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A RESPONSE TO THE HAGUE SYMPOSIUM

PARTICULARISM IN THE CONFLICT OF LAWS

Courtland H. Peterson*

He who would do good to another must do it in Minute Particulars.
General Good is the plea of the scoundrel, hypocrite, and flatterer;
For Art and Science cannot exist but in Minutely organized Particulars.¹

William Blake (ca. 1810)

The great appeal of particularism, no less in legal reasoning than in Blake's larger view of the matter, lies in the sense that there is an inherent relationship between rationality and justice, and that being able to articulate specific reasons for decisions is not only more rational but therefore also more just. Legal reasoning—a process involving facts, rules, policies, and the relationships between them which lead us to or divert us from the application of the rules in question—may deal with its internal components either abstractly or particularistically. Surely no demonstration is required for the proposition that judges may render decisions on the basis of highly abstract rules and policies. In earlier times even the fact element was

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often treated abstractly, through systems of “formal” proof or oath-taking.

Particularism, on the other hand, urges that controversies be resolved in light of the specific law-fact problems presented by the individual case, rather than by abstract principles of general good which do not adequately consider the specific goals of a decision implicated by the case at hand. Any realization of the goals of decision requires us to consider the actual facts, define rules as precisely as possible, and identify the specific policies which would be effectuated or undermined by a decision one way or another.

There are, surely, limits to particularism which are also derived from a sense of justice. Controversies decided differently on the basis of distinctions intuitively felt to make no difference seem arbitrary and unjust. Decisions which pay no attention to the “real” differences between cases are ad hoc and appear unprincipled. Professor Arthur von Mehren captured the balance between particularism which is just and particularism which is unjust with the marvelous phrase “explanatory power.” Specificity derives its appeal from the desire to explain and be understood; specificity becomes unjust when the particulars referred to do not explain differences in result.

In this article I do not, therefore, assume that particularism is an unqualified value, or that the ultimate in specificity is necessarily the ultimate in justice. It appears, however, that decisions in virtually all fields of American law have been moving steadily toward lowered levels of abstraction, with the objective of increasing their explanatory power. The concept of particularism may thus provide an index of the level of abstraction, against which perspectives of explanatory power can be described. Applying this index to conflict-of-laws theory reveals, I believe, that even the modern approaches to this field remain relatively abstract.

A noteworthy aspect of the nature of particularism, peculiarly important to conflicts theory, is best described in terms of the dual nature of abstraction. Abstraction is a process by which some particulars are defined as irrelevant because they are unessential to the validity of the proposition or applicability of the rule in question. Thus many of the particular facts of cases a, b, and c may be quite

2. von Mehren, Recent Trends in Choice-of-Law Methodology, 60 CORNELL L. REV. 927, 944 (1975). Professor von Mehren uses the term in criticizing the broad policy approach of Joseph Story, but goes on to discuss the problems of “incomprehensible or invidious results” arising when a layman “cannot understand distinctions taken or when he considers them unfair.” Id. at 944-45, 961.
different; yet, by defining the differences as irrelevant, the proposition governing case a may nevertheless become abstract enough to cover b and c as well. The more particulars defined as irrelevant, the more abstract the resulting proposition becomes because it will accommodate an increasingly disparate group of cases. At some such level of removal almost any proposition begins to lose its explanatory power because it becomes divorced from what are generally perceived to be relevant differences between the cases covered. I submit that this broadening process is usually the way we think about the concept of abstraction and that, as such, it is clearly the conceptual opposite of particularism.

Yet another way in which abstraction can occur comes not by broadening the proposition in question, but by narrowing it. Perhaps the term pseudo-particularism is appropriate to describe this process, although that description should not necessarily be understood in a pejorative sense. The focus on a set of particulars as solely determinative of the applicability of a proposition or rule seems highly particularistic. It may result in abstraction, however, because it defines other particulars as irrelevant. Thus, if in a given case containing particulars of facts x, y, and z, fact x is made the only determinative factor, the resulting proposition is abstract from y and z. As in the case of abstraction through the broadening of a proposition, the abstraction resulting from pseudo-particularism also loses its explanatory power when it is perceived that there is no rational basis for excluding particulars y and z.

The purpose of this article is not to solve the intractable problems of conflict of laws; rather, it has the much less ambitious objective of bringing some new perspectives to old problems. I begin by describing the movement of American law toward particularism, emphasizing the increasing policy-orientation of our legal reasoning, and by identifying differences encountered in the application of policy analysis to nondomestic cases.

Section II describes the main currents of modern attempts to particularize conflicts theory in terms of their levels of abstraction, and attention is given to the question of an “ordering principle” in

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3. The pseudo-particularistic nature of this form of abstraction frequently emerges in conflicts cases in terms of particulars of policy. If a given rule of forum law, urged as applicable in a conflicts case, has a single, identifiable underlying policy, but the case also implicates competing rules and policies of another state, an exclusive focus on the policy of the forum appears to be particularistic but is an abstraction; the policies of the other state are simply defined as irrelevant to decision.
the treatment of broad policy questions. Section III continues the
discussion of policy problems in conflicts theory, and suggests some
ways in which particularistic approaches can help to clarify policy
analysis.

In the final section of the paper, I address the constitutional
dimension of conflicts theory in light of the index of particularism,
suggesting that negative reactions to the Supreme Court's recent ab-
dication of responsibility for control of state choice of law are pri-
marily concerned with the abstract treatment of the "state interests"
essential to constitutional choice. I argue in this section that particu-
larism in the articulation of state interests lies at the heart of the
rationality which should be demanded as a constitutional standard. I
also suggest that a particularized approach may provide a workable
method of dealing with post-occurrence changes in domicile.

I. SOME PARTICULARS ABOUT PARTICULARISM

... [M]y fundamental formula ... [is]
that the chief end of man is to frame
general propositions and that no
general proposition is worth a damn.6

O.W. Holmes, Jr.

Holmes' epigram identifies both the common urge to generalize
and the weakness of the result. Indeed, I am struck by the irony of
my inclinations to generalize about particularism and the risks of
oversimplification inherent in doing so. Perhaps there is some small
comfort in another epigram, that "[a]ll generalizations are false, in-
cluding this one."7

The objective of specificity in factfinding and in defining rules
has never been lacking in our legal system, even though imperfectly
realized. Particularism, however, or particularization, seems most
often to have been used only with reference to matters of fact. It is
especially used in the context of discussing whether cases ought to be
analyzed according to their specific facts or whether certain factual
distinctions between cases should be ignored in the interest of formu-
lating an efficient rule.7 This usage, although hardly incorrect, is, in

4. See Allstate v. Hague, 449 U.S. 302 (1981); see also infra notes 130-57 and accom-
panying text.
5. 2 HOLMES-POLLOCK LETTERS 59 (1942) (letter to Sir Frederick Pollock (1920)).
6. This quotation has also been attributed to Holmes, but I have not been able to find
the source.
7. Cf. Comment, Fact Analysis as a Method for Resolving Conflicts Under the State-
my view, misleading because its focus is wrong. The inference is that factual issues are primarily at stake. We would do better, I believe, to recognize that particularism is at work in all elements of legal reasoning—facts, rules, and policies—and on the relationships between these elements.

A review of several basic propositions demonstrates the validity of this broader perspective. All facts of all cases cannot be treated as relevant if the rules used in deciding them are to be normative: The objective of deciding like cases alike presupposes an ability to determine some central or essential characteristics of "likeness." The content of the potentially applicable rules drawn into question by the nature of the controversy defines the relevant facts in a legal controversy. That process of definition obviously depends upon a determination of the content of the rules, which may be supplied by their literal scope, their purposes, or both. There are thus three sets of particulars to consider: particulars of fact, the particular literal scope of a rule, and the particulars of the rule's underlying policy. Each of these sets of particulars can be thought of independently, and perhaps such abstract consideration can legitimately claim to be a form of legal reasoning. None of these sets of particulars, however, is operative as part of the process of judicial decisionmaking except in its relationship to one or both of the other sets.

The application of rules to facts falling within their literal scope, without inquiry into underlying policy, remains the norm in numerical terms. The simple explanation for the failure to consider underlying policy is that the majority of such applications is seldom disputed, or is disputed only in terms of what constitutes the literal scope of the rule in question. In such cases, the scope of the rule—its content—is determined by its own "plain meaning," and this literal scope in turn defines the relevance of facts in each case.

When the purpose of a rule is permitted to play a role, however, it may affect the reasoning process in several ways. First, the scope of the rule, which may now be defined by its underlying policy rather than by its plain meaning, may be substantially altered. Second, the

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8. "If you think you can think about something which is attached to something else without thinking about what it is attached to, then you have what is called a legal mind." T.R. Powell, quoted in Arnold, Criminal Attempts—The Rise and Fall of an Abstraction, 40 YALE L.J. 53, 58 (1930).
facts relevant to decision may be defined by the underlying policy rather than, or in addition to, the literal scope of the rule. Both of these effects are complicated in our legal system by differences dependent upon whether the rule in question is statutory or of common law origin. Subject to inhibitions imposed by the (abstract) doctrine of stare decisis, the rearticulation of a common law rule in the process of decisionmaking may shrink or expand its literal scope to match its underlying policy. The (abstract) doctrine of separation of powers has a more restrictive effect. It may permit the expansion of literal statutory scope by the creation of supplementary and consistent common law rules, but, at least in theory, it forbids the shrinkage of statutory scope because that would usurp the legislative function.

American law in this century, abetted if not inspired by changing methodologies in American law schools, has seen an incremental but nonetheless dramatic movement toward acceptance of lowered levels of abstraction. The key to that movement has been the elevation of the role of underlying policy to a position of greater importance, if not dominance, in the determination of critical issues. On its face this movement has been highly particularistic in nature, shunning mechanical application of rules having an abstract character, and seeking to explain the outcomes of legal decisions in terms of specific societal objectives. This policy-oriented approach has not only increased the importance of determining the purposes of legal rules, but has also significantly altered the relationships between the other elements of the legal reasoning process in the fashion described. These alterations are avoided only if underlying policy is perceived as coextensive with the literal scope of the rule. The determination of policy, however, presents special problems which must be considered.

The underlying policy of a rule may be apparent from its literal scope. Where it is not, and, for example, the literal scope of the rule is broader or narrower than the policy suggested by its language, recourse may be had to legislative history. Few states, however, have any comprehensive source material of this kind. Comparable "judicial history" may be of assistance with respect to the common law and in the prior interpretation of statutes. The inductive nature of analogical reasoning used by American courts, however, invites the articulation of policy in broad terms. Moreover, most judges are acutely aware that present decision creates future precedent, and are therefore concerned with the possible use that may be made of the
immediate decision in deciding future cases. Consequently, judges are likely to test the meaning and scope of policy presently under consideration, not only as it affects the case at hand, but also in light of its potential impact on hypothetical cases which the judge foresees arising. Policy is likely to be rationalized, therefore, not only in terms of the particular facts presented for adjudication, but also in terms of the particulars of hypothetical cases.

The abstract articulation of policy is tempered in several ways. The mandates of stare decisis, for example, do not extend beyond the specific holdings of cases, and permit broad pronouncements to be ignored as dicta. Although this may ameliorate the effect of broadly articulated policy on future cases, it may also encourage the activist judge to indulge in charting directions for the law without being bound by that language in future decisions.

The shift to a policy-oriented approach in decisionmaking may also temper the abstract articulation of policy because it exerts pressure upon judges to discover the underlying policy of rules in issue. Conflicts theory requires policy not only to define the reach of a rule but to determine state interests as well. In purely domestic cases there is no such compelling necessity to find the relevant policy if it is in doubt. Rather, doubt may be resolved simply by applying the rule according to its literal scope on the ground that it serves some general regulatory purpose, even if a more specific underlying policy cannot be identified. Thus, in domestic cases the application of rules according to their literal scope, without an examination of underlying policy, is still the numerical norm. Policy is used primarily to aid in understanding the rule as well as in defining the scope of the rule in relation to competing domestic rules and policies. The "interest" of the state in applying these rules, one or the other, is never in doubt. Finally, and of special importance to this inquiry, a policy-oriented approach will discourage the articulation of broad policy in domestic cases where the actual facts of the case would render the policy in question irrelevant. 9

The foregoing description of particularism in domestic cases is

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9. There are exceptions, of course, most notably in the use of general formulae for damages, where a court may refuse to consider facts which would render its general rules of compensation inapplicable, but such refusals of particularism are made notable by their rarity. E.g., Don v. Trojan Constr. Co., 178 Cal. App. 2d 135, 2 Cal. Rptr. 626 (1960) (owner permitted to recover rental value of vacant land against trespasser, although trial court had awarded only nominal damages on finding that plaintiff would not have rented or otherwise used the land during the period in question). See also D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 12.21, at 903 (1973) (discussing breach by delay in construction contracts).
obviously oversimplified but will not, I trust, be controversial. Hopefully, it demonstrates that particularism is pervasive in the process of legal reasoning, and that our increasing concern with underlying policy in the resolution of critical legal issues has not only influenced the process itself but has also encouraged greater particularism. This brief review also suggests that the use and articulation of policy creates a tension between particularism and abstraction.

