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COULD A STATE COURT'S SELECTION OF ANOTHER STATE'S SUBSTANTIVE LAW EXCEED CONSTITUTIONAL LIMITATIONS ON CHOICE OF LAW?

CHARLES M. THATCHER†

I. INTRODUCTION

On those infrequent occasions when the Supreme Court of the United States has addressed limitations that the Constitution imposes on a court's power to choose the law governing resolution of issues arising in multistate litigation, the Court has never reversed a lower court's decision to apply the substantive law of another state.[1] Almost all of the Supreme Court cases treating constitutional limitations on choice of law have involved possible *overreaching* by courts that applied forum law rather than the conflicting law of another state or nation.[2] This article considers the rare case in which a litigant challenges a state court's decision to apply the substantive law of another state rather than the conflicting law of the forum, a situation that has been described as *underreaching* by the state court.[3] The conclusion that a court's choice of another state's substantive law might be unconstitutional when that law conflicts with the forum's own substantive law is, at the very least, counter-intuitive.

Most of the Supreme Court Justices agreed in *Allstate Insurance Co. v. Hague*[4] that the two principal sources of constitutional limitations on choice of law are the Full Faith and Credit Clause[5] and the Due Process Clause.[6] A plurality of the Court in *Hague* announced a single standard which satisfies the restrictions that each clause imposes on choice of law:[7] "[F]or a State's

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1. *See, e.g.*, Young v. Masci, 289 U.S. 253, 256, 261 (1933) (upholding New Jersey court's application of New York law imposing vicarious liability on bailors of automobiles for injuries caused by the negligence of bailees under a tort characterization of the case).

2. Lea Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315, 1316 n.9, 1324 n.52 (1981) (characterizing as "constitutionally irrelevant" the question whether a "state intend[s] to exercise *less than* its constitutional share of power") (emphasis added); Robert A. Leflar, *Choice of Law: State's Rights*, 10 HOFSTRA L. REV. 203, 206 (1981) (noting situations in which the forum court might choose to apply the law of another state).

3. Brilmayer, *supra* note 2, at 1316 n.9.

4. *See* 449 U.S. 302, 308 (1981); *id.* at 320 (Stevens, J., concurring); *id.* at 332 (Powell, J., dissenting).

5. U.S. CONST. art. IV § 1 ("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.").

6. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

7. *Hague*, 449 U.S. at 308 n.10, 312-13 ("This Court has taken a similar approach in deciding choice-of-law cases under both the Due Process Clause and the Full Faith and Credit Clause.").

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."[8] Yet, as concurring Justice Stevens opined in *Hague*, "the [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 upon the legitimate interests of another State."[9] Consistent with that opinion, a state court's application of the substantive law of *another state* could not possibly "infring[e] upon the legitimate interests of [that other] State."[10] Quite the contrary.[11] Moreover, if satisfaction of the Full Faith and Credit Clause necessarily insulates the forum court's decision to apply some other state's law from a due process challenge, then a state court's application of the substantive law of another state would seem to be constitutionally permissible.

The standard which a majority of the Court's membership endorsed in *Hague*[12] and which continues to govern constitutional limitations on choice of law[13] is *permissive*. The *Hague* test has been described as requiring only "minimal constitutional scrutiny"[14] under a "rational basis" standard of review;[15] it fosters an attitude of "judicial abstention"[16] under an "'anything goes' approach"[17] in reviewing lower court decisions on choice of law. The ease with which the proponent of a state court's choice of law can satisfy the *Hague* test[18] makes it unlikely that a state court's application of the substantive law of

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8. *Id.* at 312-13.

9. *Id.* at 323 (Stevens, J., concurring) (emphasis added).

10. *Id.*

11. Gene R. Shreve, *Interest Analysis as Constitutional Law*, 48 OHIO ST. L.J. 51, 77 (1987) ("It is difficult to see how giving the law of a sister state too much play does any violence to sister-state interests.").

12. *Hague*, 449 U.S. at 312 (plurality opinion of Justice Brennan, joined by Justices White, Marshall, and Blackmun) (quoted in text accompanying note 8, *supra),* and 332 (dissenting opinion of Justice Powell, joined by Chief Justice Burger and Justice Rehnquist).

13. *See generally* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Sun Oil Co. v. Wortman, 486 U.S. 717 (1988).

14. RUSSEL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 635 (5th ed. 2006). *See also* Louise Weinberg, *The Place of Trial and the Law Applied: Overhauling Constitutional Theory*, 59 U. COLO. L. REV. 67, 69 (1988) [hereinafter Weinberg I]; Terry S. Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness Over Comity*, 62 N.Y.U. L. REV. 651, 686, 714 (1987); Robert A. Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59, 61 ("[T]he Constitution should be interpreted as placing only the most minimal limitations on the power of state courts to make choice-of-law decisions."); Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 447(1982) [hereinafter Weinberg II].

15. Weinberg I, *supra* note 14, at 104; Louise Weinberg, *Conflicts Cases and the Problem of Relevant Time: A Response to the* Hague *Symposium*, 10 HOFSTRA L. REV. 1023, 1029 n.29 (1982) [hereinafter Weinberg III]; Sedler, *supra* note 14, at 77 (noting the test under "the purportedly less restrictive rational basis standard" is whether "[t]he restriction in question [is] reasonably related to the advancement of a legitimate governmental interest").

16. Sedler, *supra* note 14, at 67-68.

17. Aaron D. Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149, 169 (1981).

18. Andreas F. Lowenfeld, *Three Might-Have-Beens: A Reaction to the Symposium on* Allstate Insurance Co. v. Hague, 10 HOFSTRA L. REV. 1045, 1046 ("[T]he burden is on those who would invoke

another state could ever be held to exceed the modest limitations the Constitution imposes on choice of law.

When a state court chooses to apply another state's law, rather than the conflicting law of the forum, based on the court's straightforward application of a traditional choice of law rule, the prospect of mounting a successful constitutional challenge is even dimmer.[19] Consider a hypothetical breach of contract action in which a state court chooses the substantive law of another state by applying the forum's traditional choice of law rules, under which the contractual capacity of a party is determined in accordance with the local law of the state where the contract was made,[20] and a contract formed by the process of offer and acceptance is made in the state where an offeree accepts the offer.[21] Even if the choice of the other state's substantive law would appear to produce an *unreasonable* result from an intuitive perspective, "the Supreme Court has never clearly [rejected an] unreasonable [result] reached [by the application of a] traditional choice of law rule[,]" even though application of such an unreasonable law "is quite at odds with the Court's own pronouncements."[22]

In its initial treatment of the subject, the Supreme Court appeared to take the position that application of the substantive law of the state where a contract was made[23] or modified[24] was a constitutional imperative under the Due Process Clause of the Fourteenth Amendment in order to protect freedom of contract.[25] Although the Court has long since repudiated that position, it has never overturned a state court's application of the substantive law of the place where an unmodified contract was made.[26]

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the Constitution against choice of law by state courts (or by federal courts in diversity cases) to show outrageous or arbitrary action.").

19. WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 312 (3d ed. 2002) ("Traditional choice-of-law methods of analysis such as the First Restatement . . . may be used with little fear of offending the Constitution."); Weinberg I, *supra* note 14, at 70 & n.12 ("A virtual immunity from even minimal scrutiny, for example, seems to be enjoyed by the Bealeian choice, however irrational.") ("By the 'Bealeian' choice I mean . . . a choice made through one of the traditional, generally territorialist, jurisdiction-selecting choice-of-law rules advocated by Professor Beale . . . a Reporter for the 1934 RESTATEMENT OF CONFLICT OF LAWS."); Leflar, *supra* note 2, at 207 (noting that in contract cases where a court still might automatically apply "the law of the place where the contract was made . . . the *Hague* decision will have little effect").

20. RESTATEMENT OF CONFLICT OF LAWS § 332(a) (AM. LAW INST. 1934) (stating that "[t]he law of the place of contracting determines" the capacity to enter into a contract).

21. *Id.* § 325 ("In the case of an informal bilateral contract, the place of contracting is where the second promise is made in consideration of the first promise.").

22. Weinberg I, *supra* note 14, at 71.

23. *See* N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357, 387 (1918); Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143, 150 (1934).

24. *See* N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914); Mut. Life Ins. Co. of N.Y. v. Liebing, 259 U.S. 209, 213 (1922).

25. *Dodge,* 246 U.S. at 377.

26. Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) (disparaging the Court's former willingness to give controlling constitutional significance to "an isolated event"); *id.* at 315 n.21 (describing as "hoary" the traditional choice of law rule known as *lex loci contractus*, under which issues concerning the validity of a contract are governed by the local law of the place where the alleged contract was made).

Application of the *Hague* test[27] to the facts of the following hypothetical case supports the proposition that a state court's decision to apply another state's substantive law when that law conflicts with forum law could be unconstitutional under the due process clause. That conclusion is warranted even though choice of the other state's law does not violate the Full Faith and Credit clause and even though the court makes that choice by applying the traditional rule that questions of capacity to contract are resolved under the local law of the state where the contract was made. If that proposition is sound, it supports the proposition that the Due Process Clause is the exclusive source of constitutional limitations on choice of law in such a case.[28]

II. THE HYPOTHETICAL CASE OF *PI V. DELTA*

Gerry Pi brought suit against Dawn Delta in a State F[orum] court seeking specific performance of a contract for the sale of land. Pi and Delta are both lifelong domiciliaries and citizens of State F, where they have always resided in the city of Feffington. When the contract was made, Pi was a fifty-year-old real estate tycoon, and Delta was a twenty-year-old college student majoring in veterinary science at Faber University in Feffington. Delta had been employed for the preceding two years under annual contracts as an assistant at a local veterinary clinic. Delta is an only child. Her mother died when Delta was fifteen, and her father died shortly after Delta's twentieth birthday. Delta's father had been a wealthy industrialist, and Delta inherited most of the assets in her father's estate, including the family mansion in Feffington. One month after Delta's father died, Pi contacted Delta and asked whether she would be willing to sell the mansion to Pi. Delta responded that such a sale was possible. Lawyers for the parties conducted extensive negotiations in Feffington for Pi's purchase of the property from Delta. At the conclusion of the negotiations on March 1, Delta's lawyer delivered to Pi an elaborate writing that Delta's lawyer had drafted and Delta had signed. The writing communicated Delta's formal offer to sell the property to Pi for a price of one million dollars and invited Pi to accept by signing and dating his copy of the written offer and mailing it to Delta at the mansion within thirty days. If Pi accepted Delta's offer, the parties understood that the closing was to take place at the mansion. Six days later, Pi decided to accept Delta's offer. While Pi was at his office in Feffington on the morning of March 7, Pi signed and dated Delta's signed written offer in the blanks marked "Acceptance" and "Date." Pi enclosed this written acceptance in a stamped envelope and addressed it to Delta at her mansion. Pi put the envelope in his brief case, intending to mail it in Feffington later that day. Pi forgot to do so, however, before he drove two hundred miles west across State F early that afternoon to attend a wedding in Fexarkana, a city bisected by the

27. *See supra* note 8 and accompanying text.

