

ON TEACHING CONFLICTS AND WHY I DISLIKE *ALLSTATE INSURANCE Co. v. HAGUE*

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I. INTRODUCTION

Conflict of laws cases seldom generate much public attention. But like an intercollegiate sports team from a mid-major conference,¹ the subject of conflict of laws finds the national spotlight once each decade or so, and devoted (if long-suffering) fans hope for an impressive showing when their moment arises. *Allstate Insurance Co. v. Hague*² is surely not a serious contender for, as this Symposium ponders, the *worst* Supreme Court decision ever. But for this devotee and teacher of conflicts, the case is the worst of its kind and a missed opportunity on the national stage. And unfortunately, the consequences of that failure linger—in the courtroom and in my classroom.

In *Allstate*, the Court confronted a situation where a state court applied forum law to a set of facts that had essentially no connection to that state. The dubious relevance of forum law forced the Court to confront the principal constitutional underpinnings of conflicts doctrine, namely the Due Process and Full Faith and Credit Clauses. Importantly, these two clauses have profoundly different histories and fundamentally different purposes. Yet the Court reduced the commands of both into one muddled test—frankly, the sort of jumble that one sees on mediocre law exams. My principal criticism, then, is the Court's analytical framework: the collapse of two distinct constitutional questions into one. These clauses deserve better, and so do my conflicts students.

On a lighter note, I challenge all students of Supreme Court jurisprudence to find a more compelling example of this phenomenon. A better example would have to draw upon two clauses of the U.S. Constitution as discrete and distinct as these. And the Court must, within one opinion, conclude that both clauses are controlling and also that both clauses pose the same constitutional question. Whether unprecedented or simply unusual, the combination of the Due Process and Full Faith and Credit Clauses into a single test in conflicts cases is unfortunate and problematic. In this Essay, I will briefly describe the Court's decision in *Allstate* and then outline why the case is a candidate for the Hall of Shame.

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¹ Consider our gracious hosts: the Runnin' Rebels of the University of Nevada-Las Vegas are a consistent performer in the Mountain West athletic conference and an occasional participant on the national stage—winning the 1990 NCAA Men's Basketball Championship, for example.

² *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

II. A BRIEF SUMMARY OF THE CASE

Allstate involved the death of Ralph Hague who died as a result of injuries he sustained in a motorcycle accident in 1974.³ Ralph's son was driving the motorcycle, on which Ralph was a passenger, when an automobile struck the motorcycle from behind.⁴ Ralph and his son were citizens of Wisconsin, as was the negligent driver.⁵ The two vehicles involved in the accident were registered in Wisconsin, and the fatal accident occurred in Wisconsin.⁶

Both the negligent driver and Ralph's son were uninsured.⁷ However, Ralph carried uninsured motorist coverage on each of three vehicles that he owned.⁸ Each of those three policies provided for up to \$15,000 of coverage for injuries caused by the negligence of uninsured motorists, regardless of whether the accident involved the insured vehicle.⁹ Ralph's cars were registered in Wisconsin and were insured by a policy obtained in Wisconsin from a Wisconsin branch of Allstate.¹⁰

The decedent's personal representative, Ralph's widow, Lavina Hague, filed a declaratory judgment action in Minnesota.¹¹ After the accident, she had moved to Minnesota and married a Minnesota resident.¹² In the suit, Lavina sought a declaration that the uninsured motorist coverage on each of the decedent's automobile policies could be "stacked."¹³ Minnesota law allowed an insured to "stack" the three policies; Wisconsin law did not allow stacking.¹⁴ Pursuant to Minnesota law, then, her recovery would be \$45,000 instead of the \$15,000 that Wisconsin law would allow.¹⁵

Notwithstanding the tenuous connection with Minnesota, the Minnesota trial and appeals courts applied forum law.¹⁶ And on certiorari, the United States Supreme Court affirmed. Writing for a plurality of four justices, Justice Brennan stated that in order to be consistent with the Due Process Clause and the Full Faith and Credit Clause, Minnesota must have had a "significant contact or significant aggregation of contacts" with the parties and the occurrence such that the choice of law would not be arbitrary or fundamentally unfair.¹⁷

There were only three facts or contacts that purported to support the application of Minnesota law. First, Allstate did substantial business in the state.¹⁸ This contact was arguably relevant because it minimized any claim by Allstate

³ Hague v. Allstate Ins. Co., 289 N.W.2d 43, 44 (Minn. 1978).

