suggest that because Allstate had not purposely availed itself of the benefits and protections of Minnesota law in doing business with Hague, Minnesota law should not have been applied.\(^{27}\)

The second argument was clearer and stronger. Justice Otis relied on the contacts mentioned in two prior cases, *Milkovich v. Saari*\(^{28}\) and *Bolgrean v. Stich*,\(^{29}\) to argue that the contacts in *Hague* favored Wisconsin law. An important assertion in this argument was that "the only question in *Bolgrean* and *Milkovich* was whether Minnesota had sufficient interest in the litigation to apply this state's better rule of law."\(^{30}\) Thus, under Justice Otis' view, the forum must have an interest as a condition precedent to application of forum law. It is evident, therefore, that Justice Otis' view allows for application of forum law to a true conflict or a false conflict in which the forum has the interest, but never to an unprovided-for-case in which neither state has an interest. Since Justice Otis failed to recognize the unprovided-for-case, he was

\(^{24}\) 357 U.S. 235 (1958).


\(^{26}\) True, the question of whether the law of a state can be applied to a transaction is different from the question of whether the courts of that state have jurisdiction to enter a judgment, but the two are often closely related and to a substantial degree depend upon similar considerations. *Hanson v. Denckla*, 357 U.S. at 258 (Black, J., dissenting) (distinction between legislative jurisdiction and judicial jurisdiction).

I recognize that the jurisdictional and choice-of-law inquiries are not identical. . . . In either case an important linchpin is the extent of contact between the controversy, the parties, and the forum state. While constitutional limitations on the choice of law are by no means settled. . . . important considerations certainly include the expectancies of the parties and the fairness of governing the defendants' acts and behavior by rules of conduct created by a given jurisdiction.


\(^{27}\) Justice Otis' reasoning was not altogether clear. His syllogism appears to have been:

(a) The second Restatement protects justifiable expectations;

(b) Legislative jurisdiction should depend upon judicial jurisdiction;

(c) *Hanson* conditions judicial jurisdiction on purposeful availment of the benefits and protections of forum law;

(d) Allstate did not purposely avail itself of Minnesota's law in writing Hague's insurance;

(e) Therefore, Allstate had a reasonable expectation that Minnesota law would not apply to Hague's policies;

(f) Therefore, Minnesota law should not apply.

\(^{28}\) 295 Minn. 155, 203 N.W.2d 408 (1973).

\(^{29}\) 293 Minn. 8, 196 N.W.2d 442 (1972).

\(^{30}\) 289 N.W.2d at 52.
foreclosed from applying Minnesota law to Hague, in which he correctly found no Minnesota interest. Thus, Justice Otis’ analysis forced him to accept Wisconsin’s contacts without examination.

The dissent’s third argument rested not only on Home Insurance Co. v. Dick,31 but also on Hartford Accident and Indemnity Co. v. Delta Pine Land Co.32 Justice Otis proved that Texas had no interest in Home33 and Minnesota had no interest in Hague, but he overlooked the crucial distinction between Mexico’s interest in Home and Wisconsin’s lack of interest in Hague.34 For Justice Otis, apparently, the law of the place of the contract was the “Milhollinian” residual law to be applied when the risk of nonpersuasion as to choice of law was not overcome.35 On correctly finding no affirmative basis for Minnesota’s law, Justice Otis applied Wisconsin law without further inquiry. The difficulty, therefore, lies not in Justice Otis’ discernment, but in his analytic scheme. The next section of the Article describes the Hague opinions in the Supreme Court, setting the stage for the critical analysis to follow.36

C. Hague in the Supreme Court


31. 281 U.S. 397 (1930).
33. For a discussion of Home, see infra text accompanying notes 118-30.
34. See infra notes 262-67 and accompanying text.
35. There are three different views as to which law controls when the party with the risk of nonpersuasion on the issue of choice of law fails to meet the burden. Currie would apply the forum law; hence, there is a rebuttable presumption in its favor. Judges Fuld and Otis would follow the choice of law dictates of the first Restatement. See, e.g., Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972). Hence, there would be a rebuttable presumption in favor of territorialism. See infra note 507. It appears that Justice Traynor would apply the nonforum law. See infra note 108. Professor Milhollin has discussed this relation in terms of which law is the “residual law,” that is, the law to be applied by default. Milhollin, The Forum Preference in Choice of Laws: Some Notes on Hurtado v. Superior Court, 10 U.S.F.L. Rev. 625, 626-38 (1976). This concept deserves greater recognition.
36. See infra notes 354-433 and accompanying text.
1. The Plurality

The plurality opinion has three parts. Part I presents the facts and the holding below. In part II, after reviewing precedent, Justice Brennan selected contact analysis as the standard for decision, thereby eschewing interest analysis. In part III, Justice Brennan was forced to exaggerate the importance of Minnesota's contacts to show compliance with the standard derived in part II. Wisconsin's interest was given no direct consideration.

Justice Brennan decided that neither the due process clause of the fourteenth amendment nor the full faith and credit clause of article IV, section 1 of the Constitution barred the Minnesota Supreme Court's choice of substantive Minnesota law.38

The plurality limited the Court's role in choice of law to setting the outer boundaries of decisionmaking for the states. While Justice Brennan acknowledged that cases or issues may support the application of the law of more than one state without being inconsistent with the Constitution, he nonetheless required an affirmative demonstration of contacts to sustain a choice of law:

In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair . . . the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.39

The minimum contacts standard was derived from a comparison of Home Insurance Company v. Dick40 and John Hancock Mutual Life Insurance Co. v. Yates,41 which reversed forum attempts to apply the local law, with Alaska Packers Association v. Industrial Accident Commission,42 Cardillo v. Liberty Mutual Insurance Co.,43 and Clay v. Sun Life Insurance Office, Ltd.,44 which affirmed applications of forum law. As cases rejecting application of forum law, Home and Yates presented only the "nonsignificant forum contact"45 of what might be called "tainted residency." In Home, Dick was a "a nominal, permanent resident of Texas"46 "who was domiciled in Mexico and 'physically present and acting

38. Id. at 304.
39. Id. at 308.
40. 281 U.S. 397 (1930).
41. 299 U.S. 178 (1936).
42. 294 U.S. 532 (1935).
44. 377 U.S. 179 (1964).
46. Id.
in Mexico.'”47 In Yates, the plaintiff-widow presented only the nonsignificant forum contact of having moved to Georgia to seek its more favorable law after both the purchase in New York of life insurance on her late husband and his death in that state.

In the set of cases affirming application of forum law, Justice Brennan found more significant contacts. In Alaska Packers, the worker was hired in California; in Cardillo, the worker was hired in, commuted from, and resided in the District of Columbia; and in Clay II, the insured resided in and suffered his loss in Florida.

According to Justice Brennan, the lesson of these two sets of cases is that the law of a particular state may be applied only if that state has a significant contact or aggregation of contacts which creates a state interest. If either of those prerequisites is met, the choice of that state's law is neither arbitrary nor fundamentally unfair.48

In Part III of the plurality opinion, Justice Brennan found a significant aggregation of contacts which permitted the Minnesota court's application of Minnesota law in favor of stacking. This aggregation comprised three contacts. First, Mr. Hague was both a Minnesota employee and a Minnesota commuter. Second, "All-state was at all times present and doing business in Minnesota."49 Finally, without any "suggestion that Mrs. Hague moved to Minnesota in anticipation of this litigation or for the purpose of finding a legal climate especially hospitable to her claim,"50 she "became a Minnesota resident prior to the institution of this litigation."51

2. The Dissent

Justice Powell's dissent, joined by the Chief Justice and Justice Rehnquist, accepted the plurality's contacts standard of decision. This dissent, however, rejected the plurality's result.

According to the dissent, the "modest"52 check on choice of law provided by due process and full faith and credit comprises two requirements. First, like the plurality, the dissent articulated a contacts requirement that "there must be some connection between the facts giving rise to the litigation and the scope of the

47. Id. (quoting from Home, 281 U.S. at 408).
48. Id. at 312-13.
49. Id. at 317.
50. Id. at 319.
51. Id. at 318.
52. Id. at 332 (Powell, J., dissenting).
State's lawmaking jurisdiction . . . [in order that] the States do not 'reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.' "53 Second, to prevent fundamental unfairness, the application of the state's law must not be beyond a party's reasonable expectations.

Although "no reasonable expectations of the parties were frustrated," Minnesota lacked "sufficient contacts with the 'persons and events' in [Hague] to apply its rule permitting stacking."54 Post-accident changes in residence could not be permissible contacts. Furthermore, without a relationship to the facts of the dispute, presence of the defendant in a state is relevant only to the question of personal jurisdiction. Hague's employment status in Minnesota would have been relevant to an employment-based issue like workers' compensation, but had no relevance to the issue in this case. Since no contact was relevant to any Minnesota policies, aggregation of the contacts likewise failed to make the necessary affirmative case for application of Minnesota law.

3. Justice Stevens' Concurrence

Whereas the plurality and the dissent agreed on the rule, but divided over its application to the facts, Justice Stevens' concurrence in the judgment manifested a sophisticated appreciation of the constitutional constraints on choice of law, a clear affirmation of the presumption in favor of forum law, but a preference, nonetheless, for traditional Bealean choice of law doctrines.

Justice Stevens separated full faith and credit from due process:

As I view this unusual case—in which neither precedent nor constitutional language provides sure guidance—two separate questions must be answered. First, does the Full Faith and Credit Clause require Minnesota, the forum State, to apply Wisconsin law? Second, does the Due Process Clause of the Fourteenth Amendment prevent Minnesota from applying its own law? The first inquiry implicates the federal interest in ensuring that Minnesota respect the sovereignty of the State of Wisconsin; the second implicates the litigants' interests in a fair adjudication of their rights.55

According to Justice Stevens, the function of the full faith and credit clause is to forbid encroachments by one state on another

53. Id. at 334 (quoting from World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).
54. Id. at 336.
55. Id. at 320 (Stevens, J., concurring) (emphasis supplied).
state's sovereignty by requiring deference from a state lacking an interest to any state possessing an interest. Deference would not be required, however, if either the forum state possessed an interest or if, as in Hague, no other state possessed an interest. Justice Stevens wrote that whether Minnesota had followed "normal conflicts law,"\textsuperscript{56} the absence of a Wisconsin interest supported the Minnesota court's use of Minnesota law:

Petitioner has failed to establish that Minnesota's refusal to apply Wisconsin law poses any direct or indirect threat to Wisconsin's sovereignty. In the absence of any such threat, I find it unnecessary to evaluate the forum State's interest in the litigation in order to reach the conclusion that the Full Faith and Credit Clause does not require the Minnesota courts to apply Wisconsin law to the question of contract interpretation presented in this case.\textsuperscript{57}

Thus, the full faith and credit clause did not bar Minnesota's courts from applying Minnesota law because Wisconsin's sovereignty suffered no encroachment.

Due process would be denied, according to Justice Stevens, only if a state's choice of law was either totally arbitrary or fundamentally unfair to a litigant. By suggesting that application of forum law by a forum judge \textit{could not be arbitrary}, Justice Stevens seems to have implied the existence of a rebuttable presumption in favor of forum law. This presumption would be rebutted if "the application of a rule of law [would be] fundamentally unfair to one of the litigants."\textsuperscript{58} Fundamental unfairness would be found if the forum's law discriminated against nonresidents, "if it represented a dramatic departure from the rule that obtains in most American jurisdictions, or if the rule itself was unfair on its face or as applied."\textsuperscript{59} Unfair surprise, for example, would make an otherwise permissible law unfair as applied.\textsuperscript{60}

The decision of the Minnesota court to apply Minnesota law presented no fundamental unfairness. Not only was stacking \textit{not} a "dramatic departure," it was also the majority rule. Furthermore, a rule could not be fundamentally unfair on its face merely for requiring the insurance company to provide that for which it had been paid. Finally, Allstate would not be unfairly surprised by the stacking rule because the company did business in Minnesota

\textsuperscript{56} Id. at 324.
\textsuperscript{57} Id. at 325-26.
\textsuperscript{58} Id. at 326.
\textsuperscript{59} Id. at 326-27.
\textsuperscript{60} Id. at 327.
and had neglected to forbid stacking in the policy it had drafted. Consequently, Justice Stevens concluded: "The choice-of-law decision of the Minnesota courts is consistent with due process because it does not result in unfairness to either litigant, not because Minnesota now has an interest in the plaintiff as resident or formerly had an interest in the decedent as employee."\(^6\)

Since the full faith and credit clause did not require application of Wisconsin's law and due process of law was not denied by application of Minnesota law, the presumption in favor of forum law was not rebutted. Thus, Justice Stevens voted to affirm the Minnesota court's application of Minnesota law.

D. Hague and the Restatements

Justice Stevens seemed to view Hague as opening new ground because Minnesota's use of Minnesota law was "plainly unsound as a matter of normal conflicts law."\(^6\) Although Justice Stevens did not define normal conflicts law, two obvious possibilities are the first and second Restatements of Conflict of Laws. If either of the two Restatements is deemed to be normal conflicts law, then Justice Stevens' observation is accurate because neither Restatement can support the result in Hague. This Article will examine next the deficiencies of the Restatements and then will introduce more satisfactory analyses.

1. The First Restatement

The first Restatement of Conflict of Laws reflects the territorialist view of its reporter, Joseph H. Beale,\(^6\) that only one law gov-

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\(^6\) Id. at 331.
\(^6\) Id. at 324.
\(^6\) After graduating from Harvard College in 1882, and its law school in 1887, Beale spent all but four of the next 56 years on the Harvard Law School faculty. Three years were spent in private practice and one year as the organizer and first Dean of the University of Chicago School of Law. In all, Beale compiled casebooks in nine different subjects. SELECTED READINGS ON CONFLICT OF LAWS 629 (M. Culp ed. 1956) [hereinafter cited as SELECTED READINGS].

A measure of one's work, however, is the effort required to refute it. W. Cook, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942) and Cavers, A Critique of the Choice of Law Problem, 47 Harv. L. Rev. 173 (1933) are early and devastating critiques of Beale's ideas. B. Currie, supra note 3; A. Ehrenzweig, TREATISE ON THE CONFLICT OF LAWS (1962); R. Leflar, AMERICAN CONFLICTS LAW (3d ed. 1977); A. von Mehren & D. Trautman, THE LAW OF MULTISTATE PROBLEMS (1965); and R. Weintraub, COMMENTARY ON THE CONFLICT OF LAWS (2d ed. 1981) are recent and thorough works which are completely at odds with Beale. Despite the weight and vigor of scholarly criticism, some courts continue to apply his choice of law ideas. See, e.g., Gibson v. Fullin,
erns the consequences of any event or transaction.\textsuperscript{64} If, for example, a motorist and his guest, both from New York, drive from Buffalo to Toronto and are injured in Ontario because of the driver's negligence, Professor Beale believed that the law of Ontario should be applied to decide whether the injured guest could recover from the negligent host. Beale's belief was premised on Ontario being the territory of the last event of the tort. Thus, both New York's and Ontario's courts would be compelled to apply Ontario law.\textsuperscript{65} The place of the tort invariably would be the place of the last event—the harm.\textsuperscript{66} Under Beale's territorialist system, every choice of law is made without consideration of the content of the various states' laws.

Beale's system promised simplicity, certainty, and uniformity. Simplicity would promote ease of administration and enhance certainty. Certainty would assist the bar in planning both before transactions and during litigation. Uniformity would promote fairness of treatment and minimize forum shopping.

Beale's system could achieve these three goals with reasonable consistency only if factual patterns could be allocated to but one of Beale's many rules. Before the appropriate rule could be selected, however, the case would have to be characterized, for example, as contract, property, or tort. While in many instances the classification would not be difficult, some factual patterns would be hard to characterize. If workers' compensation cases were

\begin{itemize}
\item 64. [The applicability of law to the juridical facts must be determined as of the time of their occurrence. Some proper law must have governed the juridical situation at the moment of its occurrence; the effort of the court is to determine what the law was; and that involves a question of the power of some particular law to extend to and rule the juridical situation.]
\item 1 J. BEALE, TREATISE ON THE CONFLICT OF LAWS § 1.1 (1935).
\item 65. "The existence and nature of a cause of action for a tort is governed by the law of the place where the plaintiff's alleged right to be free from the act or event complained of is alleged to have been violated by a wrongful act or omission." \textit{2 Id.} § 378.2.
\item 66. It is impossible for a plaintiff to recover in tort unless he has been given by some law a cause of action in tort; and this cause of action can be given only by the law of the place where the tort was committed. That is the place where the injurious event occurs, and its law is the law therefore which applies to it. \textit{Id.} § 378.1.
\end{itemize}

Beale advanced a similar rule for contracts. He deemed the "place of contracting" to be the place in which the final act was done which made the promise or promises binding. \textit{Id.} § 311.1. Notwithstanding his belief that the forum would be able to determine the place of contracting, Professor Beale provided explicit rules for 23 different contractual situations. \textit{See id.} §§ 312.1-331.1.

Property questions were to be determined by the situs of the property. \textit{Id.} § 208.1.
deemed to arise from the employment relation, then they could be characterized as contract cases and governed by the law of the place of contract—the place of hiring.\textsuperscript{67} If compensation cases, however, were deemed to arise from the injury, as Beale believed,\textsuperscript{68} then they could be characterized as tort cases and governed by the place of the tort—the place of the injury. If, therefore, as in\textit{Bradford Electric Light Co. v. Clapper},\textsuperscript{69} a Vermont employee generally employed in Vermont by a Vermont employer were injured in New Hampshire in an accident arising from and in the course of his employment, Professor Beale believed that the law of New Hampshire should govern.\textsuperscript{70}

Even when characterization was not a problem,\textsuperscript{71} the territorialist view of the first Restatement presented a basic dilemma. The fundamental premise of the Restatement that only one law governs each case necessarily implied that the principles of the Restatement apportion legislative jurisdiction among the states.\textsuperscript{72} If New Hampshire had the power to provide the rule for\textit{Clapper}, then Vermont could not have the same power. To apportion such legislative powers among the states, the apportioning power must be superior to the states or be "super law."\textsuperscript{73} In the United States, however, the only conceivable such power would be in the Consti-

\textsuperscript{67} For cases subscribing to the contracts view, see authorities collected in Bradford Elec. Light Co. v. Clapper, 51 F.2d 992, 996 (1st Cir. 1931).

\textsuperscript{68} 2 J. Beale, supra note 64, § 401.2.

\textsuperscript{69} 286 U.S. 145 (1932).

\textsuperscript{70} "It follows generally that no statute has force to affect any person, thing, or act . . . outside the territory of the state that passed it. . . . Neglect of these principles seems to have led to an untenable decision in . . .\textit{Clapper}.” 1 J. Beale, supra note 64, §§ 61.1–2.

\textsuperscript{71} Even if labelling did not tempt the court, there were other escape devices available such as renvoi, the substance-procedure dichotomy, and public policy. See generally R. Cramton, D. Currie & H. Kay, Conflict of Laws 63-145 (3d ed. 1981) [hereinafter cited as Cramton & Currie].

\textsuperscript{72} This view is reflected in the Beale quotation at supra note 64.

\textsuperscript{73} "Super law" is a general term usually used to disparage the idea that there is an overlying law or compulsion which controls choice of law. The first Restatement attempted to be a super law in apportioning legislative jurisdiction. Beale’s analysis implicitly required a super law to determine which secondary rights had vested. Many critics have debunked the myth of super law. See, e.g., W. Cook, supra note 63, at 94; Traynor, War and Peace in the Conflict of Laws, 25 INT’L & COMP. L.Q. 121, 122 (1976). Nonetheless, super law remains an insidious influence. Ehrenzweig, for example, saw both the second Restatement’s attempt to measure the significance of relationships with states and Currie’s interest analysis as requiring a nonexistent super law. R. Cramton, D. Currie & H. Kay, Conflict of Laws 305 (2d ed. 1975). Ehrenzweig’s advocacy, however, of “true rules,” see generally Ehrenzweig, A Proper Law in a Proper Forum: A “Restatement” of the “Lex Fori Approach,” 18 OKLA. L. REV. 340 (1965), is even more clearly the advocacy of another species of the genus super law.
tution which, whatever its ultimate impact on choice of law, has not been interpreted to provide the kind of exclusive grants of authority suggested by Beale and the first Restatement. Thus, the first Restatement's implicit claim to be a super law conflicts with current constitutional law, and thus, fails to restate fundamental law accurately. In fact, by affirming application of Minnesota law, _Hague_ thwarted the first Restatement's attempt to allocate legislative jurisdiction. If the first Restatement were Justice Stevens' normal conflicts law, the question arises as to how much longer it could remain the norm after having its core repudiated.\footnote{74}

2. The Second Restatement

Alternatively, the second Restatement of Conflict of Laws\footnote{75}

\footnote{74. Recall Justice Stevens' willingness to let either law control in _Hague_. See supra notes 55-61 and accompanying text.}

\footnote{75. RESTATMENT (SECOND) OF CONFLICT OF LAWS (1971). The second Restatement was to have been a more detailed, precisely focused, and less ambitious reworking of Professor Beale's first Restatement. Professor Reese, the Reporter for the Restatement, stated: "[C]onflict of laws was not ripe for restatement in the 1920's and 1930's, [for] [t]he subject was then largely unexplored. . . . It soon became apparent that many of the rules stated in [the first] Restatement [were] wrong or at least so oversimplified as to be misleading." Reese, CONFLICT OF LAWS AND THE RESTATEMENT SECOND, 28 LAW & CONTEMP. PROBS. 679, 680 (1963). Hence, Professor Reese advocated replacing the first Restatement's few, simple rules of general application with a "large number of relatively narrow rules that [would] be applicable only in precisely defined situations." Id. at 681. Recognizing that many situations had not yet been litigated often enough to create a weight of authority, Reese was prepared either to understate the law or, in the alternative, to offer "a rule that may be too fluid and uncertain in application [rather] than take one's chances with a precise and hard-and-fast rule that may be proved wrong in the future." Id.

The second Restatement, however, was deflected from its three goals by court decisions employing "center of gravity" or "state of the most significant relationship" analyses. Not long after work was begun on the second Restatement, the New York Court of Appeals broke with both territorial practice and theory by seeking to determine the "center of gravity" and "place which had the most significant contacts with a dispute." Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954). To break with territorialist practice was not novel, for courts repeatedly had used escape devices. See Levy v. Daniels' U-Drive Auto Renting Co., 108 Conn. 333, 143 A. 163 (1928) (characterization); University of Chicago v. Dater, 277 Mich. 658, 270 N.W. 175 (1936) (renvoi alternative holding); Mertz v. Mertz, 271 N.Y. 466, 3 N.E.2d 597 (1936) (public policy). In earlier cases, however, the courts usually had stoutly proclaimed allegiance to that which they were evading. The New York Court of Appeals, in contrast, simply announced its new approach with minimal apology and perhaps even less authority. The immediate results were incorporation of the new view into the evolving drafts of the new Restatement, commendation by some, see, e.g., Fabricus v. Horgen, 257 Iowa 268, 132 N.W.2d 410 (1965), and condemnation by others. See, e.g., Ehrenzweig, _The "Most Significant Relationship" in the Conflicts Law of Torts_, 28 LAW & CONTEMPS. PROBS. 700 (1963). The effort which began with an attempt to find or create better rules had evolved to include a general criterion which required an external standard. Thus, the same super law problem which fatally flawed the first Restatement was raised again.}
might have been Justice Stevens' normal conflict of laws, but it is no more able to account for the result in *Hague* than was the first Restatement. A comparison of the two Restatements and further analysis can explain the deficiencies of the second Restatement.

Like the first Restatement, *Hague* presents the potential for a characterization problem.\(^{76}\) The second Restatement not only permits alternative characterizations of cases or issues, but also presents the option of applying either specific, presumptive rules or the generalized policy principles of section 6 of that Restatement.\(^{77}\) Yet none of the specific, presumptive rules can explain

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> To determine which state has the most significant relationship with an issue requires a universal yardstick with which to measure significance. It is not clear, however, what authority could provide such a yardstick. Since that yardstick would allocate legislative jurisdiction among the sovereign states, it would be a super law. Although the full faith and credit clause would authorize such a scheme by Congress within the federal union, Congress has not so acted. Although the first Restatement's territorialist principles, in toto, did amount to an attempted super law, only the drafts of the second Restatement made explicit the super law implicit in any set of a priori jurisdiction selecting rules as a specific standard.

The second Restatement ultimately broke apart on the wave of interest analyses, judicial and academic. Currie had published his landmark series of articles. B. Currie, supra note 3. Important courts concurred. See, e.g., Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); Tooker v. Lopez, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 819 (1969). Scholarly commentary also made an impact. See, e.g., A. von Mehren & D. Trautman, supra note 63; R. Weintraub, supra note 63 (collection of his essays over the decade 1959-68). To ignore the policy analyses was impossible; to adopt any of them instead of "relatively narrow rules . . . applicable only in precisely defined situations," Reese, supra, at 681, would repudiate the original goals; and to reconcile the two would have seemed implausible. Nonetheless, the second Restatement, as published in 1971, contained hundreds of rules, repeated searches for the state having the more significant relationship to a particular issue, see, e.g. §§ 145, 188, 222, 270, 283, 291-294, 302-306, and a ukase to consider a list of factors which included, but was not limited to, "relevant policies." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). See also infra note 77.

76. Characterization could be done at the level of the case as a whole, the technical legal issue, or the actual practical problem. Cramton & Currie, supra note 71, at 100. In Haumschild v. Continental Casualty Co., 7 Wis. 2d 130, 95 N.W.2d 814 (1959), for example, a former wife sued her ex-husband for injuries allegedly inflicted negligently on her while they were in California. The whole case could be characterized as tort. The legal issue of immunity could be characterized as procedural or the actual problem as domestic relations. The court chose the domestic relations characterization in a thoughtful opinion.

77. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971), under the heading of Choice of Law Principles, provides:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

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Hague because they all require that Wisconsin, not Minnesota, law be applied. Viewing the case as one in tort, Wisconsin was the place of injury, the place of the conduct causing the injury, the domicile of Hague and a place of business of Allstate, and finally, the place where Allstate and Hague had formed their relationship. Viewing the case instead as one in contract, Wisconsin was still the place of contract, the place where the contract was negotiated, the place where Hague had performed by paying his three separate premiums and the place where Hague might have expected Allstate to perform by paying his claim, the location of the cars, and again, Hague’s residence and a place of business for Allstate. Even the very specific rule of section 193 of the second Restatement called for application of Wisconsin law.

(e) the basic policies underlying the field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied.

78. The second Restatement, under the heading of “The General Principle,” provides:

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place where the injury occurred,
(b) the place where the conduct causing the injury occurred,
(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
(d) the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. § 145.

