

2015

## Resolving Intrastate Conflicts of Laws: The Example of the Federal Arbitration Act

Andrew D. Bradt

Follow this and additional works at: [http://openscholarship.wustl.edu/law\\_lawreview](http://openscholarship.wustl.edu/law_lawreview)



Part of the [Conflict of Laws Commons](#), and the [Dispute Resolution and Arbitration Commons](#)

---

### Recommended Citation

Andrew D. Bradt, *Resolving Intrastate Conflicts of Laws: The Example of the Federal Arbitration Act*, 92 WASH. U. L. REV. 603 (2015).  
Available at: [http://openscholarship.wustl.edu/law\\_lawreview/vol92/iss3/6](http://openscholarship.wustl.edu/law_lawreview/vol92/iss3/6)

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

# RESOLVING INTRASTATE CONFLICTS OF LAWS: THE EXAMPLE OF THE FEDERAL ARBITRATION ACT

ANDREW D. BRADT\*

## ABSTRACT

*Choice-of-law analysis is typically thought of as confined to the multistate setting. This is a mistake. To the contrary, conflicts often appear between statutes of a single state. Unfortunately, courts do not see these cases as “choice-of-law” cases. They see them only as problems of statutory interpretation and ignore conflicts of laws instead of resolving them, either by construing the conflicting statutes independently or applying a canon of construction. Here, I examine the benefits of importing choice-of-law tools—particularly the tools of governmental-interest analysis—into the resolution of intrastate conflicts of laws. When two laws promulgated by the same sovereign clash, governmental-interest analysis is a promising approach to resolve the conflict. It is promising not only because it offers a path toward more rational results, but also because it highlights conflicts, requires courts to make explicit their policy preferences, and potentially prompts legislative dialogue. After suggesting how interest analysis might work to resolve intrastate conflicts of laws, I turn to a specific example of such a conflict: the Supreme Court’s decision last term in *American Express Co. v. Italian Colors Restaurant*, in which the Court held, 5–4, that the Federal Arbitration Act commanded enforcement of an arbitration clause that rendered the defendant’s alleged antitrust violations practically unenforceable. Although the Court did not say so, *Italian Colors* was a choice-of-law case. Use of choice-of-law methodology would have laid bare the conflict and provided a more direct path to its resolution. *Italian Colors*, therefore, provides an example of the opportunities available in using choice-of-law analysis to resolve intrastate conflicts.*

---

\* Assistant Professor of Law, University of California, Berkeley School of Law (Boalt Hall). Many thanks to Hiro Aragaki, Stephen Bundy, Tom Donnelly, Mark Gergen, Herma Hill Kay, Martin Kurzweil, Judith Resnik, Teddy Rave, Erin Sheley, Joseph Singer, Allan Stein, Karen Tani, Susannah Barton Tobin, and Jan Vetter for valuable comments and suggestions. I’d also like to express my appreciation to participants in the Junior Federal Courts Faculty Workshop, held at Brooklyn Law School, who provided exceptional feedback.

## INTRODUCTION

“Choice is inescapable and must be explicit.”

—Paul Freund<sup>1</sup>

Even before the Supreme Court handed down its strikingly pro-arbitration ruling in 2013’s *American Express Co. v. Italian Colors Restaurant*,<sup>2</sup> many commentators saw the Supreme Court’s 2011 decision in *AT&T Mobility v. Concepcion*<sup>3</sup> as another nail, if not the last nail, in the consumer-class-action coffin.<sup>4</sup> *Concepcion*, which held that the Federal Arbitration Act (FAA) preempted California’s rule invalidating most class-arbitration waivers in contracts of adhesion as unconscionable, seemed to be yet another roadblock to maintaining a class action—particularly the paradigmatic “small claims” class action brought on behalf of a class of consumers who individually suffered minimal damages.<sup>5</sup> Despite the generally gloomy response to *Concepcion*, some courts and commentators have suggested that the decision does not invalidate all state-law rejections of class-arbitration waivers.<sup>6</sup> But the Supreme Court may have dashed any such hopes in its decision in *Italian Colors*.<sup>7</sup>

One reason *Italian Colors* broke new ground in the class-action-and-arbitration saga is that it does not rest on preemption grounds. *Concepcion* rested on the holding that the federal statute preempts state laws that appear to frustrate the policy, enshrined in the FAA, in favor of enforcing

---

1. Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1210 (1946).

2. 133 S. Ct. 2304 (2013).

3. 131 S. Ct. 1740 (2011).

4. See Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 629 (2012) (predicting that, post-*Concepcion*, “most class cases will not survive the impending tsunami of class action waivers”); Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012) (predicting that *Concepcion* may “signify death for the legal claims of many potential plaintiffs”); Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 792 (2012) (suggesting that legislative response may be necessary to undo the effects of *Concepcion*).

5. David Korn & David Rosenberg, *Concepcion’s Pro-Defendant Biasing of the Arbitration Process: The Class Counsel Solution*, 46 U. MICH. J.L. REFORM 1151, 1193 (2013).

6. See David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217 (2013) (discussing the use of the public-policy defense under the *Concepcion* framework); Hiro N. Aragaki, *AT&T Mobility v. Concepcion and the Antidiscrimination Theory of FAA Preemption*, 4 PENN ST. Y.B. ARB. & MEDIATION 39, 41 (2013).

7. *Italian Colors*, 133 S. Ct. 2304.

arbitration clauses.<sup>8</sup> As a result of that strong federal policy, the FAA is impervious to attempts by states to frustrate its aims by protecting consumers from harsh arbitration clauses. *Italian Colors* is different. Unlike *Concepcion*, in *Italian Colors* the plaintiffs did not rest their attempt to avoid arbitration on a state-law ground. In pressing their federal antitrust class action, these plaintiffs argued that the FAA should not apply to their case because a waiver of class-wide arbitration would prevent the vindication of their rights under *federal law*.<sup>9</sup> Under the circumstances, because the individual damages claims were so small, enforcing an arbitration clause requiring individual arbitration (and prohibiting class-wide arbitration) would effectively prevent the plaintiffs from pursuing their claims because no lawyer would be adequately incentivized to take cases on an individual basis.<sup>10</sup> The plaintiffs here were appealing to the standard “private attorney general” rationale for any small-claims class action—a rationale that would be stymied if the right to arbitrate as a class could be waived.<sup>11</sup> Indeed, this is also the best argument against the holding in *Concepcion* itself, articulated straightforwardly by Justice Breyer in his opinion for the four dissenting justices in that case.<sup>12</sup>

*Italian Colors*, therefore, presented a new question—is a class-arbitration waiver enforceable even if enforcing it will frustrate vindication of another federal statute, when the question of federal preemption of state law is not in play? Put another way, will the FAA trump a *federal* statute without the added ammunition of the vindication of the federal policy favoring arbitration against a state’s attempt to avoid it? In a 5–3 decision, the Court in *Italian Colors* answered “yes.”<sup>13</sup>

Per Justice Scalia, the majority accepted that the class-arbitration waiver in the case effectively prevented prosecution of antitrust claims against American Express, but held that the FAA mandated that conclusion.<sup>14</sup> In the Court’s view, because nothing in the text of the FAA (or any other statute) required that the arbitration clause not be enforced, and because the “purpose” of the FAA is to enforce agreements to

---

8. *Concepcion*, 131 S. Ct. at 1753.

9. *Italian Colors*, 133 S. Ct. at 2310.

10. *See In re Am. Express Merchs.’ Litig. (Amex I)*, 554 F.3d 300, 304 (2d Cir. 2009).

11. *Id.*; see also D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1239 (2013) (explaining the “value-generating” purpose of small-claims aggregation).

12. 131 S. Ct. at 1761 (Breyer, J., dissenting).

13. 133 S. Ct. at 2307. Justice Sotomayor did not participate because she had been on the original panel that decided the case in the Second Circuit.

14. *Id.* at 2309–10.

arbitrate, the FAA straightforwardly applied.<sup>15</sup> As Justice Scalia put it, “the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.”<sup>16</sup> In dissent, Justice Kagan saw the case differently. In her view, the FAA admits of an “effective vindication” exception when enforcement of an arbitration clause amounts to exculpation of the defendant.<sup>17</sup> In her view, reading such an exception into the FAA is necessary to “reconcile[] the [FAA] with all the rest of federal law.”<sup>18</sup>

What’s missing from both opinions, however, is the recognition that *Italian Colors* presented a choice-of-law problem. There is an apparent conflict between the Federal Arbitration Act and the Sherman Act under these circumstances because the policies underlying both statutes cannot be achieved at the same time. Applying the FAA in this case would effectively prevent enforcement of the Sherman Act, while privileging enforcement of the Sherman Act would necessitate invalidating the arbitration clause. Neither the majority nor the dissent approaches the case as a choice-of-law problem (although the dissent comes closer). Yet the pattern is familiar to choice-of-law scholars—the choice of law ultimately determines the outcome of the litigation.

This is unfortunate but unsurprising. Choice of law is typically considered an issue only in the multistate setting, when a court must decide whether to depart from local law and apply the law of another jurisdiction connected to the dispute. And even in the multistate setting, the Supreme Court has been out of the choice-of-law business for decades,<sup>19</sup> confining its involvement to instances in which a state egregiously violates the Constitution by applying its own law when it has no legitimate connection to the case.<sup>20</sup> This Article questions whether confining the tools of choice of law to the multistate setting makes sense or whether choice-of-law analysis has something to offer in the purely intrastate setting. As a way of starting to investigate that question, this Article suggests what the use of one mode of conflicts analysis—the

---

15. *Id.* at 2312.

16. *Id.* at 2309. Justice Thomas concurred separately to note that because nothing in the text of the statute suggested that the waiver should not be enforced, the FAA undoubtedly applied. *Id.* at 2312–13.

17. *Id.* at 2317.

18. *Id.* at 2313.

19. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 *IND. L.J.* 271, 279 (1996); Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 *U. CHI. L. REV.* 440, 442 (1982).

20. Compare *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), with *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

governmental-interest approach—might look like when used in the intrastate conflict of laws, and considers *Italian Colors* as an example of how it might work.

One of the crucial steps forward made by modern choice-of-law theorists, especially Brainerd Currie, the father of interest analysis, was that choosing law must be dictated by the content and underlying purposes of the arguably conflicting laws. Only by figuring out whether the laws' purposes would be vindicated by their application in a particular case could a court determine whether there was really a conflict or just a false problem.<sup>21</sup> One of Currie's central insights was that choice of law was really, at its root, a process of statutory interpretation and construction, which would reveal whether a state had a legitimate interest in its law applying to a specific case. In many cases this analysis would reveal that only one of the allegedly conflicting jurisdictions had such an interest, and its law should apply. Currie's approach, called governmental-interest analysis, was revolutionary and offered the means of breaking free of the rigid and arbitrary choice-of-law rules then in force.<sup>22</sup> Defenders and friendly critics of Currie, such as Larry Kramer, have recognized that the steps of Currie's approach are not foreign to the domestic process of statutory interpretation.<sup>23</sup> Domestic, or intrastate, cases, however, are not typically viewed as "choice-of-law" cases, even though courts often must choose between clashing statutes promulgated by a forum sovereign. Rather, domestic cases are typically decided by interpreting the scope of a single statute or applying a single tiebreaking canon of statutory interpretation.<sup>24</sup>

---

21. See Larry Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, 24 CORNELL INT'L L.J. 245, 248 (1991).

22. Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 539 (1983).

23. Kramer, *supra* note 21, at 252–53; see also Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2489 nn.182–83 (1999); Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 79 (1989) (arguing that "[c]onflicts cases really differ from domestic disputes in only two important respects: (1) they implicate the interests of a party who may have relied on, or who claims protection under, the conflicting norms of another state; and (2) they further implicate the ability of the members of that other state to govern themselves").

24. Roosevelt, *supra* note 23, at 2489. Conflicts analysis has typically been absent from intrastate statutory cases, likely because the conflicts field originally grew out of the need to accommodate the interests of multiple sovereigns. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS §§ 7–9 (2d ed. 1841). As conflicts law developed in the mid-20th century to center on problems of statutory interpretation, the utility of modern conflicts thinking in the intrastate case has become clearer. Because there is obviously only one sovereign in a purely domestic case, traditional conflicts law might at first glance seem out of place.

This Article contends that employing interest analysis in the intrastate conflict would lead to more satisfying results because interest analysis provides a mechanism for exposing and rationally resolving conflicts of laws. At this point (particularly if you have studied choice of law), one might reasonably ask, why look to *that* notorious field for guidance?<sup>25</sup> And if you're going to look to choice-of-law approaches for guidance, why would you choose interest analysis, which has been the target of serious criticism<sup>26</sup> (and vigorous defense)?<sup>27</sup> To state my priors, I am mostly persuaded by interest analysis even in the multistate context, though that debate is (and continues to be) well ventilated. In the intrastate setting however, many of the potential criticisms of interest analysis as too parochial and forum-centric do not apply. The prime benefits of interest analysis are that it makes explicit the potential clashes between domestic statutes and requires courts to make clear their reasoning process in choosing law, better communicating to legislatures the conflicts lurking among the codes, potentially triggering corrective action.<sup>28</sup> Choice of law is one area of law in which purposive statutory interpretation remains pervasive. It involves a particular kind of purposive interpretation in that it is done by taking the potentially conflicting law into account.

The Court's arbitration jurisprudence, and specifically *Italian Colors*, provides an example of the opportunities lost by not using interest analysis in the intrastate setting. *Italian Colors* is a choice-of-law case in search of a choice-of-law methodology. Had the court properly applied interest analysis, it would have made clearer the arguable conflict among federal statutes and the failure of the text to resolve those conflicts rather than suggesting that there was no conflict to resolve—as both the majority and dissent implied. Moreover, use of the interest-analysis tool of moderate and restrained interpretation would have provided a pathway to holding that the FAA should have yielded in this case. To be sure, such an alternative path might not have convinced the five justices in the majority,

---

25. One could tell a joke here about conflicts scholars holding a hammer and everything looking like a nail. Nevertheless, William Prosser set us back generations with our colleagues outside the conflicts field by calling (and requiring an obligatory reference to) the subject as a “dismal swamp.” William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

26. See, e.g., Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459 (1985).

27. Herma Hill Kay, *A Defense of Currie's Governmental Interest Analysis*, 215 RECUEIL DES COURS 9 (1989).

28. See Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637 (2012) (discussing the potential benefits of more explicit statutory interpretation for interbranch cooperation).

but establishing interest analysis as a tool for resolving domestic conflicts might have been a productive tool in dissent.