⁴ *Id.*

⁵ *Allstate*, 449 U.S. at 305.

⁶ *Id.* at 305, 316.

⁷ *Id.* at 305.

⁸ *Id.*

⁹ *Id.* at n.3.

¹⁰ *Id.* at 305, 316.

¹¹ *Id.* at 305; Hague v. Allstate Ins. Co., 289 N.W.2d 43, 44 (Minn. 1978).

¹² *Allstate*, 449 U.S. at 305.

¹³ *Id.*

¹⁴ *Id.* at 305-06.

¹⁵ *Id.*

¹⁶ See Hague, 289 N.W.2d at 43.

¹⁷ *Allstate*, 449 U.S. at 313, 320. Justice Stewart took no part in the consideration or decision of the case.

¹⁸ *Id.* at 317-18.

that they would be unfairly surprised as to the content or relevance of Minnesota law. But as applied here, this contact was dubious because the loss had nothing to do with any of Allstate's Minnesota business; surely, say, Nevada law could not be applied to this insurance policy and automobile accident even if Allstate did substantial business there. Second, prior to the accident Mr. Hague had been a member of Minnesota's work force for fifteen years.¹⁹ This contact implicated certain "police power responsibilities" owed to non-resident employees.²⁰ But it is not at all clear why Minnesota's police power responsibilities over non-resident employees extended to insurance policies and automobile accidents unrelated to Mr. Hague's employment status (since he was not commuting to/from work or otherwise engaged in work-related activity at the time of contracting nor at the time of the accident). Third, and finally, Mrs. Hague had moved to Minnesota prior to filing the suit.²¹ But the Court had previously held that in light of the serious potential for forum shopping, a post-occurrence change in residency could not create an interest in the forum sufficient to justify the application of that law.²² Nevertheless, the plurality relied on the "aggregation" of these three contacts to satisfy the constitutional threshold.

Justice Stevens concurred with the plurality's judgment, but emphasized that the Full Faith and Credit and Due Process Clauses were designed to further different policies and required separate analyses.²³ He wrote that the Due Process Clause protected individuals from choice of law determinations that result in unfair surprise;²⁴ and the Full Faith and Credit Clause protected sovereign interests from encroachment by other states.²⁵ Justice Stevens concurred with the plurality because, with regard to the Due Process Clause, Allstate was not unfairly surprised by the application of Minnesota law²⁶ and, as to the Full Faith and Credit Clause, because there was no evidence of encroachment upon Wisconsin's sovereign interests.²⁷

Justice Powell's dissent, which was joined by two other justices, accepted the plurality's statement that the "significant contacts creating state interests" standard governed state choice-of-law determinations under both the Due Process and Full Faith and Credit Clauses.²⁸ However, in applying the test, the dissenters analyzed the case separately under each clause. The dissenters thought the Due Process Clause was satisfied because it was within the reasonable expectation of the parties (before the cause of action accrued) that Minnesota law might apply.²⁹ But the dissenters could not find any interest that

¹⁹ *Id.* at 313–14.

²⁰ *Id.* at 314.

²¹ *Id.* at 318–19.

²² *See, e.g.*, *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930); *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936).

²³ *Allstate*, 449 U.S. at 320.

²⁴ *Id.* at 327.

²⁵ *Id.* at 322.

²⁶ *Id.* at 330.

²⁷ *Id.* at 325.

²⁸ *Id.* at 332.

²⁹ *Id.* at 336.