79. Id. § 188 under the heading, “Law Governing in Absence of Effective Choice by the Parties,” provides:

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, as to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

80. Id. § 193, pertaining to “Contracts of Fire, Surety or Casualty Insurance,” provides:
Under the generalized policy principles of section 6, the answer appears no different, even if less certain. As Justice Stevens viewed the case, at least the application of either law would meet the needs of the interstate system since neither state possessed an interest.\textsuperscript{81} Consequently, since Minnesota had no interest in the outcome, it is not clear that any Minnesota policy is relevant.\textsuperscript{82} Similarly, Wisconsin's policies lack relevance.\textsuperscript{83} Once again, however, a comparison of the relative interests of the various states raises the problem of implied super law.

Furthermore, under section 6's broad principles, protecting justified expectations is complicated. First, the expectations must be identified. The choice then must be made as to whether the expectations to be protected are expectations of outcomes or of choices of law.

Analysis of Hague's expectations when he mounted his son's motorcycle raises several questions. Presumably, at a minimum, Hague expected to return home safely. If Hague contemplated being injured, the question is whether he then relied on an expectation of being compensated or faced the danger without regard to financial peril. If Hague expected compensation, the question is whether he contemplated compensation from his or another's resources. If Hague expected compensation from his insurance, then the issue is whether he expected compensation simply because insurance had been purchased or because he believed that Wisconsin law required compensation. Furthermore, inquiry must be made into whether Hague knew anything about Wisconsin law or any details of his insurance policy.

Even if Hague did expect the outcome, without regard to the details of the law to be applied, the question of the standard by which an expectation becomes justified must be addressed. An expectation may be justified, for example, because it appears fair a priori or because it is confirmed by experience. If the latter, no expectation can influence choice of law because the justification \textit{vel non} depends completely on the outcome of the choice of law.

\textsuperscript{81} 449 U.S. at 325-26 (Stevens, J., concurring).
\textsuperscript{82} See infra notes 263 & 337-40 and accompanying text.
\textsuperscript{83} See infra notes 264-67 & 341-47 and accompanying text.
decision. If fairness is the test, a subjective dimension is added, even though, in *Hague*, fairness would require Allstate to deliver that for which it had been paid. Certainty, predictability, and uniformity of result are similarly circular. There appeared to be no difficulty in applying either law, but there was doubt about the actual content of Wisconsin's law.  

Thus, it would appear that there is no clear thrust under section 6 towards shifting the presumptive answers provided by the more specific sections. The second Restatement, like the first, requires the application of Wisconsin law. Notwithstanding repeated references in the opinions to significant contacts and normal conflicts law, the Supreme Court nevertheless differed and affirmed the use of the Minnesota forum's law. Neither Restatement can support such a result which suggests a departure from the traditional conflict of laws rules as enshrined in the two Restatements.

E. Interest Analysis

With both Restatements requiring the application of Wisconsin law in *Hague*, neither Restatement explains the actions of the Supreme Court. Interest analysis as developed by Currie,  

85. Traynor,  

86. Sedler  

and other writers provides a better explanation of *Hague* than does traditional conflicts law. Currie defined an interest as the "product of (a) a governmental policy and (b) the concurrent existence of an appropriate relationship between the state having the policy and the transaction, the parties, or the litigation."  

88. If only one state possessed an interest, the case would be a false conflict, and the law of the interested jurisdiction would apply. If both states possessed interests, the case would present a true conflict, and forum law would prevail. Finally, if neither state possessed an interest, then forum law again would be applied to the unprovided-for-case.  

89. Many courts and commentators have subscribed to the application of the law of the interested state in false conflicts.  

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84. See supra note 16.  
85. B. Currie, supra note 3.  
86. See T.raynor, supra note 73.  
88. B. Currie, supra note 3, at 621.  
89. Id. at 189.  
ranks begin to thin as to true conflicts, however, because some courts and commentators prefer making attempts to solve true conflicts rather than embracing Currie's insistence on applying forum law.91 Similarly, the consensus in favor of applying forum law in unprovided-for-cases is less than universal.92 Since any dispute in which the laws actually differ in outcome must fall into one of these three categories,93 these disputes over true conflicts and unprovided-for-cases are affected greatly by the court's or commentator's propensity to find state interests. If the decisionmaker readily discerns interests,94 then few unprovided-for-cases, but many true conflicts, will be identified.95 Alternatively, if

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93. If the laws do not actually differ in outcome, even though different in form, there is no need to choose between the laws, and any explanation for a purported choice is only dictum. A case in which the outcomes under the allegedly varying laws do not differ should be called an "apparent conflict."

94. The idea of an analyst's propensity to find interests only reflects the observation that some will interpret policies more broadly than others. If an analyst consistently draws the line between relevant and irrelevant policies to include more policies than another analyst would, then the first analyst has a greater propensity to find interests.

95. Because a given dispute must either be a true conflict, false conflict, or unprovided-for-case, reducing the frequency of one class of conflicts necessarily increases the frequency of at least one of the others, if not both. Thus, the elimination of unprovided-for-cases through the discernment of spurious interests will lead to unnecessary spurious true conflicts.

The relations can be expressed symbolically as follows. If the propensity to find a local interest is p (the propensity not to find a local interest being q) and the corresponding propensity to find a foreign interest is p' (the propensity not to find a foreign interest being q') then the propensity to find a true conflict, T, is pp', the propensity to find an unprovided-for-case is (1-p) (1-p') since p + q = 1 and p' + q' = 1, then q = 1-p and q' = 1-p'. Since an unprovided-for-case is a case in which neither state has an interest, i.e., a case within the set of (q)(q'), the final expression is derived by substitution for q and q'. The propensity to find a false conflict, F, is p(1-p') + p'(1-p) because in a false conflict either the forum has an interest and the foreign state does not, or vice versa. The propensity to find the first type of case is expressed symbolically as:

\[ pq' \]

which is equivalent after substitution for q to

\[ p(1-p'). \]

The propensity to find the second configuration of a false conflict is expressed as:

\[ p'q \]

which is equivalent after substitution for q to

\[ p'(1-p). \]

The propensity in total that either such case will occur is the sum of the two:

\[ p(1-p') + p'(1-p). \]

If \( dT/dp - dF/dp > 0 \), then an increased propensity to recognize local interests will increase true conflicts at a greater rate than it will increase false conflicts because \( dT/dp > \)
interests are construed narrowly, with a consequent reduction in the number of true conflicts to be decided by applying forum law, then more disputes will present unprovided-for-cases.

This Article suggests that Currie and Sedler were correct in choosing to apply the forum law in true conflicts. The Article further urges that Currie was correct in choosing to apply the forum law in unprovided-for-cases, but that Sedler erred in suggesting the application of the so-called common policy of the two jurisdictions. Finally, the Article suggests that Sedler is correct.

dT/dp - dF/dp. This outcome is undesirable for all of the reasons Currie identified concerning state courts being tempted to resolve or adjudicate conflicts among peers. B. Currie, supra note 3, at 181-83.

Begin with dT/dp - dF/dp = dT/dp - dF/dp. Then substitution of the expressions derived above to express a true conflict, T = pp', and a false conflict, F = p(1-p') + p'(1-p), generates:

dT/dp - dF/dp = d/dp [ pp' - p(1-p') - p'(1-p) ].

Then expansion by multiplication of the terms in parentheses yields:

dT/dp - dF/dp = d/dp [ pp' - p + pp' -p' + pp' ]

= d/dp [ 3pp' -p - p' ]

Then taking the first derivative of each term, dT/dp - dF/dp = 3(p dp'/dp + p' dp/dp) - dp/dp - dp'/dp

Since dp/dp = 1, then

dT/dp - dF/dp = 3p dp'/dp + 3p' - 1 - dp'/dp = dp'/dp (3p-1) + (3p' - 1)

It is fair to assume that p ≥ p' for all courts. If p=p', then dp'/dp = 1, and dT/dp - dF/dp = 1 (3p-1) + (3p-1) = 6p - 2.

Thus, so long as p > 1/3, dT/dp - dF/dp is > 0. If, as is more likely the case with courts, p > p', then the condition will be true if:

p + p' > 2/3 + (1-dp'/dp) (p-1/3).

An implicit estimate of p can be obtained by noting that if p and p' are both 1/3, then but 1/9 of all cases will be true conflicts, 4/9 will be unprovided-for-cases, and the remaining 4/9 will be false conflicts. It subjectively appears from the reported cases that there are more true conflicts and fewer false conflicts than a propensity of only 1/3 would suggest. If the propensities are as much as 1/2, then the true conflicts compose 1/4, the false conflicts 1/2, and the unprovided-for-cases 1/4. A starting point for estimating what the courts' current propensities might be is closer to 2/3 with true conflicts 4/9, unprovided-for-cases only 1/9, and false conflicts the remaining 4/9. Any propensity greater than 2/3 accelerates the preponderance of true conflicts.

96. Whatever the relative propensities, according to Currie, a problem with true conflicts remains: "There is no conceivable choice-of-law rule that will solve the problem, even though both states adopt it and consequently apply it. . . . There is no apparent warrant for such an arbitrary preference of the one policy over the other." B. Currie, supra note 3, at 180-81.

Seder, however, has suggested that true conflicts can be solved, Sedler, supra note 87, at 217-18, but in the end joins Currie in articulating the role of state courts to include advancement of local policy and to exclude the purposeful frustration of local policy. Id. at 220.

97. See B. Currie, supra note 3, at 152-56.

98. Sedler takes an entirely different approach to the unprovided-for-case. He believes that unprovided-for-cases generally reflect a juxtaposition of two laws, one which has but one policy and another which both shares the general policy expressed in the first and
that only real interests should be considered\textsuperscript{99} and that all policies, and consequently all interests, should be construed narrowly. Hence, this Article’s primary thesis differs from Currie’s on state choice of law doctrine in that the analysis of interests should be strict rather than loose. Additionally, unlike either Restatement, the doctrines developed in this Article for the explanation of state court choice of law decisions explain Supreme Court precedent in

carves out a special exception which can be called a second tier. \textit{See infra} note 255 (discussion of Currie’s altruistic interests). Sedler uses guest statute immunity to illustrate this point. The “common policy reflected in . . . the general law of both states” is to compensate victims of negligence. Sedler, \textit{supra} note 87, at 235. The guest statute is an exception to this common policy for cases in which the victim is a passenger in the gratuitous host’s automobile. Because the defendant is from the recovery state and the plaintiff is from the guest act state, Sedler concludes that the guest act state has no interest in furthering its policy providing its special defense. Thus, in an unprovided-for-case, in which the defendant is from the recovery jurisdiction and neither state has an interest, the “common policy” of the general law should be applied and recovery allowed. \textit{Id.}

Conversely, if the state having the two tier law had an interest in the application of its special rule, such as Cipolla v. Shaposka, 439 Pa. 563, 267 A.2d 854 (1970), in which the defendant was from Delaware, the guest act state, and the plaintiff was from Pennsylvania, the recovery state, Sedler would recognize its interest. When, as in an unprovided-for-case, neither state has an interest in applying its law so that the state with the special rule does not have an interest in implementing its special rule, Sedler would urge the application of the rule which reflects the general, common policy rather than the special exception. Sedler apparently would engage in such application regardless of which state was the forum.

Sedler’s approach is clear when the special rule favors defendants with a special defense. Moreover, the usual outcome will be the same as under Currie’s analysis, for the plaintiff will choose the defendant’s forum to get the more favorable law. \textit{But see infra} note 309.

It is less clear what the practical outcome will be when the special rule favors the plaintiff. Under Currie’s reasoning and strict interest analysis, the forum law again will be applied, and Sedler would urge the common policy to the exclusion of the special rule favoring plaintiff. One analytic difficulty, however, lies in identifying a plaintiff-favoring rule that also could not be a defendant-targeting rule, which could be said to support a deterrence interest in the defendant’s forum. Because dram shop acts are usually among the few laws with a clear deterrent component, \textit{see infra} notes 332-34, they do not provide a useful vehicle for analyzing unprovided-for-cases.

Instead, consider comparative negligence which favors plaintiffs but does not appreciably target defendants. What is the common policy between the older rule of contributory negligence and the emerging rule of comparative negligence? Which law should control when a plaintiff from a traditional state contributes slightly to an injury caused primarily by a defendant from a progressive state?

Sedler’s approach, both in his consideration of the possibility of solving true conflicts and in his advocacy of the use of the common policy in unprovided-for-cases suggests a support for a super law which is inconsistent with interest analysis and which others have rejected. \textit{See supra} note 73. The common policy can be identified only by polling the states or by resort to a priori assumptions to determine which policy is the norm and which is the special rule. Even if resort is taken only to nose counting, the individual sovereignties of the several states potentially are impaired by having their choice of law decisions dependent on the actions of faraway courts with no concern for local problems.

\textsuperscript{99} \textit{See} Sedler, \textit{supra} note 87, at 222.
choice of law cases even before *Erie Railroad v. Tompkins.*

Strict interest analysis can be summarized with three principal points. First, the law of the forum is rebuttably presumed to apply. Second, a state has an interest in the resolution of an issue if, and only if, it has both a relevant policy and a party toward whom that policy is directed. Finally, due process is denied by a choice of law if, and only if, the law of a state lacking an interest is applied to the exclusion of the law of another state which has an interest.

When viewed under this strict interest analysis, *Hague* is an unprovided-for-case in which the application of the Minnesota forum law is fully appropriate, if not compelled. The rest of this

100. 304 U.S. 64 (1938). *Erie* represents the division between two watersheds in the Court's attitude toward state law issues, such as choice of law. Before *Erie*, as with most state law questions, the Court openly expressed its views on choice of law. See, e.g., Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932) (reversing the court of appeals in a diversity suit); Western Union Co. v. Brown, 234 U.S. 542 (1914) (an obligation created by law of the place of tort follows defendant's person). Since *Erie*, however, the Court has been more reticent about affirmatively articulating its own views and more deferential to state interests. See, e.g., Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3 (1975). But cf. Carroll v. Lanza, 349 U.S. 408 (1955), discussed at infra notes 233-61, and accompanying text.

101. A flow chart of strict interest analysis is provided for comparison with other approaches.
Article examines strict interest analysis as applied to *Hague*. Part II illustrates the presumption in favor of applying forum law in each type of case, analyzes *Hague* as an unprovided-for-case, and discusses the impact of each of the *Hague* opinions on the presumption in favor of applying forum law.\(^{102}\) Part III considers the differences between strict and loose construction of interests.\(^{103}\) Part IV examines the constitutional constraints on courts considering false conflicts.\(^{104}\) while part V investigates some of the interactions between judicial jurisdiction and constitutional constraints on choice of law.\(^{105}\) Finally, part VI explores the possible constitutional constraints on choice of law in true conflicts and unprovided-for-cases.\(^{106}\)

II. THE PRESUMPTION IN FAVOR OF APPLYING FORUM LAW

Like the interest analyses of Currie,\(^{107}\) Traynor,\(^{108}\) and Sed-

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102. *See infra* notes 107-299 and accompanying text.
103. *See infra* notes 258-347 and accompanying text.
104. *See infra* notes 348-433 and accompanying text.
105. *See infra* notes 434-94 and accompanying text.
106. *See infra* notes 495-530 and accompanying text.
107. B. CURRIE, supra note 3, at 183. Currie's interest analysis is illustrated by this flow chart:

\[\text{Input:}\]
\[\text{Plausibly, Facts, Laws}\]

\[\text{Assess}\]
\[\text{Seek Foreign}\]
\[\text{Law?}\]

\[\text{Yes}\]

\[\text{Converse}\]
\[\text{Both}\]
\[\text{Laws}\]

\[\text{No}\]

\[\text{How}\]
\[\text{Many}\]
\[\text{Interests}\]

\[\text{Reconsider}\]
\[\text{Both State's}\]
\[\text{Interest}\]

\[\text{Forum}\]
\[\text{Which}\]
\[\text{State Has}\]
\[\text{Interest}\]

\[\text{Apply Forum}\]
\[\text{Law}\]

\[\text{Foreign}\]
\[\text{Apply Foreign}\]
\[\text{Law}\]

108. A flow chart of Justice Traynor's interest analysis is supplied for comparison.
Justice Stevens articulated in *Hague* an explicit "presumption in favor of [applying] the forum's own law." In strict interest analysis, this presumption reflects not only a forum's natu-

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109. The following flow chart illustrates Professor Sedler's interest analysis.

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ral inclination, but also the rational outcome of several separate kinds of cases.

If neither the plaintiff nor defendant raises the issue of choice of law, the law of the forum will be applied by default. Since choice of law goes to neither personal nor subject matter jurisdiction, no collateral attack will be possible. Moreover, although the traditional view differed, Currie, Traynor, and Sedler all concur that the court, as neutral arbiter, should not raise the choice of law issue if neither party has chosen to do so. There is nothing in any of the Hague opinions inconsistent with leaving the choice of law issue solely to the parties to raise.

As this Article will demonstrate, the presumption in favor of applying forum law remains intact in true conflicts, unprovided-for-cases, and apparent conflicts, each of which will be illustrated, in turn, through the Supreme Court's decisions. Attention, however, will be directed first to the case in which the presumption is rebutted—the false conflict in which the nonforum state has the interest.

A. The Presumption in Operation Before Hague

1. False Conflicts

The rebuttable presumption in favor of applying forum law is overcome if the forum lacks an interest in the application of its law and the nonforum state has an actual interest in the application of nonforum law. When only one state has an interest, a false conflict exists. The outcome in such cases depends on which state has that interest. If the forum has the interest, then the presumption in favor of applying forum law compels choice of forum law. If the forum lacks an interest, then the presumption is rebutted, and thus nonforum law must be applied.

Many state courts have found the false conflict to be a valuable concept because it supports rational advancement of state policies where relevant, but avoids unnecessary harm to other states' policies through overreaching. Although eschewing the label, the Supreme Court has been a forerunner in preventing a forum without an interest from applying its law in the face of another forum's

111. Fauntleroy v. Lum, 210 U.S. 230 (1908).
112. See Walton v. Arabian Am. Oil Co., 233 F.2d 541, 544 (2d Cir. 1956).
113. See, e.g., Traynor, supra note 73, at 123 (citing B. Currie, supra note 3).

a. *Home Insurance Company v. Dick.* 118 A Mexican insurance company sold fire insurance on a tug boat to Bonner, a resident of Mexico. The tug boat was to be used and insured for use only in Mexican waters. Before the loss, Bonner assigned his policy to Dick, a citizen of Texas residing in Mexico. In a separate transaction, the Mexican insurer sold the risk, via reinsurance, to Home and another New York insurer. Both the premium and any losses were to be paid in Mexican funds in Mexico. 119

Both the policy and the Mexican commercial code required any suit on the policy to be brought within a year of any loss. 120 Texas law, however, guaranteed at least two years in which to bring suit regardless of any contractual language to the contrary. 121 When Dick brought suit in the Texas courts more than one year after the loss, the Texas state court applied the Texas provision guaranteeing two years in which to sue and allowed the citizen of Texas, Dick, to recover against the New York defendants. 122 The Supreme Court unanimously reversed the Texas decision.

The Court rejected Dick's argument that because only questions of state law and the conflict of laws were involved, the Court lacked jurisdiction to hear the case. The Court stated that because "nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas," 123 "[t]he Texas statute as here construed and applied deprive[d] the garnishees of property without due process of law." 124

The Court noted that all acts relating to the making of the original or reinsurance policies were performed outside of Texas, and that all performance on the contracts was to occur outside of

115. 281 U.S. 397 (1930).
117. 299 U.S. 178 (1936).
118. 281 U.S. 397 (1930).
119. *Id.* at 403-04.
120. *Id.* at 404.
121. *Id.* at 404-05.
122. *Id.* at 405.
123. *Id.* at 408.
124. *Id.* at 407.
Texas. Neither Texas law nor the Texas courts were invoked for any purpose other than Dick's suit. The Court did not view Dick's permanent residence in Texas as having significance because at all relevant times, Dick was physically present and acting in Mexico. The Court concluded that the attempt of the Texas court to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation was an unconstitutional deprivation of property without due process of law.125

Even the public policy argument supporting the choice of law of the forum state, advanced in *Loucks v. Standard Oil Co.*,126 was unavailing. The Texas provision was, of course, an unlikely candidate to provide the public policy escape device.127 The Court reiterated the irrelevance of Texas law to the transaction and stated that all the defendants sought was "to be let alone."128 Hence, the Texas courts could not invoke their public policy affirmatively to undo a completed transaction. Whether the Texas courts could refuse to enforce a repugnant contract was a question reserved for another day.

Mexico's law favored the insurers in *Home* by limiting the time in which suit could be brought.129 Because Mexico had both a policy in favor of defendants and a defendant which would have been assisted by the policy's enforcement, Mexico had an interest in the application of its law. In contrast, although Texas had a policy which favored plaintiffs,130 as a matter of federal constitutional law, Texas lacked a plaintiff within a protected class. The

125. *Id.* at 408.
126. 224 N.Y. 99, 120 N.E. 198 (1918).
127. It is necessary to distinguish foreign laws which violate public policy under *Loucks* by "violat[ing] some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal," *id.* at 111, 120 N.E. at 202, from foreign laws which merely differ from the local policy. The former situation presents the forum with no choice, for violation of some fundamental principle of justice must be beyond the court's power. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The latter presents a choice of law which should be made according to the forum's choice of law criteria. The problem then becomes one of sorting the two situations. It is urged in this Article that a foreign law should be presumed merely to differ unless it is shown to violate at least either the federal Constitution or forum state constitution. The *Loucks* doctrine is extremely powerful and must be reserved for cases within its limited scope, lest all choice of law be destroyed.
128. 281 U.S. at 410.
129. Not only was the one year limitation permitted under Mexican law, it also was part of Art. 1043 of Mexico's Commercial Code. *Id.* at 403 n.1. The insurance policy incorporated the commercial code's relevant provisions. *Id.*
Texas courts lacked an interest and thus, were not allowed to apply their law in the face of Mexico's clear interest.

b. *Bradford Electric Light Co. v. Clapper.*\(^{131}\) Leon Clapper, employed in Vermont by Bradford Electric, a Vermont corporation, was killed in New Hampshire while attempting to repair Bradford's Haverhill, New Hampshire substation.\(^{132}\) Clapper's representative brought suit in New Hampshire state court under that state's wrongful death act.\(^{133}\) Bradford Electric defended with the argument that plaintiff was restricted to the exclusive remedy of the Vermont Workmen's Compensation Act to which both Bradford and Clapper had consented.\(^{134}\) After defendant's removal of the case from the New Hampshire court, the Federal District Court for New Hampshire gave plaintiff judgment on a jury verdict for $4,000.\(^{135}\) This judgment was awarded on the assumption that because the Vermont Act had no extraterritorial effect in New Hampshire, New Hampshire law applied.\(^{136}\)

Initially, the court of appeals viewed the case as a characterization problem, chose to apply the contracts characterization and Vermont law instead of the tort characterization and New Hampshire law, and reversed.\(^{137}\) On rehearing, however, a new majority affirmed the judgment for the plaintiff because of Bradford's acceptance of the New Hampshire Workmen's Compensation Act.

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\(^{131}\) 286 U.S. 145 (1932).
\(^{132}\) Bradford Elec. Light Co. v. Clapper, 51 F.2d 992, 993, 1000 (1st Cir. 1931).
\(^{133}\) Clapper's representative based her negligence claim on defendant's failure to give warning that the apparent cutoff switch at the electrical substation was ineffective. All of defendant's substations except Haverhill had a master switch for cutting off the power so that repairs could be attempted without risk of electrocution. The cutoff switch for Haverhill, however, was across the river in Vermont. Clapper generally was aware of the use of the cutoff switch at other substations, but apparently unaware that what appeared to be the cutoff switch at the Haverhill unit would be ineffective to make repairs to the substation safe.
\(^{134}\) Actually, the parties' consent to the application of the Vermont Act to an out-of-state injury was presumed. *See infra* note 150. Consent was an issue because of legislatures' concerns that nonelective coverage would raise due process challenges to workers' compensation statutes. *National Commission on State Workmen's Compensation Laws, The Report of the National Commission on State Workmen's Compensation Laws* 34 (1972). The concern, of course, was unfounded. *See* New York Cent. R.R. v. White, 243 U.S. 188 (1917).

The exclusivity provisions of the Vermont Workmen's Compensation Act in effect at the time of Clapper's death in 1926 were outlined by the Court in a footnote. 286 U.S. at 145 n.1.

\(^{135}\) 286 U.S. at 145.
\(^{136}\) *Id.*
\(^{137}\) 51 F.2d 992 (1st Cir. 1931).
After a grant of certiorari, Justice Brandeis initially articulated the issue in terms which raised the characterization problem:

The main question for decision is whether the existence of a right of action for Leon Clapper's death should be determined by the laws of Vermont, where both parties to the contract of employment resided and where the contract was made, or by the laws of New Hampshire, where the employee was killed.

In the next paragraph, however, after observing that it was "the purpose of the Vermont Act to preclude any recovery by proceedings brought in another State," Justice Brandeis rephrased the issue:

[M]ay the New Hampshire courts disregard the relative rights of the parties as determined by the laws of Vermont where they resided and made the contract of employment; or must they give effect to the Vermont Act, and to the agreement implied therefrom, that the only right of the employee against the employer, in case of injury, shall be the claim for compensation provided in the statute?

Although omitting any mention of competing policies, Justice Brandeis' first statement of the issue reflected the modern view recognizing the competing contacts. The first statement is also neutral since the question posed does not assume any part of the answer. Justice Brandeis' second statement of the issue, however, reflected territorialism in focusing on the rights of the parties. In contrast to Professor Beale, who would have taken the position that the rights and duties of the parties vested at the time and place of injury in New Hampshire, Justice Brandeis suggested that the employer's right to limited liability provided by the Vermont Workmen's Compensation Act vested in Vermont prior to

138. *Id.* at 999.
139. 284 U.S. 221 (1931). Bradford Electric sought appeal, arguing that the Court of Appeals for the First Circuit had found the Vermont Act void and that the full faith and credit clause required application of the Vermont Act. Determining that the court of appeals had not found the Vermont Act void, but rather had chosen not to apply it, the Supreme Court denied the appeal, but granted certiorari.
140. 286 U.S. at 153.
141. *Id.*
142. *Id.* at 154.
143. Under this Article's analysis, the issue would be whether a Vermont employee's death in New Hampshire, which occurred in the course of employment in Vermont, is within the concern of the New Hampshire wrongful death act when the decedent neither lived nor left dependents in New Hampshire and when the Vermont law expressly limited the Vermont employer's liability.
144. See 2 J. Beale, *supra* note 64, § 401.2.
any right which might have arisen under the laws of New Hampshire. The first Restatement broke with its reporter and followed Justice Brandeis.