28. *See* Kogan, *supra* note 14, at 656 (advocating priority of Due Process concerns with fairness over Full Faith and Credit concerns with comity in deciding whether a court's choice of law is constitutional).

State F-State X border. Pi realized during the course of his journey that he had not yet mailed his signed written acceptance of the offer to Delta. When he arrived in Fexarkana, Pi removed the envelope containing the written agreement from his brief case and deposited it in a mailbox. Unbeknownst to Pi, the mailbox happened to be located on the State X side of the F-X border. Delta received Pi's written acceptance in Feffington two days later. When Pi returned to Feffington after the wedding, he telephoned Delta to schedule the closing. During the course of that conversation, Delta informed Pi that she had changed her mind and was unwilling to sell the family mansion after all. Delta's lawyer had examined the envelope containing Pi's written acceptance and noticed that the envelope bore a State X postmark. Although the age of majority in State F is nineteen, the age of majority in State X is twenty-one. Delta's lawyer advised her that because Pi had dispatched his written acceptance of Delta's offer in State X, the contract had been *made* in State X, and therefore Delta could disaffirm it on grounds that she was a minor under the substantive law of State X. Delta accordingly refused to perform the contract, and Pi promptly filed suit against her in a State F court seeking specific performance for breach of the land sale contract.

At a preliminary hearing before the State F trial court, Delta's lawyer made a motion for summary judgment, arguing that the contract was voidable by Delta on grounds of minority. The parties stipulated that Pi had deposited his written acceptance of Delta's signed offer in a mailbox that was located in State X. Under the common law rule of both States, State X was the place where the contract had been made, because it was the place where the last, or the "principal,"[29] event necessary to conclude the offered bargain had occurred.[30] Under the traditional choice of law rule still prevailing in State F, the local substantive law of the place where a contract is made determines each party's capacity to enter into a contract.[31] Delta was twenty years old when the contract was made. She therefore lacked full contractual capacity under the substantive

29. RESTATEMENT OF CONFLICT OF LAWS § 311 cmt. d (AM. LAW INST. 1934) (stating that "in determining the place of contracting, the forum ascertains the place in which, under the general law of Contracts, the principal event necessary to make a contract occurs").

30. *Id.* § 326(b) ("When an offer for a bilateral contract is made in one state and an acceptance is sent from another state to the first state in an authorized manner . . . the place of contracting is the state from which the acceptance is sent.").

31. *Id.* §§ 332(a), 333. In a preliminary note on "The Nature of the Subject" addressed in Chapter eight of the Restatement (Second) of Conflict of Laws (Contracts), the drafters note that under the first Restatement, "issues of validity are determined by the local law of the place . . . where occurred the last act necessary under the forum's rules of offer and acceptance to give the contract binding effect, assuming, hypothetically, that the local law of the place where the act occurred rendered the contract binding." RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 8, intro. note (AM. LAW INST. 1971). The assumption is consistent with the rule stated in section 333 of the first Restatement that "[t]he law of the place of contracting determines the capacity to enter into a contract." RESTATEMENT OF CONFLICT OF LAWS § 333 (AM. LAW INST. 1934). If one party to a contract lacks that capacity, the contract may be *voidable* by the incapacitated party, but the contract is still *valid*. The incapacitated party is empowered to enforce the contract against a party having full contractual capacity. *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 (AM. LAW. INST. 1981) ("A voidable contract is one where one or more parties have the power by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.").

law of State X, and she manifested her intention to exercise the power to avoid the contract by disaffirming it at the preliminary hearing before the State F trial court.

In opposition to Delta's motion, Pi alleged that when he accepted Delta's offer, he believed he was acting in State F, because he had been unaware that he was on the State X side of the F-X border when he deposited the written acceptance in the Fexarkana mailbox. Pi's lawyer urged the State F trial court to apply the substantive law of State F, because the only contact State X had with the parties and the transaction was that Pi had unknowingly been in State X when he deposited the written acceptance of Delta's offer in the mailbox; all of the other possibly relevant contacts were with State F. The list of relevant contacts with State F include: (1) both parties are lifelong citizens, domiciliaries, and residents of State F; (2) the real property that is the subject of the contract is located in State F; (3) the parties' negotiations were conducted in State F; (4) Delta's lawyer drafted the written offer in State F; (5) Delta made the offer to Pi in State F when her lawyer delivered the writing which communicated the terms of the proposed bargain to him; (6) Pi signed and dated his written acceptance of Delta's offer in State F; (7) Delta received Pi's written acceptance in State F; (8) Delta purported to disaffirm the contract in State F; and (9) the anticipated closing was to be held in State F. Neither party had any reason to foresee the possibility that a court might apply the substantive law of State X to these facts. Pi's lawyer therefore urged the State F trial court to apply the substantive law of State F, under which Delta was an adult who had full contractual capacity when the contract was made.

Pi's lawyer also made several other arguments in support of that position. He urged the court to repudiate the choice of law rules prescribed in the first Restatement of Conflict of Laws and to adopt in their place one of the modern, policy-based approaches to resolve the choice of law issue. Under any one of these approaches, the validating law of State F would apply in these circumstances. Even if the State F trial court felt constrained by authoritative State F case law to apply the traditional choice of law rules endorsed in the first Restatement of Conflict of Laws, Pi's lawyer argued that the court should apply the substantive law of State F on several grounds. First, the case should be characterized as sounding in real property law rather than in contract law, and the substantive law of State F should apply on grounds that the land which is the subject of the contract is located in State F. Even if the court decided to characterize the case as sounding in contract, Pi's lawyer urged the court to apply the "whole" law of State X, not just State X's local law under which Delta lacked contractual capacity. State X courts resolve choice of law issues in accordance with the "most significant relationship" approach endorsed in the Restatement (Second) of Conflict of Laws. Under section 198(2) of the Second Restatement, "[t]he capacity of a party to contract will . . . be upheld if [s]he has such capacity under the local law of the state of [her] domicil."[32] Moreover,

32. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 198(2) (AM. LAW INST. 1971).

even if the State F court refused to apply State X's choice of law approach, it should still refuse to apply the State X law governing incapacity to contract on grounds of minority because application of that law is contrary to the strong public policy of State F. Finally, Pi's lawyer argued that choice of the substantive law of State X would be unconstitutional under the Due Process Clause of the Fourteenth Amendment.

Delta's lawyer responded by arguing that the State F trial court was obligated under the doctrine of *stare decisis* to apply the traditional choice of law rules endorsed in the first Restatement of Conflict of Laws, as the State F Supreme Court has always applied those rules in the past and has never indicated an inclination to adopt in their place any of the policy-based approaches to resolving choice of law issues. Applying pertinent sections of the first Restatement to the stipulated facts, the State F court must choose to apply the local substantive law of State X, under which Delta lacked the capacity to contract when the contract was made. State X is "the place of contracting" under the first Restatement.[33] Pi mailed his written acceptance of Delta's signed offer while Pi was in State X, thereby performing the last act necessary for the formation of the contract; the substantive law of State X therefore governs the issue whether Delta has the capacity to enter into the contract.[34] The case is properly characterized as sounding in the law of contract rather than in the law of real property, because a contracting party's "capacity to make a contract for the transfer of land is governed by the law of the place of contracting" rather than "the law of the state where the land is[.]"[35] In applying the law of State X, the State F court applies State X's *local* law only; it does not apply the "whole" law of State X, including State X's choice of law approach.[36] The State F court's choice of State X's local law, under which Delta lacked full contractual capacity

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33. RESTATEMENT OF CONFLICT OF LAWS § 311 (AM. LAW INST. 1934) ("The law of the forum decides as a preliminary question by the law of which state questions arising concerning the formation of a contract are to be determined, and this state is . . . called the 'place of contracting.'"); *id.* § 325 ("In the case of an informal bilateral contract, the place of contracting is where the second promise is made in consideration of the first promise.").

34. *Id.* § 332(a) ("The law of the place of contracting determines the validity and effect of a promise with respect to . . . capacity to make the contract."); *id.* § 333 ("The law of the place of contracting determines the capacity to enter into a contract."). *See also* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 n.11 (1981).

> Prior to the advent of interest analysis in the state courts as the 'dominant mode of analysis in modern choice of law theory,' . . . the prevailing choice-of-law methodology focused on the jurisdiction where a particular event occurred. For example, in cases characterized as contract cases, the law of the place of contracting controlled the determination of such issues as *capacity*. . . .

Id. (citation omitted) (emphasis added).

35. RESTATEMENT OF CONFLICT OF LAWS § 333 cmt. a. (AM. LAW INST. 1934).

36. *Id.* § 7(b).

> [W]hen there is a difference in the Conflict of Laws of two states whose laws are involved in a problem, the rule of Conflict of Laws of the forum is applied . . . where in making the choice of law to govern a certain situation the law of another state is to be applied, since the only Conflict of Laws used in the determination of the case is the Conflict of Laws of the forum, the foreign law to be applied is the law applicable to the matter in hand and not the Conflict of Laws of the foreign state.

Id.

when the contract was made, is also appropriate because that law does not create a cause of action "the enforcement of which is contrary to the strong public policy of the forum."[37]

Finally, Delta's lawyer argued that selection of State X's substantive law would not exceed constitutional limitations on choice of law under the test announced by a plurality of the United States Supreme Court in *Allstate Insurance Co. v. Hague*.[38] Pi accepted Delta's offer while Pi was physically within the geographical territory of State X. That State, therefore, has "a significant contact . . . , creating [a] [S]tate [X] interest[ ], such that choice of [State X's substantive] law is neither arbitrary nor fundamentally unfair."[39] The State F trial court regarded all of defense counsel's arguments as persuasive. It therefore granted defendant's motion for summary disposition and entered judgment for Delta. Pi filed a timely notice of appeal from that judgment.

The Supreme Court of State F affirmed the judgment for the defendant. It refused to adopt any of the policy-based approaches to resolving choice of law issues in place of the traditional rules of the first Restatement, which the court continued to prefer for their comparative certainty, simplicity, and ease of administration.[40] Applying all of the pertinent rules of the first Restatement referenced in the trial court's opinion, the State F Supreme Court held that the defendant-appellee was a minor under the substantive law of State X when the contract was made by Pi's deposit of the written acceptance in the State X mailbox. The State F Supreme Court endorsed a contract rather than a real property characterization of the case. It chose to apply only the "local" law of State X and not that state's "whole" law, including its choice of law approach. The State F Supreme Court also concluded that according Delta the power to avoid the contract, because she lacked full contractual capacity under the substantive law of State X, is not contrary to any strong public policy of State F.

Finally, the State F Supreme Court rejected the plaintiff-appellant's constitutional challenge. It observed that the United States Supreme Court has never overturned a state court's decision to apply the substantive law of another state. A state court's choice of the substantive law of another state could not possibly violate the Full Faith and Credit Clause. Although the United States Supreme Court long ago abandoned its original position that applying the substantive law of the place of the making of a contract might be constitutionally required under the Due Process Clause of the Fourteenth Amendment, the Court has never overturned a state court's decision to apply the substantive law of a state in which an unmodified contract was made. The State F Supreme Court approved the trial court's application of the *Hague* test to the facts, holding that choice of the substantive law of State F was neither arbitrary nor fundamentally unfair given State X's legitimate interest in applying its substantive law to a

37. *Id.* § 612 ("No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum.").