It is possible that the majority's straightforward policy judgment is that it is better to avoid class actions than violations of the antitrust laws. This judgment is arguable, but the benefit of interest analysis is that it requires the Court to make clear its position in resolving the conflict rather than hiding behind an assertion that the two statutes can peacefully coexist.

This Article proceeds in two parts. In Part I, I will briskly describe interest analysis and then suggest why it may be a useful tool in purely domestic cases. In Part II, I will turn to *Italian Colors* as an example of opportunities missed by not assessing the case as a matter of choice of law. Within Part II, I will discuss the FAA jurisprudence that led to *Italian Colors* and then the case itself, which had a lengthy stay in the Second Circuit before ascending to the Supreme Court. After reviewing the majority and dissenting opinions in the case, I will show how the reasoning and result may have been different had interest analysis been properly applied. Ultimately, my hypothesis is that the importation of interest analysis into the purely domestic context might lead to more well-reasoned decisions, or at least more candid statements to Congress of how to properly resolve conflicts of federal statutes.

## I. INTEREST ANALYSIS AND THE INTRASTATE CONFLICT

### A. *The Development of Interest Analysis*

To scholars and students of choice of law, the story of the choice-of-law revolution is familiar, so only a brief summary is necessary to set the stage here.<sup>29</sup> Although conflicts jurisprudence is ancient, and early American conflicts law is rich and interesting,<sup>30</sup> I'll pick up the story in the early twentieth century. At that time, American conflicts law was defined by a set of rigid rules that mandated selection of the law of a state to govern multistate controversies. Such selections were based on a single connecting factor, such as the place of the injury or the place of the making of a contract, and not the content or purpose of the arguably conflicting laws.<sup>31</sup> The system was based on the notion that parties' rights

---

29. An excellent summary of the story may be found in Roosevelt, *supra* note 23.

30. See, e.g., ERNEST G. LORENZEN, *SELECTED ARTICLES ON THE CONFLICT OF LAWS* (1947) (describing early development of American conflicts law from European roots).

31. See, e.g., Friedrich K. Juenger, *General Course on Private International Law*, 193 RECUEIL DES COURS 119, 209 (1983) (noting that "the rules [Beale] proposed were extremely rigid").



vested at a particular moment and that the location where those rights vested provided the proper governing law. Such rules sought, above all else, uniformity of result without regard to the forum selected.<sup>32</sup>

This “traditional” system reached its apogee in 1934 with the publication of the Restatement of Conflict of Laws, spearheaded by Harvard Law School Professor Joseph H. Beale.<sup>33</sup> But by the time the Restatement was published it was already under sustained attack, most prominently by Walter Wheeler Cook,<sup>34</sup> Ernest Lorenzen,<sup>35</sup> and David Cavers.<sup>36</sup> Beyond rejecting the metaphysical underpinnings of vested rights, these scholars demonstrated that when courts faithfully followed the traditional rules, which were not always as easy to apply as they seemed to be, they often reached absurd and unfair results.<sup>37</sup> Moreover, courts simply didn’t follow the rules in many cases, using “escape devices” to avoid results they could not abide.<sup>38</sup> Ultimately, the traditional system could not achieve the uniformity it prized most.<sup>39</sup>

Although the early critics of the First Restatement were exceptionally successful in demonstrating the shortcomings of the traditional system, they were less successful in providing a workable alternative. Cook’s “local law” theory, premised on the idea that states always apply their own law but sometimes borrow the content of that law from other jurisdictions,

---

32. Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736, 751 (1924).

33. Kay, *supra* note 27, at 27–28.

34. See WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942). Cook, one of the leaders of the legal-realism movement, is still considered the most effective of Beale’s critics. Brainerd Currie, voicing every academic’s worst nightmare, described Cook as having “discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another.” Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 966 (1958). See also David F. Cavers, *Book Review*, 56 HARV. L. REV. 1170, 1171 (1943) (reviewing COOK, *supra*) (noting Cook’s “frontal assault” on Beale’s theory).

35. See LORENZEN, *supra* note 30.

36. See David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933).

37. See, e.g., Roger J. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 658 (1959) (“However conscientiously such courts have ordinarily sought to apply the substantive law of the state where the facts took place, they have become embroiled in the chronic problems of characterization, and in the illusory classification of statutes of limitation, statutes of fraud, and rules governing burden of proof.”).

38. Cavers, *supra* note 36, at 182.

39. See Lorenzen, *supra* note 32, at 751 (“Notwithstanding the vogue that *a priori* theories have enjoyed during the last century on the continent, no approach toward uniformity has been attained. There is no reason, therefore, why our courts should give up their traditional way of working out the problems of the Conflict of Laws in favor of any *a priori* theory which has no support other than that of the person advocating the same.”). See also BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 101 (1963) (“The ideal of uniformity of result is . . . to some extent illusory.”).

came closest but did not create a complete process for choosing law.<sup>40</sup> Some states had begun experimenting with more flexible methods, such as the “center of gravity” approach, that sought to determine the state with the most meaningful relationship with particular controversies, but those approaches, too, proved unsatisfying.<sup>41</sup>

By the time Brainerd Currie entered the fray in 1958, the system was in upheaval.<sup>42</sup> During an incredibly prolific few years, Currie announced and continually refined his choice-of-law system, the governmental-interest approach.<sup>43</sup> Interest analysis is intricate, as the voluminous literature it has inspired demonstrates.<sup>44</sup> My recap here is necessarily abbreviated, but I emphasize the aspects of the process that lend themselves most readily to intrastate conflicts. In short, interest analysis posits that the right way to look at choice-of-law problems is by assessing the underlying purposes of the arguably conflicting laws, and asking which of those laws’ purposes would be advanced by application to the case at hand.<sup>45</sup> Rather than blindly selecting the jurisdiction most connected with the case and applying its laws, the court should look at the purposes of the arguably conflicting laws in order to figure out whether either or both of the two laws ought to rationally apply to a given case.<sup>46</sup> As Professor Kay describes it: “Currie’s major insight was that [the traditional] rules ‘create problems that did not exist before,’ and that they solve the false problems in irrational ways, by nullifying capriciously the interest of one state or another whose laws were said to be in conflict without analysis of their underlying policies.”<sup>47</sup>

---

40. COOK, *supra* note 34, at 21 (noting that under the local-law theory “[t]he forum thus enforces not a foreign right but a right created by its own law”).

41. Kay, *supra* note 22, at 536 (noting that the center of gravity approach “lacks identifiable content” and is “open to manipulation”).

42. Kay, *supra* note 27, at 39 (“By 1958, when Currie announced his governmental interest approach, he viewed the theoretical work of destroying Beale’s vested rights thesis as complete.”).

43. Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1637–38 (2005) (describing Currie’s article on married-women’s contracts as “the shot heard round the world”); Kay, *supra* note 22, at 538 (describing Currie’s “extraordinary period of scholarly productivity,” consisting of publishing seventeen major articles in six years).

44. See HERMA HILL KAY, LARRY KRAMER & KERMIT ROOSEVELT III, *CONFLICT OF LAWS: CASES—COMMENTS—QUESTIONS* 149 (9th ed. 2013) (noting the “enormous literature devoted specifically to Brainerd Currie’s writings”).

45. CURRIE, *supra* note 39, at 110.

46. See, e.g., Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178; Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 1013–14 (1958).

47. Kay, *supra* note 22, at 539. See also CURRIE, *supra* note 39, at 178; Symposium, *Choice of Law: How It Ought to Be*, 48 MERCER L. REV. 639, 652 (1997) (describing the “essence of the Currie method” thusly: “choice of law is just the ordinary process of interpretation of the various substantive

At the outset, it is important to note that Currie's theory was one that sought to effectuate legislative purpose. Similar to his contemporaries, the legal-process-school thinkers, Currie believed that legislatures passed laws to achieve purposes.<sup>48</sup> Currie saw the legislative process as being influenced by "pressure groups" who sought to advance their private interests, and he saw statutes ultimately as representing decisions by legislatures as to whose policy positions would be prioritized.<sup>49</sup> The legislation ultimately enacted represented a choice of one set of policies over another in a particular context.<sup>50</sup> For instance, in his landmark article about married women's contracts, Currie posited that the Massachusetts legislature's decision to allow married women to void those contracts "subordinated the interests of creditors to the interests of this particular, favored class of debtors."<sup>51</sup>

In choice-of-law cases, the court's role is to accomplish the purpose of the legislature when appropriate. In cases where application of a state's law would further that purpose, the court should apply it, except in the somewhat limited circumstances in which the Constitution forbids it.<sup>52</sup> In Currie's view, the old "jurisdiction-selecting" choice-of-law rules were irrational because they often mandated selecting a law which did not advance the purpose of any state involved in the case. To Currie, it made no sense for a state to choose not to apply its own law, when doing so would advance its social policy, in favor of applying the law of a sister

---

laws in question in light of their purposes"); *id.* at 661 (contending that Currie's interest analysis would have been more properly named "interpretation analysis"); Arthur Taylor von Mehren, *Book Reviews*, 17 J. LEGAL EDUC. 91, 93 (1964) (reviewing CURRIE, *supra* note 39)).

48. See KAY, KRAMER & ROOSEVELT, *supra* note 44, at 148 ("Resort to purposive interpretation places Currie squarely within the 'legal process' school of thought that was dominant at the time he was writing."); William L. Reynolds, *Legal Process and Choice of Law*, 56 MD. L. REV. 1371, 1380 (1997).

49. See CURRIE, *supra* note 39, at 85; Kay, *supra* note 27, at 42.

50. See CURRIE, *supra* note 39, at 80-85; Kay, *supra* note 27, at 41-43 (describing Currie's view of legislatures "weighing and balancing the conflicting interests of its various constituents" and ultimately "the vindication of the expressed interest of one or more private groups over those of another").

51. CURRIE, *supra* note 39, at 85.

52. *Id.* at 52-53. It is beyond the scope of this Article to discuss Currie's deep analysis of choice of law and the Constitution in three papers, one written on his own, and two with Herma Hill Schreter. It is worth noting, however, that these articles suggest a much more robust role for Constitutional regulation of choice of law than the Supreme Court has adopted over the course of the last three decades. See Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960); Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960); Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9 (1958).

state, when doing so would *not* advance any policy of that state.<sup>53</sup> The crux of interest analysis, then, is to figure out whether applying either or both of the two states' arguably conflicting laws will advance their underlying purposes.

Determining whether applying a state's law will advance its purpose is a two-step process. Step one is to ascertain the governmental policy behind a state's law.<sup>54</sup> That is, what is the balance struck by the state when it adopted a particular law?<sup>55</sup> In the best of all worlds, the legislature would be explicit about the underlying policy of a law, but legislatures rarely are. If the legislature has been silent, the court must do its best to unearth the law's underlying policy, even though this is a difficult task.<sup>56</sup> As Professor Weintraub has put it, "[i]n real cases, there is no substitute for determining the actual policies underlying common-law rules and statutes. Sources for these policies include judicial opinions, scholarly commentary, and legislative history."<sup>57</sup> At this stage, it is important to note that Currie recognized the criticisms of attempts to ascertain governmental policy. But in the face of legislative silence, he saw no alternative to making the effort aside from use of arbitrary choice-of-law rules, which he deemed worse.<sup>58</sup>

Step two of the analysis is to determine whether, in light of this policy, the state has a governmental interest in applying its law in the specific case.<sup>59</sup> An "interest" requires a *link* between the governmental policy

---

53. CURRIE, *supra* note 39, 52–53.

54. *Id.* at 172. Note that such a policy could be represented both by a statute passed by the legislature or the lack thereof.

55. Kay, *supra* note 27, at 50.

56. CURRIE, *supra* note 39, at 172. *See also* Kay, *supra* note 27, at 52 (noting that Currie "persevered in his belief that laws express domestic social, economic, or administrative policies, and that courts are capable of discovering those policies by the kind of analysis he described").

57. RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 8 (6th ed. 2010); Kay, *supra* note 27, at 122 (noting that Currie "gratefully accepted such legislative history as may be available"); *see also* CURRIE, *supra* note 39, at 377:

The method employed is that of statutory construction or interpretation. It involves an attempt to ascertain what the legislature meant, in part by reference to definitions that have been established in other contexts for terms employed in the statute, and in part by resort to such "legislative history" as may be available; beyond this, it involves an attempt to ascertain the legislative purpose, and to impute to the legislature an "intention" to include the marginal situation or not according to whether analysis indicates that inclusion would serve, or disserve, or be irrelevant to that purpose.

58. Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 762 (1963) (noting that "those who believe that problems in the conflict of laws are appropriately treated as problems of statutory construction (or of the interpretation of common-law rules) are not likely to lay down their cause in dismay because of [the] insight into the fictive character of legislative 'intent'").

59. Kay, *supra* note 27, at 53–54.

embodied in a particular law and the facts of the specific case.<sup>60</sup> As Currie put it, “An ‘interest’ as I use the term is the product of (a) a governmental policy and (b) the concurrent existence of an appropriate relationship between the state having the policy and the transaction, the parties, or the litigation.”<sup>61</sup> Professor Kay helpfully elaborates:

[W]hether a state has an ‘interest’ in Currie’s sense depends on circumstances beyond the state’s control. Three elements are necessary to produce an interest: first, a factual relationship must exist between the state and the transaction, the parties, or the litigation; second, the factual relationship must implicate the governmental policy; and third, the relationship must be an appropriate one.<sup>62</sup>

An appropriate relationship requires the state’s interest to be legitimate under the Constitution.<sup>63</sup> In other words, the goal of interest analysis is to figure out whether applying the state’s law to a particular case will advance the governmental policy underlying that law.<sup>64</sup> At this stage, however, a court is *not* attempting to ascertain legislative intent in multistate cases—that is, a court is not trying to figure out whether the legislature intended that a statute apply to a particular case. The legislature will almost certainly have been silent on that score. Rather, the court is determining whether application of a statute to a particular case would advance the purpose that motivated the statute’s enactment.<sup>65</sup>

---

60. See Robert A. Sedler, *Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer’s “Foundational Attack”*, 46 OHIO ST. L.J. 483, 485–87 (1985) (“According to Currie, it is rational to make choice of law decisions with reference to the policies reflected in the laws of the involved states, and the interest of each state, in light of those policies, in having its law applied on the point in issue in the particular case.”); Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 291 (1966) (“A governmental interest in a choice-of-law case, in its simplest sense, is discoverable by putting together (a) the reasons supporting the rule of law in question . . . and (b) the state’s . . . factual contacts with a case, or the issue in a case, to see if they match.”).