After concluding that if the full faith and credit clause were relevant, it would require the application of Vermont law, Justice Brandeis finally reached the nub of the case in his discussion of the inapplicability of New Hampshire's policy. Justice Brandeis wrote: "The interest of New Hampshire was only casual. Leon Clapper was not a resident there. He was not continuously employed there. So far as it appears, he had no dependent there. It is difficult to see how [New Hampshire's] interest would be subserved under such circumstances, by burdening its courts with this litigation."

Whereas the court of appeals rested on Bradford's consent to the New Hampshire statute, Justice Brandeis placed that consent in proper context by explaining that it was "referable only to such New Hampshire employees, and not as bringing under the New Hampshire Act employees not otherwise subject to it." Thus, to find an interest, Justice Brandeis required both a policy and a citizen subject to the policy. Reserved for a later day were cases in which the injured employee was a resident of New Hampshire, had been employed continuously in New Hampshire, or had left dependents in New Hampshire, each of which might be recognized today under appropriate circumstances to combine with New Hampshire's policy to provide a New Hampshire interest.

The Vermont Act embodied a policy of favoring the employer by limiting recovery for death arising out of and in the course of employment. In Clapper, the suit involved a Vermont employer, and the Vermont Act was not self-limited to only instate injuries. Vermont, therefore, had an actual interest in the applica-

145. 286 U.S. at 158. No right, of course, can ever have vested until some court, well after the fact, so declares. Cf. K. Llewellyn, The Bramble Bush 12 (1960). "What these officials do about disputes is, to my mind, the law itself." Id.

146. See Restatement of Conflict of Laws § 401 (1934).

147. 286 U.S. at 162. Note also that it was the federal court in New Hampshire which had heard the case.

148. Id. at 162-63.

149. Id. at 163.

150. Employers who hire workmen within this state to work outside of the state, may agree with such workmen that the remedies under the provisions of this chapter shall be exclusive as regards injuries received outside this state by accident arising out of and in the course of such employment, and all contracts of hiring shall be presumed to include such an agreement.

Id. at 153 n.1 (citing VT. GEN. LAWS ch. 241, § 5774 (1917)).
tion of its law.

In contrast to the employer-favoring Vermont Act, the New Hampshire law in this case favored employees. This favoritism was shown by giving plaintiffs an election between assured, but limited, liability under workers' compensation and unlimited liability if the wrongful death were due to the employer's negligence. There was, however, no New Hampshire employee in this case.\textsuperscript{151} Hence, New Hampshire had no interest in the application of its law, the case was a false conflict, the presumption in favor of applying New Hampshire forum law was rebutted, and application of the law of the jurisdiction having an interest—in this case, Vermont—was compelled.

c. \textit{John Hancock Mutual Life Insurance Co. v. Yates}.\textsuperscript{152} Hancock insured the life of Harmon H. Yates in favor of his wife for $2,000. The insured died of cancer one month after the policy's issuance. The application for insurance contained questions concerning the insured's health. The answers appearing on the application were undeniably false and, under the law of New York, material misrepresentations which were grounds for avoidance of liability on the policy. After Yates' death, his widow-beneficiary moved to Georgia, where she brought suit on the policy in a Georgia state court. The Georgia jury found that truthful answers had been given to the insurance agent and by imputing knowledge of the truth to the insurer, the misstatements found on the application were not material. Georgia law supported all these arguments. The court granted the widow judgment on the policy.\textsuperscript{153}

Writing for a unanimous Court, Justice Brandeis quickly\textsuperscript{154} disposed of the case, relying on \textit{Home} and \textit{Clapper} to reverse. The insured's liability on the policy was not merely a question of remedy to be governed by the forum,\textsuperscript{155} but rather a question of substantive law. "In respect to the accrual of the right asserted under the contract, or liability denied, there was no occurrence, nothing done, to which the law of Georgia could apply."\textsuperscript{156}

The insurer, the insured, and the beneficiary all resided in New York both at the time of the issuance of the policy and at the

\textsuperscript{151} Professor Currie also considered whether any other party could support a New Hampshire interest and concluded none could. B. \textit{CURRIE}, \textit{supra} note 3, at 209-10.

\textsuperscript{152} 299 U.S. 178 (1936).

\textsuperscript{153} 182 Ga. 213, 185 S.E. 268 (1936).

\textsuperscript{154} Only two and a half weeks passed from argument to decision. 299 U.S. at 178.

\textsuperscript{155} \textit{See supra} notes 71 & 76.

\textsuperscript{156} 299 U.S. at 182.
insured’s death a month later. New York’s law protected insurers, and John Hancock was within the protected class. New York, therefore, had an interest in the application of its law. Whether Georgia’s law favored either insureds or their beneficiaries, Georgia had no one within its protected class until Mrs. Yates moved there after the death of Mr. Yates. The date of that move, however, was too late to afford her such protection. Neither Mr. or Mrs. Yates was within the protection of the Georgia law at any relevant time. Only New York had the congruence of party and policy which creates a state interest. The Supreme Court correctly reversed the Georgia forum’s application of its uninterested law in the face of New York’s undeniable interest.

2. True Conflicts

In true conflicts, cases in which both the forum and another jurisdiction have an interest, the presumption in favor of applying the forum’s law should govern. Although another jurisdiction has an interest, the forum’s own interest meets the constitutional prohibition against applying the law of a jurisdiction without an interest in the face of another jurisdiction’s interest. 157

Even though many states have embraced Currie’s insights concerning the false conflict, 158 his approach to the true conflict has been received less warmly. Currie rejected the propriety of state courts attempting to choose among competing state policies on any basis other than adherence to the forum law. 159 Many commentators and some courts, however, have attempted either to invoke external factors by which to make a choice, 160 to compare the relative impairments to be suffered as a result of the competing state interests, 161 or to identify and then apply the better of the competing laws. 162 None of these alternatives was attractive to

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157. See infra notes 300-47 and accompanying text.
158. See supra note 114.
159. See B. Currie, supra note 3, at 181-82.
162. See Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973), applying Leflar, supra note 17. It may be that Leflar’s principles can be used to parallel strict interest analysis, but they do not provide any unique outcome. False conflicts in which the forum has the interest should be governed by the fourth consideration, advancement of the forum’s governmental interest. True conflicts also would receive forum law under the fourth and fifth considerations—the application of the better law—which would have to be the forum’s law.
Currie. While Congress\textsuperscript{163} certainly was entitled to enact positive choice of law principles to apportion legislative jurisdiction among the states, even to the point of writing "super law,"\textsuperscript{166} Currie urged that state courts were neither empowered nor equipped to allocate power among their peers.\textsuperscript{165} Traynor,\textsuperscript{166} Sedler,\textsuperscript{167} and proponents of strict interest analysis concurred.

Before \textit{Erie}, the Supreme Court's behavior was mixed.\textsuperscript{168} Since that decision, the Court consistently has sustained the application of forum law in true conflicts. Three examples, delineated below, are illustrative of this consistency.

In \textit{Griffin v. McCoach},\textsuperscript{169} a group of investors retained an insurance policy on the life of the syndicate's organizer as the syndicate's remaining asset after a partial liquidation. The application had been completed and the policy delivered in New York, a state where the investors met the requirements for an insurable interest in the insured. After the insured's death several years later, his representative brought suit in the United States District Court for the Northern District of Texas claiming that under Texas law the syndicate's members lacked an insurable interest, and therefore that the entirety of the proceeds belonged to the estate. The suit presented a true conflict because New York had an interest, evidenced by New York law favoring the investors and the presence of New York investors in the case. Texas also had an interest because Texas law protected insureds and the insured was a citizen of Texas from before issuance of the policy until his death.

\begin{itemize}
\item If the court took its oath seriously, False conflicts in which the forum had no interest would not trigger the fourth consideration, but rather could be governed by the second consideration—maintenance of the interstate and international order—because applying the local law despite the absence of a local interest and the existence of a foreign interest would, in choice of law, upset interjurisdictional order. Thus, so long as a case presented some interest, Leflar's choice influencing considerations can be made to achieve a proper result. These considerations can, of course, also be used to produce a contrary result. Unless the third consideration, simplification of the judicial task, is read to support a presumption in favor of applying forum law, the unprovided-for-case again would be the orphan. Even Professor Leflar has lost some enthusiasm for these considerations as normative guidelines. \textit{Compare} Leflar, \textit{Choice Influencing Considerations in Conflicts Law}, 41 N.Y.U. L. REV. 267 (1966) (considerations as prescriptions) \textit{with} Leflar, \textit{The "New Choice of Law"}, 21 AM. L. REV. 457 (1972) (considerations as descriptions).
\item 163. The United States Supreme Court might likewise be so entitled.
\item 164. \textit{See} B. \textit{Currie, supra} note 3, at 179-83.
\item 165. \textit{Id.} at 182. \textit{See supra} text accompanying note 53 (limits imposed by status as coequal sovereigns).
\item 166. \textit{See} Traynor, \textit{supra} note 73, at 123-24.
\item 167. \textit{See} Sedler, \textit{supra} note 87, at 121.
\item 168. \textit{See supra} note 96.
\item 169. 313 U.S. 498 (1941).
\end{itemize}
After the Court of Appeals for the Fifth Circuit decided this true conflict according to the law of New York, as the place of contract, the Supreme Court reversed and remanded. The Court held that Texas choice of law principles, the law of the forum, governed. If those principles required the use of Texas law, applying such law to the case would be constitutional in light of Texas' legitimate policy to protect insureds from attempts to control the outcome of wagers on their longevity. *Home Insurance Co. v. Dick*, the false conflict, was distinguished as a case in which nothing was "done or to be done within [Texas'] borders." It is striking that the Court reversed the outcome mandated by the first Restatement to require not only the application of the forum's choice of law rule, but also the forum's substantive rule in a case which could not have been heard in the Texas state courts. Despite judicial jurisdiction having been available in the federal district court only through statutory interpleader, the Court nevertheless required application of forum law, if that law were relevant.

In *Watson v. Employers Liability Assurance Corp.*, a products liability case removed to the District Court for the Western District of Louisiana, the defendant insurance company sought to avoid the application of Louisiana's direct action statute by interposing its contractual right under the laws of Massachusetts and Illinois to remain on the sidelines unless and until the insured manufacturer had been held liable. Relying in part on *Home*, the federal district court in Louisiana held, and the Court of Appeals for the Fifth Circuit affirmed, that a Louisiana statute

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171. 281 U.S. 397 (1930). For a discussion of *Home*, see supra notes 118-30 and accompanying text.
172. 313 U.S. at 507.
173. See RESTATEMENT OF CONFLICT OF LAWS §§ 317-319 (1934). These sections state the conflict of laws rules as they apply to insurance contracts.
177. 348 U.S. at 68. The case states that the insurance policy sued upon contained a clause "which prohibits direct actions against the insurance company until after final determination of the Toni Company's [the insured] obligation to pay personal injury damages either by judgment or agreement. Contrary to this contractual 'no action' clause, the challenged statutory provisions permit injured persons to sue an insurance company before such final determination." (emphasis supplied).
could not constitutionally override a valid contract made under other states' laws. The Supreme Court reversed. Even though Massachusetts had an interest in the application of its law because of the defendant manufacturer's presence in that state, that interest could not outweigh the interest in the plaintiff who was injured in Louisiana. 179 Home was inapposite because the claim was "for injuries from a product bought and used" in Louisiana. As in Griffin, 181 the Court required the application of relevant forum law in a true conflict.

The recent case of Nevada v. Hall 182 reconfirms the Supreme Court's acceptance of forum law in true conflicts. California plaintiffs were injured in California in an automobile collision with a car owned by the state of Nevada and driven by an employee of Nevada acting within the scope of his employment. 183 Suit was brought in a California state court, and the state of Nevada was served under California's nonresident motorist statute. Failing with the argument that no state need appear in the courts of another state, 184 Nevada next argued that California owed full faith and credit to Nevada's statute limiting its liability in tort to $25,000. 185 The California courts disagreed, following California's abrogation of the doctrine of sovereign immunity, and entered judgment against Nevada on the jury's verdict of $1.15 million. 186

This case presented a true conflict because California law fa-

179. The Court noted the state's interest:

Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help. Louisiana has manifested its natural interest in the injured by providing remedies for recovery of damages.

348 U.S. at 72.

180. Id. at 72-73. The Court noted that Home might have been decided differently if activities upon which that action was based took place in Texas. Id. at 71.

181. For a discussion of Griffin, see supra notes 169-75 and accompanying text.


183. Id. at 411.


185. The relevant Nevada statute appears in 410 U.S. at 412-13 n.2. This statute has since been amended to remove the monetary limitation. See Nev. Rev. Stat. § 41.031 (1979).

vored plaintiffs and two California plaintiffs were present in the case. Furthermore, Nevada law favored Nevada, an interest beyond dispute. Whether or not the California Court of Appeals correctly followed California's current choice of law doctrine, the Supreme Court reaffirmed the forum's power to apply its law to true conflicts, except "in certain limited situations." The only limitation on this power is that forum law not be applied without an actual interest when another jurisdiction has such an interest.

3. Apparent Conflicts

If the laws of all the potentially relevant states suggest the same result, the conflict is deemed apparent, and there is no reason to displace forum law. *Alaska Packers Association v. Industrial Accident Commission,* *Pacific Employers Insurance Co. v. Industrial Accident Commission,* and *Cardillo v. Liberty Mutual Insurance Co.* are examples in which the parties' failure to plead differences between the allegedly applicable laws presented the courts with, at most, only apparent conflicts. Reliance on these three cases for any stronger proposition, therefore, is misplaced.

In each of the three cases, the defendant insurance carrier, which was fully and incontestably within the judicial jurisdiction of the forum, raised the concededly limited jurisdiction of the workers' compensation tribunal as a procedural defense. In each case, however, the defendant failed to plead any substantive difference between applying forum law and the other state's law which would have provided an actual, or at least a colorable, defense to the insurance company's liability. In each of these apparent conflicts, the Supreme Court affirmed application of forum law.

a. *Alaska Packers Association v. Industrial Accident Commission.* A nonresident alien, Juan Palma, was hired in San Fran-

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188. 440 U.S. at 421. "Moreover, in certain limited situations, the courts of one State must apply the statutory law of another State." *Id.* (citing Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932)).
189. 294 U.S. 532 (1935).
cisco to work during the salmon season in Alaska with the employer agreeing to supply roundtrip transportation. Palma was injured and treated in Alaska, and then returned to San Francisco. Shortly thereafter, Palma claimed workers' compensation in California.

The employer offered two defenses. First, the employer contended, without explanation, that the accident had not arisen out of Palma's employment. Second, the employer argued that Alaska's Workmen's Compensation Act provided Palma's sole remedy for any work-related injury in Alaska and that, therefore, the California Industrial Accident Commission had no jurisdiction. In an attempt to bolster its argument, the employer offered Palma's adhesive election in the employment contract to be bound by Alaska's workers' compensation law even though such a contractual provision would have been ineffective under California law.\(^9\)

It is difficult in this case to determine whether Alaska had any interest. The employer did not rely on Alaska law to invoke any particular defense or to profit from a lower compensation scale, but rather, to deny jurisdiction to the California Industrial Accident Commission.\(^9\) As the defendant presented the case, there was no conflict between the laws of Alaska and California. Each state conditioned compensation on the accident having arisen out of employment, and this issue was the only substantive concern mentioned. The California Supreme Court's decision indicated that the defendant did not even suggest that the application of Alaska law would result in a different decision on the substantive issue than the application of California law.\(^9\)

193. The facts are taken from the per curiam decision of the California Supreme Court, 1 Cal. 2d 250, 252-54, 34 P.2d 716, 717-18 (1934).
194. Id. at 254, 34 P.2d at 718.
195. The Alaska's Workmen's Compensation Act was designed to keep the litigation over its provisions at home.

No action for the recovery of compensation hereunder shall in any case be brought outside of the Territory of Alaska, except in cases where it is not possible to obtain service of summons upon the defendant in said Territory, and in all such cases the plaintiff must plead and prove his inability to obtain service of summons upon the defendant within the Territory of Alaska.

1929 ALASKA Sess. LAWS ch. 25, § 25 (cited in 1 Cal. 2d at 255, 34 P.2d at 719).

Writing for a unanimous Supreme Court, Justice Stone easily affirmed the use of California law. California had a "peculiar concern"\(^\text{196}\) in providing a remedy for employees hired in California sufficient to justify application of forum law. Even if Alaska did have an interest, Justice Stone deemed California's interest to be greater than that "of a state of which the employee was never resident and to which he may never return."\(^\text{197}\) Justice Stone then established a rebuttable presumption in favor of applying forum law and found that Alaska's situs of the injury did not require displacement of California law:

The interest of Alaska is not shown to be superior to that of California. No persuasive reason is shown for denying to California the right to enforce its own laws in its own courts, and in the circumstances the full faith and credit clause does not require that the statutes of Alaska be given that effect.\(^\text{198}\)

Professor Beale, of course, would have insisted that California or any state with judicial jurisdiction yield to what he saw as Alaska's exclusive legislative jurisdiction. See infra note 70. The defendant argued that since California's workers' compensation agency could not apply Alaska law, it should not hear the case. The California view was that the case would be heard, but under California law.

Judicial and legislative jurisdiction are ordinarily separate issues. See supra note 26. Certain disputes, however, commingle the issues. Workers' compensation boards generally believe that they are empowered only to apply the local compensation law. W. Malone, M. Plant & J. Little, Cases and Materials on the Employment Relation 515 n.2 (1974). Hence, it appears that the defendant raised the colorable, albeit easily resolved, issue of choice of law to frustrate the California system's ability to hear the case.

One can sympathize with an agency asked to decide a claim under the law of another state, but that sympathy does not compel dismissal of the claim. Cook, of course, rejected exclusive legislative jurisdiction several years before Alaska Packers. Cook, The Logical and Legal Bases of the Conflict of Laws, 33 Yale L.J. 457 (1924), reprinted in Selected Readings, supra note 63, at 71, 77-78, 78 n.41, 81.

196. 294 U.S. at 549. Although "peculiar" may have been meant in the sense of distinct, particular, or exclusive, this view herein is that California's claimed concern for Palma may more aptly be thought unusual, eccentric, or strange. If Alaska had provided the defendant a clear, articulated defense, California's "peculiar concern" would have been inadequate.

197. Id. at 550.

198. Id. By asking whether a "persuasive reason is shown for denying to California the right to enforce its own laws in its own courts," id., Justice Stone established the presumption that California law applied. Justice Stone seemed to suggest that Alaska's law would displace California's law only if the "interest of Alaska is... shown to be superior to that of California." Id. Although a weighing of interests might show one state's interest to be greater according to some external standard provided by a super law, Stone's requirement also would be met by a false conflict in which Alaska had an interest and California had none. See, e.g., Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

Strict interest analysis is qualitative, not quantitative. Interests are either present or nonexistent; they cannot be weighed without resort to the discredited notion of an external super law standard. What is not clear in Stone's language is whether the presumption in favor of applying California law is based on California, the forum, or California, the place of the contract.
There may be a temptation to read Justice Stone's perception of California's "peculiar concern" for Palma as recognition of a California interest in Palma. This temptation should be resisted. Although California's expanded policy protected nonresident aliens such as Palma under workers' compensation, the holding of the Court did not necessitate finding a California interest since this case presented only an apparent conflict in which the defendant failed to show how the result would differ under Alaska law. Thus, any suggestion in the case of a California interest must be regarded as dictum.

b. *Pacific Employers Insurance Co. v. Industrial Accident Commission.* Dewey & Almy Chemical Company, headquartered in Massachusetts, employed Kenneth Tator as a chemical engineer and research chemist. The Massachusetts Workmen's Compensation Act applied to both Tator and his employer, with the Hartford Accident and Indemnity Company providing the insurance, but only for Massachusetts.

In 1935, Tator was assigned temporarily to the company's Oakland, California plant. The California Workmen's Compensation Act applied to the company and its California employees, with Pacific Employers Insurance Company providing the required insurance.

After his injury in California, Tator claimed compensation under the California Act. Pacific raised no substantive defense, but instead urged that California both lacked jurisdiction to hear the claim of an employee hired in Massachusetts and was obliged

199. The California Workmen's Compensation Act expressly protected workers, who were hired within the state, and California residents at the time of injury, who were injured outside of California. *Pacific Employers Ins. Co. v. Indus. Accident Comm'n*, 10 Cal. 2d 567, 75 P.2d 1058, 1062 (1938). Palma was a nonresident and, therefore, outside the express protections of the Act. Although the California court of appeals based its decision on *Quong Ham Wah Co. v. Industrial Accident Comm'n*, 184 Cal. 26, 192 P. 1021 (1920), *dismissing writ of error*, 255 U.S. 445 (1921), for the extension of the Act's protections to nonresident aliens, Currie has argued that the extension of the statute's benefit in *Quong* was dubious and properly limited under the privileges and immunities clause, U.S. Const. art. IV, § 2, only to citizens of some state. B. CURRIE, supra note 3, at 202 n.47. In an ironic coincidence, Quong Ham Wah was also the labor broker that hired Palma on behalf of Alaska Packers.


202. *Id.*

203. Although Tator reported to both the manager of the Oakland plant and the officers of the company in Massachusetts, he was primarily under the control of the Massachusetts office. *Id.*
to defer to the state of employment.\textsuperscript{204} Also present in the case were health care providers in California who had treated Tator and who allegedly were apprehensive that they might need to seek their fees in Massachusetts.

One plausible reading of Justice Stone's framing of the issue is that the Court impliedly assumed that forum law applied unless and until precluded by the Constitution. The Court stated the issue:

[\textit{W}hether the full faith and credit which the Constitution requires to be given to a Massachusetts workmen's compensation statute precludes California from applying its own workmen's compensation act in the case of an injury suffered by a Massachusetts employee of a Massachusetts employer while in California in the course of his employment.\textsuperscript{205}]

In Justice Stone's words, the defense urged by Pacific Employers was

[\textit{T}hat the employee, because he was regularly employed at the head office of the corporation in Massachusetts and was temporarily in California on the business of the employer when injured there, was subject to the workmen's compensation law of Massachusetts, and that the California Commission, in applying the California Act and in refusing to recognize the Massachusetts statute as a defense, had denied to the latter the full faith and credit to which it was entitled under Article IV, § 1 of the Constitution.\textsuperscript{206}]

Justice Stone held that the exclusive remedy provided by Massachusetts and the full faith and credit clause did not require California to "withhold the remedy given by its own statute to its residents [Tator's medical creditors], by way of compensation for medical, hospital and nursing services rendered to the injured employee . . . ."\textsuperscript{207}

According to Justice Stone, the purpose of the full faith and credit clause was "to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state, . . . [but that it did not compel a state] to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."\textsuperscript{208} Hence, the full faith and credit clause protects rights in judgments but does not necessarily compel application of another state's law before judgment. If the

\textsuperscript{204} Id. at 571, 75 P.2d at 1060.
\textsuperscript{205} 306 U.S. at 497.
\textsuperscript{206} Id.
\textsuperscript{207} Id. at 501.
\textsuperscript{208} Id.
meaning and effect of the clause were otherwise, then Massachusetts would be obliged to defer to California, and California, in turn, would be obliged to defer to Massachusetts. Thus, neither state would be able to hear the case because neither California nor Massachusetts could apply its own law and neither state could apply the other's law in its own administrative system. Consequently, the victim would go remediless. Alternatively, the reach of the full faith and credit clause would be expanded to compel the California Industrial Accident Commission to become familiar with every state’s workers' compensation law—a responsibility only reluctantlyshouldered by state courts, much less administrative agencies. Justice Stone decided the alleged conflict between Massachusetts and California by concluding that either state could apply its own law.

Although Massachusetts has an interest in safeguarding the compensation of Massachusetts employees while temporarily abroad in the course of their employment, and may adopt that policy for itself, that could hardly be thought to support an application of the full faith and credit clause which would override the constitutional authority of another state to legislate for the bodily safety and economic protection of employees injured within it. . . . [T]he full faith and credit exacted for the statute of one state does not necessarily preclude another state from enforcing in its own courts its own conflicting statute having no extra-territorial operation forbidden by the Fourteenth Amendment . . . .

Thus, the full faith and credit clause would not require California to defer to Massachusetts. Application of California’s statute, therefore, would be constitutional if California did not deny due process by using forum law without an interest in the face of a conflicting Massachusetts interest.

The single most striking fact about *Pacific Employers* is that the Court treated the case as a true conflict in which Massachusetts and California had interests, even though no conflicting interest in Massachusetts was articulated. All that Pacific Employers urged was that Massachusetts law required the payment of creditors. California law did not differ on that point. Neither state, consequently, had articulated any interest in its workers’ compensation carriers escaping liability. As in *Alaska Packers*, the defendant insurance company raised the possible application of the other state’s compensation act solely as a technical, jurisdictional defense. If the other state’s act controlled, then

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209. *Id.* at 503.
the California Industrial Accident Commission would not be able to hear the case, and the worker, or in *Pacific*, Tator's creditors, would be obliged to travel to the other state, either Alaska or Massachusetts, respectively, to prosecute the claim. In neither instance did the defendant insurance company advance any substantive defense to the claim. Like *Alaska Packers*, therefore, *Pacific Employers* presented only an apparent conflict between the laws of two states. The laws of both states, in fact, called for full recovery. In neither case was the presumptive applicability of the forum law overcome.

c. *Cardillo v. Liberty Mutual Insurance Company.* 210 E.C. Ernst, Inc., a contractor incorporated and headquartered in the District of Columbia, employed Ticer, 211 a resident of the District, on a job in Virginia. Returning home from work, Ticer was killed in Virginia when struck by a stone hurled through the windshield of his car. 212 One of the working conditions negotiated by Ticer's collective bargaining agent required Ernst to provide transportation to any job site outside the District. 213 Workers for Ernst on the Virginia job had agreed orally to accept two dollars cash each day in lieu of transportation in kind. 214 At the time of his injury, Ticer was transporting two members of a regular car pool and two other co-workers who had paid him a dollar each for that day's transportation. 215

Ticer's widow brought a claim for death benefits under the District of Columbia Workmen's Compensation Act. Liberty Mutual defended Ernst on two grounds: First, that the injury had not arisen out of and in the course of employment; and second, that the deputy commissioner lacked jurisdiction to award compensation under the District's Act for a death which had occurred in Virginia. 216

The deputy commissioner, sitting as the initial determiner, found that the provision of payment for transportation sufficed to

211. The reports are not clear as to Ticer's full name. The Court of Appeals for the District of Columbia Circuit reported his name as Walter H. Ticer. Liberty Mut. Ins. Co. v. Cardillo, 154 F.2d 529, 530 (D.C. Cir. 1946). Justice Murphy, however, reported his name as Clarence H. Ticer. 330 U.S. at 472. Otherwise the accounts agree.
212. 154 F.2d at 530.
213. *Id.* at 530-31.
214. *Id.* at 531.
215. *Id.* at 530.
216. *Id.*
bring Ticer's death into the course of his employment and thus, that Ticer's widow was entitled to compensation. The United States District Court for the District of Columbia sustained that finding. The Court of Appeals for the District of Columbia Circuit reversed in a split decision. Having found that the injury had not arisen out of and in the course of employment under the District of Columbia Act, the court of appeals did not determine whether the District of Columbia compensation board had jurisdiction over the injury. The Supreme Court, in an opinion by Justice Murphy, reversed the Court of Appeals over the dissents, without opinion, of Justices Jackson and Burton.