38. *Hague*, 449 U.S. at 302.

39. *Id.* at 313.

40. *See, e.g.*, Heidemann v. Rohl, 194 N.W.2d 164, 169 (S.D. 1972).

contract that had been made in State X. Following affirmance of the judgment for the defendant, Pi's lawyer petitioned the Supreme Court of the United States for a writ of certiorari to the Supreme Court of State F, and the United States Supreme Court granted certiorari.[41]

III. APPLICATION OF THE *HAGUE* TEST TO THE FACTS OF *PI V. DELTA*

Counsel for the Petitioner, Jerry Pi, must convince a sufficient number of the Supreme Court Justices to reverse the decision of the State F Supreme Court on the ground that the State F courts' choice of the substantive law of State X violates the Due Process Clause of the Fourteenth Amendment and is therefore impermissible under the *Hague* test governing constitutional limitations on choice of law.[42] Petitioner's counsel argues that none of the components of that test are satisfied in this case: (1) The manner in which the State F courts selected the substantive law of State X is not constitutionally permissible under the facts of this case; (2) State X does not have "a significant contact or significant aggregation of contacts" "with the parties and the . . . transaction"; (3) Pi's mailing the written acceptance in State X does not create a legitimate State X interest in having its substantive law governing capacity to contract apply; (4) the State F courts' choice of State X's law is arbitrary; and (5) the State F courts' choice of State X's law is also fundamentally unfair.[43] Because the Defendant-Respondent cannot meet her burden of establishing that all of these components are satisfied, the State F courts' selection of the substantive law of State X is not constitutionally permissible as a matter of law, and the judgment of the State X Supreme Court should be reversed.

A. THE *MANNER* IN WHICH THE STATE F COURTS SELECTED THE SUBSTANTIVE LAW OF STATE X IS NOT CONSTITUTIONALLY PERMISSIBLE AS APPLIED TO THE FACTS OF THIS CASE

The determinative inquiry under the standard endorsed in *Allstate Insurance Co. v. Hague* is whether the court, or courts, below selected the substantive law

41. This hypothetical fact pattern is not as artificial as it might at first seem. Like State F, the age of majority in the state of Alabama is nineteen; like State X, the age of majority in the state of Mississippi is twenty-one. ALA. CODE § 26-1-1 (West 2015); MISS. CODE ANN. § 15-1-59 (West 2015). Moreover, the town of State Line, Alabama, is so close to the Alabama—Mississippi border that a transient visitor in that town might deposit an envelope in a mailbox without being aware that it was situated just over the border in Mississippi. Finally, Alabama courts still apply traditional rules to resolve choice of law issues in contract cases; Mississippi courts apply the "most significant relationship" approach of the Restatement (Second) of Conflict of Laws to resolve choice of law issues in contract cases. EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 85 (3d ed. 2000).

42. *Hague*, 449 U.S. at 312-13 ("[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.").

43. *Id.* at 310-13.

of a given state "in a constitutionally permissible *manner*."[44] Reference to the *manner* in which a court selected the substantive law of some state implies that the choice of law question must be resolved in a manner that is consistent with the concept of *procedural* due process. In *Pi v. Delta*, the *manner* in which the State F courts selected the substantive law of State X was in accordance with traditional choice of law rules. Applying those rules to the undisputed facts, the State F courts resolved the question of whether Delta had full capacity to contract by applying the substantive law of the place of contracting[45]—the state where the contract was made.[46] Because Pi deposited the writing communicating his intention to accept Delta's offer in a mailbox that happened to be in State X, the contract was "made" in State X.[47] The State F courts accordingly selected the substantive law of State X, under which Delta was still a minor and lacked full contractual capacity.

The manner in which the State F courts selected the substantive law of State X in this case seems consistent with the requirements of procedural due process. The State F courts applied the same choice of law rules that both of the State F parties—as lifelong citizens, domiciliaries, and residents of State F—might have anticipated would apply in accordance with State F case law.[48] Moreover, as previously noted, the United States Supreme Court has never overturned a lower court's decision to apply the substantive law of the state or nation in which the contract at issue was made or modified.[49]

Early United States Supreme Court precedents, though dated, still support the proposition that it remains constitutionally permissible for a court to select the substantive law of a state in a manner consistent with the application of traditional choice of law rules.[50] In contract cases where the Supreme Court first addressed the topic of constitutional limitations on choice of law, it appeared to hold that choice of the substantive law of the state or nation where a contract was made or modified is *required* under the Due Process Clause as a matter of *substantive* due process.[51] The Court seemed to endorse "the territorially-

44. *Id.* at 313 (emphasis added).

45. RESTATEMENT OF CONFLICT OF LAWS §§ 332(a), 333 (AM. LAW INST.1934).

46. *Id.* §§ 325, 326(b).

47. *Id.*

48. *See* Courtland H. Peterson, *Particularism in the Conflict of Laws,* 10 HOFSTRA L. REV. 973, 1006 (1982) ("In the first third of [the twentieth] century, the Supreme Court indicated in several opinions that the vested rights theory of choice of law, eventually embodied in the first *Restatement* [of Conflict of Laws], should be elevated to constitutional status."); *id.* at 1012 (referring to "[t]he earlier, abortive attempt of the [Supreme] Court to constitutionalize vested rights theory").

49. *See* Weinberg I, *supra* note 14, at 71 (noting "the Supreme Court has never clearly struck down an application of unreasonable law reached through some traditional choice rule").

50. BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 99 (1963) ("[O]nly a few years ago the United States Supreme Court was able to hold that an attempt by a state other than that where the contract was made to control the incidents of a contract was so presumptuous an intermeddling with matters beyond the state's legitimate sphere of governmental function as to amount to a denial of due process of law . . . .").

51. *See* John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 182-83 (1936); Hartford Accident & Indem. Co. v. Delta & Pine Land Co., 292 U.S. 143, 149-50 (1934); Home Ins. Co. v. Dick, 281 U.S. 397, 411-12(1930); Aetna Life. Ins. Co. v. Dunken, 266 U.S. 389, 398-400 (1924); Mut. Life Ins. Co. v. Liebing, 259 U.S. 209, 213-14 (1922); N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357, 373-74

oriented choice-of-law rules, which until the 1960's prevailed in every state, and . . . the 'vested rights' theory that formed the philosophical foundation for the territorial rules."[52]

> Under this theory, rights 'vested' at a particular moment under the law of the state in which a key event occurred, such as the place of injury in torts. If this theory is accepted, any tampering with those vested rights by applying the law of some state other than that of the locus of the key event selected by the standard choice-of-law rule would raise serious due process and perhaps full faith and credit problems.[53]

Although the Supreme Court has long since repudiated the proposition that application of such traditional, territorially-based choice of law rules might be required as an aspect of substantive due process,[54] it would be startling if a manner of selection that the Court once seemed prepared to regard as constitutionally compelled under the Due Process Clause[55] could now be

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(1918); N.Y. Life Ins. Co. v. Head, 234 U.S. 149, 162 (1914); Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897). *Cf.* Security Ins. Group v. Emery, 272 A.2d 736, 739-40 (Me. 1971) (enforcing notice period prescribed in automobile liability insurance policy issued in Connecticut to a Connecticut motorist rather than notice period prescribed by Maine statute, even though the accident occurred in Maine with a Maine motorist and the insured subsequently moved to Maine); McCluney v. Jos. Schlitz Brewing Co., 454 U.S. 1071, 1071 (1981), *aff'g without written opinion* 649 F.2d 578 (8th Cir. 1981) (reversing application of the law of the state where an employment contract was initially made and requiring application of the law of the state in which that contract was modified for the second and final time); Allstate Ins. Co. v. Hague, 449 U.S. 302, 307 n.11 (1981) ("Prior to the advent of interest analysis in the state courts as the 'dominant mode of analysis in modern choice of law theory' . . . the prevailing choice-of-law methodology focused on the jurisdiction where a particular event occurred. For example, in cases characterized as contract cases, the law of the place of contracting controlled the determination of such issues as capacity . . . ."). *See also* Sedler, *supra* note 14, at 64 ("Substantive due process was the primary doctrinal vehicle by which the Supreme Court invalidated state court choice of law decisions in the '*Dodge* era'. . . . The Supreme Court's decisions protected 'contractual rights' as established by the law of the state where the contract was 'made.'"); James A. Martin, *The Constitution and Legislative Jurisdiction,* 10 HOFSTRA L. REV. 133, 139 (referring to the Supreme Court's initial tendency to "impose rules that would purport . . . to choose the law of one and only one state for all occasions, as a matter of constitutional law"). *See also* Kogan, *supra* note 14, at 658 n.33 (referencing the "Supreme Court's *flirtation* with the *possibility* of constitutionalizing the vested rights theory") (emphasis added); *id.* at 659-60 (referring to the Supreme Court's "*brush* with constitutionalizing all conflicts law") (emphasis added).

52. WEINTRAUB, *supra* note 14, at 620.

53. *Id. See also* Peterson, *supra* note 48, at 982 ("The traditional jurisdiction-selective choice-of-law rules were abstract in several respects . . . [as] their structure was designed to select only legal systems, regardless of the rules they might contain.").

54. *See* Pacific Emp'rs Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 500 (1939); Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 320-21 (1943); Watson v. Emp'rs Liab. Assurance Corp., 348 U.S. 66, 73-74 (1954); Richards v. United States, 369 U.S. 1, 15 (1962) ("Where more than one State has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the States involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity."); Clay v. Sun Ins. Office, Ltd., 377 U.S. 179, 181-82 (1964); *Hague*, 449 U.S. at 308. *See also* Russell J. Weintraub, *Who's Afraid of Constitutional Limitations on Choice of Law?*, 10 HOFSTRA L. REV. 17, 33 (1981).

55. *See, e.g.*, *Dodge*, 246 U.S. at 373-74. *See also* WEINTRAUB, *supra* note 14, at 635. Professor Weintraub stated:

> When . . . is it a denial of due process to apply the law of a state to an interstate transaction? The safest, but not very helpful, answer is when it is not reasonable to apply the law of that state. Reasonableness is the basic, core concept of due process. Any

constitutionally impermissible under a set of facts such as those in *Pi v. Delta.* Justice Scalia's reliance upon "traditional and subsisting practice" in upholding a state court's characterization of the forum's statute of limitations as "procedural"[56] for choice of law purposes also provides marginal support for the prediction that "[a] practice will not violate due process if it has a solid historical base and it has not been widely repudiated. Traditional choice-of-law methods of analysis such as the First Restatement . . . may be used with little fear of offending the Constitution."[57] Although a majority of state courts no longer resolve choice of law issues sounding in contract by applying the traditional rules endorsed in the First Restatement of Conflict of Laws, those rules have not been "widely repudiated" by any courts as affording a constitutionally impermissible manner of resolving choice of law issues.[58]

Nevertheless, if the facts of *Pi v. Delta* fail to satisfy each of the components of the *Hague* test, then the State F courts cannot be held to have selected the substantive law of State X in a constitutionally permissible manner. The belief among commentators that the Supreme Court would never overturn a decision to apply a state's substantive law based on the application of a traditional choice of law rule is not universally shared.[59] If application of a traditional choice of law rule "results in application of [a state's substantive] law to facts outside the reasonably intended scope of that law, the . . . choice [of that state's substantive law] is unconstitutional."[60] Thus, if the State F courts' application of the traditional choice of law rules has resulted in the application of State X's law governing contractual capacity to facts outside the reasonably intended scope of that law, choice of State X's law is unconstitutional in *Pi v. Delta.*

> further elaboration of this "reasonableness" standard attempts to give this vague standard more specific content in order to facilitate its application to specific cases. The Supreme Court was applying this reasonableness standard in *Dodge.* The answer that the Court arrived at in *Dodge* was that it is not reasonable to use the law of a state to invalidate a provision in a contract unless that state was the place of the making of the contract.