Minnesota had in the controversy; Minnesota's contacts were either trivial or illegitimate.³⁰

III. THE MISSED OPPORTUNITY

The Minnesota courts were brazen: they applied forum law to determine how a contract that had been entered into by Wisconsin parties in Wisconsin should be interpreted in light of an automobile accident that occurred in Wisconsin involving Wisconsin parties.³¹ But of course the Supreme Court's review focused on the constitutionality rather than the wisdom of that choice-of-law determination.³²

Since the 1940s, the Court has held that the Constitution does not prescribe a single governing law by which the facts giving rise to a lawsuit must be controlled; rather, the Constitution merely polices the set of possible solutions—curbing excesses in state choice-of-law doctrine.³³ There are several clauses of the U.S. Constitution that could be implicated by a choice-of-law analysis,³⁴ but historically, as today, attention has focused primarily on the Due Process Clause³⁵ and the Full Faith and Credit Clause.³⁶

My principal criticism of this case is the combination of the constitutional tests under the Due Process and Full Faith and Credit Clauses into a single test. But *Allstate* is not alone to blame for that synthesis.³⁷ As Justice Brennan noted, the two clauses had imposed different requirements “at one time,” but the Court had since “taken a similar approach in deciding choice-of-law cases under both [clauses].”³⁸ To be sure, a careless slouch had begun prior to *Allstate*; but the merger was not fully consummated and *Allstate* could have

³⁰ *Id.* at 337.

³¹ James Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 887 (1980). The Minnesota courts are notorious for applying forum law in extreme situations. See Linda Silberman, *Can the State of Minnesota Bind the Nation? Federal Choice-of-Law Constraints after Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103, 112 (1981); Harold P. Souterland, *Sovereignty, Value Judgments, and Choice of Law*, 38 BRANDEIS L.J. 451, 486 (2000).

³² This is a point that Justice Brennan emphasized at the outset of his opinion. See *Allstate*, 449 U.S. at 307 (“It is not for this Court to say whether the choice-of-law analysis . . . is to be preferred or whether we would make the same choice-of-law decision if sitting as the Minnesota Supreme Court. Our sole function is to determine whether the Minnesota Supreme Court's choice of its own substantive law in this case exceeded federal constitutional limitations.”).

³³ See generally Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271 (1996).

³⁴ This list includes the Commerce Clause, the Privileges and Immunities Clause of Article IV, and the Equal Protection Clause. See James A. Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 185–86 (1976).

³⁵ U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

³⁶ U.S. CONST. art. IV, § 1.

³⁷ See *Watson v. Emp'r Liab. Assurance Corp.*, 348 U.S. 66, 70–74 (1954) (implying that no true distinction existed in constitutional choice of law between the requirements imposed by the Due Process Clause and the Full Faith and Credit Clause); *Carroll v. Lanza*, 349 U.S. 408 (1955) (concluding that both clauses were satisfied if the forum state has sufficient contacts with the litigation).

³⁸ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981) (citing *Alaska Packers Assn. v. Indus. Accident Comm'n*, 294 U.S. 532, 549–50 (1935)).

reversed the regress.³⁹ And as the first constitutional choice of law case that the Court had heard in seventeen years, the case presented a unique opportunity to articulate the dual constitutional underpinnings of choice of law theory.⁴⁰ Moreover, the relative simplicity of the case would have allowed the Court to outline certain fundamental principles while postponing any refinements or elaboration for future, more difficult cases.⁴¹

Yet Justice Brennan demurred, articulating the following merged standard:

In deciding constitutional choice-of-law questions, whether under the Due Process Clause or the Full Faith and Credit Clause, this Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation. 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.⁴²

None of the members of the Court disagreed with Justice Brennan's formulation of that test.⁴³ Moreover, this test was embraced by a clear majority of the Court four years later, and continues today.⁴⁴

The Court's conclusion in *Allstate* that the three contacts enumerated above satisfied this test was unpersuasive and unpopular.⁴⁵ But more disturbing than that particular dubious disposition is the case's legacy: the suggestion that the Due Process and Full Faith and Credit Clauses address the same concerns and thus can be consolidated into a single constitutional inquiry.

In fact, the two clauses are designed to protect very different concerns. Consider, first, that the Due Process Clause focuses on the relationship between the state and the individual: no "state" can deprive any "person" of certain

³⁹ *Carroll*, 349 U.S. at 413 (impliedly forbidding "any policy of hostility to the public Acts" of another state); *Nevada v. Hall*, 440 U.S. 410, 424 n.24 (1979) (observing that actions "pose[d] no substantial threat to our constitutional system of cooperative federalism"); see also *Watson*, 348 U.S. at 73.

⁴⁰ See generally Gene R. Shreve, *In Search of a Choice-of-Law Reviewing Standard — Reflections on Allstate Insurance Co. v. Hague*, 66 MINN. L. REV. 327 (1982).

