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## Personal Jurisdiction and Choice of Law

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# PERSONAL JURISDICTION AND CHOICE OF LAW

James Martin\*

The time has come for the Supreme Court to declare that a state may not apply its own law to a case unless it has the “minimum contacts” required by *International Shoe*<sup>1</sup> for the exercise of specific<sup>2</sup> personal jurisdiction over the defendant. Although the present state of the law is less than certain,<sup>3</sup> the Supreme Court has not yet required that a state show it has minimum contacts with a defendant before applying its law. As a result, in some cases where a state has obtained personal jurisdiction because of a defendant’s contacts unrelated to the case — contacts such as transaction of substantial but unrelated business within the state, or incorporation or domicile within the state — the state may apply its own law even when in conflict with the law of a state that has much greater contact with both the defendant and the events giving rise to the case.<sup>4</sup> The situation fairly cries out for a standard for the application of forum law on a basis that does not depend upon the vagaries of the defendant’s unrelated activities. With recent attention refocusing upon constitutional limitations on jurisdiction and choice of law,<sup>5</sup> the time is ripe for examination of a “minimum contacts” limitation on choice of law. The potential rewards include greater fairness to litigants, healthier federalism, and improvements in judicial administration.

The basic standard for in personam jurisdiction, despite recent

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1. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). “Minimum contacts” is used here to indicate contacts related to the substance of the case. Thus a state’s substantial but unrelated contacts would not justify application of its law under this proposal.

2. The term “specific” jurisdiction is used in the sense of von Mehren & Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1145 (1966), to indicate jurisdiction of the type involved in *International Shoe* — based upon minimum contacts related to the plaintiff’s claim and supporting only litigation related to those contacts.

3. See, e.g., *Shaffer v. Heitner*, 433 U.S. 186, 225 (1977) (Brennan, J., dissenting) (“[C]onstitutional limitations on the choice of law are by no means settled”).

4. *Hague v. Allstate Ins. Co.*, — Minn. —, 289 N.W.2d 43 (1979), cert. granted, 100 S. Ct. 1012 (1980), is just such a case.

5. See *Rush v. Savchuk*, 100 S. Ct. 571 (1980) (jurisdiction); *World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. 559 (1980) (jurisdiction); *Kulko v. Superior Court*, 436 U.S. 84 (1978) (jurisdiction); *Shaffer v. Heitner*, 433 U.S. 186 (1977) (jurisdiction); *Hague v. Allstate Ins. Co.*, — Minn. —, 289 N.W.2d 43 (1979), cert. granted, 100 S. Ct. 1012 (1980) (choice of law).

elaboration, is still found in *International Shoe Co. v. Washington*: a state may not exercise in personam jurisdiction unless to do so would be consistent with "fair play and substantial justice" and unless there are either "minimum contacts" between the defendant and the forum state out of which the plaintiff's claim arises (specific personal jurisdiction), or there are substantial contacts, not necessarily related to the case,<sup>6</sup> between the defendant and the state. There is no clear corresponding formula for constitutional limitations on the state's right to apply its own law to a case, but some kind of "contact" is a precondition of the state's right to apply its own law, and the Supreme Court has indicated that some contacts that may suffice for choice-of-law purposes do not suffice for jurisdiction purposes.<sup>7</sup> Professor Willis Reese has recently suggested that the "same basic principles" underlie jurisdiction and choice-of-law issues, but he stops short of suggesting a minimum contacts test for constitutional limitations on choice of law.<sup>8</sup>

I suggest that the Supreme Court take that further step. When a state obtains jurisdiction over the defendant through substantial contacts unrelated to the case, courts should ask whether jurisdiction could have been upheld absent those substantial unrelated contacts. In other words, are there "minimum contacts" between the state and the defendant? If there are not, the forum state should not be allowed to apply its own law to the case.

## I.

The differing standards for choice of law and jurisdiction seem to be an accident of history. Both standards create constitutional limitations on state judicial action, rather than provide prescriptive rules for that action. The sources of the constitutional limitations for the

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6. Unrelated contacts sufficient to support in personam jurisdiction include the defendant's domicile, incorporation, or transaction of business in the state. Regarding substantial unrelated contacts between the defendant and the forum, *International Shoe* says:

While it has been held, in cases on which appellant relies, that continuous activity of some sort within a state is not enough to support the demand that [a] corporation be amenable to suits unrelated to that activity . . . there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.  
326 U.S. at 318.

7. For example, the contacts with Louisiana considered by the Supreme Court in *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954), included the fact that the plaintiff was a resident of Louisiana. These interests were used to support application of Louisiana law, even though the plaintiff's residence is generally held to be irrelevant to the forum's jurisdiction. *But cf. Curtis Publishing Co. v. Birdsong*, 360 F.2d 344 (5th Cir. 1966) (Alabama court declined jurisdiction in part because plaintiff was not Alabama resident).