Id.

56. Sun Oil Co. v. Wortman, 486 U.S. 717, 727 n.2 (1988).

57. RICHMAN & REYNOLDS, *supra* note 19, at 312.

58. *See* SCOLES ET AL., *supra* note 41, at 86. *But see* Peterson, *supra* note 48, at 986 ("[A] significant number of states have made a conscious choice to retain traditional theory . . . .").

59. Weinberg I, *supra* note 14, at 70-71.

> A virtual immunity from even minimal scrutiny . . . seems to be enjoyed by . . . [a] choice [made on the basis of traditional choice of law rules], however irrational. . . . [M]ost of us in the field take it for granted that a state connected to a case by a traditional connecting factor—[such as the] . . . place of contracting . . .—can always constitutionally govern the . . . contract . . . .

Id.

60. *Id.* at 76-77.

B. STATE X DOES NOT HAVE A SIGNIFICANT CONTACT OR SIGNIFICANT AGGREGATION OF CONTACTS WITH THE PARTIES AND THE TRANSACTION

In order for the manner in which the State F courts selected the substantive law of State X to be constitutionally permissible under the *Hague* test, the Respondent (Dawn Delta) must have an adequate basis for establishing that State X has "a significant contact or significant aggregation of contracts" with both the parties and the transaction.[61] Petitioner Gerry Pi's deposit in a State X mailbox of his written acceptance is the only factor connecting State X with the transaction, the parties, and the events giving rise to their dispute. As an abstract proposition, it must be conceded that an offeree's dispatch of a writing that communicates an intention to accept the offer is a "significant" *event* in the process of contract formation, as that act both completes the manifestation of mutual assent to the bargain proposed by the offeror and furnishes consideration for the offeror's promise(s).[62] Nevertheless, for purposes of determining whether a court's selection of a state's substantive law exceeds constitutional limitations on choice of law, the state in which the offeree happens to mail a written acceptance does not have "a significant contact" with the parties or the bargain concluded by that act when (a) neither party had any reason to anticipate the offeree would be in that State when he posted the written acceptance, (b) neither party was aware the offeree was in that State at that time, and (c) the offeree's posting of the written acceptance in State X does not create any legitimate state interests in having that state's substantive law apply.[63] Pi did not know he was in State X when he deposited his written acceptance of Delta's offer in a Fexarkana mailbox, and Delta did not know at the time that Pi had done so while Pi happened to be in State X. There are no other affiliating circumstances between State X and the parties. The happenstance that Pi was unknowingly in State X when he mailed the written acceptance to Delta is insufficient as a matter of law to support any *principled* conclusion that State X had "a significant contact" with either the parties or the transaction. Pi's mailing of the acceptance while he was unknowingly in State X is the *sole* factor connecting State X with the litigation. State X therefore cannot be said to have a significant *aggregation* of contacts with either the parties or the transaction.

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61. Allstate Ins. Co. v. Hague, 499 U.S. 302, 313 (1981). *See* Jack Davies, *A Legislator's Look at* Hague *and Choice of Law*, 10 HOFSTRA L. REV. 171, 172 (1981) ("[A]t a minimum, some facts must connect a case to a state before a legal rule from that state's body of law may be applied to the dispute."). "In conflicts analysis, a factual relevancy or irrelevancy should be determined by asking whether a fact or contact is connected to the particular issue under consideration." *Id.* at 186. *See also* Frederic L. Kirgis, Jr., *A Wishful Thinker's Rehearing in the* Hague *Case,* 10 HOFSTRA L. REV. 1059, 1070 (1982) ("Persons should not be subjected to the adverse rules of a state with which they have no contact or affiliation relevant to the particular rules involved.").

62. RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (AM. LAW INST. 1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."); *id.* § 63(a) ("[A]n acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession . . . .").

63. *See infra* Part III.C.

If a State's "affiliational contacts"[64] with the parties and the transaction can qualify as being "significant" under the *Hague* test only when those contacts create a legitimate state interest, making choice of its law neither arbitrary nor fundamentally unfair,[65] then the requirement of a "significant contact" with the state whose substantive law a court chooses to apply is not a separate *element* of a multi-element test; it is instead only a *component* of a unitary test under which a contact cannot qualify as being "significant" in the abstract. A state's contact with the controversy is only significant if that contact creates "state interests," which makes a court's choice of that state's substantive law neither arbitrary nor fundamentally unfair.

Under such a unitary test, localizing the place where an offeree accepts an offer in any particular state does not make that contact "significant" when reviewing a choice of law decision under the *Hague* test,[66] even though acceptance of the offer was essential to the formation of the contract. "[A] state's law may constitutionally govern an issue if that state's contact with the issue is *significant* in that it generates a legitimate governmental *interest* in the law's application, on the particular facts";[67] "[a]n interest is clearly not established by the bare fact of contact."[68] A contact with a state may have constitutional significance either if the contact can be expected to have an *impact* on that state, or if the contact is relevant in deciding whether the choice of law is *fair* to the litigants.[69] As demonstrated below, Pi's deposit of the written

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64. Kogan, *supra* note 14, at 656 ("[F]airness concerns focus on the litigants' affiliating contacts, contacts that in political theory justify a person's obligation to a governmental entity."); *id.* at 669 ("There must, however, be some *affiliating circumstance* that can enable the controversy to be deemed to have 'touched' the state [whose law was applied] even if the actors in the controversy are elsewhere.") (emphasis added).

65. *But see* Brilmayer, *supra* note 2, at 1349 ("[T]he *Hague* plurality failed to provide standards for determining when contacts are significant . . . .").

66. *Cf. Hague*, 449 U.S. at 315 n.21 ("[T]he [insurance] policy . . . recites that Allstate signed the policy in Northbrook, Ill. Under some versions of the hoary rule of *lex loci contractus*, . . . the law of Illinois arguably might apply to govern contract construction, even though Illinois would have less contact with the parties and the occurrence than either Wisconsin or Minnesota.").

67. Weinberg I, *supra* note 14, at 75.

68. *Id.* at 77. *Cf. Hague*, 449 U.S. at 306-07 ("[S]tating that the Minnesota contacts might not be, 'in themselves, sufficient to mandate application of [Minnesota] law' . . . .") (second alteration in original) (citation omitted).

69. *Kogan*, *supra* note 14, at 667. Professor Kogan noted:

> Reliance on an *impact* contact to justify a constitutional choice-of-law decision vindicates concerns of comity . . . . Such reliance looks to the relationship between the *controversy as a whole* and the *state*. It justifies a choice-of-law decision from the viewpoint of a state by supporting an argument that it is in the state's interest to have its law applied to the controversy. In contrast, a [choice of law] justification that relies on a *fairness* contact vindicates concerns of fairness to the individual litigants. It focuses on the relationship between the *litigants* and the *state*, and justifies a choice-of-law decision from the viewpoint of the litigants.

Id. (emphasis added). *See also id.* at 669 n.96 ("A person's physical presence takes on legal significance not because of some mystical relationship that physical presence imparts, but because physical presence is *generally* coincident with that person's having some *impact* on the state.") (emphasis added); Sedler, *supra* note 14, at 62-63 (finding it constitutionally permissible to apply a state's law when "that state had sufficient factual contacts with the underlying transaction making it *reasonable* for its law to be applied without regard to that state's 'substantive' interest in doing so") (emphasis added).

acceptance in a State X mailbox does not qualify as an "impact contact," because that act could not produce any discernible *consequences* in State X.[70] Nor did that act qualify as a "fairness contact," because the absence of any other affiliating circumstances connecting either of the parties or the transaction to State X would make it unfair to apply State X's substantive law to resolve the issue of whether Delta lacked full capacity to contract.[71]

C. PI'S DEPOSIT OF THE WRITTEN ACCEPTANCE IN A STATE X MAILBOX DOES NOT CREATE ANY CONSTITUTIONALLY COGNIZABLE STATE X INTERESTS IN HAVING ITS SUBSTANTIVE LAW APPLIED

The concept of "state interests" plays the "central role" in the *Hague* test.[72] State X, however, does not have any plausible policy-related interest in applying its substantive law governing incapacity to contract on grounds of minority based solely upon Pi depositing his written acceptance of Delta's offer in a mailbox which Pi did not know was located in State X.[73] The policy underlying rules governing the incapacity of minors to incur anything other than voidable contractual duties is to shield persons who are regarded as being presumptively immature from having to carry out improvident commitments they made.[74] A state may have a legitimate governmental interest in applying its protective rules governing the incapacity of a contracting party who is sufficiently affiliated with the state, such as by domicile or residence in that state. State X has no such interest in applying its substantive law on behalf of the defendant-Respondent, Dawn Delta. Delta is a lifelong citizen, domiciliary, and resident of State F. The age of majority in State F is nineteen, and Delta had been an adult under the law of State F for over a year when she made the land sale contract with Pi, who was also a lifelong citizen, domiciliary, and resident of State F. Moreover, Delta has been a party to annual employment contracts with a State F veterinary clinic, the first of which was made and performed before Delta became an adult at the age of nineteen under the law of State F. Delta has no affiliating connection whatsoever with State X. She did not enter into the contract in reliance upon any expectation that she might be empowered to avoid (or rescind) that contract on grounds of minority under the substantive law of State X. Delta's lawyer drafted the terms of Delta's written offer on her behalf, and so any paternalistic policy

70. *Kogan, supra* note 14, at 670 ("[F]or an impact contact to exist, the in-state effect relied on must relate to the facts of the litigation."). *See* Weintraub, *supra* note 54, at 28 (discussing one way to evaluate whether a contact with a state is significant for due process purposes is to require that "the contact be such that the state is likely to experience the social *consequences* if its law is not applied") (emphasis added).

71. *Kogan, supra* note 14, at 679.

72. *Id.* at 657, 662 (stating the *Hague* test reflects the "preeminence of state interest relative to fairness").

73. *Id.* at 679 ("A state has an interest in a controversy if the state has a regulatory policy aimed at controlling transactions of the type that are the subject of the controversy [and] it is the existence of a relevant regulatory policy . . . that infuses a contact with significance.").