61. CURRIE, *supra* note 39, at 621.

62. Kay, *supra* note 27, at 54.

63. *Id.* In general, for instance, it would not be a legitimate interest for a state to enact a law for the purpose of discriminating against out-of-staters.

64. As Cavers described it, “The decisive factor in Professor Currie’s method is the finding that the application of a law is reasonable in the light of the circumstances of the case and the policies the law expresses.” DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 99 (1965).

65. As Kay notes, “Currie’s search for legislative purpose, in other words, was limited to the discovery of domestic policy,” and not “legislative purpose about a conflicts question.” Kay, *supra* note 27, at 122–23; Sedler, *supra* note 60, at 487.

### B. Interest Analysis and False Conflicts

Proper application of interest analysis may reveal that only one state's governmental policy will be advanced by applying its law to a particular case. In other words, only one state has a governmental interest, and the court should apply that state's law. In the language of interest analysis, that is a "false conflict," and represents an easy case. One problem with the old choice-of-law system was that it created conflicts where none existed and then sought to resolve them through application of arbitrary rules.<sup>66</sup>

Perhaps the most famous "false conflict" is the New York case, *Babcock v. Jackson*.<sup>67</sup> In *Babcock*, two residents of Rochester, New York, were traveling by automobile in Ontario, Canada, where they suffered an accident in which the passenger was badly harmed. The passenger sued the driver in New York, and the driver defended himself under the Ontario "guest statute," which held that a driver would not be liable for any injuries suffered by a passenger in the event of an accident.<sup>68</sup> No such statute existed under New York law, so the defendant would be vulnerable to a negligence suit. Under the traditional choice-of-law rules applying the law of the place where the injury occurred, the trial court applied Ontario law and dismissed the case.<sup>69</sup>

The New York Court of Appeals reversed, departing from the traditional rule. In so holding, the court found that the policy underlying Ontario's guest statute was to prevent fraudulent claims against Ontario drivers and insurance carriers.<sup>70</sup> Because no such parties were involved in the litigation, Ontario therefore had no interest in its law applying. New York, on the other hand, did have an interest. New York's law provided for recovery by passengers against drivers based on its "policy of requiring a tort-feasor to compensate his guest for injuries caused by his negligence."<sup>71</sup> Under the circumstances, only New York had an interest in applying its law, and its law should therefore be applied even though the injury occurred in Ontario. For Currie, this was an easy case: New York

---

66. CURRIE, *supra* note 39, at 726 ("A conflicts problem does not arise merely because a statement of the facts of the case requires mention of two states. A true problem arises only when the laws of two or more states are in conflict, in the sense that each state has an interest in the application of its distinctive legal policy."). Currie himself thought this to be the most important contribution of interest analysis. Currie, *supra* note 58, at 756.

67. 191 N.E.2d 279 (N.Y. 1963).

68. *Babcock v. Jackson*, 230 N.Y.S.2d 114, 115–17 (App. Div. 1962).

69. *Babcock*, 191 N.E.2d at 280.

70. *Id.* at 285.

71. *Id.* at 284.

had an interest in applying its law “for the benefit of the injured New York resident.”<sup>72</sup> Ontario had no conceivable interest because “[t]he guest statute expresses a policy for the protection of defendants,” but “[t]he defendant here . . . is not a citizen or resident of Ontario; he is a citizen of a state that holds him accountable for injuries to his guests.”<sup>73</sup>

### C. True Conflicts and Apparent True Conflicts

Currie’s observation of “false conflicts” and recognition that traditional choice-of-law rules often lead to the application of a disinterested state’s law are *relatively* uncontroversial today.<sup>74</sup> The more controversial aspect of Currie’s process comes when more than one state has a governmental interest in applying its law. That is, “[e]ach state has a policy, expressed in its law, and each state has a legitimate interest, because of its relationship to one of the parties, in applying its law and policy to the determination of the case.”<sup>75</sup> This is a true conflict.

According to Currie, in the case of a true conflict, the forum should apply its own law. This view is based on two core tenets of Currie’s theory. First, such a true conflict is “insoluble” by a court because it required “weighing” the relative merits of two states’ competing policies.<sup>76</sup> In Currie’s view, there was no legitimate basis for deciding which of two validly held policies ought to yield; in his mind, this was a core legislative function for which the courts lacked the necessary resources.<sup>77</sup> Second, as an agent of the state, the court ought to apply forum law when the state has a legitimate interest in doing so. That is, when application of forum law will advance the state’s governmental purpose, the court should not refuse to do so in order to effectuate the policy of another state.<sup>78</sup>

---

72. CURRIE, *supra* note 39, at 724.

73. *Id.*

74. See also Weinberg, *supra* note 43, at 1642 (noting the importance of the discovery of the false conflict); Kramer, *supra* note 21, at 248 (noting Currie’s insight that “the rules create false problems by requiring a choice in cases where there is no real conflict of interests”). The existence of false conflicts is relatively uncontroversial, though Professor Singer has persuasively demonstrated that courts are sometimes too quick to dismiss cases as false conflicts when one or the other state really does have a legitimate interest in its law applying. See Singer, *supra* note 23, at 34.

75. CURRIE, *supra* note 39, at 107–08.

76. Currie, *Note on Methods and Objectives*, *supra* note 46, at 176 (noting that “assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function which should not be committed to courts in a democracy. It is a function which the courts cannot perform effectively, for they lack the necessary resources.”).

77. Herma Hill Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CALIF. L. REV. 577, 579 (1980).

78. CURRIE, *supra* note 39, at 119.

Currie was notably unenthusiastic about this result. He referred to it as a “give-it-up” solution to the problem and recognized that it opened his theory to the attack that it is parochial, but he posited that this solution was preferable to the traditional system and its jurisdiction-selecting rules.<sup>79</sup> But at the time he initially proposed his theory, Currie believed that the forum-law solution was the best available.

Several years later, however, Currie revised his thinking. Although his untimely death prevented him from fully elaborating his revised approach, he provided useful guidance in one of his last articles, *The Disinterested Third State*.<sup>80</sup> There, building on observations from an earlier essay,<sup>81</sup> he deviated from the view that the court should necessarily apply forum law whenever it has a legitimate interest in doing so. Instead, when faced with an “apparent true conflict,” courts should take into account the conflicting interest of the other state involved in the dispute.<sup>82</sup> In the face of such a conflicting interest, Currie suggested that the forum state may reexamine its own interest “with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum’s legitimate purpose.”<sup>83</sup> Instead of considering cases as providing a binary choice, Currie espoused the view that cases fall along a “continuum with no clear internal boundaries.”<sup>84</sup> In other words, a case may fall somewhere in between a false and true conflict. In intermediate cases, the court ought to consider whether “on reflection conflict is avoided by a moderate definition of the policy or interest of one state or the other.”<sup>85</sup> If the court could not avoid the conflict even through restrained interpretation, then it should simply apply forum law to achieve the forum state governmental interest.<sup>86</sup> But such cases should be rare. In Professor Kay’s view, however, Currie’s refinement of his theory represented a significant shift in his thinking by “allow[ing] a measure of discretion to accommodate the conflicting interests of other states. In doing so he significantly increased the flexibility of his approach.”<sup>87</sup>

---

79. Kay, *supra* note 27, at 66. Currie hoped that Congress would enact a solution using the Full Faith & Credit clause, but it was unclear what this solution would be.

80. Currie, *supra* note 58.

81. CURRIE, *supra* note 39, at 368–70.

82. Currie, *supra* note 58, at 757.

83. *Id.* at 757.

84. *Id.* at 764.

85. *Id.* at 763.

86. Kay, *supra* note 27, at 76.

87. *Id.* at 75–76.



Perhaps the best way to elaborate what Currie meant by the process of moderate and restrained interpretation in the case of an apparent true conflict is to assess how it worked in the opinion Currie viewed as a model: Chief Justice Traynor's decision for the California Supreme Court in *Bernkrant v. Fowler*.<sup>88</sup> *Bernkrant* was a statute-of-frauds case. The plaintiffs, Nevada residents, had purchased land in Nevada from the defendant.<sup>89</sup> The land remained encumbered by a note held by the defendant, which the plaintiffs paid off in monthly installments.<sup>90</sup> It was unclear at the time of the contract whether the defendant was a resident of Nevada or California.<sup>91</sup> Sometime later, the defendant, in need of cash, approached the plaintiffs about renegotiating the deal so that the plaintiffs would pay a large portion of their indebtedness to the defendant in exchange for the defendant's promise to forgive any outstanding debt at the time of his death.<sup>92</sup> Of course, no one wrote any of this down, and the defendant later died in California, having moved there at some point. After the defendant's death, the plaintiffs continued making their monthly payments under protest and sued the estate in California (where it was being probated) to have that money returned and to discharge the note.<sup>93</sup> The California statute of frauds would have barred enforcement of the oral agreement, while Nevada law would have allowed it.<sup>94</sup> There was an apparent conflict: apply California law and the plaintiffs lose; apply Nevada law and the plaintiffs win.

Justice Traynor approached the problem using interest analysis. Traynor first identified the policy underlying the California statute of frauds: "protecting estates being probated here from false claims based on alleged oral contracts to make wills."<sup>95</sup> But Traynor then noted that the legislature "has not spelled out the extent to which the statute of frauds is to apply to a contract having substantial contacts with another state" and this was not a purely domestic case.<sup>96</sup> Under these circumstances, it was important to assess the policy underlying Nevada's law enforcing oral contracts: "protect[ion of] the rights of its residents who are parties

---

88. 360 P.2d 906 (Cal. 1961). Currie thought that Traynor had "brilliantly" resolved the conflicts issue in that case. Kay, *supra* note 27, at 75.

89. *Id.* at 906.

90. *Id.* at 907.

91. *Id.*

92. *Id.* at 907-08.

93. *Id.*

94. *Id.* at 908.

95. *Id.* at 909.

96. *Id.*

thereto.”<sup>97</sup> The case therefore presented two competing policies: the policy in favor of enforcing contracts to protect the expectations of the parties and the policy refusing to enforce the same contracts because of the risk of fraud.

Having established the policies underlying the two states’ laws, the next question was whether each state had an *interest* in applying its law to these facts. As Traynor recognized, although the estate was being probated in California, the case had significant contacts with Nevada: the plaintiffs were from Nevada and the contract was made and performed in Nevada. It was unclear, however, where the defendant resided at the time of the contract, although at some point he had moved to California and died there.<sup>98</sup> Traynor concluded that on these facts both states had a legitimate interest in their laws applying: California had an interest in protecting estates being probated in California from false claims and Nevada had an interest in protecting the rights of Nevada residents entering into a contract in Nevada.<sup>99</sup> The case therefore presented an apparent *true* conflict of laws.

Under the original formulation of Currie’s method, this situation would call for the application of the law of the forum state, California. But such a result seemed untenable under the circumstances. There was no doubt that California *could* have constitutionally applied its own law, either as a matter of interest analysis or as a matter of traditional conflicts rules. Under traditional analysis, the statute of frauds might be considered as a matter of evidence or procedure governed by the law of the forum.<sup>100</sup>

Instead of reflexively applying California law, however, Traynor reassessed the problem in light of the conflict and decided that Nevada law ought to apply, whether or not the defendant resided in Nevada or California at the time of the contract. If the defendant had been residing in Nevada at the time the contract was made, applying California law would make little sense—the parties would not have been operating under any conception that California law might apply and the defendant’s subsequent move to California should not serve to undermine a contract that all parties believed would be valid.<sup>101</sup> In Traynor’s view, this would be a fairly easy case—closer to a false conflict than a true conflict.

---

97. *Id.* at 910.

98. *Id.* at 909–10

99. *Id.*

100. See Currie & Schreter, *supra* note 52 at 1326–27; see also Emery v. Burbank, 39 N.E. 1026 (Mass. 1895) (considering statute of frauds procedural and governed by forum law).

101. *Bernkrant*, 360 P.2d at 909.

But the same result would be required even if the defendant had been a California resident at the time the contract was made. This would be a much harder case, because the defendant would then be just the sort of person California sought to protect through its statute of frauds. Moreover, if the defendant had been from California, the plaintiffs should have had some inkling that California law might apply to the contract. Traynor, however, came to the conclusion that, in light of the conflict, California's statute did not reach the contract.<sup>102</sup> First, Nevada had a strong interest in enforcing the contract because the plaintiffs were from Nevada, the land was located in Nevada, and the contract was to be performed in Nevada. Second, alongside the statute of frauds, California *also* has a policy of enforcing contracts according to the expectations of the parties. To be sure, in a domestic case, California would subordinate that policy in a case where the contract did not meet the requirements of the statute of frauds, but it was not clear whether the same result should apply in a case with foreign contacts. Third, even though the plaintiffs would have reason to consider whether California law might apply, the question of enforcing the contract would arise only upon the defendant's death, and the defendant could move anywhere.<sup>103</sup> "Unless [the plaintiffs] could rely on their own law, they would have to look to the laws of all of the jurisdictions to which [the defendant] might move regardless of where he was domiciled when the contract was made."<sup>104</sup>

Under the circumstances, Traynor concluded that "there is thus no conflict between the law of California and the law of Nevada."<sup>105</sup> By applying Nevada law, the court could "give effect to the common policy of both states to enforce lawful contracts and sustain Nevada's interest in protecting its residents and their reasonable expectations growing out of a transaction substantially related to that state without subordinating any legitimate interest of this state."<sup>106</sup>

Currie later expressed great admiration for Traynor's work in *Bernkrant*, calling it "brilliantly performed."<sup>107</sup> To begin with, the case

---

102. *Id.* at 910

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Currie, *supra* note 58, at 757 (calling Traynor's analysis "brilliantly performed"). Professor Weinberg has persuasively critiqued *Bernkrant*, which she described as "discriminatory" against the Granrud estate. On this ground she viewed the departure from California law "very hard to justify." See Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595, 610 (1984). In her view, the opposite result in *Bernkrant* "would not have been unfair." *Id.* at 611. She is not wrong. *Bernkrant* is certainly a close call, which Currie recognized, Currie, *supra* note 58, at 763, and there is

approached the conflicts problem through interest analysis rather than applying a mechanical rule, such as applying the procedural law of the forum or the law of the place of the making of the contract (that either rule could plausibly apply demonstrated the malleability of the traditional system). Beyond that, however, Traynor correctly employed the tool of moderate and restrained interpretation in deciding that California need not apply its statute in order to achieve its legislative purpose. Under the circumstances, California could achieve its subsidiary policy of enforcing contracts while recognizing that, in light of Nevada's strong interest in the case, it need not apply its statute of frauds in this specific case.