Although defendant argued that the District of Columbia Act applied “only where the employee, during the whole of his employment, spent more time working within the District than he spent outside the District,” Justice Murphy construed the plain meaning of the Act's jurisdictional provision:

Nothing in the history, the purpose or the language of the Act warrants any limitation which would preclude its application to this case. . . . [The words] “irrespective of the place where the injury, or death occurs” . . . leave no possible room for reading in an implied exception excluding those employees like Ticer who have substantial business and personal connections in the District and who are injured outside the District. Buttressing reliance on the plain meaning of the language, the opinion continued:

[T]he District's legitimate interest in providing adequate workmen's compensation measures for its residents does not turn on the fortuitous circumstance of the place of their work or injury. . . . Rather it depends upon some substantial connection between the District and the particular employee-employer relationship, a connection which is present in this case.

Thus, the Court found a statutory policy to compensate residents of the District of Columbia for occupational injuries. By statutory construction, the Court determined the compensatory purpose of the statute and found that purpose would be advanced by application of the statute to the case at hand. This concurrence of policy and presence of a person of the protected class “fully satisfy[ed] any constitutional questions of due process or full faith

217. 330 U.S. at 472-73.
218. Id. at 473.
219. 154 F.2d 529 (D.C. Cir. 1946).
220. 330 U.S. at 473.
221. Id. at 475.
222. Id. at 476.
Thus, the statute expressed a clear policy that was generally constitutional and reached the facts of the case. Nothing more was required to support the constitutionality of the District’s jurisdiction.

Once again the court ignored an insurance company’s argument of no legislative jurisdiction. The case, though presenting a forum interest, is nonetheless similar to Alaska Packers and Pacific Employers. In each instance, the defendant’s failure to allege any difference between the laws that could be articulated presented the courts with mere apparent conflicts and, therefore, with no reason to displace the presumptively applicable forum law. Thus, a choice of law decision was unnecessary.

4. Unprovided-for-Cases

Unprovided-for-cases, in which neither state has an interest but the laws urged by the parties nonetheless differ, provide the greatest confusion for courts and analysts. The consensus accepting false conflicts is broad and deep. Recognition of true conflicts is also widespread, even if agreement on their treatment is not. The unprovided-for-case, however, with its lack of interests, is both unfamiliar and disquieting to many.
Nonetheless, the unprovided-for-case is straightforward because it is strictly parallel to a purely domestic case in which the court must apply forum law. Similarly, in an unprovided-for-case, no reason exists for displacing forum law because no other state has any interest.\textsuperscript{228}

Unprovided-for-cases, however, may go unrecognized if courts discern interests where none exists.\textsuperscript{229} Such unrecognized unprovided-for-cases are doubly unfortunate. First, such cases delay understanding and recognition of the utility and merit of interest analysis. Second, such cases support a mistaken view of what suffices to create a state interest. It is urged herein that there can be no meaningful and successful interest analysis without acceptance of the unprovided-for-case. Furthermore, interest analysis which does not strictly discern interests will avoid unprovided-for-cases only at the cost of generating excessive numbers of spurious true conflicts.\textsuperscript{230}

\textit{Allstate Insurance Co. v. Hague}\textsuperscript{231} is not the first unprovided-for-case to have been decided by the Supreme Court, as the following development of precedent will show. As with true conflicts, the precedent before \textit{Erie} is mixed,\textsuperscript{232} but since \textit{Erie}, the Supreme Court consistently has sustained and even required application of forum law when no other state has presented an interest, whether a forum interest was or could have been shown.

a. \textit{Carroll v. Lanza}.\textsuperscript{233} Carroll, a Missouri resident, was injured in Arkansas in the course of his employment with Hogan, also a Missouri resident, who was a subcontractor to Lanza, a resident of Louisiana. The negligence of Lanza’s employees, acting within the scope of their employment, caused Carroll’s injury.\textsuperscript{234}

\textsuperscript{228} \textit{Cf.} Home Ins. Co. v. Dick, 281 U.S. 397 (1930) (where the “other jurisdiction” did have an interest in the application of its law, and the forum’s interest was irrelevant, the forum rule could not be invoked without denying due process). \textit{See supra} text accompanying notes 118-30.

\textsuperscript{229} \textit{See supra} note 224.

\textsuperscript{230} \textit{See supra} note 95.

\textsuperscript{231} 449 U.S. 302 (1981).

\textsuperscript{232} \textit{Compare} Northwestern Life Ins. Co. v. McCue, 223 U.S. 234 (1912) (Virginia, the forum and domicile of the decedent, regarded death by capital punishment a valid defense to a life insurance police; Wisconsin, the home of the insurer, did not. Locating the contract in Virginia, the Supreme Court denied recovery.) \textit{with} Ormsby v. Chase, 290 U.S. 387 (1933) (place of wrong determines whether claim for damages survives death of wrongdoer). \textit{See also supra} note 100.

\textsuperscript{233} 349 U.S. 408 (1955).

\textsuperscript{234} 116 F. Supp. 491, 505 (W.D. Ark. 1953).
Under Missouri law, the general contractor, Lanza, was immune from tort actions brought by an employee of the subcontractor when that employee had received workers' compensation for his injuries. In contrast, the law of Arkansas permitted employees of subcontractors to recover against negligent general contractors. The subcontractor's workers' compensation insurance carrier in both Missouri and Arkansas voluntarily paid compensation to Carroll initially according to the law of Missouri, the state of employment. Carroll, however, also obtained judgment against the general contractor in federal district court in Arkansas.

The Court of Appeals for the Eighth Circuit reversed on two grounds. First, according to his deposition, Carroll knew he was being compensated under Missouri law six weeks before he requested compensation under Arkansas law, but he continued to accept the Missouri benefits for those six weeks. The court deemed such acceptance of Missouri benefits to entail acceptance of the exclusive remedy in Missouri law. Second, Magnolia Petroleum Co. v. Hunt, which has since been overruled, was deemed to govern. Having received workers' compensation from his employer's insurer, which was all that he could obtain under Missouri law, Carroll was barred from seeking a further tort recovery under Arkansas law from Lanza, the general contractor.

In an opinion by Justice Douglas, the Supreme Court reversed the decision of the court of appeals and held that Arkansas, the forum, need not defer to the law of Missouri. Although the Court reached the correct result, its analysis omitted any express distinction between the true conflict and the unprovided-for-case.

235. Id. at 501.
236. Id.
238. 216 F.2d 808 (8th Cir. 1954).
239. 320 U.S. 430 (1943). Magnolia was overruled by Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980), but Magnolia had never been a popular decision. Id. at 269 n.13.
240. In the Magnolia case, Hunt, a resident of Louisiana, was employed in that state by Magnolia as a laborer in connection with the drilling of oil wells. In the course of his employment he went to Texas where, while working on an oil well, he was injured. He procured workmen's compensation for his injuries under the Texas Workmen's Compensation Law. Under the Texas law the award of compensation was final and exclusive, resembling the Missouri law in that respect. Afterward Hunt instituted a proceeding in Louisiana to recover compensation under the laws of that state. He was awarded the relief demanded by the state court of Louisiana, and the Supreme Court reversed. It is difficult to distinguish that case from the present one.
Lanza v. Carroll, 216 F.2d 808, 816 (8th Cir. 1954).
First, the Court distinguished *Magnolia*, in which final adjudication had been obtained in the state awarding compensation, from *Carroll*, in which "no adjudication was sought or obtained." Justice Douglas also emphasized that *Carroll* was not a case in which an employee "knowing of two remedies which purport to be mutually exclusive, chooses one as against the other and therefore is precluded a second choice by the law of the forum." Instead, Justice Douglas framed the issue as "whether the full faith and credit clause makes Missouri's statute a bar to Arkansas' common-law remedy."

In the remainder of the opinion, the Court departed from the traditional Bealean concepts of the first Restatement by discarding the notion that one law must apply exclusively to any one event. Although a statute is a "public act" within the full faith and credit clause, a forum need not yield to another state's statute if obnoxious to the forum. Such rejection of exclusivity reflects the modern view of basing choice of law on the competing policies of the states' allegedly conflicting laws.

Nonetheless, even though the Court was sensitive to the importance of state policies, it overlooked the concurrent requirement that the policies also be relevant in the case at bar. Although *Carroll* is actually an unprovided-for-case, the Court's language, taken almost verbatim from *Pacific Employers*, describes the strict interest analysis of a true conflict:

The [Supreme] Court [has] proceeded on the premise, repeated over and again in the cases, that the Full Faith and Credit Clause does not require a State to substitute for its own statute,

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242. Id. at 411.
243. Id.
244. Id.
245. Id.
246. The exact meaning of "obnoxious" in the choice of law context has never been clear, but it does seem to have had a lower threshold than the public policy doctrine described in *Loucks v. Standard Oil*, 224 N.Y. 99, 120 N.E. 198 (1918). See supra note 127.
247. 349 U.S. at 412.
248. If obnoxious behavior were contrary to local public policy, see supra note 127, then nothing new would have been added by *Pacific Employers*, upon which the Court in *Carroll* relied. If obnoxious behavior meant merely being different, then there would be no choice of law. If, however, a law without an interest is urged in the face of a forum interest, then it may be obnoxious in an ordinary sense.
249. Cf. "[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, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events." *Pacific Employers*, 306 U.S. at 502.
applicable to persons and events within it, the statute of another State reflecting conflicting and opposed policy.\textsuperscript{250}

Where both states are seen to have conflicting interests, which the Court calls "policies," the Court finds a true conflict. If Arkansas law is applicable to Carroll's injury, for example, then Arkansas need not yield to the conflicting policy of the Missouri law. The difficulty is that neither Pacific Employers nor Carroll presents a true conflict. Pacific Employers is only an apparent conflict,\textsuperscript{251} and Carroll is an unprovided-for-case.

The key issue in Carroll was whether Lanza, the general contractor, could avail himself of the defense provided by the exclusive remedy in the Missouri workers' compensation law. Lanza, however, was completely unconnected to Missouri. It is unlikely that the Missouri legislature worried about Louisiana general contractors working in Arkansas even if such general contractors hired Missouri subcontractors.\textsuperscript{252} Lanza simply did not have standing in an Arkansas court to seek a defense provided in Missouri law,\textsuperscript{253} because Missouri had no interest in applying its law protecting Missouri contractors in favor of a Louisiana contractor.\textsuperscript{254}

It is, of course, equally true that Arkansas had no interest in providing a common law remedy to a Missouri worker who had incurred no debts in Arkansas.\textsuperscript{255} Strict interest analysis, however, does not require a forum interest as a precondition to the application of forum law. Forum law is applicable unless the forum lacks an interest in an issue in which another jurisdiction has an actual interest.\textsuperscript{256} Application of Arkansas forum law to this unprovided-for-case was correct and appropriate. Thus, the majority reached a result in full accord with strict interest analysis of the unprovided-for-case.

Although Justice Frankfurter's dissent manifested a desire to construe state interests broadly so that weighing would be used, at

\textsuperscript{250} 349 U.S. at 412.
\textsuperscript{251} See supra note 93.
\textsuperscript{252} "Thus there is no warrant for believing that the Missouri courts would refuse to allow suit against [Lanza] as an ordinary third party." 349 U.S. at 425 (Frankfurter, J., dissenting).
\textsuperscript{253} See Cramton & Currie, supra note 71, at 307.
\textsuperscript{254} See, e.g., Home Ins. Co. v. Dick, 281 U.S. 397 (1930), discussed at supra note 228.
\textsuperscript{255} Currie has articulated a lower order of interests in unprovided-for-cases which he called "altruistic interests," B. Currie, supra note 3, at 489, but the primary purpose of altruistic interests in his thinking was to allow unprovided-for-cases to meet his inaccurate due process test.
\textsuperscript{256} See, e.g., Home Ins. Co. v. Dick, 281 U.S. 397 (1930), discussed at supra note 228.
least in the workers’ compensation cases, to decide the conflicts,\textsuperscript{257} even his discussion of Lanza’s alleged defense under Missouri law is consistent with strict interest analysis.\textsuperscript{258} According to Frankfurter, Lanza’s rights and duties were governed by Arkansas or Louisiana law,\textsuperscript{259} but not by Missouri law, because Lanza was not a Missouri employer. With “no warrant for believing that the Missouri courts would [allow an affirmative defense of exclusivity], [p]resumably, then, Carroll could sue Lanza under either Missouri or Arkansas law for his negligence.”\textsuperscript{260} Justice Frankfurter then concluded that the question of whether Arkansas owed full faith and credit to the Missouri defense need not have been reached. Justice Frankfurter urged remand to determine whether his reading of Missouri law was correct. If that reading were correct, then Arkansas had no duty to defer to the application of Missouri law in a case in which careful consideration of Missouri precedents showed that Missouri policy did not embrace out-of-state contractors like Lanza. Thus, even the dissent’s basic analytical framework is largely consistent with strict interest analysis.

Interest analysis enables the reconciliation of apparently conflicting cases. Although the consensus in the literature is that \textit{Carroll} overruled \textit{Clapper} sub silentio,\textsuperscript{261} the two cases are consistent under strict interest analysis. \textit{Carroll} is viewed as an unprovided-for-case in which the presumption in favor of the Arkansas forum

\textsuperscript{257} 349 U.S. at 419.

\textsuperscript{258} See id. at 422-25.

\textsuperscript{259} Although Louisiana law provided immunity from tort liability to general contractors, the immunity was in exchange for the general contractor’s liability for workers’ compensation benefits. Malone, \textit{Workmen’s Compensation}, 12 La. L. Rev. 150, 150 n.3 (1952). Because Carroll could not have obtained workers’ compensation from Lanza under Louisiana law, Cobb v. International Paper Co., 76 So. 2d 460 (La. App. 1954), Lanza could not raise the Louisiana immunity as a defense to liability under Arkansas law. See supra text accompanying note 148 (Brandeis, J. limiting the benefit of New Hampshire’s employee favoring law to New Hampshire employees in \textit{Clapper}).

\textsuperscript{260} 349 U.S. at 425.

\textsuperscript{261} See, e.g., R. Cramton & R. Sedler, \textit{Conflict of Laws} 159-60 (1977); A. Ehrenzweig, supra note 63, § 40, at 145; H. Goodrich & E. Scopes, \textit{Handbook of the Conflict of Laws} § 100, at 190-91 (4th ed. 1964); R. Leflar, supra note 63, § 57; R. Weintraub, supra note 63, at 399-404. The Supreme Court’s recent pronouncements, however, have been inconsistent. \textit{Compare} Nevada v. Hall, 440 U.S. 410, 421 (1979) (favorable to a modified application of \textit{Clapper}) \textit{with} Thomas v. Washington Gas Light, 448 U.S. 261 (1980), which stated: “Carroll, which for all intents and purposes buried whatever was left of \textit{Clapper} after Pacific Employers . . ., cast no doubt on \textit{Clapper’s} reliance on the Full Faith and Credit Clause itself.” Id. at 273 n.18. Although \textit{Thomas} is a year more recent, \textit{Hall} is more relevant. \textit{Hall} concerned choice of law; \textit{Thomas} concerned recognition of judgments. \textit{Thomas} also contains three opinions which in the aggregate conclude that the rule to be followed is conceptually inferior to the rule to be ignored.
was not rebutted, and Clapper is a false conflict in which the interest of Vermont, the nonforum, in the Vermont employer required the New Hampshire forum to yield.

b. Allstate Insurance Company v. Hague.\(^{262}\) Under strict interest analysis, Hague is an unprovided-for-case with the presumption of forum law not rebutted. This conclusion is justified because neither Minnesota nor Wisconsin had an interest composed of a policy and a person within the protected class.

Minnesota's stacking rule benefits the victims of accidents in which the party legally responsible is uninsured. Under strict interest analysis, the class for which this law was made is narrowly defined. In Hague, that class consists of Minnesota residents, or the heirs of decedents from Minnesota, or both. Regardless of her motivation, Mrs. Hague's postaccident move to Minnesota did not give her membership in the protected class.\(^{263}\) With no one within the protected class present in the case, Minnesota lacked an interest.

Determining Wisconsin's interest is more complicated because of the difficulty in identifying both the policy behind Wisconsin's disallowance of stacking and the protected class.\(^{264}\) In a case like Hague, Allstate would have collected three separate premiums, each purporting to provide $15,000 of coverage against injury by uninsured motorists. Upon the insured's injury by an uninsured motorist, Allstate would tender $15,000 and, so far as any opinion discloses, keep both the other $30,000 and the extra two premiums. The Minnesota Supreme Court's majority in Hague suggested that Wisconsin's purpose may have been "to keep insurance premiums low while providing some protections against uninsured motorists."\(^{265}\) The rule against stacking could keep insurance rates down if the actuaries planned subsidizing purchasers of single policies through the sale of nonexistent coverage, but it is difficult to see how the class of compelled purchasers of multiple uninsured coverages would be aided by denial of that for which they had already paid. In short, if Wisconsin did not join the ma-


\(^{264}\) There is substantial reason to believe that the case was actually only an apparent conflict, notwithstanding Allstate's position. The Wisconsin statute in question had not been interpreted since its amendment in 1973. It may be that the amended statute applicable to Hague required stacking. See supra note 16.

\(^{265}\) 289 N.W.2d at 47.
jority upholding stacking with its 1973 amendment, the purpose and policy of its minority rule resists identification. Wisconsin certainly can enact laws without obvious purpose. Some such laws might even survive scrutiny under due process and other constitutional protections. Wisconsin, however, cannot expect other states to defer to such laws.

With neither state having an identifiable interest in the litigation, Hague is an unprovided-for-case, and the presumption in favor of applying Minnesota law in a Minnesota court stands unrebuted. Hague, therefore, illustrates the difference between presuming forum law to apply and requiring an affirmative reason for applying a law. Mrs. Hague's claim for the application of Minnesota law may lack the affirmative support it would have gained if she or Mr. Hague were within the set of beneficiaries for whom the Minnesota rule had been enacted, but her lawsuit nevertheless requires resolution. With the forum law as the residual law, a predictable decision follows.

B. The Presumption of Forum Law in the Hague Opinions

Both the plurality and dissent concurred that a state's law may not properly be applied in the absence of an affirmative state interest. Only Justice Stevens recognized the rebuttable presumption in favor of applying forum law.

The plurality's test for the constitutionality of applying a state's law, however, sets too high a threshold. "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." The shortcoming of the plurality's test is that it does not allow for the possibility of a lawsuit, like Hague, which does not reflect any state interests. The plurality's implicit assumption that every

266. See supra note 16.

267. No serious consideration is given to Allstate as the party for whom the rule against stacking was maintained. First, strict interest analysis regards casualty insurance companies as only proxies for their risk pools. See infra note 326 and accompanying text. Second, Allstate stands to lose only the windfall associated with selling the same coverage three times. Third, whatever Wisconsin's policy, Wisconsin is nonetheless entitled to a presumption against having legitimized the intentional sale of phantom coverage. If this type of review sounds too much like substantive due process, the defense offered is that the substantive standard which always has governed is that no law can take from A and give to B. See, e.g., Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

case presents at least one state interest ignores both the unprovided-for-case in general and the facts of *Hague* in particular. Moreover, the affirmative requirement is not necessary to explain the precedents, for which the rebuttable presumption in favor of applying forum law adequately accounts. The cost of this incorrect test is the plurality’s need to exaggerate Minnesota’s relationship with *Hague* to justify the application of Minnesota law.

The plurality attempted to derive its test from leading, familiar cases. *Watson v. Employers Liability Assurance Corp.*^{269} and *Clay v. Sun Insurance Office, Ltd.*^{270} were correctly cited for the proposition that more than one state’s law may properly govern a lawsuit.^{271} Both cases meet the plurality’s requirement of an affirmative basis for the application of forum law. Yet, both cases are true conflicts, not unprovided-for-cases like *Hague*. Furthermore, *Watson* and *Clay II* only show that a forum interest is a sufficient basis for applying forum law, not a necessary basis. Only a case barring use of forum law can demonstrate what is necessary.

The next two cases relied on by the plurality, *Home Insurance Co. v. Dick*^{272} and *Yates v. John Hancock Mutual Life Insurance Co.*^{273} are described as cases in which “the selection of forum law rested exclusively on the presence of one nonsignificant forum contact.”^{274} These two cases, however, are false conflicts in which the application of forum law was barred not only because the forum had no interest, but also because the other jurisdictions did have interests. Both Mexico, in *Home*, and New York, in *Yates*, had clear interests contrary to the policies of the forums.

*Watson* and *Clay II* demonstrate that a forum interest is sufficient. *Home* and *Yates* demonstrate that in the face of a contrary nonforum interest, a forum interest is necessary. Neither pair of cases establishes a requirement for a forum interest in the absence of another jurisdiction’s conflicting nonforum interest.

The *Hague* plurality then erroneously likened *Hague* to *Alaska Packers*,^{275} *Cardillo*,^{276} and *Clay II*,^{277} as “cases where this Court

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271. 449 U.S. at 307.
272. 281 U.S. 397 (1930).
274. 449 U.S. at 309.
sustained choice-of-law decisions based on the contacts of the State, whose law was applied, with the parties and occurrence.278 These three cases are, in fact, different. While Alaska Packers and Cardillo resemble Hague in presenting no nonforum interest,279 Cardillo differs from Hague in that it presents a clear forum interest. California's interest in Palma, the employee in Alaska Packers, was less clear. As a true conflict, Clay II differs completely from Hague, the unprovided-for-case. In Clay II and Cardillo, the forum interests sufficed to support the forums' laws. In Alaska Packers and Cardillo, the absence of any nonforum interests made a showing of a forum interest unnecessary. Thus, these cases relied on by the Hague plurality do not provide strong support for its thesis.

Dropping a footnote, the plurality sought further to buttress its argument.280 The cases on which the plurality relied, however, are distinguishable when viewed under interest analysis. Nevada v. Hall281 and Watson applied forum law on the basis of the plaintiff's residence and place of the injury. As true conflicts, forum law was the correct choice in both instances. The footnote then endorsed Pacific Employers282 and Carroll283 for relying on the forum as "the place of the injury arising from the respective employee's temporary presence in the forum State in connection with his employment."284 With neither case showing a nonforum interest, there was no necessity to demonstrate a forum interest. In Pacific Employers, California did have an interest in its medical creditors being paid, but in Carroll, Arkansas had no interest in Carroll, whose injury "cast no burden on [Arkansas] or her institutions."285 As with Watson and Clay, because a forum interest suffices to support forum law does not mean that a forum interest is necessary for the forum to apply its law. Thus, while reaching the correct result that forum law applied, the plurality's reasoning is vulnerable to serious criticism.

Even more than the plurality, the dissent demonstrates the conceptual difficulties of a failure to recognize the unprovided-

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278. 449 U.S. at 311.
279. While Alaska Packers and Cardillo might well have presented nonforum interests on their facts, no nonforum interest was articulated.
280. 449 U.S. at 312-13 n.17.
284. 449 U.S. at 313.
285. 349 U.S. at 413.
for-case. By requiring an affirmative showing of an interest in the forum, the dissent only could reject application of forum law when no Minnesota interest could be found. The dissent's statement that "both the Due Process and the Full Faith and Credit 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" suggests that a forum interest is sufficient but might not be necessary. The remainder of the opinion, however, urges that an affirmative case must be made to sustain application of forum law. The dissent may have gone beyond requiring a state interest as a necessary condition precedent to application of forum law by stating, "the forum State must have a legitimate interest in the outcome of the litigation before it." By restricting the states' powers to hear cases and provide the rules of decision for cases, the plain meaning of these words would bar Texas and Georgia from even deferring to the interests of Mexico and New York in Home and Yates, respectively. Yet the dissent may not have intended the plain meaning to be interpreted to the fullest extent because it expressed an awareness of the distinction between judicial jurisdiction and choice of law (i.e., legislative jurisdiction) in the next paragraph. More likely, the dissent simply was joining the plurality in insisting on an actual state interest to support any application of state law. Otherwise, further complexities would have been added to the question of judicial jurisdiction. Nevertheless, even this limited reading of the dissent's seemingly plain words is inconsistent with the second Restatement's paradigm of the neutral forum.

Moreover, the apparent conflict, Pacific Employers, is thin authority for an affirmative condition precedent to the application of state law. Dictum in Hall similarly was relied on to restrict the full faith and credit clause from requiring the application of nonforum law in the face of a contrary legitimate public policy.

The dissent assumed that every application of a state's law re-

286. 449 U.S. at 333 (Powell, J., dissenting).
287. Id. at 334.
288. Id. But cf. supra notes 26 & 27 (Justices Black and Brennan and Justice Otis linking judicial and legislative jurisdiction).
289. Compare Reese, supra note 75, at 692: "[T]he Restatement is written from the viewpoint of a neutral forum which has no interest of its own to protect and is seeking only to apply the most appropriate law," with Currie, The Disinterested Third State, 28 LAW & CONTEMP. PROBS. 754, 766 (1963): "[Reese] wants to devise rules for Almost-Never Land with the expressed hope that they will encroach on real life and be applied to the [cases neglected by the Restatement] that make up our normal experience."
flects an attempt to advance its policy: "Nonetheless, for a forum State to further its legitimate public policy by applying its own law to a controversy, there must be some connection between the facts giving rise to the litigation and the scope of the State's law-making jurisdiction." 290

The existence of the unprovided-for-case, however, refutes the dissent's assumption. Mere application of a state's law does not imply an attempt to further its policy. A state cannot further its policy without some party who stands to benefit from application of that policy. Congruence of party and policy is required where at least one of the litigants is within the legitimate concern of the state—that is, when the state has an interest. Yet, the unprovided-for-case is the precise instance where no such party is present. Not every case presents a state interest.

In an unprovided-for-case, the forum does not attempt to further its interest because it has none. All that the forum can do in an unprovided-for-case is apply forum law to decide the parties' real dispute. There is no reason to do otherwise. Certainly the application of the equally uninterested law of another state cannot be thought preferable.