I do not mean to suggest that particularism has proceeded at an even pace, or that it extends equally to all fields of law; the inertia of centuries of conceptualism, for example, has discouraged particularism in the law of real property. In domestic cases the growth of particularism nevertheless has had a common identity and comparability, so that progress in one field of law influences and reinforces change in another.

The pressure to find underlying policy is far greater in nondomestic cases than in domestic cases, and the extension of particularism and the closely associated notions of policy orientation to conflict of laws cases has presented some special problems. As in the case of property law, these have partly been concerned with the inertia of deeply rooted conceptualism. The problems in conflicts cases, however, have been even more fundamental, and have lacked the same degree of commonality and comparability found in the extension of particularism and policy-oriented notions to other fields of domestic law. Four other differences between domestic and conflicts cases which create the special problems associated with the extension of particularism to conflicts cases must be mentioned.

The most obvious difference lies in the irreducible necessity of choice. In domestic cases, rules are simply assumed to be applicable if the facts of the controversy are relevant to the literal scope and policy of the rules. In cases involving nondomestic persons or events, a choice must be made between applying the rules of the forum or of some other state with which the persons or events are connected. How that decision is to be made has elicited various responses, and the more recent theories represent attempts to make the process more rational through particularization. Whether attempts have been successful remains to be seen. None of these theories, however, has successfully eliminated the basic necessity of choice.11

10. In the conflicts area this conceptualism has been expressed primarily by the vested rights theory and by formalized modes of the exercise of judicial jurisdiction.

11. The "local law" theory proposed by Professor Walter Wheeler Cook avoided the choice issue by arguing that the forum always applied its own law, that rights enforced were
A second difference between domestic and conflicts cases arises from the effect of choice in the existing political structure of our federal system. The judge in a domestic case, of course, is frequently confronted with a choice between several domestic rules in a situation where both rules could legitimately be applied as the rule of decision because the facts of the case fall wholly or partly within their literal scope or, perhaps, within their competing policies. Application of one rule may expand its scope and shrink the scope of the rule not applied. Under a policy-oriented approach, this choice is likely to be made after a comparative evaluation of the policies in question. The result in such domestic cases is an integrated whole, which redefines the relationship between these rules and their policies. In a nondomestic case, even if approached on the same level of particularism, no such integrated whole can result. When choosing between competing rules and policies of several states, the forum court is powerless to change the scope of the foreign rule or its underlying policy. The decision has precedential value in the forum, but little, if any, outside the forum. A subsequent case on identical facts tried in the state of the competing rule and policy may thus be decided differently.12

A third difference between domestic and conflicts cases arises from the fact that many rules of law are supported by more than one underlying policy. In the domestic setting such policies supplement and reinforce one another. Evaluation of competing rules and their multiple underlying policies in the nondomestic setting is more complex because of the larger number of policies to be considered, but this complexity is manageable. The distribution of law-fact elements in conflicts cases, which may render some of the policies underlying only those created by forum law, and that such rights might be molded in appropriate cases after a foreign model. W. Cook, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 29 (1942). This, of course, merely changes the terminology of choice, since the question of when and how the foreign model is to be used remains. In a similar vein, Professor Herma Kay suggests that the question in choice-of-law cases is not "whose law is to be applied" but rather "under what circumstances is a departure from local law justified?" Kay, The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience, 68 CAL. L. REV. 577, 617 (1980). This, too, as Kay recognizes, merely redirects the focus of the inquiry and does not itself solve the problem.

12. This consequence could be avoided by national legislation setting choice standards or by a national court charged with similar responsibility, but proposals for these solutions have drawn few adherents. See, e.g., Horowitz, Towards a Federal Common Law of Choice of Law, 14 U.C.L.A. L. REV. 1191 (1967); Trautman, The Relation Between American Choice of Law and Federal Common Law, 41 LAW & CONTEMP. PROBS. 105 (Spring 1977).
the rules in question irrelevant, poses a more difficult problem. Is a rule thus deprived of part of its supporting policy to be treated as it would if its application were to effectuate all of its underlying purposes?

A fourth major difference between domestic and nondomestic cases also stems from a multiplicity of policies, but, in this case, from the addition of policies wholly irrelevant to domestic cases. Harmonious relations between states and the promotion of social and economic relationships between citizens of different states are desirable objectives. Rules of multilateral applicability as to these matters probably presuppose agreements among the states or a super-state authority with the power to regulate them. The absence of either of these, however, does not prevent states from acting on a unilateral basis in seeking to effectuate these objectives through the recognition of appropriate multistate or interstate policies. A persistent problem of conflicts theory has been whether to ignore policies unique to nondomestic cases or, if not, how to relate them to the treatment of policies underlying specific rules.

II. ATTEMPTS TO PARTICULARIZE AMERICAN CONFLICTS THEORY

There are and can be only two ways of searching into and discovering truth. The one flies from the senses and particulars to the most general axioms... this way is now in fashion. The other derives axioms from the senses and particulars, rising by a gradual and unbroken ascent, so that it arrives at the most general axioms last of all. This is the true way, but as yet untried.15

Francis Bacon
Novum Organum (1620)

The traditional jurisdiction-selective choice-of-law rules were abstract in several respects. First, their structure was designed to select only legal systems, regardless of the rules they might contain. At

13. For a discussion of this “disappearance phenomenon,” see von Mehren, supra note 2, at 937.
least in theory, this deprived the judge of the opportunity to consider
the underlying policy of the domestic rules actually in conflict. The
d judge could, of course, resort to the policy of rules of the jurisdiction
selected to determine which of its rules should be applied, but this
was to occur only after the selection was made and was thus not to
be a part of the choice process. Second, the traditional choice rules
covered broad classes of cases rather than specific issues. Third, the
connecting factors used in the rules—locus, situs, and domicile—were so few in number as to exclude many other potentially
relevant connectives.\(^{16}\) In addition, to the extent that the choice rules
could themselves be said to have underlying policies of certainty,
predictability, uniformity of result regardless of forum, and the
avoidance of forum shopping, they were highly nonspecific. Indeed,
laudable as these objectives may be, they were useful less as policies
guiding decision than as justifications for having any abstract sys-
tem, regardless of its content. In sum, the traditional system rejected
any role for policy analysis, save as a defense against the use of an
otherwise applicable foreign law deemed offensive to the public pol-
icy of the forum.

This traditional system, based on a territorial theory of vested
rights, was brought to its fullest flowering with the publication of the
original Restatement of Conflict of Laws\(^{17}\) in 1934. Not surpris-
ingly, the trend toward policy analysis and particularism described
in the preceding section brought forth contemporary criticism of the
Restatement's abstractions. Professor Walter Wheeler Cook, in a se-
ries of essays later drawn into book form, demonstrated the absurdities in case results to which the traditional system could and did
lead.\(^{18}\) Professor David Cavers, in a landmark article\(^ {19}\) foreshad-
owing most of the important developments in this field over the next
half century, suggested as a prescription for these ills that the
"blindfold" of jurisdiction selection be removed,\(^ {20}\) and that choice
questions be resolved through a direct comparison and evaluation of
the rules and policies of the states involved.\(^ {21}\) The critics then and
later agreed that the traditional system, apart from its potential for

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16. The connectives so defined were pseudo-particularistic in the sense described earlier. See supra text accompanying note 3.
17. RESTATEMENT OF CONFLICT OF LAWS (1934).
18. See W. COOK, supra note 11 passim.
20. Id. at 180.
21. See generally id.
irrational results in individual cases, could not and did not achieve its own objectives of certainty, predictability, and uniformity of result regardless of forum because the mechanics of its structure were vulnerable to manipulation through such devices as characterization and renvoi.

Somewhat more surprising than this devastating criticism was the hesitancy of American courts to accept and act upon it. Perhaps the explanation lies in the fact that many courts were particularizing, by peeking under the blindfold, thus reaching acceptable results in individual cases precisely through the traditional system's vulnerability to manipulation. In any event, there were only isolated cases seeking new solutions for almost thirty years. A major reorientation of American choice-of-law theory had to await a congeries of events beginning in the 1950's which included the decision of the American Law Institute to issue a Restatement (Second), with Professor Willis Reese as Chief Reporter; the emergence of Justice Roger Traynor of the California Supreme Court as an innovator in this field; the appearance of Professor Brainerd Currie's seminal works on governmental interest analysis; and the willingness of the prestigious New York Court of Appeals to break with traditional theory. As Professor Juenger recently pointed out, although the ideas in the ensuing and still continuing American "revolution" of choice theory were fresh by American standards, they were not really new when viewed in historical perspective. Most of these ideas

23. *Id.* § 7, at 166.
24. *Id.* § 89, at 180.
fell well within the growing American tradition of particularism and policy orientation.\textsuperscript{31}

Subsequent details of the "revolution" are familiar history and need no comprehensive recitation here. What has emerged, on the scholarly side, is a fair profusion of theories and refinements of theories, often closely defined and jealously guarded as academics are wont to do. On the judicial side it is clear that a majority of American states have broken with traditional theory, at least in some fields of law,\textsuperscript{32} in favor of a more particularistic approach. Beyond that, and the presumptive primacy which many of these theories have given to the application of forum law, it is difficult to find a common denominator in the cases. Instead, the case law reflects a highly eclectic approach to theory;\textsuperscript{33} this eclecticism can itself be read as a form of particularism, in which the courts seek a theory to fit the case. If this is so, such an approach is as unprincipled as were the manipulative devices used to reach acceptable results in individual cases under the traditional territorialist theories of the first Restatement.

No detailed evaluation of the particularistic qualities of all of the various theories can be undertaken here. The most that I will attempt is a discussion of the principal currents of modern theory. In their recent criticism of \textit{Allstate Insurance Co. v. Hague},\textsuperscript{34} Professors von Mehren and Trautman suggested that "at least three general approaches" to choice of law have been utilized in the last two centuries in the United States: (1) Choice "in terms of broad policies respecting the requirements of social and economic intercourse among states," with which the authors associate the work of Joseph Story; (2) the traditional territorialist system, associated with Professor Beale and the first Restatement; and (3) the instrumentalist methodology "widely accepted today," under which it is regarded as arbitrary for a legal order to apply a legal rule in a given case unless the contacts between that legal order and the transaction or occurrence are such that there is a reason, in view of the policies

\textsuperscript{31} See supra text accompanying notes 6-14.
\textsuperscript{34} 449 U.S. 302 (1981).
related to the rule, to apply it to the particular issue presented.\textsuperscript{85}

Presumably this third approach sweeps within its ambit not only the second \textit{Restatement} but also Currie's interest analysis and the various "functional" theories.\textsuperscript{86}

For purposes of assessing the degree of particularism in modern choice theory, I would describe the main currents of thought as four theories rather than three. First, it should be recognized that a significant number of states have made a conscious choice to retain traditional theory, notwithstanding the defects and abstractions noted above.\textsuperscript{87} Moreover, even in those states that have broken with traditional theory in principle, by deciding one or more cases under new theory, it should not be assumed that traditional theory is dead. Most of the "breakthrough" cases have been decided in the areas of tort and contract law.\textsuperscript{88} The tenacity of traditional theory in other fields, such as property law, should not be overlooked.\textsuperscript{89}

The second current may be called the broad policy approach, or more specifically, the approach based on "choice influencing considerations."\textsuperscript{90} In my view, the general policies of accommodation among sovereign states suggested by Judge Story were submerged in the traditional territorialist system to which Story's work also pointed. These policies may have served as justifications for the territorialist theory which found its fullest expression in the first \textit{Restatement}, but they were not operative parts of that approach because, as Cavers put it, the first \textit{Restatement} was a "closed system."\textsuperscript{91} The broad policies re-emerged, however, in 1952 when Professors Cheatham and Reese expanded them to include such matters as forum preference, the protection of justified expectations, and justice in the individual case.\textsuperscript{92} Professor Yntema differentiated these policies to an even greater number.\textsuperscript{93} Later, Professor Robert Leflar summarized these

\begin{itemize}
  \item 36. See infra text accompanying note 73.
  \item 38. Reese, \textit{American Choice of Law}, 30 \textit{Am. J. Comp. Law}, 135, 139-40 (1982).
  \item 39. See id. at 141-44.
  \item 40. For a discussion of choice-influencing considerations, see Leflar, supra note 23, at 193-96.
  \item 41. Cavers, supra note 20, at 208 n.59.
\end{itemize}
lists. The Leflar list, which several courts have adopted,\textsuperscript{44} includes the following considerations:

1. Predictability of results;
2. maintenance of interstate and international order;
3. simplification of the judicial task;
4. advancement of the forum's governmental interests; and
5. application of the better rule of law.\textsuperscript{45}

Professor Leflar does not regard these broad policies as the exclusive source material for conflicts decisions; rather, they "tie in with the common law as it has already developed, and they assume that the mass of developed common law on choice of law will continue to serve its normal precedential function."\textsuperscript{46} Thus, the intention is to allow and encourage courts to particularize by articulating the specific aspects of each case presented for decision which are relevant to the broad policies listed in the five categories. Mechanical rules are not discarded, although

[t]he function of the considerations should be to assure a continuing reexamination of precedents, a readiness to lay aside old mechanical rules that turn out to be without support in the considerations or that contradict them, yet at the same time to promise a reaffirmation of old rules, or at least of old results, that conform to and implement the considerations.\textsuperscript{47}

The most controversial aspect of this approach has been the inclusion of the "better law" factor, which subsumes "protection of justified expectations" and "conflicts justice" as well as the avoidance of archaic or otherwise defective rules.\textsuperscript{48} Leflar argues persuasively that this factor should be explicitly recognized, since courts do, in fact, pay attention to such matters. It is clear, however, that he does not view it as an unbridled license to engage in judicial legislation.\textsuperscript{49}

\textsuperscript{44} Turcotte v. Ford Motor Co., 494 F.2d 173 (1st Cir. 1974) (applying Rhode Island law); Milkovich v. Saari, 295 Minn. 155, 203 N.W.2d 408 (1973); Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966); Conklin v. Horner, 38 Wis. 2d 468, 157 N.W.2d 579 (Wis. 1968).

\textsuperscript{45} R. LEFLAR, supra note 22, § 96, at 195, §§ 103-07, at 205-15. Professor Leflar believes his list to include, at least by implication, all of the matters covered in the more differentiated lists of Cheatham, Reese, and Yntema. \textit{Id.} at § 96, at 195.

\textsuperscript{46} \textit{Id.} at § 108, at 215.

\textsuperscript{47} \textit{Id.} at 216.

\textsuperscript{48} \textit{Id.} § 107, at 212-14.

\textsuperscript{49} \textit{Id.} at 215.
A common denominator of the Leflar approach and the other broad policy lists is their lack of an ordering principle, by which a choice between conflicting indicators in the various factors can be made.\(^5\) The assumption that public and private interests, and specific and abstract policies, can all be thrown into the same balancing process further complicates a choice-influencing-considerations approach. It may be true that a predominance of considerations will appear on one side in many cases and thus lead to sensible results. It is also clear that the lack of guidance in the choice between particulars leaves decision very much at large in the more difficult cases.

Judged by the standard of particularism, therefore, the choice-influencing-considerations approach presents a mixed bag. Courts are invited, even urged, to identify the specifics relevant to decision within the scope of each of the listed considerations. What is to be done with these particulars after their identification, however, is left to a vague and highly abstract principle of "reasonableness."

The third major current of modern conflicts theory is the governmental interest analysis originally proposed by Professor Currie\(^5\)\(^1\) and since developed in greater detail by others. This analysis not only provides an ordering principle but also solves the problem of choice by assuming the applicability of the law of the forum unless that law is somehow displaced.\(^5\)\(^2\) The assumption is rationalized not only by the normal separation of powers concept,\(^5\)\(^8\) under which courts are bound to follow legislative commands if constitutional, but also by a view of the horizontal separation of powers residing in the various states in a federal system.\(^5\)\(^4\) This broader perspective of separation of powers permits, indeed requires, the forum court to regard its own common law rules and statutes as directives looking to the application of forum law. Foreign statutes and rules will not displace a forum's statutes and rules in the decision of a case unless the forum has no "interest" in the case.\(^5\)\(^5\) State interest for these purposes is defined by whether or not, on the facts presented, the underlying

\(^5\)\(^0\) "These catalogues are virtually meaningless in view of their generality, comprehensiveness and inevitable inconsistency. In order to derive concrete solutions from them it would be necessary to limit their scope severely and to establish standards of relative effectiveness."


\(^5\)\(^1\) B. Currie, supra note 28, at 75, 183.
\(^5\)\(^2\) Id.
\(^5\)\(^3\) Id. at 182-83.
\(^5\)\(^4\) Id. at 194.
\(^5\)\(^5\) Id. at 184.
policies of the forum rules would be effectuated. In other words, even if the foreign state has an arguably stronger interest, its rule will not displace forum law if the forum has any interest at all. Competing interests are not to be "weighed" against each other because the choice-of-law decision is a political, nonjudicial function. If neither state has an interest, the "unprovided for case," then forum law should be applied for lack of any better solution. As an antidote to the potential for parochialism which these rules obviously contain, Currie suggests that in case of doubt a state should give a "restrained and enlightened" interpretation to its own interests.

Professor Currie's approach clearly sought to bring particularism and policy analysis to conflicts theory in some effective way, and in several respects his approach was admirably successful in doing so. Perhaps Currie's most notable contribution lies in his demonstration that the 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. The irrationality of such a result, and Currie's proposal of no-application-without-an-interest as a method of avoiding it, gave his approach a high degree of credibility and explanatory power.

Uneasiness with much of the interest analysis approach, however, was expressed early and has increased in recent years. I suggest that most of this criticism can be understood in terms of the particularism index. Interest analysis as expounded by Currie was in many respects scarcely less abstract than the first Restatement. Its abstractions were less apparent, however, because they took the form of pseudo-particularism described earlier. In other words, by focusing on particulars, especially particulars of policy, which clearly

56. Id. at 183, 189.
57. Id. at 181-82, 604.
58. Id. at 184.
59. Id. at 93-94, 186, 191, 717, 718.
60. Id. at 95-96, 107.
62. E.g., Brilmayer, Interest Analysis and the Myth of Legislative Intent, 78 Mich. L. Rev. 392 (1980); see also von Mehren, supra note 2, at 935-41; R. Lefflar, supra note 22, § 92, at 185.
63. Professor Brilmayer, supra note 62, at 393, 430, characterizes the interest-analysis approach as "metaphysical."
64. See supra note 3 and accompanying text.
were relevant, and demonstrably more relevant than traditional theory had allowed them to be, it diverted attention from the fact that other relevant particulars were being excluded from consideration.\textsuperscript{65}

Thus, under interest analysis, the answer to the basic question of choice of law is the primacy of forum law; the policy on which this choice rests is the state sovereignty concept described above as an expansion of the separation of powers principle in the federal system. Interest analysis may be criticized, however, in that it effectively excludes other arguably relevant policies such as those designed to promote harmony among states or commercial intercourse. The only bow in this direction is Currie's suggestion of a state's restrained and enlightened interpretation of forum interests.\textsuperscript{66}

Moreover, to the extent that restrained and enlightened interpretation is intended as a recognition of general multilateral policies, it lacks, even more than the general principles of the \textit{Restatement (Second)},\textsuperscript{67} an ordering principle by which to decide among choices. Although the \textit{Restatement (Second)} offers an ill-defined weighing process, it at least invites comparative analysis. Governmental interest analysis rejects any weighing of interests.

A second area of abstraction for which interest analysis has been criticized, although perhaps somewhat unfairly, is its definition of interests as governmental interests, and its consequent subordination of private interests such as justified expectations and party autonomy in consensual transactions.\textsuperscript{68} It is a partial answer that such

\textsuperscript{65} See von Mehren, \textit{supra} note 2, at 938-41.


\textsuperscript{67} \textit{Restatement (Second) Conflict of Laws} (1971).

The principles of Section 6 read as follows:

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

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

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

(b) the relevant policies of the forum,

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

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

\textit{Id.} § 6.

\textsuperscript{68} See A. Ehrenzweig, \textit{supra} note 50, at 350.
interests derive their protection from public or governmental policies, and that the latter are the very stuff from which state interests are defined. Private interests, however, which are not necessarily embodied in a specific policy, may have a legitimate claim for consideration in the choice process, and their exclusion or subordination by interest analysis erodes the explanatory power of that theory.69

Two more cogent criticisms of abstraction in interest analysis may be advanced. One of these, which relates to the potential for finding state interests based on only hypothetical particulars of fact, will be deferred for later discussion.70 The other, discussed here, is concerned with the definition of state interests by policy analysis.

The interest of a state in applying its rules to a controversy having foreign elements is said, under interest analysis, to depend upon whether such application would effectuate the policy underlying those rules. The state thus has an interest if the persons or events involved are within the intended reach of that policy, but that intended reach cannot be read as an intention to legislate for the whole world.71 It must instead be limited by some relationship between the state and the persons or events to be affected, and this requires identification of some connecting factor or factors—even if they be called by some other name. Critics attacked traditional choice-of-law rules because their scope was defined in territorial terms, primarily by connectives of locus and situs. In his zeal to rid conflicts theory of territorial conceptualism, Professor Currie focused on the relationship between the state and persons, using the connectives of residence, domicile, or citizenship.72 These connectives may be slightly more particularistic and more rational than the territorial connectives, in that they may increase slightly the odds that appropriate policies will be implicated. Thus, it may be argued that states intend to extend rules embodying protective or compensatory policies to persons having a more or less established relationship with the state, rather than automatically ending the rules’ reach at the state line. So far as the connectives themselves are concerned, they are only marginally less abstract than the connecting factors used in tradi-
A fourth major current of modern choice theory is one which attempts to encompass the second and third, by drawing into a single methodology consideration of broad multilateral policies, private interests, governmental interests, and underlying policies. This approach is primarily distinguishable from the broad policy approach or choice-influencing-considerations approach in that it attempts to impose an ordering principle or principles on these diverse matters so as to provide guides to decision rather than leaving the competition between policies unfettered. Within this current we can identify the "functional" theories of Professors von Mehren and Trautman\(^7\) or Weintraub;\(^7\) the "principles of preference" theory of Professor Cavers;\(^7\) and the "most significant relationship" approach of the Restatement (Second).\(^7\) Although there are important differences between these approaches, I will confine my examination here to the approach of the Restatement (Second) since it seems to have commanded a major share of the courts' attention.

It may be appropriate at this point to interject a comment about the relationship of particularism to the familiar canon of interpretation, that "the specific governs over the general." The canon may itself be an illustration of the urge to particularize, in explaining the effect or meaning of statutes, contracts, or other documents. Particularism, however, as we have seen, is a much more pervasive idea, limited in some ways, but reflecting a value or objective felt but not always articulated in many aspects of legal reasoning. Particularism may thus even be described as constituting a policy, that the general should be made more specific—still followed, of course, by the proposition that the matter thus specified should govern over the general.

The structure of the Restatement (Second) represents a fascinating study from the standpoint of particularism because the ordering principle it proposes uses, and simultaneously limits the specific-governs-general standard,\(^7\) and also demonstrates the general-

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74. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (2d ed. 1980).
76. RESTATEMENT (SECOND) CONFLICT OF LAWS (1971).
77. The choice provisions of the Restatement (Second), id., may be distinguished by noting whether they fall within a one-, two- or three-tiered structure. The single-tiered category is composed of provisions of the traditional choice-of-law rule type, with a single connecting factor directing application of an identified jurisdiction's laws. They are one-tiered in the sense that they are self-contained dispositions, and invite no reference to other or broader
should-be-specific objective. This is accomplished through a system of provisions, at varying levels of abstraction, with numerous cross-references. The result is a hierarchical structure with quite particularized choice rules at the bottom which pyramid to the general principles or policies at the top. Guidance in the quest for the “most significant relationship” is quite explicit at the lowest level, with more generalized criteria suggested at the middle level. The general principles at the top, like the choice-influencing-considerations in the Leflar list, have no explicit ordering principle to guide choice decisions among conflicting indicators. Rather, it is assumed that choice is best guided by the vague standards of reasonableness, aided by more specific considerations which emerge from attempts to articulate the relevant principles of a case.