8. See Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1592 (1978).

two areas — the full faith and credit clause and the due process clause — do not by their own terms demand any particular standards. Unfortunately, standards for “legislative jurisdiction”<sup>9</sup> (constitutional limitations on choice of law) and “judicial jurisdiction” (constitutional limitations on jurisdiction) were developed before the close relation between choice of law and jurisdiction was appreciated.<sup>10</sup> Development of modern standards began in an era in which it was acknowledged that more than one state could have jurisdiction over a case but it was believed that only one state’s law could properly apply to the case.<sup>11</sup>

The chief difference between the contacts needed to impose judicial jurisdiction and those needed to impose legislative jurisdiction seems to lie in the question: contacts with what or whom? In the area of judicial jurisdiction it is clear that contacts between the defendant and the forum occupy center stage.<sup>12</sup> Not so clear is the role, if any, played by contacts between the forum and the factual elements of the case<sup>13</sup> (such as the physical location of an accident, the place of contract execution, etc.). The Supreme Court discussed forum-plaintiff and forum-case contacts, which may be equated with the interests of the forum in asserting jurisdiction,<sup>14</sup> in cases prior to *International Shoe*.<sup>15</sup> And in *McGee v. International Life Insurance*

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9. There is some objection in the literature to the phrase “legislative jurisdiction” because of its association with the first Restatement of Conflict of Laws. See, e.g., A. EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS § 4 (1962). The phrase is used here because the idea is referred to frequently and “legislative jurisdiction” bears frequent repetition more readily than “constitutional limitations on choice of law.”

10. For a discussion of jurisdiction and choice of law, and the relationship of the two to full faith and credit and due process, see Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 201-03 (1976).

11. Under the first Restatement of Conflicts of Laws, for example, the rules always led to the law of a single jurisdiction.

12. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. 559 (1980).

13. The term “factual elements of the case” will be used hereafter to indicate aspects of the case excluding the domicile, incorporation, business activities, etc., of the plaintiff and the defendant. Thus, for example, the chief factual element of any tort case will be the location of the tort. The chief factual elements of a contract case will be the location of the negotiation, execution, performance, and breach of the contract.

14. Discussion of forum-plaintiff and forum-case contacts may be equated with concern for the interests of the forum because legitimate forum interests would seem to have to relate to the well-being of people or things within the forum. Since such an interest will not be an interest in the well-being of a foreign defendant with only minimum contacts with the forum, it must be based upon contacts with the plaintiff or with the factual elements of the case. Thus, whatever importance is attached to the forum’s interest in jurisdiction cases is based ultimately on contacts between the forum and the plaintiff or between the forum and the factual elements of the case. And, since there is no obvious importance to these two kinds of contacts other than as support for the forum’s interest, discussion of them may fairly be equated with discussion of forum interests.

15. E.g., *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935); *Hess v. Pawlowski*, 274 U.S. 352 (1927).

*Co.*,<sup>16</sup> decided after *International Shoe*, the Court referred to the “manifest” interest of California in regulating insurance, as evidenced by special legislation on the subject, in allowing the state to exercise jurisdiction.<sup>17</sup> The recent cases, however, seem to have abandoned the “interests” theme. In *Kulko v. Superior Court*,<sup>18</sup> the Supreme Court specifically held that the interest of California in the well-being of resident children affected by a foreign divorce proceeding was insufficient to support jurisdiction in child support proceedings,<sup>19</sup> despite the sufficiency of the same state’s interest in insurance regulation in *McGee*. In *World-Wide Volkswagen Corp. v. Woodson*,<sup>20</sup> Oklahoma’s interest in redressing a wrong that occurred within its borders was simply ignored as a possible basis for jurisdiction. And although *Shaffer v. Heitner*<sup>21</sup> seemed to echo *McGee* when it said that special legislation claiming jurisdiction under the facts of the case might have tipped the scales in favor of Delaware’s jurisdiction,<sup>22</sup> the reference was aimed at the issue of notice, rather than at the state’s interest.

These cases imply a current view that state interests are simply insufficient to support judicial jurisdiction if minimum contacts with the defendant are absent.<sup>23</sup> Because jurisdiction is available on the basis of minimum contacts alone, the fact that forum interests are insufficient without minimum contacts means in effect that forum interests are simply irrelevant. In other words, contacts between the forum and the plaintiff or between the forum and the factual ele-

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16. 355 U.S. 220 (1957) (Texas company, which insured California resident by mail, held subject to California’s jurisdiction when sued on policy, even though company did no other business in California).

17. 355 U.S. at 223.

18. 436 U.S. 84 (1978) (ex-wife, California resident, brought suit in California against ex-husband, New York resident, to modify terms of Haitian divorce, where defendant’s only relation to California was residency of ex-wife and children).

19. 436 U.S. at 98.

20. 100 S. Ct. 559 (1980) (Oklahoma jurisdiction over defendant New York auto dealer denied when former New York residents were injured in Oklahoma while driving car purchased from defendant).

21. 433 U.S. 186 (1977) (in stockholder’s derivative suit, Delaware sequestration of stock owned by defendant officers of Delaware corporation held insufficient basis for jurisdiction absent minimum contacts between defendants and Delaware).

22. 433 U.S. at 216. *But see* 433 U.S. at 220 (Brennan, J., dissenting).