Moreover, Currie recognized the difficulty of Traynor's task. Currie well understood the difficulties of ascertaining legislative intent—particularly in an area where the legislature had not spoken explicitly to the scope of the statute in the face of a conflict.<sup>108</sup> Currie recognized that the court would have to make explicit its decision in the face of the apparent conflict, and that by doing so the court would invite the legislature to address the problem for future cases. In Currie's view, the court resolved the conflict “in such a way as to invite legislative correction of its interpretation of the legislative purpose—not in such a way as to give the impression that the result was dictated by principles having a validity independent of legislative purpose.”<sup>109</sup> In other words, Traynor's opinion

---

much to recommend Professor Weinberg's view; at the same time, from the perspective of accommodating both states' policies, Justice Traynor's analysis holds up much better. Ultimately, however, I find Traynor and Currie more persuasive. Professor Weinberg contends that Traynor's result is based on the conclusion that “Granrud arrived too recently” and his estate was therefore not entitled to the protection of the statute of frauds. Weinberg, *supra*, at 610. This is not so—Traynor holds explicitly that Nevada law would apply whether or not Granrud was a California resident at the time the contract was made. *Bernkrant*, 360 P.2d at 910. Moreover, Professor Weinberg contends that Traynor's result would allow for different results for plaintiffs who could foresee the location of the defendant's death versus those who could not. Weinberg, *supra*, at 610. This result doesn't necessarily follow from Traynor's opinion, which simply states that Nevada law would apply to any similarly situated plaintiff because it is entirely unpredictable where someone will die. *Bernkrant*, 306 P.2d at 910. The salient issue in *Bernkrant* is the relative strength of California's competing policies of protecting local estates and enforcing contract *under the specific circumstances of this cases*. As Traynor notes, California's statute of frauds would undoubtedly apply to a purely local dispute, and it would undoubtedly not apply to a purely Nevadan dispute. *Id.* at 909. The operative question is the extent of California's interest when the only connection to California is the location of the estate when the foreign law is in conflict. In that scenario, the Traynor approach properly recognizes that California's policy of enforcing contracts is stronger than its policy of protecting this particular estate—especially when such an interpretation avoids an unnecessary conflict with a sister State. As Currie noted, *Bernkrant* is an example of statutory interpretation of two conflicting local laws in light of the conflict with another state—a circumstance that the California legislature undoubtedly had never considered. Post *Bernkrant*, the ball was in the legislature's court to change the result in future cases. Currie, *supra* note 58, at 762.

108. Currie, *supra* note 58, at 762–63.

109. *Id.*

did not appeal to metaphysical conflicts rules or suggest that the court was “weighing” state interests in a way only it could accomplish. Rather, the court explicitly engaged in a process of statutory interpretation that the legislature was free to correct.

Two things stand out from this extended review of *Bernkrant*. The first is that, in the face of a conflict, interest analysis provides for a process of assessing the two conflicting laws in light of the conflict. A court ought to reassess the conflict in light of the competing law to determine whether the conflict can be avoided. This is emphatically not a process of weighing the merits of the two competing policies, but is instead an assessment of whether the conflict is intractable. Such a process may include recognizing that a state’s policy is multifarious and that aspects of its policy may be served by avoiding the conflict, such as California’s policy of enforcing contracts in *Bernkrant*. Second, this process of resolving apparent true conflicts is premised on the notion that the court is explicit about highlighting the potential conflict and how it deals with it—even if in dealing with it, the court exposes a policy preference. This highlighting function is meant to communicate with the legislature frankly, and to offer the legislature the opportunity to prospectively overrule the court’s reasoning.<sup>110</sup> In this way, proper use of interest analysis facilitates dialogue with the legislature. Other methods of conflicts analysis, based on metaphysical rules or notions of conflicts rules that operate independently of legislative intent, shut down such a dialogue.<sup>111</sup>

Even despite Currie’s enthusiasm toward Justice Traynor’s approach in *Bernkrant*, there remained the problem of the true conflict that could not be resolved through restrained interpretation. Under these circumstances, Currie adhered to his “give-it-up” conclusion in the multistate setting that a state should apply forum law. This was due to Currie’s deep aversion to a court’s weighing the interests and policies of the forum state against those of a foreign state. Currie thought there was no way for a court to do such a weighing in a principled way, so application of the forum law would at least effectuate the admittedly legitimate interest of the forum state.<sup>112</sup> But in the circumstances of an intrastate true conflict, the analysis might be a bit different. The conflict remains insoluble from an objective

---

110. See ROBERT A. KATZMANN, JUDGING STATUTES 101–02 (2014) (discussing the importance of the courts’ communicating to Congress glitches and problems in statutes).

111. Freund, *supra* note 1, at 1217 (“If one of the great ends of the law is the harmonizing of interests, a system of conflicts of laws may make a greater contribution to that end by such an examination of the policies of the competing laws . . .”).

112. CURRIE, *supra* note 39, at 182–83.

standpoint, but the court still is faced with making a choice. Since both laws are “laws of the forum,” Currie’s “give-it-up” solution is no help. Under such circumstances, the court is forced to exercise “legislative discretion,” explaining the reasoning for its result under the circumstances and communicating to the legislature the problem. Although Currie would have undoubtedly preferred that such conflict-resolution be performed by the legislature, the court’s hand is forced, and it should be explicit about what it is doing.<sup>113</sup>

#### *D. Interest Analysis in Intrastate Conflicts*

One of the central insights of interest analysis is that choosing law in a multistate case ought to be a process of statutory interpretation, a process familiar to courts from run-of-the-mill domestic cases. The problem of choosing among conflicting laws is not limited to the multistate setting; it appears in the intrastate setting as well when two laws issued by the same sovereign clash.<sup>114</sup> Multistate cases add an additional element of complexity because of the presence of another state with a potentially competing interest.<sup>115</sup> But the involvement of multiple states is not a necessary condition for the existence of a conflict of laws. Such conflicts often occur between the laws promulgated by a single sovereign. But when resolving those conflicts, courts rarely turn to conflicts methods. Instead, they resort to canons of statutory interpretation, of which the legislature is unaware.<sup>116</sup>

Interest analysis, however, adds a new element to statutory interpretation because it requires explicit recognition and resolution of conflicts between statutes. Rather than simply interpreting a single statute or selecting a canon of construction to resolve a potential conflict, interest analysis requires analysis of policies and interests in light of the conflict.<sup>117</sup> This is especially true in the case of apparent true conflicts,

---

113. See Currie, *supra* note 58, at 789 (describing the need in some cases for “judicial legislation,” and noting his preference for it over “the pseudo-judicial mumbo jumbo that is employed to camouflage judicial legislation”).

114. Kramer, *supra* note 21, at 252–53; see also Roosevelt, *supra* note 23, at 2489.

115. Singer, *supra* note 23, at 79 (arguing that “[c]onflicts cases really differ from domestic disputes in only two important respects: (1) they implicate the interests of a party who may have relied on, or claims protection under, the conflicting norms of another state; and (2) they further implicate the ability of the members of that other state to govern themselves . . .”).

116. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 929 (2013).

117. Kay, *supra* note 27, at 75.

which require reassessment of statutory scope while taking account of the conflicting interests.

Although interest analysis was developed to handle multistate conflicts, many of the benefits of interest analysis in the multistate setting would also obtain in the intrastate setting. Interest analysis exposes and resolves conflicts based on the potential advancement of the government's underlying policy in a particular case. Rather than resorting to manipulable and potentially obfuscating rules like the canons of statutory construction, interest analysis makes explicit the potential conflict and how the court chooses to resolve it based on interpretations of legislative policy. As in the multistate setting, interest analysis serves to avoid unnecessary false conflicts. And in the case of potential true conflicts, interest analysis offers the opportunity to reach results more consistent with legislative intent.<sup>118</sup> More importantly, though, use of interest analysis tools, such as moderate and restrained interpretation, allows courts to begin a dialogue with the legislature, highlighting where conflicts might exist and prompting either legislative endorsement or correction.<sup>119</sup>

This dialogue is of a piece with similar efforts at communication between the federal courts and Congress in order to facilitate legislative correction of vague or difficult to apply statutes. As Judge Robert Katzmann has written, such straightforward construction of ambiguous statutes by the federal courts is crucial to facilitating a more cooperative interbranch relationship between the courts and Congress.<sup>120</sup> One recent example of such inter-branch dialogue is the "statutory housekeeping" initiative pioneered by the Governance Institute, which allows courts to transmit difficulties with statutory text to Congress. The program has been quite effective in increasing communication with Congress in part because it makes explicit the unforeseen problems with statutory text and makes clear to Congress the opportunities to fix them.<sup>121</sup>

Moreover, use of an explicit interest-based conflicts analysis may be a significant improvement over the use of canons of statutory construction when statutes clash. Although some conflicts scholars have been more sanguine about the use of canons to resolve intrastate conflicts,<sup>122</sup>

---

118. *See id.*

119. *See Currie, supra note 58, at 789*

120. *See Katzmann, supra note 28, at 666–67; see also id. at 670* ("When courts construe statutes in ways that respect what legislators consider their work product, the judiciary promotes comity with the first branch of government.")

121. *See id. at 690–91.*

122. *See, e.g., Larry Kramer, Rethinking Choice of Law, 90 COLUM. L. REV. 277, 289 (1990); Kramer, supra note 21, at 250.*

statutory-interpretation scholars have long noted the manipulability of the canons.<sup>123</sup> Such criticisms have not abated, at least with respect to the “substantive” policy-based canons.<sup>124</sup> With respect to an intrastate conflict, multiple canons could lead to different conclusions in a particular case.<sup>125</sup> As one example, the canon implying a repeal of an earlier statute by a statute passed later in time might lead to a different result than the canon seeking harmony of new statutes with those already on the books.<sup>126</sup> In this way, the canons present more than a passing resemblance to the rigid and contradictory rules of the First Restatement of Conflict of Laws and present the same characterization-based concerns of the old system.

Even recognizing the potential benefits of a more directly conflicts-based approach, several questions linger. Even if one agrees that conflicts analysis is appropriate in the intrastate setting, why use interest analysis as opposed to other choice-of-law approaches, particularly when interest analysis has been the subject of intense criticism? For one thing, territorial rules of choice of law are of no use since the conflict is intrastate—looking to a territorial connecting factor as a guide provides no help, nor do systems based on qualitative assessments of contacts with a state, such as the center of gravity, or those that reflexively apply the law of the forum. Moreover, modern approaches that focus on cosmopolitan policies, such as multistate comity, provide little help because such policies are not in play in the intrastate conflict.<sup>127</sup> The leading approach to choice of law, the

---

123. See, e.g., Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950); Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1991 (2005) (noting that courts can create new canons all the time: “the notion of a static set of entrenched policy-based canons is a myth”).

124. FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 92 (2009) (noting that “the canons may not even be helpful interpretive tools in close cases”); see also *id.* at 101 (noting that empirical studies demonstrate that the “canons are too often indeterminate in direction, making them vulnerable to easy manipulation, much like the criticism of other interpretive tools”).

125. See James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 7 (2005) (“Federal judges regularly exercise broad discretion in deciding when the canons should apply, which ones to invoke in a particular setting, and how to reconcile them with other contextual resources such as specific legislative history, general statutory policy or purpose, and deference to agency determinations.”); ROBERT A. KATZMANN, *COURTS AND CONGRESS* 49 (1997).

126. See Karen Petroski, *Rethorizing the Presumption Against Implied Repeals*, 92 CALIF. L. REV. 487 (2004) (noting the conflict between these two canons in intrastate situations); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 274–75 (2000). See also *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001) (“Canons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction.”).

127. Cf. ARTHUR TAYLOR VON MEHREN & DONALD THEODORE TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS: CASES AND MATERIALS ON CONFLICT OF LAWS* (1965); Kramer, *supra* note 122. Similarly, criticisms of Currie as too focused on domestic law are inapposite. See, e.g., Alfred



Restatement (Second), is unhelpful in the domestic conflict for the same reason. The Restatement does little more than provide a laundry list of factors to take into account when choosing law, several of which are based on interest analysis.<sup>128</sup> The other factors are those specifically addressed to the multistate setting and are therefore inapplicable.<sup>129</sup> Setting aside the general incoherence of the Restatement (Second), when one eliminates the multistate-based factors, one is essentially left with interest analysis.<sup>130</sup>

Moreover, many of the criticisms of interest analysis do not apply to its use in the intrastate setting. One of the primary critiques of interest analysis is its supposed parochialism—that is, it is skewed toward forum law, and this is improper because it devalues the policies of other states and facilitates forum shopping.<sup>131</sup> Much can be (and has been) said about these criticisms, but there is little need to add to that debate here.<sup>132</sup> When both arguably conflicting laws are issued by the same sovereign, there can be little concern about forum-centrism. The forum, after all, will be applying its own law either way.

The potent criticisms of interest analysis for our purposes really boil down to criticisms of a purposivist approach to statutory interpretation, which interest analysis embraces for better or for worse.<sup>133</sup> This too is a debate that has been well ventilated, and I do not purport to add much here.<sup>134</sup> It is fair to say that textualist criticisms of purposivism certainly

---

Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 489 (1960) (arguing that Currie improperly prioritizes local interest over “a common, or national, interest which cannot realistically be ignored”).

128. See RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 6 (1971). Three of the listed factors are rooted in interest analysis: “(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; . . . (e) the basic policies underlying the particular field of law.” *Id.* These factors were included as a compromise in the 1960s when it became clear that a more rules-based approach, as advocated by Reporter Willis Reese, would be untenable. See Kay, *supra* note 22, at 552–55.

129. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 6 (1971) (For instance, the following factors, applicable to a multistate case, are inapplicable to the intrastate setting: “(a) the needs of the interstate and international systems; . . . (f) certainty, predictability and uniformity of result.”).

130. See Kay, *supra* note 22, at 562 (contending that with the framers of the Restatement’s “attempt to mollify their critics, they have created an umbrella for traditionalist and modern theorist alike: a fragile shelter that may prove itself unable to survive any but the most gentle of showers”).

131. See, e.g., LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* 75–76 (1991). See also Douglas Laycock, *Equality and the Citizens of Sister States*, 15 FLA. ST. U. L. REV. 431 (1987); John Hart Ely, *Choice of Law and the State’s Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981).

132. See generally Sedler, *supra* note 60.

133. Indeed, it is unavoidable that “interest analysis seeks to determine ‘legislative purpose’ in the sense of ascertaining the objective that the legislature was trying to accomplish by the enactment of the statute.” Sedler, *supra* note 60, at 486.

134. See, e.g., Philip P. Frickey, *Legislative Processes and Products*, 46 J. LEGAL EDUC. 469, 472–75 (1996) (describing the debate between textualism and purposivism).

apply to interest analysis to the extent that interest analysis attempts to determine the policy underlying a statute and that interest analysis is willing to make use of legislative history to accomplish that goal. Such criticisms were not lost on Currie himself or his contemporaries.<sup>135</sup>

On that score then, a defense of interest analysis necessarily includes all defenses of statutory interpretation methods that go beyond the text itself and canons of statutory construction. But as recent scholarship suggests, the gap between purposivism and textualism appears to be narrowing.<sup>136</sup> Courts appear to have occupied a middle ground, in which they start with the text of a statute and then turn to other sources only if the plain meaning of the text is unclear.<sup>137</sup> This seems reasonable to me, both as a matter of statutory construction and as a matter of conflicts analysis. Currie would agree that if the legislature made clear the scope of a statute, courts ought to follow it.<sup>138</sup> As explained above, interest analysis is nothing if not a theory of legislative primacy. The problem is that, as in most multistate conflicts cases, the legislature has not defined the scope of

---

135. Currie, *supra* note 58, at 762; *see also* von Mehren, *supra* note 47, at 92 (noting the difficulty of ascertaining policies and interests, but concluding that “a court in seeking to determine and define the policy or interest expressed in a given rule should seek to articulate the contemporary function or purpose of that rule, and in this effort should have recourse to all relevant materials that are appropriate for judicial consideration”). Indeed, numerous contemporary critics of Currie argued that it was an insurmountably difficult and wholly subjective task to determine governmental policies and interests. *See* Willis L. M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315, 317 (1972); Max Rheinstein, *How to Review a Festschrift*, 11 AM. J. COMP. L. 632, 663 (1962) (reviewing TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA (Kurt Nadelmann et al. eds., 1961)).

136. *See* Jonathan T. Molot, Exchange, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006); John F. Manning, Exchange, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 74–78 (2006). *See also* John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1309, 1314 (2010) (noting that counter-critiques of public-choice theory refined textualist theory by making it “more modest but more fundamental” and that the “ferocity of the debate . . . has largely receded”).

137. *See, e.g.*, Todd D. Rakoff, Essay *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. U. L. REV. 1559, 1559 (2010) (arguing that “judges in general do not restrict themselves, sometimes even within a single opinion, to following any single theory of statutory construction”); Manning, *Second-Generation Textualism*, *supra* note 136, at 1307 (noting that the Court “has apparently reached an equilibrium that greatly tempers judicial reliance on legislative history as a source of evidence while enhancing judicial attention to the text”); Frickey, *supra* note 123, at 1980 (contending that the votes of centrist Supreme Court justices are “best explained by a balancing process in which text, legislative intent, purpose, and policy are all considered eclectically”); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

138. One limit on this principle in the multistate setting is if the legislature has violated a constitutional limit on its power. A critical function of courts in the multistate setting is to ensure that the court has not transgressed those limits by legislating a legitimate interest when one would not otherwise exist. *See* Herma Hill Kay, “*The Entrails of a Goat*”: *Reflections on Reading Lea Brilmayer’s Hague Lectures*, 48 MERCER L. REV. 891 (1997).

the statute or how it should be applied when in conflict with other statutes.<sup>139</sup> In such cases, the text of the statute only gets you so far.<sup>140</sup> Only by using conflicts analysis can the court decide which of two clashing statutes ought to be enforced.

## II. *ITALIAN COLORS* AND THE INTRASTATE CONFLICT

Perhaps the best way to assess the possibilities of interest analysis in the intrastate setting is to suggest how it might change the analysis and correct some of the problems with analysis of an individual case. The Supreme Court presented such an example just last term in *American Express Co. v. Italian Colors Restaurant*,<sup>141</sup> which involved a potential true conflict between the Federal Arbitration Act and the Sherman Act. In this Part, I will describe the doctrinal developments that led to the *Italian Colors* decision and then describe the case itself. Then I will offer some observations about how the Court's analysis might have benefitted from use of the tools of interest analysis.

### A. *How We Got Here: The Federal Arbitration Act in the Supreme Court*

Congress passed the Federal Arbitration Act in 1924 with very little controversy—indeed, in his exhaustive study of the legislative history of the statute, Ian MacNeil has referred to its passage as “very close to the rubber stamp model.”<sup>142</sup> Agitation for the passage of the federal act came primarily from the American Bar Association, which had succeeded in getting numerous similar state arbitration acts passed over the prior decade.<sup>143</sup> This movement for arbitration statutes sought to overturn the common law rules allowing for revocation of agreements to arbitrate and courts' refusals to stay litigation in favor of arbitration.<sup>144</sup> Although proponents of these statutes sought legislation in all fifty states, they deemed a federal statute necessary in order to ensure that arbitration

---

139. Currie, *supra* note 58, at 761–62.

140. See Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 559 (1992) (“Formalism cannot eliminate the existence of hard cases, and deciding those hard cases will remain a major part of the work of the appellate judge.”).

141. 133 S. Ct. 2304 (2013).

142. IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 109 (1992). See also Horton, *supra* note 6, at 1249 (referring to the legislative history of the FAA as a “rickety skeleton”).

143. MACNEIL, *supra* note 142, at 41.

144. See *id.* at 29.

agreements would be enforced in the federal courts.<sup>145</sup> This is because federal courts, operating prior to the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*,<sup>146</sup> applied their own procedural law to arbitration agreements and, under that law, typically allowed parties to revoke them at any time before the arbitrator reached a decision, regardless of whether such an agreement was irrevocable in state court due to a state arbitration statute.<sup>147</sup> As MacNeil and others have noted, the primary goal of those pushing the federal statute was to ensure that arbitration agreements were enforceable in federal courts as a matter of federal procedural and remedial law.<sup>148</sup> The scope of the FAA has, however, become much broader than that in the intervening nine decades.

The FAA's crucial provisions are found in Sections 2 through 4. Section 2 provides that:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid,

---

145. *Id.* at 93–94.

146. 304 U.S. 64 (1938).

147. See H.R. REP. NO. 68-96, at 1 (1924). Prior to *Erie*, federal law was in a state of confusion. Federal courts were of the view that the law governing arbitration agreements was procedural or remedial in nature and that these issues were therefore governed by the law of the forum. But at the same time, the federal courts were of the view that they were not required to follow state arbitration statutes pursuant to the Conformity Act. In any event, although the reasons are not clear, federal courts prior to the arbitration act's passage applied federal common law in this area, and federal courts generally allowed revocation of arbitration agreements and refused to stay litigation while arbitration was pending. See MACNEIL, *supra* note 142, at 23–24, 84. For discussion of the general patchwork quilt of federal procedural law during the era of the Conformity Act, see EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958, at 54 (1992).

148. MACNEIL, *supra* note 142, at 93–97. As MacNeil demonstrates, supporters of the federal statute consistently referred to the federal statute as procedural and designed to apply in cases where the federal courts had subject-matter jurisdiction. Earlier versions of the bill, in fact, had provisions to reduce the jurisdictional amount for diversity cases seeking to enforce arbitration agreements, and the Senate balked. Moreover, the supporters of the rule continued to push for state arbitration statutes and a uniform state arbitration act, indicating that even the bill's proponents did not consider the federal statute to be applicable in the state courts. *Id.* at 114–117. See also Horton, *supra* note 6, at 1224; Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006). But see Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 105 (2002) (arguing that supporters intended the FAA to apply in state court).

irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>149</sup>

Section 3 provides for a stay of litigation while a dispute covered by an arbitration agreement is pending.<sup>150</sup> And Section 4 allows a party to an arbitration agreement to bring an action in federal court to compel arbitration.<sup>151</sup>

The Supreme Court addressed the applicability of the FAA to a federal statutory claim in 1953 in *Wilko v. Swan*.<sup>152</sup> *Wilko* involved a misrepresentation claim against a brokerage firm under the Securities Act of 1933.<sup>153</sup> The question in the case was whether Section 14 of the Securities Act, which voids any “condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision” of the Act, barred enforcement of the arbitration clause.<sup>154</sup> The Court held that it did. Justice Reed, writing for the majority, explicitly recognized a conflict between the FAA and the Securities Act, writing that “[t]wo policies, not easily reconcilable, are involved in this case.”<sup>155</sup> Reed noted that the FAA “afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment,” and that the Securities Act “protect[s] the rights of investors and has forbidden a waiver of any of those rights.”<sup>156</sup> Under the circumstances, the Court held that a contract agreeing to arbitrate a claim under the Securities Act was invalid on the ground that such contracts were typically the result of the disparity of bargaining power between the seller and the buyer that the Securities Act sought to protect.<sup>157</sup>

In some ways, *Wilko* is presented as a choice-of-law case, although the Court did not ultimately resolve it through use of conflicts analysis. The

---

149. 9 U.S.C. § 2 (2012).

150. *Id.* § 3.

151. *Id.* § 4. This section intended to overrule the old rule that a court of equity would not enforce an agreement to arbitrate, remitting the party seeking arbitration to a breach-of-contract action in the courts of law. MACNEIL, *supra* note 142, at 20.

152. 346 U.S. 427 (1953). *See also* Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 831 (2002) (arguing “that *Wilko* was an attempt by the Court to enforce Congress’s intent that a securities purchaser not be forced to waive the statutory rights that the Securities Act grants”).

153. *Wilko*, 346 U.S. at 428–29.

154. *Id.* at 430.

155. *Id.* at 438.

156. *Id.*

157. *Id.* at 435.

Court recognized that the two policies underlying the laws were in conflict, but held that Congress had prospectively resolved the conflict in favor of the Securities Act in the unwaivability provision.<sup>158</sup> In other words, the Court avoids the conflicts analysis by reading the Securities Act as providing a choice-of-law rule. As a general matter, Currie might have approved of the result in *Wilko* on the ground that the Court did not engage in weighing interests itself but sought to effectuate the intent of the legislature through interpretation of statutory language—the Court relied not on a canon of statutory construction but instead looked to the policies underlying the allegedly conflicting statutes.

The Court's next major foray into interpretation of the FAA involved the question of its applicability in diversity cases. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,<sup>159</sup> the Court held that the FAA applied to diversity cases involving contracts in interstate commerce.<sup>160</sup> This was so even in the face of a conflicting law of the state in which the district court sat that would have rejected enforcing the arbitration clause.<sup>161</sup> The holding in *Prima Paint*—in a shift from the original understanding of those sponsoring the FAA—was based on Congress's power to regulate interstate commerce and not merely the procedure of the federal courts.<sup>162</sup> In 1984, in *Southland Corp. v. Keating*, the Supreme Court held that the FAA applied in state court and preempted state laws barring arbitration of certain agreements.<sup>163</sup> In so doing, the Court held that in passing the FAA, “Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”<sup>164</sup> After the Court's holding in *Prima Paint* that the FAA

---

158. *Id.* at 438.

159. 388 U.S. 395 (1967).

160. *Id.* at 405.

161. *Id.* at 424–425 (Black, J., dissenting). Justice Black penned a strong dissent arguing, in part, that the FAA should not apply in diversity cases under *Erie* because the application of federal law could be outcome determinative. This was the position that Justice Frankfurter had taken in 1956 in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 209 (1956) (Frankfurter, J., concurring). The majority in the case held only that the FAA does not apply to diversity cases involving *intrastate* contracts. *Id.* 202–03. To say that the reasoning underlying the majority's approach in *Bernhardt* is difficult to square with *Prima Paint* is an understatement. See MACNEIL, *supra* note 142, at 138.

162. *Prima Paint*, 388 U.S. at 405 (stating that “it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of ‘control over interstate commerce and over admiralty’”); see also *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (noting that the FAA created a “body of federal substantive law”); MACNEIL, *supra* note 142, at 138.

163. 465 U.S. 1, 16 (1984).

164. *Id.* at 10.

was in fact passed pursuant to the Commerce Clause, the holding in *Southland* that the FAA preempts conflicting state law came as no surprise.<sup>165</sup>

During the same period, the Court also confined the *Wilko* holding to its facts.<sup>166</sup> Most directly applicable to our discussion, the Court held that antitrust claims were arbitrable in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*<sup>167</sup> Like *Wilko*, *Mitsubishi* involved a potential clash between the arbitration act and another federal statute—the Sherman Antitrust Act.<sup>168</sup> In the case, the Japanese car manufacturer, Mitsubishi,<sup>169</sup> sought to enforce an arbitration clause in its distribution contract with one of its dealers, Soler, based in Puerto Rico.<sup>170</sup> The arbitration agreement specified that any claims arising out of the contract would be arbitrated in Japan.<sup>171</sup> Because the dispute dealt with whether, under the contract, Soler had a right to resell Mitsubishi cars to other buyers, Mitsubishi sought to compel arbitration.<sup>172</sup> Soler counterclaimed that Mitsubishi's practices amounted to a restraint of trade under the Sherman Act.<sup>173</sup> The First Circuit held that the antitrust claims were not arbitrable, relying on a similar holding in the Second Circuit, *American Safety Equipment Corp. v. J. P. Maguire & Co.*,<sup>174</sup> which had held in 1968 that antitrust claims were not subject to arbitration under the FAA.<sup>175</sup>

The Supreme Court reversed in a 5–3 decision authored by Justice Blackmun.<sup>176</sup> In it, Justice Blackmun sharply departs from the reasoning underlying *Wilko*. Although the case does not formally overrule *Wilko*, it was clear from the opinion that, barring a change in the governing philosophy of the Court, *Wilko*'s days were numbered. Citing the liberal

---

165. See MACNEIL, *supra* note 142, at 138.

166. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that ADEA claims are arbitrable); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 238 (1987) (permitting arbitration of claims under the 1934 Exchange Act); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985) (requiring arbitration of pendent state-law claims); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515–18 (1974) (refusing to extend *Wilko* to bar arbitration of claims brought under the 1934 Exchange Act involving international agreements).