74. 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.1, at 442 (3d ed. 2004).

State X might have of shielding presumptively immature persons from honoring improvident commitments resulting from overreaching by the other party is not implicated under these facts.

If, as the dissenters in *Hague* argued, the test's reference to "state interests" is limited to policy-based interests that are in some meaningful sense related to the issue before the court,[75] then Pi's mailing of the acceptance in State X does not create any legitimate State X interests in having its defendant-protective law applied to the facts of this case. This conclusion is based in part upon

> the difference between a 'contact' and an 'interest.' A state does not have an automatic "interest" in [having its rule of decision govern] an issue by virtue of being the place where an event occurred.... The relevant inquiry... is whether the particular occurrence... is within the reasonably intended scope of the particular rule of law.... [A] state's law may constitutionally govern an issue if that state's contact with the issue is *significant* in that it generates a legitimate governmental *interest* in the law's application on the particular facts."[76]

"[T]he right to be free of arbitrary and irrational governance is a constitutional right that can, and does, deny lawmaking power to an *uninterested* contact state."[77]

Yet, "[i]t is apparent that the plurality [in *Allstate Insurance Co. v. Hague*] was not using the term 'state interests' in the sense of a policy or policies underlying a state's law."[78] Regardless of whether a State F court permitted Delta to avoid the land sale contract on grounds of minority or ordered specific performance of the contract on behalf of Pi, the decision would have no "social consequences" in State X.[79] In order for a litigant to establish under the *Hague*

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75. Allstate Ins. Co. v. Hague, 449 U.S. 302, 334 (1981) (Powell, J., dissenting) ("[A] State has a legitimate interest in applying a rule of decision to the litigation only if the facts to which the rule will be applied have *created effects* within the State, toward which the State's public policy is directed.") (emphasis added). *See* Martin, *supra* note 51, at 142-43 (stating a court may choose to apply the law of a state to an issue "if at least one contact [with that state] bears formal substantive relevance or informal policy relevance to the state's regulatory effort, but not otherwise"); Sedler, *supra* note 14, at 71-72 ("Justice Powell appears to be saying that the state must have an 'interest' as that term is used in the interest analysis approach to choice of law—under which the state must be interested in applying its law in order to implement the policy reflected in that law."); Weinberg III, *supra* note 15, at 1026 (acknowledging the "truism... that the power of a sovereign to regulate a controversy depends upon whether that controversy is within the sovereign's sphere of legitimate interest").

76. Weinberg I, *supra* note 14, at 75 (emphasis added) (citing *Hague*, 449 U.S. at 308); *id.* at 77 ("An interest is clearly not established by the bare fact of contact.").

77. *Id.* at 76.

78. WEINTRAUB, *supra* note 14, at 628. *See* Shreve, *supra* note 11, at 51 (noting "the difference between interest analysis used in choice of law and used to justify Supreme Court invalidation of conflicts decisions"); Willis L. M. Reese, *The* Hague *Case: An Opportunity*, 10 HOFSTRA L. REV. 195, 200 (discussing plurality opinion in *Hague* giving "a broad and undiscriminating meaning to the term 'state interest'"); Weinberg III, *supra* note 15, at 1031 n.37 (noting "fine points of difference between minimal scrutiny and ordinary interest analysis").

79. *See* Kogan, *supra* note 14, at 671 (defining an "impact contact" as a "contact that provides an argument that the state's welfare and goals—embodied in its regulatory policies—will be furthered by the application of its law to the litigation or, in other words, that the state has an interest in the dispute"); *id.* at 673 (distinguishing an "impact contact" from a "fairness contact"). An "impact contact" involves

test that a contact with the state whose substantive law was applied creates the requisite "state interests," the litigant need only convince the court that the contact is *sufficient* in the sense that "a reasonable person, unschooled in the niceties of 'interest analysis,' would not regard the application of the law of that state as arbitrary or as resulting in unfair surprise to one of the parties."[80]

Applying that expansive and "common sense" definition of "state interests"[81] under the *Hague* test to the facts of *Pi v. Delta*, such a reasonable lay person probably *would* regard the application of State X's substantive law governing contractual incapacity on grounds of minority as *both* arbitrary *and* as resulting in unfair surprise to Pi.[82] Although Pi performed the last act necessary to conclude the proposed bargain when he deposited the signed writing in the State X mailbox and thereby accepted Delta's offer, a reasonable lay person would undoubtedly regard the State F courts' application of State X's law giving Delta the power to avoid the contract on grounds of minority as "arbitrary." It seems *irrational* to give controlling constitutional effect to the law of the state where an offeree happens to have dispatched a written communication of acceptance when neither party anticipated or had reason to know the offeree might be in that state at the time. A reasonable lay person also would undoubtedly regard the State F courts' application of State X's law governing the contractual incapacity of minors as resulting in "unfair surprise" to Pi, because all of the relevant contacts which the parties were aware of or might have been expected to take into account were with State F. State X therefore did not have a

> sufficient contact[] with the parties or with the facts to make it *reasonable* . . . to enforce [that state's] policies in adjudicating a controversy arising between the parties on those facts, [and] application of the law of that state . . . violate[s] the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.[83]

Even if the United States Supreme Court in this case were to give "arbitrary" the "less rigorous and more impressionistic content" which a plurality of the Court gave that pejorative in *Hague*,[84] *Pi v. Delta* is a case in which it is clear that State X has "so *little* contact with the parties [and] with the transaction that application of its law [is] arbitrary and therefore violate[s] due process."[85] Although it may be appropriate in any given case to recognize "the generally

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"the relationship . . . between the *controversy* and the state," whereas a "fairness contact" involves "the relationship . . . between the *litigants* and the state." *Id.* (emphasis added).

80. WEINTRAUB, *supra* note 14, at 630. *See* Sedler, *supra* note 14, at 62-63 (finding application of a state's law is constitutional when "that state had sufficient factual contacts with the underlying transaction making it reasonable for its law to be applied without regard to the state's 'substantive' interest in doing so").

81. WEINTRAUB, *supra* note 14, at 635.

82. *See infra* Part III.D (discussing arbitrary); Part III.E (discussing unfair surprise).

83. WEINTRAUB, *supra* note 14, at 634 (emphasis added).

84. *Id.* at 635.

85. *Id.* (emphasis added).

validating interests of the place of contracting,"[86] it is *not* appropriate in *this* case to recognize an *invalidating* interest of State X in shielding Delta from liability when the only factor connecting Delta with State X is Pi's deposit of his written acceptance of Delta's offer in a State X mailbox. "[T]he place of contracting can have no legitimate interest in invalidating the contract, [at least] not without further contact with the transaction than as the place of contracting. . . . [C]ontractual *defenses* ought not to be attended by the same deference and concern for *validation* that attends contract claims."[87] If, as seems clear, State X is an "uninterested" state under the facts of *Pi v. Delta*, the State F courts' choice of State X law is unconstitutional.[88]

The conclusion that State X does not have any constitutionally cognizable interest in having its substantive law applied to the facts of *Pi v. Delta* is consistent with the choice of law a State X court would have made if it had exercised judicial jurisdiction in this case. State X courts apply the "most significant relationship" approach of the Restatement (Second) of Conflict of Laws in resolving choice of law issues. Consistent with that approach, the Restatement (Second) states that "[t]he capacity of a party to contract will usually be upheld if [s]he has such capacity under the local law of [her] domicil."[89] Applying this presumptive rule to the facts of *Pi v. Delta*, a State X court might be expected to choose the local law of State F and thereby uphold the capacity of Dawn Delta to contract, because she has that capacity under the local law of her domicil, State F. Delta was twenty years old when the land sale contract was made, and she acquired the capacity to contract when she reached the age of nineteen under the law of State F. Moreover, the Restatement (Second) states what has become a negative paraphrase of the *Hague* test governing constitutional limitations on choice of law: "A court may not apply the local law of its own state to determine a particular issue unless such application of this law would be reasonable in the light of the relationship of the state and of other states to the person, thing, or occurrence involved."[90] Applying that standard to the facts of *Pi v. Delta*, a State X court undoubtedly would have refused to apply the local law of State X in resolving the issue whether Delta has the capacity to contract. State X's relationship to the matter in

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86. Weinberg I, *supra* note 14, at 80 (emphasis added).

> [T]he state has the power to make laws for the general welfare of residents. By invalidating the agreement of those contracting in the territory, the state can only discourage transactions in the territory, thus not advancing the general welfare of residents. Of course, the state can render certain agreements invalid because of protective concerns for particular classes of residents. But the case under consideration is one in which the law chosen is that of a state that is not the residence of either party, but the place of contracting only.

Id. at 81 n.63.

87. *Id.* at 81.

88. *Compare* Shreve, *supra* note 11, at 53, *with* Martin, *supra* note 51, at 143, *and* Peterson, *supra* note 48, at 989 ("[T]he use of abstract, traditional choice-of-law rules can lead to the application of the law of a state which has no interest in the controversy, that is, its policies would not be effectuated by application of its law, while denying application to the laws of a state which has such an interest.").

89. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 198(2) (AM. LAW INST. 1971).

90. *Id.* § 9.

dispute is at best tenuous in comparison with the relationship that State F has with the parties and the contract; the only factor connecting State X with the litigation is that Pi unknowingly happened to be in State X when he deposited his written acceptance of Delta's offer in a mailbox. The likelihood that a State X court would have refused to apply the State X statute governing capacity to contract on grounds that it would not be reasonable to do so under the circumstances of this case is reinforced by the more specific validating rule of the Restatement (Second), under which a State X court might have been expected to uphold Delta's capacity to contract under the local law of her domicil.[91]

The confident prediction that a State X court would have chosen to apply the validating law of State F under pertinent sections of the Restatement (Second) to the facts of *Pi v. Delta* supports the proposition that State X does not have any legitimate interest in having its local law applied in this case. Even conceding that it is easier to satisfy the "state interests" component of the *Hague* test than it is to establish legitimate governmental interests under a policy-based approach in resolving choice of law issues under state law,[92] the overwhelming likelihood that a State X court would have chosen to apply State F's local law in this case reinforces the conclusion that State X does not have any constitutionally cognizable "state interests" that would make choice of its substantive law "neither arbitrary nor fundamentally unfair."[93]

> [T]here will ordinarily be little justification for applying the local law of a state which has little or no interest in the matter at hand. An indication of the existence of a state interest in a given matter . . . can sometimes be obtained from an examination of that state's choice of law decisions. For example, the fact that a state's choice of law decisions provide for application of the local law of another state to determine a certain issue may afford some indication that the state has little or no interest in the application of its relevant local law rule in the resolution of that issue.[94]

Consistent with this suggested technique for identifying and evaluating state interests, the confident prediction that a State X court would have applied the local law of State F under the Restatement (Second) approach affords some indication that State X has little or no interest in the application of its relevant statute to resolve the issue whether Delta has full capacity to contract.