23. It is true, of course, that in each of these last three cases jurisdiction was denied. Thus a lack of detailed discussion of a factor like forum interest that might uphold jurisdiction might not be surprising if the opinions are viewed as advocacy rather than explanation. The opinions are not particularly argumentative, however, and their varying treatment of or silence on forum interests thus seems to imply the view that state interests are simply insufficient if minimum contacts are not also present.

ments of the case are no longer a part of the jurisprudence of state court jurisdiction.

In contrast, contacts between the forum and the plaintiff or between the forum and the factual elements of the case have had a prominent place in the analysis of choice of law cases. It is probably safe to say that the "modern" era of constitutional restrictions on choice of law began with *Home Insurance Co. v. Dick*.<sup>24</sup> *Dick* established that a plaintiff's domicile is insufficient by itself for imposition of the forum's law.<sup>25</sup> Although the forum's interest did not prevail in *Dick*, Justice Black's discussion of the choice-of-law issues in the subsequent case of *Watson v. Employers Liability Assurance Corp.*<sup>26</sup> relies heavily on the forum state's interest in providing remedies for those injured within its borders to justify application of the forum's law.<sup>27</sup> *Clay v. Sun Insurance Office Ltd.*,<sup>28</sup> the only subsequent Supreme Court decision that discusses constitutional limits on choice of law, avoided discussion of interests and turned directly to contacts. Justice Douglas's opinion, quoting Justice Black's language from an earlier phase of the case,<sup>29</sup> gave equal prominence to contacts between the forum and the defendant and contacts between the forum and the plaintiff or the factual elements of the case. The legislative jurisdiction cases have thus conceded an importance to forum-plaintiff or forum-case contacts that the judicial jurisdiction cases have reserved to forum-defendant contacts.

Although the affirmative reasons for adopting a minimum contacts standard for legislative jurisdiction<sup>30</sup> are discussed at length be-

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24. 281 U.S. 397 (1930) (application of Texas law prohibiting limitations period shorter than two years for filing insurance claims to contract made in Mexico between plaintiff, domiciled in Texas but residing in Mexico, and Mexican company held violation of due process).

25. *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 182 (1964), does not hold to the contrary since the insured-against loss occurred within the forum in *Clay*. See text following note 58 *infra*.

26. 348 U.S. 66 (1954) (Louisiana direct-action statute held to apply, in an action based upon a Louisiana injury, to insurance contract made outside Louisiana by insured and insurer whose chief places of business were outside Louisiana, which contained clause forbidding direct actions).

27. 348 U.S. at 72-73.

28. 377 U.S. 179 (1964) (Florida law prohibiting limitations period shorter than five years for filing insurance claims held to apply to contract made in Illinois between Illinois resident who moved to Florida, where injury occurred, and British company doing business in both states).

29. *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 221 (1960) (Black, J., dissenting), *quoted at* 377 U.S. at 182.

30. In proposing a "minimum contacts" test I do not intend to foreclose the possibility that a state may have minimum contacts with one aspect of a case and yet not with another, and that it may therefore apply its own law only to the related aspect of the case. For example, a state may have the right to apply its own law to determine the validity of the marriage between

low,<sup>31</sup> it is appropriate to emphasize that even though the differences between the standards for legislative and judicial jurisdiction are significant, adoption of a minimum contacts test for legislative jurisdiction would have surprisingly little unsettling effect on the law in its present state of development by the Supreme Court. Even though the Supreme Court has not expressly applied a minimum contacts standard in earlier cases, no coherent alternative theory of legislative jurisdiction would have to be rejected if minimum contacts is adopted. The cases are simply too few and speak in too many tongues to be able to state, with any confidence, that there is an articulable approach that minimum contacts would displace. The remarkable diversity of formulas produced by some of the best minds in this field, as well as by this author, testifies to the difficulty in formulating the rationale of the earlier cases.<sup>32</sup> Perhaps more important in ensuring a smooth shift to a minimum contacts standard, few if any of the earlier Supreme Court cases would require a different result under the new standard, and hence the Court need not necessarily overrule any cases to adopt a minimum contacts test for limitations on choice of law.

The latter conclusion follows from a close examination of the two sources of statements asserting that legislative jurisdiction standards differ from the minimum contacts standard: cases considering judicial jurisdiction and cases considering choice of law. In the judicial jurisdiction cases<sup>33</sup> the statements have generally been similar to that in *Kulko v. Superior Court*:<sup>34</sup> "But while the presence of the children and one parent in California arguably might favor application of California law in a lawsuit in New York, the fact that California may be the 'center of gravity' for choice-of-law purposes does not

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its domiciliaries but not necessarily to determine all the consequences of that marriage no matter where they occur.

31. See text at notes 44-49 *infra*.

32. See R. LEFLAR, AMERICAN CONFLICTS LAW § 60, at 116 (3d ed. 1977); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 505 (2d ed. 1980); Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 CORNELL L. REV. 94, 103-04 (1976); Overton, *State Decisions in Conflict of Laws and Review by the United States Supreme Court Under the Due Process Clause*, 22 ORE. L. REV. 109, 170 (1943); Reese, *supra* note 8, at 1596-97; Simson, *State Autonomy in Choice of Law: A Suggested Approach*, 52 S. CAL. L. REV. 61, 87 (1978); Martin, *supra* note 10, at 211.