It is especially unfortunate that the dissent quoted Currie out of context. The dissent stated, "In short, examination of contacts addresses whether 'the state has an interest in the application of its policy in this instance.'" 291 Currie, of course, did not speak of contacts, but rather of interests which were not generated simply by the geographical location of a transaction. 292 Moreover, the quotation is the last line of the second of five suggestions. The first suggestion is that, "normally, even in cases involving foreign factors, a court should as a matter of course look to the law of the forum as the source of the rule of decision." 293 Thus, quite to the contrary of the dissent's suggestion, Currie presumed the applicability of forum law unless "the forum state has no interest in the application of its law and policy, but . . . the foreign state has such an interest." 294 Currie, of course, would have applied forum law to cases where neither state has an interest. 295 Reliance on

290. 449 U.S. at 334.
291. Id. at 334-35.
292. See B. Currie, supra note 3, at 192-93.
293. Id. at 188.
294. Id. at 189.
295. "In comparatively rare cases, it may be found that neither state has an interest in the application of its policy, although no other state is concerned. In such [unprovided-for-cases], also, it seems the law of the forum should ordinarily be applied. Id."
Currie notwithstanding, the dissent's requirement of an interest to sustain the forum's law and determination that there was none in Minnesota necessitated the conclusion that Minnesota erred in applying its own law.

In his concurring opinion, however, Justice Stevens recognized an express presumption in favor of applying forum law, applicable even in a case such as Hague, where neither state seemed to have an interest: "[T]he [Full Faith and Credit] Clause should not invalidate a state court's choice of forum law unless that choice threatens the federal interest in national unity by unjustifiably infringing on the legitimate interests of another State."\(^{296}\) With Allstate having "failed to establish that Minnesota's refusal to apply Wisconsin law poses any direct or indirect threat to Wisconsin's sovereignty,"\(^{297}\) Stevens found no denial of full faith and credit.

Similarly, Stevens found the presumption in favor of applying forum law to be consistent with the requirements of due process.

I question whether a judge's decision to apply the law of his own State could ever be described as wholly irrational. For judges are presumably familiar with their own state law and may find it difficult and time consuming to discover and apply correctly the law of another State. The forum State's interest in the fair and efficient administration of justice is therefore sufficient, in my judgment, to attach a presumption of validity to a forum State's decision to apply its own law to a dispute over which it has jurisdiction.\(^{298}\)

With the application of Minnesota law presenting no fundamental unfairness to Allstate, Justice Stevens concluded, "Although I regard the Minnesota court's decision to apply forum law as unsound as a matter of conflicts law, and there is little in this record other than the presumption in favor of the forum's own law to support that decision, I concur in the plurality's judgment."\(^{299}\)

Whereas his Brother Justices' insistence on an affirmative case for applying any state's law left them with the choice between the plurality's invention of a Minnesota interest or the dissent's insistence on the wrong result, Justice Stevens was able to affirm the application of Minnesota law simply because there was no good reason to apply any other. Having examined the Hague opinions in detail, this Article next will advocate the use of strict interest analysis for deciding future cases and reconciling past decisions.

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296. 449 U.S. at 323 (Stevens, J., concurring).
297. Id. at 325.
298. Id. at 326.
299. Id. at 331-32.
III. IDENTIFYING STATE INTERESTS

Currie defined an interest as “the product of (a) a governmental policy and (b) the concurrent existence of an appropriate relationship between the state having the policy and the transaction, the parties, or the litigation.” Extension of Currie's insights has become necessary because courts have found state interests where none exists and commentators have combined appropriate criticisms of arguments and decisions with inappropriate attribution of flaws in those decisions and arguments to interest analysis. In

300. B. CURRIE, supra note 3, at 621.

As a pioneer interest analyst whose work was tragically shortened by an early death, Currie did not live to see what courts and commentators have done with his essentially sound insight. Moreover, because Currie viewed his essays as only a series of working papers with which to enhance his understanding of the cases in his conflicts course, id. at 585, and, perhaps more importantly, because he disliked systems, id. at 121, Currie never wrung every inconsistency from his work nor used his insights to the fullest extent as analytical tools.

301. See, e.g., Brilmayer, Interest Analysis and the Myth of Legislative Intent, 78 Mich. L. Rev. 392 (1980), stating in part: "Interest analysis is simply too unpredictable and parochial to be a plausible theory of constructive intent." Id. at 393. Professor Brilmayer holds Currie's interrupted, interim efforts, which posed important questions more than they provided definitive answers, to a high standard of rigor and consistency. Professor Brilmayer is, of course, correct that Currie's work is not entirely satisfactory, but this author prefers to attempt to understand what was intended and to further interest analysis' evolutionary progress, rather than to resolve Currie's ambiguities and tentative conclusions against him. Additionally, it appears that Professor Brilmayer's perception of the structure and content of interest analysis differs so significantly from the views expressed herein that neither our respective descriptions of several cases nor the conclusions drawn therefrom can be reconciled. This divergence of viewpoints reinforces the need for this exposition of the structure and content of strict interest analysis.

In charging Currie with parochialism, Professor Brilmayer states: "'Interest' under the Currie approach amounts to an 'interest' in getting the best deal possible for the resident party by choosing the most favorable law." Id. at 409. Professor Brilmayer further states: "Currie assumed that the legislature would want a guest statute to benefit resident drivers only; if the driver was from a state without a guest statute, Currie would allow a resident plaintiff to recover." Id. at 409 n.66. But see B. CURRIE, supra note 3, at 489.

If Professor Brilmayer is assuming the forum to be a guest act state, Brilmayer, supra at 408, she poses an unprovided-for-case, which additionally could raise jurisdictional problems if the accident happened outside the state. See, e.g., Frummer v. Hilton Hotels, Int'l, Inc., 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41, cert. denied, 389 U.S. 923 (1967). Professor Brilmayer's citation, however, is to Currie's discussion of an Ontario driver being sued by a New York resident in New York, a state without a guest act. Cf. B. CURRIE, supra note 3, at 725 (Ontario driver sued by New York guest in New York court). Currie's hypothetical case is a true conflict. In interest analyses, whether strict, Sedler’s, or Currie's, these cases are absolutely different: in the former case, neither state has an interest; in the latter, both present interests. Professor Brilmayer's analysis does not reflect a full appreciation of this distinction and its consequences. It is inferred that Professor Brilmayer equates the cases because she perceives them to result in the local party always winning. In strict interest analysis, the forum law is presumed applicable and is displaced only when another jurisdiction has the only interest. Thus, viewed in terms of strict interest
strict interest analysis, a state will be recognized to have an interest only if it has a clear policy which is otherwise constitutional and which reaches the facts of the case at hand by

analysis, the cases are similar because the forum law will be applied to both, but in the former, that application will occur to the detriment of the local plaintiff, in the latter to his benefit.

In short, the presumption of forum law in the unprovided-for-case is not narrowly selfish and parochial. Currie did not necessarily discuss these considerations fully. It is only the gap between Professor Brilmayer's perception of Currie's interim thought and the current status of the evolutionary extensions of his insights that leads to the appearance of unpredictability. Cf. Twerski, supra note 227, at 121 (conceding the predictability of interest analysis).

Just as this Article was going to press, the Columbia Law Review published a well-deserved tribute to Professor Reese upon his retirement July 1, 1981 as Charles Evans Hughes Professor of Law at Columbia University Law School. This issue contained articles by Professors Rosenberg, Hill, Cavers, von Mehren, Juengar, and Leflar. A recurring theme was the superiority of insightful rules over interest analyses. 81 COLUM. L. REV. 933-1149 (1981).

In particular, however, Professor Rosenberg seems to have joined Professor Brilmayer in ascribing the flaws they find in others' work to Currie. It may be, for example, that the method of the California Supreme Court in Vesely v. Sager, 5 Cal. 3d 135, 486 P.2d 151, 95 Cal. Rptr. 623 (1971), in which an action for dram shop damages was created, differed from that of Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976). If Currie failed to predict the language of the courts, so be it. What Currie did urge, and what the court did do, however involuted and confused its method, see Kay, supra note 187, was for the forum court to apply its compensatory law in favor of its injured plaintiff, regardless of the fact that the defendant's law would not have sustained compensation. The case was a true conflict and a contrary result would be expected and appropriate in Nevada where the defendant did business. The choice of law should be the same even if the bar were at Metropolitan Airport outside Detroit and the customer stayed drunk for the five hours it would take to get from Michigan to his car in the parking lot at Los Angeles International Airport. This hypothetical case, of course, makes clear that the real problem in Bernhard might well be judicial jurisdiction and not choice of law.

Similarly, the failure of the court in Bernkrant v. Fowler, 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961), to track a domestic case perfectly does not show the impossibility of determining the appropriate reach of a state's policy. In fact, there is no reason to expect Currie and Traynor to approach cases identically. Compare supra note 107 with note 108.

302. The requirement of a clear interest serves only to emphasize that a judge deciding an issue of choice of law should not first discover a policy in either domestic or foreign law unintended by its makers and then use that revelation to justify choosing the reinterpreted law. Cf. Leflar, The Nature of Conflicts Law, 81 COLUM. L. REV. 1080 (1981). "Inventive minds can discover local interests and ascribe major weight to them even when factual contacts are small and the interest itself is making its first appearance in court." Id. at 1087. Furthermore, a state should not adopt a covert discriminatory policy under an apparently acceptable disguise. See B. CURRIE, supra note 3, at 347.

A separate, although easily commingled, question is what the court should do when it prefers the other jurisdiction's substantive law to its own. See, e.g., Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955), discussed in Traynor, supra note 73, at 132 (domestic rule was changed before the court reached the choice of law issue). Leflar has recognized this preference as a potentially valid basis for choice of law. See supra note 17.

303. The requirement that the law to be applied be otherwise constitutional simply recognizes that the choice of law process cannot be a tool to sidestep other valid con-
affecting a member of the class to be protected by the law under consideration.

Strict interest analysis considers the actual rather than the presumed relevance of a state's law. The premise is that in the absence of guidance from the legislature, courts shall determine the proper reach of each policy. In making these ordinary common law determinations, however, the courts should be careful to construe their interests narrowly. Such strict construction harmonizes state choice of law decisions with the Supreme Court's constraints on the choice of law process.

Currie did not discuss whether interests should be broadly or narrowly construed. It is evident, however, that Currie recognized in himself a tendency toward the overinclusive identification of state interests. When confronted by a seemingly true conflict, for example, Currie was willing to reconsider his initial characterization of both laws so as to avoid the true conflict. This overinclusion followed by reconsideration is harmless when a seemingly true conflict is recognized, on closer examination, as a false conflict. The harm occurs when what is merely an unprovided-for-case is perceived spuriously and treated as a false conflict without reexamination.

If the forum is found erroneously to have an interest, the appropriate law is nonetheless applied, but misleading precedent will have been made. Thereafter, insightful counsel may be able to separate the dictum purporting to find an interest from the narrower holding, but the task will be difficult where stare dictum and headnote jurisprudence are the professional norms. Later, when false conflicts are erroneously apprehended to be true conflicts, actual foreign interests may be frustrated by the erroneous precedents of spurious forum interests. Likewise, if the foreign state instead is found erroneously to have an interest,
misleading precedent results and the wrong party prevails as the normally applicable forum law is displaced without reason. 309

This Article will not offer detailed guidelines to draw the lines between actual and speculative interests. Reconsideration of actual cases will be employed instead. While these past courts probably did not consciously use strict interest analysis, the large number of Supreme Court decisions conforming to such analysis is striking—a coincidence of outcome reflecting the sound instincts of the Justices. Furthermore, such coincidence satisfies the requirements for acceptance of any theory: that it account for past

converted to a spurious true conflict by the California courts' aggressive overinclusive identification of state interests).

309. Brilmayer, supra note 301, implies that interest analysts advocate the parochial ploy of denying nonresidents the benefits of local policies, whether protective or compensatory. Id. at 408. In unprovided-for-cases, e.g., Carroll v. Lanza, 349 U.S. 408 (1955); Northwestern Life Ins. Co. v. McCue, 234 U.S. 234 (1912); Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974); Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), the nonresident will obtain the forum law if suit can be brought there. For nonresident plaintiffs, it should be simple to sue the defendant at its home.

Strangely, however, Professor Brilmayer offers Frummer v. Hilton Hotels, Int'l, Inc., 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41, cert. denied, 389 U.S. 923 (1967), as an example of a court eschewing what she calls parochialism. In Frummer, a New York court gave a New York plaintiff the benefit of England's rule of comparative negligence when interest analysis would have applied forum law to what the court acknowledged as an unprovided-for-case. The decision is clearly wrong under interest analysis, but does illustrate a forum "getting the best deal possible for the resident party." Brilmayer, supra note 301, at 409.

With Frummer having been injured in a London bathtub, only an interest analysis would deny him English law in a New York court. Fuld's third rule, supra note 35, both Conflict of Laws Restatements, and according to the court in Frummer, Leflar, supra note 17, would call for English law to be applied to the benefit of the New York plaintiff. The court said that it was applying interest analysis, but actually did not.

Perhaps some of the confusion occurred during the printing of Professor Brilmayer's article. The language quoted in Brilmayer, supra note 301, at 410 n.67, appears without a direct citation. The full citation to the case, 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41, cert. denied, 389 U.S. 923 (1967), which immediately precedes the quotation, is to the earlier phase of the litigation in which the London hotel and its parent resisted New York's long-arm statute. Instead, the quoted language appears at 60 Misc. 2d 840, 848, 304 N.Y.S.2d 335, 343 (Sup. Ct. 1969). The decision rests as much on Leflar, supra note 17, as on any other basis. 60 Misc. 2d at 849, 304 N.Y.S.2d at 344. In this unprovided-for-case which plaintiff's counsel attempted to litigate at home, only an interest analysis would deny recovery. The presumption in favor of applying forum law is neither parochial nor selfish.

The results of the other cases Professor Brilmayer cites, Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974); McCrossin v. Hicks Chevrolet, Inc., 248 A.2d 917 (D.C. Ct. App. 1969); Labree v. Major, 111 R.I. 657, 306 A.2d 808 (1973), do not support the argument that the presumption favoring the application of forum law is parochial or selfish, even though the courts in McCrossin and Hurtado reached for phantom interests when recognition of the unprovided-for-case would have amply sustained the application of forum law in favor of the nonresident.
events and accurately predict future ones. If the outcomes of past cases were not largely consistent with the analysis, that analysis would be fatally flawed.\(^3\)

Yet, strict interest analysis does provide a useful tool to reconcile past precedent, provided the interests are construed strictly. A state interest is discerned most clearly when the state has a policy which benefits some class within its reasonable concern and the litigation presents a member of the class who would be benefitted by application of that state’s law. In *New York Insurance Co. v. Head*,\(^3\) for example, the Court considered the question of applying a Missouri statute to a non-Missouri decedent. The Missouri statute provided that if a life insurance policy in force for at least three years were allowed to lapse for nonpayment of premiums, three-quarters of the net value of that policy would be used to provide paid-up term insurance in the face amount of the policy for as long as that fraction of the net value would provide.\(^3\)\(^1\)\(^2\) A unanimous Court barred application of Missouri’s nonforfeiture statute.\(^3\)\(^1\)\(^3\) In the factually parallel case of *Mutual Life Insurance Co. v. Liebing*,\(^3\)\(^1\)\(^4\) however, the Court considered a Missouri decedent, and an equally unanimous Court sustained application of Missouri law. The only distinction between the cases is that in *Head* the decedent was not from Missouri. Missouri’s nonforfeiture act was enacted to protect the beneficiaries of Missouri insureds from the consequences of nonpayment of premiums. Thus, the beneficiary in *Liebing* was within the protected class, thereby supporting the forum’s interest.\(^3\)\(^1\)\(^5\)

Strict interest analysis next focuses on the defendant insurers, both New York companies. With New York law protecting the security interests of the insurers, which in both cases had ad-

\(^{310}\) The distinction between this symbiotic and synergistic method and the scientific method is that when Mendel spoke to his plants, there was no expectation that doing so would affect their genetics. In this case, there is no desire to change the way the Court has been deciding choice of law issues, but only a desire to affect the way the Court and commentators explain the Court’s actions so that other courts will be as sure-handed as the Supreme Court has been.

\(^{311}\) 234 U.S. 149 (1914).


\(^{313}\) 234 U.S. at 157.

\(^{314}\) 259 U.S. 209 (1922).

\(^{315}\) 259 U.S. at 212; 234 U.S. at 160.
vanced cash on the security of a lien on the entire cash value later in dispute, New York had an interest in each of its insurers. Thus, New York's interest made *Liebing* a true conflict, but *Head* only a false conflict. By applying the forum law in *Liebing* and the nonforum law in *Head*, the Court demonstrates the consistent application of strict interest analysis and the ability to reconcile the cases. The Court in *Head* also explicitly recognized the impropriety of applying Missouri law in favor of residents of other states even when their contracts technically had been made in Missouri.\(^3\) Similarly, in *Yates*,\(^3\) the decedent could not have been within the class for whom the favorable Georgia law had been enacted and Mrs. Yates' post mortem move to Georgia was unavailing. Thus, *Yates* was a false conflict to which Georgia forum law did not apply.

If strict interest analysis is to be a fully meaningful tool, however, the analysis of state interests must indeed be strict and narrow. An example underscoring the need for strictness in interest identification is *Home Insurance Co. v. Dick*,\(^3\) which shows that a state does not have an interest merely because a casualty insurance problem concerns one of its domiciliaries. Whereas domicile sufficed for membership in the protected class so as to generate an interest in *Liebing*, and would have sufficed if present in *Head* and *Yates*, "The fact that Dick's permanent residence was in Texas [was] without significance," due to Dick's extended absence from his Texas domicile.\(^3\) Thus, while life insurance *is* a concern of the insured's domicile, it is less clear that a state has an interest in every casualty insurance problem of its citizens.

To illustrate, assume the forum has the common rule that the insured will have at least two years in which to bring suit on a claim, notwithstanding any contract to the contrary, and the contract provides only one year. Further assume that after a resident of the forum has purchased insurance from a forum insurer, an

\(^3\)16. In other words, . . . we must consider . . . how far it was within the power of the State of Missouri to extend its authority into the State of New York and there forbid . . . a citizen of New Mexico and . . . a citizen of New York from making such a loan agreement in New York simply because it modified a contract originally made in Missouri. . . . [That Missouri could not do so was] so obviously the necessary result of the Constitution that it has rarely been called in question. 234 U.S. at 161.

\(^3\)17. 299 U.S. 178 (1936). For a discussion of *Yates*, see supra notes 152-56 and accompanying text.

\(^3\)18. 281 U.S. 397 (1930). For a discussion of *Home*, see supra notes 118-30 and accompanying text.

\(^3\)19. 281 U.S. at 408.
arguably insured loss occurs for which the insured waits eighteen months to make a claim. If the loss occurs within the forum, there will be no reason not to apply the domestic rule. The facts will be within the lawmakers' anticipations. If, instead, the loss occurs outside the forum, the court must determine whether the policy of the rule includes losses without and within the forum. The forum might properly find the insured within the class intended to be protected by its policy, and thereby find an interest, if the policy provided such coverage, if the loss was in the course of a temporary absence from the forum, or especially if the insurance premium had been determined wholly or in part by the insured's residence.

In *Home*, however, Dick's absence from the forum was protracted and the risk against which Dick was insured had no connection with the forum. Thus, a real issue arose whether a long-absent resident remained, for all purposes, within the ambit of the policies of his technical place of residence. While the decedent in *Griffin v. McCoach* seems to have remained a basis for one Texas interest while doing extensive business in New York, Dick's stay in Mexico vitiated the Texas policy under the facts of that case.

The distinction between these two cases lies in the difference between casualty insurance and life insurance. With life insurance so closely related to estate planning and intestacy, it is not an extravagant reach for the domicile to retain an interest in the question of who may have an insurable interest in a person's life. The reach on casualty insurance, however, is shorter and usually dependent upon the risk pool against which loss will be charged. When strictly construing statutory policies to determine the existence or absence of interests in cases involving casualty insurance, courts must consider carefully the dimensions of the actuarial risk pool bearing the loss to distinguish statutory policies protecting all domiciliaries from policies having a narrower focus. Consider, for example, *Tooker v. Lopez*. Catherina Tooker and Marcia Lopez, both residents of New York, were killed in Michigan when Lopez lost control of her sports car. Suit for wrongful death was

320. *See B. Currie, supra* note 3, at 724–25 and the authority discussed therein. Moreover, a state does not abandon its resident while the resident is merely temporarily absent from the state.

321. 313 U.S. 498 (1941). For a discussion of *Griffin*, see *supra* notes 170–75 and accompanying text.

brought in New York state court, alleging negligence by Lopez. Recognizing the case as a false conflict in which only the forum had an interest, the New York Court of Appeals correctly applied New York law. Michigan did not have an interest because there was no reason to believe that New York drivers were within the policy of the Michigan Guest Act to protect negligent, gratuitous Michigan hosts.

Consider two hypothetical variants of Lopez to distinguish liable New York host-drivers from immune Michigan host-drivers. Assume, in addition to the facts already mentioned, that Lopez had been engaged to marry a student from Michigan, with their intent having been to live in Michigan. Lopez then would have acquired a Michigan domicile. The distribution of Lopez' estate, as a domiciliary of Michigan, would no longer be controlled by the law of her previous domicile, New York.323 The distribution of Lopez' estate, as a domiciliary of Michigan, would no longer be controlled by the law of her previous domicile, New York.324

Next, assume that Lopez' father agreed to continue providing and insuring the car from his Brooklyn, New York home until after the wedding. Notwithstanding Michigan’s new found control of Lopez’ estate, neither her estate nor her father’s insurer would be entitled to raise the guest act defense because Michigan had no interest composed of a policy and a member of the protected class. The policy of Michigan’s guest act was to protect Michigan drivers—the aggregate pool of drivers sharing in and contributing to Michigan’s loss experience—from liability to gratuitous guests.325

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323. Her Michigan domicile would have been a consequence of her previous arrival in Michigan, together with her newly formulated intent to remain indefinitely. Restatement (Second) of Conflict of Laws §§ 15, 18 (1971). No reliance is placed on Restatement of Conflict of Laws § 27 (1934) (married woman has domicile of husband).

324. In the actual case, New York law controlled distribution of Lopez' estate, as she was a New York domiciliary. See Restatement (Second) of Conflict of Laws § 260 (1971); In re Barrie's Estate, 240 Iowa 431, 35 N.W.2d 658 (1949).

325. See supra note 320. This analysis rejects “plaintiff-targeting” as unlikely, unrealistic, and a misconception of arguably rational defendant-protecting policies.

A common example of supposed plaintiff-targeting is the bar on suits by hitchhikers as a buttress to the existing ban on hitchhiking. If Michigan enacted such a disability, it presumably would apply to Michigan hitchhikers. A determination would then have to be made as to who would properly be included within that set. If the motive were to protect hitchhikers from attacks and abuse by drivers and highwaypersons, then all Michigan domiciliaries, wherever hitchhiking, would be targeted. If the motive were to protect Michigan drivers by targeting plaintiffs, then the class would be hitchhikers riding in Michigan, irrespective of home address. If the motive were to encourage the sale of automobiles by discouraging ad hoc carpooling, the class would be more difficult to discern. The first view is essentially perverse. To discourage hitchhiking, which is usually a last resort mode of transportation, by leaving the cost of an accident on one who likely has limited resources, would be little more effective than imposing capital punishment for stealing food. Deterrence affects choices made by people who have a choice. See infra notes 332-33. Impover-
Tooker’s claim against Lopez could not affect Michigan insurance rates because Lopez was not in the pool of drivers contributing to Michigan’s loss experience since she was insured according to the loss experience of New York drivers. While Lopez’ car was insured and registered in New York, she remained a New York driver. The extra facts do not change the case’s characterization as a false conflict.

If, however, Lopez retained an intent to return indefinitely to New York upon the completion of her studies so that her domicile remained in New York, but she chose to register and insure her car in Michigan (perhaps to enjoy the difference between insurance rates in East Lansing and Brooklyn), she then would have been a Michigan driver because she would have been a member of the pool of drivers sharing in Michigan’s loss experience which determined Michigan’s insurance rates. Lopez’ estate would have been entitled, consequently, to the Michigan defense in what would have become a true conflict. Although, as false conflicts, the results of both the actual case and the former hypothetical case should be forum invariant, the latter hypothetical case would present a true conflict and would be governed by the law of the forum in which it was brought. By giving close attention to the particular risk pool involved, the courts would have firm factual basis for use of strict interest analysis.

Furthermore, strict interest analysis would permit courts and commentators to eschew the two frequently articulated policies of “cleanup” and deterrence which only serve to hinder correct anal-

ished hitchhikers have no choice. The second view is merely another way of actually protecting Michigan drivers. The third view so obscures the real purpose as to excuse a court from any obligation to effectuate its goals. See B. Currie, supra note 3, at 283, 347. Plaintiff-targeting generally does not make sense; defendant-protection does.

One plausible, although perhaps pernicious example of plaintiff-targeting is Wood Bros. Homes, Inc. v. Walker Adjustment Bureau, 198 Colo. 444, 601 P.2d 1369 (1979), in which the Colorado Supreme Court denied a California contractor compensation for services rendered in New Mexico because of his failure to obtain a New Mexico license.

Limiting Michigan’s policy to Michigan insureds protects the correct risk pool, avoids both overinclusion and underinclusion, and tracks the method insurance companies use to monitor experience and to build premiums. See B. Currie, supra note 3, at 724–25 and authority discussed there. The reasonableness of geographic differentials in casualty insurance rates survives the hazards of population mobility (and thus the risks) in inverse proportion to the length of the policy. In Michigan, auto insurance is written for only six-month periods. Even if the problems with small geographical units are potentially serious since “redlining” is facilitated, rates generally have not been challenged for using too small a unit. Life insurance, however, is written for much longer time spans, and the risks against which the insurance is bought do not involve the same legal and geographical variations.
ysis. The cleanup policy rests on the erroneous assumption that if a state policy seeks to compensate its citizens for physical injuries, that state has a policy to compensate anyone injured within its territory.\footnote{See, e.g., Traynor, \textit{supra} note 73, at 136. In Carroll v. Lanza, 349 U.S. 408 (1955), Justice Douglas seemed to have suggested such: "Arkansas therefore has a legitimate interest in opening her courts to suits of this nature, even though in this case Carroll's injury may have cast no burden on her institutions." \textit{Id.} at 413. \textit{See supra} notes 233-61 and accompanying text.} The policies in favor of recovery should not, and need not, be construed so broadly. Although California had an interest in the payment of its health care creditors in \textit{Pacific Em-

Justice Douglas' statement, however, is ambiguous. That statement could mean that a state has a legitimate interest in compensating anyone injured within its borders, whether other states have conflicting provisions and whether the injury has actually burdened the situs state's institutions. If this view is adopted, interest analysis would not differ significantly from territorialism when the state in which the injury occurred provided compensation, even if the state of common residence had alternative arrangements. This overly broad view of the class protected by a state's policy of compensation would generate spurious interests casting unprovided-for-cases as false conflicts and false conflicts as true conflicts. While the former might provide short term comfort for those reluctant to acknowledge the unprovided-for-case, the latter would unnecessarily tempt the courts to solve the resulting spurious true conflicts, \textit{see, e.g.,} Hernandez v. Burger, 102 Cal. App. 3d 795, 162 Cal. Rptr. 564 (1980). Since state courts have no legitimate means to resolve true conflicts, strict interest analysis construes state policies narrowly so as to insulate state courts from confronting any conflicts but actual true conflicts. Moreover, expansive construction of state interests also would substantiate otherwise unfounded criticisms of interest analysis for being parochial. \textit{See supra} note 301. If Justice Douglas' words are read as legitimizing an irrebuttable presumptive cleanup interest, whether any debris remained to be swept up, then the overly broad construction of state policies also may be legitimized. Justice Douglas' words, however, support another interpretation.