On the other hand, the prospect that a State X court would have chosen to apply the substantive law of State F if *Pi v. Delta* had been litigated in State X does not support a plausible argument that State X has an affirmative governmental interest in *not* having its substantive law applied to the facts of this case. Although application of the State X statute governing the age at which a

91. *Id.* § 198(2).
92. *See infra* notes 80-84 and accompanying text.
93. Allstate Ins. Co. v. Hague, 449 U.S. at 312-13.
94. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8 cmt. k (AM. LAW INST. 1971).

party acquires full capacity to contract will not advance any legitimate governmental interest of State X under these facts, the State F courts' application of that State X statute could not cause State X to suffer any adverse consequences.

The "state interests" whose creation is determinative under the *Hague* test are interests of the state whose substantive law the court applied, not any putative "procedural" interests a court might assert the forum state has in allowing its courts to apply easily administrable choice of law rules.[95] Any such ostensible "procedural" interest Delta might argue State F has in permitting its courts to apply the easily administrable choice of law rule that questions of contract capacity are determined in accordance with the local law of the state where an offeree dispatches a written communication of acceptance is not sufficient to insulate the choice of law made under that rule from a constitutional challenge. If the interest a court has in applying the forum's familiar choice of law rules were alone sufficient to make the choice of law decision impervious to constitutional scrutiny, there would be no meaningful constitutional limitations on choice of law.[96]

D. THE STATE F COURTS' CHOICE OF STATE X LAW IN DETERMINING WHETHER DELTA HAS FULL CAPACITY TO CONTRACT IS ARBITRARY

In order for the manner in which a court selects a state's substantive law to be constitutionally permissible, the choice of that state's law must not be "arbitrary."[97] The State F courts' choice of State X law is not "arbitrary" in at least one respect: the State F courts did not exercise unrestricted discretion in resolving the choice of law issue; they were constrained in their exercise of discretion by judicial precedent establishing the governing rule under which a party's capacity to contract is determined in accordance with the local law of the state where the proposed bargain was concluded by an offeree's acceptance of the offer.[98]

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95. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821 (1985) (rejecting argument that Kansas courts could apply Kansas law to all claims in a class action suit based upon the difficulty of ascertaining and applying the local law of other states when most of the transactions at issue have an insufficient connection with Kansas to justify application of Kansas law); Home Ins. Co. v. Dick, 281 U.S. 397, 409-10 (1930) (rejecting Texas courts' characterization of the Texas statute it chose to apply as dealing with remedies and procedure merely when that statute purports to create rights and obligations inconsistent with terms of a contract not made or to be performed in Texas).

96. *See Hague*, 449 U.S. at 326 (Stevens, J., concurring) ("The forum State's interest in the efficient operation of its judicial system is clearly not sufficient . . . to justify the application of a rule of law that is fundamentally unfair to one of the litigants.").

97. *Id.* at 312 (plurality opinion); *id.* at 326 (Stevens, J., concurring) ("[A] choice-of-law decision would violate the Due Process Clause if it were totally arbitrary . . . ."); Weintraub, *supra* note 54, at 34 ("The state whose law is applied need have only sufficient nexus with the parties or with the transaction to keep the choice from appearing patently arbitrary.").

98. *Cf.* BLACK'S LAW DICTIONARY 112 (8th ed. 1999) (defining the adjective "arbitrary" as "[d]epending on individual discretion; . . . determined by a judge rather than by fixed rules, procedures, or law").

Yet, "[*r*]*esults* can be fairly described as *arbitrary* when they cannot be explained in a coherent and principled manner on the basis of an acceptable intellectual system."[99] If a court's eventual choice of law was reasonably foreseeable to the parties when a contract is made, that choice is not arbitrary. It is arbitrary, however, for the place where a contract was made to be the sole determinant in deciding whether a party has the capacity to contract.[100]

Addressing the topic of choice of law where the issue is whether a party has the capacity to contract, Brainerd Currie considered cases in which both parties were forum residents who had contractual capacity under forum law, but the contract was made in another state under whose law one of the parties lacked contractual capacity.[101] Currie concluded that the forum court's choice of the invalidating law of the other state solely because the contract was made in that state produced a result that seemed indefensible,[102] and he cited *Burr v. Beckler*[103] as an example of such a case.[104] The basis for that conclusion has been restated as follows:

> It is arbitrary for a legal order to apply a legal rule in a given case unless the contacts between that legal order and the transaction . . . are such that there is a reason, in view of the policies related to the rule, to apply it to the particular issue presented.[105]

The policies underlying the State X statute making twenty-one the age at which a person acquires full capacity to contract are to absolve a presumptively immature person from a duty to honor improvident commitments[106] and to prevent the other party from taking unfair advantage of the incapacitated party's presumptive immaturity by overreaching.[107] Pi's deposit of the written acceptance in a mailbox which Pi did not know was located in State X is the only contact between State X and the transaction. Neither of those policies would be advanced by the State F courts' application of the State X statute making twenty-one the age at which a person acquires full contractual capacity. Delta is a citizen, domiciliary, and resident of State F; she either never had any contacts whatsoever with State X, or any contacts she might have had with State X are unrelated to the transaction at issue. Delta had already reached the age of

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99. Arthur T. von Mehren & Donald T. Trautman, *Constitutional Control of Choice of Law: Some Reflections on Hague*, 10 HOFSTRA L. REV. 35, 39 (1981) (emphasis added).

100. CURRIE, *supra* note 50, at 79-80 ("[T]he place where the contract is made, determined in accordance with rules of contract law for determining *when* the contract is made, is irrelevant to the selection of the rule that should govern.").

101. *Id.* at 96 (showing Table 1a's hypothetical Case Number 13 where the claimant and the allegedly incapacitated defendant are both residents of the forum—which has the validating rule—and the contract was made in another state—which has the invalidating rule).

102. *Id.* at 99.

103. 106 N.E. 206, 208-09 (1914). In *Burr*, the Illinois Supreme Court applied the invalidating law of Florida because the contract was made in that state even though all other connecting factors were with the state of Illinois. *Id.*

104. CURRIE, *supra* note 50, at 100.

105. Mehren & Trautman, *supra* note 99, at 40.

106. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 24, at 46 (4th ed. 2001).

107. FARNSWORTH, *supra* note 74, § 4.1, at 440.

majority in State F when the contract was made, as she was over the age of nineteen at that time. She had been a party to two successive annual employment contracts with a State F veterinary clinic, the first of which contracts Delta made and performed before she reached the age of majority under the law of State F. Delta cannot be regarded as having made an improvident commitment when she offered to sell her real property at a price—and on other terms—that were satisfactory to her. Delta's only apparent reason for seeking to avoid the contract is that she has changed her mind and no longer wants to sell the property she contracted to sell to Pi. Any residual protective policy State X might conceivably have in giving presumptively immature persons under the age of twenty-one the power to avoid contracts they might regret having made or contracts they might have been induced to make by the overreaching of the other party has not been advanced by the State F courts' choice of State X's law, considering Delta's experience in contracting and the fact that the terms of the land sale contract were proposed in the offer she made to Pi. The one contact between State X and the transaction at issue in *Pi v. Delta* does not make it reasonable to apply the State X statute under which twenty-one is the age at which a person acquires full capacity to contract.

> The application of a state's law to govern liability in civil litigation should be held arbitrary for due process purposes only where that state does not have an interest in applying its law in order to implement the policy reflected in that law *or* where that state does not have a significant factual connection with the underlying transaction, making it reasonable to apply the law of that state on the point in issue.[108]

The policies underlying the State X statute would not be advanced by its application to the facts of this case; State X, therefore, does not have "an interest in applying its law in order to implement the policy reflected in that law."[109] Nor does Pi's presence in State X when he deposited the written acceptance in a mailbox establish a "*significant* factual connection [between State X and] the underlying transaction";[110] therefore, it is *not* "reasonable to apply the law of [State X]" on the issue whether Delta has full capacity to contract.[111] Because "neither criterion is satisfied, there is simply no rational basis for the application of [State X's] law,"[112] and the State F courts' choice of the State X law is *arbitrary*.

108. Sedler, *supra* note 14, at 85 (emphasis added).
109. *Id.*
110. *Id.* (emphasis added).
111. *Id.*
112. *Id.* at 85 n.123.

E. THE STATE F COURTS' CHOICE OF STATE X LAW IN DETERMINING WHETHER DELTA HAS FULL CAPACITY TO CONTRACT IS *FUNDAMENTALLY UNFAIR*

In *Pi v. Delta*, even if it were plausible to conclude that State X has some sort of inchoate interest in having its substantive law applied to any contract that somehow could be said to have been "made" in State X, and that choice of State X law is therefore not arbitrary, that interest is not sufficient to support the conclusion that the State F courts' choice of State X law is not fundamentally unfair to the plaintiff-Petitioner.

> The application of a state's law should be held [fundamentally] *unfair* only where (1) the party against whom the law is applied could not reasonably have foreseen its application to the transaction in question at the time the party entered into the transaction, and (2) the party conformed its conduct to the requirements imposed by the law of another state, in justifiable reliance that the [other] state's law would apply to the transaction.[113]

Pi, "the party against whom the [State X] law [was] applied[,] could not reasonably have foreseen . . . application [of the State X statute] to the transaction in question at the time [Pi] entered into the transaction";[114] Pi was not aware that he had crossed the state line and was in State X when he deposited his written acceptance in a mailbox. Nor did that one contact with State X charge Pi with knowledge of the State X statute governing the age at which a person acquires full capacity to contract. Moreover, Pi "conformed [his] conduct to the requirements imposed by the law of [State F] in justifiable reliance that [State F's] law would apply to the transaction."[115] The location of the subject real property in State F, along with the State F citizenship, domicile, and residence of both parties, and the conduct of the negotiations in State F all justified Pi's reliance on his implicit assumption that State F's law would apply to the transaction.

The inquiry under the final component of the *Hague* test is not whether a choice of law is *merely* "unfair" but is instead whether that choice is "*fundamentally* unfair."[116] The emphatic adverb underscores the permissive nature of the test. Courts and commentators have considered several closely related concepts in addressing the question whether a choice of law in contract cases is so "fundamentally unfair" as to deprive a litigant of due process of law. Those concepts implicate several questions: Was the prospect that a court might

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113. *Id.* at 85 (emphasis added).

114. *Id.*

115. *Id. See* Reese, *supra* note 78, at 196 ("[D]ue process is likely to be offended when a party who has conformed his or her conduct to the requirements of the state where he or she did the act in question is held subject to a law of which he or she had no notice.").