33. *E.g.*, *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977) ("But like Heitner's first argument, this line of reasoning establishes only that it is appropriate for Delaware law to govern the obligations of appellants . . . . It does not demonstrate [contacts] that would justify bringing them before a Delaware tribunal"); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("For choice-of-law purposes such a ruling may be justified, but we think it an insubstantial connection with the trust agreement for purposes of determining the question of personal jurisdiction over a nonresident defendant").

34. 436 U.S. 84 (1978).

mean that California has personal jurisdiction over the defendant."<sup>35</sup> Two things should be noted about such statements. First, they usually do not assert that the forum's law could constitutionally have been applied, but rather only suggest that possibility. Second, such statements are not only dicta but obiter as well when considered as statements about choice of law, since their purpose is to make an assertion about jurisdiction rather than about choice of law.

Statements about standards for legislative jurisdiction found in the choice-of-law cases themselves require closer inspection. Since *Home Insurance v. Dick*<sup>36</sup> marks the beginning of the modern era of constitutional limitations on choice of law, the inspection of the case law for legislative jurisdiction standards requiring less than minimum contacts between the forum and the defendant can be restricted to cases starting with *Dick*. Moreover, the inspection can be further limited to cases in which the forum's application of its own law was upheld: all other cases are either cases like *Dick*, where contacts were insufficient both for specific in personam jurisdiction and for choice of law, or cases like *Bradford Electric Light Co. v. Clapper*<sup>37</sup> and *Order of United Commercial Travelers v. Wolfe*,<sup>38</sup> whose holdings are of doubtful current validity, raise peculiar full faith and credit problems, and have been disapproved or limited to their particular facts.<sup>39</sup> Among the cases upholding choice of forum law, a majority may be dealt with by the observation that, whatever the expressed rationale of the case, the contacts were sufficient to support not only application of the forum's law but also assertion of its jurisdiction.<sup>40</sup> Only two really troublesome cases remain: *Watson v. Em-*

35. 436 U.S. at 98.

36. 281 U.S. 397 (1930).

37. 286 U.S. 145 (1932) (Vermont resident employed by Vermont company injured while temporarily performing duties in New Hampshire; federal court in New Hampshire held bound to apply Vermont compensation law which provided that Vermont compensation law would apply to out-of-state activities performed under employment contracts made in Vermont).

38. 331 U.S. 586 (1947) (South Dakota court required to give full faith and credit to Ohio law permitting six-month contractual limit on suit for denial of insurance benefits, when Ohio assignee of claim of South Dakota fraternal benefit society member sued the Ohio fraternal benefit society).

39. In *Carroll v. Lanza*, 349 U.S. 408, 412 (1955), Justice Douglas indicated that *Pacific Employers Ins. Co. v. Industrial Accident Commn.*, 306 U.S. 493 (1939), had "departed" from *Clapper*. The plurality opinion in *Thomas v. Washington Gas Light Co.*, 48 U.S.L.W. 4930, 4934 n.18 (U.S. June 27, 1980) (No. 79-116), said "*Carroll* . . . for all intents and purposes buried whatever was left of *Clapper* after *Pacific Employers* . . ." *Wolfe* is questioned in R. LEFLAR, *supra* note 32, § 58, at 113-14, and R. WEINTRAUB, *supra* note 32, at 526-30.

40. *E.g.*, *Pacific Employers Ins. Co. v. Industrial Accident Commn.*, 306 U.S. 493 (1939) (accident giving rise to liability occurred within the forum state); *Alaska Packers Assn. v. Industrial Accident Commn.*, 294 U.S. 532 (1935) (contract of employment entered into in forum state though work-related accident took place elsewhere).

*ployers Liability Assurance Corp.*<sup>41</sup> and *Clay v. Sun Insurance Office, Ltd.*<sup>42</sup> And as the final section of this Article will show, an application of a minimum contacts choice-of-law standard to the facts of *Watson* and *Clay* might arguably produce the same results the Supreme Court reached in those cases.<sup>43</sup> The transition to a minimum contacts standard for legislative jurisdiction could therefore be quite smooth.

## II.

The benefits of a new minimum contacts standard for legislative jurisdiction are considerable. The minimum contacts approach to choice of law prevents the unfairness to defendants that is possible under present law, promotes healthier interstate relations, and is relatively easy for judges to apply.

Although legislative jurisdiction cases for the most part speak in terms of power rather than fairness,<sup>44</sup> the importance of fairness has always been apparent to observers, and many,<sup>45</sup> though not all,<sup>46</sup> of the various attempts at formulating choice-of-law limitations doctrine have included fairness as a criterion. From the defendant's perspective, the differing treatment of contacts in the jurisdiction and choice-of-law cases turns things on their head. In the typical jurisdiction case, overreaching on the part of the forum state results at worst in inconvenience and greater expense for the defendant.<sup>47</sup> In the typical conflicts case, however, overreaching on the part of the forum will change the results of the case: if the plaintiff has chosen his forum wisely, the defendant will lose a case he would otherwise

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41. 348 U.S. 66 (1954).

42. 377 U.S. 179 (1964).