To have barred Carroll's action would have suggested, as Justice Douglas did not, that the state of employment had the exclusive power to provide compensation for workers injured during employment. \textit{Clapper}, discussed at \textit{supra} notes 131-51 and accompanying text, need not be read so expansively and Justice Douglas showed no desire to return to any particular territorial connection as a basis for choice of law. Writing "not only for this case and this day alone, but for this type of case," 349 U.S. at 413, Justice Douglas may be understood to have been preserving the possibility of applying Arkansas law if there were an Arkansas interest because of actual local expenses or if, as in \textit{Carroll}, there were no conflicting nonforum interests. The Arkansas courts were not to be foreclosed merely because of Carroll's Missouri employment or his receipt of Missouri workers' compensation. \textit{See Cramton & Currie, \textit{supra} note 71, at 452-75.} Cramton, D. Currie, and Kay suggest that Currie would find an interest in a recovery state for any plaintiff injured therein, \textit{id.} at 338, but the text they cite, B. \textit{Currie, \textit{supra} note 3, at 128, 144-45, and Bradford Elec. Light Co. v. Clapper, 286 U.S. 145 (1932), implies a qualification that some expense be owed to local creditors as a result of the injury. Strict interest analysis requires a showing of consequential local debts and limits the cleanup doctrine exactly to its basis: cleaning up the actual mess after an accident. Hypothetical messes are left to others. The state in which the injury occurs may claim an interest only on this basis, unless, of course, a secondary right of recovery vested in the plaintiff at the time of injury. \textit{See B. Currie, \textit{supra} note 3, at 487-89; \textit{supra} notes 63-71 and accompanying text.}
ployers, no such interest was present in Carroll since no expenses were incurred in Arkansas. Similarly, although California had an interest in Hall, New Hampshire had no such interest in Clapper.

Perhaps the most bothersome recent case is Milkovich v. Saari\(^{328}\) in which an Ontario guest-passenger was injured in Minnesota through the negligence of his Ontario host-driver. The Minnesota Supreme Court assumed without inquiry that Minnesota had an interest in providing a recovery for the Ontario passenger to ensure that Minnesota health care providers would be guaranteed payment. In fact, no medical debts were incurred in Minnesota.\(^{329}\) Moreover, because the Province of Ontario had provided a different allocation of the losses,\(^{330}\) the Minnesota judgment for the plaintiff needlessly meddled in the affairs of another sovereign. Milkovich was a false conflict in which Minnesota had no interest, but Ontario had a clear policy and parties for whom that policy had been created. The Court should have relied on Ontario law instead of an implicit cleanup policy in Minnesota.

The cleanup policy, when used, should be limited to those cases, such as Hall and Pacific Employers, in which the existence of an actual unpaid loss within the forum brings the injured party within the ambit of the policy, either because the injury is to a domiciliary or because actual debts to forum creditors have been incurred. No policy should automatically be "manna for the whole world."\(^{331}\)

\(^{328}\) 295 Minn. 155, 203 N.W.2d 408 (1973).
\(^{329}\) 38 Minn. L. Rev. 199, 204 (1973) (citing 142 N.W.2d 66 (1966)).
\(^{330}\) Ont. Rev. Stat. ch. 200, §§ 6, 9, 19(2), 25 (1970), essentially amount to an all-inclusive, compulsory health insurance scheme providing an alternative allocation and distribution of some of the risks recognized by Minnesota's negligence law. The Ontario scheme does not, of course, include all of a passenger's potential losses, but it does include all of the losses in which Minnesota can properly have an interest. Debts to Minnesota medical creditors are within Minnesota concerns. The debts, however, were both insured and paid.

\(^{331}\) Reese, Chief Judge Fuld and Choice of Law, 71 Colum. L. Rev. 548, 563 (1971). Professor Reese used the term in praising the lower court's denial of recovery in Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972), the well-known unprovided-for-case decided under Judge Fuld's third rule. See infra note 506 for a statement of Judge Fuld's rules. Reese's next paragraph contains similar praise for the entirely different but equally wrong true conflict of Weinstein v. Abraham, 64 Misc. 2d 76, 314 N.Y.S.2d 270 (Sup. Ct. 1970) (reliance on Judge Fuld's third rule to grant Illinois defendant use of California guest act defense against claim by New York plaintiff). It should be noted that Weinstein is a true conflict not because California, the place of injury, and Iowa, the origin of the journey, are guest act states but because Illinois, where the car and the driver were based, was also a guest act state, Rosenbaum v. Raskin, 45 Ill. 2d 25, 257 N.E.2d 100 (1970) (finding Illinois guest act, Ill. Rev. Stat. 1967, ch. 95 1/2, § 9-201 not applicable to children 7 years of age or younger)—a fact not even mentioned in Weinstein. Strict interest
Just as inferring a cleanup policy in every state compensation rule makes too low a threshold for finding state interests, inferring a deterrence policy leads to an overly broad construction of state interests. Deterrence seeks to prevent acts by affecting the decisionmaker's calculations of benefit. An individual who is deaf to threats or heedless of consequences cannot be deterred. To deter, first the decisionmaker's attention must be gained, then significant loss must be threatened, and finally, credibility of the threat must be established. An insured defendant, however, simply does not perceive the likelihood of a personal loss in immediate terms. Thus, strict interest analysis ignores deterrence as a policy unless the attempt to deter is unmistakable. Clear, uninsurable, punitive damages, together with a well-publicized campaign of enforcement, would establish an actual policy of deterrence. All other damages, however, are compensatory and therefore directed to the benefit of plaintiffs.

analysis agrees with Professor Reese in denying the benefit of New York's recovery law to an Ontario plaintiff injured by his Ontario host, even if the injury occurred in New York. See Reese, supra, at 564 (praising Arbuthnot v. Allbright, 35 A.D.2d 315, 316 N.Y.S.2d 391 (1970)). With the application of strict interest analysis, however, there is no reason to displace the normally applicable forum law in an unprovided-for-case like Neumeier. Because Professor Reese does not seem to have been as specific as strict interest analysis would warrant in attempting to determine the relevance of state interests, he does not seem to have recognized the absence of state interests in some cases. Professor Reese, therefore, has not considered unprovided-for-cases as such.

It required the acumen of Judge Weinfeld to use a loophole in Fuld's third rule to provide recovery to a New Jersey guest for injuries inflicted by the New York host in Ohio, the only guest act state of the three. Chila v. Owens, 348 F. Supp. 1207 (S.D.N.Y. 1972). How could there be doubt that Ohio's guest act was irrelevant to the apparent conflict between New York and New Jersey? See supra text accompanying notes 189-223.

333. "If our interest is confined to how [threats] affect human behavior, membership in the threatened audience should be restricted to those individuals who are aware of a threat's existence." F. ZIMRING & G. HAWKINS, DETERRENCE 71 (1973). See also H. KAHN, ON THERMONUCLEAR WAR 291-95 (1961). Indeed, the ineffectiveness of even capital punishment to deter murder has been shown repeatedly. See, e.g., Bailey, Deterrence and the Death Penalty for Murder in Utah: A Time Series Analysis, 5 J. CONTEMP. L. I (1978).

334. Contra Brilmayer, supra note 301, at 404. Brilmayer offers the hypothetical case of a state which requires a safety guard on power lawnmowers and provides that noncompliance shall be negligence per se. Because the guard is expensive, the manufacturer calculates that it need not install the guard on machines to be sold out-of-state. Brilmayer concludes that it would be unlikely that an interest analyst would apply the negligence per se rule in favor of a resident injured out-of-state by a machine manufactured and sold without the guard. Id.

Professor Brilmayer misconstrues interest analysis. The case she poses is a false conflict, the place of injury is fortuitous, and Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), is exactly on point. Moreover, while she will have been led astray by her expectations of what Currie and his disciples actually think, and the manu-
If either cleanup or deterrence is uncritically accepted as an interest, then whenever the situs has plaintiff-favoring law, loose interest analysis will assume a situs interest.\textsuperscript{335} Even if the core-sidence of the parties has provided an alternative, adequate allocation of the loss in question, the result will be no more sensitive to actual sovereign interests than was the first Restatement. This uncritical assumption of situs interests, without regard to the actual relevance of situs policies, easily can lead to the further, reflexive assumption that the situs always has an interest, even if its law disfavors recovery.\textsuperscript{336} \textit{Hague} presents these risks of interpretation to subsequent courts and commentators.

In \textit{Hague}, for Minnesota to have had an actual interest in applying its plaintiff-favoring law, Hague would have had to have been within the class for whom Minnesota maintained its policy in favor of stacking. The plurality opinion offers three factors which are said to suffice in the aggregate, though not individually, to give Minnesota an interest: Hague's Minnesota employment, his travel to and from work in Minnesota, and Mrs. Hague's later move to Minnesota.\textsuperscript{337} The second factor is an almost inevitable consequence of the first and the first is irrelevant to the issue of stacking. Employment in a state usually connotes presence for at least part of the time. Mention of Hague's commuting into Minnesota

\textsuperscript{335} If cleanup is the articulation, it will encompass every plaintiff within the situs, and if deterrence is the articulation, it will include every defendant within the situs. With plaintiff and defendant usually in close proximity at the time of the injury, few injuries will avoid situs law, even if the co-residence of the parties has made adequate alternative arrangements.

\textsuperscript{336} See, e.g., \textit{Ryan v. Clark Equip. Co.}, 268 Cal. App. 2d 679, 74 Cal. Rptr. 329 (1969) (Oregon limit on recovery applied against an Oregon worker and in favor of a Michigan manufacturer). This aspect of \textit{Ryan} was disapproved in \textit{Hurtado v. Superior Court}, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974). For a discussion of \textit{Hurtado}, see supra note 224. \textit{Ryan} was actually an unprovided-for-case in a disinterested forum. It is suggested below that \textit{Clark Equipment} should not have to answer in a disinterested foreign forum. See infra notes 434-94 and accompanying text. Until those jurisdictional limitations are recognized, there is no reason to displace the California forum's law in the absence of any actual contrary interest in any other state.

\textsuperscript{337} 449 U.S. at 313-16.
is an attempt to put a "positive spin" on the fact that he neither lived nor died in Minnesota. If the issue involved employment law, such as workers' compensation or provisions against discrimination, then Hague's employment, and consequent commuting, in Minnesota would have been relevant. The stacking issue in Hague, however, has nothing to do with employment.

The third factor, Mrs. Hague's move after death, is equally irrelevant to a Minnesota interest, regardless of her motivation. John Hancock Mutual Life Insurance Co. v. Yates\(^{338}\) is authority for this conclusion. If post-event moves could supply relevance to state policies where none had previously existed, then interest analysis would deserve some of its criticisms.\(^{339}\) If a party could affect the choice of law process with post-event changes of residence, then mobile persons would be unjustly advantaged and virtually retroactive legislation\(^{340}\) would be permitted.

Thus, since neither Hague's employment nor Mrs. Hague's subsequent residence has any relevance to stacking, no forum interest existed in Minnesota. There is no precedent for combining two or three irrelevant factors to make one relevant factor. Strict interest analysis rejects aggregation of contacts. One actual, relevant policy is all that is required. In Hague, however, the plurality offered only an aggregation of irrelevant factors in lieu of a sufficient basis for finding an affirmative reason to apply Minnesota law. Having overstated the minimum requirements, the plurality could not avoid an equal overstatement of its argument.

Wisconsin's interest in denying recovery is equally nonexistent. Being the situs of an event provides no automatic relevance to a state's law sufficient to sustain an interest. If Wisconsin's stacking law did differ from Minnesota's,\(^{341}\) the Wisconsin policy against stacking must be determined. With the policy identified, it should not be difficult to determine whether any person in the lawsuit is a member of the class to be protected by that policy who can, therefore, support a Wisconsin interest. To be recognized in strict interest analysis, a policy must be clear, not obscure. Even before 1973, Wisconsin did not actually bar stacking but rather permitted insurers to limit uninsured motorist coverage through narrow contractual language. Wisconsin's one-time policy against

\(^{338}\) 299 U.S. 178 (1936).
\(^{339}\) For criticism of interest analysis, see, e.g., Brilmayer, supra note 301.
\(^{340}\) See CRAMPTON & CURRIE, supra note 71, at 432-33.
\(^{341}\) See supra note 16.
stacking, therefore, was at most the commonplace policy of enforcing contracts which were entered into freely.

The policies behind enforcing promises need not be reviewed. One consequence of this policy is that a party who has paid in advance is usually entitled to receive performance. The policy in favor of enforcing a bargain is not, of course, unlimited—fraudulent bargains do not support enforcement. The insurer's interpretation of the contract allowed it to collect three premiums for a single coverage. At a minimum, that collection is not generous. Moreover, even before 1973, it was not Wisconsin's policy. The Minnesota court in Hague relied on Nelson v. Employers Mutual Casualty Co. which in turn relied on Leatherman v. American Family Mutual Insurance Co. and Scherr v. Drobac. None of these cases concerned an insured like Hague paying three times for one performance. While the Minnesota court's interpretation of Wisconsin law before 1973 is not inconsistent with these cases, it was neither compelled by them nor consistent with the general policies behind the enforcement of contracts.

Even if the Wisconsin policy were to allow narrow uninsured coverages to reduce costs and increase attractiveness, letting an insurer retain two extra premiums without performing would not reduce the cost of uninsured coverage across Wisconsin. Since the alleged Wisconsin policy provided no advantage to Wisconsin insureds, Hague could not have been the party to support the existence of a Wisconsin interest by making the rule against stacking relevant. Allstate, however, is no more attractive as the beneficiary of Wisconsin's concern.

Strict interest analysis requires a more explicit statement of

342. 63 Wis. 2d 558, 217 N.W.2d 670 (1974).
343. 52 Wis. 2d 644, 190 N.W.2d 904 (1971).
344. 53 Wis. 2d 308, 193 N.W.2d 14 (1972).
345. Leatherman and Scherr involved this question:
[Whether the uninsured motorist provision guaranteed payment to the plaintiff only to the extent that all other sources had not yielded the recovery to which the plaintiff would otherwise be entitled under the uninsured motorist coverage or whether it guaranteed recovery equivalent to that which would have been had if the uninsured motorist had been minimally insured.

Nelson, 63 Wis. 2d at 567, 217 N.W. at 674. Nelson involved a completely uninsured defendant. The plaintiff was attempting to stack her father's coverage of members of the insured's household on top of her employer's coverage for an accident in her employer's automobile. In Hague, however, the decedent himself had paid for three separate coverages.
Wisconsin's alleged policy to provide a triple dip\textsuperscript{346} to Hague's insurer.\textsuperscript{347} A casualty insurer is no more than a proxy for and conduit to the underlying risk pool of insureds for whose benefit these coverages are required. The insurer should break even on the pooled risk. Under strict interest analysis, the mere existence of a particular party in the case will not suffice to support an interest based only on a supposed state policy or presumed relevance of a policy to those parties. With no articulated policy benefitting either Hague or Allstate, Wisconsin had no interest in denying Mrs. Hague the benefit for which Mr. Hague had paid. Thus, under strict interest analysis, as extended in this Article to casualty insurance cases, \textit{Hague} is an unprovided-for-case in which forum law is applied. While the Supreme Court reached the correct result, the Court's contact analysis is debatable, and strict interest analysis provides a superior analytical framework for the problem.

IV. FALSE CONFLICTS AND THE CONSTITUTION

There is no doubt that the Constitution, and therefore the Supreme Court, controls at least the outer limits of the choice of law process in state courts.\textsuperscript{348} Traditionally, however, constitutional constraints have been considered only \textit{after} completion of the state law analysis. Thus, the issues of which law should be chosen and which law can be chosen have been differentiated.\textsuperscript{349} Consequently, state choices of law are made initially without regard to the Constitution and are then subject to the condition subsequent that the choice not violate the Constitution.\textsuperscript{350} This

\textsuperscript{346} Cf. W. SAFIRE, SAFIRE'S POLITICAL DICTIONARY 185 (3d ed. 1978) ("double dip" defined as income, in the form of salary or pensions from two governmental sources).

\textsuperscript{347} Hague did not benefit, but if Wisconsin had an articulated policy explicitly providing for a compulsory windfall-to-the-insurer triple dip, the choice of law requirements would have been met. The analysis then would have shifted to whether the explicit statutory triple dip would deny due process.

\textsuperscript{348} For a comparison of the efficacy of the due process clause and the full faith and credit clause as constraints, see Martin, \textit{Constitutional Limitations on Choice of Law}, 61 CORNELL L. REV. 185 (1976).

\textsuperscript{349} Indeed, the choice of law is made often without any consideration of constitutional constraint. Consider, for example, Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3 (1975), in which the Court of Appeals for the Fifth Circuit was instructed to apply the law of Cambodia, which could not possibly meet the requirements of \textit{Home}, to an apparent conflict in which the law of every relevant state provided recovery. \textit{See} Allo, Book Review, 30 J. LEGAL EDUC. 612, 619 (1980).

\textsuperscript{350} A comparable analogy would be if police manuals could provide for assorted interrogation techniques including barring counsel and using rubber hoses (1) so long as the manuals also contained an epilogue stating that if any of the enumerated and therefore
Article proposes integration of the constitutional constraints and the basic rules.

Since, as is correctly acknowledged by the Court, the Constitution exerts at least a minimal constraint on choices of law, in addition to its undoubted exertion of constraints on the contents of the laws chosen, the Court must provide clear guidance to the states on these issues. Such guidance probably will not be forthcoming while the issues of state choice of law and the constitutional constraint on choice of law are separated, as evidenced by the decisions of the Minnesota Supreme Court and United States Supreme Court in Hague. Such separation is unnecessary and counter-productive. Strict interest analysis provides the needed integration. If state interests are construed narrowly, the requirements for choice of law and the constraints of the Constitution will be seen to have converged. Moreover, once the existing constitutional controls are better understood, the states will find neither need nor room for two-step analyses.

Many commentators and the current Court's majority assert that precedent requires an affirmative basis for applying a state's law to meet the requirements of the Constitution. Precedent, however, does not require an affirmative basis for constitutional application of a state's law. If interests are construed strictly, a forum interest, though sufficient, is not necessary to support constitutional applications of forum law. Thus, the Constitution permits strict interest analysis' presumption in favor of forum law in unprovided-for-cases where neither state has an interest. The rebuttable presumption provides a better analytical tool to explain precedent and unifies state choice of law doctrine with constitutional constraints. Hague is a prime example of the integrative role of strict interest analysis.

A. The Hague Analyses—Plurality and Dissent

The plurality correctly asserted that some issues in some cases may be decided properly by applying the law of more than one

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353. See, e.g., Hague, 449 U.S. at 308; B. Currie, supra note 3, at 271; R. Weintraub, supra note 63, at 505; Kirgis, The Roles of Due Process and Full Faith and Credit in Choice of Law, 62 Cornell L. Rev. 94 (1976); Martin, supra note 348.
The cases cited, *Watson v. Employers Liability Assurance Corp.* 355 and *Clay v. Sun Insurance Office, Ltd.* 356 are true conflicts, however, and they provide support for the point under either theory. Additionally, while the cases directly support the principle of strict interest analysis that a forum interest is sufficient, not necessary, for forum law to apply, they are at best only consistent with the plurality's view that an interest is necessary. The cases do not provide direct support for a necessity requirement.

In equating the requirements of full faith and credit 357 and due process, 358 the plurality based its conclusion on evidence which was irrelevant. Although *Watson* and *Clay* were argued under both clauses, the cases cited, *Nevada v. Hall,* 359 *Alaska Packers Association v. Industrial Accident Commission,* 360 and *Carroll v. Lanza,* 361 were argued only under the full faith and credit clause.

Notwithstanding citation of *Clay* and *Alaska Packers,* the plurality's assertion that an affirmative state interest is necessary to sustain the application of a state's law is without support in case law. 362 Only a reversal of forum law in an unprovided-for-case for lack of a forum interest would demonstrate the necessity of a forum interest. 363 *Clay,* however, a true conflict, presented forum interests in both Florida and Illinois. Without doubt, Florida's

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354. 449 U.S. at 307. See supra note 39 and accompanying text. Beale, however, asserted that only one clearly determined law controlled the consequences of any event or transaction. See supra note 64 and accompanying text.


357. See U.S. CONST. art. IV, § 1.

358. See id. amend. XIV, § 1.


362. 449 U.S. at 308. *Clay* and *Alaska Packers* are joined by *Cardillo v. Liberty Mut. Ins. Co.,* 330 U.S. 469 (1947). The plurality correctly discerned *Cardillo* to have presented an actual forum interest in the District of Columbia, but again the plurality overlooked the defendant's failure even to plead or prove a contrary interest or policy in Virginia. *Cardillo* presented an interest but does not begin to show that an interest is necessary.

363. The only reversal of the application of forum law to an unprovided-for-case discovered to date is *Ormsby v. Chase,* 290 U.S. 387 (1933), in which a New York tenant waited until after the death of her landlord, who was domiciled in Pennsylvania, to bring suit in the decedent's domicile for her personal injuries incurred on the landlord's New York property. *Id.* at 338. Under New York law, the action abated at the defendant's death; in Pennsylvania such actions survived. *Id.* at 389. The Third Circuit's application of Pennsylvania's rule was reversed quickly under territorial principles without discussion of any forum interests. *Id.* The court did not inquire into the purpose of New York's adherence at the time to the nonsurvivability of tort actions. If, however, analysis clearly showed that the New York law which did not allow such actions to survive was designed in
interest in *Clay* was necessary constitutionally for the application of Florida law, but its necessity was a consequence of the contrary interest in Illinois. *Alaska Packers*, an apparent conflict, can stand only for the proposition that in the absence of a clear, contrary policy in another state, full faith and credit does not require a party to show an interest in the forum. \(^{364}\) *Alaska Packers*, therefore, supports the existence of the presumption in favor of applying forum law but provides minimal support for a forum interest as a necessary condition precedent to the application of forum law. The defendant in *Alaska Packers*, of course, made no attempt to rebut the presumption. In *Carroll*, however, an attempt was made to displace forum law by arguing a contrary policy, but in the absence of an actual interest in another state, full faith and credit did not require the displacement of forum law. \(^{365}\) *Carroll* shows that a contrary interest is needed to displace the presumptively applicable law of the forum; a contrary policy alone will not suffice. Although *Clay, Watson*, and *Hall* contained clear forum interests, *Alaska Packers* and *Carroll* presented only the absence of nonforum interests. Since *Alaska Packers* presents only an apparent conflict and *Carroll* is an unprovided-for-case, each is consistent with true conflicts analysis only in that each bases the permissible application of forum law on something other than the plurality’s proffered requirement of an affirmative forum interest. All six cases, of course, are consistent with the rebuttable presumption of strict interest analysis. Thus, the plurality went beyond its proofs when it asserted the necessity, instead of the sufficiency, of a forum interest.

The plurality’s detailed treatment of *Home Insurance Co. v. Dick*\(^{366}\) and *John Hancock Mutual Life Insurance Co. v. Yates*\(^{367}\) was similarly imprecise. In both cases, the forum lacked an interest, and in neither case was the forum allowed to apply its own law. Hence, both cases show the presumption in favor of applying forum law overcome. The plurality, however, ignored the essential fact that in both *Home* and *Yates*, clear, contrary, and relevant nonforum policies created nonforum interests. That was true of neither *Alaska Packers*, in which no policy contrary to forum

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364. *See supra* notes 192-99 and accompanying text.
365. *See supra* notes 233-61 and accompanying text.
366. 281 U.S. 397 (1930).
367. 299 U.S. 178 (1936).
law was articulated, nor Carroll, in which the contrary policy could not be shown to have been relevant. In Home, Mexico had a clear interest in protecting its defendant through limiting the time in which to bring suit. In Yates, New York had a clear interest in protecting its insurance company by denying payment on an insurance policy procured through material misstatements. These contrary nonforum interests made Home and Yates false conflicts in which the forum lacked an interest. Due process and full faith and credit, respectively, would not, therefore, allow the forum lacking an interest to apply its law in the face of a contrary nonforum interest.

When the plurality returned to a more detailed consideration of Alaska Packers, its argument supported strict interest analysis more than the plurality's own thesis that an affirmative showing of forum interest was necessary, not simply sufficient, for applying forum law. "[T]he Court upheld California's application of its Workmen's Compensation Act, where the most significant contact of the worker with California was his execution of an employment contract in California." California's choice of law was not "so arbitrary or unreasonable as to amount to a denial of due process,' . . . because '[w]ithout a remedy in California, . . . [he] would be remediless,' . . . and because of California's interest that the worker not become a public charge." No reason was ever given why Palma, the worker in Alaska Packers, could not have sought compensation under the law of Alaska. While less convenient, seeking compensation under Alaska law was not shown to be impossible. If the minimal contact of a migrant worker contracting to work in another state is sufficient to provide a state interest, then the plurality's test is hollow, for no requirement could be lower. It is evident that Dick's affiliation with Texas exceeded Palma's connection with California. Both cases were correctly decided, but a correct reading requires recognition of the contrary Mexican interest and the absence of any contrary interest in Alaska. Strict interest analysis allows for this needed recognition.

Thus, the plurality's purported requirement that the application of a state's law must be supported by the affirmative presence of a state interest is superficially attractive, but fails to account for precedent. Moreover, by not allowing for an unprovided-for-case, the plurality's test invites the discernment of spurious interests

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368. 449 U.S. at 311. "Most significant contact" also can mean the best contact California could muster.
369. Id. (quoting Alaska Packers, 294 U.S. at 542).
with the consequent expense of erroneous decisions and misstated precedents.\textsuperscript{370} The plurality correctly sustained the application of Minnesota law to the unprovided-for-case of \textit{Hague}, but to do so under its misreading of the constitutional requirements, it was obliged to invent interests for Minnesota.

The dissenters accepted the plurality's erroneous premises, but not its conclusions.\textsuperscript{371} The dissent correctly noted that Minnesota had no interest in the application of its law to the facts of \textit{Hague}, but drew an incorrect conclusion from that correct observation.