116. Allstate Ins. Co. v. Hague, 449 U.S. 302, 312 (1981). *See* Weinberg I, *supra* note 14, at 69-70 n.10 ("'Fundamental unfairness' and 'unfairness' are two distinct terms of art in this jurisprudence. 'Fundamental unfairness' is the technical equivalent of 'unreasonableness' in the law of conflicts; that is, an assertion of power by a state without a legitimate public interest in the assertion—without a rational basis for the action taken—will be fundamentally unfair." (citing *Hague*, 449 U.S. at 313)).

choose to apply the substantive law of a particular state *reasonably foreseeable* to the parties (and especially to the party disadvantaged by that choice of law) when they entered into the transaction?[117] Did the court's choice of law comport with the parties' *reasonable, rational, justifiable, or legitimate expectations*?[118] Would choice of a particular state's law result in *unfair surprise* to either litigant?[119] Did either litigant act in *reasonable* or *justifiable reliance* on a belief that a particular state's law would govern the parties' contractual rights and duties?[120] Did the parties have *notice* of the possibility that a particular state's law might govern the incidents of their transaction?[121] Did the party disadvantaged by a court's choice of law expressly or impliedly *consent* to be bound by that law?[122]

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117. *Hague*, 449 U.S. at 327 (Stevens, J., concurring) ("The application of an otherwise acceptable rule of law may result in unfairness to the litigants if, in engaging in the activity which is the subject of the litigation, they could not reasonably have anticipated that their actions would later be judged by this rule of law."); RICHMAN & REYNOLDS, *supra* note 19, at 313 (stating foreseeability is one of the focuses in procedural unfairness determinations); Willis L.M. Reese, *Limitations on the Extraterritorial Application of Law,* 4 DALHOUSIE L.J. 589, 597 (1977-1978) (stating an unforeseeable extraterritorial application of law is unfair). *But see* Weinberg I, *supra* note 14, at 96 ("Foreseeability . . . is not a critical feature of constitutional review of conflict cases," [but it adds] a "helpful buttressing argument."); Weintraub, *supra* note 54, at 34 ("He who justifiably plans his conduct under the law of one state will not have that conduct judged by the different law of another state if he had no reason to foresee the application of that law.").

118. *Hague*, 449 U.S. at 318 n.24 (using the language "legitimate expectations"); *id.* at 324 n.11 (Stevens, J., concurring) (using the language "justifiable expectations"); *id.* at 327 (using the language "justifiable expectations"); *id.* at 330 (using the language "reasonable expectations"); *id.* at 333 (Powell, J., dissenting) (using the language "reasonable expectations of the parties"); Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985) (noting that an important element of fairness is "the expectation of the parties"); Peterson, *supra* note 48, at 999 (using the language "justified expectations"); Kirgis, *supra* note 61, at 1062 (using the language "reasonable expectations"); Shreve, *supra* note 11, at 63 (using the language "justified expectations"); Kogan, *supra* note 14, at 653 (using the language "reasonable expectations"). *But see* Weinberg I, *supra* note 14, at 96 (stating that a court does not focus on the expectations of the parties but on the reasonableness of the state's exercise of law-making power); Sedler, *supra* note 14, at 79 ("Where the choice of a state's law in the circumstances presented unfairly defeats the legitimate expectations of a party, it would be consistent with general due process doctrine to hold that the choice of law is violative of due process.").

119. *Hague*, 449 U.S. at 318 n.24; *id.* at 327 (Stevens, J., concurring); *id.* at 336 (Powell, J., dissenting); RICHMAN & REYNOLDS, *supra* note 19, at 313 (stating unfair surprise is one of the focuses in procedural unfairness determinations); WEINTRAUB, *supra* note 14, at 630, 637; Kogan, *supra* note 14, at 653 (stating the choice that results in unfair surprise to a litigant is a concern of fairness); Martin, *supra* note 51, at 139; Peterson, *supra* note 48, at 999; Brilmayer, *supra* note 2, at 1349 n.134 (stating fairness involves absence of unfair surprise); Weintraub, *supra* note 54, at 34 ("If a choice of law does not outrageously surprise one of the parties, it will rarely be held unconstitutional.").

120. WEINTRAUB, *supra* note 14, at 646 (stating a court's choice of law should not upset a party's reasonable reliance on the law of a particular jurisdiction); Kogan, *supra* note 144, at 672 (discussing lip service given to the concept of fairness by "reference to concepts such as reliance, reasonable expectations, and unfair surprise"); Sedler, *supra* note 14, at 90 (referencing a party that "conformed its conduct to the law of another state in justifiable reliance on the [assumption] that that state's law would determine [the party's] rights with respect to that transaction").

121. Shreve, *supra* note 11, at 64 ("Concern that notice precede governmental action is a persistent theme in due process jurisprudence.").

122. 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, 124 (1981) ("[T]he purposefulness-as-consent criteria . . . ought to be a major factor in the development of federal limitations on the state choice-of-law process.").

The State F courts' choice of State X law in deciding whether Delta had full capacity to contract is "fundamentally unfair" when tested with reference to any of the aforementioned criteria. The lynchpin in assessing the impact each of those criteria might have in deciding whether the State F courts' choice of State X law is "fundamentally unfair" is the absence of any indication that either party knew or had reason to know Pi might be or had been in State X when he concluded the bargain proposed in Delta's offer by depositing the written acceptance in a mailbox.

As previously indicated, the prospect that a State F court might choose to apply the law of State X in deciding whether Delta has full capacity to contract was not reasonably foreseeable to either of the parties when they entered into the transaction.[123] Although the State F courts made that choice by applying choice of law rules that State F courts had applied in the past, it is unreasonable to argue that Pi, as a State F citizen, had reason to foresee that application of those rules would permit Delta to avoid the contract on grounds that she was still a minor under a State X statute. This is because Pi was not aware he was in State X when he deposited the written acceptance in the mailbox, and because lay persons—such as Pi and Delta—cannot fairly be expected to take account of the impact that application of such technical choice of law rules might have on their contractual rights and duties under the facts of this case.

Neither of the parties were aware that their transaction had any connection whatsoever with State X, making the State F courts' choice of State X law fundamentally unfair when tested with reference to any of the other aforementioned relevant criteria. That choice does not comport with either party's reasonable, rational, justifiable, or legitimate expectations. The facts do not indicate the parties ever considered any potential multistate aspect of the contemplated land sale contract during the course of their negotiations. Nor is there any indication that the written offer Delta made and Pi accepted contained a choice of law clause or a choice of forum clause. The absence of any reference to choice of law in the negotiations and in the terms of the agreement reflect the parties' implicit assumption that their rights and obligations under the contract would be determined in accordance with the law of State F. The State F courts' choice of State X law is unfairly surprising to Pi. He was undoubtedly surprised to learn that the postmark on the envelope containing his written acceptance indicated he had mailed it while he was unknowingly in State X; the absence of any other nexus between State X, the parties, and the transaction makes that surprise unfair. Neither party acted in reliance upon any belief that State X law would determine whether Delta had full capacity to contract. Delta had no reason (let alone any *justifiable* reason) to take account of any State X connection with the transaction until after the contract was concluded by Pi's dispatch of the written acceptance. If Pi had had any reason to anticipate that Delta might have been empowered to avoid the contract on grounds of minority until she reached the age of twenty-one, he could have postponed negotiations

123. *See supra* note 117 and accompanying text.

until that time. Given the absence of any perceived contact State X might have had with the transaction or the parties, neither party had any notice of the possibility that State X law might govern the incidents of their transaction, and Pi cannot be said to have expressly or impliedly manifested his consent to be bound by State X law.

The choice of State X law is also fundamentally unfair when evaluated in accordance with a theory of political obligation based upon affiliating circumstances.[124]

> In utilizing fairness contacts as a justification for a choice-of-law decision, a court must look to the affiliations both of the party seeking to invoke the state's law and of the party seeking to avoid that law. The inquiry involves two independent questions. First, is it fair for the party invoking the state's law to take affirmative advantage of that law in light of her affiliations with the state and the other litigants? Second, if the first question yields an affirmative answer, one must then ask whether it is fair to impose the burden of that law on the party resisting application. . . . Fairness dictates that a choice-of-law justification explain why the benefited litigant should be allowed to enjoy that benefit, given that the enjoyment is always at the expense of the other litigant. Therefore, the affiliations of both parties must be considered in determining the fairness posture of each in developing a theory of political obligation for the federal context.[125]

Application of this "bilateral" test to the facts of *Pi v. Delta* confirms the conclusion that the State F courts' choice of State X law is fundamentally unfair.[126]

Dawn Delta does not have any affiliating contacts with State X that would entitle her "to invoke the benefits of that state's law."[127] The facts do not indicate that Delta has ever had any contacts whatsoever with State X, and even if she had some contacts with State X before the events giving rise to the instant dispute occurred, those contacts are unrelated to that dispute. All of Delta's affiliating contacts with Pi occurred in State F. The only connection between Delta and State X is derivative of Pi's having been in State X when he accepted Delta's offer. In light of the lack of any direct affiliation with State X, it is not fair for Delta to invoke the benefit of the State X statute which affords persons under the age of twenty-one the power to avoid a contract.

If the lack of any direct affiliating contacts between Delta and State X make the State F courts' choice of State X law *unfair*, then the additional absence of any purposeful affiliating contacts between Pi and State X make that choice *fundamentally* unfair. Pi's unperceived presence in State X when he mailed the

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124. *See* LEA BRILMAYER, CONFLICT OF LAWS § 5.1 (Richard A. Epstein et al. eds., 2d ed. 1995).
125. Kogan, *supra* note 14, at 676.
126. *Id.* at 701.
127. *Id.* at 705.

written acceptance does not justify imposing the burden of State X's defendant-protective statute on him. Pi has not realized any benefit from his fleeting presence in State X, and subjecting him to the burden of State X law is therefore impermissible under a "benefaction theory" of political obligation.[128]

Each and every one of the criteria that have been recognized as being potentially relevant in evaluating whether a court's choice of law is "fundamentally unfair" in *Pi v. Delta* supports an affirmative answer. By choosing to apply the law of a state which has no legitimate interest in having its invalidating law applied to the facts, the State F courts unfairly denied one of its citizens (Gerry Pi) the benefit of State F's conflicting law, thereby violating the Due Process Clause.[129]

IV. CONCLUSION

It is not difficult to devise a hypothetical fact pattern which supports an affirmative answer to the question whether a state court's selection of another state's substantive law could exceed constitutional limitations on choice of law when that choice is reviewed under the permissive standard endorsed in *Allstate Insurance Co. v. Hague.* The point of this speculation is what that affirmative answer implies: Application of a manner of selection which the United States Supreme Court once insisted was a guarantor of due process[130] could now produce a choice of law that deprives a litigant of due process.[131] A state court's decision to apply the substantive law of another state could exceed constitutional limitations based solely on the Due Process Clause, rather than on both the Due Process Clause and the Full Faith and Credit Clause.[132] A court's non-parochial decision[133] to apply the law of another state could deprive forum citizens of substantive due process,[134] even though the court applied the forum's "traditional and subsisting" choice of law rules[135] in reaching that decision.

If a state court's decision to apply the substantive law of another state could deprive a claimant of due process in a contract case, it might also deprive a claimant of due process in other cases. Suppose, for example, that State F has adopted the rule making an actor liable without fault for injury caused as a result

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128. *Id.*

129. Shreve, *supra* note 11, at 77.

130. *See supra* notes 50-55 and accompanying text.

131. *Cf.* Sun Oil Co. v. Wortman, 486 U.S. 717, 727 n.2 (1988) (noting Court's rejection of "the view that the Constitution enshrines the rule that the law of the place of contracting governs validity of all provisions of the contract."); Allstate Ins. Co. v. Hague, 449 U.S. 302, 315 n.21 (1981) (describing as "hoary" the rule that once gave controlling constitutional significance to the place where an offer was accepted);.