43. See text at notes 53-64 *infra*.

44. See, e.g., *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930) ("Texas was, therefore, without power to affect the terms of contracts so made"); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 71 (1954) (discussion of *Dick* in terms of "power").

45. E.g., R. WEINTRAUB, *supra* note 32, at 505; Overton, *supra* note 32, at 170; Reese, *supra* note 8, at 1596-97; Kirgis, *supra* note 32, at 103-04.

46. Professor Leflar's test speaks in terms of "substantial connection." R. LEFLAR, *supra* note 32, § 60, at 116. Professor Gary Simson has advocated a system that obligates reference to the law of the state or states "most interested in influencing the outcome of the case," Simson, *supra* note 32, at 87. My own proposed test makes no reference to fairness. Martin, *supra* note 10, at 211.

47. It is true, of course, that the nonavailability of compulsory process or the expense of transporting witnesses may result in a party presenting a less persuasive case, leading to a loss where there otherwise would have been a victory. But this will be the rare case. Witnesses are generally available if their expenses are paid, making the question once more one of finances. Depositions can remove a substantial part of the problem when witnesses are not likely to be a major factor in deciding whether or not to call them in "big cases."

have won, simply because the forum has asserted its legislative authority.

The due process clause of the fourteenth amendment is supposed to protect the defendant from fundamental unfairness. Thus from the defendant's perspective, it seems irrational to say that due process requires minimum contacts with the forum state merely to hale him into the forum's court while allowing more tenuous contacts to upset the very outcome of the case. Simple fairness seems to demand that when the forum's intrusion is much more destructive of his interests, as when it applies its own law, the forum be held to at least as high a standard as is exacted in the jurisdiction cases.<sup>48</sup>

The argument might be reversed, however, if the matter is viewed from the perspective of the forum. There are few advantages to the forum that flow directly from trying cases with which it has only marginal contacts, and there are obviously costs in entertaining such litigation. On the other hand, the forum sees clear advantages, in terms of effectuating its policies, in applying its own law to a case. Thus while the defendant's view of things might seem to lead logically to the requirement of equal or greater contacts for asserting legislative jurisdiction than for asserting judicial jurisdiction, emphasis on the interests of the forum suggests that *less* contact should be needed to justify imposition of its law.

For several reasons, the forum's perspective should not be the controlling one. First, although this view promotes the interests of the forum in advancing its own policies as reflected in its laws, such has not been the historical basis for the distinction between judicial and legislative jurisdiction. While the results of the judicial jurisdiction and choice-of-law cases discussed above could be explained in terms of fairness to the forum, the cases simply have not done so.

Second, the greater implementation of forum policies achieved

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48. I do not here deal with the problem of the forum's right to impose its own law on the plaintiff, based upon the plaintiff's domicile or a combination of the plaintiff's and the defendant's domicile. Such cases arise in the context, for example, of *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), where the plaintiff and the defendant were domiciled in New York but the accident in question took place in Ontario. New York applied its own law rather than the Ontario guest statute. Since there were contacts with New York other than the domicile of the parties, *Babcock* itself presents no significant constitutional problems. But several variations can be imagined on a case in which an accident takes place in State *A*, the forum is State *B*, and the only contacts between the forum and the parties are party domiciles: (1) the plaintiff was domiciled in State *B* but the defendant was not (the *Dick* case); (2) neither the plaintiff nor the defendant was domiciled in State *B* at the time of the accident but the plaintiff thereafter acquires a domicile there (the *Hague* case discussed in text at notes 65-68 *infra*); (3) the plaintiff was domiciled in State *B* at the time of the accident and the defendant thereafter becomes domiciled there; and (4) both parties acquired domicile in State *B* after the accident.

by the forum under the more relaxed contact requirements in choice-of-law cases is entirely haphazard. The forum's interests are effectuated under such a standard only when factors unrelated to the merits of the case or the interests of the forum provide it with general in personam jurisdiction: when, for example, the defendant is a corporation that fortuitously happens to be carrying on business in the forum unrelated to the plaintiff's claim. In all other cases — where the forum exercises jurisdiction based on minimum contacts or on substantial contacts related to the cause of action — the minimum contacts choice-of-law requirement suggested by this Article would be satisfied. Consideration of the forum's interest therefore further extends the forum's policies only in cases where the defendant is unfortunate enough to have substantial contacts with the forum that are unrelated to the case. This haphazard application of the forum's law is unfair to the defendant and of erratic benefit to the forum.

A final and important argument against the perspective of the forum state — and in favor of the defendant's perspective that would require at least minimum contacts in choice-of-law cases — is that the balance that is being struck is not simply between the forum state and the defendant resisting the application of the forum's law. In any case in which the contacts with the forum state are less than "minimum contacts," the contacts with some other state must be much more substantial. Thus the balance is between the plaintiff and the forum state — whose contacts are slight — on one side and the defendant and the state whose law he invokes — whose contacts are substantial — on the other.