⁴¹ See Shreve, *supra* note 40, at 340 n.64; see also HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 156-57 (10th ed. 1958); EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 4, 8-9 (1948).

⁴² *Allstate*, 449 U.S. at 308 (citations omitted) (footnotes omitted).

⁴³ See *id.* at 320 (Stevens, J., concurring); *id.* at 332 (Powell, J., dissenting); Courtland H. Peterson, *Particularism in the Conflict of Laws*, 10 HOFSTRA L. REV. 973, 1009 (1982).

⁴⁴ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985).

⁴⁵ See, e.g., Lea Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315, 1335 (1981); Jack Davies, *A Legislator's Look at Hague and Choice of Law*, 10 HOFSTRA L. REV. 171 (1981); Frederic L. Kirgis, Jr., *A Wishful Thinker's Rehearing in the Hague Case*, 10 HOFSTRA L. REV. 1059 (1982); P. John Kozyris, *Reflections on Allstate—The Lessening of Due Process in Choice of Law*, 14 U.C. DAVIS L. REV. 889 (1981); James A. Martin, *The Constitution and Legislative Jurisdiction*, 10 HOFSTRA L. REV. 133, 141-48 (1981); Willis L.M. Reese, *The Hague Case: An Opportunity Lost*, 10 HOFSTRA L. REV. 195 (1981); Silberman, *supra* note 31, at 103; Aaron D. Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149 (1981); Arthur T. von Mehren & Donald T. Trautman, *Constitutional Control of Choice of Law: Some Reflections on Hague*, 10 HOFSTRA L. REV. 35 (1981).

interests without due process of law.⁴⁶ In the context of a choice-of-law determination, then, one would expect the Due Process Clause to prohibit a state from applying a law that would unfairly compromise the litigants' interest in having a fair adjudication of their rights.

By contrast, the Full Faith and Credit Clause focuses on the federal interest in ensuring that "each State" gives proper respect to the official acts of "every other State."⁴⁷ The deference is to the sovereignty of the other state, not to the personal rights of the parties.⁴⁸ The purpose of the Clause is to control excessive provincialism.⁴⁹ In the context of a choice-of-law determination, then, one would expect the Full Faith and Credit Clause, if applicable, to require some sort of appreciation for and evaluation of the sovereign interests of other States.⁵⁰

When I teach Conflicts, I emphasize the variety of options available to the courts to address (separately) each of these constitutional concerns. With regard to issues of fairness under the Due Process Clause, for example, the controlling variables could focus on notice ranging from actual to constructive, foreseeability could be examined *ex ante* or *ex post*, the standard could be more protective of plaintiffs or more forgiving of defendants, the inquiry could be subjective or objective, and so forth. And with regard to issues of state sovereignty under the Full Faith and Credit Clause, there could be one of any number of balancing tests from which the court could choose; or, more aggressively, the Court could establish controlling principles to locate multi-jurisdiction events within a single state for purposes of recognizing the dominant sovereign interest.

But rather than choosing from among the menu of options for each of those clauses, the plurality suggested that there was only one test, and that the Constitution does not interfere with the choice of law application unless the

⁴⁶ Section 1 of the Fourteenth Amendment provides, in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1; *see also* *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966) (The Clause "protect[s] a person against having the Government impose burdens upon him except in accordance with the valid laws of the land."); *Martin*, *supra* note 34, at 192.

⁴⁷ Article IV, § 1 provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1. *See generally* *Martin*, *supra* note 34, at 192.

⁴⁸ *See, e.g.*, *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (describing the purpose of the Full Faith and Credit Clause as the prevention of "parochial entrenchment on the interests of other States").

⁴⁹ *See* BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 199–200 (1963); William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 34–41 (1963); James D. Sumner, Jr., *The Full-Faith-and-Credit Clause—Its History and Purpose*, 34 OR. L. REV. 224, 242 (1955).