\textbf{B. Justice Stevens' Concurrence and the Constitution}

Justice Stevens took a significantly different view of the constitutional principles and their application. Full faith and credit and due process, having different purposes, required separate, though perhaps parallel, analyses.\textsuperscript{372} By observing that another state's interest does not immediately prevent the application of the forum's law,\textsuperscript{373} Justice Stevens adopted an approach to full faith and credit similar to that of strict interest analysis. According to Justice Stevens, if the forum has a legitimate interest, it may apply its own law. The forum's interest, therefore, is sufficient, a position consistent with strict interest analysis.\textsuperscript{374} Full faith and credit will restrict the application of forum law only if the forum has no interest and another state has an interest.\textsuperscript{375} Only if Wisconsin had an interest would a finding of Minnesota's interest be necessary for application of Minnesota law, again a view consistent with interest analysis. With Wisconsin lacking an interest, there was no impediment to applying Minnesota law in \textit{Hague}.\textsuperscript{376}

Even Justice Stevens, however, misread precedent. Justice Stevens categorized \textit{Hall}, \textit{Alaska Packers}, and \textit{Pacific Employers} together implicitly as true conflicts when only \textit{Hall} included a nonforum interest\textsuperscript{377} and \textit{Alaska Packers} may not have included any interest in either California or Alaska.\textsuperscript{378} Justice Stevens nonetheless correctly placed on the party seeking to displace forum law the burden to show that not only did the forum lack an

\textsuperscript{370} See \textit{supra} notes 303-09 and accompanying text.
\textsuperscript{371} See \textit{supra} notes 52-54 and accompanying text.
\textsuperscript{372} 449 U.S. at 320 (Stevens, J., concurring).
\textsuperscript{373} \textit{Id.} at 323.
\textsuperscript{374} \textit{Id.}.
\textsuperscript{375} \textit{Id.}.
\textsuperscript{376} \textit{Id.} at 325-26.
\textsuperscript{377} See \textit{supra} note 185 and accompanying text.
\textsuperscript{378} See \textit{supra} notes 192-99 and accompanying text.
interest in the litigation, but also that another state possessed an actual interest in its outcome. Only if both conditions were met would full faith and credit prevent the application of forum law. Such a requirement is consistent with strict interest analysis of a false conflict.

Justice Stevens also found due process to support a presumption in favor of applying forum law which would be overcome only if the application of forum law were fundamentally unfair to one of the parties. Although there were a number of ways in which choice of law could be fundamentally unfair, the focus of Justice Stevens’ concern was the prevention of unfair surprise. Justice Stevens’ review of precedents under due process emphasized the parties’ expectations and ignored the issue of whether state interests existed. The difficulty with his concentration on unfair surprise as an essential test is that this benchmark is both circular in its logic and largely irrelevant in precedent. While there is always some concern for avoiding unfair surprise in any judicial action, surprise is often inevitable among laypersons, and the unfairness of the surprise is more often a matter of subjective evaluation.

Justice Stevens’ other due process tests do not add to his analysis. His concern for protecting nonresidents from discrimination is legitimate, but safeguarded by both equal protection and privileges and immunities. Due process generally provides protection against rules which are intrinsically unfair, either as applied or on their faces. Such protection is not part of a choice of law analysis, however, because it applies equally well to purely domestic cases. Justice Stevens’ final concern that forum law not “represent a dramatic departure from the rule that obtains in most

380. Id.
381. Id. at 326.
382. Id. at 327.
383. See supra notes 75-84 and accompanying text.
384. The clearest illustration of the minimal utility of unfair surprise as an analytical tool may be the Missouri Life Insurance cases. Currie has shown that the Missouri nonforfeiture rule itself was an unfair surprise to all insurers. Indeed, Currie uses that conclusion as an explanation for the Supreme Court’s action in New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918). Although the Court succumbed to the temptation to protect an out-of-state party from unfair surprise in Dodge, a more principled decision on insignificantly different facts followed almost immediately afterward in Mutual Life Ins. Co. v. Liebing, 259 U.S. 209 (1922). See B. CURRIE, supra note 3, at 214-22.
385. See infra notes 495-530 and accompanying text.
American jurisdictions\textsuperscript{386} is both an affront to federalism and an unnecessary throwback to substantive due process.

Having found none of his constitutional tests violated, Justice Stevens approved the use of Minnesota law in \textit{Hague} even though he regarded the choice of Minnesota law as erroneous.\textsuperscript{387} Stevens could find no reason to displace the presumptively applicable forum law because he conceived the Court's role not to include providing a federal choice of law scheme\textsuperscript{388} and neither full faith and credit nor due process had been violated.

C. \textit{Strict Interest Analysis and the Constitution}

Justice Stevens correctly stated that the full faith and credit and due process clauses provide separate constraints on state choice of law decisions.\textsuperscript{389} The full faith and credit clause ensures that states do not improperly ignore an impingement on the interests of other states.\textsuperscript{390} The due process clause assures persons that courts will neither act unfairly nor exceed their powers.\textsuperscript{391} Under strict interest analysis and the most recent decisions on judicial jurisdiction, the clauses usually are interpreted to provide equivalent protections. Construing, equally narrowly, both state interests for choice of law and state interests for constitutional constraints on choice of law achieves a synthesis of state choice of law and the Constitution. Neither due process nor full faith and credit is violated unless a state lacking an interest in the application of its law attempts to apply that law in the face of another state's actual interest. Thus, the result of constitutional analysis is consistent with the result of strict interest analysis.

Full faith and credit's command with respect to judgments has a single condition—the judgment must have been grounded in

\textsuperscript{386} 449 U.S. at 327.
\textsuperscript{387} \textit{Id.} at 331.
\textsuperscript{388} \textit{Id.} The task, however, is unavoidable. Once some boundaries for state choice of law are provided, all choice of law systems necessarily are constrained. Although many commentators assert the existence of sufficient room within the acknowledged constraints for varying choice of law methodologies, see supra note 356, it is argued herein that a clearer understanding of the cases provides a complete and unique system.
\textsuperscript{389} \textit{Id.} at 320-22.
\textsuperscript{390} \textit{Cf.} "But the full faith and credit clause is the foundation of any hope we may have for a truly national system of justice, based on the preservation but better integration of the local jurisdictions we have." Jackson, \textit{Full Faith and Credit, The Lawyer's Clause of the Constitution}, in \textit{Selected Readings}, supra note 63, at 229, 254.
\textsuperscript{391} "These procedural safeguards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary government action." L. TRIBE, \textit{American Constitutional Law} 501 (1978).
proper jurisdiction.\textsuperscript{392} Even if the first court made an egregious choice of law\textsuperscript{393} or refused to give full faith and credit to a valid prior judgment,\textsuperscript{394} a second court cannot look behind the judgment if the first court had valid power over the issues and parties.

Full faith and credit's command before judgment is only slightly more complicated. If no other state has an interest in an issue, then the use of forum law cannot threaten interstate harmony by impinging on the sovereignty of other states. The forum is forbidden only from applying its law when it lacks an interest and another state has an actual interest. If a nonforum state does have an interest, then the potential for conflict does exist, but the forum's interests are not foreclosed before judgment.\textsuperscript{395} The essential requirement for this rule, which avoids weighing respective states' interests, is for all of the states' interests to be construed strictly. This strict construction reduces the frequency of true conflicts in which forum law is applied, notwithstanding the contrary interests of other jurisdictions. More importantly, one state will be required to defer to another only because of an actual, contrary, nonforum interest. There will be no need for the forum to defer to another state's potential interest at the expense of its own actual interest. In an unprovided-for-case like \textit{Hague}, Wisconsin had no interest. The Minnesota forum is allowed to apply its own law even without a Minnesota interest. With Wisconsin equally without an interest, the deference required by the full faith and credit clause is not activated.

The analysis under due process is parallel. Due process is generally recognized to have two components. The sovereign's actions must be within its power\textsuperscript{396} and fair.\textsuperscript{397} Fairness is measured by the procedures used\textsuperscript{398} and the actual content of the law ap-

\begin{footnotesize}
\begin{enumerate}
\item Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 469 (1873).
\item See, e.g., Fauntleroy v. Lum, 210 U.S. 230 (1908).
\item See, e.g., Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939).
\item "The article is a restraint on the legislature as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will." Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855).
\item Due process is to be determined by "those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . ." Rochin v. California, 342 U.S. 165, 169 (1952) (quoting Malinski v. New York, 324 U.S. 401, 417 (1945)). No protection is given, however, unless life, liberty, or property is threatened. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-72 (1972).
\end{enumerate}
\end{footnotesize}
plied, although the scope of the last restriction has been narrowed substantially. Some events are wholly outside a particular sovereign's reach. It is not for South Dakota to determine the usury rate for credit transactions between a Michigan merchant and a Michigan consumer. Other transactions, however, which are arguably within the reach of a state, may raise questions of fairness if the state attempts to control their consequences. When Ontario, for example, has provided a comprehensive scheme for allocating the losses following automobile accidents and providing for any of its citizens' health care needs, it simply is not fair for Minnesota to interject its own ideas on these issues. Even though the Minnesota law is generally fair on its face, it is not fair when applied to a particular occurrence for which other provisions have been made.

It is unimportant to determine whether the lack of fairness is simply a procedural defect or whether the application of a law alien to a transaction compares in gravity with the few remaining, recognized violations of substantive due process. If application of forum law actually will advance forum policy, thus giving the forum an interest, due process will not be denied by use of forum law. If, as in Hague, neither state has an interest, due process exerts no control; either law may be applied. If, however, the nonforum state has an interest and the forum does not, then due process requires the application of the only relevant law.

The Hague plurality and dissent asserted the requirement under due process and full faith and credit that a forum interest exist prior to application of forum law, but differed on what sufficed to present such an interest. Neither opinion satisfactorily accounted for the precedents. If, however, as in strict interest analysis, interests are construed narrowly, then neither full faith and credit nor due process forbid a forum from applying its own

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401. *Cf.* supra note 316.
402. *See* supra note 330.
404. Roe v. Wade, 410 U.S. 113 (1973), is an example of a recognition of a substantive due process violation.
406. *Compare* supra notes 49-51 and accompanying text *with* supra note 54 and accompanying text.
law unless it both lacks an interest and another sovereign has an interest, as shown in the following table.

<table>
<thead>
<tr>
<th>Case</th>
<th>Forum Interest</th>
<th>Nonforum Interest</th>
<th>Type of Case</th>
<th>The Law Chosen</th>
<th>Consistent With Hague Plurality</th>
</tr>
</thead>
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<tr>
<td>GROUP I: Forum Interest Sufficient, Although Not Necessary, and Choice of Law Consistent With Strict Interest Analysis</td>
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<td></td>
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<tr>
<td>Head&lt;sup&gt;407&lt;/sup&gt;</td>
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<td>yes</td>
<td>fc</td>
<td>nonforum</td>
<td>yes</td>
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<td>Brown&lt;sup&gt;408&lt;/sup&gt;</td>
<td>no</td>
<td>yes</td>
<td>fc</td>
<td>nonforum</td>
<td>yes</td>
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<td>Liebling&lt;sup&gt;409&lt;/sup&gt;</td>
<td>yes</td>
<td>yes</td>
<td>tc</td>
<td>forum</td>
<td>yes</td>
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<tr>
<td>Home&lt;sup&gt;410&lt;/sup&gt;</td>
<td>no</td>
<td>yes</td>
<td>fc</td>
<td>nonforum</td>
<td>yes</td>
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<tr>
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<td>yes</td>
<td>fc</td>
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<td>yes</td>
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<tr>
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<td>yes</td>
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<td>yes</td>
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<td>tc</td>
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<tr>
<td>GROUP II: Apparent Conflicts Requiring No Actual Choice of Law</td>
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<tr>
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<td>yes</td>
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<tr>
<td>Alaska&lt;sup&gt;421&lt;/sup&gt;</td>
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<td>forum</td>
<td>no</td>
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<tr>
<td>Pacific&lt;sup&gt;422&lt;/sup&gt;</td>
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<td>yes</td>
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<td>GROUP III: Constitutional Under Strict Interest Analysis View of Full Faith and Credit and Due Process, but Inconsistent With the Presumption in Favor of Applying Forum Law</td>
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<td>Dodge&lt;sup&gt;423&lt;/sup&gt;</td>
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<td>Young&lt;sup&gt;424&lt;/sup&gt;</td>
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<tr>
<td>Delta &amp; Pine&lt;sup&gt;425&lt;/sup&gt;</td>
<td>yes</td>
<td>yes</td>
<td>tc</td>
<td>nonforum</td>
<td>yes</td>
</tr>
</tbody>
</table>

Key: tc=true conflict, fc=false conflict, un=unprovided-for-case, and app=apparent conflict.

Strict interest analysis' articulation of the constitutional constraints on choice of law accounts for all of these cases, reconciles

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422. The presence or absence of an Alaska interest was not raised by the defendant. See supra note 195.
Clapper and Carroll,\textsuperscript{427} and explains Hague. The Hague plurality's formulation cannot account for all of these cases, is ambivalent with respect to Clapper and Carroll, and does not explain Hague satisfactorily. Strict interest analysis' ability to account for all of the data with only a slightly more complicated formulation makes it a superior theory of the constitutional constraints on choice of law.\textsuperscript{428}

Strict interest analysis parallels full faith and credit by commanding deference when the forum lacks an interest and another forum possesses an interest and by not requiring deference when the forum has its own interest. The rationales supporting strict interest analysis and full faith and credit are identical. A forum without an interest should not meddle in another sovereign's affairs, but a forum with an interest should not be a slave to another sovereign. When, as in the unprovided-for-case, neither sovereign has an interest, there should be no full faith and credit objection to the forum's application of its own law.

There is a consensus that due process presents no difficulty when a forum with an interest applies its own law.\textsuperscript{429} Acknowledging the forum's interest in an issue recognizes that its law pertains to the immediate facts and that control of the outcome is properly within the sovereignty of the forum. When disputes arise over the existence of an actual forum interest, strict interest analysis' narrow construction of state interests generally resolves doubts against the existence of interests.

The fundamental dispute arises when neither state is perceived to have an interest: Strict interest analysis finds no problem with the unprovided-for-case, and the Hague plurality finds no unprovided-for-cases. It is difficult, however, to conceive what interest a majority of the Court would discern, for example, if a Minnesota driver negligently injured an Ontario passenger in Ontario. Perhaps the Court would find an interest in Minnesota desiring its drivers to be careful wherever they travel.\textsuperscript{430} Not even a cleanup interest could exist for an accident outside Minnesota's borders. Perhaps the Court would find an interest in Ontario denying its passengers recovery, regardless of the identity, insurance, and

\textsuperscript{427} See supra note 261 and accompanying text for a discussion of the reconciliation of Clapper and Carroll.

\textsuperscript{428} See supra note 310.

\textsuperscript{429} See supra note 352 and accompanying text.

ordinary duties of their drivers. Yet, the plurality's view of due process requires an interest to be attributed to at least one of the jurisdictions. Once it is acknowledged that some cases simply do not present interests, but nonetheless require resolution, strict interest analysis and full acceptance of the unprovided-for-case follow easily.

Further benefits to be derived from strict interest analysis are that false conflicts will not be misconstrued and possibly wrongly decided as true conflicts and unprovided-for-cases will not be misconstrued and possibly wrongly decided as false conflicts.431

In sum, because there is no super law which provides for the perfectly fair allocation of legislative jurisdiction among the several states,432 the best available standard of fairness is that which actually has been applied by the Court throughout this century: Due process is denied if, but only if, the law of a sovereign without an interest is applied in the face of another sovereign's actual interest. There is, of course, no collateral attack for improper choice of law.433 If the choice of law is thought to be improper, as with other instances of unfairness, the remedy can be sought only through vertical attack. Only if the defect is of the power of the rendering court, can attack be made collaterally. Because the power component of due process is better addressed under the topic of judicial jurisdiction, it suffices to note that once a court has properly obtained judicial jurisdiction over the parties to an action, it has the power to affect them and their property. Hence, a wrong choice of law does not defeat a court's power, but only, perhaps, impugns the court's fairness.

V. STRICT INTEREST ANALYSIS AND JUDICIAL JURISDICTION

The explicit bias of strict interest analysis in favor of forum law may provoke concern that it will induce undue forum shopping, defeat uniformity, and otherwise prejudice litigants, especially defendants. If choice of law were all there were to the subject of conflict of laws, the charge would be most serious.

It is always an error, however, to ignore the interaction of legislative jurisdiction (choice of law) and judicial jurisdiction. While strict interest analysis is a forum-favoring choice of law system, the presumption in favor of applying forum law will not un-

431. See supra notes 94-95.
432. See supra note 73.
fairly affect defendants, unless it is used under an unduly expansive system of personal judicial jurisdiction.

When personal judicial jurisdiction, however, is viewed in an unduly expansive way, both modern forum-favoring and traditional choice of law approaches produce unsatisfactory results. In the Mississippi statute of limitations cases, for example, Kansas plaintiffs barred by the statutes of limitations in every other state brought suit in Mississippi against defendants whose property or presence there would support personal judicial jurisdiction. Plaintiffs sought to use the "procedural" law of Mississippi to subvert the protections of the other states' laws, especially those of Kansas.

Such cases raise three issues: First, whether the requirements of due process in judicial jurisdiction and legislative jurisdiction disclose consistent, logical relationships; second, if not, whether recent decisions on judicial jurisdiction have any important practical effect on choice of law decisions; and finally, whether the current understandings are sufficient to promote the reasonable goals of a conflict of laws system.

A. Logical Connection

Chief Justice Stone distinguished judicial jurisdiction from choice of law (legislative jurisdiction) in International Shoe v. Washington. Justice Stone's distinction was not novel then and

434. See, e.g., Rosenthal v. Warren, 475 F.2d 438 (1st Cir. 1973) (in an action for malpractice in which jurisdiction in New York over a Massachusetts surgeon was obtained via Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), overruled, Rush v. Sauchuk, 444 U.S. 320 (1980), the interest in New York of full compensation outweighed interest of Massachusetts which was situs of tort and residence of defendant). Professor Hill also has addressed this problem recently, but his basic premises are significantly different. See Hill Choice of Law and Jurisdiction in the Supreme Court, 81 COLUM. L. REV. 960 (1981).


The questions for decision are (1) whether, within the limitations of the due process clause of the Fourteenth Amendment, appellant, a Delaware corporation, has by its activities in the State of Washington rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment compensation fund exacted by state statutes. . . , and (2) whether the state can exact those contributions consistently with the due process clause of the Fourteenth Amendment.

Id. at 311. Because the answer to the first question of jurisdiction sufficed to control the
endures today, despite occasional wistful comments to the contrary. The separateness of the issues, however, does not necessitate independence. Professor Martin, for example, has suggested that the forum court should not have the power to apply forum law unless the facts of the dispute standing alone would sustain specific in personam jurisdiction under *International Shoe.* Thus, specific personal jurisdiction would be necessary for the application of forum law. Although Professor Martin's suggestion would eliminate an egregious abuse of the federal system, his proposed cure is slightly off the mark.

Judicial jurisdiction depends on the conjunction of forum, facts, and defendant. In determining the correct choice of law, however, strict interest analysis (and, it is argued herein, the Constitution) looks to the conjunction of forum, facts, policy, and party. Thus, either the plaintiff, the defendant, or even occasionally the court can support an interest in applying forum

second question of application of law, it might appear that less is required to support a choice of law than to support the application of specific long-arm jurisdiction over a corporation. The inference, however, does not stand. See infra notes 444-50 and accompanying text.

439. See *supra* notes 24-27 and accompanying text.


442. Chief Justice Stone's analysis in *International Shoe* shows only that specific jurisdiction can be sufficient for application of law. Professor Martin sets a higher standard than is necessary. See *Martin, supra* note 440, at 873.

443. The abuse is the use of 28 U.S.C. § 1332 (1976) (diversity jurisdiction) and *id.* § 1404(a) (transfer between federal district courts) to achieve a result in a federal district court in Kansas which was unattainable in the Kansas state courts. See *Erie R.R. v. Tompkins,* 304 U.S. 64 (1938). The cure, which Professor Martin did not suggest, would be to bar the use of the Mississippi long-arm and the Mississippi statute of limitations in a case in which specific personal jurisdiction was unavailable in Mississippi. Perhaps Professor Martin was thinking only of traditionally substantive laws. Compare *Martin supra* note 440 with *Martinsupra* note 435.


445. See *supra* notes 300-47 and accompanying text.


448. See, e.g., *Wells v. Simonds Abrasive Co.,* 345 U.S. 514 (1953). If the forum has a shorter statute of limitations than other jurisdictions to protect its courts, it should be able to reject a suit even when the defendant has no particular claim for solicitude. Cf. *Loucks v. Standard Oil,* 224 N.Y. 99, 120 N.E. 198 (1918) (forum court would open its doors to domestic plaintiff suing domestic defendant on foreign cause of action where granting relief did not offend basic forum public policy). *A fortiori,* if the proffered law would violate
law if the particular facts of the case make the policy of forum law relevant (usually beneficially)\(^4\) to one of the parties.\(^4\) Since the inputs for the two analyses are different, there is no simple, logical relationship between them. Thus, Professor Martin's suggestion that personal judicial jurisdiction be a condition precedent to application of forum law does not work under the existing decisions.

Moreover, the practical consequences of such a requirement also might be unsatisfactory. The Michigan legislature, for example, has adopted comparative negligence as the state's rule for products claims.\(^4\) With Michigan as the home of the auto industry, the policy of the statute does not seem to be to target manufacturers nor to benefit all consumers,\(^4\) but rather to assist injured plaintiffs who might have contributed slightly to their own injuries.\(^4\) Thus, if a plaintiff from a contributory negligence state were to sue a manufacturer at its Michigan headquarters for an injury suffered at home, traditionalists would apply the law of the place of injury.\(^4\) Professor Martin would bar the use of Michigan law\(^4\) and probably reach the same outcome,\(^4\) while strict interest analysts would apply forum law to what would be an unprovided-for-case.

It is submitted that there is nothing wrong with using forum law, even if by default, when the defendant is centered in the forum. The evil occurs when a nonresident defendant is sufficiently

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449. Under strict interest analysis, inferring targeting policies should be avoided when compensatory policies explain a law. See supra notes 332-34 and accompanying text.

450. At least one problem, unsurprisingly, is the unprovided-for-case. It hardly can be a denial of due process to the defendant to use the defendant's law in the defendant's forum, yet it is unlikely that the defendant's home will have specific jurisdiction in every suit against its defendants. Another problem arises in a case like Tooker v. Lopez, 24 N.Y. 2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969), discussed at notes supra 322-27 and accompanying text, in which Michigan surely had specific jurisdiction but could not constitutionally apply its law.


452. Indeed, in comparison with a jurisdiction following strict liability, this comparative negligence statute could be defendant-protecting in a case involving a nonnegligent defendant.

453. The policy also did not defeat the interests of foreign plaintiffs. It is believed that the Michigan legislature, was at least unmindful, if not consciously indifferent to the fate of foreign consumers.

454. See supra notes 62-84 and accompanying text.

455. With jurisdiction based on domicile rather than specific contacts, Professor Martin's test would be unmet.

456. If Michigan law could not be applied, then the law of the place of injury might be all that would be left without reaching for a third law or inventing a law.
active in the forum so as to be amenable under today's notions of jurisdiction to suit in the forum on any cause, but the cause in particular has nothing to do with the forum.\textsuperscript{457} This situation is presented by the Mississippi statute of limitations cases.\textsuperscript{458} The flaw, however, is not in any general preference for forum law, but rather in the rules of jurisdiction. Thus, the remedy lies not in choice of law, but rather in judicial jurisdiction.

\section*{B. \textit{Current Constraints}}

Only two types of defendants need fear an adverse choice of law under strict interest analysis: nonlocal defendants who have purposely availed themselves of the benefits and protections of a forum through the conduct of activities related to the litigation, and nonlocal defendants who have done generally the same through activities unrelated to the litigation. All other defendants will have been protected either through judicial jurisdiction or the presumption in favor of applying forum law. \textit{Shaffer v. Heitner},\textsuperscript{459} and \textit{Rush v. Savchuk}\textsuperscript{460} have eliminated the abuse of quasi-in-rem jurisdiction. \textit{Kulko v. Superior Court}\textsuperscript{461} and \textit{World-Wide Volkswagen v. Woodson}\textsuperscript{462} have refuted any claim of state court jurisdiction based on the forum's concern for the plaintiff. Under strict interest analysis, local defendants in true conflicts may expect to enjoy the application of forum law. Abuse would be prevented further if general activities which did not constitute residence were

\begin{footnotesize}
\textsuperscript{457} There is little likelihood of serious abuse when the defendant corporation is amenable only to specific jurisdiction, for the contacts with the forum that support the jurisdiction also are likely to make the local law relevant. This likelihood was the basis for Chief Justice Stone's conclusion in \textit{International Shoe}. So too, even Professor Martin's standard would be satisfied. The case in which the specific facts do not support specific jurisdiction, but in which the corporate defendant is present, should be distinguished from that case where the plaintiff is a resident injured out-of-state. Assume, for example, that a Michigan native purchased a defective tire from Sears while vacationing in California and was injured in Iowa on the way home. After \textit{World-Wide Volkswagen Corp. v. Woodson}, 444 U.S. 286 (1980), specific jurisdiction would exist only in California. Sears nonetheless would be amenable to suit in Michigan for its general activities. Assuming that Michigan law favored the plaintiff, there would be no objection under strict interest analysis to the application of Michigan law, but the result under Professor Martin's suggested standard probably would be different. \textit{See supra} note 442.

\textsuperscript{458} Moreover, under the \textit{Hague} plurality's view, the use of the local long-arm statute for the benefit of a nonresident plaintiff is improper for failing to meet the plurality's requirement of an affirmative forum interest.

\textsuperscript{459} 433 U.S. 186 (1977).
\textsuperscript{460} 444 U.S. 320 (1980).
\textsuperscript{461} 436 U.S. 84 (1978).
\textsuperscript{462} 444 U.S. 286 (1980).
no longer a basis for judicial jurisdiction. All that remains is the completion of the consolidation of the theory of judicial jurisdiction. Even so, the Mississippi long-arm cases have been resolved improperly under current doctrines.

First, consider the issue of timeliness. The use of a statute of limitations either to bar or to allow suit is an application of forum law. Although these statutes usually are enacted to protect local defendants, an unusually long statute of limitations protects plaintiffs, presumably local plaintiffs. A nonresident plaintiff, therefore, would not support a forum interest in the application of its longer statute of limitations period. If the typical case, for example, is that of a Kansas woman suing a national drug company in Mississippi after the statute of limitations in every other state in the union has run, then Mississippi has no interest in opening its courts merely to allow the litigant the benefits of its longer limitations period.