The minimum contacts approach to legislative jurisdiction also has obvious benefits for interstate relations. The present system, whatever its exact bounds, allows a fair degree of grasping on the part of states that push application of their own laws to the limits. Resistance to any tighter limits on unseemly grasping is natural in light of the difficulty of devising a scheme of deciding which single state's law ought to apply. Witness the present inability of the states even to begin to agree on an approach to choice-of-law problems. Federalizing choice of law does not seem to be the answer to state overreaching. The alternative to a system of federal law requiring a particular choice of law is to provide for limitations on the states' choice of law. The minimum contacts approach here suggested is such a limitations approach, and has the advantage of providing more significant limitations than the present approach, thus tending to reduce overreaching.

Finally, a minimum contacts choice-of-law limitation provides a

corollary benefit to judicial administration by replacing a confusing body of case law with a standard with which state courts are already familiar. Long-arm jurisdiction cases are relatively common in state courts, and judges could apply their experience with these cases to the legislative jurisdiction problem. The abundance of long-arm cases also provides a wealth of case law to fall back upon when a given court's own experience is not helpful.

It would be less than open, however, to suggest that the adoption of a minimum contacts test would solve all problems of legislative jurisdiction. Obviously the concept of minimum contacts itself is undergoing a limited reinspection in light of the recent holding of the Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*.<sup>49</sup> Moreover, there are certain areas in which minimum contacts does not seem to be the standard for either jurisdiction or choice of law. Most of these areas involve what could be described loosely as "status" questions — marital status, legitimacy, spendthrift status, and the like. Even as early as *Penmoyer v. Neff*,<sup>50</sup> it was recognized that such issues are not subject to the ordinary rules of jurisdiction.<sup>51</sup> The fact that the courts of the plaintiff's domicile may assert jurisdiction *and* apply their own law in divorce cases demonstrates that at least some status questions get special treatment in the conflicts area as well. Although courts could probably devise similar jurisdiction and choice-of-law standards for these areas where they are not already the same, more attention would have to be paid to the problem.

In one respect, analysis of legislative jurisdiction would have to differ from analysis of judicial jurisdiction even if a minimum contacts standard is adopted for both. It is usually held that long-arm jurisdiction statutes are not "substantive" for purposes of retroactivity and thus may be applied retroactively without constitutional difficulty. For choice-of-law purposes, however, acquisition by a defendant of a new domicile after the operative events giving rise to the plaintiff's claim should not subject the case to the law of the after-acquired domicile.

Finally, a minimum contacts approach to legislative jurisdiction

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49. 100 S. Ct. 559 (1980).

50. 95 U.S. 714 (1878).

51. To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident.

95 U.S. at 734.

would not resolve the difficult issue of when a state law is “procedural” for choice-of-law purposes. A forum state may always apply its own “procedural” law to a case no matter how minimal its contacts with the defendant.<sup>52</sup> There is simply no analogous principle with respect to judicial jurisdiction, nor can there be — a state court either has jurisdiction or does not, and there is no possibility for treating procedural and substantive issues differently in this respect. Thus, the substance-procedure dichotomy will remain an issue in legislative jurisdiction cases, and the minimum contacts test will not assist in solving it.

### III.

The analysis below applies the proposed minimum contacts standard to the facts of two cases already decided by the Supreme Court — *Watson*<sup>53</sup> and *Clay*<sup>54</sup> — and to the facts of a case soon to be reviewed by the Court — *Hague v. Allstate Insurance Corp.*<sup>55</sup> The analysis indicates that, while application of the forum state’s law might be justifiable in *Watson* and *Clay*, the forum state in *Hague* lacked the minimum contacts necessary to apply its law.

The issue in *Watson* was whether or not Louisiana could impose its direct action statute in the case of an insurance contract entered into outside Louisiana by an insured and insurer whose chief places of business were outside Louisiana. The contract contained a clause forbidding direct actions. The insured/tortfeasor sold products in Louisiana, one of which, a Toni home permanent, injured a Louisiana resident. Jurisdiction over the insurance company was based upon the transaction of a substantial amount of business in the state unrelated to the insured’s contract or the tort. The Supreme Court allowed Louisiana to apply its direct action statute. To decide whether or not the minimum contacts standard would yield the same result, we must ask whether jurisdiction over the insurance company could have been upheld if the insurance company had not been

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52. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971). The classification of a matter as substantive or procedural for choice-of-law purposes differs from the same classification made for *Erie* purposes, as illustrated in *Sampson v. Channell*, 110 F.2d 754 (1st Cir.), cert. denied, 310 U.S. 650 (1940), where the federal court had to determine which party had the burden of proof with respect to contributory negligence. The court decided, under *Erie*, that the matter was “substantive” and that state law should govern. But under the law of the state where the court was sitting, the issue was considered procedural for choice-of-law purposes, calling for application of the law of the forum rather than the law of the state where the accident occurred.

53. *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954).

54. *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964).

55. — Minn. —, 289 N.W.2d 43 (1979), cert. granted, 100 S. Ct. 1012 (1980).

transacting the unrelated business in Louisiana. In other words, were there minimum contacts between the state and the insurer? I suggest the facts in *Watson* satisfy the minimum contacts standards. It has been widely assumed that insuring risks within the state would subject one to jurisdiction in cases involving the insurance. The Uniform Interstate and International Procedure Act, for example, provides that "A court may exercise personal jurisdiction over a person, who acts directly or by agent, as to a [cause of action] [claim for relief] arising from the person's . . . contracting to insure any person, property, or risk located within this state at the time of contracting."<sup>56</sup> Since harm caused by the tortfeasor's products was the risk insured against, and since the tortfeasor had an established distribution of products in Louisiana, the insurance company in *Watson* would apparently satisfy the requirement of the Act. Assuming that the Uniform Act is constitutional, the result in *Watson* is therefore consistent with a minimum contacts approach to choice-of-law limitations.