132. *Cf.* Home Ins. Co. v. Dick, 281 U.S. 397 (1930) (stating Texas courts' choice of Texas rather than Mexican law violated Due Process Clause even though that choice could not have violated Full Faith and Credit Clause).

133. Weinberg I, *supra* note 14, at 86.

134. Brilmayer, *supra* note 2, at 1335.

135. *Wortman*, 486 U.S. at 727 n.2.

of the actor's engaging in abnormally dangerous activity,[136] whereas tort liability under the substantive law of State X is based exclusively on fault. Suppose further that Defendant, the owner of a demolition company and a State F citizen, domiciliary, and resident, exercises ordinary care in demolishing a building in Fexarcana on the State F side of the State F – State X border. That abnormally dangerous activity causes injury to Claimant, also a State F citizen, domiciliary, and resident, who was unknowingly on the State X side of the border in Fexarcana when the injury occurred. If Claimant brought suit against Defendant in a State F court, and the court applied the traditional choice of law rule under which tort liability is determined in accordance with the local law of the place where a claimant sustains injury,[137] the State F court's decision to apply the defendant-protective substantive law of State X would not be constitutionally permissible under the *Hague* test for the same reasons that made the choice of State X's substantive law unconstitutional in the hypothetical contracts case of *Pi v. Delta*: In the absence of any other contacts between State X and the events giving rise to the dispute, Claimant's fortuitous presence in State X when the injury occurred is not "a significant contact . . . creating State [X] interests, such that [a State F court's] choice of [State X's substantive] law is neither arbitrary nor fundamentally unfair."[138]

The unconstitutionality of the State F courts' choice of State X law in *Pi v. Delta* also highlights the anomaly that the United States Supreme Court imposes more stringent restrictions on a court's exercise of specific judicial jurisdiction than on a court's power to choose the governing law.[139] After learning that Pi had been in State X when he mailed the written acceptance of Delta's offer to her, Pi's lawyer did not even attempt to file suit against Delta in State X, even though a State X court, applying the "most significant relationship" test of the Restatement (Second) of Conflict of Laws to the facts, might have been expected to apply the validating substantive law of State F in deciding whether Delta had full capacity to contract.[140] Yet if Pi's lawyer had filed suit in State X, Delta's lawyer undoubtedly would have made a motion for summary dismissal and

136. RESTATEMENT (SECOND) OF TORTS §§ 519-520 (AM. LAW INST. 1977).

137. RESTATEMENT OF CONFLICT OF LAWS § 377 (AM. LAW INST. 1934) ("The place of the wrong is the state where the last event necessary to make an actor liable for an alleged tort takes place.").

138. Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981).

139. *See Hague*, 449 U.S. at 320 n.3 (Stevens, J., concurring) (citations omitted). *See generally* James Martin, *Personal Jurisdiction and Choice of Law,* 78 MICH. L. REV. 872 (1980); Courtland H. Peterson, *Proposals of Marriage Between Jurisdiction and Choice of Law,* 140 U.C. DAVIS L. REV. 869 (1981); Robert Allen Sedler, *Judicial Jurisdiction and Choice of Law: The Consequences of* Shaffer v. Heitner, 63 IOWA L. REV. 1031 (1978); Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978) ("To believe that a defendant's contacts with the forum state should be stronger under the due process clause for [judicial] jurisdiction[] purposes than for choice of law [purposes] is to believe that an accused is more concerned with where he will be hanged than whether."); Arthur Taylor von Mehren, *Adjudicatory Jurisdiction: General Theories Compared and Evaluated*, 63 B.U. L. REV. 279, 323-37 (1983). *See also* WEINTRAUB, *supra* note 14, at 636-37 ("[T]he Court imposes restrictions on state court jurisdiction that many commentators regard as unduly narrow and in cases such as *Allstate Insurance Company v. Hague* leaves the states free to do what they will with choice of law so long as they do not do it in the street and scare the horses.").

140. *See supra* note 29 and accompanying text.

persuaded the court that State X did not have minimum contacts sufficient to support its exercise of specific judicial jurisdiction over Delta.

The overwhelming connections between State F and all but one of the potentially relevant factors in *Pi v. Delta* makes choice of State F's law a territorial imperative despite the diminished importance that territoriality has under the *Hague* test.[141] The contractual relationship between Pi and Delta was centered in State F, even though that relationship came into existence when Pi deposited the written acceptance of Delta's offer in a State X mailbox. Absent any legitimate State X interest in affording Delta the power to avoid the contract, application of State F law to govern the contractual relationship centered in State F is the only rational choice.[142]

In choosing to apply the defendant-protective law of State X, the State F courts violated the principle of validation without adequate justification. "[T]he place of contracting can have no legitimate interest in invalidating the contract, not without further contact with the transaction than as [the] place of contracting,"[143] especially when a state only qualifies as "the place of contracting" under the technical rule that the place where an offeree dispatches a written communication of acceptance *is* the place of contracting. Courts should not give the same deference to contract *defenses* that they give to contract *validation*.[144] "All states share the fundamental . . . policies favoring security of transactions underlying the law of contracts."[145] Even if the State F courts' choice of State X's invalidating law established the absence of a State F interest in having its own validating law applied to the facts of *Pi v. Delta*, there is still no justification for choosing to apply the defendant-favoring non-forum law.[146]

> When a state denies the benefit of home law to those of its resident litigants whose cases have pointless or fortuitous contacts with other states, and instead applies the laws of the uninterested contact states, the state creates two classes of forum residents: those afforded the benefit of forum law, and those from whom the benefit of forum law is withheld. . . . [S]uch a classification will withstand scrutiny only if it has a rational basis. . . . [L]ack of a rational basis

141. *See* Martin, *supra* note 51, at 139 ("There are . . . cases, and issues in cases, that are so close to one state and so far from another [state] that the Constitution is interpreted to permit one law to govern while excluding the other."); Twerski, *supra* note 17, at 159 ("[B]efore a court can apply interest analysis it must have before it a case which is not essentially local in character. . . . [S]ome cases are so heavily centered in one jurisdiction that they never lose their essentially local character."); *id.* at 160 ("If state sovereignty implies an ability to control the legal result of essentially local controversies, then events that are centered from genesis to conclusion within the geographical limits of one sovereign cannot casually be removed from the lawmaking domain of that sovereign. The presumption is clearly in favor of the territorial result.").

142. Davies, *supra* note 61, at 192 ("[A] relationship can usually be assigned a geographic location without undue difficulty. The facts which create or extinguish a legal relationship and facts which change an existing relationship to one with modified rights, privileges, powers, and immunities are almost always quite clearly connected to a jurisdiction in which the relationship can be seated.").

143. Weinberg I, *supra* note 14, at 81.

144. *Id.*

145. *Id.* at 84.

146. *Id.* at 85.

> for, or governmental interest in, a choice of law will not only evoke the concerns underlying the due process clause, but can also bring into play those underlying the equal protection clause. . . . Blind application of the law of the place of transaction . . . then, is a recipe for the maladministration of justice.[147]

The manner in which the State F courts selected the substantive law of State X in resolving the question whether Delta has full capacity to contract is not constitutionally permissible under the *Hague* test because Pi's deposit of the written acceptance in a State X mailbox does not create any legitimate State X interest in according to Delta the power to avoid the contract on grounds of minority. Although the State F courts' choice of State X law does not violate the Full Faith and Credit Clause, State X has no conceivable interest in having its law applied to the facts of *Pi v.* Delta, because State X will not experience any consequences that the State X legislature might have taken into account in enacting that law.[148] On the other hand, State F does have a legitimate interest in according full contractual capacity to a twenty-year-old State F citizen when she contracts to sell land located in State F to another State F citizen. If "a disinterested forum may never choose its conflicting law over that of another, interested state[,]"[149] then, *a fortiori,* a forum may never choose the conflicting law of a disinterested foreign state over that of the forum when the forum has a clear interest in having its law applied to the facts.[150] And if choice of the law of a state having a legitimate governmental interest in its application is not fundamentally unfair,[151] then choice of the law of a state having *no* legitimate governmental interest in its application *is* fundamentally unfair.[152] Absent a contact that is sufficient to create a plausible State X interest in having its law applied to the facts, the State F courts' choice of State X law is both arbitrary and fundamentally unfair.

Just as "the Full Faith and Credit Clause sometimes invalidates a choice of law than [*sic*] the Due Process Clause would permit,"[153] so in *Pi v. Delta* the Due Process Clause should invalidate a choice of state law that the Full Faith and Credit Clause would permit. That conclusion supports Justice Stevens' opinion that the Full Faith and Credit Clause and the Due Process Clause "protect different interests and that proper analysis requires separate consideration of each."[154] Thus, even if it were plausible to conclude that State

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147. *Id.* at 86.

148. WEINTRAUB, *supra* note 14, § 9.2A, at 635.

149. Shreve, *supra* note 11, at 51.

150. *Id.* at 53 (stating forum cannot constitutionally apply the law of an uninterested state).

151. Weinberg I, *supra* note 14, at 90.

152. Kogan, *supra* note 14, at 666 ("[T]he court can ensure that the choice of a state's law is neither arbitrary nor fundamentally unfair by invalidating a state court's choice of law when that state has no significant contacts with the dispute creating state interests. . . . [S]ignificant contacts and state interests act as proxies for fairness to litigants.").

153. Weintraub, *supra* note 14, § 9.2A, at 626 n.19.

154. Allstate Ins. Co. v. Hague, 449 U.S. 302, 322 (1981) (Stevens, J., concurring). *See* RICHMAN & REYNOLDS, *supra* note 19, at 313 ("The Due Process Clause should not be used as a device for accommodating competing state interests. Persons, not states, have a right to due process. . . . Due

X has a legitimate governmental interest in applying its law to any contract that happens to have been made in State X, that putative interest is insufficient to support the conclusion of the State F courts in *Pi v. Delta* that choice of State X's law is neither arbitrary nor fundamentally unfair under the Due Process Clause.

"Reasonableness is the basic, core concept of due process."[155] The State F courts' choice of State X's law in *Pi v. Delta* is *not reasonable*, both because State X has no legitimate governmental interest that would be advanced by the application of its law to the facts, and because that choice is both arbitrary and fundamentally unfair to Pi, the party disadvantaged by the State F courts' choice of State X's substantive law.[156]

process analysis should center on the parties and ask questions about fairness, surprise, and expectations. Full faith and credit analysis should focus on the role of the states as sovereigns and inquire into the proper relations among sovereigns in a federal union."); Kogan, *supra* note 14, at 653 n.3 ("[T]wo values are involved in determining the scope of these [constitutional] limitations [on choice of law]. One of the values is fairness to the litigants, and the other is concerned with the needs of the federal system.").

155. WEINTRAUB, *supra* note 14, at 635.

156. *Cf. id.* at 637 (addressing cases in which "applying *forum* law is unreasonable both because of lack of forum interest in advancing its own policies and also because of unfairness to the party disfavored by forum law.") (emphasis added).