Two other matters which bear on the efficacy of the Restatement (Second)’s structure as an ordering principle should be mentioned. The first is that the middle-tier choice provisions, as well as

considerations or policies. The assumption, sometimes made clear in the comments, is that the connecting factor used in these rules will implicate the appropriate policies with a high degree of accuracy. This was, of course, the claim made by the first Restatement for all its choice rules; in the Restatement (Second) the claim is restricted, not surprisingly, primarily to problems involving property, and the connecting factor used is situs. Id. at §§ 223-43 at 10-62. These one-tiered provisions are truly particularistic in the sense of attempting to focus all relevant, broader considerations into a specific rule, demonstrating the general-should-be-made-specific (where possible) objective. They would be pseudo-particularistic if other relevant policies can be identified that would point to a different result, and it is clear that even in the property area other connects than situs may be relevant to some issues. The Restatement (Second) attempts to avoid this problem by defining the issues treated in single-tiered provisions narrowly. Id. at § 223 (Validity and Effect of Conveyance of Interest in Land). See also Reese, supra note 38, at 142-43, discussing what he calls “hard-and-fast” choice rules, and the role of certainty and predictability in justifying the “situs” rules even where another state may have a greater interest.

Provisions in both the two- and three-tiered categories do not rest on a single connecting factor, but instead invite the court to find the state having the “most significant relationship.” Those I would describe as two-tiered are provisions covering fairly broad classes of cases—without more specific provisions for more particular matters—and with a cross-reference to the principles of Section 6. E.g., Restatement (Second), supra note 76, at §§ 287 (legitimacy), 221 (restitution), 208 (assignability). See also id., § 222. Section 6, of course, is a revised version of the choice-influencing-considerations; see supra text accompanying note 45.

The three-tiered provisions, used primarily for the fields of tort and contract, begin with quite particularized rules for specific types of torts or contracts, or for specific issues arising in those fields. Most of these cross-reference to Section 6, but their comments also cross-reference to a middle-tier provision, which constitutes a separate set of general principles for the field in question. E.g., Restatement (Second) supra note 76, at §§ 145 (torts), 187-88 (contracts). Section 187, under which party autonomy in choice of law for contracts is permitted, makes no cross-reference to Section 6, but Sections 145 and 188 (the latter applicable when no express party choice has been made in a contract) do cross-reference to Section 6.
the rules for particular types of torts or contracts, expressly direct
determination of the state with the most significant relationship to be
made in terms of the issue involved in the case, rather than by some
broader category of problems to which that issue might belong. The
first-tier provisions which either define the specific issue or refer
to middle-tier provisions looking to such a definition produce a simi-
lar result. The effect is to direct the courts using the Restatement
(Second) to particularize by defining the issues as narrowly as
possible.

The second matter bearing on the efficacy of the Restatement
(Second) as an ordering principle is the curious way in which the
drafting of many of these choice provisions may be taken to negate
or limit the operation of the specific-governs-general interpretation
standard. The typical operation of this standard forecloses further or
more abstract inquiry. Thus, a judge faced with rules in a hierarchi-
cal order of increasing abstraction who has found a particularized
rule with a literal scope to fit the facts before him is inhibited by this
interpretation standard from more abstract inquiry. The cross-refer-
encing to higher levels of abstraction in the Restatement (Second)
effects a presumption of the particularized rule, but clearly invites
further inquiry to determine whether or not there are cogent reasons
to regard the presumption as rebutted. This structure led to criti-
cism of the Restatement (Second) as too open-ended to serve a useful
normative function, especially because the path through levels of ab-
straction leads ultimately to a list of general policies for which no

78. For example, Section 145 of the Restatement (Second), the middle-tier provision for
torts, reads as follows:

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

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

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

79. This is true even of the “hard-and-fast” rules for property; see supra note 77. Section
222 is a sort of middle-tier provision for all property issues, cross-referencing to Section 6,
supra note 67, although the specific sections which follow Section 222 make no reference to it.
It is apparent from the comments to Section 222, however, that the principles of Section 6 are
regarded as underlying all rules of choice of law.
ordering principle is provided.\textsuperscript{80}

Two ameliorative factors deprive this criticism of much of its bite. The first is the emphasis on particularized definition of issues, described above. The second, less obvious but no less important, is that the Restatement (Second) invites particularistic articulation of policy at all of its levels of abstraction. It may be that some courts and scholars interpret the Restatement (Second) as suggesting that broad policy overrides specific policy, because of its structural cross-references to more abstract ideas. That, I believe, is a serious mistake in interpretation. The approach which will exploit the document's potential for growth is one which interprets references to more abstract ideas simply as an invitation to examine a reservoir, and to determine whether there exists within it a better rationale for the solution of a problem than has been given in the past. The comparison at the point of choice, however, is between specific ideas, recognized in past experience, and specific ideas suggesting new directions; it is not simply a choice between specific policies and more general ones.

Viewed in this way, the Restatement (Second) approach differs from the broad policy approach of Professor Leflar primarily in its attempt to capture and record past experience, and to present it in an orderly fashion for comparison with new ideas.\textsuperscript{81} Opinions may vary on the success or accuracy of this attempt, or on the desirability of so highly structured a presentation. Disagreements of those kinds differentiate the Restatement (Second) from the "functional theories" but do not divide them philosophically. All of these approaches—from choice-influencing-considerations through the Restatement (Second) to the functional theories—permit and encourage particularistic inquiry from a broad policy base. In addition, all of these approaches contrast sharply with interest analysis which offers particularized solutions to choice problems, but which deprives itself of a broad policy base through a pseudo-particularistic insistence on the primacy of the law of the forum.

III. PARTICULARISM AND POLICY ANALYSIS

[F]acts [as] used in interest analysis
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give rise to interests only if
they are made relevant to the case by

\textsuperscript{80} Cf. von Mehren, \textit{supra} note 2, at 964 (arguing that the new Restatement does not resolve the difficulties and tensions that policy-based approaches encounter).

\textsuperscript{81} Cf. Leflar's approach, \textit{supra} text accompanying notes 44-50.
the underlying policy of the laws in conflict. Lists of contacts divorced from policy have no place in the methodology of interest analysis.\textsuperscript{82} Professor Herma Kay

A striking feature of the modern approaches to choice of law theory described in the preceding section is that all of them, save the remaining vestiges of traditional territorial theory, depend heavily on "policy" as a determinant. As the above quotation from Professor Kay demonstrates, the determination of underlying policy is absolutely critical in the methodology of interest analysis. To the extent that "state interests" for constitutional purposes are or ought to be defined by underlying policy, constitutional controls of choice of law also depend on such a determination; questions associated with that area will be addressed in the concluding section of this paper.

In this section two closely related propositions will be discussed: (1) American conflicts law uses the term "policy" ambiguously, often without differentiating its several meanings or the levels of abstraction involved; and (2) modern choice theory substantially increases the pressure on judges to find policy, but offers insufficient guidance to judges who must determine the circumstances under which policies ought to be regarded as effectuated by the application of a rule. Although the problems generated by these propositions do not lend themselves to solution by any single formula, I suggest that the perspectives of particularism offer assistance in a number of ways.

There is, of course, some common ground in our use of the word "policy." At a rudimentary level, policy is often equated with purpose. A single policy or purpose may underlie a rule of law, but more frequently multiple policies are involved. When several policies are involved in a single case they may either complement and reinforce one another, or else compete with each other. A major function of policy, as suggested earlier, is to define the facts of a controversy that are relevant to decision. It is also clear that policies vary in importance as well as in their levels of abstraction.

Lack of consistent usage of "policy" is apparent beyond such basics. Thus, while we sometimes use policy to describe the purpose or objective of a rule or principle, at other times we use it as a nor-\textsuperscript{82} Kay, The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience, 68 Cal. L. Rev. 577, 600 n.133 (1980).
motive proposition, as if it were itself a rule or principle. We speak of "underlying" policy most often in reference to an identified rule, but it is often not clear whether we mean only the very specific purposes of that rule, the more general policies of the field of law in question, or some still more abstract proposition.\textsuperscript{83} It is thus uncertain how abstract an underlying policy may be. By contrast, we generally use the term "overriding" policy to identify the relative importance of a policy. Again, it is not clear whether a policy's importance has any consistent relationship to its level of abstraction. One might suppose that the specific-governs-general standard should apply to policies as well as to rules, and sometimes they do. In many usages, however, "basic" policies, or more abstract or general policies, are regarded as overriding specific policies or even specific rules.\textsuperscript{84}

We assume that every rule has a discoverable purpose if only we look hard enough. Indeed, when changes in society deprive a rule of its purpose, the rule loses its applicability; this proposition enjoys considerable success with respect to changing common law rules, but encounters difficulties when the rule in question is statutory. Moreover, there are quite a few rules with a policy-neutral content. Consider, for example, the familiar rule of the road requiring us to drive on the right and pass on the left, where the purpose is not to be found in the merits of the conduct required, but rather in the objective of having everyone behave in the same way. These rules which do not have a specific policy content, as well as those which may have lost content over time, may continue to serve regulatory purposes of standardizing conduct. The facts relevant to decision of cases involving such rules are thus defined by the literal scope of the rule, not by its underlying policy.

Regulatory rules notwithstanding, it is fair to assume that most legal rules have purposes related to their contents, either independently or in conjunction with a regulatory purpose. The lack of legislative or judicial history, lack of precision in the language of a rule, and the apparent discrepancies between the literal scope of the rule and the breadth of the policy it purports to implement, impose a heavy burden on judges who seek to discover and articulate policy. The task is not insuperable, however, even though it may mean that

\textsuperscript{83} Policy in all three senses is identified in the general Principles of Restatement (Second) Section 6. See supra note 67.

\textsuperscript{84} Cf. Professor Reese's justification for some "hard-and-fast" choice rules, supra note 38 at 138, 143-46 (Reese argues that predictability of choice rules is essential for contract law, interests in moveables, and corporate law).
the determination of policy must sometimes be made intuitively, without hard edged criteria, and with some speculation about the intentions of the courts or legislatures which formulated the rules in question. The risk of imposing the burden lies less in the potential absence of discoverable policy than in the potential manufacture of policy. Judges are likely to find state interests of tenuous validity to justify the application of rules that lack an appropriate relationship to the controversy.

Professor Robert Sedler offers a partial response to the problem of manufactured policy, pointing out that manipulation of methodology to reach improper ends speaks to the fault of the courts which manipulate, not to the methodology they abuse. It may also be argued that the declaration of new policy, at least as to forum rules, is a normal creative function of courts in a common law system; as some rules lose their policy content over time, others may acquire added vitality through the perception of new bases for their existence.

The risks of policy manufacture in conflicts cases, however, go beyond these partial answers. Even the most well-intentioned court, devoted to the conscientious development of a choice-of-law methodology, may apply inappropriate rules simply because a state interest, created by a policy at some level of abstraction, can arguably be asserted in an astonishing number of cases. The inclinations of courts to apply forum law, or to resist arguments that they are inconvenient or improper fora, do not necessarily stem from the conscious abuse implied by the term “manipulation.” The uncertainties and ambiguities in policy analysis, and the failure of conflicts theory to provide better guidance, often leads courts into error in this area.

The alternative, surely, is not to abandon policy analysis as a central focus for conflicts methodology, but rather to refine and improve it to minimize these problems. The perspective of particularism offers many promising solutions which are aimed primarily at

86. Sedler, supra note 66, at 203-04.
87. For several delightful examples, see Twerski, Book Review, 61 CORNELL L. REV. 1045, 1056-57 (1976).
88. The application of a forum protective or compensatory policy to a party or occurrence with which the forum has little or no connection, as a matter of “altruism” or under the guise of a general exercise of the police power, is illustrative of this potential. For a discussion of the relevance of policies, see infra text accompanying notes 104-10, 123-67.
lowering the level of abstraction in policy analysis. As underlying policy may define the relevance of facts, so too may the existence of facts define the relevance of policies. A greater insistence on specificity in the articulation of policy, and on the identification of the facts in the case which make that policy relevant, would help to assure that only relevant policies are considered.

Recall part of the quotation from Professor Kay that introduces this section: “Lists of contacts divorced from policy have no place in the methodology of interest analysis.” What of the converse of this proposition? One is tempted to suggest that the recitation of policies divorced from the facts should have no place in the methodologies of choice of law. That probably goes too far because there may be general policies relevant to choice, such as judicial economy and the promotion of interstate harmony, which are relatively remote from the operative facts of the case. Moreover, we must be careful to avoid the trap of pseudo-particularism into which the rigidly defined theories of interest analysis fell. At least this much seems fair, however: Reliance on policies that cannot rationally be related to the specific facts of the case should be suspect and should not form the basis of choice-of-law decisions unless their importance and their relevance on some other ground can be convincingly explained.