Even if the facts of *Watson* do not satisfy a minimum contacts standard, they take the case within the "procedure" exception discussed above, and thus outside the scope of constitutional limitations on choice of law, including a limitation based on minimum contacts. Although a direct action statute is formally "substantive" insofar as it creates a cause of action that did not previously exist against an insurance company, the reality of the matter is that the company will eventually suffer the same result if its insured is required to suffer a judgment before the insurer is liable.<sup>57</sup> The direct action statute simply hastens that result by collapsing two potential lawsuits into one. If there is any truly substantive impact of the direct action, it arises from the fear that the jury's knowledge that an insurer is involved will increase the likelihood of a plaintiff's verdict or increase the size of the plaintiff's verdict. This is a legitimate business concern on the part of insurance companies, but surely it is within the power of the forum to differ with the conclusion that such fears are well-grounded,<sup>58</sup> or to provide alternative procedural safeguards against such results in the form of appropriate cautionary jury instructions

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56. UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 103(a).

57. *Watson* would have had no trouble maintaining an action against the insured in Louisiana, at least under today's standards. Equipped with a judgment, *Watson* would have had no difficulty in enforcing against the insurance company in Louisiana, by way of garnishment or its equivalent, with jurisdiction based upon the company's transaction of unrelated business in Louisiana. *Shaffer v. Heitner* does not require minimum contacts for the enforcement of a valid judgment. 433 U.S. 186, 210 n.36 (1977).

58. Juries may typically assume that the defendant is insured whether or not insurance is mentioned. Moreover, in the *Watson* case, the tortfeasor, the Gillette Company, was so obvi-

and the like. On the whole, even though the issue may be important to the insurance company, it seems legitimately categorizable as "procedural" and thus not subject to any ordinary choice-of-law restrictions. The minimum contacts approach, with the procedure exception to legislative jurisdiction, would therefore produce the same result as the Court's opinion: the Louisiana direct action law applies in *Watson*.

It is possible, though considerably more difficult, to reconcile the result in *Clay* with a minimum contacts standard for legislative jurisdiction. In *Clay*, the issue was whether or not Florida could apply its statute outlawing contractual clauses that limited the plaintiff's time for bringing suit to a period of less than five years. The plaintiff's claim was under an insurance contract covering the loss of personal property. The insurance had been purchased with a lump-sum payment in Illinois.<sup>59</sup> A contract provision, valid under Illinois law, limited suit to one year after loss. The insured thereafter moved to Florida where the loss occurred. More than a year after the loss, the plaintiff brought suit in Florida. Florida obtained jurisdiction over the insurance company because it conducted unrelated business in the state. Florida applied its statute to void the contractual limitation, and the United States Supreme Court affirmed.<sup>60</sup>

Although it is at best tenuous to claim there were minimum contacts between the defendant and the forum in *Clay*,<sup>61</sup> a court that wanted to preserve the decision in *Clay* while adopting a minimum contacts approach to legislative jurisdiction might argue that the Florida statute was "procedural" for choice-of-law purposes.<sup>62</sup> A state should be able to label an issue "procedural" and apply its own law to that issue as long as that label appears reasonable. Reasonable persons could differ as to whether the Florida law at issue in *Clay* satisfies that standard. The typical "substantive" rule in a choice-of-law case will either create liability or destroy it. The Flor-

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ously itself a "deep pocket" that the notion of bias from the jury's knowledge of insurance is simply untenable.

59. The Supreme Court's opinion does not mention that the payment was lump sum, but the first-round Court of Appeals decision does. *Sun Ins. Office Ltd. v. Clay*, 265 F.2d 522, 524 (5th Cir. 1959), *vacated*, 363 U.S. 207 (1960).

60. 377 U.S. 179 (1964).

61. The insurance clause of the Uniform Interstate and International Procedure Act, quoted in the text at note 56 *supra*, would not by its own terms apply to the case since the risk was not present in the state of Florida at the time of contracting.

62. I have argued elsewhere, however, that a state without contacts with a case should be constitutionally barred from applying its own statute of limitations if the effect is to allow an action that would be barred under the statutes of those states having contacts with the case. Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 WASHBURN L.J. 405 (1980).

ida statute might be viewed as procedural because the time extension it requires merely extends preexisting liability.<sup>63</sup> At a minimum it can be said that the Florida statute lies on the border-line of substance and procedure, far from the core of substantive rights that ought to be preserved in any system of constitutional limitations on choice of law. On this basis, the result in *Clay* is consistent with a minimum contacts standard for legislative jurisdiction accompanied by the procedure exception.<sup>64</sup>