167. 473 U.S. 614 (1985).

168. *Id.* at 616.

169. This was a joint venture between Mitsubishi and Chrysler, but for simplicity's sake, I refer to the plaintiff as Mitsubishi as the Court does. See *id.* at 617.

170. *Id.* at 618–19.

171. *Id.* at 617.

172. *Id.* at 618.

173. *Id.* at 619–20.

174. 391 F.2d 821 (2d Cir. 1968)

175. *Mitsubishi*, 473 U.S. at 620–23.

176. Justice Powell did not participate. Justice Stevens wrote the dissent, joined by Justices Brennan and Marshall. *Id.* at 640.

policy in favor of arbitration noted in its more recent cases and the purported substantive-law foundations of the FAA on which the Court relied in *Southland*, the Court held that Soler's antitrust counterclaims were arbitrable.<sup>177</sup> The Court stated straightforwardly that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."<sup>178</sup> The Court saw no reason, then, to depart from the strong national policy in favor of arbitration in the case of statutory claims. Although, in accordance with the savings clause of the FAA, the courts should "remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract,'" it was clear from the Court's tone that such exceptions would be rare.<sup>179</sup> Indeed, in contrast to *Wilko*'s skepticism of arbitration, the *Mitsubishi* Court endorsed the parties' decision to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."<sup>180</sup> Without a provision analogous to the provision of the Securities Act barring the waiver of statutory rights (on which the *Wilko* court relied), statutory claims would not be considered per se non-arbitrable.<sup>181</sup> And, in particular, the Court did not consider antitrust claims non-arbitrable. Rejecting the Second Circuit's skepticism of arbitration of antitrust claims in *American Safety*, the Court held that, absent specific allegations of the unsuitability of the arbitral forum, there was no reason to be skeptical about arbitration of antitrust claims generally.<sup>182</sup>

The Court ultimately overruled *Wilko* in 1989 in *Rodriguez de Quijas v. Shearson/American Express, Inc.*<sup>183</sup> In so doing, the Court made clear that "[t]o the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."<sup>184</sup>

---

177. *Id.* at 629.

178. *Id.* at 626–27.

179. *Id.* at 627.

180. *Id.* at 628.

181. *Id.*

182. *Id.* at 636.

183. 490 U.S. 477, 485 (1989).

184. *Id.* at 481. Four justices dissented on the ground that Congress had not seen fit to overrule *Wilko* in the 35 years since it came down, and that the Court should therefore adhere to *stare decisis*.



The next key case in the line that currently culminates in *Italian Colors* is *AT&T Mobility v. Concepcion*.<sup>185</sup> *Concepcion* presented another iteration of the FAA's preemptive force. The case involved consumers who purchased mobile-phone service from AT&T.<sup>186</sup> The boilerplate agreement provided for mandatory arbitration of claims and that any such claims must be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."<sup>187</sup> The arbitration process was rather elaborate, providing the arbitrator with the ability to award a full array of remedies, requiring AT&T to pay all costs associated with nonfrivolous claims and to pay the customers' fees if they receive an award greater than AT&T's last settlement offer.<sup>188</sup> The plaintiffs alleged that they had been wrongly charged \$30.22 in sales tax and sought to bring a class action against AT&T on behalf of other consumers who had similarly been overcharged.<sup>189</sup> In so doing, the plaintiffs relied on California's *Discover Bank* rule, which held that when a class-action waiver appears in a contract of adhesion, involves small damages, and allegedly allows a party with superior bargaining power to "carr[y] out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money," the waiver is unconscionable and unenforceable under California law.<sup>190</sup>

The Supreme Court, per a 5–4 majority with Justice Scalia writing, held that the FAA preempted the California unconscionability rule.<sup>191</sup> Stating again that the "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms," and relying on the "national policy favoring arbitration," the Court held that "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA."<sup>192</sup> Moreover, because "[a]rbitration is poorly suited to the higher stakes of class litigation," state laws like California's, which seem to mandate such a procedure, were incompatible with the FAA.<sup>193</sup> Although Justice Scalia makes clear in the

---

*Id.* at 486–87 (Stevens, J., dissenting).

185. 131 S. Ct. 1740 (2011).

186. *Id.* at 1744.

187. *Id.*

188. *Id.* at 1752–53.

189. *Id.* at 1744.

190. *Id.* at 1746.

191. *Id.* at 1753.

192. *Id.* at 1748–49, 1751.

193. *Id.* at 1752.

opinion his general opposition to class-wide arbitration, he acknowledges that this is not the basis for the opinion; even if the *Discover Bank* rule might be warranted for policy reasons, the FAA would still preempt it.<sup>194</sup> Moreover, the particular arbitration scheme AT&T had designed was unlikely to prevent satisfaction of most small claims.<sup>195</sup>

So by the time of *Concepcion*, the Court had established the expansive scope of the FAA. The FAA preempted state law which inhibited the enforcement of arbitration clauses. And the FAA also required enforcement of agreements providing for arbitration of federal statutory claims. It was in this context that *Italian Colors* arrived at the Supreme Court.

#### B. Italian Colors

*American Express Co. v. Italian Colors Restaurant*<sup>196</sup> was the first major post-*Concepcion* arbitration case to reach the Court, and it did so after a lengthy history in the Second Circuit. Once the case reached the Supreme Court, the decision confirmed many of the worst fears of those who loathed *Concepcion*;<sup>197</sup> indeed, any hopes that *Concepcion* would be limited in its scope were scotched by the *Italian Colors* opinion.

For our purposes, *Italian Colors* provides an example of the Court avoiding choice-of-law analysis in intrastate conflicts. In this case, the Court should not have dodged the conflicts problem. Indeed, unlike other potential federal conflicts that had come before, *Italian Colors* offered no easy way out of the conflict. The *Wilko* Court was able to rely on the provision of the Securities Act barring waiver of statutory rights,<sup>198</sup> just as the *Rodriguez* court found that provision inapposite.<sup>199</sup> The *Mitsubishi* Court, for its part, was able to make the argument that the use of the arbitral forum would not hinder enforcement of the antitrust claims in that case.<sup>200</sup> *Italian Colors* offers no such similar escape—as both the majority and the dissent agree, it is inescapable that enforcement of the arbitration agreement as written will render the plaintiffs' claims practically unenforceable.<sup>201</sup> Moreover, unlike *Concepcion*, the enforcement of the

---

194. *Id.* at 1750–51.

195. *Id.* at 1753.

196. 133 S. Ct. 2304 (2013).

197. *See supra* note 4 and accompanying text.

198. *Wilko v. Swan*, 346 U.S. 427, 438 (1953).

199. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989).

200. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 636 (1985).

201. *Italian Colors*, 133 S. Ct. at 2309–11; *id.* at 2313 (Kagan, J., dissenting).

arbitration clause at issue in *Italian Colors* was not based on federal preemption of state law.

*Italian Colors* provides an opportunity for the assessment of the possibilities of interest analysis in the intrastate setting. That is, the case presents a purported conflict of two laws—the Federal Arbitration Act and the Sherman Act—promulgated by the same sovereign authority, the federal government. The case therefore presents none of the complications inherent in a “horizontal” multistate case or a “vertical” conflict between a federal and state law (as in *Southland* and *Concepcion*). Nor is *Italian Colors* a conflict of laws from different sources, such as a federal rule or the common law, a complication which might change the analysis.<sup>202</sup> Rather, *Italian Colors* represents a choice between two arguably conflicting statutes standing on equal footing.

In this Part, I will begin by briefly sketching out the factual background and procedural history of the case. I will then summarize the Supreme Court’s analysis. Then I will break down the Court’s analysis, explaining why application of interest analysis would have made this an easier case and led to the opposite result. In my view, proper application of interest analysis leads to the conclusion that the Federal Arbitration Act should not apply in this litigation, meaning that the agreement should not have been enforced. Regardless of whether interest analysis would have led a majority of the Court to a different outcome, however, it would have been a better result for the Court to straightforwardly expose and address the conflict, leading perhaps, as Currie suggested, to potential legislative correction.

### 1. *Factual Background*

Italian Colors restaurant sued American Express for violations of Section 1 of the Sherman Act.<sup>203</sup> In essence, the case alleged that American Express improperly used its market power to require merchants to pay inflated fees in order to accept purchases using American Express credit cards.<sup>204</sup> In brief, American Express offers both credit cards and charge cards.<sup>205</sup> The crucial difference is that charge cards must be paid off at the end of a billing cycle, while credit cards may only be partially paid

---

202. See, e.g., *Hanna v. Plumer*, 380 U.S. 460 (1965).

203. *Italian Colors*, 133 S. Ct. at 2308.

204. *Id.*

205. See *id.*

off, with the balance left accruing interest.<sup>206</sup> Until relatively recently, American Express's business focused on charge cards, which are thought to be used by companies and more well-heeled consumers who can afford to pay off their balances at the end of each billing cycle.<sup>207</sup> Because their customers are higher-end, American Express contends that its charge cards are typically used for more expensive purchases—a significant reason why a merchant would want to accept the American Express card.<sup>208</sup> Due to the attractiveness of accepting the American Express charge card, American Express was able to charge higher fees to merchants for every purchase by a customer using an American Express card.<sup>209</sup> The plaintiffs here alleged that this fee—called a “merchant discount fee”—was significantly higher for American Express cards than other mass-market credit cards.<sup>210</sup>

Recently, American Express started focusing more of its business on credit cards, alongside their more traditional charge-card business. The issue, according to plaintiffs, is that American Express required them to accept American Express credit cards if they wanted to also continue to accept American Express *charge* cards. The catch was that American Express demanded that the merchants pay the same high fees on American Express credit-card purchases as charge cards. It was this conduct that the plaintiffs contended was a tying arrangement in violation of the Sherman Act.<sup>211</sup>

The mechanism by which the plaintiffs could pursue these claims was the dispute that dominated the litigation that wound up in the Supreme Court. The standard-form contract between American Express and merchants contains an arbitration clause providing that either party may elect to arbitrate any claim “arising from or relating to this Agreement and/or the relationship resulting from this Agreement.”<sup>212</sup> The contract also provided (in all capital letters):

IF ARBITRATION IS CHOSEN BY ANY PARTY WITH  
RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL  
HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT

---

206. *Id.* at 2308 n.1.

207. *In re Am. Express Merchs.’ Litig. (Amex III)*, 667 F.3d 204, 207 (2d Cir. 2012).

208. *Id.*

209. *Id.* at 207–09.

210. *Italian Colors*, 133 S. Ct. at 2308. These fees are a primary reason why many merchants do not accept the American Express card. Hence the Visa ad campaign of the 1990s, using the tag line, “And they don’t take American Express. Visa, it’s everywhere you want to be.” See Stuart Elliott, *Visa Trims Slogan to Expand Meaning*, N.Y. TIMES, Jan. 13, 2014, at B6.

211. *Italian Colors*, 132 S. Ct. at 2308.

212. *Amex III*, 667 F.3d at 209.

OR HAVE A JURY TRIAL ON THAT CLAIM. . . . FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING.<sup>213</sup>

The contract continued:

There shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card (Service Establishments), or other persons or entities similarly situated.<sup>214</sup>

Two groups of plaintiffs, one based in New York and the other based in California, filed suit against American Express.<sup>215</sup> The New York plaintiffs sued in the Southern District of New York; the California plaintiffs sued in the Northern District of California and their case was transferred to New York.<sup>216</sup> All plaintiffs brought tying claims<sup>217</sup> under Section 1 of the Sherman Act.<sup>218</sup> American Express moved to compel arbitration pursuant to the Federal Arbitration Act.<sup>219</sup> Citing the “strong policy” in favor of arbitration embodied in the FAA, the district court granted the motion to compel arbitration and dismissed plaintiffs’ cases, in the process rejecting the plaintiffs’ argument that forcing arbitration would be the death knell of the litigation due to its costs and the class-action waiver.<sup>220</sup>

---

213. *Id.* (alteration in original).

214. *Id.*

215. *In re Am. Express Merchs.’ Litig. (Amex I)*, 554 F.3d 300, 305 (2d Cir. 2009).

216. *Id.* Both cases were styled as class actions and were consolidated in the Southern District of New York pursuant to FED. R. CIV. P. 42(a).

217. *Rick-Mik Enters LLC v. Equilon Enters. LLC*, 532 F.3d 963, 971 (9th Cir. 2008) (“A tying arrangement is a device used by a seller with market power in one product market to extend its market power to a distinct product market.”).

218. *In re Am. Express Merchs.’ Litig.*, No. 03 CV 9592 (GBD), 2006 U.S. Dist. LEXIS 11742, at \*11-12 (S.D.N.Y. March 16, 2006). The New York plaintiffs added a common-law unjust enrichment claim under New York law, and some California plaintiffs added a claim that the collective-action waiver violated that state’s Unfair Competition statute. *Id.*

219. *Id.*

220. *Id.* at \*18, \*22 (holding that “plaintiffs’ opposition to arbitration because of the collective action waiver provisions, on the theory that the costs preclude vindication of individual plaintiff’s statutory rights, is unpersuasive”).