Quite apart from such generalized insistence on specificity, there are several more concrete ways in which a particularized approach may contribute to improvement of policy analysis. One example may be found in the policies favoring protection of justified expectations and protection against unfair surprise. These policies not only offer helpful limits on choice of law, but their appropriate use also demonstrates how general policies, not necessarily embodied in specific rules or principles, can be given a particularized application. Thus, a court asserting that a rule should be applied because it is consistent with the expectations of a party should be able to explain, on the specific facts of the case, what these expectations were and how they were justified. Similarly, a court asserting that a rule should not be applied because of unfair surprise should be able to articulate specific facts demonstrating surprise and unfairness.

Another particularistic approach to policy analysis is Professor Baxter’s “comparative impairment” method for resolving true con-

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89. Kay, supra note 82, at 601 n.133.
90. Especially useful work has been done in this area by Professor Weintraub, see supra note 74 at 271-73. See also Reese, Legislative Jurisdiction, 78 COLUM. L. REV. 1587, 1595-99 (1978).
flicts, suggested almost twenty years ago,91 and recently resurrected by the California courts.92 This method assumes that state interests have been found in each of several states connected with a controversy, and that each such interest would be advanced by application of the corresponding rule.93 It suggests further that choice between conflicting rules be made by determining, on the specific facts of a case, which of the state interests involved would be least impaired by application of the other state's rule.94 While this proposal has received mixed reviews,95 one of its most appealing features is its potential use in cases involving multiple policies, some of which are not relevant because of the law-fact pattern of the case.96

93. See Baxter, supra note 91, at 4-5.
94. Id. at 18.
95. Discussed with approval in Note, Comparative Impairment Reformed: Rethinking State Interests in the Conflict of Laws, 95 HARV. L. REV. 1079 (1982). Kay, supra note 82, is critical, pointing out that "Baxter's proposal might have been workable had it been effectuated as he had envisioned through the overruling of Klaxon [Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941)] and the stabilizing medium of federal law." Id. at 609. She suggests that the use of comparative impairment without these constraints, and the California courts' additions to it of bits and pieces of functional analysis and other theories, opens a Pandora's box: "Few state court judges, invited to compare their own law with that of other jurisdictions, will limit themselves to an examination of the proper scope of their own law or even to an analysis of the degree of detriment it can safely be expected to bear." Id.

I assume that "proper scope of their own law" means less parochial, but if this is true I confess I find the argument baffling. Why would any court take a less parochial view in the light of such comparison than under the pure form of governmental interest analysis Professor Kay advocates, under which the only check on parochialism is moderate and restrained interpretation of forum law? Indeed, she seems to urge an expanded role for "moderate and restrained interpretation" to assure "other states and nonforum litigants" that the [court] respects and takes seriously the conflict of values inherent in the federal system," and that it will employ good will in the hope of avoiding conflict. Id. at 614. This assurance—an attempt to increase the explanatory power of decision—would appear to be strengthened by a willingness to make the impairment comparisons.

96. See supra text accompanying note 13. Currie's interest analysis has been interpreted to require that forum law should be applied if any significant policy of the forum would be effectuated, even if complementary policies "importantly supportive" in the fully domestic setting disappear. See von Mehren, supra note 2, at 936-38. Under Professor Sedler's reformulation of interest analysis, the remaining forum policy would be sufficient to require application of forum law if it gives rise to a "real" interest, and a determination of "real" interest necessarily includes the determination that forum policy would be substantially impaired if the forum rule were not to be applied. Sedler, supra note 66, at 222-27. Under the comparative impairment approach, however, it seems clear that the disappearance of one or more of the policies in question would make it at least less probable that the remaining policy would be regarded as
Still another particularist approach classifies policies into narrower categories according to the nature of the purposes they serve, in an attempt to avoid treating policy as an amorphous mass. Classifications by purpose, such as regulatory, compensatory, protective, deterrent, or retributive may help in articulating the intended reach of a particular rule. Thus, it may be argued that rules with a purely regulatory purpose, for example, rules of the road, typically have an intended territorial reach, while compensatory policies typically look to persons rather than places. The tendencies or characteristics of these categories may provide some presumptions as to intended reach, but they are not infallible guides and should not foreclose the examination of other indicators suggesting that a different reach of the rule was intended.

The concept of classification by purpose may involve measuring the actual as opposed to hypothetical effectuation of policy through the application of a particular rule. Perhaps a rule of deterrence is the clearest example of a policy dependent on hypothetical effectuation. The objective is to influence conduct in hypothetical but foreseeable fact situations. Important as such policies may be in the domestic setting, they surely have less claim in the sporadic and unusual factual configurations of conflicts cases. Deterrence policies stand in sharp contrast to protective or compensatory policies, the actual effectuation of which can be measured in the very case presented for decision, no less in conflicts than in domestic cases. A particularistic approach, seeking to measure the importance of policies in issue in a conflicts case, may be fashioned as follows: A court should not rely on a state interest, created by a policy which would be only hypothetically effectuated by such reliance, unless the court assesses and can articulate the probabilities of recurrence that would bring the

97. Many authors discussing policy analysis distinguish between types of purposes in defining interests or the spatial reach of policies. See, e.g., B. Currie, supra note 28, at 294 n.51; Kay, supra note 82, at 595-96 (discussing the interest types involved in the policies of compensation and deterrence in guest/host-driver statutes); von Mehren, supra note 2, at 947, 959-60 (suggesting that specific interests are stronger than general interests).

98. Cf. Cable, 93 Cal. App. 3d at 394-98, 155 Cal. Rptr. at 777-79 (differentiating the “nature” of the policy).

99. See Twerski & Mayer, Toward a Pragmatic Solution of Choice-of-Law Problems—At the Interface of Substance and Procedure, 74 Nw. U.L. Rev. 781, 791 (1979); cf. Kay, supra note 82, at 596 (arguing that application of California law would not have furthered a policy of deterrence in Cable).
policy into play in a significant number of future cases. This approach would help to explain the differences, for example, between the appropriate treatment of dram-shop acts in cases arising in state-line bars that solicit and depend on nonresident trade, and a "neighborhood" bar in the same state which rarely sees a nonresident customer. 

100. Both Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, cert. denied, 429 U.S. 859 (1976), and Cable v. Sahara Tahoe Corp., 93 Cal. App. 3d 384, 155 Cal. Rptr. 770 (1979), involved California residents injured after drivers were served in state-line taverns that were soliciting and dependent on California trade. In Bernhard, the plaintiff who was injured in California, was permitted recovery by the California court under California law. Bernhard, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, cert. denied, 429 U.S. 859 (1976). The recovery was denied, however, in Cable, where the injury occurred in Nevada. 93 Cal. App. 3d at 393, 155 Cal. Rptr. at 779. In both cases the taverns were located in Nevada and Nevada law provided no liability. Disregarding some other complicating factors in Cable, on the analysis suggested here Bernhard was right and Cable was wrong. The compensatory policy of California gave it an equal interest in both cases, and the place of the accident was fortuitous. To the extent California's liability rule is based on a policy of deterrence, California clearly also had an interest on this footing in Bernhard, and probably also Cable, if the frequency of such Nevada conduct was sufficient to call the California deterrent policy into play. In neither case does it appear that defendant would have been unfairly surprised by the application of California law.

101. Blarney v. Brown, 270 N.W.2d 884 (Minn. 1978), cert. denied, 444 U.S. 1070 (1980). See Silberman, supra note 71, at 120-22. Silberman argues, consistently with the particularistic approach suggested here, supra note 100, that Bernhard was right because the defendant solicited California trade, but that Blarney was wrong in allowing recovery to a Minnesota resident for an injury in Minnesota where the driver causing the accident was served in defendant's tavern in Wisconsin—a "neighborhood bar" not engaged in purposeful activity connecting its operations with Minnesota. Id. I agree, and have urged elsewhere that the "purposeful activity" concept can inform choice-of-law decisions as well as those in conflicts jurisdiction. I would not, however, make it the broad test that Professor Silberman proposes. See Peterson, Proposals of Marriage Between Jurisdiction and Choice of Law, 14 U.C.D. L. Rev. 869, 885-86 (1981). See also Lowenfeld & Silberman, Choice of Law and the Supreme Court: A Dialogue Inspired by Allstate Insurance Co. v. Hague, 14 U.C.D. L. Rev. 841, 865 (1981), in which Professor Lowenfeld argues that the size and advertising activities of defendants do not rise to the dignity of constitutional principle. Id. Professor Silberman now responds, supra note 71 at 122, and I agree, that just such detail as to purposeful activity, including advertising, has been treated by the Supreme Court as highly important for due process purposes in conflicts-jurisdiction cases, such as World-Wide Volkswagen v. Woodson, 444 U.S. 286, 295-99 (1980).

My own analysis of Blarney, which agrees in result and in the particularistic view of defendant's activities with that of Professor Silberman, does, however, differ to some extent. Minnesota clearly had an interest, even if only a generalized interest in plaintiff as a Minnesota citizen, because the scope of its compensatory policy should rationally be interpreted as extending to its citizens even as to out-of-state conduct. The Minnesota liability rule should nevertheless not have been applied; Minnesota certainly has no deterrent policy which would be effectuated in this case and, more importantly, the lack of any purposeful activity by the defendant connecting it with Minnesota customers suggests the conclusion that the defendant would be unfairly surprised by the application of Minnesota law. In Blarney, defendant tavern was near the state line, and Wisconsin bars did attract some trade from across the line because
The same or a similar approach would help to clarify the use of those protective or compensatory policies in which immediate effectuation in the case at hand can be measured. Suppose a case in which an action is brought in state X by a nonresident plaintiff against a nonresident defendant, for injuries caused to plaintiff by defendant in X. If X has a liability-imposing rule for the purpose of providing assets to injured persons for the protection of their local creditors, that policy protective of local creditors would be effectuated by application of the liability rule and diversion of at least part of the recovery to such creditors. In such a case, a legitimate argument can be made that the policy creates a state interest in X, which would justify the application of the X liability rule. Who would seriously assert that X has such an interest, based on this policy, if there were no local creditors? A rather surprising answer to that question will be found in the next section of this article. Consider, however, another example offered by the facts of the well-known but now-discredited case of Dym v. Gordon. A New York plaintiff was injured in a Colorado accident with another car while riding as a passenger in the car driven by the defendant, also a New Yorker. The question presented was whether the New York court should apply the Colorado guest statute which would deny recovery to the plaintiff. The New York Court of Appeals applied the Colorado statute, basing its decision in part on a finding that an underlying policy of the statute was a desire to give priority to occupants of the car of the blameless driver in recovering against the insurance proceeds or other assets of the negligent driver. Assuming that Colorado had such a policy, and that such a policy was effectuated on the facts of Dym, it would be absurd to assert that Colorado had an interest in

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105. 16 N.Y.2d at 124, 209 N.E.2d at 794, 262 N.Y.S.2d at 466.
106. Effectuation as a matter of complete particularism in this case would require inquiry into whether there were injured occupants of the second car, whether they had or probably would submit claims against this defendant, and perhaps even the extent of their injuries in relation to the defendant's insurance limits or other assets available. Obviously some limits as to particularism must be drawn. See supra text accompanying note 2. I submit that a showing
the application of its statute, based on such a policy, in a case where no second car was involved, even if hypothetical future accidents might involve second cars.

The supposed Colorado policy, giving priority to occupants in the car of the blameless driver, raises still another troublesome area of policy analysis in conflicts cases. This policy, "discovered" by the New York court in *Dym*, is an excellent example of manufactured policy, because no such policy was recognized in Colorado law.\(^\text{107}\) An added dimension here, however, is that the "discovery" was in a foreign law, and thus created no policy for Colorado except for purposes of *Dym*. Had Colorado been the forum, and had a Colorado court declared such a policy to justify application of its own statute, the decision might be subject to the criticism that the policy was manufactured for that purpose. The policy, however, would have at least become part of Colorado jurisprudence, possessing a high potential for affecting the future treatment of the statute.\(^\text{108}\) The ad hoc invention of policy to justify hypothetical foreign interests seems even less desirable than the problem of local manufacture, and is less restrained because the creator is not inhibited by the necessity of living with the results.\(^\text{109}\) What can be done about it?