⁵⁰ "[T]he fact that conflicts cases exist in substantial numbers is a persistent reminder that despite knowledge, shared experience, and dialogue, there really are substantial differences of opinion about what society's problems are and how they ought to be solved." Southerland, *supra* note 31, at 482 (footnote omitted). *See generally* JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* §§ 29, 33, 35 (The Lawbook Exchange 2001) (2d ed. 1841) (implying that in order for there to be "justice" in conflicts cases, the method for making the choice-of-law decision ought to pay appropriate deference to the sovereign law-making power of other states).

state whose law is being applied “had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.”⁵¹ The combination of two clauses into a single test would merely be an unfortunate complicator—another obfuscatory hurdle—for my diligent students, who treat Constitutional provisions seriously, if the mandates of both clauses were fully incorporated. Alas, such is not the case.

In *Allstate*, the “significant aggregation of contacts” was (i) the defendant’s substantial business in the state of Minnesota; (ii) the deceased’s work history in the state; and (iii) the nominal plaintiff’s post-accident move to the state. With the first two of these contacts, Justice Brennan appears to be ensuring the due process component: some level of *fairness* to the *defendant*. In other words, because Allstate subjected itself to Minnesota’s laws in other contexts, and because Allstate knew that Mr. Hague’s commute was regularly taking him into Minnesota, Allstate could reasonably have expected (*ex ante*) to be subject to Minnesota law. Indeed, case law on this point since has focused on whether the parties could reasonably have expected that that law would be applied.⁵² Although the quantum of due process protection is very modest in light of the fact that the other business contexts and the commute had nothing to do with this particular incident, still, the Court is engaged in the sort of inquiry that resembles due process.

But where is the appreciation for the sovereign interests of the State of Wisconsin? Justice Brennan used the words “creating state interests” in formulating his test and he obliquely concluded that the three enumerated contacts gave *Minnesota* some interest in the matter.⁵³ This was a plausible conclusion since the nominal plaintiff had moved to Minnesota after the accident. Although the Court had previously rejected this as a sufficient basis for the application of forum law,⁵⁴ here that contact could also be aggregated with Minnesota’s interest in regulating matters involving non-resident employees.⁵⁵ One can fairly question the conclusion as profoundly dubious, but as far as a conceptual framework is concerned, there is some consideration of *Minnesota*’s interest in adjudicating the matter.

So, after evaluating Minnesota’s interest, then, what did Justice Brennan require by way of consideration of Wisconsin’s interest? Or, put another way, what does the Full Faith and Credit Clause require by way of deference to the competing interests of the sister sovereign? Unfortunately, there was absolutely no mention—much less thoughtful consideration or balancing—of the interests of Wisconsin. In effect, then, other than to ensure that the forum state has some

⁵¹ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981).

⁵² *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985) (“When considering fairness in this context, an important element is the expectation of the parties.”).

⁵³ *Allstate*, 449 U.S. at 308.

⁵⁴ *See, e.g., Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930); *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936).

⁵⁵ *See Allstate*, 449 U.S. at 309 (Brennan, J.) (distinguishing cases where “the selection of forum law rested exclusively on the presence of one nonsignificant forum contact”) (emphasis added).

interest—with *some* being a very modest qualifier here—the Full Faith and Credit Clause plays no role in policing state choice of law determinations.⁵⁶

A meaningful role for the Full Faith and Credit Clause is conspicuously absent in the combined test. This is an unfortunate result for students and for litigants who must contend with the Full Faith and Credit Clause, in this context, as an empty promise. *Allstate* was a missed opportunity for the Court to clarify whether the Clause (really) applies and, if so, what it requires. To say that it merely requires what the Due Process Clause also requires is misleading, as the two clauses are very different: notions of fairness are not implicated in issues of state sovereignty.⁵⁷

The absence of a meaningful role for the Full Faith and Credit Clause is also highly consequential. Central to our political infrastructure is the notion of state sovereignty, which “presupposes that each state will be permitted to effectuate, to the extent consistent with the identical right of every other state, the policies it adopts.”⁵⁸ Through choice of law, among other disciplines, the relationship between states in our political system is defined. A robust Full Faith and Credit Clause could ensure that the regulatory rights and interests of states are not undermined by application of the “wrong” law. An anemic Full Faith and Credit Clause does not interfere with a state’s determination of what law should apply. With regard to the latter, the *Allstate* decision can be celebrated as a victory for states’ rights.⁵⁹ But in this context, respect for Minnesota’s state rights (to apply its own law) comes at the expense of Wisconsin’s state rights (to have its own law applied to contracts entered into and torts that occur within its state boundaries).