Unlike the result in *Watson* and *Clay*, a minimum contacts standard would require rejection of the forum state's law in *Hague v. Allstate Insurance Co.*<sup>65</sup> In *Hague*, the plaintiff's husband had been killed in a motorcycle accident in Wisconsin, near the Minnesota border. At the time, the decedent was a resident of Wisconsin as was his wife, the plaintiff. Decedent Hague worked across the border in Minnesota although he lived in Wisconsin. The motorcycle, operated by the decedent's son, was registered in Wisconsin. The automobile with which the motorcycle collided was driven by a resident of Wisconsin. The driver of the automobile was uninsured. The Hagues owned three automobiles, each of which was separately insured with the defendant Allstate. Each auto carried uninsured motorist coverage to a limit of \$15,000. After the accident but before suit was brought, the plaintiff moved to Minnesota for reasons unrelated to the suit, and then sued Allstate for \$45,000 in a Minnesota

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63. This fact would clearly not make the issue procedural for *Erie* purposes, *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945), but as indicated in note 52 *supra*, the standards for what is procedural and what is substantive differ for *Erie* and choice-of-law cases. The Supreme Court has also asserted that a state may apply its own statute of limitations, even though the statute would allow an action barred by the statute of the state whose substantive law controls and even though the forum has no basis for applying its own "substantive law," on the apparent reasoning that the statute of limitations may be considered procedural for choice-of-law purposes. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 517 (1953).

64. The proposed rationale for upholding *Clay* would also support overruling *Dick* because the issue in *Dick* was similar. That result is acceptable if it is understood that the general proposition laid down in *Dick* is still valid, but inapplicable to the limitations issue actually involved in that case for reasons stated in the text. The fact that the loss occurred within the forum in *Clay* but not in *Dick* is a tempting distinction but would still not seem to provide minimum contacts with the insurer in *Clay*.

One could also argue that *Clay* involved a waiver of the minimum contacts requirement by the defendant. The Court in *Clay* emphasized that by its own terms the insurance contract covered loss of the property anywhere in the world. Moreover, the contract did not attempt to make the law of Illinois (where the contract was entered) applicable in actions brought outside Illinois. The Court's emphasis on these two points makes it look almost as if the Court viewed the contract as consenting to the application of the law of other states. Obviously as a constitutional matter a defendant may consent to the application of a state's law even if it otherwise has insufficient contacts under any test to uphold application of that law. *Cf.* *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (upholding forum-selection contract clause although the selected forum had no interest in or contact with the controversy).

65. — *Minn.* —, 289 N.W.2d 43 (1979), *cert. granted*, 100 S. Ct. 1012 (1980).

court. Jurisdiction over the insurance company in Minnesota was based upon business transacted by the company in Minnesota unrelated to the claim. Under Wisconsin law, the plaintiff would probably not have been allowed to "stack" the \$15,000 of uninsured motorist coverage on the three automobiles to obtain \$45,000. Under the Minnesota law she would. Minnesota applied its own law to the case despite constitutional objections by the insurance company. The majority opinion of the Minnesota Supreme Court only cursorily discussed the constitutional issue involved.<sup>66</sup> The Supreme Court granted certiorari.<sup>67</sup>

*Hague* should be reversed under the proposed minimum contacts approach to legislative jurisdiction. Applying the minimum contacts approach, it seems clear that Minnesota could not have asserted jurisdiction over Allstate absent the company's unrelated business activities in the state. (It should be noted that the minimum contacts standard assures that a plaintiff's fortuitous post-liability, prelitigation move to the forum will not allow choice of the forum's substantive law since the plaintiff's residence is not part of the minimum contacts analysis.) Nor can *Hague* be rationalized under a procedure exception. The law at issue in *Hague*, unlike the Florida law in *Clay*, is clearly substantive — while the effect of the law in *Clay* was merely to prolong preexisting liability, the effect of the law in *Hague* is to triple preexisting liability.

*Hague* should be reversed even if the present case law is not supplemented by a new minimum contacts standard. *Home Insurance Co. v. Dick*<sup>68</sup> established that the plaintiff's domicile, standing alone, could not support application of the forum's law. Although there are some similarities between *Hague* and *Clay*, one important difference requires that *Hague* be reversed: the loss took place within the forum in *Clay* and outside the forum in *Hague*. The majority in *Hague* noted that the decedent worked in Minnesota, and that the insurer therefore knew that it was insuring against losses in Minnesota to which Minnesota law might be applied, but the fact remains that the accident actually took place in Wisconsin, that Minnesota therefore lacked any meaningful contact with the case, and that Wisconsin substantive law must therefore apply where it conflicts with that of Minnesota. By analogy, the fact that an airplane accident may take place anywhere within several hundred miles of the scheduled route, and that the airline will be subject to the laws of the place

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66. — Minn. at —, 289 N.W.2d at 48-49.

67. 100 S. Ct. at 1012.

68. 281 U.S. 397 (1930).

of the accident wherever it occurs, has never given nearby states carte blanche to apply their own laws in favor of the survivors of their residents.

The present case law, like the proposed minimum contacts approach to legislative jurisdiction, requires reversal in *Hague*. Thus, though *Hague* will provide an opportunity for a fresh look at constitutional limitations on choice of law, it will, unfortunately, merely invite, rather than demand, a choice between a coherent minimum contacts theory and the confused theory of the past.