In all probability, the only answer lies in some form of judicial self-restraint. A forum court cannot be relieved of the responsibility of finding the underlying policy of foreign law. It must determine whether a true or false conflict exists, even if it chooses not to engage in weighing forum against foreign interests and policies. The burden of finding the policy of a foreign state, however, may be even heavier than that of finding forum policy because the foreign rules are unfamiliar, the circumstances under which the rule came into being or the problems it was intended to address may be unknown, and sources of information on these matters may be less accessible than with forum law.

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107. The New York Court of Appeals in *Dym* cites no Colorado authority for this finding of policy, and Judge Fuld in dissent argued that "there does not appear to be any Colorado pronouncement even to intimate that the Colorado Legislature was motivated by any such objective." 16 N.Y.2d at 132, 209 N.E.2d at 799, 262 N.Y.S.2d at 473 (Fuld, J., dissenting). Judge Fuld's statement appears to be entirely correct.

108. Future treatment is, of course, only speculative since the statute was subsequently repealed. COLO. REV. STAT. § 42-9-101 (1973), repealed by 1975 COLO. SESS. LAWS 1568.

While offering no solution, I suggest that some particularistic approaches to these problems may usefully guide the necessary judicial self-restraint. With the horrible example of Dym in mind, it seems clear that the determination of a policy of foreign law, for which there is no specific precedent in the foreign cases or other sources, should be treated with special diffidence and caution. Several corollaries to this proposition are appropriate. If the foreign courts have determined with some specificity the policy that underlies the foreign rule, the present forum is not free to ignore that determination.\textsuperscript{110} If the forum proceeds to reject application of the foreign rule on the basis of some “better law” theory, it should do so with candor, not under the guise of deciding that the policy of the foreign state has changed or lost its vigor, unless, of course, there is some specific basis for predicting that the courts of the foreign state would arrive at the same conclusion. Finally, the forum should be extremely reluctant to find an interest in the foreign state which justifies application of a rule, if the courts of the foreign state have declined to find such an interest on similar facts.

IV. PARTICULARISM AND CONSTITUTIONALITY

\textit{[W]e write not only for this case and this day alone, but for this type of case. The State where the tort occurs certainly has a concern in the problems following in the wake of the injury. The problems of medical care and of possible dependents are among these . . . . Arkansas therefore has a legitimate interest in opening her courts to suits of this nature, even though in this case [plaintiff’s] injury may have cast no burden on her or on her institutions.}\textsuperscript{111}


In \textit{Carroll v. Lanza},\textsuperscript{112} in which Justice Douglas wrote the opin-

\begin{footnotesize}
\begin{enumerate}
\item Carroll v. Lanza, 349 U.S. 408, 413 (1955).
\item Id. at 408.
\end{enumerate}
\end{footnotesize}
ion of the Supreme Court, the precise issue was whether Arkansas, the state where the plaintiff's injury occurred, could not only "open her courts" but also apply her own law and allow the plaintiff a tort recovery precluded by the law of plaintiff's home state, Missouri. Missouri, no less than Arkansas, had policies favoring compensation of such injured plaintiffs. The difference was that Missouri's compensatory policy was expressed through a Worker's Compensation Act which purported to be an exclusive remedy, and this policy was already being effectuated through compensation payments to the plaintiff for his injury.

In the first third of this century, the Supreme Court indicated in several opinions that the vested rights theory of choice of law, eventually embodied in the first Restatement, should be elevated to constitutional status. Under that jurisdiction-selective approach, it was thought possible to identify some single state as having exclusive legislative jurisdiction with respect to any conflicts case. That approach found its highwater mark in Bradford Electric Light Co. v. Clapper in 1932. There, the decedent, who lived and was employed in Vermont, was killed in New Hampshire while performing services for his Vermont employer. An action for wrongful death was brought in New Hampshire, notwithstanding the decedent's coverage under a Vermont Worker's Compensation Act which purported to supply the exclusive remedy. Reversing a judgment for the plaintiff, the Supreme Court held that "[t]he interest of New Hampshire was only casual," that the formation of the employment relation in Vermont made that state's law appropriate to regulate the incidents of the relationship, and that New Hampshire must give full faith and credit to the Vermont statute.

Fortunately for the rational development of conflicts theory, the Court, from 1939 onward, began sending fairly consistent signals indicating that more than one state might have a constitutionally sufficient interest in the same case, justifying application of its own

113. Id. at 412-13.
114. The action in Arkansas was deemed not foreclosed under the full faith and credit clause, U.S. Const. art. IV, § 6, because "there was no final award under the Missouri Act." 349 U.S. at 410-11 (citing to Mo. Rev. Stat. §§ 287, 380, 400, 450 (1945)).
117. Id. at 150-52.
118. Id. at 158, 162.
119. Id. at 159.
law. Until Carroll, however, it was still arguable that the Court might attempt to identify a single controlling law, by "weighing" the respective interests of the several states having such legitimate concerns. Carroll laid that question to rest.

Unfortunately, the sufficient interest of Arkansas, identified by Justice Douglas in Carroll, arose from a policy protective of Arkansas creditors and dependents, despite facts of the case showing no Arkansas creditors or dependents. The definition of state interest thus emerging from Carroll is that an interest is constitutionally sufficient if it arises from a policy of the state that would be effectuated by application of that state's laws in a hypothetical case, even if the facts of the case in which sufficiency is challenged show that the policy is irrelevant. This unnecessary abstraction is completely at odds with an attempt to find rationality through policy analysis, which ought at least to insist on the existence of a relevant policy before a state interest is found.

Professor Currie's reaction to this aspect of Carroll was surprising. He noted that under this test the basis of a state's interest may be "somewhat conventionalized," but pointed out that the position taken by the Court on this matter was deliberate—a point underscored by three dissents taking sharp issue with it. Professor Currie proceeded, in what he termed a "latter-day rationalization of the result" in Clapper, to argue that that case was correctly decided. His reasoning was that Clapper was a death case, and therefore involved policies different from those in injury cases. The New Hampshire wrongful death statute directed that damages recovered under it be distributed to surviving dependents; they were not assets of the estate available to satisfy the claims of decedent's creditors. New Hampshire, however, had no interest because the de-

122. The invitation to "weighing" in Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935), was explicit: "[O]nly if it appears that, in the conflict of interests which have found expression in the conflicting statutes, the interest of Alaska is superior to that of California, is there a rational basis for denying to the courts of California the right to apply the laws of their own state." Id. at 549.
123. 349 U.S. at 413; id. at 420-21 (Frankfurter, J., dissenting).
124. B. Currie, supra note 28, at 204-05.
125. 349 U.S. at 414-26 (Frankfurter, J., Harlan, J., and Burton, J., dissenting).
126. 286 U.S. 145 (1932).
cedent left no dependents or heirs resident in New Hampshire. "The fact of injury or death in the state was therefore irrelevant to New Hampshire's policy."\textsuperscript{128}

If the \textit{Carroll} view of state interest was correct, then New Hampshire did have an interest in \textit{Clapper} because its policy protective of dependents might be effectuated in some hypothetical case in which a Vermonter was killed and left dependents or heirs in New Hampshire. A more sensible alternative is to regard \textit{Carroll} as wrong, and to conclude that neither Arkansas nor New Hampshire had an interest based on the policies under discussion because neither of the policies relied upon were relevant to the facts of the cases being decided.\textsuperscript{139}

The Supreme Court's most recent foray into state interests for choice-of-law purposes is the natural child of \textit{Carroll}. In \textit{Allstate Insurance Co. v. Hague},\textsuperscript{140} the question presented was whether Minnesota could apply its own rule, "stacking" uninsured motorist coverages under the Allstate policies owned by decedent, in preference to a presumably contrary Wisconsin rule.\textsuperscript{141} The decedent lived in Wisconsin, near the state line, and had been killed in Wisconsin on a purely intrastate excursion. The plurality opinion by Justice Brennan,\textsuperscript{142} affirming Minnesota's application of its own law, found three bases for a Minnesota interest: (1) Decedent was a member of Minnesota's workforce, having been employed for fifteen years in that state commuting from Wisconsin; (2) Allstate was at all times present and doing business in Minnesota; and (3) decedent's widow, respondent here, moved to Minnesota after decedent's death, remarried, and undertook in Minnesota the administration of decedent's estate.\textsuperscript{143} Justices White, Marshall, and Blackmun concurred.\textsuperscript{144} Justice Stevens, concurring in the judgment, found it "unnecessary to evaluate the forum State's interest" for full faith and credit pur-

\begin{itemize}
  \item \textsuperscript{128} \textit{Id.}
  \item \textsuperscript{129} Perhaps Professor Currie would have distinguished the cases on the ground that the existence of New Hampshire dependents or heirs in \textit{Clapper} was a matter not dependent on post-occurrence conduct, while the question of local creditors in \textit{Carroll} was so dependent. It seems clear that Currie normally defined state interests at the time of occurrence of the transaction or event at issue. \textit{Id.} at 621. That being so, however, it is in some respects even more strange that he approved \textit{Carroll}'s reliance on post-occurrence indebtedness as giving rise to a state interest—even if there had been actual rather than merely hypothetical creditors.
  \item \textsuperscript{130} 449 U.S. 302 (1981).
  \item \textsuperscript{131} \textit{Id.} at 305-07.
  \item \textsuperscript{132} \textit{Id.} at 305.
  \item \textsuperscript{133} \textit{Id.} at 313-19.
  \item \textsuperscript{134} \textit{Id.} at 304.
\end{itemize}
poses, because the application of forum law was not shown to pose "any direct or indirect threat to Wisconsin's sovereignty."\textsuperscript{135} For due process purposes, Justice Stevens argued that a state's interest in the fair and efficient administration of justice is sufficient to give presumptive validity to the application of its laws—a presumption that could be rebutted by showing that the application of the rule in question would be "totally arbitrary or . . . fundamentally unfair to either litigant."\textsuperscript{136} Although Justice Stevens found no showing of unfairness in this case, he noted that two of the factors relied upon in the Brennan opinion, namely, the plaintiff's post-occurrence change of domicile and the decedent's Minnesota employment, were "either irrelevant to or possibly even tend[ed] to undermine the plurality's conclusion."\textsuperscript{137} The three dissenters agreed that the decedent's employment in Minnesota and the post-accident move were irrelevant to the rules and policies involved in this case,\textsuperscript{138} and argued that Allstate's business activities in Minnesota gave that state no interest in "regulating that conduct of the insurer unrelated to property, persons, or contracts executed within the forum State."\textsuperscript{139}

Despite the fragmented nature of the \textit{Hague} decision, several propositions emerge with some clarity. First, with the exception of Justice Stevens,\textsuperscript{140} the Court did not find any significant distinction between the commands of due process and that of full faith and credit in formulating a test of constitutionality. Second, none of the members of the Court disagreed with Justice Brennan's formulation of that test: "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."\textsuperscript{141} It was the application of this test, however, that resulted in the divergent views described above. Measured by a standard of particularism, there were not only differences of view between the opinions but differences within the opinions as well.