## 2. *An Extended Stay in the Second Circuit*

The district court's grant of American Express's motion triggered the case's four-year-long second act in the Second Circuit. In the first round before the Second Circuit, a panel of the Court comprised of Judges Pooler, Sack, and Sotomayor, held "that the class action waiver provision at issue should not be enforced because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs."<sup>221</sup> Observing that the class-action waiver was "nothing if not capaciously worded,"<sup>222</sup> the court determined that the result of the waiver was that it "precludes the signatory from having any claim arbitrated on anything other than an individual basis."<sup>223</sup>

The court began by noting that the plaintiffs were not seeking to avoid arbitration entirely, just arbitration on an individualized basis.<sup>224</sup> The court then recognized that requiring individual arbitration would mean no arbitration at all because "the class action device is the only economically rational alternative when a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action."<sup>225</sup> Citing testimony that the cost for an expert to conduct a report proving the antitrust claims would likely exceed \$1 million, the court determined that the plaintiffs' "claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration."<sup>226</sup> The court did not hold that waivers of classwide arbitration were per se unenforceable—even in antitrust cases—but rather held that enforceability of such waivers must be assessed on a case-by-case basis.<sup>227</sup>

The Supreme Court, however, vacated the Second Circuit's decision and remanded for reconsideration in light of the Court's decision in *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*<sup>228</sup> In *Stolt-Nielsen*, the Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."<sup>229</sup> On remand, the Second Circuit reaffirmed its

---

221. *Amex I*, 554 F.3d at 304.

222. *Id.* at 306.

223. *Id.* at 307.

224. *Id.* at 310.

225. *Id.* at 312.

226. *Id.* at 319.

227. *Id.* at 321.

228. 559 U.S. 662 (2010).

229. *Id.* at 684.

prior holding, deciding again “as a matter of law, that the cost of plaintiffs’ individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws.”<sup>230</sup>

Following its decision, however, the Second Circuit stayed the mandate pending American Express’s application for Supreme Court review.<sup>231</sup> While the hold was in place, the Court decided *Concepcion*.<sup>232</sup> After *Concepcion*, the parties briefed to the Second Circuit the question of whether *Concepcion* should change the result.<sup>233</sup> For a third time, the Second Circuit held that because the class-arbitration waiver effectively prevented plaintiffs from pursuing their claims, the waiver was unenforceable.<sup>234</sup> *Amex III*, however, had a new wrinkle, necessitated by the Supreme Court’s recent arbitration decisions: figuring out what the next step should be in the litigation. Having decided that *Stolt-Nielsen* prevented requiring American Express to submit to classwide arbitration and also that to bar classwide litigation of plaintiffs’ claims would effectively immunize the defendant, the Second Circuit held that the arbitration clause was unenforceable.<sup>235</sup> The court’s decision thus cleared the way for the plaintiffs’ federal class actions.

Following *Amex III*, as permitted by Second Circuit rules, a judge of the court requested a poll on whether the court ought to rehear the case *en banc*.<sup>236</sup> A majority of judges voted against rehearing, but the vote spawned a set of short opinions regarding the denial.<sup>237</sup> Judge Pooler again wrote in defense of the panel decision, this time arguing that *Concepcion* did not control the outcome because this case did not involve preemption.<sup>238</sup> Instead, this case dealt with the question “whether the FAA always trumps rights created by a competing federal statute, as opposed to

---

230. *In re Am. Express Merchs.’ Litig. (Amex II)*, 634 F.3d 187, 197–98 (2d Cir. 2011); *see also id.* at 198 (“[T]he only economically feasible means for enforcing [plaintiffs’] statutory rights is via a class action.”).

231. *In re Am. Express Merchs.’ Litig.*, No. 06-1871, Dkt. No. 112, (2d Cir. April 11, 2011) (granting motion to stay the mandate).

232. *See supra* notes 185–95 and accompanying text.

233. *In re Am. Express Merchs.’ Litig.*, No. 06-1871, Dkt. No. 118-128.

234. *In re Am. Express Merchs.’ Litig. (Amex III)*, 667 F.3d 204, 218 (2d Cir. 2012) (“[A]s the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we find the arbitration provision unenforceable.”). By the time of *Amex III*, Justice Sotomayor, a member of the original panel who had decided *Amex I*, had moved on to the Supreme Court. Judges Pooler and Sack decided both *Amex II* and *Amex III* as a two-judge panel.

235. *Id.* at 219.

236. *In re Am. Express Merchs.’ Litig. (Amex IV)*, 681 F.3d 139, 139 (2d Cir. 2012).

237. *Id.*

238. *See id.* (Pooler, J., concurring in denial of rehearing *en banc*).

rights existing under a common law of unconscionability.”<sup>239</sup> In her view, the arbitration clause was unenforceable because it effectively prevented plaintiffs from vindicating their federal rights.<sup>240</sup>

Chief Judge Jacobs dissented from the denial of rehearing.<sup>241</sup> In his view, the panel opinion was “a broad ruling that, in the hands of class action lawyers, can be used to challenge virtually every consumer arbitration agreement that contains a class-action waiver.”<sup>242</sup> Finding the case-by-case analysis prescribed by the panel to be vague and unworkable, Chief Judge Jacobs found the panel’s decision an unwarranted evasion of the policy in favor of arbitration, just like California’s evasion that the Supreme Court rejected in *Concepcion*.<sup>243</sup> And with that, the case finally found its way up to the Supreme Court.

### 3. Italian Colors in the Supreme Court

More than five years after the appeal was first argued in the Court of Appeals, the Supreme Court handed down its opinion reversing the Second Circuit in *American Express Co. v. Italian Colors Restaurant*.<sup>244</sup> Speaking for a 5–3 majority,<sup>245</sup> Justice Scalia held that the arbitration clause and class-arbitration waiver were enforceable.<sup>246</sup> Justice Scalia began by citing the text of Section 2 of the FAA:

A written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>247</sup>

The Court then stated, straightforwardly, “[n]o contrary congressional command requires us to reject the waiver of class arbitration here.”<sup>248</sup> In

---

239. *Id.* at 140.

240. *Id.* at 141–42.

241. *Id.* at 142 (Jacobs, J., dissenting from denial of rehearing *en banc*). Judge Cabranes and Judge Raggi also issued short separate dissents, but their opinions are on process grounds and express sympathy with Chief Judge Jacobs’ reasoning. *Id.* at 149.

242. *Id.* at 143.

243. *Id.* at 146.

244. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

245. Justice Sotomayor did not participate due to her being on the original panel that decided the case in the Second Circuit.

246. *Id.* at 2312.

247. *Id.* at 2309 (alteration in original) (citing 9 U.S.C. § 2 (1947)).

248. *Id.*



response to the argument that barring class arbitration or litigation would effectively preclude vindication of the plaintiffs' antitrust claims, which the Second Circuit panel found so persuasive, the Court stated that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."<sup>249</sup> To the contrary, neither the antitrust laws nor Rule 23 of the Federal Rules of Civil Procedure provide any reason to believe that Congress intended to reject class-arbitration waivers.<sup>250</sup>

Having held that no conflicting statute required rejection of the class-arbitration waiver, the Court then turned to the question of whether a common law exception for "effective vindication" of federal statutory rights warranted rejection of the waiver.<sup>251</sup> Even if such an exception were to exist, it would not have served to invalidate the class-arbitration waiver in this case.<sup>252</sup> According to the Court, "the fact that [a claim] is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy," a conclusion bolstered by the fact that the exception (supposedly) would not have applied before the Federal Rules provided for class actions in 1938.<sup>253</sup>

The Court concluded by discussing the impact of *Concepcion* on its opinion. Importing the Court's preemption analysis, Justice Scalia wrote that *Concepcion* "established . . . that the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims."<sup>254</sup> The Court added: "[t]he latter interest, we said, is 'unrelated' to the FAA. . . . Accordingly, the FAA does . . . favor the absence of litigation when that is the consequence of a class-action waiver, since its 'principal purpose' is the enforcement of arbitration agreements according to their terms."<sup>255</sup> Acceptance of the Second Circuit's case-by-case assessment of whether a class-action waiver prevents vindication of statutory rights "would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure."<sup>256</sup>

Though he joined the Court's opinion in full, Justice Thomas concurred separately, reiterating his view expressed in *Concepcion* that the text of the FAA permits challenges to arbitration clauses based only on infirmities

---

249. *Id.*

250. *Id.*

251. *Id.* at 2310.

252. *See id.* at 2310–11.

253. *Id.* at 2311.

254. *Id.* at 2312 n.5.

255. *Id.*

256. *Id.* at 2312.

with the *making* of the contract, such as fraud or duress.<sup>257</sup> Because the plaintiffs did not allege any such problems with the making of the contract, the plain language of the FAA required enforcement of the class-action waiver.<sup>258</sup>

Justice Kagan penned a forceful dissent, joined by Justices Breyer and Ginsburg. Characterizing the economics of pursuing an antitrust claim under the terms of the contract as “a fool’s errand,” Justice Kagan contended that the result of the Court’s holding is: “[t]he monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse. And here is the nutshell version of today’s opinion, admirably flaunted rather than camouflaged: Too darn bad.”<sup>259</sup> In Kagan’s view, the Court should have refused to enforce the class-arbitration waiver pursuant to the “effective vindication” exception to the FAA.<sup>260</sup> In the dissenters’ view, doing so would “reconcil[e] the [FAA] with all the rest of federal law—and indeed, promot[e] the fundamental purposes of the FAA itself.”<sup>261</sup>

Justice Kagan started with an “uncontroversial proposition,” that a court would not enforce a contractual provision exculpating a party from antitrust liability.<sup>262</sup> Otherwise a party with sufficient market power could always insulate itself from liability under the antitrust laws.<sup>263</sup> Ultimately, though, the arbitration agreement at issue in this case had the same effect. In Justice Kagan’s view, the FAA applies “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.”<sup>264</sup> When “arbitration agreements . . . make federal claims too costly to bring,” the FAA will not enforce them.<sup>265</sup> In short, “[w]hen an arbitration agreement prevents the effective vindication of federal rights, a party may go to court.”<sup>266</sup>

Justice Kagan argued that recognizing the “effective vindication” exception furthers both the purposes of the Sherman Act and the FAA. In her view, recognizing the exception “furthers the statute’s goals by ensuring that arbitration remains a real, not faux, method of dispute

---

257. *Id.* (Thomas, J., concurring).

258. *Id.* at 2312–13.

259. *Id.* at 2313 (Kagan, J., dissenting).

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 2314.

264. *Id.* at 2314 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 637 (1985)).

265. *Id.* at 2315.

266. *Id.* at 2317.

resolution.<sup>267</sup> Because enforcement of arbitration provisions when the arbitration is prohibitively expensive will lead to no arbitration at all, the effective-vindication exception actually furthers the purposes of the FAA.

Applying the exception in this case, Justice Kagan found these facts to fall squarely within the effective-vindication exception. Not only is there a class-action waiver, but the agreement contains a confidentiality provision precluding any sort of cost-sharing among potential plaintiffs and a provision barring any shifting costs to American Express.<sup>268</sup> Moreover, Amex refused to enter any stipulations that might ease the burden of the economic analysis the plaintiffs would have to undertake.<sup>269</sup> The totality of the circumstances—not just the class-action waiver—led Justice Kagan to decide that the FAA did not demand enforcement of the agreement.

Finally, the dissent answered the argument that *Concepcion* is dispositive. First, Justice Kagan noted that *Concepcion* relied in part on the fact that the arbitration procedures at issue in that case *were* likely to allow plaintiffs to vindicate their substantive rights.<sup>270</sup> Second, she noted that *Concepcion* was a preemption case, while this case involved only potentially conflicting *federal laws*.<sup>271</sup> Unlike Justice Scalia, Justice Kagan saw the conflicts problem:

Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law, like the Sherman Act here. In that all-federal context, one law does not automatically bow to the other, and the effective-vindication rule serves as a way to reconcile any tension between them.<sup>272</sup>

### C. *Italian Colors as a Choice-of-Law Decision*

Neither the majority opinion nor the dissent approached *Italian Colors* as a conflicts problem. There are many arguable explanations why: courts don't generally resolve intrastate conflicts by using choice-of-law analysis, and the Supreme Court has not deployed explicit conflicts analysis in Federal Arbitration Act cases, in part because, until *Italian Colors*, the Court focused on preemption doctrine. But, whether or not the Court said so in as many words, *Italian Colors* was a choice-of-law case because both

---

267. *Id.* at 2315.

268. *Id.* at 2316.

269. *Id.*

270. *Id.* at 2320.

271. *Id.*

272. *Id.*

the antitrust statute and the Federal Arbitration Act's purposes could not be vindicated simultaneously. As a practical matter, prioritizing one statute required undermining the other. By enforcing the contract's arbitration clause, the plaintiffs were left unable to enforce their antitrust claims; but by prioritizing enforcement of antitrust claims, the Court would have to reject the arbitration agreement.

In Justice Scalia's view, there is no conflict. Both statutes operate simultaneously: the FAA demands enforcement of the agreement, while the plaintiffs may enforce their claims under the antitrust statute in an individual capacity. If the result is that the plaintiffs' antitrust claims are not economical to pursue, then so be it. After all, lots of litigation never happens because the claims are not worth the time, effort, or return.<sup>273</sup>

The problem with Justice Scalia's opinion is that he ignores the governmental interests and policies underlying these two statutes and, therefore, the conflicts problem. Statutes do not operate in vacuums but in interaction with each other under specific circumstances. In all sorts of settings, the FAA and the antitrust statutes may not come into conflict. But in this setting, the conflict occurs because of the existence of the arbitration agreement. Absent the enforcement of the arbitration clause pursuant to the FAA, the claims would be cost-effective to pursue because they could be pursued as a class action.<sup>274</sup> It is the conflict of laws that creates the problem in the case.

Scalia's move here is especially striking in light of the fact that the Court had labored greatly to avoid such reasoning in the earlier arbitration cases. *Mitsubishi*, for instance, took great pains to hold that the plaintiff's claims would suffer no prejudice from enforcement of the arbitration clause because "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."<sup>275</sup> The same was true in *Concepcion*, in which the Court spent significant time demonstrating that the particular arbitration process

---

273. *See id.* at 2310–11.

274. Or, as Justice Kagan notes, the claims might be cost-effective to pursue as a matter of consolidated or class-wide arbitration. But the arbitration clause prohibits that approach as well. Justice Scalia's statement that these claims are uneconomical to pursue is an argument bootstrapped to the enforceability of the arbitration clause. *See id.* at 2318–20 (Kagan, J., dissenting).

275. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 626–27 (1985). *Cf. Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000) ("These cases demonstrate that even claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' the statute serves its functions.") (alteration in original) (internal citations omitted).

mandated by the contract in that case would likely satisfy plaintiffs' claims.<sup>276</sup> Here, however, the circumstances required the conclusion that enforcement of the arbitration provision would result in the claims never being brought. And, as the dissent recognizes, American Express's ability to create those circumstances was a product of its market power over the plaintiffs.<sup>277</sup> Justice Scalia's attempt, therefore, to paint the case as avoiding a conflicts problem is unavailing. Moreover, Justice Scalia's attempted harmonization of the statutes obscures the conflict between them, freeing him of the duty to make plain the reasons motivating his resolution of the conflict.

Although the dissent comes closer to approaching the case as a conflicts case, its analysis misses the mark too. The dissent also attempts to avoid a choice-of-law issue by applying a common-law exception to the FAA for "effective vindication" of the plaintiffs' rights. Doctrinally, under this view, there is no need for choice-of-law analysis because the statute admits of an exception that avoids the conflict.<sup>278</sup> As a matter of result, I agree with the dissent's conclusions—and the dissent's methodology is preferable to the majority's, even if its particular solution is ad hoc. And the reasoning I would prefer under interest analysis is not terribly different in substance from Justice Kagan's. But there are two problems with relying on a common law exception here. First, as the dueling opinions here amply demonstrate, reliance on the exception requires a mostly ancillary fight over whether the exception exists and what the scope of it ought to be.<sup>279</sup> Second, positing the existence of the exception at least minimizes and at most obscures the existence of the conflict, standing in the way of the sort of conflicts analysis that would make clear the basis of the Court's decision and potentially provoke legislative correction. Justice Kagan's assertion that there is a common-law effective-vindication exception built into the FAA suggests that all is well and the legislature

---

276. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (agreeing with the District Court's conclusion that plaintiffs would be "*better off* under their arbitration agreement . . . than they would have been as participants in a class action, which 'could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars'").

277. *Italian Colors*, 133 S. Ct. at 2313 (Kagan, J., dissenting) ("So if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.").

278. This mode of analysis hearkens back to *Wilko*, in which the Court found that prohibition on waivers of statutory rights under the Securities Act prevented the conflict. See *Wilko v. Swan*, 346 U.S. 427, 435 (1953).

279. *Italian Colors*, 133 S. Ct. at 2310–11.

need not act to resolve potential conflicts between other federal statutes and the FAA.<sup>280</sup>

The question then becomes: what would an application of interest analysis look like in this case? As described above,<sup>281</sup> interest analysis requires a two-step process: first determining the governmental policy underlying both of the allegedly conflicting statutes, and then determining whether those policies will be animated by applying the statutes in the particular case. If there is an interest in applying only one of the statutes implicated in the analysis, the case is a “false conflict” and that statute should be applied. If there appears to be an interest in applying both statutes under the circumstances, then the case involves an apparent true conflict. At that point, the court ought to engage in an effort at moderate and restrained interpretation of the two statutes to determine whether the conflict is avoidable. And if the conflict is unavoidable, then the court must make a frank decision about which law to apply under the circumstances.

The application of interest analysis to the *Italian Colors* scenario reveals that it is an apparent true conflict that can be resolved through moderate and restrained interpretation. To begin, it is necessary to consider the governmental policy underlying the Federal Arbitration Act. Even applying Professor MacNeil’s analysis of the originally limited aspirations of the FAA, the text and legislative history of the statute both demonstrate that it was intended to ensure that arbitration clauses are enforced on the same footing as other contracts and to ensure that parties can rely on their enforcement when they choose to resolve disputes by arbitration.<sup>282</sup> The statute explicitly displaces common-law rules preventing enforcement of such agreements and provides for a stay of litigation in the face of arbitration and the right to compel arbitration. The next preliminary question is whether there is an interest in applying the statute in this case. That is, will the policy underlying the FAA be effectuated by its application in this case? At least at first glance, the

---

280. *Id.* at 2315 (Kagan, J., dissenting) (“Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law, like the Sherman Act here. In that all-federal context, one law does not automatically bow to the other, and the effective-vindication rule serves as a way to reconcile any tension between them.”).

281. *See supra* Part I.A.

282. *See, e.g.,* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (stating the FAA’s “purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts”); MACNEIL, *supra* note 142, at 113–14 (describing the legislative history).

answer is yes. Here, American Express is seeking to enforce an arbitration agreement that the parties agreed to, and the FAA's policy seeks to protect those expectations.

The next consideration is the policy underlying the Sherman Act. As Professor Hovenkamp has stated, “[a]ntitrust’s fundamental concern . . . is to remedy, within its abilities, unreasonable exercises of market power by dominant firms or groups of firms.”<sup>283</sup> And as the Court has stated with respect to tying agreements, as alleged by the plaintiffs in *Italian Colors*, “[w]here such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed.”<sup>284</sup> Given that policy, is there an interest here? The answer is yes. The plaintiffs’ allegations against American Express involve the paradigmatic conduct that the Sherman Act is intended to prevent—the use of monopoly market power to charge confiscatory rates and force a tying agreement.<sup>285</sup> Under the circumstances, applying the Sherman Act would advance its underlying policy. Therefore, there is an interest.

Having decided that there is a governmental interest in applying both statutes, at least on the first read, Currie’s process now calls for reconsideration of those interests in light of the conflict to decide whether a moderate or restrained interpretation of one of the statutes is called for in order to avoid the conflict.<sup>286</sup> Alternatively, if there is a true conflict, the court is forced into a situation in which it must choose among the conflicting laws. Under the circumstances here, the court is forced to go down one of those routes because, as discussed above, application of one statute will frustrate the purpose of the other.

Before engaging in the process of reconsidering the conflict though, it is worth considering whether, in the intrastate context, there is a

---

283. HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 93 (2005). As Professor Hovenkamp has written, although the “much of the legislative history [of the Sherman Act] is useless,” the “protection of small business . . . was probably the most faithful to Congress’s goals in passing the Sherman Act.” *Id.* at 39, 41.

284. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 6 (1958).

285. *See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 462 (1992) (stating that a tying “agreement violates § 1 of the Sherman Act if the seller has ‘appreciable economic power’ in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market”); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 14 (1984) (noting that such market power exists when it can “force a purchaser to do something that he would not do in a competitive market”). *See also* Christopher R. Leslie, *Unilaterally Imposed Tying Arrangements and Antitrust’s Concerted Action Requirement*, 60 OHIO ST. L.J. 1773, 1783 (1999) (“[T]ying arrangements imposed by a single seller are condemned because of concern that such restraints suppress competition for the tied product, facilitate price discrimination, and can be used to evade price regulations.”).

274. *See supra* Part I.C.

significant difference between judicially legislating a resolution to a true conflict or moderate and restrained interpretation to avoid a true conflict. Many of the reasons for seeking to avoid true conflicts in the multistate setting—in particular, those seeking to avoid interstate friction<sup>287</sup>—disappear in the intrastate setting. As a result, the impulse to avoid the conflict is weaker. Moreover, the benefits of interest analysis will be achieved by taking either course because the Court will be engaged in an explicit analysis of how the statutes interact when they are in conflict. It is this explicit analysis that invites legislative correction—whether in the multistate setting, as Currie envisioned, or in the domestic setting.<sup>288</sup>

Use of moderate and restrained interpretation, however, remains useful in the domestic setting, but not because it will avoid conflicts. Indeed, recognizing the conflict is useful in itself. Rather, the tools of moderate and restrained interpretation are useful in *resolving* the conflict. For instance, in *Bernkrant*, the paradigmatic example of moderate and restrained interpretation, Justice Traynor recognized that, along with the primary conflicting policies underlying two clashing statutes, there may also be consistent underlying secondary policies which counseled application of one law at the expense of the other.<sup>289</sup> Recognition of these possibilities, even in the face of the conflict, might lead the way to the best possible resolution of the case while also serving the purpose of alerting the legislature to a need for future guidance. In *Bernkrant* itself, for instance, Traynor identified in California's contract law both the fraud-preventing policy of the statute of frauds but also the more general policy of enforcing agreements.<sup>290</sup> In light of the conflict, and under the circumstances, Traynor took the position that the statute of frauds would take a backseat to California's more general policy of enforcing agreements.<sup>291</sup>

In the *Italian Colors* case, one can imagine how this approach might work. On the face of the problem, the conflict is apparent—enforcing one statute sacrifices the purposes of the other. But reinterpretation in light of the conflict would lead to different analysis. As per usual in the conflicts setting, the legislature has not spoken as to how to resolve the conflict.<sup>292</sup>

---

287. See CURRIE, *supra* note 39, at 182–83.

288. Currie, *supra* note 58, at 759.

289. *Bernkrant v. Fowler*, 360 P.2d 906, 909 (1961).

290. *Id.* at 910.

291. *Id.*

292. Currie, *supra* note 58, at 761–62 (“[E]veryone knows that the legislature never thought about the factual configuration presented by the case at bar, the judges of necessity must inquire what the legislature would have desired had it thought about the problem . . .”).



Both statutes, however, present an underlying policy of enforcing the substantive law. Even in its most expansive applications of the FAA, however, the Supreme Court has cited the procedural and practical benefits of arbitration in resolving disputes.<sup>293</sup> There is little reason to believe that there is an interest in applying the FAA in a case where its application will frustrate even the testing (much less the vindication) of the plaintiffs' claims, as Justice Kagan noted. This is especially true in a context where the existence of the arbitration agreement is the result of the sort of concentration of market power the plaintiffs' Sherman Act claims exist to prevent. In light of the conflict, the interest in enforcing this particular arbitration clause appears to be much more attenuated. Under these circumstances, the conflict is resolvable in favor of rejecting the arbitration clause. And instead of relying on a common-law exception to the FAA, the Court would be relying on an explicit resolution of the conflict between the FAA and a substantive statute under particular circumstances.<sup>294</sup>

It is possible, of course, to imagine a judge resolving the conflict in the opposite direction, though I find this analysis less persuasive. A judge might take the position that the strong national policy in favor of enforcing arbitration agreements wins out in this case. An argument along these lines would run as follows: there is a strong policy in favor of enforcing arbitration agreements in order to promote both party autonomy and the use of alternatives to litigation for resolving disputes. The parties' agreement to the particular arbitration agreement represents a conclusion that the parties have agreed only to arbitrate claims that are cost-justified on an individual basis. Under these circumstances, the governmental interest in providing plaintiffs with a means of enforcing antitrust claims may seem more attenuated—the plaintiffs have arguably bargained away their ability to join together to arbitrate those claims and the FAA enforces that bargain. This analysis is less compelling because it suggests that the FAA was intended to enforce exculpatory agreements obtained through the application of excessive market power, but the argument is a colorable one.

---

293. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 637 (1985) (noting that “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function”).

294. As with an effective vindication, however, the use of interest analysis does require case-by-case resolution of conflicts. Currie embraced this; different factual circumstances require different outcomes. Indeed, the blunt nature of the traditional rules often demanded outcomes that made little sense under the circumstances of the individual case. *See CURRIE, supra* note 39, at 180.

Both tacks, however, demonstrate that a conflict exists and encourages legislative response. Unlike the majority opinion and dissent in *Italian Colors*, both of which present the case as one which can be resolved without application of any conflicts methodology at all, the conflicts-based approach invites legislative correction without perpetuating the idea that courts can resolve the problem effectively themselves.

As former Professor and now Chief Judge of the Second Circuit Robert A. Katzmann has demonstrated in his recent book, *Judging Statutes*, such dialogue between the judicial and legislative branches has proved fruitful, both in improving ambiguous statutes and inter-branch relations.<sup>295</sup> Although these efforts, pioneered by the Governance Institute, have proceeded in fits and starts, all involved have expressed enthusiasm about the results. My hope is that the conflicts-based method of resolving statutory problems will be in the spirit of such efforts, the more of which the better.<sup>296</sup>

There may even be signs of hope in the Supreme Court. In a decision reached shortly before this article went to press, it did engage in a potentially more promising method of analysis in the recent case, *Pom Wonderful LLC v. Coca-Cola Co.*<sup>297</sup> The case involved a Lanham Act claim against Coca-Cola alleging that its competing “pomegranate blueberry juice,” which apparently contained very little of either, was deceptively labeled and constituted unfair competition. Coca-Cola argued, and the Ninth Circuit agreed, that Pom’s claims were precluded by the Food, Drug, and Cosmetic Act, which prohibits false or misleading food labeling.<sup>298</sup> The Court unanimously rejected this argument and employed analysis remarkably consistent with that suggested in this Article. The Court examined the purposes of the two statutes and found them complementary. As a result, there was no need to apply a canon of statutory interpretation to resolve the purported clash.<sup>299</sup> Although there was no conflict to resolve here, hopefully the mode of analysis used in *Pom Wonderful* is a positive sign. The express consideration of the interacting purposes of the arguably conflicting statutes ought to be extended to cases like *Italian Colors*, where the statutes do conflict on that level.

---

295. See KATZMANN, *supra* note 110.

296. *Id.* at 96–102; see also KATZMANN, *supra* note 125, at 76–79.

297. 134 S. Ct. 2228 (2014).

298. *Id.* at 2233–34.

299. *Id.* at 2237–39.

## CONCLUSION

*Italian Colors* was a choice-of-law case in search of a choice-of-law methodology. Even though the case involved a conflict of federal statutes, because application of one statute would frustrate the purpose of the other and vice versa, neither the majority nor the dissent treated the case as a conflicts case. Rather, the majority saw no conflict between the statutes at all while the dissent recognized the conflict but avoided it through use of a judge-made exception. The Court's analysis, however, is not unusual. Indeed, conflicts between two statutes promulgated by the same sovereign are not analyzed as choice-of-law cases but are instead considered problems of statutory interpretation. This article uses *Italian Colors* to investigate recasting such intrastate statutory conflicts as choice-of-law cases. In particular, I examine the use of the policy-based choice-of-law tools offered by governmental-interest analysis to resolve such conflicts. The benefits of interest analysis are that it (1) highlights the existence of the conflict and makes clear the court's preferences in choosing law, and (2) it invites legislative correction of conflicts by making explicit both the clash and the court's means of resolving it. *Italian Colors* provides an ideal vehicle to begin the conversation in assessing the opportunities presented by such analysis.