Moreover, if the purpose of the statute of limitations in the defendant's home state includes a policy of repose for defendants, the home state will have an interest. Additionally, if the purpose of the plaintiff's statute of limitations also were stated clearly to be to deny the slothful, the plaintiff might even be under a direct, legal disability. Notwithstanding the smokescreen of the procedural characterization, Mississippi can show no legitimate policy relevant to a Kansas plaintiff, no matter how unfortunate her loss. Each of these cases has been a false conflict in which Mississippi has applied its law which was unsupported by an interest in the face of another state's relevant policies. Thus, Mississippi was constitutionally barred from applying its longer limitations period in favor of a nonlocal plaintiff and at the expense of a nonlocal defendant. It is only the traditional, procedural characterization of both the Kansas and Mississippi statutes of limitations which

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463. There is a difference between a company doing significant business in a state and a company being located physically in the state. The former must respond to claims arising out of specific jurisdiction; the latter also must accept the full impact of the forum's laws. See National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967) (mail order company not subject to the impact of forum tax statute).

464. See supra notes 435-37 and accompanying text.


466. Moreover, it is hard to see how Mississippi could have sufficient interest in the Kansas plaintiff to meet even the Hague plurality's test.

467. But see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142(2) (1971); RESTATEMENT OF CONFLICT OF LAWS § 604 (1934).
has obscured the repeated violations of *Home Ins. Co. v. Dick*\(^{468}\) by the Mississippi courts.

Similarly, on the issue of whether to grant jurisdiction, Kansas initially had an interest in hearing suits between its parties, but because long-arm statutes are enacted to assist local plaintiffs in bringing suit against nonlocal defendants, Mississippi never had an interest in applying its long-arm statute for the benefit of a Kansas plaintiff. Until the Kansas statute of limitations ran, however, there was no conflict; both states would hear the case. The analysis is different after the Kansas statute has run. Kansas has resolved any conflict between its domestic policies in favor of the defendant and therefore has an interest in providing a defense, but Mississippi still has no interest in either party. The issue of jurisdiction is therefore also a false conflict and under strict interest analysis, Mississippi again should yield to Kansas. Because the obligation to provide a forum does not arise unless a state has jurisdiction over a cause\(^{469}\) and is subject to an impartial statute of limitations,\(^{470}\) *Hughes v. Fetter*\(^{471}\) does not affect the analysis.

**C. Potential Solutions**

Because not every case of egregious forum shopping will present a false conflict and thereby be constrained by *Home Insurance Co. v. Dick*,\(^{472}\) general jurisdiction must be restricted to the defendant's home base, or following the analogy to diversity jurisdiction,\(^{473}\) to the defendant's home bases.\(^{474}\) Without this

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\(^{468}\) 281 U.S. 397 (1930). See *supra* notes 118-30 and accompanying text for a discussion of *Home*.

\(^{469}\) Jurisdictional restrictions, however, cannot be used to defeat a class of claims or claimants. *Hughes v. Fetter*, 341 U.S. 609, 611 (1951).


\(^{471}\) 341 U.S. 609 (1951).

\(^{472}\) 281 U.S. 397 (1930).

\(^{473}\) 28 U.S.C. § 1332(c) (1976) provides that for purposes of subject matter jurisdiction, a corporation shall be construed to be a citizen of both its state of incorporation and its principal place of business. The suggestion here is that a corporation should be regarded as a resident of every state in which it has substantial physical presence.


Professor Martin suggests restricting the application of forum law to only those defendants within its specific jurisdiction. *See* Martin, *supra* note 440, at 872. This suggestion is underinclusive. The *Hague* plurality standard, in contrast, is overinclusive because under that standard, any defendant within the general jurisdiction of a state is vulnerable. It is urged instead that only those defendants that are either within the specific jurisdiction of a forum or quasi-residents should be subject to the application of forum law. Professor Martin and the *Hague* plurality and dissent use choice of law to constrain overly broad jurisdictional principles. This Article suggests using narrower jurisdictional principles to prevent
constraint on judicial jurisdiction, the potential for confusion as desperate plaintiffs seek to bring unprovided-for-cases in forums lacking interests could discredit strict interest analysis.

Judicial jurisdiction has two necessary elements: power and fairness.\textsuperscript{475} Power can be shown either through domicile, personal service, or attachment. Fairness can be shown either through domicile or specific contracts among the forum, the facts, and the defendant. Fairness also requires a comparison of hardship between requiring the defendant to defend in the plaintiff's choice of forum and requiring the plaintiff to travel to the defendant's home. Since suing the defendant in a third forum minimizes neither parties' inconvenience, the defendant's inconvenience cannot be justified by the plaintiff's convenience. Thus, even though the third forum may have adequate power over the defendant, perhaps because of property\textsuperscript{476} or general activities\textsuperscript{477} within the forum, the separate and independently necessary requirement of fairness is not satisfied. If the choice of the third forum is further motivated solely for choice of law reasons, the unfairness usually will be greater.\textsuperscript{478} In short, it is suggested that jurisdiction based merely on general contacts is likely to yield unfairness, is unnecessary,\textsuperscript{479} and should be abolished.

In the Mississippi long-arm cases,\textsuperscript{480} the Kansas defendants being sued in Mississippi were corporations, but the same problem can arise for individuals. Individuals perhaps may be amenable to suit via long-arm statutes because of their general activities within a forum.\textsuperscript{481} If so, then individuals need the same protec-

\textsuperscript{475} Shaffer v. Heitner, 433 U.S. 186 (1977), represents power without fairness; World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), represents fairness without power. Neither combination is sufficient; both are necessary.

\textsuperscript{476} See, e.g., Steele v. G. D. Searle & Co., 483 F.2d 339 (5th Cir. 1973).

\textsuperscript{477} See, e.g., Schreiber v. Allis-Chalmers Corp., 611 F.2d 790 (10th Cir. 1979).

\textsuperscript{478} The choice of a Minnesota forum in Hague, for example, could not have been without regard to the content of Minnesota law.

\textsuperscript{479} The defendant's home is always available as is any other place of significant presence and often, through specific jurisdiction, the situs of an alleged wrong.

\textsuperscript{480} See supra notes 435-37 and accompanying text.

\textsuperscript{481} The Supreme Court has not given a general answer to the question of whether long-arm statutes which do not rest on consent apply to individuals. The nonresident motorist acts can rest on the state's power to condition driving in the state on consent to suit arising out of the same activity. In contrast, Kulko v. Superior Court, 436 U.S. 84 (1978), was decided in favor of the defendant individual on the basis of his not having purposely availed himself of the benefits and protections of the California forum. Given the recent
tion described above. Moreover, whether individuals are subject to long-arm jurisdiction for “doing business” or for “the commission of any tortious act” in a state, it is accepted today that an individual can be sued wherever found by a plaintiff. The classic, hypothetical case is that of the passenger who is merely changing planes at Chicago’s O’Hare airport when presented with a summons from an equally out-of-state plaintiff seeking, for whatever reason, to litigate in a hub city. As with corporations, jurisdiction based merely on an individual’s presence is unfair. A forum should be required to show both power and fairness. A purposeful, specific availing of the benefits and protections of a forum’s laws can provide both power and fairness. Not only does the continued existence of jurisdiction over transients threaten rational treatment of choice of law problems, it poses a direct threat to the right to travel. With domiciliary service always available and with the potential for local personal service wherever the cause of action would support a long-arm action over a similarly situated corporate defendant, plaintiffs suing

contractions of state courts’ powers to reach out-of-state defendants, see, e.g., World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Kulko v. Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977), it may not be too much to suggest that individuals will be amenable to suit only on the bases of domicile and consent.

483. See, e.g., id. § 302(a)(2).
484. It has been suggested by students that changing planes at O’Hare is a purposeful availing of the benefits and protections of Illinois law. The availing of United Airlines may be purposeful or without alternative, but the choice of Chicago as a hub, however well judged, is United’s. Moreover, transient jurisdiction may be independently unconstitutional as an infringement on the fundamental right of travel. Cf. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868) (striking down for abridgement of right to travel a state tax imposed on every person leaving state).

485. Before International Shoe, the two metaphors of consent and presence explained jurisdiction over foreign corporations. International Shoe can be understood as having consolidated the metaphors, making it unnecessary to decide which applied. Hanson v. Denckla, 357 U.S. 235 (1957), can be read as providing the test for the consolidated metaphor. If a defendant purposefully has availed itself of the benefits and protections of a forum’s law, then it has consented implicitly to jurisdiction for suits arising out of the purposeful availing. Id. at 253 (essentiality of purposeful availing by defendant).

487. Although long-arm statutes provide no conceptual difficulties when applied to corporations which are legal fictions, the application of a long-arm statute to an individual is disquieting. See, e.g., Great W. United Corp. v. Kidwell, 577 F.2d 1256 (5th Cir. 1978) (Texas long-arm statute conferred personal jurisdiction over Idaho state official, who never left Idaho because official enforcement of Idaho statute foreseeably caused compliance efforts in Texas). Thus, it is suggested that personal service on an individual meets the power requirement and that specific minimum contacts meet the fairness requirement, and that both are necessary.
individuals should not be at a loss for a forum due to abolition of jurisdiction over transients.

Thus, in conclusion, so long as a forum-favoring choice of law system like strict interest analysis does not operate under an unduly expansive system of personal jurisdiction, the presumption in favor of applying forum law will not unfairly affect defendants. False conflicts will be decided uniformly. True conflicts will be decided under forum law. If the defendant has specifically, purposely availed itself of the benefits and protections of the plaintiff's forum, that defendant will be subject to forum law. If the defendant has not sufficiently affiliated itself with the plaintiff's forum to satisfy traditional notions of fair play and substantial justice, the plaintiff will have to sue the defendant at home and likely lose. Unprovided-for-cases usually will be tried in the defendant's forum, resulting in the application of forum law. Under strict interest analysis, the frequency of true conflicts will be reduced to the lowest possible rate. Thus, although there is no necessary correlation between judicial jurisdiction and choice of law, if both are construed narrowly, certainty and uniformity can be achievable.

If, as suggested in this Article, judicial jurisdiction had been construed narrowly in Hague, Minnesota might have declined to hear the case for lack of specific jurisdiction, notwithstanding Allstate's general presence in Minnesota. Mrs. Hague would have been left with a Wisconsin forum which would have applied Wisconsin law as written by the Wisconsin legislature, rather than as the Minnesota Supreme Court misread it. Mrs. Hague then would have received that for which Mr. Hague had paid, and much discomfiture could have been avoided.

490. See supra note 95.
491. If Allstate has so many agents and such a volume of insurance in Minnesota that it is unrealistic to regard it as a mere transient, then it should have to answer any cause, including Hague, in Minnesota. This kind of substantial presence surely would be shown if Allstate were one of the five largest insurers in Minnesota. See Hill, supra note 434, at 984-85.
492. There would be no problem with specific jurisdiction in Wisconsin over a casualty insurance policy sold there to cover a risk principally located there.
493. See supra note 16.
494. Alternatively, Allstate always can be sued in Illinois at its headquarters. The use of Illinois law would be correct because Minnesota's lack of an interest in the Hagues presents no reason to displace Illinois law. The Illinois rule was described as the same in effect as the Wisconsin rule of 1967 applied in Nelson v. Employers Mut. Casualty Co., 63
VI. STRICT INTEREST ANALYSIS AND INTERSTATE DISCRIMINATION

Professors Currie and Kay have suggested that many choice of law decisions contain the potential for improper discrimination. The traditional territorial jurisdiction selecting rules can result in irrational distinctions among domestic parties, and the modern policy-based analyses may, if not properly constrained, result in explicit bias against out-of-state parties.

The following analysis explores the utilities of and potentials in the interstate privileges and immunities and equal protection clauses for constitutional control of choices of law. As the application of due process to choice of law problems may be unfamiliar to many students of constitutional law, so too the extension of equal protection may be novel.

The assumption is that the control of the false conflict and the apparent conflict by the due process and full faith and credit clauses is both sound and established by the weight of authority. Just as the due process and full faith and credit clauses implicitly prevent improper discrimination in false conflicts, the interstate privileges and immunities and equal protection clauses may buttress the presumption in favor of applying forum law to further prevent improper discrimination in unprovided-for-cases and true conflicts.

A. False Conflicts

Strict interest analysis presents no problems of improper discrimination in false conflicts. In the typical false conflict, two local parties will be litigating in a local court. The only foreign factors will be the locations of one or more of the allegedly significant events. When the local court applies the local law to a dis-
pute between two local parties, it will be treating them identically with all other local parties.

The result could be different if a court continued to follow the territorialist view. If, regardless of whether the differing laws had relevant policies, the court distinguished among local parties on the basis of where their injuries occurred, then completely arbitrary and capricious discrimination would occur. Because the result under due process has been clear for at least a generation, the equal protection issue implicit in such a situation has not required adjudication. Similarly, if in a misguided attempt to treat foreign parties as natives, a court were to attempt to apply its own law to a false conflict in which its law lacked any interest, due process and full faith and credit would provide adequate bases for preventing it from improperly treating foreign litigants as if they were natives.

B. Unprovided-for-Cases

*Neumeier v. Kuehner* is the paradigmatic unprovided-for-case. An Ontario passenger was killed in Ontario through the alleged ordinary negligence of his New York host-driver. Under the law of Ontario, recovery by the guest would require a showing of at least gross negligence. Under New York law, ordinary negligence would suffice to support recovery. Judge Fuld's rules restricted the fruits of interest analysis to false conflicts and left both

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501. See B. CURRIE, supra note 3, at 575-79.
505. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).
506. 1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.
2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.
3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants.

*Id.* at 128, 286 N.E.2d at 457-58, 335 N.Y.S.2d at 70 (quoting Tooker v. Lopez, 24 N.Y.2d 569, 585, 249 N.E.2d 394, 404, 301 N.Y.S.2d 519, 532 (1969) (concurring opinion)).
true conflicts and unprovided-for-cases to territorial principles. With New York law favoring guest-plaintiffs (there being no suggestion that it targeted driver-defendants), New York lacked an interest. Similarly, with Ontario law protecting drivers and the driver coming from New York, Ontario also lacked an interest in the case. Whereas strict interest analysis would apply New York forum law to this unprovided-for-case, the court of appeals applied the Ontario law of the place of injury to deny the plaintiff recovery.

If the plaintiff had been from New York, all but the most tenacious territorialist would expect the law of New York to control the dispute between coresidents, regardless of the situs of the injury. Thus, the plaintiff's loss of recovery in the actual case is a direct consequence of his residency or citizenship, thereby raising concerns over denial of equal protection and interstate privileges and immunities which may compel a result contrary to Neumeier.

Because of Neumeier's international elements, it will be useful to first consider the application of the privileges and immunities clause to the case of a Delaware plaintiff against a New York defendant. The earliest interpretation of the interstate privileges and immunities clause injected natural rights into the clause and also confined them to "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign." Thus, if the claim involved one of the few protected privileges, immunities, or rights, the state surely would lose, but otherwise the state surely would win.

The more recent interpretations, however, have both widened the range of the foreign state party's protected interests and legitimized an actual inquiry into the state's justifications for the ac-

507. Rule one allocates most false conflicts to the law of the coresidence. Rule two allocates most true conflicts to the law of the situs. Rule three allocates most unprovided-for-cases to the law of the situs. The rules are especially inappropriate when parties from different states have an accident in a third state. See supra note 331.


Consequently, the Supreme Court has held that article IV, section two "bar[s] discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of the other States." To deny a Delaware plaintiff the benefit of New York law, which a New York plaintiff would receive in a suit against a New York defendant, merely because of the plaintiff's Delaware affiliation, would therefore violate the interstate privileges and immunities clause. Strict interest analysis' presumption of the applicability of forum law in the unprovided-for-case, which treats out-of-state plaintiffs and natives equally, is consistent, therefore, with the interstate privileges and immunities clause. If, however, both plaintiff and defendant were from Delaware, but nonetheless litigating in New York, then the due process and full faith and credit clauses would command New York not to meddle in the domestic affairs of Delaware and would provide a "substantial reason" for denying a Delaware plaintiff the recovery he or she would enjoy if a New York plaintiff.

In Neumeier, Ontario plaintiff is not within the protections of article IV, section two, but is within the equal protection clause and therefore may enjoy even greater protection. Nonetheless, even if the corresponding Ontario false conflict somehow were heard in New York, due process should provide a sufficiently compelling reason not to apply New York law.

510. See L. Tribe, supra note 391, § 6-33. Although Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978), might appear to be a partial retreat toward Corfield, the conservation of ferae naturae has been a consistent theme in the privileges and immunities cases which need not affect its application to choice of law decisions. See L. Tribe, American Constitutional Law 40 (1979 supplement).


513. Compare In re Griffiths, 413 U.S. 717 (1973) (classification based on alienage inherently suspect and, therefore, subject to close judicial scrutiny) with Ambach v. Norwich, 441 U.S. 68 (1979) (special significance of citizenship to governmental entities permits a school system to justify classification based on alienage by showing a rational basis for the classification). That alienage is a classification requiring strict scrutiny is well accepted, although not universally. Justice Rehnquist has suggested that the fourteenth amendment's protections were aimed only at racial minorities, W. Lockhart, Y. Kamisar & J. Choper, Constitutional Law 1389 (5th ed. 1980). Even if alienage or citizenship in another state provide no special protection from local discrimination per se, the view here is that any difference in result which rests upon factors unrelated to actual relevant state policies must fall as irrational under any form of actual review.


515. B. Currie, supra note 3, at 539-40. Consider the scenario of a New York defendant traveling to Delaware to seek a declaration of no liability under Delaware's less generous law. Although some might find the potential for races to the opposing parties'
The soundest objection to the compulsory use of forum law in the unprovided-for-case arises when the defendant's connection with the forum is trivial, as when service of the defendant has been achieved based only on either transient or, as in *Hague*, general jurisdiction. To have denied Mrs. Hague the benefit of the Minnesota stacking rule when Wisconsin had no concrete interest in protecting Allstate would have discriminated against her for "no substantial reason." But if Allstate were not essentially as active in Minnesota as would be a "native" insurance company, the result in *Hague* still would not be altogether satisfactory.

If jurisdiction instead were based only on either the defendant's basic, long-term affiliation with the forum or the defendant's specific, litigation related activities within the forum, no harm would follow from "saddling" the defendant with what then would be its own law. Unprovided-for-cases would be heard almost exclusively in the defendant's home court, where the defendant actually might have had some opportunity through the representational political process to exert influence over the content of the law to be applied. With the evil a consequence of overly expansive jurisdiction, the remedy should be a limitation of judicial jurisdiction and not the application of arbitrary constitutional constraints on choice of law.

C. True Conflicts

A New York plaintiff-passenger suing an Ontario defendant-driver in a guest act case in New York can claim that any failure of the New York courts to apply New York law would amount to discrimination. Other New York plaintiffs suing New York defendants surely would receive the benefits of the application of New York law. Currie and Kay asked whether use of the law of the Ontario place of injury in such a case would deny the plaintiff equal protection of the law. Even as a definitive answer was

courthouses disturbing, if not perverse, neither native can object properly to the application of his or her own law when no other law has an interest.

516. But if Allstate were much a part of Minnesota, then there would be no hesitation in treating it like any other native. Just as the national policy in favor of commerce requires doors to be open to foreign entrepreneurs, it also requires them to compete fairly by stepping in all the way. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (out-of-state manufacturer must pay unemployment tax on local sales representatives).

517. This requirement may have been met by Allstate in Minnesota.

518. For Allstate, the home courts certainly would include Illinois and possibly, with respect to the Hagues, Wisconsin as well.

 unavailable in 1961 when Currie and Kay posed the question, it is now beyond the scope of this Article. Nonetheless, these suggestions should at least be considered.

Although discrimination on the basis of one's opponent or place of injury does not rest on any invidious classification, it does potentially threaten a fundamental right. The voting rights and apportionment cases recognized the right to participate in the political and legislative processes. Thus, it would seem that protection for the resident's enjoyment of the fruits of the legislative process would be necessary to make the right to participate fully meaningful. To deny a New York plaintiff the benefit of New York law merely because an Ontario defendant injured him or her in Ontario would deny the New York plaintiff the benefit of the New York legislative process and make worthless prior opportunities to participate in the political life of the state. Before denying the fruits of participation in the New York political process, New York should be required to adduce a compelling state interest—a difficult, if not impossible, burden on these facts.

The defendant, who is away from home in a true conflict, however, finds no protection in either the equal protection clause or the interstate privileges and immunities clause. Both clauses require treating the non-native as a native. That treatment, however, is exactly the result the foreign defendant in a true conflict seeks to avoid.

The foregoing analysis may have limited applicability, however, for under the most recent cases and the jurisdictional prin-

524. The author is indebted to his colleague, Jim O'Fallon, for this notion. Professor O'Fallon is, of course, free from any responsibility for its use.
525. Except for assuming that strict scrutiny still is triggered by invidious classifications or abridgements of fundamental rights, neither assessments of nor assumptions about mainstream equal protection analysis are offered herein. Even if the connection between the making and the application of law is too tenuous to support strict scrutiny, it is not clear that territorialism could withstand actual review today. This latter point, however, is far less certain than the failure of territorialism to pass strict scrutiny. If the review is not via strict scrutiny, the standards may range from very deferential to the state legislature, see, e.g., Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), to an actual inquiry into purpose or alternatives. See, e.g., Reed v. Reed, 404 U.S. 71 (1971).
principles urged above,\textsuperscript{527} it may be difficult for New York guests injured in Ontario to sue their allegedly negligent Ontario hosts in the courts of New York. If the defendant generally is amenable to process in New York, he or she is probably not exclusively an Ontario defendant. Thus, only Ontario defendants brought before New York courts because of a purposeful availment of the benefits and protections of New York laws which apply to the particular facts of the case at hand need fear New York law. Such cases do not present the specter of "unfair surprise."

Another species of true conflicts may be less affected by the proposed narrower jurisdictional standard. If a manufacturer or insurer has distributed the identical product line in the forum which provides the basis for the litigation, then the fact that the particular item which elicited complaints was not distributed within the forum should not impair jurisdiction.\textsuperscript{528} Thus, in \textit{World-Wide Volkswagen},\textsuperscript{529} because Volkswagen sold Audis in Oklahoma, Volkswagen had to respond to suit in Oklahoma even though the particular vehicle had been sold in New York. Whether such jurisdiction represents a vestige of general corporate jurisdiction or a broad reading of specific contacts is beyond this Article's scope; the result appears to be in accord with intuitive fairness and not foreclosed by precedent. Moreover, some businesses may be so active within the forum that to regard them as nonlocal would ignore reality. Instead of true conflicts, such defendants would generate only false conflicts.

Most unprovided-for-cases and many true conflicts will be brought in the home state of the defendant, where the presumption of forum law will provide application of the law of the defendant. This application will redound to the defendant's benefit in a true conflict and to his or her detriment in the unprovided-for-case. The latter result flows directly from both equal protection and interstate privileges and immunities. The former result is a plausible consequence of an application of the equal protection clause. If the defendant has been active sufficiently in the plaintiff's forum, then equal protection again supports the application of forum law, but to the benefit of the plaintiff. False conflicts should almost always be litigated at the parties' coresidence under their mutually applicable law. Regardless of the forum, due pro-

\footnotesize{\textsuperscript{527} See supra notes 434-94 and accompanying text. \\
\textsuperscript{529} 444 U.S. 286 (1980).}
cess and full faith and credit will require the use of only the interested law in a false conflict.

VII. SUMMARY AND CONCLUSION

Although choice of law, constitutional constraints on choice of law, and judicial jurisdiction have been considered to be separate issues, their intersection in conflicts cases is unavoidable. The apparent virtues and evils of the various explanations of each issue can be affected greatly by an understanding of the other issues. Consequently, doctrinal difficulties associated with one of these issues have often indirectly affected the debates and understandings of the others. This Article has argued that a synthesis of these issues not only eliminates most of these difficulties, but also simplifies the application of the doctrines to actual cases. The starting point for analysis has been Currie's interest analysis. Two modifications of Currie's analysis have been offered. First, state interests should be construed strictly for choice of law purposes. If these interests are construed in this manner, then state interests for choice of law and for the purpose of constitutional controls on choice of law can be measured identically. Second, if the power of state courts over both corporations which have only minimal contacts unrelated to the litigation, and over transient individuals also is construed strictly, many of the most difficult problems of choice of law will be ameliorated. The following statements summarize the method advocated:

1. The law of the forum is rebuttably presumed to apply;
2. A state has an interest in the resolution of an issue if and only if it has both a relevant policy and a party toward whom that policy is clearly directed; and
3. Due process is denied by a choice of law if and only if the law of a state lacking an interest is applied to the exclusion of the law of another state which has an interest.

These three statements are sufficient to provide a satisfactory choice of law system. Additionally, however, this Article urges that:

4. Interstate privileges and immunities and equal protection require application of forum law in unprovided-for-cases.
5. Equal protection requires application of forum law in true conflicts.

Finally, this Article urges that a forum favoring a choice of law system will be more attractive if the fairness component of the
requirements for judicial jurisdiction is recognized to limit jurisdiction not related to the forum so that:

6. Transient jurisdiction over individuals in litigation with no relationship to the forum is forbidden; and

7. Jurisdiction over nonindividuals is not allowed in cases in which the defendant neither has a strong primary affiliation with the forum nor contacts relevant to the litigation sufficient to support specific personal jurisdiction.

*Allstate Insurance Co. v. Hague*\(^{530}\) provides an excellent vehicle for analysis: Under current jurisdictional doctrines, the case was properly decided, even though improperly described. As an unprovided-for-case under strict interest analysis, there was no reason not to apply the law of the Minnesota forum. By adding the suggestions for narrowing jurisdiction, the dispositive issue in *Hague* would have become whether Allstate was sufficiently affiliated with Minnesota for Minnesota to have been fairly considered one of its homes. If so, then the result is correct; if not, then Mrs. Hague's forums would have been limited to Wisconsin via specific jurisdiction or Illinois via general jurisdiction. The choice of Wisconsin might have yielded the same result after a more accurate reading of the Wisconsin statute. The choice of an Illinois forum would have led to the application of Illinois law which is allegedly the same as Wisconsin's law.

For over a generation, the Supreme Court's choice of law decisions have exhibited a basic consistency with these articulated principles. When examined retrospectively, these decisions are consistent with the proffered due process test and show only three counter-examples to the rebuttable presumption in favor of applying forum law. Even the most recent of these counter-examples is over forty years old. In contrast, the principle articulated by the *Hague* plurality is contradicted by two of the Court's more recent choice of law cases, including, according to an equal number of Justices, *Hague* itself.

If state interests and state jurisdiction are both construed narrowly, then simplicity, predictability, and basic fairness are achievable. Moreover, these goals can be met without the invocation of an extra-constitutional super law. The time has come for the strict analysis of interests.