The dissenters' view that decedent's employment in Minnesota and Allstate's business activities there were irrelevant was, in the

\begin{footnotes}
\footnotetext{135.} Id. at 325-26 (Stevens, J., concurring).
\footnotetext{136.} Id. at 326 (Stevens, J., concurring).
\footnotetext{137.} Id. at 331 (Stevens, J., concurring).
\footnotetext{138.} Id. at 337-39 (Powell, J., dissenting).
\footnotetext{139.} Id. at 338 (Powell, J., dissenting).
\footnotetext{140.} Id. at 320 (Stevens, J., concurring).
\footnotetext{141.} Id. at 312-13.
\end{footnotes}
terms I have described earlier, particularistic; it rejects the hypothetical interests approved by Carroll and instead demands that the policies relied upon to create state interests be actually implicated by the facts of the case.\footnote{Hofstra Law Review, Vol. 10, Iss. 4 [1982], Art. 1}{142} With respect to the widow's post-accident change of domicile, however, an almost imperceptible shifting of gears occurs, for the dissenters also view this connective as irrelevant. On doctrinal grounds, the dissenters argue that "post accrual residence has nothing to do with facts to which the forum State proposes to apply its rule;"\footnote{Id. at 334 (Powell, J., dissenting).} on policy grounds they argue that "the invitation to forum shopping would be irresistible,"\footnote{Id. (Powell, J., dissenting).} and that the relevance of post-accrual residence "would permit defendant's reasonable expectations at the time the cause of action accrues to be frustrated."\footnote{Id. at 319 n.28.} These last two policies are obviously phrased generally and the dissenters do not particularize their application in the case at hand. Indeed, it appears that the widow's change of domicile was bona fide and was not motivated by litigation considerations.\footnote{Id. at 318 n.24.} Further, there was no showing that Allstate's issuance of insurance to decedent, or its conduct thereafter, relied on the more restrictive Wisconsin law.\footnote{Id. at 319.}

Conversely, the plurality opinion eschews any particularistic discussion of decedent's employment or Allstate's business activities, yet in discussing the widow's change of domicile, it emphasizes, particularistically, the absence of any suggestion that the plaintiff was seeking "a legal climate especially hospitable to her claim."\footnote{Id. at 318.}

The concurrence by Justice Stevens displays a comparable division. His view that a state interest is created by the forum's concern with the fair and efficient administration of justice is abstract in the extreme. The limits he would place, however, on the exercise of this interest—unfairness to the defendant or invasion of another state's sovereignty—do not come into play in the absence of some particularized showing of such unfairness or disregard for another state's

\begin{itemize}
  \item \footnote{Hofstra Law Review, Vol. 10, Iss. 4 [1982], Art. 1}{142} "The 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. To assess the sufficiency of asserted contacts between the forum and the litigation, the court must determine if the contacts form a reasonable link between the litigation and a state policy." Id. at 334 (Powell, J., dissenting).
  \item \footnote{Id. at 337 (Powell, J., dissenting).}{143}
  \item \footnote{Id. (Powell, J., dissenting).}{144}
  \item \footnote{Id. (Powell, J., dissenting).}{145}
  \item \footnote{Id. at 319 n.28.}{146}
  \item \footnote{Id. at 318 n.24.}{147}
  \item \footnote{Id. at 319.}{148}
\end{itemize}
sovereignty.

Most of the scholarly reaction to Hague has been critical, especially of the plurality's failure to demonstrate that the asserted Minnesota state interests had an appropriate relationship to the actual facts of the case; in other words, the complaint is that the particular policies alleged to give rise to the asserted interests were not relevant when viewed in light of the particular facts. Among the less numerous defenders of the result in Hague is Professor Robert Sedler who argues that there are two constitutional standards for choice of law. Sedler finds that a state's law may constitutionally be applied where:

(1) that state had an interest in applying its law on the point in issue in order to implement the policy reflected in its law, and the application of its law in the circumstances presented was not fundamentally unfair to the party against whom the law was applied, or, (2) 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.

Professor Sedler regards these alternative standards as the opera-


150. Professor Leflar, whose "better law" approach the Minnesota Supreme Court had used in Hague, was understandably approving, Leflar, Choice of Law: State's Rights, 10 Hofstra L. Rev. 203 (1981). Also understandably sympathetic was Professor Lowenfeld, see supra note 101. See also Lowenfeld, Three Might-Have-Beens: A Reaction to the Symposium on Allstate Insurance Co. v. Hague, 10 Hofstra L. Rev. 1045 (1982). He had argued the case for Mrs. Hague before the Supreme Court. Professor Weintraub found the laws of Minnesota and Wisconsin not in conflict, and thus concluded that the Supreme Court should not have taken the case. Assuming decision was necessary, he believes the result was correct on constitutional grounds but unsound as a matter of conflicts theory. Weintraub, supra note 102, at 24-25; Weinberg, Conflicts Cases and the Problem of Relevant Time: A Response to the Hague Symposium, 10 Hofstra L. Rev. 1023 (1982).

tional test before *Hague*, and finds this view confirmed by *Hague*. He notes that Justice Brennan's opinion relies on the second or "factual-contacts" test, under which only the "generalized interest" of a state is required.

Professor Sedler may well be right about the state of the law, as reflected by the views of a majority of the Court—three Justices joined in Brennan's opinion and Justice Stevens finding that the state's interest inhered in the fair administration of justice is even more generalized. The disappointment felt by the critics of *Hague* is largely to be found in their frustrated hope that the Court would at least severely limit, if not abandon, a constitutional test based on contacts unrelated to specific policies. *Hague* was, after all, the first occasion the Court elected to speak directly to this issue of state choice of law since *Carroll*. From 1955 until 1981, the only other cases involving state choice of law were decisions in which the state applying its own law had a policy, relevant on the facts presented, which was effectuated by the assertion of its interest. In the meantime, the revolution in American conflicts theory had occurred, effectively changing the focus of choice of law from contacts to one of particularism and policy analysis.

It is not the business of the Supreme Court, of course, to tell the states what their conflicts theory should be, but only to define the constitutional limits within which a state's theory must operate. This was clearly recognized in *Hague*. The earlier, abortive attempt of the *Clapper* Court to constitutionalize vested rights theory should make any observer wary. The question remains, however, as to what the constitutional limits should be; the philosophical content of the mainstream of state choice theory is relevant to such limits.

It is generally recognized that constitutional limits have both positive and negative aspects—positive in the sense that a state must have an interest before its law can be applied; negative in the sense that the application of a state's law must be neither arbitrary nor unfair. These are conjunctive tests, since constitutionality may fail

152. *Id.* at 73 n.68.
153. *Id.* at 72.
156. 449 U.S. at 307; *id.* at 331-32 (Stevens, J., concurring); *cf.* *id.* at 332 (Powell, J., dissenting).
158. *See supra* text accompanying note 141 (Justice Brennan's formulation of the test).
if either test is not met. Thus, application of a state's law is unconstitutional if it is arbitrary or unfair under the circumstances of the case, even if the state in question has an interest. Similarly, it is unconstitutional if the state has no interest, even if the application of its law would not otherwise be arbitrary or unfair. The possibility that no state may have an interest, however, may complicate this proposition. The negative test is highly particularized, and is inoperative unless some specific showing of arbitrariness or unfairness on the particular facts of the case presented can be shown. The open question, of course, is the extent to which the positive test, requiring the existence of a state interest, ought also be particularized.

Professor Sedler's interesting arguments about "constitutional generalism"[159] suggest that due process is the only relevant limit on choice of law. Like Justice Stevens,[160] he finds full faith and credit to be a limit only in the unlikely event that an otherwise valid state choice of law would threaten national unity.[161] Although in Sedler's view "constitutional limitations . . . do inhere in the due process clause,"[162] state choice of law is constrained only by the "rational-basis test" of due process,[163] and this standard of review does not require a state to have any "substantial interest."[164] If a state has "some factual connections" with a case, choice of its law would be reasonable in terms of state interest, leaving only the negative test—constraints on arbitrary or irrational application—as a limit on choice of law.[165] Although Sedler approves of the result in Hague, he urges that most conflicts scholars, and the Supreme Court, are

The negative (not arbitrary or unfair) aspect of this test parallels the particularistic treatment given by the Supreme Court to conflicts jurisdiction cases, with their tight focus on defendant-fairness. See supra note 101, and the insistence of the Court on actual rather than hypothetical connections between the defendant and the forum. See Rush v. Savchuk, 444 U.S. 320, 328-33 (1980); Kulko v. Superior Court, 436 U.S. 84, 91-98 (1978); Shaffer v. Heitner, 433 U.S. 186, 213 (1977); Hanson v. Denckla, 357 U.S. 235, 246-54 (1958).

159. Sedler, supra note 151, at 60-61.

160. 449 U.S. at 324 (Stevens, J., concurring).

161. Sedler, supra note 151, at 93, 100.

162. Id. at 76 n.88.

163. Id. at 78. Apparently Professor Weinberg shares this view. See Weinberg, Choice of Law and Minimal Scrutiny, 49 Chi. L. Rev. 440 (1982).

164. Sedler, supra note 151, at 84 (noting that a legitimate interest is all that is required).

165. Id. at 77-79. Perhaps this emphasis on individual rights as the only significant operational test is associated with the myopic view of constitutional scholars recently noted by Professor Robert Nagel, who suggests that such an emphasis risks the loss of structural values. Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 SUP. CT. REV. 81, 108-09.
wrong in treating limitations on choice of law as a specialized constitutional area.\textsuperscript{166}

A fuller response to Professor Sedler's thesis must await some other occasion, but, in sum, I argue that conflicts cases are different because they implicate problems of federalism and interstate relations. These issues justify a different standard of due process review. This standard might be expressed in terms of requiring the state interest to be "substantial," although perhaps it is best to avoid such a description to prevent confusion with other types of problems. With regard to the positive test, a different standard of rationality that examines the connection between the case and the policy the state seeks to effectuate might be used. What is at issue is the rationality of asserting a generalized as opposed to a particularized interest. Modern choice-of-law theory is an appropriate tool for measuring that rationality. Moreover, the existence of other states' interests is relevant; competing interests are among the reasons for treating conflicts cases differently than those that involve only a single state.\textsuperscript{167}

The reluctance of the majorities in \textit{Carroll} and \textit{Hague} to require a particularized state interest is understandable, even in the light of modern conflicts theory, on two grounds. One is that such a requirement complicates decision, taking judicial time. Consider, for example, the generalized state interest in protecting local creditors relied upon in \textit{Carroll}. I argued earlier that this asserted interest was irrelevant because there were no such creditors' interests involved. Suppose, however, that the injured plaintiff had indeed incurred medical expenses in Arkansas. The policy is obviously relevant if the bills are unpaid, but does it remain relevant if they have been paid? Would a requirement of particularization invite forum shopping because it would permit plaintiff to "create" a state interest by incurring debts and not paying them? Particularization may complicate decision by requiring the consideration of other policies which may bear on the issue of how far particularization should be carried.\textsuperscript{168} It may also involve uncomfortable inquiry into a party's

\textsuperscript{166} Sedler, \textit{supra} note 151, at 60-61.

\textsuperscript{167} Professor Sedler is at least consistent in his analysis, since such concerns are (pseudo-particularistically) defined as irrelevant by his view of interest analysis. See \textit{supra} note 66.

\textsuperscript{168} In most cases it would strain credulity to suggest that the decision as to where an injured plaintiff was taken for treatment was motivated by the desire to create a state interest, at least where that decision was made immediately after the injury. The bona fides of a subsequent move for further treatment could be subjected to particularized inquiry in the same way that motives for a post-occurrence change of domicile are. The nonpayment of bills legiti-
motives, although it should be noted that Justice Brennan's opinion in *Hague* does not shun reliance on the apparent bona fides of the plaintiff's post-accident change of domicile to Minnesota.¹⁶⁹

My answer to this concern about judicial economy is that rational decision is the business of the courts. If a policy is plainly irrelevant, it ought not to be regarded as creating a state interest. If there is some reason for treating an otherwise irrelevant policy as if it were relevant, then identification and articulation of that reason preserves the rationality of decision. Rationality is lost, however, and should be regarded as lacking for constitutional purposes no less than for purposes of policy analysis, if the only reason for decision is that it is easier to ignore the problem than to solve it. It seems probable that difficult questions of this kind are relatively rare; those who assert that rationality should be abandoned in the interest of efficiency should at least have the burden of showing that the resolution of such issues is excessively burdensome to the courts.¹⁷⁰

The second reason for the Court's reluctance to particularize a state's interest for constitutional purposes is that there are some types of cases in which generalized interests are, or seem to be, relied upon: (1) Domestic cases, where it is simply assumed that forum law applies; (2) conflicts cases in which the policies at stake, such as...
deterrence, depend for their effectuation on hypothetical future conduct; (3) conflicts cases in which only a regulatory interest is involved; (4) nondomestic cases of the “unprovided for” type, where analysis reveals that no specific policy of any concerned state would be effectuated by the application of its laws; and (5) conflicts cases in which the intended scope of a rule is defined only by a generalized relationship between the state and one or more of the parties involved, such as domicile. How, one may ask, can the need for a specific policy basis be asserted, as a matter of constitutional principle, if so many exceptions are apparent at the outset, and where a more generalized requirement would cover all the cases?

There are, I believe, several answers. First, with respect to domestic cases, the assumption about the applicability of forum law is correct, but the question of state interest, at least for purposes under discussion here, is simply not at issue. Second, the Constitution does not demand the impossible. In type (4), the “unprovided for” case, the absence of any relevant policy at a specific level requires resort to more abstract considerations. Thus, it would be rational in such a case for state courts to attempt to develop a uniform rule, to avoid the dangers of forum shopping, for example, by resort to a traditional territorial rule. It may be equally as rational, based on policies of convenience, for the forum simply to apply its own law.