One may fairly query why the Full Faith and Credit Clause was not removed from the choice of law analysis altogether, as occurred with personal jurisdiction, one year after *Allstate*. With personal jurisdiction, the contemporary concern is about due process and *fairness* to the *parties*, with little or no regard for the regulatory interests of the sovereign state that is deprived of jurisdiction.⁶⁰ I think this development, too, is unfortunate because of its corrosive effect on the regulatory interests of sovereign states; however, I was

⁵⁶ Edith Freidler, *Party Autonomy Revisited: A Statutory Solution to a Choice-of-Law Problem*, 37 U. KAN. L. REV. 471, 500 (1989) (describing how the court would no longer weigh interests; rather it would merely find them); Robert A. Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59, 74 (1981) (“[S]ince all but Justice Stevens said the constitutional tests for applying a state’s law under due process and full faith and credit are coextensive, it is reasonable to assume that ordinarily full faith and credit will not be an independent constitutional limitation on choice of law.”); Russell J. Weintraub, *Who’s Afraid of Constitutional Limitations on Choice of Law?*, 10 HOFSTRA L. REV. 17, 34 (1981) (noting that, after *Hague*, “[i]f a choice of law does not outrageously surprise one of the parties, it will rarely be held unconstitutional”); W. Clark Williams, Jr., *The Impact of Allstate Insurance Co. v. Hague on Constitutional Limitations on Choice of Law*, 17 U. RICH. L. REV. 489, 496 (1983).

⁵⁷ Martin, *supra* note 34, at 195–96 (arguing that full faith and credit principles are founded on territoriality and sovereignty, not fairness).

⁵⁸ Baxter, *supra* note 49, at 24.

⁵⁹ See Robert A. Leflar, *Choice-of-Law: States’ Rights*, 10 HOFSTRA L. REV. 203 (1981).

⁶⁰ See *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinée*, 456 U.S. 694, 702–03 n.10 (1982) (The Due Process Clause “is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.”).

invited to criticize only one Supreme Court case, not two. But one must at least credit the Court for its transparency in formally removing the Full Faith and Credit Clause from the personal jurisdiction analysis. Why not do the same here, rather than cite the clause and yet render it toothless?

Presumably the Full Faith and Credit Clause remains formally a part of the choice of law analysis because the Court wanted the Clause to play some role . . . someday.⁶¹ The Court may have left the Full Faith and Credit Clause in the consolidated test as something of a placeholder—a shell until there is a better technique for implementing its mandate. Developing an alternative to the perfunctory *Allstate* test is, indeed, tricky.⁶² The Court did not want to return to a constitutionally mandated choice of law mode, in which a single transactional contact is pre-selected for each category of case, then imposed inflexibly on the states as the requisite choice of law rule.⁶³ And yet introducing some sort of test that required a balancing of state interests would have been difficult and subject to criticism.⁶⁴ But accepting this daunting challenge was the opportunity in this “big game.” And we lost, cowardly.

⁶¹ Choice of law determinations pose a much greater threat to the integrity of the federal system than does the exercise of personal jurisdiction. The goal of interstate allocation of judicial business through personal jurisdiction doctrines differs from the goal of interstate allocation of the states’ substantive policies sought to be achieved by choice of law rules. E.g. Richard W. Mattson, *Allstate Insurance Company v. Hague: Abandonment of Meaningful Constitutional Controls on Choice of Law*, 70 KY. L.J. 131, 148 (1981–1982); Kirt O’Neill, *Contractual Choice of Law: The Case for a New Determination of Full Faith and Credit Limitations*, 71 TEX. L. REV. 1019, 1038 (1993).

⁶² See generally Andreas F. Lowenfeld & Linda J. Silberman, *Choice of Law and the Supreme Court: A Dialogue Inspired by Allstate Insurance Co. v. Hague*, 14 U.C. DAVIS L. REV. 841 (1981); von Mehren & Trautman, *supra* note 45, at 38.

⁶³ The Court had tried something like this with cases such as *Bradford Electric Co. v. Clapper*, 286 U.S. 145 (1932), with little success.

⁶⁴ The Court had tried something like this with cases such as *Alaska Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532 (1935), with little success.