Third, and most importantly, what the Constitution can and should be held to demand is rationality in state court interpretations of the intended reach of legal rules. Such rationality can only be tested by examining the relationships among the facts, policies, and rules involved in any given case and determining their relevance. Interpretations based on facts irrelevant to the issue presented are irrational; so, too, are interpretations based on irrelevant policies unless some reason can be shown for treating such a policy as if it were relevant. The underlying policies of rules whose purpose is to influ-

171. Because no problems of federalism or interstate relations are implicated in such cases, there is no need for a specialized standard of review. See supra text accompanying notes 139, 140.

172. The “unprovided for case,” like the domestic case, presupposes that there are no problems of federalism or competing state interests. See supra note 144.

173. See B. Currie, supra note 28, at 184-85. Alternatively, Professor Sedler proposes a “common policy” test, under which a rule constituting an exception to general policy recognized by both states would simply be ignored. Sedler, supra note 66, at 235.

174. Cf. Brilmayer, supra note 14, at 1336; Twerski, supra note 149, at 165 (discussing Brilmayer and asking why a verifiable domestic interest would be beyond constitutional attack whereas if it were expressed as a part of a multistate policy it would violate the due process clause).
future conduct (type 2) are not irrelevant, even though effectuation must depend on the hypothetical particulars of future cases. Careful policy analysis might suggest to a court that it ought to give a restrictive interpretation to rules based on such policies, as they relate to foreign facts, on the ground that effectuation is unlikely because the probabilities of recurrence or of influencing such conduct are low.\textsuperscript{176} An attempt to effectuate such a policy, however, would not be irrational. Much the same analysis fits regulatory policies (type 3). It would clearly be irrational for a forum to interpret its rules of the road as having an intended reach to drivers in another state—whether to its own residents or others. It is clearly rational, however, to apply such rules to nonresidents who drive in the forum.

The most troublesome category is type (5), in which the intended scope of a rule is defined only by a generalized relationship between the state and one or more of the parties involved, such as domicile. It is rational to assume that all of the compensatory and protective policies of a state are intended to reach its citizens who, as participants in that community or society, have at least an indirect role in the making of its laws. The forum ought to regard such rules and policies as reaching its citizens, even as to foreign facts.\textsuperscript{176} The primary constitutional guard against the inappropriate application of such rules, as they may affect other persons, must lie in the part of the constitutional test prohibiting unfair or arbitrary application of a state’s law.\textsuperscript{177}

The question remains, however, as to whether other types of generalized relationships of this kind justify the same treatment.

175. See supra text accompanying note 99.

176. The domicile, residence and citizenship of a person normally coincide, and the intended scope of a policy of that place to include that person is usually clear if the nature of the policy in question is compensatory or protective. See supra text accompanying note 98. Where they do not coincide it seems sensible to regard the state where the person votes or has the right to vote as the seat of this generalized relationship. There will normally be only one such place, and to the extent that some “social compact” can be said to exist between persons and states this contact identifies it. See also infra note 178. For juristic persons resort must obviously be made to other connectives, among which the principal place of business seems most analogous. See von Mehren & Trautman, supra note 73, at 162.

177. See supra note 88 and text accompanying note 158. As indicated earlier, I believe that the problems of federalism and interstate relations inherent in conflicts cases justify a more particularized standard of constitutional review than may be required for domestic cases. That question is separate, however, from the extent to which such concerns may be used as specific limits on the constitutionality of state choice of law—whether only through moderate interpretation of forum interests or through some active “weighing” of state interests. For purposes of the present inquiry, I do not enter the debate as to the relative propriety of these approaches. The perspective of particularism is useful to either side of that controversy.
Should all of the compensatory or protective policies of the forum, for example, be interpreted as extending to a nonresident who is a frequent visitor to the forum, or, as in Hague, to a nonresident who is employed in the forum? Surely the answer must lie in some more particularized view of the nature of the relationship. It would be irrational for the forum to interpret its rules, designed to protect members of its workforce, as reaching a plaintiff nonresident who is not employed in the forum, even if the nonresident were a frequent visitor there. It would be rational to apply such work-force rules to a nonresident employed there. It is irrational, as in Hague, to apply a forum rule to foreign facts, on behalf of a nonresident employed in the forum, where the rule and policy in question have nothing to do with the employment relationship.\textsuperscript{178}

This analysis also offers a possible solution to the persistent problem of post-occurrence changes of domicile. The Supreme Court in Hague was evenly divided on the relevance of Mrs. Hague's post-accident move to Minnesota, with Justice Stevens joining the dissenters in the view that such a move was irrelevant. As noted earlier, the plurality and the dissenters reversed their roles on this issue with respect to particularism, the dissenters taking refuge in abstract policy and Justice Brennan's opinion focusing on the particulars, the

\textsuperscript{178} An interesting problem of the assertion of a generalized interest was recently presented in Rhoades v. Wright, 622 P.2d 343 (Utah 1980), cert. denied, 102 S. Ct. 397 (1981). This was an action for wrongful death arising out of the murder of plaintiff's decedent by one of the defendants in Colorado. The present action was jurisdictionally based on attachment of defendants' land in Utah. An earlier action in the Utah federal court, based on the Utah long-arm statute, had been dismissed by the Tenth Circuit for lack of personal jurisdiction. A subsequent attempt to sue in Colorado state court resulted in a summary judgment for defendants on the ground that the Colorado statute of limitations had run, and that the Colorado "renewal" statute did not apply. Id. at 344-45.

The case presents a number of difficult issues. Of special interest here was the assertion by the Utah Supreme Court that plaintiff was entitled to the benefit of an exception in the Utah borrowing statute, which exempted "a citizen of this state" from being barred by a statute of limitations which had run in the state where the cause of action arose. The majority opinion rejected defendants' contention that plaintiff and decedent were not citizens of Utah because, said the Court "They clearly owned land in Utah, farmed it, presumably paid taxes, and licensed their vehicles in Utah." Id. at 347 n.16. The trial court had made no finding on the issue, pending clarification of the jurisdictional problems of the case. A dissenter urged remand for determination of the issue because, "Although plaintiff's living quarters were located in Utah, she apparently considered herself to be a resident of Colorado. Plaintiff voted in Colorado, received mail in Colorado, and conducted her business in Colorado." Id. at 353 (Hall, J., dissenting) (footnotes omitted).

In terms of the present analysis, assuming the facts as stated, plaintiff would not have been entitled to claim the protective exception of the Utah statute on the basis of her generalized relationship with the state, and in the absence of a showing that the particular Utah policy involved was directed at her frequent presence there.
bona fides, of the move. Why, however, is a black or white view of the relevance of a change of domicile required? The latecomer who was a nonparticipant in the community at the time the events in question in the case occurred surely has no claim to the benefits of all forum policies in a retroactive way, regardless of the motivation for the change of domicile. It does not follow, however, that the latecomer has no claim. In Mrs. Hague’s case, for example, it would not be unreasonable to regard the purposes underlying the “stacking” rule as combining regulatory and compensatory policies. The reach of the regulatory policy should not be interpreted as extending to insurance issued in Wisconsin and made payable in Wisconsin by an accident in that state. But it does not follow that Minnesota has no interest in extending its compensatory policy to Mrs. Hague, now that she has become a member of that community. Compensatory policies are usually rationalized in terms of the state’s interest in not having the person involved become a public charge, as for example, by becoming dependent on the local welfare system.

Was Mrs. Hague within the intended reach of such a policy? One might rationally conclude that she was if, on more particularized inquiry, the facts indicated any significant probability that non-application of the “stacking” rule would result in her becoming a public charge in Minnesota. We generally would not distinguish between the application of compensatory policies to domiciliaries on the basis of whether they are poor or wealthy. This distinction would be relevant, even in domestic cases, but another policy, calling for equality of treatment of persons regardless of their financial standing, intrudes and ends or draws a limit to particularism. As a latecomer, however, Mrs. Hague is not on the same footing as other domiciliaries with respect to this set of facts. Her claim should rationally be particularized.

It should be emphasized that nothing in this suggested use of particularism for constitutional purposes requires the Supreme Court to tell the states what their policies should be. Moreover, it leaves the state courts wide latitude in interpreting the intended reach of rules in the light of underlying policy. It does not solve the problem of “manufactured” policy discussed in the preceding section. As I

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179. See supra notes 146-48 and accompanying text.
181. It seems to me that this approach fully satisfies the “ongoing requirements of prudent governance” urged by Professor Weinberg, see supra note 150, at 1043, in arguing that Mrs. Hague should be treated as a Minnesota resident.
suggested there, the only real answer to that problem is restraint on
the part of the state courts; the Supreme Court ought to rely on the
integrity of the state courts and take at face value the state courts’
declaration of underlying policy. In the dual constitutional test, how-
ever, requiring both a positive basis for asserting a state interest and
a negative check on the arbitrary or unfair application of rules, the
Court should insist on rationality in the definition of state interests
no less than on a particularized showing of arbitrariness or unfair-
ness on the negative side. 182

V. CONCLUSION

In Professor Kay’s provocative article on the use of the compar-
ative impairment theory in California, she concludes that “[t]he
tidal wave of creative effort that followed the collapse of the First
Restatement has receded, leaving isolated, stagnant pools of doc-
trine, each jealously guarded by its adherents.” 183 She suggests that
there is value in attempting to reduce the scope of disagreement
among conflicts scholars, the members of what Professor Cavers has
called “our disputatious fraternity.” 184 I agree, and this article has
been offered as part of that effort. I am less sanguine than others
about the probabilities of success in resolving fundamental differ-
ences in approach to choice-of-law problems, but it does seem to me
that the perspectives of particularism may contribute to the search
for common ground. 185

182. In an interesting article which became available only after this manuscript was
completed, Professor Ely argues that, on the basis of Austin v. New Hampshire, 420 U.S. 656
(1975), the whole methodology of interest analysis might be regarded as unconstitutional be-
cause any claim by a state to an interest in asserting policies on behalf of its residents, which it
would deny to nonresidents, may be a violation of the privileges and immunities clause. Ely,
Choice of Law and the State’s Interest in Protecting Its Own, 23 WM. & MARY L. REV. 173,

Austin invalidated a New Hampshire income tax applicable to nonresidents’ income de-
derived from New Hampshire—a tax from which the similar income of residents was exempt—although the tax was subject to a ceiling measured by the tax of the nonresident’s
home state and allowed that state to prevent imposition of the New Hampshire tax by refusing
to give the taxpayer credit for payment of it. Ely argues that the teaching of Austin is that
treating a nonresident as well as he would be treated at home is not enough to satisfy the
privileges and immunities clause. He concludes that the Supreme Court did not fully consider
the implications of Austin, id. at 187, and that Austin should probably be limited if not over-
ruled. Id. at 190-91. He goes on to suggest, however, that the only useful insight generated by
interest analysis is that the law of the common domicile should apply. Id. at 213-14.

183. Kay, supra note 82, at 615.
184. Cavers, Introduction to Symposium: Conflict-of-Laws Theory After Allstate Insur-
185. The point to be emphasized, of course, is that particularism is not itself a free-
A concern expressed by colleagues who have generously read and commented on this paper is that it invites still further ad hoc treatment of conflicts cases. That, of course, is a criticism generally advanced with respect to the use of policy analysis in choice-of-law theory, and I have not attempted to address it fully here. I understand the force of the argument, but believe there are two basic responses. The first stems from the fact that American choice-of-law theory has accepted policy analysis as part of its mainstream, albeit with a variety of different approaches described earlier. That acceptance, however, has left choice theory in a state of limbo between the abstractions of earlier mechanical rules and those invited by policy analysis itself; in some respects that result is the worst of both worlds. Having taken on policy analysis as a central feature of choice theory, it seems to me that we are under some obligation to continue the experiment and attempt to realize its full potential.

A second response is in effect a denial. We were driven to accept policy analysis by the realization that the Bealian rules of the first Restatement lacked explanatory power and their results were themselves a kind of irrational if not ad hoc justice. To the extent that the subsequent resort to policy analysis produced more rational results, the departure was and has continued to be attractive. There is plenty of evidence, however, of a different brand of ad hoc justice in the unrestrained use of policy analysis. Our search now is for methods to restrain that use. My thesis is that particularism, understood as a search for the level of specificity with maximum explanatory power, offers a promising method of such restraint because it sets a higher standard of rationality for policy analysis.

This excursion into particularism has, I fear, suffered the irony noted at the outset of generalizing about specificity. There are, no doubt, many debatable problems in the use of these ideas, and the usefulness of this approach must ultimately be tested in a more analytical examination of individual cases. The purpose here, however, will have been served if this survey generates some new views of old problems.